



March 27, 2006

United States Sentencing Commission
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Washington, D.C. 20002-8002

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RE: Review and Possible Amendment of
Application Note 12 to Guidelines Section 8C2.5(g)

Dear Chairman Hinojosa and Members of the Commission:

As Chairs of the Federal Criminal Procedure and Attorney-Client Relations Committees of the American College of Trial Lawyers (the "College"), we write on behalf of the College, and with the approval of its Executive Committee, to provide its views on the waiver language contained in the present version of Application Note 12 to Section 8C2.5.¹ We appreciate the Commission's willingness to receive public comment on this important issue.

As currently formulated, the Application Note reads in pertinent part:

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

¹ The American College of Trial Lawyers, founded in 1950, is an association of the trial bar from the United States and Canada. Fellowship in the College is extended by invitation only, after careful investigation, to those experienced trial lawyers who have mastered the art of advocacy and whose professional careers have been marked by the highest standards of ethical conduct, professionalism, civility and collegiality. There are currently more than 5,500 Fellows who practice throughout the United States and Canada; fellowship is limited to a maximum of 1% of the total lawyer population of any state or province. Fellows are carefully selected from among those who represent plaintiffs and those who represent defendants in civil cases, and those who prosecute and those who defend persons accused of crime. The College is thus able to speak with a balanced voice on important issues affecting the administration of justice. The College strives to improve and elevate the standards of trial practice, the administration of justice and the ethics of the trial profession.

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The College recommends that the Commission amend the Application Note to make clear that waiver of the attorney-client privilege and the work product doctrine (collectively, the "Privilege") should not be taken into account in determining an organization's Culpability Score under §8C2.5. Rather, whether an organization has "fully cooperated in the investigation" for purposes of subsection (g)(1) or (g)(2) should be determined by whether the organization has made timely disclosure of all pertinent *non-privileged* information known to it. The final sentence of the Application Note, as currently written, unfortunately creates an exception that swallows the rule, and also requires sentencing judges to make unnecessarily difficult hindsight determinations about whether a particular defendant organization that has provided all pertinent non-privileged information to the government should also have waived the Privilege.

This recommendation flows directly from the College's long-standing concern that developments in the conduct of federal criminal investigations pose substantial threats to the integrity of the Privilege. In 2002, the College published a report titled "The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations" (the "2002 Report"), a copy of which is attached to this letter at tab A. The 2002 Report addresses threats to the Privilege beyond the sentencing issue presented here. However, the College believes that the Sentencing Commission has an important role to play in safeguarding the Privilege. As an independent agency in the judicial branch, beholden neither to the institutional interests of the Department of Justice nor to the self-interest of corporations potentially subject to investigation, the Commission is uniquely well-situated to take a stand that will promote the effective administration of justice in the long term by protecting Privilege, thereby protecting the important values it serves.

The 2002 Report sets forth at length the many benefits produced by the Privilege — we will not list all of these benefits separately here, but it is worth emphasizing that, especially for corporate clients trying to navigate today's complex legal and regulatory environment, these benefits are tangible and practical, not simply a matter of high-toned rhetoric. Moreover, by encouraging effective compliance and risk management programs, the Privilege benefits not only the corporate clients but society and the legal system as a whole.

However, as set forth at length in the 2002 Report, routine prosecutorial demands for a privilege waiver in order to show "cooperation" with an investigation create a number of systematic



problems that far outweigh whatever public benefit might be gained by the incremental information made available to the prosecution in a particular case. Pressure on a company to waive the Privilege in order to secure lenient treatment from prosecutors can and does easily build to the point where the decision to waive is effectively coerced. Just as importantly, this pressure leads to a "culture of waiver," which systematically undercuts effective representation of companies by both inside and outside counsel even before a request to waive is made, because a privilege known to be of uncertain durability is in effect no privilege at all. Without a reasonable expectation that the Privilege can be and will be maintained in practice, the free flow of information from client to attorney and of advice from attorney to client, which the privilege aims to promote, will simply not take place with the same degree of effectiveness. In particular:

- Awareness by management that any knowledge gained by their lawyers is at risk of disclosure to the government will tend to dissuade management from investigating potential problems in the first place, undercutting early detection of compliance risks.
- Indeed, companies may become reluctant to conduct thorough and comprehensive investigations even when alerted to potential wrongdoing, for fear that with inevitable pressure to waive the Privilege their interests will be compromised in subsequent civil litigation.
- Individual employees and officers may view the company's lawyers as adversaries and de facto agents of the government, and for that reason be less willing to provide information.
- Employees and counsel alike will be loathe to commit important matters to writing but instead will tend to communicate orally, as well as by euphemisms and "nods and winks," in order to avoid creating a paper trail that will be turned over to the government.

Corporate counsel and members of the practicing bar have already observed these phenomena, and have observed the situation growing worse rather than better over the last several years, as documented in the recently-published results of a survey conducted by a broad coalition of groups concerned with this issue, which were presented to the Commission in connection with the testimony of Susan Hackett at the March 15, 2006 public hearing and are available at <http://www.acca.com/Surveys/attyclient2.pdf>. In the aggregate, the



"culture of waiver" risks crippling the ability of counsel and management to work together to prevent wrongful behavior by corporate employees and/or mitigate its consequences.

For these reasons, treating a waiver of the privilege as potentially relevant evidence of cooperation for purposes of determining an organizational defendant's Culpability Score is highly undesirable. While the current wording attempts to suggest that waiver will be relevant only in exceptional cases, we respectfully submit that that is not how it will inevitably work in practice. Under §8C2.5(g), whether the defendant "fully cooperated with the investigation" is an all-or-nothing determination. Cooperation that is deemed after the fact to have been less than "full" will have no positive impact whatsoever on the defendant's Culpability Score. A company setting out at the beginning of an investigation to cooperate fully will find it almost impossible under the current wording to gain sufficient comfort that a decision to maintain, rather than waive, the Privilege will not be held against it for sentencing purposes. It will always be possible in hindsight for the court (perhaps pressed by the prosecutor) to decide that waiver was "necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization" because it would have presumably led to the disclosure of additional information. Indeed, the present wording suggests that waiver will be "necessary" in the ordinary case, unless 100% of the information the organization has learned in a privileged capacity is not "pertinent." Thus, declining to waive the Privilege at the outset of the investigation will raise a very real risk that no credit will be received for otherwise full cooperation, including timely and thorough disclosure of all non-privileged pertinent information known to the organization.

This is not just a problem with the wording of the Application Note as it now reads. In this area, any approach that says, in effect, that waiver is not necessary except under the extremely broad and undefined terms of the current formulation will ensure that the exception swallows the rule. There will always be enough uncertainty at the time the decision to maintain the Privilege or to waive it must be made that the failure to waive will seem unacceptably risky. This also may mean in some instances that the decision to cooperate may appear unacceptably risky. That is, if the company decides that it is not willing to waive but cannot be comfortable that it will derive any benefit from cooperation absent a waiver, it will not have a sufficient incentive to make timely and thorough disclosure to the investigators of the non-privileged information it may know, and may instead wish to take its chances on



the prosecution being unable to make a case without the company's cooperation.

Moreover, deciding in hindsight whether an organization that has provided timely and thorough cooperation in all respects except for a privilege waiver should be deemed to have "fully cooperated" is not a task most sentencing judges will find palatable. It requires speculation as to how much greater a benefit to the investigation might have been provided by a waiver. Indeed, since the issue will only come up when the company has maintained the Privilege, the court will be unable to determine precisely what additional benefit a waiver might have provided unless the company were to waive the Privilege in connection with the sentencing proceeding.

Finally, treating waiver as relevant to full cooperation for sentencing purposes also sends a negative message about the legitimacy of the Privilege and the interests it protects. It is appropriate to treat an organization that cooperates with an investigation more leniently than one that does not cooperate, because cooperation can fairly be said to mitigate culpability. But there is nothing culpable about maintaining the confidentiality of privileged information, and neither the Commission nor individual judges making sentencing determinations should be seen to suggest that there is. For purposes of determining "Culpability Score," an organization that maintains its right to safeguard the Privilege should not be deemed more culpable than one that is willing to succumb to pressure to waive that right.

The most practical way to avoid these problems is to amend the Application Note to make clear that waiver of the Privilege is not required nor even relevant to the determination of whether an organization has "fully cooperated" under §8C2.5(g), and that timely and thorough disclosure of all non-privileged pertinent information is what is required. The College believes that the proposed alternative language submitted to the Commission by the American Bar Association at the Commission's November 15, 2005 meeting would satisfactorily accomplish these goals.

We note that the Commission has requested comments only on the relevance of privilege waiver to determining Culpability Score under §8C2.5(g). A question might arise as to whether, under unusual circumstances outside the "heartland" of the Guidelines, a Privilege waiver might be relevant to an organizational defendant's eligibility for a downward departure from the range of sanctions determined pursuant to



the Guidelines (including the determination of Culpability Score). That, however, is a separate question not presently before the Commission, and we accordingly do not address that issue.

Again, we appreciate the Commission's willingness to consider public comment on this issue, and we hope the College's submission will assist the Commission in its important work of promoting justice under the law.

Respectfully submitted,

Elizabeth K. Ainslie
(by *WGA*)

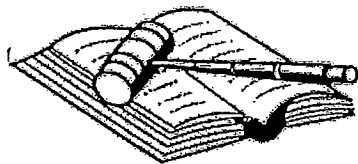
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American College of Trial Lawyers



THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

Approved by the Board of Regents
March, 2002

American College of Trial Lawyers

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—Hon. Emil Gumpert,
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This report is the joint product of the following committees of the
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COMMITTEE ON ATTORNEY-CLIENT RELATIONSHIPS

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THE EROSION OF THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE IN FEDERAL CRIMINAL INVESTIGATIONS

SUMMARY

The American College of Trial Lawyers (the "College") expresses its concern in this Report that the attorney-client privilege and work product doctrine are being eroded in federal criminal investigations and prosecutions in a way inimical to the fair administration of justice. We believe that the attorney-client privilege and the work product doctrine are essential to the adversary process and the criminal justice system, and request that the federal government review and modify its policies to ensure that these historic privileges are preserved.

I. INTRODUCTION

Federal prosecutors increasingly rely on counsel for the defense to build the government's case by insisting that the individual or corporate defendant waive the attorney-client privilege and turn over both client-lawyer communications and the work product of the lawyer. This provides prosecutors at the outset of an investigation with information defense counsel has obtained from their client, as well as with defense counsel's factual and legal analysis. In previous years, federal prosecutors were more likely to rely primarily on their own investigation of the facts and seek a waiver of the attorney-client privilege only rarely and then in very limited circumstances.

Today, federal prosecutors are able to obtain waivers of the attorney-client privilege and work product protections both by threatening to prosecute and by seeking more serious charges or sanctions if such cooperation is not provided. After the government has selected the crimes to be charged and obtained a conviction, courts must impose the sentence for that level crime prescribed by the Federal Sentencing Guidelines. As a result, prosecutors are able to exert a great measure of control over both the charging and sentencing process, thus requiring that defense counsel take into account the often harsh effect of the Sentencing Guidelines before responding to a federal prosecutor's request for a waiver of the attorney-client privilege or work product protections.

In seeking a waiver of the attorney-client or work product privilege, the government's demands change the very nature of the criminal justice system as well as the adversary process. These demands, which erode the attorney-client privilege and the work product doctrine, commonly include not only waiver of these protections, but also disclosure of corporate internal investigations by counsel, discouragement of payment by the corporation for counsel for individual employees whom the government prosecutor believes are culpable, and requests that information regarding the nature of the government's investigation not be relayed to other suspects through joint defense agreements. This government approach has been likened to the sound of "a requiem marking the death of privilege in corporate criminal investigations."¹

¹ David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000).

Inherent in this approach is that the prosecutor's initial view of the case must be accepted as fact and not be opposed by counsel for the individual or the corporation; to do so is to act at the client's peril. And this approach has recently become more widespread, if not universal, by embodiment in the United States Department of Justice ("Justice Department") standards for the federal prosecution of corporations.² Initially circulated as an internal memorandum by then-Deputy Attorney General Eric Holder in June of 1999, these standards are applied to individuals as well as corporations.³

The Holder Memo Standards encourage federal prosecutors to seek waivers of the attorney-client and work product privilege. They state that, when weighing whether the corporation has sufficiently cooperated in the investigation phase so as to not be charged with a crime, the prosecutor may consider whether the corporation has identified culprits, turned over its internal investigation and waived the attorney-client and work product protections. The Holder Memo Standards provide:

In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available, to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges.⁴

The Holder Memo Standards do emphasize that such a waiver is not an absolute requirement, but merely one factor the government should consider in evaluating the corporation's cooperation.⁵ For example, the Holder Memo Standards note that:

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.⁶

Yet, it is difficult to see or to make this distinction, which is, in any event, left to the sole discretion of the prosecutor.

