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CORPORATE BENEFITS OF PROPERLY CONDUCTED INTERNAL INVESTIGATIONS

Michael P. Kenny and William R. Mitchelson, Jr.†

INTRODUCTION

A. *The Increase in Corporate Internal Investigations Due to Federal and State Prosecutions*

In recent years, federal and state governments have intensified criminal and civil enforcement activities as they relate to corporate behavior, and they also have enacted tougher penalties for criminal and civil corporate wrongdoing.[1] Corporations that compete in industries of high government interest, such as health care, are particularly at risk and are increasingly targeted in both civil and criminal proceedings.[2] Not coincidentally, corporations in many industries have adopted compliance programs that relate to antitrust, securities fraud (especially addressing insider trading), environmental law, and management and employee relations.[3] As the Supreme Court has recognized,

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1. The United States Department of Justice Antitrust Division, for example, has significantly increased its enforcement efforts, collecting a record amount of criminal fines in 1993. *Antitrust Division Obtains Record Sum of Fines,* 66 Antitrust & Trade Reg. Rep. (BNA) No. 1658, at 379, 389 (Apr. 7, 1994). Moreover, the average imprisonment sentence for individuals convicted increased from five months during the five-year period 1984-1988 to an average of ten months for a sentencing guidelines offense and 7.5 months for a nonguidelines offense during the five-year period ended February 1993. *Ethics and Investigations,* 66 Antitrust & Trade Reg. Rep. (BNA) No. 1659, at 408, 416 (Apr. 14, 1994).

2. *See, e.g.,* United States v. Greber, 760 F.2d 68 (3d Cir.) (interpreting and enforcing anti-kickback provisions of Medicare laws), *cert. denied,* 474 U.S. 988 (1985); Trauma Assocs. of N. Broward, Inc., 59 Fed. Reg. 42051 (1994) (concerning a Federal Trade Commission challenge to physician corporation); Seropian, 57 Fed. Reg. 19,130 (Fed. Trade Comm'n 1992) (addressing a Federal Trade Commission challenge to hospital medical staff for attempts to boycott hospital and interfere with HMO contract).

3. In some instances, Congress actually requires companies to engage in some forms of self-policing. The Insider Trading and Securities Fraud Enforcement Act of 1988 requires broker-dealers and investment advisers to "establish, maintain, and

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"[i]n light of the vast and complicated array of regulatory legislation confronting the modern corporation, corporations, unlike most individuals, 'constantly go to lawyers to find out how to obey the law,' particularly since compliance with the law in this area is hardly an instinctive matter."[4] As a consequence, more and more corporations in one form or another are utilizing internal investigations to investigate potential wrongdoing by employees, including, in some instances, senior management.

It is now well established that corporations can be held criminally and civilly liable not only for the acts of senior management, but also for acts of lower level employees.[5] As in many other areas of the law, this general proposition has given birth to corollary propositions that expand the scope of corporate liability. In some jurisdictions, for example, a corporation can be criminally prosecuted under the "collective knowledge" doctrine, which imputes to a corporation the collective knowledge of its employees and agents, even if no single individual has the requisite knowledge.[6] The "responsible corporate officer" doctrine is another expansion of criminal culpability to areas essentially regulatory in name, but resulting in the criminalization of an officer's failure to fulfill his corporate duties. Pursuant to that omnibus doctrine, corporate officials whose positions of responsibility provide them with corporate authority over matters subject to regulation by criminal statutes, such as environmental laws, may be prosecuted for failing to act to remedy problems that developed before they assumed their positions of responsibility.[7]

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enforce written policies and procedures reasonably designed . . . to prevent the misuse . . . of material, nonpublic information . . . ." 15 U.S.C.S. § 80b-4a (Law. Co-op. Supp. 1994).

4. Upjohn Co. v. United States, 449 U.S. 383, 392 (1981) (citation omitted).

5. *E.g.*, United States v. Richmond, 700 F.2d 1183, 1195 n.7 (8th Cir. 1983) (citing United States v. Cincotta, 689 F.2d 238 (1st Cir.), *cert. denied*, 459 U.S. 991 (1982)). "Generally, a corporation is responsible for the criminal acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation." United States v. Demauro, 581 F.2d 50, 53 (2d Cir. 1978).

6. *See, e.g.*, United States v. Bank of New England, N.A., 821 F.2d 844, 856 (1st Cir.), *cert. denied*, 484 U.S. 943 (1987).

7. *See, e.g.*, United States v. Dee, 912 F.2d 741, 745, 748-49 (4th Cir. 1990) (holding that defendant's knowing failure to remedy improper storage of hazardous waste violated criminal provisions of Resource Conservation and Recovery Act), *cert. denied*, 499 U.S. 919 (1991). *See generally* Jeremy D. Heep, *Adapting Responsible Corporate Officer Doctrine in Light of* United States v. MacDonald & Watson Waste Oil Co., 78 MINN. L. REV. 699 (1994).

Increased federal and state enforcement activity has the potential to effect corporations both large and small. In cases in which the corporation ultimately decides to pursue its right to trial, early and effective internal investigations are essential to the development of successful factual and legal defenses. Early identification of legal issues or problems may prevent a criminal or civil violation or may mean the difference between a conviction and an acquittal.[8]

B. The Trend Toward Increasing Leniency for Corporations with Good Compliance Programs and for Corporations that "Blow the Whistle" on Themselves

The United States Sentencing Commission has adopted new sentencing guidelines applicable to all organizational defendants involved in federal criminal offenses after November 1, 1991.[9] These sentencing guidelines substantially increase the financial penalties for corporations whose employees engage in unlawful conduct that is ostensibly intended for the corporation's benefit.[10] Along with these enhanced corporate penalties, however, the sentencing commission has provided organizational defendants with a significant opportunity to mitigate their exposure to these criminal fines through self-reporting.[11]

Corporate sentencing guidelines provide for a healthy reduction in organizational fines for self-reporting or for

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8. In the most complex cases, subtle legal issues may ultimately be dispositive. In United States v. General Elec. Co., 869 F. Supp. 1285 (S.D. Oh. 1994), the United States Department of Justice Antitrust Division brought felony price-fixing charges against General Electric, alleging a conspiracy with DeBeers Centenary Company to raise the list prices of its industrial diamonds, in violation of 15 U.S.C. § 1. General Electric ultimately won a motion for judgment of acquittal at the close of the government's case. *Id.* at 1300-01. The court determined that the government had failed to produce sufficient evidence that the individual the government claimed to be DeBeers' agent in the conspiracy was actually acting on DeBeers' behalf. *Id.*

9. *See* United States Sentencing Commission, GUIDELINES MANUAL (Nov. 1991) [hereinafter USSG].

