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Sarah Helene Duggin
The Catholic University of American, Columbus School of Law

Shannon "A.J." Singleton

James D. Wing

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*By Sarah H. Duggin, Shannon "A.J." Singleton, and James D. Wing**

In today's law enforcement environment, business entities facing criminal investigations and possible indictment have little practical choice but to cooperate with authorities. Cooperation offers the opportunity to avoid a costly trial and attendant adverse reputational, financial, and morale impacts. Resolution of potential criminal charges, however, almost always requires entities to cooperate with law enforcement efforts to impose criminal liability on individual business executives.

While businesses and their executives once generally perceived their interests as closely aligned, the "Cooperation Revolution" of the last few decades has forced corporate boards and business executives to reassess their individual obligations and risks. In so doing, they often turn to corporate lawyers, particularly general counsel, for assistance in evaluating and enhancing executive protection plans encompassing exculpation, indemnification, and fee advancement. These questions raise complex substantive issues and—because corporate counsel owe their fiduciary obligations to the entity itself—the evaluation and design of plans created to protect individuals often raises challenging ethical dilemmas. Legal advice provided on a "clear day" when the possibility of involvement in a criminal investigation seems remote may be perceived very differently on a "stormy day" when law enforcement officials are at the door.

The purpose of this article is to explore the evolution and ongoing impacts of the "Cooperation Revolution" on business entities and their directors, officers, and lawyers with a particular focus on how corporate counsel can advise governing bodies on executive

* Sarah Duggin is Professor of Law and Director of the Compliance, Investigations & Corporate Responsibility Program at The Catholic University of America's Columbus School of Law. Prior to joining the CUA faculty, Sarah served as Vice President and General Counsel of the National Railroad Passenger Corporation (Amtrak), as Chief Counsel of the University of Pennsylvania Health System, and as a partner in the Washington, D.C. law firm of Williams & Connolly. Sarah has published numerous articles in the fields of corporate law, legal ethics, compliance and corporate responsibility, and constitutional law. She is also an Episcopal priest.

Shannon "A.J." Singleton is a Member and General Counsel of Stoll Keenon Ogden PLLC. He is part of the Business Litigation practice, concentrating on Business Torts and Trust & Estates. A.J. represents financial institutions, as well as other business clients, and he frequently advises lawyers and law firms on ethics issues. He is a frequent lecturer on law industry issues, including conflicts of interest, client confidentiality, attorney-client privilege, law firm advertising and risk management, and law firm departures.

James D. Wing's practice focuses on international litigation and arbitration in a wide variety of commercial contexts. He has represented numerous directors and C-Suite officers seeking advancement, indemnification, and insurance coverage relating to both civil claims and criminal charges. He is Chair of the Director and Officer Liability Committee of the ABA Business Law Section. He is a frequent presenter and author on these subjects.

protection plans in ways that offer the best possible assistance to their clients while appropriately protecting themselves.

I. The Problem

Since the 1990s, the United States Department of Justice (DOJ) and other law enforcement agencies have regularly enlisted the private sector in investigations of business entities. Just as acquiring entities often use a target organization's assets to support a leveraged buyout, law enforcement authorities frequently leverage their prosecutorial resources by encouraging entities under investigation to identify individuals potentially involved in alleged wrongdoing. Businesses accede to government requests in the hope of obtaining more favorable treatment of the entities themselves. This kind of cooperation has become a pre-condition for deferred and non-prosecution agreements as well as settlements based on lesser charges than otherwise might be filed.

As a practical matter, when a business entity uncovers potentially significant wrongdoing through its compliance program or becomes a target of a government investigation, the company has little choice but to offer to "cooperate" with law enforcement authorities. Hardly a week goes by without news media reporting that an entity is "cooperating" with prosecutors or other governmental enforcement authorities in the investigation of alleged wrongdoing.

Cooperation with law enforcement authorities can enable entities to resolve potential criminal charges and significant civil enforcement matters without going through a risky trial and enduring attendant business disruptions, reputational harm, and adverse impacts on morale. Cooperating is generally perceived as far less costly than going to trial, even if a settlement requires the entity to admit to a legal violation and pay millions of dollars in fines or penalties. The advantages of even an expensive settlement, when weighed against the financial and reputational harm of possible criminal conviction, present an opportunity few businesses can afford to reject. In fact, sometimes such cooperation is essential to the entity's very survival.

This reality—the "Cooperation Revolution"[1]—forces corporate boards[2] and senior executives to reassess their individual responsibilities and risks. Major investigations are perilous not only for organizations but for their officers and directors personally. Settlements reached through deferred prosecution agreements often require entities to cooperate with law enforcement efforts to impose criminal responsibility on individuals. Consequently, the need for effective indemnification

1. To the best of our knowledge, the term "Cooperation Revolution" was coined by co-author James Wing and first appeared in print in a 2015 article in *The Business Lawyer*. *See* James D. Wing & Andrew L. Oringer, *Discipline Involving Multiple Disciplines—Protecting Innocent Executives in the Age of Cooperation*, 70 Bus. Law. 1123, 1124 (2015).

2. Throughout this article we refer to "corporate boards," "corporate officers and directors," "managers," and the like. As suggested above, however, the issues and concerns discussed are not limited to incorporated entities. They apply equally to any business entity, as well as to many not-for-profit organizations, regardless of whether the entity is a corporation, a partnership, a limited liability company, or another "alternative" entity or organization. Similarly, when we use the terms "executives," "directors," or "officers," we intend those terms to include "managers" or persons discharging similar responsibilities for alternative entities.

and advancement provisions for the entity's constituents (notably, the entity's directors and officers) in governance documents, protective clauses in individual contracts, and broad insurance coverage is greater than ever before.

General counsel and other corporate lawyers[3] play an essential role in ameliorating individual constituents' legal risks. It is to corporate counsel that boards, and senior executives generally first turn for guidance on devising effective executive protection plans or evaluating the elements of an existing plan.[4] The issue arises on the "clear day"—before a major claim or potential scandal manifests itself.[5] If boards and executives await the "stormy day" before seeking such guidance—after allegations of wrongdoing surface, an investigation begins, or law enforcement authorities come knocking—it is often too late. Even when an entity's charter provides for indemnification to the "fullest extent permitted by law," analysis of executive protection plans is often fraught with difficulties pertaining to interpretation of bylaws given the legal effect of contractual agreements with individual executives, the impact of allegations of misconduct an entity may not legally indemnify, the scope of insurance coverage, the enforceability of fee advancement, the consequences of settlements, and a host of related matters.

When corporate boards or senior executives request advice on executive protection from entity counsel, serious ethical questions immediately arise. The first consideration, of course, is "Who is the client?"

Like any attorney representing an entity, in-house counsel owe their fiduciary and professional obligations to the entity itself. But corporations and other business entities speak only through their constituents.[6] Corporate law has long

3. The focus of this article is on an entity's in-house "general counsel" or similar position. However, the issues, analysis, and best practices addressed herein apply equally to any attorney representing an entity on these issues, including outside counsel from a private law firm who serve as an entity client's *de facto* in-house counsel.

4. Throughout this article we use the term "executive protection plan" to refer to the combination of rights to exculpation, advancement, and indemnification contained within entity foundational documents, statutes, professional liability insurance policies, or directors and officers liability insurance policies. A classic article considers these rights together as separate elements of a unitary program of protection that may be embodied in a corporation's charter and bylaws, as well as insurance policies and individual contractual agreements. *See* E. Norman Veasey, Jesse A. Finkelstein & C. Stephen Bigler, *Delaware Supports Directors with a Three-Legged Stool of Limited Liability, Indemnification, and Insurance*, 42 Bus. Law. 399 (1987).

5. The terms "clear day" and "stormy day" were used in the Wing and Oringer article based on Delaware case law that refers to the term "clear day" as "proverbial." The article describes the "clear day" as implying the time "when an executive protection program is first instituted or even renewed, [and] there is no hint of a legal violation that can result in an investigation and an adversity of interest between executives and the corporation." Wing & Oringer, *supra* note 1, at 1129 n.18. In contrast, the "stormy day" arrives when "an issue of corporate misconduct arises" and the executive protection program is put to the test. *Id.* at 1131.

6. "Constituents" is a term of art used in ethics law. ABA Model Rule 1.13(a) notes: "A lawyer is employed or retained by an organization to represent the organization *acting through its duly authorized constituents*." Model Rules Prof'l Conduct R. 1.13(a) (2020) (emphasis added); *see also id.* 1.13 cmt. 1 ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. 'Other constituents' as used in this Comment means the positions

recognized that entities have an interest in attracting and retaining qualified and talented personnel by relieving them of the financial burden of defending meritless litigation arising from their service.[7] A corporate board, *through directors acting collectively as the entity's highest authority*, may instruct a general counsel to analyze and provide advice on the protection the entity affords directors and officers personally. One or more of those directors or senior executives may ask general counsel the same question on an *individual* basis. Obviously, general counsel may not give different answers to the same question simply because the entity speaking through its board is the client, but directors, personally, are unrepresented constituents. They are, after all, the same individuals.