The Holder Memo Standards also suggest that providing counsel for corporate officers, directors or employees⁷ and entering into joint defense agreements may indicate a corporation's

² U.S. ATTORNEYS' MANUAL, tit. 9, Criminal Resource Manual, art. 162, *Federal Prosecutions of Corporations* (2000), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm, [hereinafter "Criminal Resource Manual"]; see also Jonathan D. Polkes & Renee L. Jarusinsky, *Waiver of Corporate Privileges in a Government Investigation: Reaction to the New DOJ Policy*, WHITE COLLAR CRIME 2001 J-31, J-31 to J-33 (ABA 2001).

³ See generally Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S. Attorneys (June 16, 1999) (including attachment entitled "Federal Prosecution of Corporations"), reprinted in *Criminal Resource Manual*, arts. 161, 162, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm. The attachment to the Holder Memo will be hereinafter referred to as the "Holder Memo Standards."

⁴ Criminal Resource Manual, art. 162, § VI.A.

⁵ *Id.* § VI.B.

⁶ *Id.* § VI.B n.2.

⁷ The Holder Memo Standards do recognize in a footnote that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate." *Id.* § VI.B n.3.

lack of cooperation; *i.e.*, the company that engages in these practices is more likely to be indicted than the company that avoids them. Indeed, the Holder Memo Standards provide:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.⁸

In addition to the policies expressed in the Holder Memo Standards, the federal government has further undermined the attorney-client privilege and work product doctrine by increasingly attacking the existence of these protections in *ex parte* proceedings, asserting that the crime-fraud exception vitiates any privilege.⁹ In these situations, the defendant or person under investigation has no opportunity to be heard and the government need make only a *prima facie* showing. As a result, courts often adopt the government's view of the available facts and defense counsel may be required to testify against his or her client on short notice if the court finds that the crime-fraud exception applies.

The College is concerned that these government policies undermine and erode the attorney-client privilege and work product doctrine to an alarming extent and change the balance in the adversary system from one in which opposite points of view may be pursued by opposing counsel to a system in which the federal prosecutor's view can be challenged only at great peril, thereby reducing the ability of defense counsel in a criminal investigation to provide effective assistance to his or her client.¹⁰

II. THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE

A. ORIGIN AND PURPOSE OF THE ATTORNEY-CLIENT PRIVILEGE

The Federal Rules of Evidence have adopted the attorney-client privilege as it existed at common law. Rule 501 states that "the privilege of a witness . . . shall be governed by the

⁸ *Id.* § VI.B (footnote omitted).

⁹ Under this exception, a client who seeks assistance from counsel for the purpose of committing a crime or fraud is not entitled to the protections of confidentiality. Indeed, "[t]he privilege ends when the client seeks to involve the attorney in wrongdoing." David J. Fried, *Too High A Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 443-44 (1986) (tracing the history of the exception, discussing its rationale, and reviewing its expansion).

¹⁰ In addition to the concerns expressed in this Report, the College also notes that it recently submitted comments to the Bureau of Prisons, the Attorney General and the Senate Judiciary Committee, regarding the interim rule and amendments to the Code of Federal Regulations that became effective on October 30, 2001, and that authorize the monitoring and recording of communications and meetings between inmates and counsel. See generally Letter from Stuart D. Shanor, President, American College of Trial Lawyers, to Rules Unit, Office of General Counsel, Bureau of Prisons, (Dec. 21, 2001) (on file with the College). These comments stated that, despite the College's support of our government's ongoing efforts to eliminate terrorism, the monitoring authorized in the amendments:

[W]ill have a chilling effect, inhibit the free exchange between defendant and lawyer and is therefore (i) a threat to the effective assistance of counsel at a time when a defendant who is being held for trial has a constitutional right to competent and effective counsel and (ii) an unwarranted intrusion on the attorney-client privilege of both individuals awaiting trial and of unindicted detainees.

The College refers to these comments for a complete statement of the College's views on the monitoring issue.

principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."¹¹ As recognized by Wigmore in his comprehensive and oft-cited work setting forth the history of the attorney-client privilege, this privilege is "the oldest of the privileges for confidential communications."¹²

The earliest reported cases recognizing the privilege date as far back as the early part of the reign of Elizabeth I.¹³ The attorney-client privilege is likely not reported prior to this era because the testimony of witnesses and defendants was not a common source of proof at trial and, in general, testimonial compulsion had not been previously authorized.¹⁴

Although modern federal courts tend to apply the attorney-client privilege narrowly, the elements for establishing the privilege reflect the basic contours of the privilege since its establishment in England. In the seminal case of *United States v. United Shoe Machinery Corp.*, Judge Wyzanski first pronounced that the privilege applies if:

(1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.¹⁵

The *United Shoe* rule essentially remains the prevailing law as it relates to the attorney-client privilege when applied by federal courts.¹⁶

Thus, for centuries in English and American law, the attorney-client privilege has been firmly grounded in the recognition that legal consultation serves the public interest.¹⁷ Federal

¹¹ FED. R. EVID. 501; see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citing this rule with approval).

¹² 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (McNaughton Rev. 1961) [hereinafter "WIGMORE"]; see also *Upjohn*, 449 U.S. at 389; WIGMORE, *supra*, at 542 n.1 (citing, for example, *Berd v. Lovelace*, Cary 88, 21 Eng. Rep. 33 (Ch. 1577), and *Dennis v. Codrington*, Cary 143, 21 Eng. Rep. 53 (Ch. 1580)).

¹³ WIGMORE, *supra* note 12, § 2290, at 542 n.1 (collecting cases from the late 1500s to the 1600s and indicating that the privilege first appeared as unquestioned in these cases); see also 1 CHARLES TILFORD MCCORMICK, MCCORMICK ON EVIDENCE § 87, at 343-44 (John William Strong ed., 5th ed. 1999) [hereinafter "MCCORMICK ON EVIDENCE"].

¹⁴ WIGMORE, *supra* note 12, § 2290, at 542-43 (noting that the privilege "appears to have commended itself at the very outset as a natural exception to the then novel right of testimonial compulsion").

¹⁵ 89 F. Supp. 357, 358-59 (D. Mass. 1950); see also John E. Sexton, *A Post-Upjohn Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 449 (1982) (indicating that the *United Shoe* court was the first federal court to discuss the corporate attorney-client privilege at length); Zornow & Krakaur, *supra* note 1, at 149 n.9 (indicating that the *United Shoe* rule is one of the most inclusive recitations of the elements of the attorney-client privilege).

¹⁶ See, e.g., *In re Grand Jury Subpoena*, 204 F.3d 516, 520 n.1 (4th Cir. 2000); *Montgomery County v. Microvote Corp.*, 175 F.3d 296, 301 (3d Cir. 1999); *In re Fed. Grand Jury Proceedings 89-10(MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991); *In re Sealed Case*, 737 F.2d 94, 98-99 (D.C. Cir. 1984); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 601-02 (8th Cir. 1977). The only part of *United Shoe* that has been called into question is the application of the rule to patent matters. See, e.g., *Am. Standard v. Pfizer Inc.*, 828 F.2d 734, 745-46 (Fed. Cir. 1987); *Woods v. N.J. Dep't of Educ.*, 858 F. Supp. 51, 54 (D.N.J. 1993).

¹⁷ See, e.g., WIGMORE, *supra* note 12, § 2291, at 545-49 (quoting decisions from the 1700s and 1800s that expound on the importance of the privilege).

common law in the United States has long embraced this justification,¹⁸ in both a criminal and civil law context. Indeed, the application of the privilege to criminal as well as to civil cases has been largely unquestioned.¹⁹ Moreover, the privilege is generally considered absolute unless waived by the client.²⁰ As such, today, the "attorney-client privilege may well be the pivotal element of the modern American lawyer's professional functions."²¹

B. ORIGIN AND PURPOSE OF THE WORK PRODUCT DOCTRINE

The work product doctrine, like the attorney-client privilege, derives from common law origins. As a leading commentator has explained:

The natural jealousy of the lawyer for the privacy of his file, and the courts' desire to protect the effectiveness of the lawyer's work as the manager of litigation, have found expression, not only as we have seen in the evidential privilege for confidential lawyer-client communications, but in rules and practices about the various forms of pretrial discovery. Thus, under the chancery practice of discovery, the adversary was not required to disclose, apart from his own testimony, the evidence which he would use, or the names of the witnesses he would call in support of his own case. The same restriction has often been embodied in, or read into, the statutory discovery systems.²²

At common law, the privilege was much broader than its modern day analog: a document in the hands of the attorney, even if it did not come into existence as a communication to

¹⁸ See, e.g., *Hatton v. Robinson*, 31 Mass. (14 Pick.) 416, 422 (1833) ("[S]o numerous and complex are the laws . . . , so important is it that [citizens] should be permitted to avail themselves of the superior skill and learning of those who are sanctioned by the law as its ministers and expounders, . . . that the law has considered it the wisest policy to encourage and sanction this confidence [between client and attorney], by requiring that on such facts the mouth of the attorney shall be for ever sealed."); see also *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (explaining that the privilege encourages "full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and administration of justice" and acknowledging that the "rationality for the privilege has long been recognized by the [Supreme] Court"); *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888) (stating that the privilege is necessary "in the interest and administration of justice").

¹⁹ See, e.g., *Swidler & Berlin v. United States*, 524 U.S. 399, 408-09 (1998) (rejecting any effort to apply the attorney-client privilege differently in criminal cases); *Schwimmer v. United States*, 232 F.2d 855, 863-66 (8th Cir. 1956) (assuming without discussion that the attorney-client privilege applied in a criminal case); *Gunther v. United States*, 230 F.2d 222, 223-24 (D.C. Cir. 1956) (per curiam) (same).

²⁰ See, e.g., *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1429 (3d Cir. 1991) (indicating that the attorney-client privilege affords "absolute protection" and discussing waiver standards).

²¹ Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061, 1061 (1978) (stating that the privilege "is considered indispensable to the lawyer's function as advocate on the theory that the advocate can adequately prepare a case only if the client is free to disclose everything," and that a "legal counselor can properly advise the client what to do only if the client is free to make full disclosure").

In fact, the Justice Department itself recognizes the value and usefulness of the attorney-client privilege with respect to its representation of federal employees. In the Justice Department's codified statement of policy, it states that:

Attorneys employed by any component of the Department of Justice . . . undertake a full and traditional attorney-client relationship with the employee with respect to application of the attorney-client privilege Any adverse information communicated by the client-employee to an attorney during the course of such attorney-client relationship shall not be disclosed to anyone, either inside or outside the Department, other than attorneys responsible for representation of the employee, unless such disclosure is authorized by the employee.

28 C.F.R. § 50.15(a)(3) (2000).

²² MCCORMICK'S HANDBOOK OF THE LAW OF EVIDENCE 201-02 (Edward W. Cleary ed., 2d ed. 1972) (footnotes omitted); see also *In re Grand Jury Proceedings*, 473 F.2d 840, 844 (8th Cir. 1973).

the attorney, would have been exempt from production.²³ The modern work product doctrine is more narrowly tailored and traces back to the Supreme Court's decision of more than half a century ago in *Hickman v. Taylor*.²⁴ As articulated by the Court, the work product doctrine is distinct from and broader than the attorney-client privilege: "[W]ritten statements, private memoranda and personal recollections prepared or formed by an [attorney] in the course of his legal duties," and with an eye toward litigation, are not discoverable, as "[d]iscovery was hardly intended to enable a learned profession to perform its functions . . . on wits borrowed from the adversary."²⁵ The work product doctrine, however, unlike the attorney-client privilege, is not absolute, and can be overcome if a party seeking discovery shows that "relevant and non-privileged facts remain hidden in an attorney's file and where production of those facts is essential to the preparation of one's case."²⁶

The Court in *Hickman* explained that the doctrine serves both a public and a private purpose. With respect to the former, the work product doctrine directly promotes the adversary system by enabling attorneys to prepare their cases without fear that their work product will be used against their clients.²⁷ At the same time, it also serves a private purpose by affording an attorney "a certain degree of privacy" so as to discourage "unfairness" and "sharp practices."²⁸ These same policies remain vital today. The rule first pronounced in *Hickman* has been codified in Federal Rule of Criminal Procedure 16(a)(2), (b)(2) and in Federal Rule of Civil Procedure 26(b)(3).

In contrast to the attorney-client privilege, which may be asserted only by the client, either the attorney or the client usually may invoke the work product doctrine.²⁹ Courts have recognized that "the interests of attorneys and those of their clients may not always be the same. To the extent that the interests do not conflict, attorneys should be entitled to claim [work product] privilege even if their clients have relinquished their claims."³⁰ The ability of the lawyer to claim the privilege has been broadly construed by the courts. For example, the Court of Appeals for the District of Columbia has held that a lawyer had the right to assert the privilege for work product materials even where the attorney was consulted in furtherance of the client's fraud, at least to the extent that the lawyer was unaware of the fraud.³¹

²³ See WIGMORE, *supra* note 12, § 2318, at 620-21 & n.3 (collecting extensive list of cases from nineteenth century English courts).

