804:How to Respond to a Government Investigation/Inquiry: The First 30 Days

Stuart A. Alderoty
Chief Litigation Counsel
American Express

Anthony Boone
Associate General Counsel, Retail Operations—Full Line Stores
Sears, Roebuck and Co.

Thomas A. Hanusik
Senior Counsel for Securities Fraud
U.S. Department of Justice, Criminal Division and Fraud Section

Thomas F. O'Neil III
Chair, Governement Affairs Practice Group
Piper Rudnick LLP

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).
Materials may not be reproduced without the consent of ACC.
Reprint permission requests should be directed to James Merklinger at ACC: 202/293-4103, ext. 326; merklinger@acca.com

Faculty Biographies

Stuart A. Alderoty

Stuart A. Alderoty is the chief litigation counsel for American Express Company in New York, where he manages all domestic litigation for American Express and all its affiliates and subsidiaries.

Prior to joining American Express, Mr. Alderoty was a litigator in private practice with LeBoeuf, Lamb, Greene & MacRae. While at LeBoeuf, he served as special counsel to the court-appointed independent administrator of the International Brotherhood of Teamsters as part of the government's efforts to rid that union of organized crime influences. In 1993, he was appointed by Attorney General William P. Barr as a special assistant United States attorney in connection with an independent counsel investigation of loans by Bacna Nazionale del Lavoro to Iraq ("Iraqgate").

Mr. Alderoty has lectured on privilege issues and taught legal writing and appellate advocacy at Seton Hall Law School as an adjunct professor.

Anthony Boone
Associate General Counsel, Retail Operations—Full Line Stores
Sears, Roebuck and Co.

Thomas A. Hanusik

Thomas A. Hanusik is senior counsel for securities fraud with the Fraud Section, Criminal Division, of the Department of Justice in Washington, DC. Mr. Hanusik was one of the original members of the Enron Task Force and prosecutes and supervises corporate and securities fraud cases in venues throughout the country.

Prior to joining the Department of Justice, Mr. Hanusik was senior counsel with the SEC's Division of Enforcement in Washington, DC where he investigated and prosecuted numerous insider trading and financial fraud cases. Before joining the SEC, he was in private practice in New York.

Mr. Hanusik received his AB from Fordham University and his JD from Duke University School of Law.

Thomas F. O'Neil III

Thomas F. O'Neil III is a partner, chair of the government affairs practice group, and cochair of the government controversies practice group at Piper Rudnick LLP is Washington, DC. His areas of practice include corporate governance and protective practices, government affairs, government controversies, litigation, class action litigation, privacy litigation, and nonprofit and philanthropy. He provides strategic advice and business-focused advocacy to privately held and publicly-traded companies whose business practices are the subject of congressional oversight, regulatory enforcement, or criminal investigations.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

Early in his career, Mr. O'Neil served as a clerk to U.S. District Judge Alexander Harvey II (D - Md). Following two years in private practice, he was an assistant U.S. attorney for the District of Maryland. Mr. O'Neil was a partner at an AmLaw 100 firm, where his practice included white collar criminal defense and complex civil litigation, with a particular emphasis on internal corporate, congressional, grand jury, and regulatory enforcement investigations of business practices in the aviation, biotechnology, health care, pharmaceutical, medical device, insurance, and financial service sectors. In 1995, he left private practice to become the vice president and chief litigation counsel of MCI Communications Corporation. He subsequently held several positions at the company and, as the general counsel of the MCI Group, was responsible for legal, regulatory, and public policy matters affecting the company. He managed a large in-house legal department that was responsible for all corporate compliance, employment, investigatory, and civil litigation matters at the company.

Mr. O'Neil speaks and publishes regularly on a broad range of topics. He is a member of the International Bar Association, the advisory board of Georgetown Corporate Counsel Institute, the board of visitors of the Georgetown University Law Center, and the Serjeants Inn Law Club, and he is a trustee at The Contemporary Museum.

Mr. O'Neil received an AB, magna cum laude, from Dartmouth College and was a Rufus Choate Scholar. He earned his JD from Georgetown University Law Center and was an associate editor of *Law Review: The Tax Lawyer*.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

ACCA PRESENTATION
HOW TO RESPOND TO A GOVERNMENT INVESTIGATION/INQUIRY: THE FIRST THIRTY DAYS

STUART ALDEROTY - - AMERICAN EXPRESS CHIEF LITIGATION COUNSEL

PROTECTING APPLICABLE PRIVILEGES

As an in-house lawyer one of the first things you need to concern yourself with when faced with a Government investigation or inquiry is the appropriate protection of applicable privileges.

Here are the basics:

Attorney-Client Privilege: Requires that the communication be a confidential one between lawyer and client for the purpose of enabling the lawyer to render legal advice.

Anticipation of Litigation (Work-Product): Materials prepared "by or for another party" in anticipation of litigation are protected, absent a showing of "substantial need" for the materials.

Self-Evaluation Privilege: Not broadly recognized, though it still exists to some extent in some jurisdictions.