10. In antitrust cases involving bid-rigging, price-fixing, or market-allocation agreements, for example, the sentencing guidelines provide for a base fine equal to at least twenty percent of the volume of affected commerce. USSG § 2R1.1(d)(1) (Nov. 1994). The base fine is then subjected to a multiplier that reflects the size of the organizational defendant, its prior criminal history, whether the criminal conduct involved the violation of an injunction or prior judicial order, and the level of authority within the corporation of those involved in the commission of the offense. *Id.* § 8C2.5.

11. *Id.* § 8C4.1.

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cooperation that both assists the government in the further development of its investigation and demonstrates an affirmative recognition and acceptance of responsibility by the corporation.[12] The extent of the fine reduction for self-reporting is primarily a function of the stage of the government's investigation at which reporting occurs.[13] Emphasizing the need for, and the benefit of, internal control measures, the sentencing guidelines provide for the largest downward adjustment to criminal fines in cases in which the corporation reports wrongdoing "prior to an imminent threat of disclosure or government investigation[,] and . . . within a reasonably prompt time after becoming aware of the offense . . . ."[14] The sentencing guidelines also reward corporations that have in place effective internal compliance programs designed to "prevent and detect violations of law" with an additional reduction to their criminal fines if detected violations are reported without unreasonable delay.[15]

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12. *Id.* Downward departures from the range provided by the Sentencing Guidelines are permitted, in the court's discretion, for corporate defendants whose cooperation is both significant and timely. Section 8C4.1 of the Sentencing Guidelines provides:

> Substantial Assistance to Authorities—Organizations (Policy Statement)
>
> (a) Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another organization that has committed an offense, or in the investigation or prosecution of an individual not directly affiliated with the defendant who has committed an offense, the court may depart from the guidelines.
>
> (b) The appropriate reduction shall be determined by the court for reasons stated on the record that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the organization's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the nature and extent of the organization's assistance; and
>
> (3) the timeliness of the organization's assistance.

Id. Effective internal investigations may provide an opportunity for a corporation to provide significant and timely cooperation, resulting in a significant reduction in the sentence.

13. *See id.*

14. *Id.* § 8C2.5(g)(1).

15. *Id.* § 8C2.5(f). The federal sentencing guidelines provide, however, that "[p]articipation of an individual within substantial authority personnel in an offense results in a rebuttable presumption that the organization did not have an effective program to prevent and detect violations of law." *Id.*

I. THE ADVANTAGES AND DISADVANTAGES OF INTERNAL INVESTIGATIONS

Internal investigations initiated as a result of an actual or anticipated government inquiry offer distinct advantages to the corporation and its employees. But, the kind of investigation required for a corporation to avail itself of these advantages carries with it associated risks. It is essential for a corporation and its attorneys to identify early, achievable goals for the investigation so that the scope of the investigation and the manner in which it is conducted can be tailored to minimize possible adverse consequences. In any internal investigation, the manner in which the investigation is being conducted and the objectives to be achieved should be constantly re-evaluated so that the risks associated with the internal inquiry remain within tolerable proportion to the expected benefits.

A. The Advantages of Internal Investigations

Internal investigations offer substantial benefits, if properly conducted, regardless of whether the matter being investigated relates to internal controls, potential civil exposure, or possible criminal sanctions. Investigations can play an important role in the assessment of internal controls and loss-prevention measures and can assist management in ascertaining the effectiveness of existing corporate policies. When integrated with an effective compliance program, investigations also can assist in the identification of areas where additional corporate policies or measures may avoid future loss or civil or criminal exposure. Internal investigations often are initiated as a result of an informal demand by a potential private litigant. In these circumstances, an effective investigation can lead to an early and accurate assessment of civil exposure and the avoidance of formal legal proceedings and expenses. In many circumstances, civil liability may be completely avoided or a more favorable resolution obtained.

In matters with potential criminal implications, investigations may provide the corporation with the information needed for the corporation to take advantage of leniency programs, immunity, agreements not to prosecute, or opportunities for a reduction in criminal penalties. For example, certain government authorities have adopted formal guidelines that allow corporations to identify criminal violations through internal investigations and

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avoid criminal prosecution for any discovered offenses, even if a government investigation into the conduct has already been initiated.[16] In addition, the enactment of sentencing guidelines in federal prosecutions has shifted significant discretion on criminal penalties from the courts to the prosecutors.[17] With that shift of discretionary power, favorable decisions concerning criminal penalties now depend more heavily on the ability of the corporation or its officers to provide substantial assistance to the government in furtherance of the investigation.[18] Thus, properly

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16. The United States Department of Justice Antitrust Division (the Division) has adopted formal guidelines for corporate leniency. Opportunities for leniency exist at the early stages of criminal investigation if the corporation satisfies these seven conditions:

> 1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported;
> 2. The Division, at the time the corporation comes in, does not yet have evidence against the company that is likely to result in a substainable conviction;
> 3. The corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity;
> 4. The corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation that advances the Division in its investigation;
> 5. The confession of wrongdoing is truly a corporate act, as opposed to isolated confessions of individual executives or officials;
> 6. Where possible, the corporation makes restitution to injured parties; and
> 7. The Division determines that granting leniency would not be unfair to others, considering the nature of the illegal activity, the confessing corporation's role in it, and when the corporation comes forward.

ANTITRUST DIVISION, UNITED STATES DEPARTMENT OF JUSTICE, CORPORATE LENIENCY POLICY, Part B, at 2-3 (Aug. 10, 1993).