²⁴ 329 U.S. 495 (1947). In *Hickman*, the Supreme Court dealt with two forms of work product: written statements from witnesses interviewed by defense counsel and the contents of oral interviews with witnesses, some of which had been summarized in memoranda prepared by the defense lawyers. The court reasoned that the protection for the latter category, often referred to as "opinion" product, exceeded that of the former. *Id.* at 512-13.

²⁵ *Id.* at 510 (Murphy, J.), 516 (Jackson, J., concurring).

²⁶ *Id.* at 511.

²⁷ *Id.* at 510-11.

²⁸ *Id.*

²⁹ See, e.g., *In re Sealed Case*, 676 F.2d 793, 809 n.56 (D.C. Cir. 1982) (indicating that work product privilege belongs to the lawyer as well as the client); *In re Grand Jury Proceeding (Duffy)*, 473 F.2d 840, 848 (8th Cir. 1973) (allowing an attorney to invoke the doctrine).

³⁰ *In re Sealed Case*, 676 F.2d at 809 n.56 (citing *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 801 (3d Cir. 1979)). The Supreme Court has identified several interrelated interests that the work product doctrine seeks to protect, ranging from a client's interest in obtaining sound legal advice to the interests attorneys have in protecting their own intellectual product. *Id.* (discussing *Hickman*, 329 U.S. at 511).

³¹ *Id.* at 812 & n.75 (citing *FMC Corp.*, 604 F.2d at 801 n.4, 802 n.5).

C. THE JOINT DEFENSE PRIVILEGE

The joint defense privilege, first recognized in *Chahoon v. Commonwealth*,³² enables multiple parties to share information protected by the attorney-client privilege without waiving the privilege, where the parties "have common interests in defending against a pending or anticipated proceeding."³³ This privilege, however, is not an independent privilege; it is only an extension of the attorney-client privilege and acts as an exception to the general rule that the privilege is waived when privileged information is shared with a third party.³⁴

Accordingly, courts have generally recognized that this privilege, also known as the "common interest rule," protects "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."³⁵

D. BALANCING THE UNAVAILABILITY OF EVIDENCE AGAINST NEED FOR THE PRIVILEGE

The attorney-client privilege and the work product doctrine frequently operate to deny powerful evidence to the opposition, *i.e.*, the defendant's very own statement of the case against him. Our courts, however, have consistently found that "[t]he systemic benefits of the privilege are commonly understood to outweigh the harm caused by excluding critical evidence."³⁶ Federal courts have supported the need for these protections on public policy grounds and have repeatedly recognized that the attorney-client privilege advances the administration of justice, as a "public good transcending the normally predominant principle of utilizing all rational means for ascertaining truth."³⁷ As the Court of Appeals for the Ninth Circuit has stated, "[t]his valuable social service of counseling clients and bringing them into compliance with the law cannot be performed effectively if clients are scared to tell their lawyers what they are doing, for fear that their lawyers will be turned into government informants."³⁸ In similar terms, the Supreme Court has observed that the work product doctrine serves "the cause of justice" by preventing "[i]nefficiency, unfairness and sharp practices."³⁹

Any perceived harm to the fact-finding process attributable to the attorney-client privilege and work product doctrine may be exaggerated because, without these protections, clients

³² 62 Va. (21 Gratt.) 822 (1871).

³³ John F. Savarese & Carol Miller, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, 1178 PLI/CORP 665, 719 (2000); see also Michael J. Chepiga, *Federal Attorney-Client Privilege and Work Product Doctrine*, 653 PLI/LIT 519, 589 (2001); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 871-72 (1996).

³⁴ See *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989); *Waller v. Fin. Corp. of Am.*, 828 F.2d 579, 583 n.7 (9th Cir. 1987).

³⁵ *Schwimmer*, 892 F.2d at 243; see also *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 WL 693384, at *5 (N.D.N.Y. Sept. 28, 1992) ("[D]efendants with common interests in multi-defendant actions are entitled to share information protected by the attorney-client privilege without danger that the privilege will be waived by disclosure to a third person.").

³⁶ *Swidler & Berlin v. United States*, 524 U.S. 399, 412 (1998) (O'Connor, J., dissenting); see also *Sampson Fire Sales, Inc. v. Oaks*, 201 F.R.D. 351, 356 (M.D. Pa. 2001).

³⁷ *Trammel v. United States*, 445 U.S. 40, 50 (1980) (quoting *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting)); see also *Jaffee v. Redmond*, 518 U.S. 1, 9 (1996).

³⁸ *United States v. Chen*, 99 F.3d 1495, 1500 (9th Cir. 1996).

³⁹ *Hickman v. Taylor*, 329 U.S. 495, 511 (1947); see also *United States v. Noble*, 422 U.S. 225, 236-38 (1975).

may well choose not to disclose sensitive information to their attorneys, and lawyers may not commit their thoughts and analysis to paper in the first instance.⁴⁰

E. THE PRIVILEGE AND CORPORATIONS

It is well established that the attorney-client privilege and work product doctrine may be asserted by corporations, as well as by natural persons.⁴¹ The attorney-client privilege protects confidential communications between the attorney and anyone within the corporate structure – directors, officers, as well as middle and lower-level employees – whose duties relate to the issues upon which the attorney is asked to provide legal assistance and who has information that the attorney would need to render adequate legal advice.⁴² The Supreme Court has expressly rejected the argument that the privilege should cover only those in the corporate control group (*i.e.*, the directors and officers of the corporation), because such a view ignores the fact that “the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”⁴³

F. SPECIAL NEED FOR THE CORPORATE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

A corporation faced with evidence or allegations of illegal behavior will generally conduct an internal investigation to determine the scope of wrongdoing and the extent of its potential liability. Typically, the corporation will retain outside counsel who will interview employees, prepare notes of interviews, review documents (privileged and otherwise), create a chronology of events, and write client memos. Counsel may also prepare a written report of such an inquiry including conclusions and recommendations, but this is not always the case. To accomplish these tasks, the investigating attorney must induce cooperation from numerous employees who, for various reasons, may not wish to cooperate. In a properly conducted investigation, the employees are informed at the outset that communications with counsel for the corporation are not privileged as to the employee; that is, the company lawyer is not the employee’s lawyer, and the corporation is free to disclose such communications without the consent of the employee.⁴⁴ Nonetheless, corporate employees and officers are generally more willing to cooperate where they receive a measure of assurance that their conversations with counsel will not be divulged to government investigators or prosecutors.⁴⁵ An internal investigation would be far less useful, and its demoralizing effect on employees would be far greater, if the investigator’s sole means of inducing cooperation was the threat of discipline or termination of employment, and not the protection of confidentiality.⁴⁶

⁴⁰ See, e.g., *Hickman*, 329 U.S. at 511 (noting that were privileged materials open to the opposition on demand, “much of what is now put down in writing would remain unwritten”).

⁴¹ See *Upjohn Co. v. United States*, 449 U.S. 383, 390-95 (1981) (allowing a corporation to invoke the privilege).

⁴² See *id.* at 391-92.

⁴³ *Id.* at 390.

⁴⁴ Despite this caution, many employees as a practical matter consider the corporation’s lawyers to be their lawyers and are otherwise hesitant for job security reasons not to answer their questions.

⁴⁵ Judson W. Starr and Joshua N. Schopf, *Cooperating with the Government’s Investigation: The New Dilemma*, SE72 ALI-ABA 353, 360-61 (2000).

⁴⁶ *Id.* at 361.

In short, by facilitating internal investigations, the corporate attorney-client privilege and work product doctrine advance the administration of justice by enabling the corporation to gather the information necessary to understand the relevant issues, to receive competent legal advice, to identify culpable employees, to determine its own liability, to change existing or institute new compliance programs, and, finally, to fully cooperate with the government. It is important to note that information and documents may be provided to the government to assist it in conducting its investigation and to others without divulging such specific privileged communications.

III. REVIEW OF THE GOVERNMENT ENCROACHMENT ON THE ATTORNEY-CLIENT PRIVILEGE AND WORK PRODUCT DOCTRINE

A. WAIVER OF THE ATTORNEY-CLIENT AND WORK PRODUCT PRIVILEGE

When a corporation has learned – whether through receipt of a grand jury subpoena, self-reporting by employees, or internal monitoring under a corporate compliance program – that its employees may have acted illegally and an internal investigation has begun, the corporation generally expects that communications with its lawyers and their investigators and documents produced at their request will be protected by the attorney-client privilege and/or the work product doctrine. Unfortunately, in light of the recent practices and policy statements by the Justice Department, particularly those set forth in the Holder Memo Standards, this assumption is no longer tenable.

The Justice Department's policy, as expressed in the Holder Memo Standards, is to obtain waivers of the corporate attorney-client and work product privilege where, in the government's view, these protections might keep information relevant to a criminal investigation from discovery. Indeed, there is no pretense that the values underlying these privileges are to be sacrificed for any reason other than to make the prosecution's job easier: "Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."⁴⁷ The obvious alternative not widely favored by government prosecutors is to conduct a factual investigation by taking statements and obtaining documents from a corporation and its employers, yet without insisting on also obtaining privileged statements made to counsel and attorney work product. It is not inconsistent with preserving the attorney-client privilege and work product protections for a company to provide information and documents to aid the government, since the privilege goes to the specific communication with the client and not necessarily to the information and documents obtained during the course of an internal investigation.

The Holder Memo Standards, now incorporated into the United States Attorneys' Manual's Criminal Resource Manual, provide a blueprint for maximizing the government's leverage to induce waivers of the corporate attorney-client privilege and work product doctrine. For example, one source of leverage arises from the possibility that the prosecutor may enter into a non-prosecution agreement with a corporate target. The Criminal Resource Manual authorizes prosecutors to offer not to indict a corporation where its "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."⁴⁸ And in determining whether a non-prosecu-

⁴⁷ Criminal Resource Manual, art. 162, § VI.B.

⁴⁸ *Id.* (internal quotation omitted).

tion agreement would be appropriate, prosecutors are instructed to consider the "completeness" of the corporation's disclosure, including whether the corporation granted "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."⁴⁹ Although the Holder Memo Standards do not consider a waiver as an "absolute requirement," they still authorize and even encourage prosecutors to "request a waiver in appropriate circumstances."⁵⁰ Fluid and ambiguous terms such as "necessary," "necessary to the public interest" and "appropriate circumstances" are left to the sole discretion of the government and generally to the individual prosecutor.

Another source of leverage that the government enjoys is its control over the sentencing decision. At the outset, the government selects the crime to be charged and the Sentencing Guidelines set forth the appropriate sentence range for such charge from which the court generally may not depart. The Sentencing Guidelines also give credit to corporations that have engaged in self-reporting, cooperation, and acceptance of responsibility for purposes of calculating the corporation's "culpability score."⁵¹ To qualify for this credit, "cooperation must be both timely and thorough."⁵² Here, "timeliness" means cooperation must begin "essentially at the same time as the organization is officially notified of a criminal investigation," while "thoroughness" requires "the disclosure of all pertinent information known by the organization."⁵³ Although courts ultimately decide what sentence must be imposed under the Sentencing Guidelines, the government's recommendation, based on its assessment of whether a corporation has cooperated in a "timely," "thorough," and complete manner, has tremendous influence on the ultimate sentence.⁵⁴ Similarly, the government can materially affect the sentencing decision by favorably or unfavorably calculating either the amount of pecuniary gain to the corporation or the pecuniary loss from the offense caused by the corporation.⁵⁵

With regard to the government's raw power implicit under the Sentencing Guidelines, the government is often not willing to make a binding non-prosecution commitment without a reciprocal commitment from a defendant, oftentimes seeking in exchange a full and complete waiver of the attorney-client privilege and the work product doctrine. Yet, as commentators have queried:

Do such demands ultimately benefit the cause of justice? Are the costs of coercing companies to waive the attorney-client privilege worth the short-term gains in the immediate case? The long-term damage inflicted on both corporate and societal interests by the government's emerging coercive waiver policy far outweighs any short-term utility.⁵⁶

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2001) [hereinafter "U.S.S.G."].

⁵² *Id.*, cmt. 12.

⁵³ *Id.*

⁵⁴ See Zornow & Krakaur, *supra* note 1, at 154-55.

⁵⁵ See *id.*

⁵⁶ Starr and Schopf, *supra* note 45, at 356.

If the government, however, demands a waiver of the attorney-client privilege and, more specifically, the protections for counsel's work product, the corporation is forced to make a classic Hobson's choice. It either gives in to the government's demand, thereby sending a message to its employees that they should not cooperate in future internal investigations, or rejects the government's conditions and risks indictment and conviction. The chilling effect on corporate self-scrutiny is obvious and there will be a serious adverse impact on the ability of corporations to prevent the occurrence of future violations of law, and of counsel to conduct meaningful and effective internal investigations. Furthermore, this practice serves to drive a harmful wedge between employees and the corporation.