Given the "Cooperation Revolution," in both cases general counsel may be asked on a "clear day" to provide advice on executive protection plans designed to safeguard directors and senior officers on a later "stormy day" when the entity and/or its senior executives come under investigation. The problem is that the interests of the entity and those of its senior executives are generally aligned on the "clear day," but the interests of an entity that cooperates with law enforcement authorities may later fall into severe conflict with the interests of one or more of the constituents whom the entity has promised to protect. How does counsel respond on a "clear day," knowing that a "stormy day" may well arise? If asked on a developing or actual "stormy day," is there a different answer?

The substantive law of executive protection involves complex legal questions and many uncertainties that tax the knowledge and skills of even practitioners who are expert in the field. While the board of directors must determine the appropriate level of protection the entity will provide to directors and senior executives, boards rely on counsel to supply the information they need to reach this decision. General counsel asked to provide advice on executive protection plans may later encounter criticism that the plan is too favorable to beneficiaries if a subsequent board regards those executives as miscreants. Conversely, individuals facing investigations (and the high legal fees they ordinarily entail) may blame counsel if the plan provides directors and officers with less protection than they believe, in hindsight, it should. How do counsel in this position protect themselves from criticism, and perhaps even from potential professional liability, if the answer the attorney gave on the "clear day" turns out to be incomplete or lacking in some fashion once the "stormy day" arrives? Given current law enforcement trends, this is not a negligible risk.

The purpose of this article is to explore the evolution and ongoing impacts of the "Cooperation Revolution" on business entities and the directors, officers, and counsel who serve them. The article identifies resources available to general counsel and other corporate lawyers to check the comprehensiveness and balance of executive protection plans. It suggests that counsel might work with boards in ways that minimize their risk when advising on executive protection

equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.").

7. *See* Wing & Oringer, *supra* note 1, at 1127 n.14.

plans, particularly by structuring the manner in which the board requests this kind of advice. Along the way, the article identifies ethical rules and principles that come into play when both boards, *qua* boards, and protected entity constituents seek advice from corporate counsel on their rights to exculpation, advancement, indemnification, and liability insurance protection.

II. The "Cooperation Revolution" and Its Impact on Business Executives and Entity Counsel

The "Cooperation Revolution" can have serious, real-life ramifications for entity officers, directors, and other constituents—including those who are innocent of any wrongdoing—when the entity they once served or continue to serve becomes the target of law enforcement. Lost jobs, damaged reputations, seriously adverse health impacts, and financial ruin are very real risks for these individuals.

In a March 3, 2022 speech to the American Bar Association's (ABA) 37th National Institute on White Collar Crime, Attorney General Merrick Garland made it clear that "the prosecution of corporate crime is a Justice Department priority,"[8] and that the Department will focus on individuals in seeking to hold business entities accountable. Mr. Garland stressed that "the prosecution of individuals is our first priority because it is essential to Americans' trust in the rule of law. . . . [T]he rule of law requires that there not be one rule for the powerful and another for the powerless; one rule for the rich and another for the poor."[9]

Referring to Deputy Attorney General Lisa Monaco's statement in her October 2021 keynote address to the ABA's 36th National Institute on White Collar Crime,[10] Mr. Garland reiterated that the Justice Department is restoring "prior Department guidance making clear that, to be eligible for any cooperation credit, companies must provide the Justice Department with all non-privileged information about individuals involved in or responsible for the misconduct at issue," and emphasized that the entity must identify all individuals involved in the misconduct, regardless of their "position, status, or seniority" and regardless of whether the entity deems an individual's involvement as "substantial."[11]

Mr. Garland was explicit about the implications of this guidance for the private sector: "When the Justice Department offers a company the opportunity to enter into a resolution for its misconduct, it is in that company's best interest to provide us with a full picture of what happened and who was involved. When we give a company an opportunity to come clean, it must come clean about everyone involved in the misconduct, at every level."[12] In a subsequent September 2022 guidance

8. Press Release, U.S. Dep't of Justice, Attorney General Merrick B. Garland Delivers Remarks to the ABA Institute on White Collar Crime (Mar. 3, 2022), [hereinafter Garland Press Release]; *see also AG Garland Defends Crack-down on White Collar Crime*, ABA News (Mar. 7, 2022).

9. Garland Press Release, *supra* note 8.

10. Deputy Attorney General Lisa O. Monaco Gives Keynote Address at ABA's 36th National Institute on White Collar Crime (Oct. 28, 2021), https://www.justice.gov/opa/speech/deputy-attorney-general-lisa-o-monaco-gives-keynote-address-abas-36th-national-institute.

11. Garland Press Release, *supra* note 8.

12. *Id.*

memorandum, Ms. Monaco stressed that companies must report information pertaining to individuals "on a timely basis" to receive full cooperation credit and instructed prosecutors that they "must strive to complete investigations into individuals—and seek any warranted individual criminal charges—prior to or simultaneously with the entry of a resolution against the corporation."[13]

As the remarks of Attorney General Garland and Deputy Attorney General Monaco illustrate, the Biden Justice Department is breathing new life into policies requiring business organizations seeking credit for cooperating with the government in criminal and civil enforcement proceedings to turn over information on individuals that it gains through corporate compliance programs and internal investigations. For more than two decades, these policies have served as an increasingly effective means of leveraging prosecutorial resources in federal investigations of corporations and other business entities.[14]

Understanding the genesis and evolution of the "Cooperation Revolution" is critical to appreciating the importance of carefully designed executive protection plans to both individual executives and business organizations. Appreciating the impact of the "Cooperation Revolution" on individual directors and officers is essential for corporate drafting. This section offers a brief summary of key developments.

A. The Emergence of the "Cooperation Revolution"

The publication of the United States Sentencing Commission's Organizational Sentencing Guidelines in 1991 set the stage for the "Cooperation Revolution."[15] The Organizational Sentencing Guidelines, promulgated as part of the reforms mandated by Congress in the Sentencing Reform Act of 1984,[16] included provisions that allowed for downward departures—i.e., lower penalties—for businesses that had "effective" compliance programs in place at the time of the events that led to their prosecution.[17]

13. Memorandum from Deputy Att'y Gen. Lisa O. Monaco for Assistant Att'ys Gen. & U.S. Attorneys, Further Revisions to Corporate Criminal Enforcement Policies Following Discussions with Corporate Crime Advisory Group (Sept. 15, 2022), https://www.justice.gov/opa/speech/file/1535301/download. Among other things, in discussing evaluation of both prior misconduct and corporate compliance plans, Deputy Attorney General Monaco also emphasized the importance of clawback provisions enabling companies to impose financial sanctions against individuals who contribute to criminal conduct directly or in a supervisory capacity. *Id*.

14. *See, e.g.*, Robert S. Bennett, Hilary Holt LoCicero & Brooks M. Hanner, *From Regulation to Prosecution to Cooperation: Trends in Corporate White Collar Crime Enforcement and the Evolving Role of the White Collar Criminal Defense Attorney*, 68 Bus. Law. 411 (2013); Jonathan A. Forman & Samuel Light, *Recent Government Policies Deputize Companies to Root Out Global Corruption*, Bus. L. Today, June 2016, at 39.

15. Bennett, LoCicero & Hanner, *supra* note 14, at 418–20. This landmark article provides an excellent and detailed discussion of the evolution of white-collar criminal enforcement and the cooperation approach through 2012.

16. Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.).

17. U.S. Sentencing Comm'n, Federal Sentencing Guidelines ch. 8 (1991) (Sentencing of Organizations). Since the organizational sentencing guidelines were first published in 1991, the United States Sentencing Commission has not only retained, but expanded, the provisions pertaining to effective compliance and ethics programs. The most recent iteration, for example, now refers to an "effective

Five years later the Delaware Chancery Court decided *In re Caremark International, Inc. Derivative Litigation*.[18] In reviewing a proposed settlement agreement in a shareholders' derivative action, the court concluded that in some circumstances directors of corporations convicted of criminal wrongdoing could be held personally liable in shareholder litigation for sustained or systemic failures to ensure that their companies had effective compliance programs in place.[19] *Caremark* added powerful personal incentives for corporate boards to focus on establishing the kinds of compliance programs called for by the Organizational Sentencing Guidelines. Taken together, the Organizational Sentencing Guidelines and the *Caremark* decision laid the foundation for a new prosecutorial focus on corporate compliance and disclosure and set the stage for the criminalization of legal risk to corporate officers and directors.[20]

Deputy Attorney General Eric Holder added a critical piece to the emerging framework in 1999. In a guidance document issued to DOJ attorneys (the "Holder Memorandum"), Mr. Holder instructed federal prosecutors to consider eight factors in determining whether to bring criminal charges against business entities.[21] The Holder Memorandum specifically identified the "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate" with the government as one of these factors.[22] Mr. Holder also admonished that "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation."[23]

In 2003, in the aftermath of the Enron and WorldCom debacles, the implosion of Arthur Andersen, and other high-profile corporate scandals, Deputy Attorney General Larry Thompson issued new guidance on charging business organizations with criminal wrongdoing, emphasizing the need for increased "scrutiny of the authenticity of a corporation's cooperation."[24] Among other things, Mr. Thompson reiterated the key elements of the Holder Memorandum and added a ninth factor pertaining to the adequacy of civil or regulatory enforcement actions to the list prosecutors should consider.[25] The most significant change, however, was Mr. Thompson's expansion of the definition of corporate cooperation to encompass "if necessary, the waiver of corporate attorney-client

compliance *and ethics* program." U.S. SENTENCING COMM'N, FEDERAL SENTENCING GUIDELINES ch. 8 (2021) (Sentencing of Organizations).