17. *See* USSG ch. 1, pt. A.3 (Nov. 1994) (granting courts broader discretion in sentencing under the guidelines "would have risked a return to the wide disparity that Congress established the Commission to reduce"). Prior to November 1, 1987, when the sentencing guidelines were implemented, courts generally had the authority to sentence offenders within their discretion so long as the penalty did not exceed the statutory maximum provided for the offense. *See* Robert W. Adler & Charles Lord, *Environmental Crimes: Raising the Stakes* 59 GEO. WASH. L. REV. 781, 797 (1991). For offenses occurring after that date under the guidelines, "the sentencing court must select [absent grounds for departure] a sentence from within the guidelines range." USSG ch. 1, pt. A.2 (Nov. 1994). Application of the guidelines in a specific case may be determined largely by the number of offenses charged and the nature of the statutory offenses selected by the prosecutor, characteristics of the guidelines that the Sentencing Commission recognized are important for "the potential it affords prosecutors to influence sentences." USSG ch. 1, pt. A.4.

18. Prior to the adoption of federal sentencing guidelines, federal courts retained greater discretion to weight the relative importance of sentencing factors like acceptance of responsibility and assistance to authorities. *See supra* note 17. Much of

conducted investigations may enhance the ability of the corporation or its officers to negotiate for a more favorable criminal disposition, if no other course is available, by disclosing helpful facts at an early stage.

B. Risks Associated with the Internal Investigation

Despite the many advantages produced by investigations, they also carry their own risks. Those risks generally fall into two categories: (1) The information generated by the investigation may identify a previously undiscovered problem, the knowledge of which requires the corporation to act affirmatively to avoid civil or criminal liability;[19] or (2) the investigation may uncover documents, notes, or other evidence that an outside party, particularly the government, may be able to obtain by subpoena or other legal process.[20] The discovery of information may require the corporation to implement remedial measures, but these measures may eliminate or mitigate more significant problems for the company or individual employees that could result if the problematic conduct is allowed to persist.[21]

Internal investigations may uncover information that could subject the corporation to civil or criminal exposure, because corporations do not enjoy the right to refuse to provide testimony under the Fifth Amendment or to refuse to produce nonprivileged documents within its files.[22] The best method of ensuring that

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that discretion now rests with the government. *See supra* note 17. For example, the commentary to the current federal sentencing guidelines provides: "Substantial weight should be given to the government's evaluation of the extent of the defendant's assistance, particularly where the extent and value of the assistance are difficult to ascertain." USSG § 5K1.1, cmt. 3 (Nov. 1994). A reduction in a corporation's criminal sentence is also available for the corporation's cooperation with authorities, but relief from the sentencing judge is only available on a motion by the prosecutor. *Compare id.* § 8C2.5(g)(2) (making a reduction in criminal fine multiplier available upon determination by the court that corporation has accepted responsibility) *with id.* § 8C4.1 (making a downward departure from sentencing available to cooperating corporation only upon motion of the government).

19. *See generally* Lisa A. Harig, Note, *Ignorance Is Not Bliss: Responsible Corporte Officers Convicted of Environmental Crimes and the Federal Sentencing Guidelines,* 42 DUKE L.J. 145 (1992) (discussing impact of knowledge in environmental prosecutions).

20. *See, e.g.,* Upjohn Co. v. United States, 449 U.S. 383, 387-88 (1981).

21. For a discussion of employee liability for acts committed before the employee took office, see *supra* note 8 and accompanying text.

22. Doe v. United States, 487 U.S. 201, 206 (1988); Bellis v. United States, 417 U.S. 85, 89-90 (1974) (asserting that "no artificial organization may utilize the personal privilege against compulsory self-incrimination"). Individual officers or

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the results of the investigation remain within the company's control is to conduct the investigation in a manner specifically designed to maintain both the confidentiality of the investigative results and the attorney-client or work product privileges associated with them.

II. CONDUCTING AN INTERNAL INVESTIGATION

All investigations have a purpose, and the nature of that purpose could have a profound effect on the investigation. If, for example, the investigation is prompted by a government inquiry or some other external cause, it may well be necessary to disclose some or all of the results of the investigation. Indeed, the very purpose of the investigation might be to counteract false, misleading, or negative publicity. In the case of a publicly-held corporation, the company might decide to undertake an internal investigation to quell the fears of analysts and investors.

Many internal investigations, however, are not designed to play out in a larger theater, but rather are intended to be strictly confidential and private. The possible reasons for such investigations are numerous. For example, a company tipped off to potential wrongdoing may want to learn the facts and evaluate its legal exposure before the criminal authorities or potential civil litigants do so. By acting quickly, the company is better able to decide upon a strategy that it believes is in its best interest.

Whether an internal investigation is conducted in confidence or with the awareness of the outside world, attorneys should conduct the investigation. By using attorneys, a corporation can take advantage of the attorney-client privilege and work product privilege to maximize their privacy. Neither privilege, however, can cloak discoverable information in a veil of secrecy.

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employees, however, do enjoy protection under the Fifth Amendment with respect to compelled testimony that could be self-incriminating. Fisher v. United States, 425 U.S. 391, 408-10 (1976). Grants of immunity, however, can be used by the government to compel an employee's testimony to be used against the corporation. *See* 18 U.S.C. §§ 6002-6003 (1988) (providing statutory authority for an order compelling testimony by a witness who has received a grant of immunity after which the witness "may not refuse to comply with the order on the basis of his privilege against self-incrimination"). Once statutory use immunity is extended, the witness must testify even if the witness believes that the testimony would subject the witness to negative consequences apart from the use of the testimony in a criminal proceeding. *See In re* Grand Jury Proceedings, 835 F.2d 375, 376 (1st Cir. 1987) (per curiam) (witness who believed pension benefits would be jeopardized by testimony held in contempt for refusing order to testify after immunity).