While individual prosecutors may advance a particular case more quickly and effectively under the Holder Memo Standards, the Justice Department's waiver policy is indefensible from a systemic perspective. First, the waiver policy is ultimately counterproductive to the Justice Department's stated objective of obtaining "critical" assistance from the corporation "in identifying the culprits and locating relevant evidence."⁵⁷ As a result of this policy, outside counsel for a corporation now commences an internal investigation with the knowledge that the statements taken by the lawyer will likely be sought by and turned over to the prosecution and that the lawyer may be called as a witness. The likelihood of this occurring – and fairness to a company's employees dictates that they be so advised before their interviews – has the dual effect of chilling the inquiry from the outset and of eroding trust between management and staff.⁵⁸ Moreover, it can only complicate the task of detecting and preventing future wrongdoing.

Indeed, it has been suggested that today, in response to current Justice Department pressure on corporations to waive the protections of the work product doctrine, counsel often anticipate at the outset of an investigation that "the fruits of the investigation stand a substantial chance of being delivered to the government," and that this may, again, have a chilling effect on the investigative process.⁵⁹ As a result, counsel may simply refrain from putting inculpatory information in written form.

Second, the waiver policy also undermines our adversarial legal system. When a company decides to waive its privileges, "the role of the criminal counsel is repositioned from that of the client's confidential legal advisor and the government's adversary into a conduit of information between the client and the government."⁶⁰ Contrary to the *Hickman* Court's admonition, the prosecution then performs its duties "on wits borrowed from the adversary."⁶¹ Moreover, counsel for the company is forced to become a witness against it and its employees, stripping both of their counsel of choice and generally impairing the client's trust in the lawyer.

Third, the government's approach, as expressed in the Holder Memo Standards, may enable federal prosecutors to circumvent employees' Fifth Amendment privilege against self-incrimination. This risk tends to be greatest when the government agrees to defer its investiga-

⁵⁷ Criminal Resource Manual, art. 162, § VI.B.

⁵⁸ Zornow & Krakaur, *supra* note 1, at 157.

⁵⁹ *Id.* at 156.

⁶⁰ *Id.* at 156-57.

⁶¹ 329 U.S. at 516 (Jackson, J. concurring).

tion pending completion of the corporation's internal inquiry. Under such circumstances, the government defers with the knowledge that an employee speaking with the corporation's lawyers is less likely to retain separate counsel who, presumably, would advise the employee to invoke the Fifth Amendment privilege against self-incrimination.⁶² As a result, the employee is lured into a false sense of security and speaks more freely than perhaps is wise. If, under pressure to demonstrate "complete" cooperation in pursuit of its own interest, the company subsequently decides to reveal the substance of the employee's interview, the government may gain a significant advantage in obtaining incriminating evidence from an employee without having to negotiate immunity or plea agreements.⁶³ Furthermore, counsel for the corporation could eventually be disqualified if called as a witness by the prosecution to impeach testimony given by one of the interviewed employees. Of course, in rare cases, calling the lawyer as a witness could also be used as a tactical tool by the prosecution to rid the corporation of the counsel of its choice.

Finally, the timing of a corporation's decision to affect a waiver of the protections may also exacerbate the waiver's detrimental impact on the case. A premature waiver may result in the corporation being "deprived of legal advice based on counsel's full development of the facts and an assessment of the strengths and weaknesses of the government's case."⁶⁴ Again, because disclosure of an internal investigation to the government by a corporation waives the protections of the attorney-client and work product privilege, the corporation may be subjected to additional litigation regarding what information must be turned over to the government.⁶⁵

In most complicated government criminal investigations, there are parallel proceedings upon which the government's conduct also has an impact. These include civil cases against the company and individuals as well as various civil enforcement proceedings brought by federal or state agencies. If the company has waived the attorney-client privilege in the criminal investigation, it is likely to be found to have waived the privilege in these proceedings as well.

Although the current United States Attorneys' Manual recognizes the value of the attorney-client privilege and seeks to provide some protection and balance before the government may invade it, these provisions seem now to be either outdated or increasingly ignored. For example, the United States Attorneys' Manual states:

Department of Justice attorneys should recognize that communications with represented persons at any stage may present the potential for undue interference with attorney-client relationships and should undertake any such communications with great circumspection and care. This Department as a matter of policy will respect *bona fide* attorney-client relationships whenever possible, consistent with its law enforcement responsibilities and duties.⁶⁶

⁶² Zornow & Krakaur, *supra* note 1, at 157.

⁶³ See Criminal Resource Manual, art. 162, § VI.B.

⁶⁴ Zornow & Krakaur, *supra* note 1, at 157.

⁶⁵ See, e.g., *Westinghouse Elec. Corp. v. Republic of Philippines*, 951 F.2d 1414, 1418 (3d Cir. 1991) (indicating that disclosure of internal investigation report to the SEC and the Justice Department constituted waiver of both protections).

⁶⁶ U.S. ATTORNEYS' MANUAL, tit. 9, § 9-13.200, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrm.htm#9-13.200.

Another section of the United States Attorneys' Manual provides:

In considering a request to approve the issuance of a subpoena to an attorney for information relating to the representation of a client, the Assistant Attorney General in charge of the Criminal Division applies the following principles:

- ♦ The information shall not be protected by a valid claim of privilege.
- ♦ All reasonable attempts to obtain the information from alternative sources shall have proved to be unsuccessful.
- ♦ In a criminal investigation or prosecution, there must be reasonable grounds to believe that a crime has been or is being committed, and that the information sought is reasonably needed for the successful completion of the investigation or prosecution.

.....

- ♦ The need for the information must outweigh the potential adverse effects upon the attorney-client relationship.⁶⁷

These expressions of support for the value of the attorney-client privilege and the work product doctrine, however, are belied by the current Justice Department practices and guidelines and appear to be in conflict with the Holder Memo Standards.

B. JOINT DEFENSE AGREEMENTS

In addition to government pressure to waive the protections of the attorney-client and the work product privilege, lawyers representing clients in corporate criminal matters today encounter federal prosecutors who view joint defense agreements with suspicion and sometimes even as improper or illegal, although such agreements have long been recognized in the law as appropriate and necessary to the function of providing adequate legal advice.

The sharing of information by co-defendants under the joint defense privilege can greatly assist counsel in their efforts to represent their clients while offering substantial benefits to the agreement's participants.⁶⁸ Indeed, lawyers increasingly seek to enter into formal joint defense agreements with another party's counsel which set forth the applicability and scope of the privilege prior to the sharing of any otherwise privileged information.⁶⁹

⁶⁷ *Id.* § 9-13.410C, available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/13mcrim.htm#9-13.410.

⁶⁸ Bartel, *supra* note 33, at 879.

⁶⁹ Under certain circumstances, disqualification issues may arise when a joint defense agreement exists. Indeed, seeking disqualification is one method by which the government may seek to attack a joint defense agreement. Several commentators discuss this matter in greater detail. *See, e.g.,* Chepiga, *supra* note 33, at 593 (indicating that although the government has moved in several criminal cases to disqualify an attorney who represented one party to a joint defense agreement after another party became a witness for the prosecution, courts have routinely rejected these motions) (citing *United States v. Anderson*, 790 F. Supp. 231 (W.D. Wash. 1992), and *United States v. Bicoastal Corp.*, No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445, at *17-18 (N.D.N.Y. 1992)); Arnold Rochvarg, *Joint Defense Agreements and Disqualification of Co-Defendant's Counsel*, 22 AM. J. TRIAL ADVOC. 311 (1998) (reviewing and analyzing cases dealing with joint defense agreements and disqualification); A. Howard Matz, *Lawyers on the Attack: Prosecutors' and Defense Lawyers' Efforts to Curb the Other Side's Perceived Misconduct*, 161 PLI/CRIM 177, 181-90 (1991) (discussing attempts to disqualify counsel, potential conflicts of interest and measures to avoid disqualification).

An attorney seeking to invoke the joint defense privilege on behalf of a client must be aware that the definition and scope of the privilege, as well as factors relevant to its existence, differ markedly among the Circuits. For instance, while a defendant in the Ninth Circuit need only point to a "common interest" between himself and a co-defendant in order to assert the privilege,⁷⁰ that same defendant in the Third Circuit must demonstrate that the communications he seeks to protect arose from an "on-going and joint effort to set up a common defense strategy."⁷¹ These differences between the Circuits can have a profound impact on whether or not a client can successfully invoke the privilege.

The Courts of Appeals for the First, Second, Third and Tenth Circuits have set rigid standards for invoking the joint defense privilege. The law in these Circuits requires evidence of common defense strategy between parties before allowing the privilege to be invoked.⁷² Indeed, the Court of Appeals for the Second Circuit has held that "only those communications made in the course of an ongoing common enterprise and intended to further the enterprise are protected."⁷³

The Court of Appeals for the Fourth Circuit also espouses a more limited scope for the joint defense privilege. Although the court has stated in one case that, "persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims,"⁷⁴ the facts of that case actually suggest a narrower holding. Specifically, the parties were engaged in a joint effort to prosecute a claim and had documented their cooperation in a written agreement.⁷⁵

Arguably, the Circuit most vigorous in protecting otherwise privileged communications divulged to third parties is the Ninth Circuit.⁷⁶ The Court has stated that the common interest exception was "not limited . . . to situations where codefendants share a common defense or have interests that are not adverse."⁷⁷ The Ninth Circuit has also indicated that the criterion for invoking a joint defense privilege is not whether the meeting was called to prepare trial strategy, stating:

⁷⁰ See, e.g., *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965).

⁷¹ *Matter of Beville, Bresler & Schulman Asset Mgt Corp.*, 805 F.2d 120, 126 (3d Cir. 1986) (citing *Eisenberg v. Gagnon*, 766 F.2d 770, 787 (3d Cir. 1985)).

⁷² *Id.* (citing *In re Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974*, 406 F. Supp. 381 (S.D.N.Y. 1975)). Moreover, the communications must be made in confidence to further the joint defense effort. *Id.* The party must also present concrete evidence of an actual agreement between the parties to adopt a joint defense strategy. *Id.* See also *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1043 (10th Cir. 1998) (stating that failure to "produce any evidence, express or implied, of a joint defense agreement" precluded application of the joint defense privilege to documents); *United States v. Bay St. Ambulance and Hosp. Rental Serv.*, 874 F.2d 20, 28-29 (1st Cir. 1989) (adopting the *Beville* test and finding that while the parties at issue had "many interests in common," a particular document was not covered by the joint defense privilege because there was no evidence that it related to the joint defense).

⁷³ *United States v. Weissman*, 195 F.3d 96, 99 (2d Cir. 1999) (citing *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989)). The Court of Appeals for the Seventh Circuit is also moving toward the Second Circuit's restrictive interpretation of the joint defense privilege and currently requires that the parties be engaged in an actual joint defense strategy. See *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979); see also *United States v. Keplinger*, 776 F.2d 678, 701 (7th Cir. 1985) (applying *McPartlin*, but finding no joint defense privilege because the communications at issue were not made in confidence).

⁷⁴ *In re Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244, 249 (4th Cir. 1990).

⁷⁵ *Id.* at 246; see also *Sheet Metal Workers Int'l Ass'n v. Sweeney*, 29 F.3d 120, 124-25 (4th Cir. 1994) (indicating that a defendant's belief that he shared a common interest with another party would not suffice to invoke the common interest privilege).

⁷⁶ See *United States v. Montgomery*, 990 F.2d 1264, 1993 WL 74314 (9th Cir. Mar. 15, 1993) (unpublished); *Hunydee v. United States*, 355 F.2d 183, 185 (9th Cir. 1965); see also *United States v. Zolin*, 809 F.2d 1411, 1417 (9th Cir. 1987) (holding that the defendant need not show that the party with whom he allegedly shared a "common interest" faced any immediate liability; a shared interest in "sorting out . . . affairs" was sufficient), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir. 1988).

⁷⁷ *Montgomery*, 1993 WL 74314, at *4.

[W]here two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.⁷⁸

Another Ninth Circuit case highlights the expansiveness of this prior holding, noting that while the "paradigm case [of joint defense privilege] is where two or more persons subject to possible indictment arising from the same transaction make confidential statements that are exchanged among their attorneys," the privilege is not limited to such a case.⁷⁹ Indeed, "[e]ven where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no immediate liability, it can still be found to have a common interest with the party seeking to protect the communications."⁸⁰

With regard to the existence of a joint defense privilege as to documents and not just oral communications, the Court of Appeals for the Tenth Circuit has held that for a privilege to apply to documents, the party invoking the privilege must establish that "(1) the documents were made in the course of a joint-defense effort; and (2) the documents were designed to further that effort."⁸¹

In sum, although courts tend to impose different requirements before validating a joint defense agreement, courts nonetheless recognize the importance of, and generally uphold, such agreements. The agreements, however, still make prosecutors "uneasy."⁸² Indeed, commentators suggest that prosecutors disfavor the use of joint defense agreements because they fear that the cooperation and confidentiality amongst defendants inherent in a joint defense agreement will shield pertinent evidence and hinder the government's ability to get convictions because it will be more difficult for prosecutors to isolate individuals.⁸³ Moreover, prosecutors worry that joint defense agreements "may include unlawful efforts to impede justice, provide a group of co-defendants with the opportunity to influence improperly the memories of witnesses, or otherwise permit a concerted attempt to obstruct grand jury investigations."⁸⁴ Prosecutors also express concern that the joint defense privilege enables the continuation of criminal conspiracies.⁸⁵

During the past two decades, as the Justice Department prosecuted corporations with increasing frequency, it began to discourage the use of joint defense agreements. In 1991, the

⁷⁸ *Hunydee*, 355 F.2d at 184.