18. 698 A.2d 959 (Del. Ch. 1996).

19. *Id.* at 970.

20. *See* Wing & Oringer, *supra* note 1, at 1123–24.

21. Memorandum from Eric H. Holder, Jr., Deputy Att'y Gen., to All Component Heads & U.S. Att'ys re: Bringing Criminal Charges Against Corporations (June 16, 1999), https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF.

22. *Id.* at 3. The Holder Memorandum further explained: "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 [with some limitations] to waive the attorney-client and work product privileges," *id.* at 5, as well as apparent protection of culpable individuals. *Id.* at 6.

23. *Id.* at 2.

24. Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components & U.S. Att'ys re: Principles of Federal Prosecutions of Business Organizations (Jan. 20, 2003).

25. *Id.* at 3–4.

privilege and work product protection and apparent protection of 'culpable individuals' through fee advancement and other means unless required by law."[26]

The Thompson Memorandum's focus on waiver of attorney-client privilege and work-product protections as indicia of corporate cooperation gave rise to a firestorm of protests. The ABA, the National Association of Criminal Defense Lawyers, and a number of other advocacy groups, practitioners, and scholars vehemently objected. They urged that these new cooperation criteria created unconstitutional pressure on companies to waive the attorney-client privilege and work-product protections and presaged dire consequences for individuals caught in the crossfire.[27]

The dispute over the Thompson Memorandum came to a head in the course of a federal investigation of both KPMG, Inc. and a number of KPMG partners for promoting allegedly illegal tax shelters.[28] KPMG decided to cooperate with federal authorities. It agreed to withdraw from joint defense agreements with potential individual defendants and to stop advancing legal fees and expenses to KPMG partners who were not cooperating with the investigation.[29] In *United States v. Stein*, targeted partners challenged these actions. The partners argued that the pressure the government exerted on KPMG to cease advancing legal fees and to withdraw from joint defense agreements violated the partners' rights under the Fifth and Sixth Amendments.[30] The partners prevailed in the United States District Court for the Southern District of New York and the court dismissed the indictments in relevant parts.[31] The United States Court of Appeals for the Second Circuit affirmed.[32]

26. *Id.* at 7–8.

27. *See*, *e.g.*, Stephanie A. Martz, *Report from the Front Lines: The Thompson Memorandum and the KPMG Tax Shelter Case,* WALL ST. LAW. (Aug. 2006); *ABA Takes Aim at Thomson Memorandum, Again*, WALL ST. J. (Aug. 9, 2006), https://www.wsj.com/articles/BL-LB-2103; *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary,* 109th Cong. (2006) (statement of Karen J. Mathis, President of the American Bar Association), https://www.govinfo.gov/content/pkg/CHRG-109shrg34117/pdf/CHRG-109shrg34117.pdf.

28. United States v. Stein, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (*Stein I*) *aff'd*, 541 F.3d 130 (2d Cir. 2008); *see also* United States v. Stein, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (*Stein IV*).

29. *See* Sarah Helene Duggin, *The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics*, 21 GEO. J. LEGAL ETHICS 341 (2008); *see also* Mark Gideon & Thomas C. Pearson, *Corporate Cooperation During Investigations and Audits*, 13 STANFORD J.L. BUS. & FIN. 1 (2008).

30. *Stein I*, 435 F. Supp. 2d at 336.

31. *Id.* at 382 (granting the KPMG Defendants' motion to dismiss the indictments in part "only to the extent that . . . [t]he court declares that so much of the Thompson Memorandum and the activities of the USAO as threatened to take into account, in deciding whether to indict KPMG, whether KPMG would advance attorneys' fees to present or former employees in the event they were indicted for activities undertaken in the course of their employment interfered with the rights of such employees to a fair trial and to the effective assistance of counsel and therefore violated the Fifth and Sixth Amendments to the Constitution"); *see also Stein IV*, 495 F. Supp. 2d at 394 ("This Court held in *Stein I* that the government violated the Fifth and Sixth Amendment rights of the KPMG Defendants by causing KPMG to depart from its prior practice of paying the legal expenses of KPMG personnel in all cases in which they were sued in consequence of their activities on behalf of the firm. It found that KPMG would have paid those expenses—whether legally obligated to do so or not—but for the government's improper actions." (internal citations omitted)).

32. United States v. Stein, 541 F.3d 130 (2d Cir. 2008).

Following the district court's June 2006 decision in *Stein*, the DOJ backed away from privilege waiver and anti-fee advancement demands. In December 2006, Deputy Attorney General Paul McNulty issued new guidance to federal prosecutors.[33] Acknowledging the legal community's concern that DOJ practices might "discourag[e] full and candid communications between corporate employees and legal counsel,"[34] Mr. McNulty instructed: "Prosecutors may only request waiver of attorney-client and work product protections when there is a legitimate need . . . [after] a careful balancing of important policy considerations underlying the attorney-client privilege and work product doctrine and the law enforcement needs of the government's investigation."[35] He stated that federal "[p]rosecutors generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment" in assessing cooperation.[36]

Two years later, Deputy Attorney General Mark Filip issued yet another guidance memorandum,[37] and the DOJ incorporated the approach into the *United States Attorneys' Manual*.[38] Mr. Filip prohibited prosecutors from seeking privilege and work product protection waivers except where "a corporation or one of its employees . . . asserts an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue"[39] or where the "[c]ommunications [are] between a corporation (through its officers, employees, directors, or agents) and corporate counsel are made in furtherance of a crime or fraud."[40] The Filip Memorandum also acknowledged that "the mere participation by a corporation in a

33. Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Department Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006).

34. *Id.*

35. *Id.* at 8.

36. *Id.* at 11.

37. Memorandum from Mark Filip, Deputy Att'y Gen., to Heads of Department Components & U.S. Att'ys, Principles of Federal Prosecution of Business Organizations (Aug. 28, 2008), https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf [hereinafter Filip Memo].

38. U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-28.000 to 9-28.1300 (2008) (Principles of Federal Prosecution of Business Organizations).

39. Filip Memo, *supra* note 37, at 12; U.S. DEP'T OF JUSTICE, *supra* note 38, at 12 ("The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would be the appropriate course of prosecutorial action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly, where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it."). The question of whether an accused possessed the necessary *mens rea* is a significant element of most criminal trials. "Advice of counsel" is not a recognized stand-alone criminal defense, but merely a component of the general issue of criminal intent. White collar defendants frequently argue that actions or inactions of general counsel contributed to the conduct for which they are being charged. If general counsel is immunized and testifies adversely to the charged executive, communications to and from counsel easily rise to the status of *Brady* material and can create issues relating to the crime-fraud exception to the attorney-client privilege. One possible effect of the Filip Memorandum is to put on charged executives the government's task, as well as the associated expense, of obtaining and reviewing exculpatory evidence in the heat of trial, rather than requiring the government to review this material before making charging decisions. This is a rarely recognized adverse consequence of the "Cooperation Revolution."

40. Filip Memo, *supra* note 37, at 12.

joint defense agreement does not render the corporation ineligible to receive cooperation credit" and that "prosecutors may not request that a corporation refrain from entering into such agreements."[41] Mr. Filip strengthened the McNulty guidance on fee advancement: "In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys' fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action."[42]

These developments removed any doubt that indemnification and advancement of fees to directors and officers subject to criminal and administrative proceedings arising from their service to an entity are permissible subjects of an executive protection plan.

Mr. Filip's guidance remained the last word until 2015 when Deputy Attorney General Sally Yates enunciated an aggressive policy to persuade businesses to "cough up" "high-level executives who perpetrated the misconduct."[43] Ms. Yates reiterated in a formal memorandum that the DOJ would continue to base cooperation credit calculations on established factors. But she emphasized: "One of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing."[44]

The Yates Memorandum specified that business organizations seeking cooperation credit "must provide to the Department all relevant facts relating to the individuals responsible for the misconduct."[45] It instructed that both "criminal and civil corporate investigations [were to] focus on individuals from the inception of the investigation,"[46] and directed DOJ attorneys not to "resolve matters with a corporation without a clear plan to resolve related individual cases, and [to] memorialize any declinations as to individuals in such cases."[47] This new guidance exacerbated the widening rift between business entities and individuals associated with them.[48]

41. *Id*.