Internal investigations should usually be conducted by outside law firms. Although in-house counsel usually know more about a company's business and employees, if those lawyers are also officers of the company, their work product might not be privileged from discovery.[23] Moreover, outside attorneys, as the Second Circuit has observed, can also create the appearance of greater independence:

> We recognize that corporate counsel coming upon evidence of criminality in communications . . . are placed in an uncomfortable position. Their superiors or clients may well fear the commercial or even more serious personal consequences of disclosure. The lawyers' professional relationship to the corporation may extend well beyond aspects relating to criminal liability and leave them torn between a desire to see the firm prosper and their professional and legal obligations. In such cases, the wiser course may be to hire counsel with no other connection to the corporation to conduct investigations . . . .[24]

A. Document Review

Most internal investigations consist of a document review and employee interviews. Generally, counsel should review the relevant documents before the interviews for the fairly obvious reason that such a procedure should facilitate more informed interviews. Counsel should proceed under the assumption that the documents will at some later time have to be produced to government enforcement authorities or civil litigants. Consequently, counsel should undertake a comprehensive search and review of the documents not only to eliminate surprises, but also to increase the likelihood that they will accurately predict the results of an investigation by the enforcement authorities. Counsel should identify all privileged documents and separate them from nonprivileged documents. Further, counsel should confirm that the company has taken appropriate steps not to destroy documents that relate to the subject matter of the investigation.

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23. *See, e.g.*, Fine v. Facet Aerospace Prods. Co., 133 F.R.D. 439, 444 (S.D.N.Y. 1990) (holding that attorney-client privilege does not apply to a memorandum written by an in-house counsel who was also an officer of the company).

24. John Doe Corp. v. United States, 675 F.2d 482, 491 (2d Cir. 1982).

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B. Employee Interviews

Before interviewing any employee, investigating counsel must first evaluate the risks associated with dual representations. Investigating counsel represent the corporation, and they must decide if they also want to represent the employee. Although cost considerations favor dual representation, such representation raises conflicts issues with respect to the attorney-client relationship.[25] Accordingly, if interviewing counsel represent the employee, as well as the corporation, they will be constrained from disclosing communications with the employee. Such constraints would be especially unfortunate when investigating counsel learn from employees that they, contrary to company policy and without the knowledge of senior management, have violated the law within the scope of employment.

If investigating counsel decide not to represent a particular employee, they should advise the employee, prior to the interview, that they represent the corporation and not the employee. Some courts have held that, in the absence of such advice and disclosure, it would be reasonable for the employees to believe that the company's counsel also represent them.[26] The Model Rules of Professional Conduct expressly provide that:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when it is

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25. In a criminal case or investigation, a client has "the right to conflict-free representation." United States v. Mascony, 927 F.2d 742, 748 (3d Cir.), *cert. denied,* 501 U.S. 1211 (1991). Representation of two or more clients with potentially different interests not only raises concerns regarding the adequacy and effectiveness of representation, but also implicates the attorney-client privilege in a manner that may lead to disqualification of counsel. *Id.* at 748, 751-52. If a court in a criminal case determines an actual conflict of interest exists because of counsel's representation of the defendant and the counsel's representation of another defendant or witness, the court may decline a waiver of conflict and insist that the client defendant be separately represented. Wheat v. United States, 486 U.S. 153, 162 (1988). *See generally* Bruce A. Green, *"Through a Glass, Darkly": How the Court Sees Motions To Disqualify Criminal Defense Lawyers,* 89 COLUM. L. REV. 1201 (1989).

26. *E.g.*, United States v. Hart, No. 92-219, 1992 U.S. Dist. LEXIS 17796, at *6 (E.D. La. Nov. 16, 1992); *cf.* Rosman v. Shapiro, 653 F. Supp. 1441, 1446 (S.D.N.Y. 1987) (holding that company's counsel was disqualified from representing company because plaintiff shareholder reasonably believed counsel represented him); Alan R. Kidston, *Current Developments in Attorney-Client Privilege*, 36 BUS. LAW. 701, 706 (1981) (arguing that employees be given a warning that the corporation might later waive the privilege).

> apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.[27]

Although investigating counsel should demand full cooperation from the employee, including candid and truthful answers to questions, they should also inform the employee that the interview is for the purpose of gathering information to advise the company. Accordingly, the employee should be instructed not to discuss the interview with anyone else, including fellow employees. Investigating counsel should similarly inform the employees that the information they provide will be treated as confidential, but that the company will evaluate the information and decide whether to disclose it.[28]

Only in the rarest of circumstances will investigating counsel not take notes of an employee interview. As discussed below, attorney notes are potentially discoverable, but they probably do not need to be maintained if the attorneys convert their notes into a memorandum that accurately contains the information in the notes. Both attorney notes and interview memoranda, however, should contain the mental impressions of the attorneys and should not be a mere verbatim recitation of interviews.[29]

III. INVESTIGATING COUNSEL SHOULD PROTECT THE ATTORNEY-CLIENT PRIVILEGE

A. The Attorney-Client Privilege Benefits the Corporation

Investigating counsel should take all appropriate measures to preserve the attorney-client privilege.[30] This privilege, as the

27. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13(d) (1995); *see also id.* Rule 4.3 ("In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.").

28. *See generally* Kathleen G. Gallagher, *Legal and Professional Responsibility of Corporate Counsel to Employees During an Internal Investigation for Corporate Misconduct*, 6 CORP. L. REV. 3 (1983). An issue not addressed here that sometimes arises is whether the employee should be advised of the right to hire independent counsel. The Comment to Model Rule 1.13 provides that investigating counsel should advise an employee whose interests may be adverse to the corporation that the employee "may wish to obtain independent representation," but also states that "[w]hether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1994). This issue raises tactical, ethical, and indemnification issues of which investigating counsel should be aware.

29. *See* Redvanly v. NYNEX Corp., 152 F.R.D. 460, 466 (S.D.N.Y. 1993) (ordering the production of company's counsel notes since they were "a running transcript of the meeting in abbreviated form" and did not reflect counsel's mental impressions).

30. *See* Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955, 960 (3d Cir. 1984);

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Supreme Court has noted, is designed "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."[31] In *Upjohn Co. v. United States*, the Supreme Court rejected a challenge by the government to the attorney-client privilege by recognizing that "considerations of convenience do not overcome the policies served by the attorney-client privilege."[32] Thus, in *Upjohn* the Court evaluated the following facts and held that the attorney-client privilege applied.