⁷⁹ *Zolin*, 809 F.2d at 1417.

⁸⁰ *Id.*

⁸¹ *Grand Jury Proceedings v. United States*, 156 F.3d 1038, 1042-43 (10th Cir. 1998); see also *Chepiga*, *supra* note 33, at 586. In fact, one court has held that the privilege was not waived where an attorney shared his work product with another attorney representing a different client with a common interest, but not involved in the same litigation. *Chepiga*, *supra*, at 586-87 (citing *United States v. AT&T*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)). Of course, transferring documents to another party's attorney under a joint defense agreement does not work to extend the privilege if the protection did not apply before the transfer. *Id.* at 588 (citing *Aiken v. Texas Farm Bureau Mut. Ins. Co.*, 151 F.R.D. 621, 624 (E.D. Tex. 1993)).

⁸² *Savarese & Miller*, *supra* note 33, at 720.

⁸³ *Chepiga*, *supra* note 33, at 591; *Bartel*, *supra* note 33, at 879.

⁸⁴ *Bartel*, *supra* note 33, at 879 (citation omitted).

⁸⁵ *Id.*

Justice Department outwardly expressed its suspicion of such agreements in an article published in "The DOJ Alert," which reported, "a select group of DOJ's senior white-collar prosecutors has launched a systematic survey of the nation's U.S. attorneys to gauge their views on joint defense agreements."⁸⁶ The then chief of the Criminal Division's Fraud Section also noted in the article that "[p]rosecutors are uneasy . . . because they see in [joint defense agreements], even unintentionally, an opportunity to get together and shape testimony."⁸⁷ Yet, despite this uneasiness, prosecutors were still cautioned in the article against having a "knee-jerk reaction" against joint defense agreements and were directed to focus instead on the investigation, unless there was a "specific reason to believe the agreement [was] being used for improper purposes."⁸⁸

The Justice Department's view of joint defense agreements is consistent with the notion of cooperation found in the Organizational Sentencing chapter of the federal Sentencing Guidelines ("Corporate Sentencing Guidelines").⁸⁹ The Corporate Sentencing Guidelines, which became effective in November 1991, aid federal prosecutors in determining whether a target for prosecution should receive a more lenient sentence based on the quality of the cooperation with the government. Under the Corporate Sentencing Guidelines, corporations receive a more lenient sentence if they disclose the violation prior to an "imminent threat" of disclosure or if they "fully cooperate" with the government investigation.⁹⁰ The Corporate Sentencing Guidelines require that the cooperation be "timely" and "thorough."⁹¹ "Thorough" cooperation requires the corporation to provide pertinent information "sufficient for law enforcement personnel to identify the nature and the extent of the offense and the individual(s) responsible for the criminal conduct."⁹² In applying the Corporate Sentencing Guidelines, prosecutors have interpreted "cooperate" broadly and pressed corporations to disclose privileged information in order to receive credit for cooperating.⁹³ Therefore, the Justice Department's uneasiness with joint defense agreements reflects the fact that these agreements are perceived as inherently uncooperative since they seek to benefit the parties, while hindering the free flow of information to the government if one party seeks to cooperate under the Corporate Sentencing Guidelines. (In fact, that perception is exaggerated since the agreements hinder the flow only of privileged information which, but for the agreement, the recipient would not have.)

It is unclear whether the Holder Memo Standards, when first issued, were meant merely to clarify the Justice Department's view of joint defense agreements or whether they were meant as a warning to attorneys that pressure on corporations to waive privilege to receive

⁸⁶ *White-Collar Prosecutors Probe Joint Defense Agreements*, 1 THE DOJ ALERT 3, July 1991 [hereinafter "DOJ ALERT"].

⁸⁷ *Id.* (internal quotation omitted) (alteration in original); see also Savarese & Miller, *supra* note 33, at 720.

⁸⁸ DOJ ALERT, *supra* note 86, at 3.

⁸⁹ U.S.S.G. ch. 8.

⁹⁰ *Id.* § 8C2.5(g)(1), (2).

⁹¹ *Id.* § 8C2.5(g), cmt. 12.

⁹² *Id.*

⁹³ See, e.g., Zornow & Krakaur, *supra* note 1, at 148. One former United States Attorney described this cooperation as an "enforced partnership" between prosecutors and corporations, declaring it the best route to compliance with the law. *Id.* (citing Otto G. Obermaier, *Drafting Companies to Fight Crime*, N.Y. TIMES, May 24, 1992, at 11). Legal commentators have documented how this "enforced partnership" conflicts with *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), in which the Supreme Court held that the best route to corporate compliance with the law is "full and frank communication between attorneys and their clients." See, e.g., Zornow & Krakaur, *supra*, at 148-49.

credit for cooperating will increase, thereby indicating that joint defense agreements that undermine this cooperation would not be viewed favorably.⁹⁴ A former Assistant Attorney General, however, has denied that the Justice Department requires corporations to waive privilege in order to receive the benefits of cooperation.⁹⁵ "There certainly is no department policy requiring companies to waive the attorney-client privilege to receive credit for cooperating with the government . . . [and] I, for one would be opposed to [such a] policy."⁹⁶ But, this same former Justice Department official also noted that it "should not be surprising" that prosecutors will continue "to give greater consideration to a corporation which cooperates extensively and provides substantial assistance" to the government, and stated:

I should fully disclose that when I was doing white collar criminal defense work, I certainly participated in joint defense agreements and recognized their value. On the other hand, their value has to be balanced because there is the potential for mischief and the potential for utilizing the agreements to allow targets to circle the wagons and make it difficult for prosecutors successfully to complete an investigation or prosecution. That is, of course, why these agreements are viewed by some investigators and prosecutors as potential vehicles to obstruct a successful investigation and prosecution.⁹⁷

While the Holder Memo Standards and this former Justice Department official's comments outwardly seem to suggest some Justice Department suspicion of joint defense agreements, the United States Attorney's Office for the Southern District of New York has been more explicit in its disapproval of the use of joint defense agreements for at least a decade. In cases where individual employees have entered into joint defense agreements with a target corporation:

[T]he office of the United States Attorney for the Southern District of New York routinely coerces corporate waivers of the privilege by informing corporate managers that their failure to waive the privilege will be evaluated in determining whether the corporation has been sufficiently cooperative to avoid indictment and/or a severe guidelines sentence.⁹⁸

Indeed, the United States Attorney for the Southern District of New York "has publicly called for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation."⁹⁹ Accordingly, both corporations and individual employees need to take this hostility towards joint defense agreements into account prior to formalizing such agreements.

⁹⁴ See generally Polkes & Jarusinsky, *supra* note 2.

⁹⁵ Irvin B. Nathan, *Assistant Attorney General James Robinson Speaks to White Collar Criminal Issues*, 6 No. 12 BUS. CRIMES BULL. 3 (Jan. 2000).

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Robert Morvillo, *The Decline of the Attorney Client Privilege*, N.Y.L.J., Dec. 2, 1997, at 3.

⁹⁹ Judson W. Starr & Brian L. Flack, *The Government's Insistence on a Waiver of Privilege*, WHITE COLLAR CRIME 2001 J-1, at J-4 (ABA 2001); see also Polkes & Jarusinsky, *supra* note 2, at J-31 (noting that beginning in the early 1990s, the United States Attorney's Office for the Southern District of New York began transgressing former standards for corporate cooperation).

In addition, the Government view, as expressed in the guidelines and elsewhere, sees all joint defense agreements as similar, while in fact they vary widely--from full disclosure of client communications to providing corporate documents to merely explaining the corporate structure and process.

It has been suggested, however, that, despite the apparent lack of clarity as to the government's position regarding joint defense agreements, the Justice Department's stance may actually be relaxing. The American Bar Association ("ABA") a few years ago held a session addressing attacks on the joint defense privilege,¹⁰⁰ and a lawyer who spoke at the session commented that several years ago the Justice Department saw joint defense agreements mainly as a "mechanism simply to obstruct justice," but that "[t]hrough education, the [Justice] Department has come to see that these agreements are simply a way for defense counsel to legitimately preserve privileges while sharing information."¹⁰¹ It was further noted that the federal prosecutor who has a negative "knee-jerk" reaction against joint defense agreements has become "the exception rather than the rule."¹⁰² If this is in fact the case, this positive development needs to be further supported by Justice Department policies and guidelines.

C. ADVANCEMENT OF ATTORNEYS' FEES

Defense counsel and their clients increasingly find government resistance to corporate efforts to advancing attorneys' fees to individual employees once a government investigation has been commenced. Although individuals under investigation or charged by the government are entitled to obtain qualified, independent counsel without interference from the government, federal prosecutors frequently object to a corporation providing counsel for its employees and penalizes the company for not cooperating with the government investigation. This federal government policy, however, undermines a well-established and necessary practice and imposes itself where law enforcement has no real interest.

In recognition that "[t]he sort of litigation in which corporate executives are involved . . . is likely to be protracted, complex, and expensive,"¹⁰³ the vast majority of states have enacted statutes that expressly authorize corporations to adopt provisions within the company's by-laws, articles of incorporation, or employment contracts that automatically provide for the advancement of legal fees of officers and directors.¹⁰⁴ Given today's litigious environment, many corporations have adopted such provisions.¹⁰⁵ Since these bylaws, articles, and employment agreements are enforceable contracts, corporations that refuse to advance the fees to

¹⁰⁰ The session was entitled "Assault on the Privilege: Protecting and Defending the Attorney-Client Privilege, Work Product, and Joint Defense Agreements in Criminal Investigation." *Interview with Jan Handzlik, Kirkland & Ellis and Vincent J. Marella, Bird, Marella, Boxer & Wolpert, Los Angeles, California*, 13 CORP. CRIME REP. 12 (1999).

¹⁰¹ *Id.* at 15.

¹⁰² *Id.*

¹⁰³ JOSEPH WARREN BISHOP, JR., *LAW OF CORPORATE OFFICERS AND DIRECTORS - INDEMNIFICATION AND INSURANCE* § 6.27, at 45 (Gail A. O'Gradney ed., 2000).

¹⁰⁴ See, e.g., DEL. CODE ANN. tit. 8, § 145(f) (2000); MODEL BUS. CORP. ACT ANNOTATED § 8.58(a) (3d. ed. Supp. 1998/99) [hereinafter "MBCA"]. Some state statutes directly require a corporation to advance fees. See, e.g., MINN. STAT. ANN. § 300.083(3) (West 2000); N.D. CENT. CODE § 10-19.1-91(4) (1999).

¹⁰⁵ See 1 RODMAN WARD, JR. ET AL., *FOLK ON THE DELAWARE GENERAL CORPORATION LAW* § 145.7, at 237 (4th ed. Supp. 2000-1) ("Mandatory advancement provisions frequently appear in corporate charters, by-laws, and indemnification agreements.").

directors and officers in accordance with the agreements face declaratory judgments and damages verdicts.¹⁰⁶

For example, Delaware's code extends the scope of this authority allowing for the adoption of mandatory advancement provisions to include employees, as well as directors and officers.¹⁰⁷ Although some corporations have bound themselves to advance fees to employees pursuant to a bylaw or merger agreement,¹⁰⁸ the far more common practice is for corporations to adopt provisions that provide the corporation with *discretion* to advance fees to employees:

Under bylaws, articles of incorporation, or other contractual provisions, a corporation may provide for advancement of expenses, including attorneys' fees. The corporation may agree to make such advancements mandatory The provisions in bylaws and articles of incorporation dealing with indemnification all cover directors and officers, and a substantial minority apply also to "employees" and "agents," even if the statute does not But . . . , most of those that cover employees provide that the corporation "may" indemnify employees¹⁰⁹

A discretionary fee advancement provision allows the corporation's board of directors to assess the circumstances underlying an employee's need for separate counsel (and a concomitant need for fees to be paid in advance) and render a decision that is subject to a reasonableness requirement.¹¹⁰ Typically, the corporations that adopt such discretionary provisions will require the employee to provide a written affirmation of good faith or an undertaking to repay the fees if he or she is later found to be ineligible for indemnification.¹¹¹

Significantly, Delaware's corporate code and the codes of many other states expressly permit this discretionary advancement of fees to employees.¹¹² The Model Business Corporation Act, which endeavors to leave unregulated the issue of advancement of expenses to employees, similarly acknowledges that its provisions are "not in any way intended to cast doubt on the power of the corporation to indemnify or advance expenses to . . . employees and agents"¹¹³

In addition to the state corporation codes, legal ethics rules also permit a corporation to pay an employee's attorney's fees, provided that the attorney maintains professional independence and loyalty to the employee. For example, Model Rule 1.8(f) of the ABA Model Rules of Professional Conduct ("Model Rules") requires a lawyer who accepts compensation from a third party to take steps to ensure no conflict of interest exists:

¹⁰⁶ See generally *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1994) (holding that officer is entitled to injunction requiring corporation to advance fees prior to final disposition of the claim); *Citadel Holding Corp. v. Roven*, 603 A.2d 818 (Del. 1992) (awarding damages and prejudgment interest to director after corporation refused to advance fees as mandated in employment agreement).