42. *Id*.

43. *See* Sally Quillian Yates, Deputy Att'y Gen., Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing (Sept. 10, 2015), https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-new-york-university-school.

44. Memorandum from Sally Q. Yates, Deputy Att'y Gen., for Assistant Att'ys Gen. & U.S. Att'ys, Individual Accountability for Corporate Wrongdoing (Sept. 9, 2015) [hereinafter Yates Memo]; *see also* Sarah H. Duggin, Stephen Braga, Adam P. Schwartz & James Wing, *Ethical Rules and Professional Liability Risks of Business Lawyers Advising on Executive Protection Programs*, Bus. L. Today (June 28, 2019), https://businesslawtoday.org/2019/06/ethical-rules-professional-liability-risks-business-lawyers-advising-executive-protection-programs.

45. Yates Memo, *supra* note 44, at 2.

46. *Id*. at 2.

47. *Id*. at 2–3.

48. *See, e.g.*, Gary G. Grindler & Laura K. Bennett, *True Cooperation: DOJ's Reshaped Conversation and Its Consequences*, Crim. Just., Summer 2015, at 32; Gideon Mark, *The Yates Memorandum*, 51 U.C. Davis L.J. 1589 (2018); David Douglas, William Pericak & Leo Reichert, *Impact of DOJ's Corporate Healthcare Fraud Enforcement Strategies on Organizations and Defense Counsel*, Health Law., Aug. 2017, at 42; Adam Rahman, *Cooperation and Its Discontents: The Constitutional and Policy Implications of the DOJ's War on Corporate Crime*, 14 Geo. J.L. & Pub. Pol'y 323 (2016); Brandon L. Garrett, *The Metamorphosis of Corporate Criminal Prosecutions*, 101 Va. L. Rev. Online 60 (2016); Sharon

A few years later, in 2018, Deputy Attorney General Rod Rosenstein relaxed to some extent what he characterized as the "binary" proposition of the Yates Memorandum.[49] Mr. Rosenstein stated that prosecutors would no longer take an "all or nothing" approach to cooperation. Rather, corporations that identified every individual "substantially involved in or responsible for the criminal conduct" could be given credit in criminal proceedings, and DOJ attorneys would have more discretion to offer partial cooperation credit in civil enforcement actions so long as companies "meaningfully assist[ed]" in the government's investigation[50] and identified individuals "substantially involved in or responsible for the misconduct."[51] The DOJ incorporated Mr. Rosenstein's revised policy into the *Justice Manual* (i.e., the DOJ publication formerly known as the *United States Attorneys' Manual*). Accordingly, the *U.S. Attorneys' Manual* (now known as the *Justice Manual*) was revised to provide: "If the company is unable to identify all relevant individuals or provide complete factual information despite its good faith efforts to cooperate fully, the organization may still be eligible for cooperation credit."[52]

B. Corporate Cooperation Today

Although corporate criminal prosecutions declined during the Trump Administration,[53] counsel assisting with executive protection plans in times when DOJ policies appear more favorable to individual businesspeople cannot count on those policies remaining in place if a "stormy day" arrives. While DOJ policy may swing back and forth with different administrations, the overall trend in prosecutions of both entity and individual defendants is upward.[54] The Biden Administration clearly plans to move aggressively against corporate offenders. Deputy Attorney General Lisa Monaco's fall 2021 announcement signaled the end of the Rosenstein approach and a return to the Yates Memorandum's "full disclosure" mandate.[55] Attorney General Merrick Garland's spring 2022 remarks resoundingly confirmed the DOJ's commitment to aggressive efforts to investigate

Oded, *Coughing Up Executives or Rolling the Dice: Individual Accountability for Corporate Corruption*, 35 Yale L. & Pol'y Rev. 49 (2016).

49. Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act (Nov. 29, 2018), https://www.justice.gov/opa/speech/deputy-attorney-general-rod-j-rosenstein-delivers-remarks-american-conference-institute-0.

50. *Id.*

51. Justice Manual, *supra* note 38, § 9-28.700. For discussion of the implications of this policy change, see, for example, Kerry L. Myers, *DOJ Relaxes the Standard to Receive Cooperation Credit for Criminal and Civil Corporate Misconduct*, Ark. Law., Spring 2019, at 38.

52. Justice Manual, *supra* note 38, § 9-28.700.

53. *See* Brandon L. Garrett, *Declining Corporate Prosecutions*, 57 Am. Crim. L. Rev. 109 (2020).

54. *Id.* at 110 (noting, for example, that "[b]y 2015, federal prosecutors were charging more financial institutions than ever before"); Oded, *supra* note 48, at 63 (discussing increase in Foreign Corrupt Practices Act prosecutions and enforcement actions through 2015).

55. *See supra* text accompanying note 10 (discussing October 2021 remarks of Deputy Attorney General Lisa Monaco) and notes 8 & 45 (discussing Attorney General Merrick Garland's remarks and the memorandum authored by Deputy Attorney General Sally Yates in September 2022).

and prosecute culpable conduct involving business entities and their managers, employees, and agents.[56]

Review of the outcomes in a number of recent federal prosecutions demonstrates the DOJ's commitment to prosecution of both business entities and individuals. In May 2022, for example, Swiss-based Glencore International A.G. pled guilty to bribery in violation of the Foreign Corrupt Practices Act,[57] as well as fuel market manipulation charges, and agreed to pay more than $1.1 billion to resolve criminal proceedings against the entity.[58] In June 2022, the former CFO and other senior managers of Dallas-based Earthwater Ltd. pled guilty to participating in a multi-million dollar high-yield investment scheme;[59] others allegedly involved are awaiting trial in the Northern District of Texas.[60] In April 2022, a jury in the United States District Court for the Eastern District of New York convicted Roger Ng, a former managing director of Goldman Sachs Group Inc., of conspiring to violate the Foreign Corrupt Practices Act[61] and engaging in unlawful commodity market price manipulation in connection with alleged multi-billion dollar bribery and money-laundering activities involving Malaysia's state-owned investment and development fund.[62]

From a practical perspective, business organizations under investigation by the federal government often have little choice in how to respond. As a result of these DOJ policies and the threat of associated civil litigation,[63] entities faced with federal criminal investigations, as well as significant civil enforcement actions, are likely to disclose any information they have pertaining to individuals connected in any way to the subject of federal investigations. And investigations are aggressive.[64] Moreover, the expectation of corporate cooperation with law

56. *See supra* text accompanying notes 10 & 11.

57. Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (codified as amended at 15 U.S.C. § 78dd-1 et seq.) [hereinafter FCPA].

58. Press Release, U.S. Dep't of Justice, Glencore Entered Guilty Pleas to Foreign Bribery and Market Manipulation Schemes (May 18, 2022), https://www.justice.gov/usao-sdny/pr/glencore-entered-guilty-pleas-foreign-bribery-and-market-manipulation-conspiracies.

59. Press Release, U.S. Dep't of Justice, Former Earthwater CFO and Others Plead Guilty to Fraud Charges Related to High-Yield Investment Scheme (June 14, 2022), https://www.justice.gov/opa/pr/former-earthwater-cfo-and-others-plead-guilty-fraud-charges-related-high-yield-investment.

60. *Id.*

61. Press Release, U.S. Dep't of Justice, Former Goldman Sachs Investment Banker Convicted in Massive Bribery and Money Laundering Scheme (Apr. 8, 2022). https://www.justice.gov/usao-edny/pr/former-goldman-sachs-investment-banker-convicted-massive-bribery-and-money-laundering.

62. *Id.*

63. "Follow-on" civil litigation premised on announcements of criminal or significant civil investigations of entities is routine and inevitable. A recent description of such fall-out can be found in *J.P. Morgan Securities., Inc. v. Vigilant Insurance Co.*, 37 N.Y.3d 552 (2021). The opinion details the civil consequences of an SEC investigation of Bear, Stearns for allegedly assisting its hedge fund customers in market-timing transactions to the detriment of investors in mutual funds. It also considers the insurability of amounts paid in settlement of such claims where the SEC matter was settled without a binding admission of liability.