> [1] The communications at issue were made by Upjohn employees [2] to counsel for Upjohn acting as such, [3] at the direction of corporate superiors [4] in order to secure legal advice from counsel. . . . Information, [5] not available from upper-echelon management, [6] was needed to supply a basis for legal advice concerning compliance with securities and tax laws, foreign laws, currency regulations, duties to shareholders, and potential litigation in each of these areas. The communications [7] concerned matters within the scope of the employees' corporate duties, and [8] the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice. . . . [9] Pursuant to explicit instructions from the Chairman of the Board, the communications were considered "highly confidential" when made, and [10] have been kept confidential by the company.[33]

The absence of one of these facts could cause a court to hold that a communication with an employee is not protected from disclosure by the attorney-client privilege.[34]

Republic Gear Co. v. Borg-Warner Corp., 381 F.2d 551, 556 (2d Cir. 1967).

31. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that the attorney-client privilege "is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can only be safely and readily availed of when free from the consequences or the apprehension of disclosure").

32. 449 U.S. at 396.

33. *Id.* at 394-95 (citations and footnotes omitted).

34. *E.g.*, Independent Petro-chemical, Corp. v. Aetna Casualty & Sur. Co., 654 F. Supp. 1334, 1364-65 (D.D.C. 1986), *rev'd in part on other grounds*, 944 F.2d 940 (1991), *cert. denied*, 112 S. Ct. 1777 (1992).

Although the attorney-client privilege applies to communications between a company's employees and in-house counsel, the privilege does not necessarily apply if in-house counsel participate in an investigation led by the company's management.[35] Also, communications between in-house counsel and employees, for any purpose other than to seek or give legal advice, are not protected by the attorney-client privilege.[36]

A hotly contested issue is whether communications between investigating counsel and former employees are protected from disclosure by the attorney-client privilege. Some courts have held that the privilege applies if the communications are related to the interviewee's former employment and are needed by the investigating counsel in order to advise the client, the former employer.[37] Other courts have rejected the claim of attorney-client privilege, but have recognized that the work product privilege can protect such communications from disclosure.[38] Thus, investigating counsel should proceed extremely cautiously when they interview former employees.

Certain, but not all, documents may be protected by the attorney-client privilege. If counsel request that an employee create documents pursuant to an investigation, the privilege should apply because, arguably, the documents were created because the company needed legal advice.[39] This rationale does not apply, nor does the attorney-client privilege, to nonprivileged documents that a company merely turns over to its attorneys.[40]

B. Waiver of the Privilege

An issue that frequently confronts corporate management is whether it should disclose all or part of the results of an internal investigation. The company loses the attorney-client privilege with respect to any material it discloses. As the Second Circuit has noted: "[M]atters actually disclosed in public lose their

35. *See, e.g.*, General Counsel v. United States, 599 F.2d 504, 510-11 (2d Cir. 1979).

36. Marc Rich & Co. v. United States, 731 F.2d 1032, 1036-38 (2d Cir. 1984).

37. *See, e.g.*, Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486, 1493 (9th Cir. 1989); City of Long Beach v. Standard Oil Co. of Cal., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982).

38. *See In re* Grand Jury Subpoena, 478 F. Supp. 368, 374 (E.D. Wis. 1979).

39. *See* First Chicago Int'l v. United Exch. Co. Ltd., 125 F.R.D. 55, 57-58 (S.D.N.Y. 1989).

40. Fisher v. United States, 425 U.S. 391, 403-04 (1976).

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privileged status because they obviously are no longer confidential. The cat is out of the bag, so to speak."[41] The power to waive the privilege, however, is the company's and usually must be exercised by the officers or directors of the company.[42] In *Commodity Futures Trading Commission v. Weintraub*, the Supreme Court observed that officers or directors who voluntarily waive the company's privilege must do so consistent with the best interests of the company and not pursuant to their own self-interest.[43]

If it is understood that confidential communications will be disclosed to third parties, and they are in fact disclosed, the attorney-client privilege will not apply.[44] As the Second Circuit has noted, "it is well established that communications between an attorney and his client, though made privately, are not privileged if it was understood that the information communicated in the conversation was to be conveyed to others."[45] In the context of an internal investigation, the attorney-client privilege can be waived if the results of the

41. Von Bulow v. Von Bulow, 828 F.2d 94, 103 (2d Cir. 1987); *see In re* Grand Jury Proceedings, 727 F.2d 1352, 1355-56 (4th Cir. 1984) (privilege does not apply if the communication is intended to be known by others).

42. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348-49 (1985); Weissman v. Hassett (*In re* O.P.M. Leasing Servs., Inc.), 670 F.2d 383, 386 (2d Cir. 1982) (" 'It is axiomatic that the power to invoke or waive the privilege lies in the corporate client acting through its board of directors or management.' ") (quoting *In re* O.P.M. Leasing Servs., Inc., 13 B.R. 54, 57 (Bankr. S.D.N.Y. 1981))); *In re* Grand Jury Investigation, 599 F.2d 1224, 1236 (3d Cir. 1979) ("If the employees had engaged in questionable activity, the corporation clearly would have the power to waive the privilege and to turn the employees' statements over to law enforcement officials."); *In re* Grand Jury Proceedings (*In re* Jackier), 434 F. Supp. 648, 650 (E.D. Mich. 1977) ("[I]n the absence of any indication to the company's lawyer that the lawyer is to act in any other capacity than as lawyer for the company, . . . the privilege is and should remain that of the company and not that of the communicating officer."), *aff'd*, 570 F.2d 562 (6th Cir. 1978).

43. *Weintraub*, 471 U.S. at 348-49; *see also* William R. Mitchelson, Jr., Comment, *Waiver of the Attorney-Client Privilege by the Trustee in Bankruptcy*, 51 U. CHI. L. REV. 1230, 1249-50 (1984) (discussing fiduciary obligations of corporate officers respecting the attorney-client privilege).

44. *E.g.*, Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1423-24 (3d Cir. 1991); United States v. Suarez, 820 F.2d 1158, 1160 (11th Cir.), *cert denied*, 484 U.S. 987 (1987).