¹⁰⁷ See DEL. CODE ANN. tit. 8, § 145(f).

¹⁰⁸ See *Ridder*, 47 F.3d at 86-87 (indicating bylaw required advancement of expenses to all employees).

¹⁰⁹ BISHOP, *supra* note 103, §§ 7.07.50 to 7.08, at 18-19 (footnote omitted).

¹¹⁰ See *Citadel Holding*, 603 A.2d 823-24.

¹¹¹ See, e.g., BISHOP, *supra* note 103, App. 7A, at 5-8 (reprinting resolution that confers the discretion to advance fees to an employee and agent if an undertaking is provided on his or her behalf).

¹¹² See, e.g., DEL. CODE ANN. tit. 8, § 145(f).

¹¹³ MBCA § 8.58(e) & cmt.

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client consents after consultation;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6.¹¹⁴

The ABA's Standards for Criminal Justice contain a comparable direction:

In accepting payment of fees by one person for the defense of another, defense counsel should be careful to determine that he or she will not be confronted with a conflict of loyalty since defense counsel's entire loyalty is due the accused. Defense counsel should not accept such compensation unless:

- (i) the accused consents after disclosure;
- (ii) there is no interference with defense counsel's independence of professional judgment or with the client-lawyer relationship; and
- (iii) information relating to the representation of the accused is protected from disclosure as required by defense counsel's ethical obligation of confidentiality.

Defense counsel should not permit a person who recommends, employs, or pays defense counsel to render legal services for another to direct or regulate counsel's professional judgment in rendering such legal services.¹¹⁵

Accordingly, the exercise of discretion by a corporation to advance fees on behalf of an employee is permitted by law and ethical codes. Corporations that exercise this discretion are guided by a legitimate concern for employee morale as well as the view that it is unfair to require employees whose corporate conduct is under investigation to pay for their own defense before any adjudication of guilt, much less before any determination of their individual guilt or responsibility could even be made. Moreover, the principles underlying the advancement of expenses to directors and officers – *i.e.*, that those who serve the corporation should not be forced to bear the expense of their own defense, as that would discourage competent people from serving in such capacity – apply equally to a corporation's decision to advance fees to employees.¹¹⁶ Therefore, the exercise of discretion to advance fees typically reflects sound corporate governance goals, rather than an effort to not cooperate with a government investigation.

¹¹⁴ MODEL RULES OF PROF'L CONDUCT R. 1.8(f) (1999). Rule 1.8(f) is very similar to its predecessor, Disciplinary Rule 5-107 of the Model Code of Professional Responsibility, which is still in force in some states.

¹¹⁵ A.B.A. STANDARDS FOR CRIMINAL JUSTICE Standard 4-3.5(e) (1993). If the lawyer could not exercise independence, such as in a "crime family" case, the court may order disqualification. *See, e.g., United States v. Locascio*, 6 F.3d 924, 932-33 (2d Cir. 1993).

¹¹⁶ *See* MBCA § 8.58 & cmt (recognizing that the authority also exists for corporations to indemnify or advance fees to employees).

The legitimacy of the policy goals espoused by these state statutes and ethical standards is confirmed by the Justice Department's own internal regulations, which permit the Justice Department itself to pay for a prosecutor's outside counsel if the prosecutor is a subject of a federal criminal investigation.¹¹⁷ Unfortunately, the guidance recently issued to federal prosecutors in the Holder Memo Standards could, and does, generate interference with the principle that non-government employees facing government investigation or prosecution are entitled to qualified, competent representation. Today, it is common for defense counsel to be confronted by a federal prosecutor who believes that a corporation is not fully cooperating with the government in a federal criminal investigation solely because the corporation is paying the legal fees for an officer, director or employee.

Although the Holder Memo Standards quite logically instruct prosecutors that the cooperation of the corporation may be a relevant factor in determining whether to charge the company, this guidance includes flawed commentary that authorizes a prosecutor to view as non-cooperative the advancement of legal fees for employees that have been deemed "culpable" by the prosecutor. Specifically, the Holder Memo Standards state that:

[W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.¹¹⁸

A footnote, fortunately, does add that "[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate."¹¹⁹ But where this state requirement is lacking, the Holder Memo Standards undermine an otherwise legal, ethical and useful practice.

The Justice Department policy expressed in the Holder Memo Standards may unfairly prejudice corporations and their employees and, thus, compromise the administration of justice. Although corporations are often obligated under state law and their by-laws to advance fees to officers and directors, they may have statutory authority not to pay attorneys' fees for officers and directors if the corporation determines that an officer or director acted with criminal intent or acted to harm the company.¹²⁰ In addition, corporations typically retain discretion to advance fees for lower-ranking employees. Since a decision to advance fees most often must be made long before there is a sufficient factual basis to allow a corporation to assess "culpability" of the employee, the Holder Memo Standards may cause premature judgments by a corporation about an employee's criminal intent and conduct and will have a chilling effect on a corporation's exercise of discretion to advance fees.

¹¹⁷ See 28 C.F.R. §§ 50.15(a)(7), 50.16.

¹¹⁸ Criminal Resource Manual, art. 162, § VI.B (footnote omitted) (emphasis added). Section VI.B. contains numerous other relevant provisions as well.

¹¹⁹ *Id.* at n.3.

¹²⁰ See, e.g., Del. Code Ann. tit. 8, § 145(a) (2000).

In addition, the Holder Memo Standards are subject to abuse by prosecutors who could gain a strategic advantage by interfering with the ability of corporate employees to retain competent counsel if they are unable to do so absent financial support from the company.

The purported application of the Holder Memo Standards to the advancement of fees only to "culpable" employees creates a paradigm that is both incompatible with the legal standards governing advancement and impractical in its application to white-collar criminal investigations. Culpability may play a role in a corporation's decision whether to ultimately indemnify an employee, as the corporation may choose not to indemnify an employee who acted in bad faith or with reason to believe that his or her conduct was unlawful.¹²¹ Whether an employee is guilty of the offense for which he or she is under investigation, however, frequently cannot be determined by a corporation at the investigation or pre-trial stage. Indeed, the ultimate decision to not indemnify an employee is often made long after the need to do so has arisen and fees have already been advanced.

Under Delaware law, for example, a corporation's decision to advance fees is an issue resolved independently of the employee's ultimate entitlement to indemnification, and is instead resolved by answering questions that do not touch upon culpability.¹²² In general, courts applying Delaware law will first determine whether the employee is entitled to the advancement of fees by virtue of a bylaw, resolution, or contractual provision.¹²³ If not, the decision to advance fees is left to the discretion of the corporation and the sole requirement that must be fulfilled is for the employee to file an undertaking to repay the advanced fees if such an undertaking is required by the relevant bylaw, resolution, or contract.¹²⁴

In contrast, the Holder Memo Standards would require a corporation to determine an employee's "culpability" well before such a determination is ripe. As noted by one state legislature, "during the early stages of a proceeding (when advances are often needed) the facts underlying the claim cannot be fully evaluated and the board of directors therefore cannot accurately ascertain the ultimate propriety of indemnification."¹²⁵ This is particularly the case in corporate criminal investigations, where the proscribed behavior "is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct."¹²⁶ As summarized by one commentator, "[t]he jurisprudence of white collar crime, in particular, is littered with examples of courts and legislatures struggling to clarify what is or is not a crime."¹²⁷

¹²¹ *Id.* § 145(a)-(b).

¹²² See *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85, 87 (3d Cir. 1994) ("Under Delaware law, appellants' right to receive the costs of defense in advance does not depend upon the merits of the claims asserted against them and is separate and distinct from any right of indemnification they may later be able to establish.").

¹²³ See, e.g., *id.*

¹²⁴ See DEL. CODE ANN. tit. 8, § 145(e).

¹²⁵ S.C. CODE ANN. § 33-8-530 cmt. (Law. Co-op. 2000).

¹²⁶ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978); see also Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 293 (1991) (concluding that many white-collar criminal statutes and regulations create a "gray area between legal and illegal conduct").

¹²⁷ Bucy, *supra* note 126, at 293.

In light of this uncertain legal backdrop and the large volume of documents that typically must be reviewed in corporate investigations, a company will often be unable to realistically assess the culpability of its employees until the conclusion of the legal proceedings. In the case where an employee has made a serious mistake in judgment, the company may not have sufficient information to conclude that the employee had the necessary criminal intent. In most United States corporations, a basic tenet of human resources management is that an employee should be given the benefit of the doubt when determining something as serious as whether he or she acted with criminal intent. As a result, companies often properly refrain from premature determinations regarding an employee's criminal culpability. The Holder Memo Standards, however, unwisely pressures a company to rush to judgment.

In addition, the guidance set forth in the Holder Memo Standards is subject to abuse. Every lawyer – including a prosecutor – has an obligation not to interfere with an individual's legal representation, particularly in a criminal matter.¹²⁸ As Model Rule 8.4 states: "It is professional misconduct for a lawyer to . . . engage in conduct that is prejudicial to the administration of justice."¹²⁹ Although the paramount duty of a prosecutor is to seek justice,¹³⁰ the Holder Memo Standards unfortunately create a framework that allows a prosecutor to use his or her leverage to interfere with an employee's ability to obtain a well-qualified lawyer, which in fact undermines the interests of justice.

Given that most business-related investigations concern complex regulatory issues, an experienced attorney is frequently necessary to competently safeguard an employee's interests. Many employees, however, lack sufficient funds to retain such an attorney. An employee who is denied the advancement of fees is unlikely to be able to obtain competent counsel. This reasoning applies with equal – if not greater – force to low-ranking employees. Prosecutors may gain a strategic advantage by chilling a company's exercise of discretion to advance fees for employees and impeding an employee's ability to retain a capable and experienced attorney. Such strategic interference with an individual's ability to obtain representation is inconsistent with the ethical standards governing attorney conduct and ultimately impedes the fair administration of justice.¹³¹

D. CRIME-FRAUD EXCEPTION

Today, defense lawyers are confronted by government efforts to overcome the attorney-client privilege by assertion of the crime-fraud exception. A defense counsel's first notice of such a claim is often in an *ex parte* order of a court requiring the lawyer to provide testimony regarding communications with a client.

¹²⁸ Under the McDade Amendment adopted in 1998, federal prosecutors are subject to state ethics rules and local federal court rules governing attorneys in each state where such attorney engages in that attorney's duties. See 28 U.S.C. § 530B(a).

¹²⁹ MODEL RULES OF PROF'L CONDUCT R. 8.4(d) (1999).

¹³⁰ "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88 (1935).

¹³¹ The Holder Memo Standards' guidance regarding advancement of attorney's fees is also incompatible and inconsistent with the apparent approval of this practice as expressed in state statutes permitting corporations to exercise discretion to advance fees, despite the exemption in the Justice Department guidelines when such advances are required by law.

Although the crime-fraud exception to the attorney-client privilege is as universally recognized as the privilege itself, it is justified only on the grounds that the traditional rationale for the privilege – attorneys may give sound legal advice only if clients can fully and frankly communicate with them – does not apply when the intent of the communications is to further criminal activity.¹³² The crime-fraud exception to the privilege dates back to the 1743 English case of *Annesley v. Earl of Anglesea*.¹³³ A later English case, *Regina v. Cox*, was the first to give widespread effect to the exception, applying it to both civil and criminal wrongs in 1884.¹³⁴ *Regina* established the principle that the client's intent in consulting an attorney controls whether the communication is privileged, holding, "[i]n order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent."¹³⁵

In the 1891 case of *Alexander v. United States*, the United States Supreme Court endorsed the *Regina* rule, but added the limitation that the exception should only apply to wrongs for which the party is *currently* being tried.¹³⁶ This restriction, however, has since become a dead letter.¹³⁷ The Court further refined the crime-fraud exception in *Clark v. United States* by limiting its application to cases in which the party opposing the privilege had presented "*prima facie* evidence that it has some foundation in fact."¹³⁸ Another early limitation to the exception was the "independent evidence" requirement, whereby the government was required to establish its *prima facie* case through evidence acquired independently of the communications at issue.¹³⁹ Yet, since prosecutors invoked it relatively infrequently, the crime-fraud exception remained an undeveloped doctrine throughout much of this century.