64. An ABA Business Law Section program on corporate investigations held in 2019 presented a twelve-point checklist for practitioners. Number six on that twelve-point checklist was: "Throw the guilty under the bus." Cara Bradley, Erik Christiansen, Ross McGowan, Zain Raheel, James Walker & Gregory Yadley, Conducting an Effective Internal Investigation—One Chance to Get It Right, ABA Bus. Law Section Spring 2019 Meeting Program Materials (Mar. 19, 2019), https://www.americanbar.

enforcement agencies against individuals has gained increasing traction globally as well as in the United States.[65]

Today, individual directors, officers, and entity managers necessarily operate in an environment in which they may face involvement in internal investigations, as well as investigations by the DOJ and other law enforcement authorities. Participating in any investigation, whether it is an internal investigation conducted by entity counsel or a government inquiry, raises potentially grave consequences for the individuals involved, particularly at the senior management level.[66] The consequences are not merely financial. Involvement in investigatory proceedings, follow-on civil or administrative litigation or, worse yet, criminal proceedings, typically has acute adverse consequences for individuals.[67] Directors, executives, and managers often turn to the corporate counsel they already know and trust for guidance on establishing executive protection plans and navigating their complexities. It is therefore critical for corporate counsel to understand the ethical issues that arise in connection with these requests.

III. Ethical Considerations of Advising on Executive Protection Plans

Advising boards and senior executives on executive protection plans requires counsel to navigate hazardous terrain. Four ethical pitfalls stand out among a host of potential perils: substantive complexity; possible client identification issues; potential conflicts between the interests of the entity and those of constituents seeking personal protection at the "clear day" drafting stage; and duties to constituents who collectively embody the client organization yet remain nonclients in their individual capacities.

A. The Complexity of the Law Pertaining to Executive Protection Plans

The very first of the substantive Model Rules of Professional Conduct requires lawyers to provide competent representation to their clients. The Rule goes on to define competent representation as encompassing "the legal knowledge, skill,

org/groups/business_law/resources/materials/2019/spring_materials/internal_investigation/. https://www.americanbar.org/content/dam/aba/events/business_law/2019/03/spring/materials/advising-boards-201903.pdf.

65. *See, e.g.*, Lisa K. Osofsky, *Lessons from a Global Settlement*, ABA Crim. Just. Mag., July 15, 2020, at 4; Jennifer Arlen & Samuel W. Buell, *The Law of Corporate Investigations and the Global Expansion of Corporate Criminal Enforcement*, 93 So. Cal. L. Rev. 697 (2020); Duggin, *supra* note 44; Wing & Oringer, *supra* note 1; Brandon L. Garrett, *Globalized Corporate Prosecutions*, 97 Va. L. Rev. 1775 (2011).

66. *See, e.g.*, Grindler, *supra* note 48; Duggin, *supra* note 44.

67. *See* Wing & Oringer, *supra* note 1, at 1126 ("Lawyers who work in this area and have represented executives caught up in investigations and criminal prosecutions know that the stakes are high. Executives subject to investigation or criminal prosecution may find their health, family relationships, careers, reputations, relationships with colleagues, and personal finances under severe stress. These individuals often experience intense feelings of depression, fear, and shame as they contemplate losing their reputations and personal liberties. Even if they are ultimately successful in their defense, their careers and lives can still be damaged or destroyed.").

thoroughness and preparation reasonably necessary for the representation."[68] The Comments to Rule 1.1 note that "relevant factors include the relative complexity and specialized nature of the matter,"[69] and that "[p]erhaps the most fundamental legal skill consists of determining what kind of legal problems a situation may involve."[70]

Given the current legal environment with respect to criminal prosecution and related civil actions, as well as the labyrinthine nature of advancement, indemnification, and insurance law in different states, designing executive protection plans is an "ethically dangerous, highly complex, and specialized area."[71] Indeed, a comprehensive executive protection program implicates numerous areas of law including, among others, the common law of indemnification, state statutes addressing corporate advancement and indemnification, criminal law, contract law, the law of equitable remedies, fiduciary duties of insurance brokers, and insurance law generally, including state specific and federal regulatory laws that may bear on an executive's critical right to prevailing party attorneys' fees.

Litigation abounds in high stakes matters involving indemnification, even when executives are cleared of wrongdoing.[72] Case law is still developing with respect to insurance coverage for fines, penalties, and defense costs in the face of admissions made in settlements with the federal government and resolution of related litigation in the context of the "Cooperation Revolution."[73] Unfortunately, judicial decisions are sometimes inconsistent.[74]

68. Model Rules Prof'l Conduct R. 1.1 (2020).

69. *Id.* R. 1.1 cmt. 1.

70. *Id.* R. 1.1 cmt. 2.

71. *See* James Wing, Geoffrey Fehling & Brian T.M. Mammarella, *Training for Tomorrow: 2021 Checklist for Entity Counsel Supervising the Creation or Renewal of an Executive Protection Program in the Age of "Cooperation,"* Bus. L. Today (Nov. 2021), https://businesslawtoday.org/2021/11/training-for-tomorrow-2021-checklist-for-entity-counsel-supervising-executive-protection-program. The extent and complexity of the drafting issues noted in the article may surprise many practitioners.

72. For two examples, see *Field v. Certain Underwriters at Lloyd's*, 302 So. 3d 930 (Fla. Ct. App. 2020), and *Brown v. Rite Aid Corp.*, C.A. No. 2017-0480-MTZ, 2019 Del. Ch. LEXIS 186 (May 24, 2019). Both cases illustrate the complexity, duration, and expense of civil and insurance litigation in this area even when an executive is acquitted or prevails in enforcing a bar order. Brown, a former Chief Legal Counsel and Vice-Chairman of Rite Aid was convicted but then included in a bar order in a civil class action. He litigated for years his rights under the bar order as well as his claimed right to recover his legal costs in enforcing the order's limitations on subsequent civil actions. Field's case revolves around his efforts to recover millions of dollars in defense costs and prevailing-party legal fees against both the involved entity and a Lloyd's–led tower of primary and excess insurance policies after he was acquitted of significant criminal charges. Field's potential criminal exposure was first mentioned in 2004, and litigation continues today. The cited case involves only one aspect of the overall dispute.

73. *See supra* note 63.

74. *See* Nat'l Union Fire Ins. Co. v. Brown, 787 F. Supp. 1424 (S.D. Fla. 1991) (upholding executives' right to advancement in a dispute over insurers' obligation to pay defense costs of former corporate officers where the insurers sought to rescind the policies while the underlying criminal and civil actions were pending), *aff'd*, 963 F.3d 385 (11th Cir. 1992); United States v. Brown, 79 F.3d 1550 (11th Cir. 1996) (reversing executive's convictions), *overruled by* United States v. Svete, 556 F.3d 1157 (11th Cir. 2009) (overruling United States v. Brown as incorrectly decided). *See also* Emmis Commc'ns Corp. v. Ill. Nat'l Ins. Co., No. 18-3392, 2019 U.S. App. LEXIS 19795 (7th Cir. July 2, 2019), which opinion the Seventh Circuit withdrew on rehearing because it was fundamentally at odds with accepted insurance industry practice. *See* Emmis Commc'ns Corp. v. Ill. Nat'l Ins. Co., 937 F.3d 836 (7th Cir. 2019). For an analysis of the significance of the *Emmis* decision, see

Despite these complexities, every lawyer who undertakes the representation of a client in a matter is ethically obligated to provide competent representation in that matter. Stated another way, every lawyer is ethically obligated not to undertake a representation for which the lawyer is not competent.[75]

That said, Comment 2 to Rule 1.1 recognizes that "[a] lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar. . . . A lawyer can provide adequate representation in a wholly novel field through necessary study."[76] But this can be a tall order when it comes to executive protection plans. Perhaps a safer alternative would be to follow the Comment's suggestion that "[c]competent representation can also be provided through the association of a lawyer of established competence in the field in question."[77]

Adding to the pressures here is the stress that creating or revising an executive protection plan can place on its drafters and their own personal interests. Executive protection plans generally come into existence or are renewed on a "clear day." Plans are designed to be effective as a means of providing protection for events that most of those involved hope, and often firmly believe, will never occur. But when the "stormy day" arrives, the forces at work are likely to stress and strain every aspect of the plan. The beneficiaries of the plan fervently look for protection, but they may find that new directors in place following a change in control, SEC receivers, trustees in bankruptcy, foreclosing creditors, and the like are frequently hostile to the plan's beneficiaries.

Counsel's work begins with a review of an entity's governing documents. Even where a corporation's charter provides for indemnification to the "fullest extent permitted by law," however, complex questions still may arise pertaining to the scope of insurance coverage, the availability of fee advancement, the consequences of settlements, interpretation of bylaw provisions, the availability of protections when the alleged misconduct is not indemnifiable, or unindemnified in fact, and a host of related matters. The drafting lawyers will be right in the middle, particularly if they have rendered substantive advice on the conduct under investigation.[78]

Michael S. Levine & Geoffrey B. Fehling, *Seventh Circuit Withdraws Decision, Affirms Coverage for Emmis Shareholder Lawsuit Despite Notices to Multiple Insurers*, LEXOLOGY (Aug. 27, 2019), https://www.lexology.com/library/detail.aspx?g=7440c5a3-1777-477f-bdf4-73339c5ac4d9.html.