45. United States v. Tellier, 255 F.2d 441, 447 (2d Cir.), *cert. denied*, 358 U.S. 821 (1958); *see also In re* Grand Jury Proceedings, 727 F.2d 1352, 1358 (4th Cir. 1984) ("The significant fact is that the information given the [attorney] was to assist in preparing such prospectus which was to be published to others and was not intended to be kept in confidence.").

investigation are disclosed to others besides the company officials who need to know the contents of the investigation.[46]

The waiver of the attorney-client privilege can be either "vertical" or "horizontal." A vertical waiver of the attorney-client privilege applies if a waiver as to one party implies a waiver as to another party. Pursuant to this theory, disclosure of privileged communications to any third party effects a complete waiver against any other third party. Thus, in *Permian Corp. v. United States*,[47] the Court of Appeals for the District of Columbia held that "[t]he client cannot be permitted to pick and choose among his opponents, waiving the privilege for some and resurrecting the claim of confidentiality to obstruct others," and therefore disallowed the assertion of privilege against the Department of Energy with regard to documents that had previously been disclosed to a different federal agency.[48] In a subsequent case, the Court of Appeals for the District of Columbia extended the *Permian* doctrine by holding that if information is disclosed to a federal agency, the attorney-client privilege is waived as to discovery requests made by third-party litigants.[49]

By way of contrast, in *Diversified Industries, Inc. v. Meredith*, the Eighth Circuit held that the privilege was not waived as to subsequent civil litigants, reasoning that a total waiver would provide a disincentive to report voluntarily corporate wrongdoing.[50] The court held that voluntary disclosure of attorney-client communications to the Securities Exchange Commission (SEC) only constituted a "limited waiver" of the privilege.[51] The holding in *Diversified Industries*, however, is the minority view on this issue,[52] and companies should carefully

46. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 609 (8th Cir. 1978).

47. 665 F.2d 1214 (D.C. Cir. 1981).

48. *Id.* at 1221.

49. *See In re* Subpoenas Duces Tecum, 738 F.2d 1367, 1369-70 (D.C. Cir. 1984); *see also In re* Grand Jury Subpoena Duces Tecum, 566 F. Supp. 883, 885 (S.D.N.Y. 1983) (holding that prior production of work product documents waived that privilege with respect to a subsequent federal grand jury subpoena).

50. *See* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978).

51. *Id.*

52. *See, e.g.*, Permian Corp. v. United States, 665 F.2d 1214, 1220 (D.C. Cir. 1981) (rejecting reasoning of *Diversified Industries*); Westinghouse v. Republic of the Philippines, 951 F.2d 1414, 1423-27 (3d Cir. 1991) ("[S]elective waiver does not serve the purpose of encouraging full disclosure to one's attorney in order to obtain informed legal assistance; it merely encourages voluntary disclosure to government agencies, thereby extending the privilege beyond its intended purpose."); *In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (rejecting "a 'pick and choose' theory of

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assess the risk of discovery of any attorney-client communications to third parties.

A company risks a horizontal waiver when it discloses some communication about a particular subject.[53] The risk is that a waiver will result for all privileged communications concerning the same subject matter.[54] In *Pollard*, the Fourth Circuit held that disclosure of a final report of an investigation waives the privilege with respect to all other documents, including notes and transcripts that relate to the same subject.[55] The Second Circuit has taken a more relaxed approach to this issue, and has held that no waiver exists as to other privileged communications if the disclosure of privileged materials would not prejudice the adversary in a judicial proceeding.[56] The Third Circuit has adopted a similar approach to that of the Second Circuit with regard to "partial" disclosures: "When a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary."[57]

IV. PROTECTION OF THE WORK PRODUCT DOCTRINE BY INVESTIGATING COUNSEL

The work product doctrine was first articulated in *Hickman v. Taylor*[58] and was subsequently codified in Rule 26 of the Federal Rules of Civil Procedure.[59] The work product doctrine protects from discovery documents and "tangible things" that are "prepared in anticipation of litigation or for trial."[60] The rule is designed to protect an attorney's mental impressions and legal analysis. As the Supreme Court has reasoned:

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would

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attorney-client privilege").

53. *See, e.g.*, United States v. Pollard (*In re* Martin Marietta Corp.), 856 F.2d 619, 623-24 (4th Cir. 1988), *cert. denied*, 490 U.S. 1011 (1989).

54. *Id.*

55. *Id.* at 622-24.

56. *See* Von Bulow v. Von Bulow, 828 F.2d 94, 102 (2d Cir. 1987).

57. Westinghouse Elec. Corp. v. Republic of the Philippines, 951 F.2d 1414, 1426 n.12 (3d Cir. 1991).

58. 329 U.S. 495 (1947).

59. FED. R. CIV. P. 26(b)(3).

60. *Id.*

> remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness, and sharp practices would inevitably develop . . . . [T]he interests of the clients and the cause of justice would be poorly served.[61]

The doctrine applies to both documents prepared by an attorney and materials prepared by agents of the attorney.[62] Thus, in *Hickman*, the Supreme Court rejected "an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections prepared or formed by an adverse party's counsel in the course of his legal duties."[63]

Whereas the attorney-client privilege is absolute, certain types of documents covered by the work product doctrine are potentially discoverable if an adversary party in litigation can demonstrate a "substantial need" for the documents.[64] This test generally applies to non-opinion work product such as witness interview notes that contain no attorney analysis.[65] However, if these notes reflect communications between attorneys and their clients, the party seeking their discovery still has to show that the attorney-client privilege has been waived.[66]

So-called "opinion" work product, which consists of an attorney's legal theories, opinions, and mental impressions, is almost never subject to discovery.[67] The Supreme Court in *Hickman* put the matter succinctly: "[i]t should be a rare situation justifying production of these matters . . . ."[68] Federal

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61. *Hickman*, 329 U.S. at 511; *see also* United States v. Nobles, 422 U.S. 225, 236-40 (1975).

62. FED. R. CIV. P. 26(b)(3).

63. *Hickman*, 329 U.S. at 510.

64. FED. R. CIV. P. 26(b)(3); *Hickman*, 329 U.S. at 511 (requiring that documents be "essential to the preparation of one's case" to be discoverable).

65. *See* FED. R. CIV. P. 26(b)(3) (work product only obtainable "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case . . . ."); *see also* Hisaw v. Unisys Corp., 134 F.R.D. 151, 152 (W.D. La. 1991) (requiring showing of "substantial need" of "ordinary work product" not containing mental impressions of counsel); CHARLES A. WRIGHT ET AL., 8 FEDERAL PRACTICE AND PROCEDURE § 2025 (1994).