More recently, federal prosecutors have taken advantage of the increased criminalization of white-collar and regulatory offenses to invade the attorney-client privilege by asserting the crime-fraud exception.¹⁴⁰ Such government efforts have a low procedural threshold, allowing prosecutors to compel testimony about attorney-client communications based only on an *ex parte* showing that the exception applies. In most cases, the decision to proceed and the *ex parte* showing to the court are both made by the individual prosecutor handling the investigation without any additional review or approval within the Justice Department.

Most courts recognize that in order for the exception to apply, prosecutors must demonstrate two elements: (1) the client was involved in planning criminal conduct at the time of the

¹³² *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996); *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 90 (3d Cir. 1992); *Coleman v. Am. Broad. Co., Inc.*, 106 F.R.D. 201, 206 (D.D.C. 1985).

¹³³ 17 How. St. Tr. 1225 (1743), quoted in WIGMORE, *supra* note 12, § 2291; see also MCCORMICK ON EVIDENCE, *supra* note 13, § 87, at 344 n.3 (citing *Annesley*); Fried, *supra* note 9, at 446-50 (discussing the history and significance of *Annesley*).

¹³⁴ 14 Q.B.D. 153 (Cr. Cas. Res. 1884); see also Christopher Paul Galanek, Note, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1123 (1990) (discussing *Regina*).

¹³⁵ 14 Q.B.D. at 168; see also Galanek, *supra* note 134, at 1123 n.45 (quoting *Regina*).

¹³⁶ 138 U.S. 353, 360 (1891); see also Fried, *supra* note 9, at 460.

¹³⁷ Fried, *supra* note 9, at 460.

¹³⁸ 289 U.S. 1, 15 (1933) (internal quotation omitted); see also Fried, *supra* note 9, at 462-63.

¹³⁹ See, e.g., *United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir. 1972); *United States v. Bob*, 106 F.2d 37, 40 (2d Cir. 1939); see also Fried, *supra* note 9, at 463-65. This limitation has since been abrogated by *United States v. Zolin*, 491 U.S. 554 (1989), discussed *infra*.

¹⁴⁰ Fried, *supra* note 9, at 470.

consultation; and (2) the attorney's assistance was obtained in furtherance of this activity.¹⁴¹ It is the client's subjective intent, and not the attorney's knowledge of the planned criminal activity, that controls.¹⁴² In most federal Circuits, the exception applies even if the client never completed the planned crime or fraud.¹⁴³

The minimal *prima facie ex parte* showing required of prosecutors underlies the current concern regarding the government's efforts to use the crime-fraud exception. The Supreme Court has addressed this issue only once, in *United States v. Zolin*, a case in which the IRS sought to compel the defendant in a criminal tax investigation to produce various documents and audiotapes that the defendant claimed were protected by the attorney-client privilege.¹⁴⁴ The IRS submitted statements from agents working on the case, as well as partial transcripts of the tape recordings obtained from a confidential source, to demonstrate that the crime-fraud exception applied. The district court refused to conduct an *in camera* review of the privileged material, but ordered that the defendant produce five of the requested documents based on the prosecutor's evidence. The Court of Appeals for the Ninth Circuit affirmed.¹⁴⁵

The Supreme Court vacated and remanded, holding that a court can review privileged material *in camera* to determine whether the exception applies. To obtain an *in camera* review, the party opposing the privilege "must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception's applicability."¹⁴⁶ Disposing of the traditional "independent evidence" requirement, the Court held that any relevant evidence that was lawfully obtained and not privileged could be used to make this threshold showing.¹⁴⁷ Furthermore, the decision whether to grant the *in camera* review is within the district court's discretion.¹⁴⁸

The *Zolin* Court declined to define the quantum of proof ultimately necessary to invoke the crime-fraud exception following the *in camera* review.¹⁴⁹ Most federal courts, however, continue to apply the *Clark prima facie* standard when deciding whether the exception applies. Although various Circuits have different formulations of what constitutes a *prima facie* case, none of the standards are very stringent.¹⁵⁰

¹⁴¹ See, e.g., *United States v. Jacobs*, 117 F.3d 82, 87 (2d Cir. 1997); *United States v. Collis*, 128 F.3d 313, 321 (6th Cir. 1997); *In re Grand Jury Proceedings*, 87 F.3d 377, 381 (9th Cir. 1996).

¹⁴² See, e.g., *In re Grand Jury Proceeding*, 87 F.3d at 381-82; *United States v. Chen*, 99 F.3d 1495, 1504 (9th Cir. 1996).

¹⁴³ See, e.g., *Collis*, 128 F.3d at 321; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1039 (2d Cir. 1984). But see *In re Sealed Case*, 107 F.3d 46, 49 (D.C. Cir. 1997) ("[T]he client must have carried out the crime or fraud [T]he exception does not apply even though, at one time, the client had bad intentions.").

¹⁴⁴ 491 U.S. 554, 557 (1989).

¹⁴⁵ *Id.* at 558-61.

¹⁴⁶ *Id.* at 574-75.

¹⁴⁷ *Id.* at 575.

¹⁴⁸ *Id.* at 572.

¹⁴⁹ *Id.* at 563.

¹⁵⁰ See, e.g., *Haines v. Liggett Group, Inc.*, 975 F.2d 81, 96 (3d Cir. 1992) (indicating that all that may be required is "evidence which, if believed by the fact finder, supports plaintiff's theory of fraud"); *In re Grand Jury Proceedings*, 857 F.2d 710, 712 (10th Cir. 1988) (holding that a partial transcript of grand jury proceedings and affidavits established *prima facie* case that documents were not privileged, because the evidence showed that the allegation of attorney participation in a crime or fraud has some foundation in fact); *In re Int'l Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (endorsing Black's Law Dictionary definition of *prima facie* case - evidence that "will suffice until contradicted and overcome by other evidence" - and finding that mere allegations in plaintiff's pleadings did not meet this standard).

In applying *Zolin*, Circuits have generally required that prosecutors either make an *ex parte* showing to meet the threshold for an *in camera* review or establish a *prima facie* case. According to the Ninth Circuit, *Zolin* does not require that a court consider "other available evidence" outside of what the prosecutor presents to it in determining whether the exception applies.¹⁵¹ In an *in camera* review of privileged statements, a defendant asserting the privilege also has no right to notice or opportunity to be heard. Instead, the "*prima facie* foundation may be made by documentary evidence or good faith statements by the prosecutor as to testimony already received by the grand jury."¹⁵² For example, in one case, the government subpoenaed defense counsel for a hospital that was the target of a grand jury investigation and, in arguing that the crime-fraud exception applied to counsel's testimony, prosecutors submitted an *in camera*, *ex parte* "good faith" statement of evidence about the alleged criminal activity. The district court ruled that the government had established a *prima facie* case and refused to allow the hospital's counsel to view the government's evidence or to present rebuttal evidence. The Tenth Circuit affirmed, holding that instead of affording an opportunity to be heard, the court need only protect the privileged communication by defining the "scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited."¹⁵³

Courts' willingness to rely on a *prima facie*, *ex parte* showing to establish the applicability of the crime-fraud exception likely stems from dual concerns. First, that a determination of this foundational issue will become a "preliminary minitrial" and waste judicial resources.¹⁵⁴ Second, in the context of grand jury proceedings, that the government's interest in protecting the secrecy of the proceedings outweighs a defendant's due process rights.¹⁵⁵ Although the increasing use of the crime-fraud exception stems in large part from the courts' willingness to find it applies, the detrimental effect of this development is greatly exacerbated by the efforts of federal prosecutors to invoke the exception, often in *ex parte* proceedings.

The United States Attorneys' Manual contains no specific guidelines regarding the invocation of the crime-fraud exception by federal prosecutors. Despite the warnings against invading the attorney-client relationship, federal prosecutors have increasingly invoked the crime-fraud exception to compel testimony about privileged communications. One review of reported case law in the mid-1980's alone indicated an "extraordinary increase" in attempts to compel attorney testimony throughout the previous twenty years.¹⁵⁶ Invocations of the excep-

¹⁵¹ *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994). In *Zolin*, the government sought documents relating to the defendant corporations' allegedly illegal exports and presented affidavits from former employees to demonstrate that the exception applied. The district court found the government's evidence sufficient to obtain an *in camera* review of the documents and declined to consider countervailing evidence from the corporation. 491 U.S. at 573-74.

¹⁵² *In re Grand Jury Subpoenas*, 144 F.3d 653, 662 (10th Cir. 1998).

¹⁵³ *Id.* at 661. *But see Haines*, 975 F.2d at 97 ("The importance of the privilege . . . as well as fundamental concepts of due process require that the party defending the privilege be given the opportunity to be heard, by evidence and argument, at the hearing seeking an exception to the privilege."). The Third Circuit, however, eventually distinguished *Haines* and held that relying solely on an *ex parte* affidavit to determine the application of the crime-fraud exception does not violate due process. *In re Grand Jury Subpoena*, 223 F.3d 213, 218 (3d Cir. 2000) ("This case differs from *Haines* not only because *Haines* was a civil case and this is a criminal one but, even more important, because *Haines* involved adversarial proceedings whereas grand jury proceedings are investigative, and the rules of the game are different.").

¹⁵⁴ See, e.g., *In re Grand Jury Proceedings*, 857 F.2d at 712 (expressing such concern); see also H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 Ky. L.J. 1191, 1259 (1999) (discussing courts' concerns).

¹⁵⁵ See, e.g., *In re Grand Jury Subpoena*, 884 F.2d 124, 126 (4th Cir. 1989) (holding that *in camera* review of the government's evidence did not violate defendant's due process rights); see also Brown, *supra* note 154, at 1259 (discussing these secrecy concerns).

¹⁵⁶ Fried, *supra* note 9, at 445 (citing a review of the case digests).

tion "proliferate" in the context of federal grand juries.¹⁵⁷ Federal prosecutors' use of subpoenas for lawyers have been described as a "growing trend . . . [that] has troubled both practitioners and legal scholars."¹⁵⁸ This trend can be at least partially explained by the increase in criminalization of regulatory offenses and in federal prosecutions for white collar and organized crime.¹⁵⁹

Although federal prosecutors are increasingly using the crime-fraud exception to overcome the attorney-client privilege, the evidence presented by prosecutors to make a *prima facie* case is often not disclosed in court opinions, thus making an analysis of the full extent of the problem difficult. Nonetheless, the current Justice Department practices that jeopardize the privilege and undermine the policies behind it include: (1) using unsubstantiated statements to establish the application of the exception; (2) utilizing communications outside the bounds of the exception; and (3) not following the proper procedures for the introduction of privileged evidence.

As various legal scholars have commented, there are significant consequences arising from the Justice Department's increased reliance on the crime-fraud exception, particularly because of the potential for prosecutorial abuse inherent in the law pertaining to the exception itself. The most common criticisms are the abandonment of the "independent evidence" requirement, the lack of restrictions on the legitimacy and accuracy of evidence, and the *ex parte* nature of the proceeding. The current rules allow prosecutors to obtain an *in camera* review based on unsubstantiated information that they may have collected through an unlawful intrusion into the privilege, without giving defendants an opportunity to challenge the reliability or validity of that evidence.¹⁶⁰ Safeguards are necessary even during an *in camera* review because "each time a court entertains a motion to defeat the privilege with any information, qualitatively acceptable or not, the court risks disclosing privileged information that should not be disclosed to any party."¹⁶¹ In addressing the *ex parte* nature of the *in camera* review, this process has also come under attack by commentators who criticize its inherent weaknesses:

The absence of notice of the basis of the crime-fraud claim further aggravates the inability of the privilege holder to meaningfully respond and to preserve the privilege. The court is also deprived of the robust factual development and legal argument necessary for an informed judicial decision.¹⁶²

Oftentimes, the evidence that prosecutors use either to obtain an *in camera* review or to establish a *prima facie* case contains no indicia of reliability or derives from third parties with

¹⁵⁷ Ann M. St. Peter-Griffith, *Abusing the Privilege: The Crime-Fraud Exception to Rule 501 of the Federal Rules of Evidence*, 48 U. MIAMI L. REV. 259, 279 (1993).

¹⁵⁸ Ross G. Greenberg, et al., *Eighth Survey of White Collar Crime Procedural Issues: Attorney-Client Privilege*, 30 AM. CRIM. L. REV. 1011, 1021 (1993).

¹⁵⁹ Fried, *supra* note 9, at 445.

¹⁶⁰ See Brown, *supra* note 154, at 1252; St. Peter-Griffith, *supra* note 158, at 269-71; Galanek, *supra* note 134, at 1139-40 (each noting these concerns).

¹⁶¹ St. Peter-Griffith, *supra* note 157, at 271.