75. MODEL RULES PROF'L CONDUCT R. 1.1 (2020) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.").

76. *Id.* R. 1.1 cmt. 2.

77. *Id.*

78. Though beyond the scope of this article, it should be noted that the in-house counsel drafter or reviewer of the executive protection plan may also be a beneficiary of that very same plan. For example, general counsel may also be an officer of the entity–*e.g.*, Chief Legal Officer or Vice President of Legal Affairs. This itself could lead to additional conflict-of-interest issues. Moreover, many cases against other entity officers and directors involve the accused's good faith or state of mind. Those individuals may assert the equivalent of an "advice of counsel" defense and thereby implicate in-house counsel. In-house counsel themselves may then find it necessary to retain personal outside counsel to advise on matters such as internal and external investigations; grand jury, deposition, and trial testimony; and seeking personal immunity from criminal prosecution where appropriate. Legal

In sum, it is critical for corporate counsel to understand the degree of substantive complexity they face when constituents seek their advice on creating, renewing, or even attempting to interpret executive protection plans.[79] It is equally important for corporate counsel to take into account the practical difficulties constituent beneficiaries of the plan may face in enforcing critical advancement rights when the constituents are left defenseless should the protections fail or even if a remedy is merely delayed. Rendering advice in this area is fraught with uncertainty and demands both considerable expertise in numerous legal disciplines and awareness of the latest developments.[80]

B. Client Identification and Related Issues that Often Arise in Representing Entities

From a legal ethics standpoint, lawyers who represent entities must recognize that their client is the entity itself as ABA Model Rule 1.13(a) and the accompanying Comments make clear. Although lawyers for entities communicate with and receive direction from their entities' constituents,[81] it is critical that the lawyers remember that the constituents are not their clients. It is also essential for corporate counsel to take steps to ensure that the constituents themselves do not have the misimpression that corporate counsel represents them personally.

Consider the issues of client confidentiality and attorney-client privilege in the context of a lawyer (including in-house counsel) representing an entity. Rule 1.13 provides that communications between the lawyer and constituents acting in their organizational capacity are protected by Rule 1.6.[82] Comment 2 notes: "[B]y way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6."[83] As the Comment continues, "[t]his does not mean . . . that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly

fees and expenses connected with this representation are all potentially at in-house counsel's own expense. *See supra* note 39.

79. *See* Wing, Fehling & Mammarella, *supra* note 71.

80. *See* Wing & Oringer, *supra* note 1.

81. Model Rules Prof'l Conduct R. 1.13(a) (2020) ("A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."); *see also id*. R. 1.13 cmt. 1 ("An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. 'Other constituents' as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.").

82. *Id*. R. 1.13 cmt. 2 ("When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6.").

83. *Id*.

authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6."[84]

Likewise, the attorney-client privilege generally protects confidential communications between the attorney and constituents made to facilitate legal advice to the entity client. That privilege, however, belongs to the lawyer's entity client and not to the individual non-client constituents.[85] Consequently, corporate counsel requested or instructed to advise an entity's directors and officers with respect to an executive protection plan often find themselves in an awkward and professionally challenging position.

Rule 1.13 recognizes that, when the interests of the entity and those of constituents are generally aligned, the lawyer may represent both the entity and the constituents with the informed consent, confirmed in writing, of the respective clients.[86] However, the Rule also acknowledges that there are times when the interests of the entity and those of a constituent are, or may become, adverse. In these circumstances, a lawyer representing the entity should correct a constituent's misunderstanding of the identity of the lawyer's client (i.e., the entity).[87]

In a similar vein, ABA Model Rule 4.3 provides: "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. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding."[88] Rule 4.3 cautions that lawyers are not to give advice to unrepresented persons

84. *Id.* ABA Model Rule 1.13 applies to both corporate entity clients and unincorporated entity clients. *See*, *e.g.*, ABA Comm. on Ethics & Prof'l Resp. Formal Op. 91-361, at 1 (July 12, 1991) ("A partnership is an organization within the meaning of Rule 1.13. Generally, a lawyer who represents a partnership represents the entity rather than the individual partners.").

85. *See*, *e.g.*, *In re* Grand Jury Subpoena, 274 F.3d 563, 571 (1st Cir. 2001). In that case, a former attorney and two former officers of a corporate subsidiary challenged the decisions of the subsidiary and its parent corporation to waive attorney-client privilege and work product protections on grounds that an existing joint defense agreement precluded the waiver. The court held that the two officers could "mount a claim of attorney-client privilege only if, and to the extent that, [the lawyer] represented them individually. If the only attorney-client privilege at stake is that of their corporate employer, then [the entity's] waiver defeats the claim of privilege. After all, the law is settled that a corporation's attorney-client privilege may be waived by current management. . . . It is often difficult to determine whether a corporate officer or employee may claim an attorney-client privilege in communications with corporate counsel. The default assumption is that the attorney only represents the corporate entity, not the individuals within the corporate sphere, and it is the individuals' burden to dispel that presumption. This makes perfect sense because an employee has a duty to assist his employer's counsel in the investigation and defense of matters pertaining to the employer's business." (internal citations omitted).

86. *See* Model Rules Prof'l Conduct R. 1.13(g) (2020) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.").

87. *See id.* R. 1.13(f) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

88. *Id.* R. 4.3.

"other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."[89]

One important reason for the corporate lawyer to clarify the identity of the client and to correct any misunderstanding a constituent might have about the identity of the client is to avoid the inadvertent creation of an attorney-client relationship with the individual constituent. The test for the existence of an attorney-client relationship may best be described as "the subjective reasonable belief" of the would-be client,[90] even though, as the *Restatement (Third) of the Law Governing Lawyers* recognizes, an attorney-client relationship typically is consensual, with the attorney consenting to the representation.[91] Both aspects of the "subjective reasonable belief" test must be present. Certainly, the would-be client must have a "subjective belief" that the attorney is representing (or is willing to represent) the client with respect to a particular matter, but that belief must be a "reasonable" one based on objective criteria.[92]

In-house corporate counsel work side-by-side with the non-lawyer client constituents who are their business counterparts. These corporate counsel, as well as many outside lawyers, often function as integral members of business teams and provide advice to a wide variety of constituents on the need to correct existing problems and the legality of proposed actions. In these situations, it can be difficult for non-lawyer constituents to recognize that their corporate counsel colleagues represent the entity and are not providing the constituents with individual legal advice. It therefore behooves the lawyers to clarify whom they represent. In addition, it is also important to clearly identify those within the organization who are authorized to direct lawyers in their representation of the organizational client.[93] This is an ongoing concern.

89. *Id.*

90. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. *e* (2000) ("Even when a lawyer has not communicated willingness to represent a client, a client-lawyer relationship arises when the person reasonably relies on the lawyer to provide services, and the lawyer, who reasonably should know of this reliance, does not inform the person that the lawyer will not do so (*see* §14(1)(b); *see also* § 51(2)). . . . In appraising whether the person's reliance was reasonable, courts consider that lawyers ordinarily have superior knowledge of what representation entails and that lawyers often encourage clients and potential clients to rely upon them."); *see also* Span Enters. v. Wood, 274 S.W.3d 854, 858 (Tex. App. 2008) ("An attorney-client relationship is a contractual agreement that can be created by express contract or implied from the actions of the parties. We must determine whether a contract can be implied using an objective standard, looking at what the parties said and did, and we do not consider their unstated, subjective beliefs." (internal citations omitted)).

91. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 14 cmt. *b* (2000).

92. Section 14 of the *Restatement (Third) of the Law Governing Lawyers* provides, in relevant part, that:

> A relationship of client and lawyer arises when: . . . (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either (a) the lawyer manifests to the person consent to do so; or (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services[.]

Id. § 14.

93. Susanna M. Kim, *Dual Identities and Dueling Obligations: Preserving Independence in Corporate Representation*, 68 TENN. L. REV. 179, 180 (2001). Professor Kim further recognizes that: "As a general

C. Ethical Obligations to Directors and Senior Executives as Non-Clients

Clarifying just who is (and who is not) a lawyer's client may be even more difficult when an entity's organizers, directors, or officers request or instruct the lawyer to develop comprehensive executive protection plans. It can be particularly challenging for lawyers to respond to requests to design executive protection plans that provide for the advancement of legal fees, indemnification, and insurance coverage, to "the fullest extent permitted by law,"[94] should the individual constituent be the subject of civil litigation or criminal investigation or indictment. Here, too, a number of Rules of Professional Conduct are implicated.