66. *Id.* at 1426.

67. *E.g.*, United States v. Pollard (*In re* Martin Marietta Corp.), 856 F.2d 619, 626 (4th Cir. 1988), *cert. denied*, 490 U.S. 1101 (1989); United States v. Rosenthal, 142 F.R.D. 389, 394 (S.D.N.Y. 1992) ("[A]ll the cases . . . go to great lengths to protect opinion work product . . . .").

68. *Hickman*, 329 U.S. at 513.

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Rule of Civil Procedure 26(b)(3) categorically provides that a "court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."[69] This language has caused some courts to conclude that such information cannot be compelled to be disclosed even if there is a substantial need or nondisclosure would cause the requesting party an undue hardship.[70]

Many internal investigations are undertaken prior to actual litigation. Documents and reports that are generated pursuant to such investigations will not be protected by the work product doctrine unless the materials were prepared in anticipation of litigation and litigation was a real possibility when the documents were generated.[71] As one federal district court has recognized, "[t]he mere fact that a document is prepared before litigation actually commences does not preclude a finding that it constitutes work product . . ., [but] litigation must at least be a real possibility at the time of preparation . . . ."[72]

Just as the attorney-client privilege can be waived, so too can the work product privilege.[73] With regard to internal investigations, the issue of partial disclosure, for example, to a government enforcement agency, and waiver can be especially problematic. In one recent case, a company produced a memorandum to the SEC concerning a potential enforcement action by the SEC against the company.[74] The memorandum was produced pursuant to a document request from the SEC and was stamped, "FOIA Confidential Treatment Requested."[75] The

69. FED. R. CIV. P. 26(b)(3).

70. *See, e.g.*, Duplan Corp. v. Moulinage et Retorderie de Chavanoz, 509 F.2d 730, 734 (4th Cir. 1974), *cert. denied*, 420 U.S. 997 (1975).

71. *See, e.g., In re* Grand Jury Investigation, 599 F.2d 1224, 1229 (3d Cir. 1979) ("[S]ome possibility of litigation must exist."); Duffy v. United States (*In re* Grand Jury Proceedings), 473 F.2d 840, 847 (8th Cir. 1973) ("The test of whether the work product doctrine applies is not whether litigation has begun but whether documents were prepared or obtained in anticipation of litigation.").

72. James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 143 (D. Del. 1982); *see also In re* Grand Jury Investigation, 412 F. Supp. 943, 948 (E.D. Pa. 1976) ("Advising a client about matters which may or even likely will ultimately come to litigation does not satisfy the 'in anticipation of' standard. The threat of litigation must be more real and imminent than that.").

73. *See* United States v. Nobles, 422 U.S. 225, 239 (1975).

74. *See* Salomon Bros. Treasury Litig. v. Steinhardt Partners, L.P. (*In re* Steinhardt Partners, L.P.), 9 F.3d 230 (2d Cir. 1993).

75. *Id.* at 232.

SEC did not agree to maintain confidentiality, but did not bring an enforcement action.[76]

In a parallel civil lawsuit, the plaintiffs filed a motion to compel production of the memorandum, and the district court granted the motion.[77] The Company filed a writ of mandamus to the Second Circuit, which denied the petition.[78] The Second Circuit held that the company completely waived the work product privilege when it produced the memorandum to the SEC, reasoning that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[79]

Subject matter, or horizontal, waiver of the work product privilege can also occur. In *Pollard*, the company's counsel undertook an internal investigation that included employee interviews.[80] Then, the lawyers, in an attempt to convince the local United States Attorney not to indict their client, produced a position paper to the enforcement agency.[81] Subsequently, a former employee of the company subpoenaed the employee witness's statements and audit papers that supported the position paper.[82] The Fourth Circuit held that the company had waived the work product privilege when it produced the position paper, especially because the company's attorneys had attempted to make testimonial use of the materials with the government and because the "subject matter of the disclosure and the waiver [had been] comprehensive, and include[d] all of the company's non-opinion work-product relating to the investigation that it conducted."[83]

To maximize the likelihood that work product will not have to be disclosed, investigating counsel should consider the following. First, all witness interview notes should contain the attorney's mental impressions throughout the notes and should not be a

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76. *Id.*
77. *Id.* at 232-33.
78. *Id.* at 236.
79. *Id.* at 235; *see also In re* Leslie Fay Cos., Inc. Secs. Litig., 152 F.R.D. 42, 45-46 (S.D.N.Y. 1993) (holding that corporation's audit committee voluntarily disclosed report to SEC and thus waived any work product immunity in subsequent civil proceeding). *But see* Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (upholding the use of selective waiver).
80. United States v. Pollard, 856 F.2d 619, 623 (4th Cir. 1988).
81. *Id.*
82. *See id.*
83. *Id.* at 625.

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mere recitation of the interviewee's statement. But a word of caution: the attorney's impressions should be carefully worded because the notes could be discoverable if the report is subsequently disclosed. Investigating counsel, accordingly, should try to anticipate before the investigation begins whether it is likely that the client will want to make some disclosure.

Second, if investigating counsel prepare a report, they should appreciate that the more the report reflects their work product, the greater the likelihood that the work product will be discoverable if the report is produced to an enforcement agency or to the public. These situations are mostly fact intensive, and generalizations of how to prepare the reports are of little use. Investigating counsel must recognize the risks and use professional judgment to evaluate the client's needs under the circumstances.

Finally, if a company feels compelled to produce privileged documents to a government agency, it should attempt to extract from the government an agreement that the disclosure is confidential and does not waive applicable privileges. The agreement should also explicitly refer to any parallel or subsequent civil litigation. Although such an agreement would certainly not be binding on another court, it might help persuade the court that the company had not engaged in unfair tactical maneuvers, but rather that the company was acting reasonably in the face of a government enforcement action.

V. THE SO-CALLED "SELF-CRITICAL" OR "SELF-EVALUATIVE" PRIVILEGE

A few jurisdictions have recognized the existence of the so-called "self-critical" privilege.[84] This privilege has developed pursuant to the federal common law of privilege,[85] and it usually applies only to protect the free flow of information in organizations whose activities relate to some public interest.[86]

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84. *See generally* Note, *The Privilege of Self-Critical Analysis,* 96 HARV. L. REV. 1083, 1091-1100 (1983) [hereinafter *Self-Critical Analysis*].