¹⁶² Brown, *supra* note 154, at 1259-60 (footnotes omitted); see also Michael M. Mustokoff, et al., *The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following United States v. Anderson*, 9 ANNALS HEALTH L. 107, 114-17 (2000) (reflecting the current criticism of these practices).

an interest in the matter. For example, in one case, the government relied on affidavits from two former employees of the defendant corporation to meet the threshold for an *in camera* review of documents it claimed were in furtherance of export control violations.¹⁶³ Both employees' affidavits contained hearsay evidence about specific words and acts of the company's executives:

According to one former employee, the Corporation's president shipped GPS units to the [United Arab Emirates] in July 1989 and, a short time later, received a telex from Iran thanking him for the units He further stated that both an Iranian trainee and the Corporation's vice-president indicated that the GPS units in Iran came from a [United Arab Emirates] front company deliberately set up for that purpose.¹⁶⁴

In another case, the prosecutor used testimony from a government agent that likely included hearsay to make its *prima facie* case.¹⁶⁵ In both of these cases, the courts accepted the evidence and revoked the privilege. Furthermore, although the exception is supposed to apply to communications that take place before an intended crime or fraud is committed, federal prosecutors frequently attempt to apply it to communications after the crime has occurred.¹⁶⁶ Indeed, the district courts in two cases compelled production of documents dated after the completion of the alleged crime. Fortunately, the appellate courts reversed and limited the lower courts' orders to evidence of communications *before* the crime occurred.¹⁶⁷ These efforts to use such evidence, however, is alarming.

Federal prosecutors have also attempted to circumvent the two-step procedure outlined in *Zolin*. For example, in one case, the prosecutor sought application of the exception, and the trial court initially applied it to a letter to the defendant from his attorney. Because the prosecutor did not establish a basis for an *in camera* review, the Court of Appeals for the Ninth Circuit found this to be error.¹⁶⁸ In another Ninth Circuit case, a federal prosecutor relied on disclosures of attorney-client communications from a former employee of the defendant and from an agent's affidavit regarding these communications, but without first requesting an *in camera* review or making a *prima facie* showing.¹⁶⁹

Federal prosecutors have also argued that attorney-client communications can be evidence of a particular "crime" and are therefore not privileged, even if the facts of the case do not make out the elements of the alleged crime.¹⁷⁰ Another "extraordinary ploy" used by prosecutors is to turn a past offense into a continuing one so that the communications fall

¹⁶³ *In re Grand Jury Subpoena 92-1(SJ)*, 31 F.3d 826, 830 (9th Cir. 1994).

¹⁶⁴ *Id.*

¹⁶⁵ *In re Grand Jury Subpoena*, 884 F.2d 124, 127 (4th Cir. 1989).

¹⁶⁶ See, e.g., *In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1041 (2d Cir. 1984).

¹⁶⁷ See, e.g., *In re Grand Jury Subpoena*, 31 F.3d at 831; *In re Grand Jury Subpoena*, 731 F.2d at 1041-42.

¹⁶⁸ *United States v. de la Jara*, 973 F.2d 746, 749 (9th Cir. 1992). The Ninth Circuit admitted the letter on other grounds, however, and, as a result, did not reverse the lower court decision. *Id.* at 750.

¹⁶⁹ *United States v. Chen*, 99 F.3d 1495, 1502 (9th Cir. 1996). Although the evidence was admitted, the lower court expressly stated that it had disregarded the privileged statements in ruling that the crime-fraud exception applied to them. *Id.* at 1503-04.

¹⁷⁰ See *In re Grand Jury Subpoena*, 731 F.2d at 1039-40 (stating that the court was "skeptical" that defendant corporation's sale of its stock could be considered an obstruction of justice or part of a conspiracy to defraud the United States, as the prosecutor had argued).

within the exception.¹⁷¹ For example, in a Fifth Circuit case, following the defendant's indictment for extortion, defense counsel wrote a letter to the alleged victim enclosing the money allegedly extorted.¹⁷² The prosecutor then subpoenaed the attorney to testify about conversations that occurred prior to the return of the money, which, according to the prosecutor, acted as an obstruction of justice.¹⁷³

Last, while evidence about attorney-client communications can take a variety of forms, prosecutors most often invoke the crime-fraud exception in order to force attorneys to testify against their clients.¹⁷⁴ As a result, "opposing counsel could use the subpoena to eliminate troublesome, qualified defense counsel" by compelling an attorney to testify about the client's communications and thereby forcing the subpoenaed attorney to withdraw as counsel.¹⁷⁵ It is particularly troubling when the government's use of this exception results in the lawyer being compelled to testify against his or her client.

Because of the extraordinary impact this result necessarily has on the attorney-client privilege and relationship, the government should establish a level of review within the Justice Department that would be required before the prosecutor could make such an *ex parte* application to the Court.

IV. RECOMMENDATIONS AND CONCLUSION

The current Justice Department policies and practices regarding the attorney-client privilege and the work product doctrine have significant negative consequences. By eroding the attorney-client privilege and work product doctrine, they undermine defense counsel's ability to effectively represent his or her client. The values enshrined in these protections are deep-rooted and broadly embraced by the entire legal community. As the Supreme Court has stated:

The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.¹⁷⁶

Rather than undermining and eroding the attorney-client privilege and work product doctrine by viewing them as obstacles to the legitimate prosecution of crimes, the Justice Department should recognize that these protections provide the foundation for a lawyer to offer an informed opinion and sound legal advice to a client based upon full knowledge of the issue at hand, and play a vital role in the American system of justice. Federal prosecutors should not exact a waiver of these important protections. The Justice Department should modify and clarify its guidelines regarding the attorney-client privilege and the work product doctrine in order to ensure the fullest protection possible for these fundamental principles of American

¹⁷¹ Fried, *supra* note 9, at 474.

¹⁷² *United States v. Dyer*, 722 F.2d 174, 176 (5th Cir. 1983); *see also* Fried, *supra* note 9, at 474-75.

¹⁷³ *Dyer*, 722 F.2d at 176; *see also* Fried, *supra* note 9, at 474-75.

¹⁷⁴ *See, e.g., Mustokoff*, *supra* note 162, at 110 (discussing a case in which this occurred).

¹⁷⁵ Greenberg, *supra* note 158, at 1022.

¹⁷⁶ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (citation omitted).

law, while still allowing vigorous enforcement of the criminal statutes. The two are not incompatible.

Cooperation with the government in its investigation may be full and complete without the coerced waiver of these protections. The proliferation of a policy of prosecutorial coercion is, in the long run, a disservice to the public interest and to the fair administration of justice. The waiver of the attorney-client and work product privilege should only be made voluntarily and not as a result of government coercion. And the government has a long standing policy in conflict with seeking such waivers. The U.S. Attorney's Manual requires that all reasonable attempts be made to obtain the information from other sources and only when these efforts have been unsuccessful, may a prosecutor serve a subpoena on an attorney for testimony or documents, and then only after approval of the Assistant Attorney General in charge of the Criminal Division.¹⁷⁷ There is no reason to abandon this policy.

The government has also weakened these protections by attacking joint defense agreements. Joint defense agreements provide the opportunity for defense attorneys to preserve the attorney-client privilege and work product protections while sharing information crucial to the preparation of an adequate defense. The Justice Department policy regarding joint defense agreements, however, appears to be in flux, leaving ample discretion to individual prosecutors to develop their own policies and strategies.

Some prosecutors recognize the importance of a joint defense agreement in order for a corporation's counsel to be able to obtain adequate information to advise the corporate client and provide accurate information to the government as well as its importance for an individual employee. Other prosecutors, however, find the existence of a joint defense agreement a basis for charging the corporation with interfering with a government investigation. This is an issue the Justice Department should clarify with a statement of policy supporting a presumption that joint defense agreements are valid unless there is substantial reason to believe one is being used in an illegal manner. Prior to such a determination, the fact that a joint defense agreement exists should not be used by the government as evidence of non-cooperation or obstruction on the part of a corporation.

With regard to the advancement of fees, it should be recognized in the Justice Department guidelines that this practice is permitted under state corporation law and ethical codes and is necessary to enable employees to be adequately represented in a criminal investigation of corporate conduct. The current Justice Department guidelines discourage the legitimate advancement of fees and permit prosecutors to abuse their authority and impose law enforcement where it has no real interest in order to gain a strategic advantage and thereby deprive the employee of a funded defense.

Finally, while developing case law has made it easy for prosecutors to invoke the crime-fraud exception, and perhaps this is a matter of concern best addressed to the courts, it is important that Justice Department attorneys not seek to use every opportunity available to them to invade the attorney-client privilege and work product doctrine for the purpose of building a case when other avenues are available. The government should make *ex parte* claims that these protections have been breached by the crime-fraud exception only after facts are estab-

¹⁷⁷ See discussion *supra* at 22.

lished that fully support that a challenge to the attorney-client privilege is warranted. Such a challenge should not be merely an advocate's tool. Prosecutors must be mindful of the societal importance of the attorney-client privilege and the work product doctrine and the dangers that result from their erosion by excessive invocation of the crime-fraud exception. The Justice Department should establish more specific guidelines on compelling disclosure of attorney-client communications or work product that stress strict compliance with the few safeguards and limits that do exist in the law, particularly in regard to the *ex parte* showing that prosecutors must make to invoke the crime-fraud exception.

Since courts will not customarily provide the party asserting the privilege the opportunity to challenge the evidence establishing a *prima facie* case, the Justice Department guidelines should assure that the government's evidence originates from reliable, credible sources without a personal interest in the matter. Any *ex parte* application should first be approved by the Attorney General or appropriately designated person following a review of the facts. And prosecutors should not attempt to compel disclosure of communications that do not relate directly to a planned crime.

A. SPECIFIC RECOMMENDATIONS

In order to alleviate the concerns expressed in this report that the attorney-client privilege and the work product doctrine have been and continue to be eroded in federal criminal investigations, the College makes the following specific recommendations:

- ♦ The policies and guidelines of the Justice Department should reflect the critical importance of the attorney-client privilege and work product doctrine and incorporate alternatives to circumventing them. The following proposed guideline should be incorporated into the Holder Memo Standards:

The attorney-client privilege and work product doctrine are essential to the American justice system and should not be diluted for the sake of expediting a prosecution. Prosecutors should exhaust other alternatives to obtain information before requesting that a corporation cooperate by waiving privilege.

- ♦ The current guidelines provide in part, as follows:

"In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives, to make witnesses available to disclose the complete results of its internal investigation, and to waive the attorney-client and work product privileges."

This should be changed to read:

In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify those within the corporation whom it is aware or becomes aware have engaged in culpable wrong doing, including senior executives, to make witnesses available and otherwise cooperate.

- ♦ The Justice Department, in assessing whether a corporation is cooperative, should consider its refusal to disclose the results of internal investigations by counsel or otherwise

waive the attorney-client and work product privilege only when evidence is unavailable from any other sources.

♦ With regard to joint defense agreements or payment of employees' legal fees, the guidelines should state:

A corporation's promise of support to employees and agents, either through advancing of legal fees or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, should be considered by the prosecutor in weighing the value of a corporation's cooperation only if such support continues in an inappropriate manner after a determination of culpability or misconduct on the part of an employee.

♦ The government should not attempt to breach the attorney-client privilege and work product protections by an *ex parte* application to the court claiming a crime-fraud exception to the privileges without clearly establishing a solid factual basis that this exception applies. The proposed guideline should state:

In every case in which a claim of crime-fraud is to be made to a court for the purpose of voiding the attorney-client or work product privilege, the application should be approved by the Attorney General or an appropriately designated person within the Justice Department following a review of the factual basis for such an application.

B. CONCLUSION

Any impediment to obtaining relevant information that is presented by the attorney-client privilege and work product doctrine is counterbalanced by the benefits these protections afford the criminal justice system and society in general. While a prosecutor's job may be rendered more difficult by a corporation's or its attorney's invocation of a privilege, this is not a valid reason to compromise the longstanding and important legal principles that underlie the privilege. Despite the challenges that the attorney-client privilege and work product doctrine may present to prosecutors, the overall benefits make these protections indispensable and deserving of preservation.

The attorney-client privilege and work product doctrine play a central role in corporate governance. In order to fully comply with the law, corporate employees must be able to seek the advice of corporate and outside counsel. It is necessary for the communication between counsel and corporate employees to be privileged to ensure an open and honest exchange of information. Any policy that equates the assertion of the attorney-client privilege and work product protections with non-cooperation or obstruction ignores the harmful consequences to proper corporate governance. It is in society's interest to ensure that corporations have the means to comply with often complicated and intricate regulations and laws. Corporate officers and employees need to be assured that what they reveal to corporate or outside counsel will not be used against them at a later date.

Whether invoked by a corporation or an individual, the attorney-client privilege and the work product doctrine are essential to the due administration of the American criminal justice system. Justice Department guidelines and prosecutorial standards should be revised to reflect adequately the central importance of these protections. ♦