Assume that the lawyer has established that the entity's individual constituents are not the lawyer's clients and that the lawyer is comfortable that the affected constituents are likewise not confused. Even then, the lawyer nonetheless has a duty under ABA Model Rule 4.1 not to "knowingly . . . (a) make a false statement of material fact or law to a third person [such as a non-client constituent]; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[95]

Some of the most difficult ethical issues arise when an organizational client, acting through its governing body, instructs the lawyer to analyze an executive protection program in place and then evaluate it from the standpoint of providing maximum protection to the entity's directors and covered executives. The affected constituents—i.e., the entity's individual directors and officers—are not the lawyer's clients. On a future "stormy day," the "Cooperation Revolution"

matter, the lawyer may look to the authorized managers of the corporation, namely, the senior executive officers, to speak on behalf of the corporate client. Difficulties arise, however, when the interests of managers and the corporation diverge. . . . The Model Rules recognize the board of directors to be the highest authority in the corporation. Because the corporate client usually makes and voices its final decisions through its board of directors, the corporate lawyer may rely ultimately on the board for guidance in the representation." *Id.* at 181–82.

94. This phrase or equivalent language appears in many corporate bylaws and agreements providing for advancement and indemnification. A duty of an insured entity to indemnify covered individuals to the "fullest extent permitted by law" appears in many D&O insurance policies as a "presumption" underlying the entity's right to indemnification, which coverage generally attaches only after payment of a significant retention. The language has been a part of the Model Business Corporation Act for years. It was inserted to counter the ruling by the late Delaware Chancellor Allen in *Advanced Mining Systems v. Fricke*, 623 A.2d 82 (Del. Ch. 1992). *Fricke* involved an action brought by a corporation against its former president alleging that he had breached his fiduciary duty of loyalty to the company during his tenure in office. *Id.* at 82–84. When the former president sought to compel the corporation to advance legal fees and expenses in connection with his defense, the Chancery Court held that a promise merely to indemnify did not grant an executive a right to advancement. *Id.* at 85. The ruling surprised many practitioners. New York corporate law was and is to the contrary, although the New York statute conditions a right to court-ordered advancement upon a factual showing by the executive that may seriously compromise an accused executive's Fifth Amendment privileges. This is an example of the law's complexity. This impediment to advancement can only be overcome by astute drafting.

95. Model Rules Prof'l Conduct R. 4.1 (2020). As a (hopefully) extreme example, a lawyer should not sit silently when the lawyer hears a human resources director extoll the organization's health insurance plan to a group of employees without mentioning that the policy has a less than conspicuous cancer exclusion.

may result in one or more of those same directors and officers being personally identified as potential or actual targets of criminal prosecution. It may well be in the entity's interests to see those individuals convicted.[96] How should the entity's counsel react?

Consider the frequent example of one or more concerned board members who seek assurance from the entity's in-house counsel that they will be protected against future unknown and currently unanticipated claims. This inquiry goes to the very existence of the "Cooperation Revolution." The lawyer's response may have serious ramifications for constituents when they need those protections most.[97] ABA Model Rule 2.3(a) provides little assistance; it merely recognizes that a lawyer may "provide an evaluation of a matter affecting a client for the use of someone other than the client if the lawyer reasonably believes that making the evaluation is compatible with other aspects of the lawyer's relationship with the client."[98]

Surely this Rule applies to corporate closing opinions addressing routine matters such as the validity of an entity's organization, its governing body's valid adoption of deal documents, and their due execution. But Rule 2.3(a) provides scant comfort to an entity lawyer asked to assure non-client directors and covered executives that an executive protection program in place today will adequately protect them—or even offers the best possible protection—should they be falsely accused of complicity in a crime or fraud against the entity, the government, or a third party by a real malefactor or even an entity's own investigatory counsel.

Application of Rule 2.3(a) would require the lawyer first to determine whether the instructions given by the board with respect to reviewing or drafting an executive protection plan are actually in the best interests of the entity client. That is often going to be the case, as a number of courts have recognized.[99] Even so,

96. As noted above, *see supra* Part III.A, even if an entity's charter provides for indemnification to the "fullest extent permitted by law," disagreements over the reach of the law, the availability of fee advancement, and many other issues may arise.

97. For example, a real issue is presented when an entity constituent in an internal or external investigation of alleged wrongdoing asserts Fifth Amendment protections and, as a result, is fired. In drafting or analyzing the executive protection program, the in-house counsel may need to address that issue up front with officers and directors, so that—at a minimum—the entity and the constituents know what to expect if and when the constituent is a target of an investigation and asserts Fifth Amendment rights.

98. Model Rules Prof'l Conduct R. 2.3(a) (2020); *see also* Murray v. Metro Life Ins. Co., 583 F.3d 173, 177 (2d Cir. 2009) (citing N.Y. Rules Prof'l Conduct R. 2.3(a) and stating that "[n]ot every beneficiary of a lawyer's advice is deemed a client").

99. *See* Wing & Oringer, *supra* note 1, at 1127 n.14, 1130 n.20; William D. Johnston & Elizabeth S. Bradley, *Indemnification and Insurance for Directors and Officers*, Corp. Practice Portfolio Series (Bloomberg BNA Corp. Prac. Portfolio Ser. 54-3d, 2014) (citing and considering both Delaware and Model Act law and discussing differences in legal approach to drafting for advancement between corporate bylaws and alternative entity management agreements and insurance policies). Underscoring the acceptance of Delaware's emphasis on the contractual nature of advancement and mandatory indemnification protections is the lead New York case of *Ficus Investments, Inc. v. Private Capital Management, LLC*, 61 A.D.3d 1 (N.Y. App. Div. 2009). In *Ficus*, a dispute over fee advancement arose in a case brought by a limited liability company against its former chief executive officer alleging misappropriation of company funds and assets. The court held that the defendant CEO was entitled to fee

this first step should not be overlooked because the ultimate beneficiaries of the lawyer's work for the entity client will be the non-client entity constituents. Likewise, the lawyer should consider whether the lawyer's work will "affect the [entity] client's interests materially and adversely," and—if that is the case—the lawyer may not provide the analysis unless the client consents.[100] Granted, considering it is the board that is instructing the lawyer to proceed, the consent already has been impliedly given. As long as the lawyer reasonably believes that it is in the best interest of the entity client to comply with those instructions, the lawyer may go forward.

Now suppose the board goes further: it not only asks the lawyer to evaluate or design an executive protection plan, but also requests the lawyer to advise the constituents independently of the lawyer's representation of the entity, with the sole objective of maximizing their personal protection. The lawyer is being asked, essentially, to provide legal advice to otherwise non-client (and perhaps unrepresented) entity constituents that will obligate the entity to advance defense costs to resist an investigation, on a future "stormy day," of civil or criminal charges that the entity as a whole fervently wishes will succeed. Here, the lawyer is placed in a truly unenviable position.

In the end, while it remains the province of the entity's officers and directors to make the decisions and to instruct corporate counsel on the entity's goals and objectives, corporate counsel is often an integral part of the entity's decision-making process. Consequently, the risks outlined above often cannot be avoided. The following discussion offers ideas for addressing these risks.

IV. Suggestions for Navigating Dangerous Terrain

Whenever an entity's governing body instructs the entity's lawyer, particularly in-house counsel, to evaluate or design an executive protection plan for the exclusive protection of entity constituents, it would be easy to interpret such an instruction as effectively causing counsel to assume the duties of an attorney to individuals he or she does not formally represent. Worse, these kinds of instructions essentially ask counsel to draft programs to protect those individuals from the adverse consequences of a future situation in which conflicts of interest may well exist as a result of the "Cooperation Revolution." It is unlikely that the entity's constituents will appreciate this conflict. As suggested earlier, it is essential for prudent corporate counsel to recognize these and related issues from the outset. Taking appropriate steps on the "clear day" can help to prevent future

advancement pursuant to the company's operating agreement: "Although ultimately Donovan may not be entitled to indemnification, the issuance of injunctive relief against him during this litigation does not bar him from receiving advancement of his expenses under the terms of the Operating Agreement." *Id.* at 10. *Ficus* has been cited for the proposition that New York law looks to the law of Delaware on issues of contractual advancement and indemnification. *See, e.g.*, Ryu v. Hope Bancorp, Inc., 18 Civ. 1236, 2018 U.S. Dist. LEXIS 70509, at *23 n.5 (S.D.N.Y. Apr 26, 2018) (magistrate's decision), *adopted by* 2018 U.S. Dist. LEXIS 169660 (S.D.N.Y.), *aff'd* 786 F. App'x. 271 (2d. Cir. 2019) (summary order). Other states, including those that follow the Model Business Corporation Act, may take different approaches, which is one of the reasons that practice in this area is so challenging.

100. *See* Model Rules Prof'l Conduct R. 2.3(b) (2020).

misunderstandings and mitigate the impact of any disagreements that subsequently may arise.

In our view, the best approach is to educate the constituents about the lawyer's role and fiduciary obligations and, depending on the specific circumstances, obtain informed consent, confirmed in writing, and take the specific steps outlined above: acquire necessary substantive expertise, clarify the identity of the client, communicate the possibility of future conflicts of interest (particularly if there is a change in control of the entity), and convey the limitations on corporate counsel's advice pertaining to executive protection plans in the current legal environment. Perhaps most importantly, documenting associated communications helps mitigate the risk of "stormy day" hazy recollections of what was (or was not) disclosed or discussed, and what instructions the entity's board did (or did not) give to the lawyer.