85. FED. R. EVID. 501.

86. *See Self-Critical Analysis, supra* note 84, at 1086. Some courts approving a self-evaluation privilege have stated the privilege's elements as follow: "(1) the information must result from a critical self-analysis undertaken by the party seeking protection; (2) the public must have a strong interest in preserving the free flow of the type of information sought; (3) the information must be of a type whose flow would be curtailed if discovery was allowed" and (4) the information also is "prepared with the

As suggested by one commentator, for the privilege to apply, "the information must be of the type whose flow would be curtailed if discovery were allowed."[87] Thus, the privilege was first applied when a plaintiff requested documents that related to a defendant hospital's internal review of a doctor's medical care practices.[88]

In a recent case, *Flynn v. Goldman, Sachs & Co.*,[89] the United States District Court for the Southern District of New York held that the self-critical privilege protected from discovery certain interview notes of employees that related to the equal employment of women that were prepared for Goldman, Sachs & Co. and by a nonprofit organization.[90] The court held that the privilege applied for two reasons. First, the employees expected that their comments would be confidential. Second, and more importantly, the court reasoned that the expectation of confidentiality was necessary to encourage employees to be forthright about the issue of sex discrimination.[91] The *Flynn* case, if followed, would significantly broaden the self-critical privilege.[92]

To date, most courts have been reluctant to endorse the self-critical privilege.[93] As one court has noted, the self-critical privilege "at the most remains largely undefined and has not generally been recognized . . . ."[94] Thus, in a recent case that involved the government trading desk of Salomon Brothers, the

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expectation that it would be [kept] confidential, and it has in fact been kept confidential." Reichhold Chemicals, Inc. v. Textron, Inc., 157 F.R.D. 522, 527 (N.D. Fla. 1994) (citing Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 426 (9th Cir. 1992)).

87. *Self-Critical Analysis, supra* note 84, at 1086.

88. *See* Bredice v. Doctors Hosp., Inc., 50 F.R.D. 249, 249-50 (D.D.C. 1970), *aff'd*, 479 F.2d 920 (D.C. Cir. 1973); *cf.* Webb v. Westinghouse Elec. Corp., 81 F.R.D. 431, 433-34 (E.D. Pa. 1978) (recognizing privilege but holding that it applies only to subjective evaluations and is subject to a balancing of the need for the discovery against the reasons for nondisclosure).

89. No. 91 Civ. 0035, 1993 U.S. Dist. LEXIS 12801 (S.D.N.Y. Sept. 15, 1993).

90. *Id.* at *4-5.

91. *Id.* at *4.

92. *E.g.*, Bernstein v. Antar (*In re* Crazy Eddie Secs. Litig.), 792 F. Supp. 197, 205 (E.D.N.Y. 1992) (refusing to allow plaintiffs to have copies of an accounting firm's internal report and holding that it should remain confidential pursuant to a "privilege of 'self-critical analysis' or 'self-evaluative privilege' [which] serves the public interest by encouraging self-improvement through uninhibited self-analysis and evaluation").

93. *See, e.g.*, Dowling v. American Haw. Cruises, Inc., 971 F.2d 423, 426-27 (9th Cir. 1992); Coates v. Johnson & Johnson, 756 F.2d 524, 551-52 (7th Cir. 1985); Gray v. Board of Higher Educ., 692 F.2d 901, 908 (2d Cir. 1982).

94. Lloyd v. Cessna Aircraft Co., 74 F.R.D. 518, 522 (E.D. Tenn. 1977).

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United States District Court rejected Salomon's attempt to invoke the privilege to protect from discovery documents that related to Salomon's reviews of the adequacy of internal audits of U.S. Treasury securities trading practices.[95] The court held that discovery of the requested documents would not adversely affect the free flow of information that related to internal audit programs.[96] Thus, the court rejected the argument that there was an "overwhelming public interest" in protecting the documents from discovery.[97] The court also noted that the self-critical privilege did not apply because the information was not "the type whose flow would be curtailed if discovery is allowed."[98]

Other courts could very well disagree with the *Salomon* court's rejection of the public policy argument as it relates to review of internal audits.[99] As one court has reasoned, to hold that the privilege is waived as to internal investigation "may have the effect of thwarting the developing procedure of corporations to employ independent outside counsel to investigate and advise them in order to protect stockholders, potential stockholders and customers."[100] Accordingly, it would be more appropriate for courts to engage in a balancing of the competing interests comprised of the litigant's interest in disclosure against the public's interest in promoting candid reviews of potential corporate liability. This is the public policy interest that underpins recent moves by federal and state enforcement authorities toward corporate self-policing. The *Salomon Brothers'* decision is inconsistent with this public policy agenda.

The self-critical privilege offers corporate compliance officers some potential additional protection from disclosure of internal analyses, but is not a privilege on which corporations can confidently rely. It is still prudent for corporations to charge counsel with the responsibility of conducting and supervising

95. *In re* Salomon, Inc. Sec. Litig., [1992-1993 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 97,254, at 95,148 (S.D.N.Y. 1992).

96. *Id.*

97. *Id.*

98. *Id.*

99. Apparently, Salomon had to rely on the self-critical privilege because the requested documents were not prepared pursuant to direction and supervision of counsel. Consequently, Salomon could not assert either the attorney-client privilege or the work product privilege. *See supra* notes 40, 72-73 and accompanying text.

100. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978).

internal investigations to maximize the chances that either or both the attorney-client privilege and work product privilege will apply to confidential communications and documents.

CONCLUSION

Greater scrutiny of corporate behavior by both state and federal governments has forced organizations to be proactive in monitoring and, if necessary, in correcting the manner in which they do business. Increasingly, internal investigations are used either as an important tool in a corporation's process of self-evaluation or as a means of assessing potential civil or criminal liability. Properly conducted investigations maximize the corporation's ability to obtain a favorable resolution of problem conduct while preserving the secrecy of confidential attorney-client communications and the work product of the corporation's attorneys.

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