We consider these steps to be "best practices" rather than ethical mandates. As such, corporate counsel should judge for themselves what measures they should take in particular circumstances. But it is essential for counsel to ensure that there is clarity as to the identity of the client and as to the instructions of what the lawyer is to do. To the extent clarity is lacking, counsel should try to correct any perceived misunderstanding of counsel's role and the limits of the representation.

A. Develop or Obtain Relevant Expertise

First and foremost, it is important for corporate counsel to be sensitive to the complexity of executive protection issues and the number of different legal disciplines they involve. Providing advice in this area is not something to undertake lightly. Doing so requires a significant level of expertise and familiarity with all of the relevant issues. Corporate lawyers who are instructed by entity constituents to provide advice on these matters need to consider whether to spend the time necessary to develop that expertise or, instead, obtain assistance from lawyers who regularly work in these areas. Admittedly, it will probably be the rare occurrence when the executive protection plan representation will go wrong; however, the potential magnitude of the consequences of a plan going wrong are immense. As a result, drafting or advising on an executive protection program is not an area of law in which a corporate lawyer should dabble.

For those who choose to proceed with evaluating an existing executive protection plan or designing a new plan, the ABA's 2021 Checklist for Entity Counsel Supervising the Creation or Renewal of an Executive Protection Program is an invaluable tool.[101] It offers steps to analyze the issues, as they presently exist, pertaining to a combination of the protections in the separate areas of exculpation, advancement, indemnification, and insurance. The Checklist also gives entity counsel an inventory to provide to specialty outside counsel to help ensure that the relevant steps required of the entity have been taken and that known

101. Wing, Fehling & Mammarella, *supra* note 71.

drafting issues have been dealt with. The Checklist is updated as the law develops.

B. Clarify Who Is the Client

Corporate counsel must always keep in mind that the entity itself—not its constituents—is the real client. In-house counsel in particular must remain steadfast in their willingness to remind constituents tactfully, yet firmly, that the lawyer represents the entity and not individual constituents.[102]

Admittedly, establishing and then maintaining in the eyes of non-client constituents the understanding that the entity's lawyer represents the entity and not the individual constituents may be one of the most difficult and sensitive issues facing in-house counsel. In-house counsel and other lawyers who work regularly with entity constituents may want to begin on the "clear day" to lay the groundwork about their role and its limitations, as well as the constituents' own fiduciary duties, before far more uncomfortable conversations need take place. Counsel should be very clear that constituents are not individually or collectively their clients. Conveying this understanding can take place early in counsel's relationship with the entity, especially whenever constituents approach the lawyer with personal legal questions or the constituent makes off-hand remarks referring to counsel as "my lawyer."

It is important for entity lawyers, particularly in-house counsel, to become adept at refraining from providing personal legal advice to constituents, reminding them that in-house counsel represents the entity, and perhaps even having a list of outside lawyers to whom in-house counsel can refer constituents. Where feasible, in-house counsel may want to organize routine training for both new and existing

102. As noted above, *see supra* text accompanying notes 99–100, a lawyer has an ethical obligation to look out for the best interests of the client even where the instructions originate with the entity's governing authority. While in-depth analysis of a lawyer's obligation when a governing authority appears to be acting contrary to the best interests of the entity is beyond the scope of this article, we note that this "looking out for the best interests" of the entity client is itself recognized in Model Rules of Professional Conduct 1.13(b) and (c), which authorize the attorney for the organization, including in-house counsel, to "report up," or even "report out," under certain circumstances:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

constituents to address not only each constituent's fiduciary duties generally but also to explain counsel's role as the lawyer for the entity and not for the individuals. These kinds of training sessions could involve outside counsel so that the message conveyed to the constituents comes from someone other than the in-house lawyer. Perhaps too, having the message conveyed by outside counsel may help constituents realize that even outside counsel with whom they regularly work owe their allegiance to the entity itself rather than to those who hire them.

Counsel should be able to explain not only the ethical obligations they have to their actual client—i.e., the entity—but that they necessarily owe a duty of loyalty to the entity itself rather than individual constituents. In addition, it would be helpful in such discussions for the corporate lawyer to address issues such as attorney-client privilege and the possible future ramifications of a rift between the entity and a particular constituent.

With respect to the client identification issue, it is useful to note the subtle but important distinction between (a) *explaining* a concept to a non-client—here, that an executive protection plan exists and is (or is not) intended to deal with developments and difficulties that may arise as a result of the "Cooperation Revolution"—and (b) *providing legal advice* to the non-client. In that regard, it behooves the prudent corporate lawyer explaining an executive protection plan to remind constituents that the lawyer is not providing the individual any legal advice, but is merely explaining what the plan says or what the plan is intended to cover.

In the context of discussing executive protection plans, a prudent lawyer would set forth in a writing shared among those constituents—and even perhaps a writing that the constituents sign—the lawyer's understanding of who is (and who is not) the lawyer's client(s) and evidencing both the disclosures and explanations that the lawyer provided the constituents on the above-noted issue, along with a recitation of the board's directions to the lawyer following such explanations and disclosures.

Ordinarily, it is ultimately the entity's senior constituents, namely its officers and directors, who decide what is in the entity's best interest. If a "stormy day" arrives, however, documentation of both counsel's disclosures to the board and the board's instructions to counsel will serve both the lawyer and the entity client well.

Laying the groundwork about the roles and responsibilities of an entity's counsel should allow for more comfortable conversations with constituents whenever individual legal issues arise and especially when the governing body asks counsel to draft or review an executive protection program.

C. Explain the Possibility of a Conflict and Obtain Written Consent Where Possible

Ideally, in-house counsel instructed by constituents on evaluating or designing an executive protection program would also explain to the constituents the possibility of a conflict between their individual interests and those of the

entity. This is a difficult discussion at best. No one wants to hear that they will be left on their own if something bad happens. Central to this conversation is the "Cooperation Revolution." Encouraging constituents to seek independent outside counsel (and perhaps offering to facilitate such independent outside representation) is the minimum counsel can do, if for no other purpose than to underscore the severity of the potential conflict. If, despite such disclosures, the directors or other constituents persist in demanding and instructing that in-house counsel provide advice on the protections being made available to them, it would behoove the prudent in-house counsel to have the constituents acknowledge the potential conflict and provide their informed consent, in writing, to waive the possible conflicts between the in-house counsel's duties of loyalty to the entity and counsel's duty to the constituents and covered executives.

D. Be Clear About the Limits of Your Advice

Even if every substantive point of the Checklist is considered and properly included in the resulting executive protection plan, there is, of course, no guarantee that courts will respect the drafters' and beneficiaries' intent. Prosecutorial policies continue to wax and wane. Judicial decisions and insurance law constantly evolve and develop nuances that the Checklist has not expressly considered. No lawyer can guarantee that all of the drafting suggestions that are recommended will be followed by judges who are asked to enforce the law in an atmosphere of entity hysteria, public opprobrium, or just plain "bad facts." It is important to be clear about the limits of legal advice in this complex area.

Conclusion

The "Cooperation Revolution" has fundamentally altered the relationship between directors and officers, on the one hand, and the entities they serve on the other. Tensions between entities and their constituents are inevitable whenever allegations of wrongdoing arise, an investigation is initiated, or law enforcement authorities come knocking. Litigation over efforts to maximize executive protection has revealed a morass of issues pertaining to governance, indemnification, fee advancement, and insurance law.

It is the board's obligation to make the ultimate decisions on the nature and scope of executive protection plans, but boards almost invariably turn to corporate counsel for assistance. When boards call for help, corporate counsel necessarily enter into complex substantive areas fraught with potential ethical hazards.

There are no easy answers when it comes to determining how to navigate these treacherous waters. The first step for counsel is to remind the board that it has the responsibility to determine whether the entity will provide contractually mandated protections to officers and directors at all. Once the board chooses to do so (as it usually does) and instructs counsel to oversee the task, prudent counsel should confirm that direction in writing. Counsel then need to recognize the risks associated with following these instructions, as well as attendant ethical

obligations, and take steps to address them. Even where the entity's charter already contains a "fullest extent" provision, counsel need to be cognizant of the perils inherent in interpreting the vague protection such a provision affords individual executives, as well as the complexities involved in enhancing them by means such as improved bylaws and insurance coverage. Counsel can address these risks by acquiring the appropriate expertise themselves or with assistance from other lawyers who are expert in the relevant fields. Counsel should help constituents understand that counsel represents the entity rather than individuals, obtain informed consent where appropriate, and clarify the limits of their advice. By taking these kinds of steps, entity counsel go a long way toward offering the best possible assistance to their clients and appropriately protecting themselves.