You need to consider which of these privileges may apply before you start gathering information, documents and resources to respond to the Government. The record you develop early on may very well determine what privileges are preserved later.

The privilege belongs to the company, not the employee and that needs to be made clear.

Be mindful of sharing privileged information with third parties including Government regulators and outside auditors. Any sharing of information with individuals outside the "control group" for non-privileged purposes will result in a waiver. For that reason think hard about the form the internal investigation will take and who will conduct the internal investigation. At a minimum ask: (1) Do you want to create a written report or do you want all reports to be verbal?; (2) Do you want to hire outside counsel to conduct the investigation?

Be clear (whenever appropriate) that the work you are doing internally to respond to the Government is being conducted at the direction of in-house counsel so that in house counsel can render legal advice to the company.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

SUGGESTED TEMPLATES:

LETTER AUTHORIZING INVESTIGATION FROM THE GCO TO THE SENIOR BUSINESS PERSON WHOSE BUSINESS IS IMPACTED BY THE INVESTIGATION

This confirms your authorization to have the General Counsel's office conduct an investigation into [describe nature of investigation]. This investigation is being conducted for the express purpose of rendering legal advice in connection with the Government's investigation/inquiry [add details]. [If appropriate add the following.] The investigation is also being conducted in anticipation of litigation, including regulatory action. [Add specifics on threats of litigation or regulatory action if available.] It is our intention that this investigation and the advice I provide to you will be protected by the attorney-client, work-product, and any other privileges that may be applicable.

In undertaking this investigation the GCO has directed [fill name of person(s)] to assist in the investigation. [Person(s)] will act at my direction only.

[If appropriate because the investigation is also conducted in anticipation of litigation or regulatory action add] Since this investigation is being conducted, in part, in anticipation of litigation and regulatory action it is important that no documents pertaining to the subject matter be destroyed, no matter in what form, including electronically stored documents. I will prepare an appropriate notice to all those who may possess pertinent documents informing them of this.

Once the investigation is completed, the GCO will report back to you to render legal advice on the findings of the investigation.

LETTER FROM GCO TO PERSON(S) ASSISTING IN INVESTIGATION

This confirms the GCO's request that you assist in its investigation of [insert specifics].

You will act at my direction and if you assign staff to assist you they too will work only at my direction.

The investigation is confidential and may only be discussed with the GCO.

In assisting in this investigation, all written work product, including, but not limited to any summaries, work papers, interview notes, shall be preserved and shall be returned directly to me, and any reports will be directed to me only. Once the investigation is complete the GCO will report to management for the purpose of rendering legal advice on the findings of the investigation.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

All documents generated in connection with the investigation shall be marked: "CONFIDENTIAL- -ATTORNEY/CLIENT PRIVILEGED - - WORK PRODUCT PROTECTED."

All interviews shall be conducted with GCO present or, if counsel cannot be present, interviewees will receive a written explanation from the GCO regarding: (1) the purpose of the investigation; (2) the privileged nature of the interview; (3) the confidential nature of the interview.

[If appropriate add] Since the investigation is being conducted, in part, in anticipation of litigation and regulatory action it is important that no documents pertaining to the subject matter be destroyed, no matter what form, including electronically stored documents.

MEMO FROM GCO TO PERSONS WHO WILL BE INTERVIEWED

The GCO at the request of the Company, and as the Company's attorney, is currently conducting an investigation of [provide general description] on behalf of the Company for the purpose of rendering legal advice to the Company. As part of the investigation, the GCO and/or at the GCO's direction [name of designee] will be interviewing you and others. [Attached is a memo from [business leader] requesting your cooperation.]

Please be advised that the:

1. The investigation is confidential and it is important that you not disclose what has been discussed in the interview with anyone else;
2. The interview is protected by the attorney client privilege; and
3. Since the Company is the GCO's client the Company "owns" the privilege and may, if it decides, waive the privilege at some future date.

It is also important that you do not destroy or discard any documents (no matter in what form, including electronically stored documents) pertinent to the subject matter of this investigation.

WILL YOUR COMPANY WAIVE THE PRIVILEGE WHEN THE GOVERNMENT ASKS YOU?

Even if you do everything right in preserving the privilege the Government may still ask you to waive the privilege. That is why you have to think very seriously about how you do the internal work in response to the Government's inquiry. What do you do when the Government asks you to waive the privilege?

You need to get familiar with the DOJ's January 20, 2003 memorandum (the "Thompson Memo"). In deciding whether to charge a company the DOJ will consider the company's

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

timely and voluntary disclosure of wrongdoing and its willingness to cooperate, including its willingness to disclose the complete results of its investigation and its willingness to waive the attorney-client and work product protection.

Also consider the proposed amendments to the U.S. sentencing guidelines (Voluntary waiver of privileges may be considered a reduction factor in sentencing if such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.)

Also look at SEC Release No.34-44969, October 23, 2001 (Seaboard Guidelines). The Commission does not view a company's waiver of a privilege as an end in itself, but only as a means (where necessary) to provide relevant and sometimes critical information to the Commission staff.

You can try to negotiate ways to share the underlying information with the Government without waiving the privilege. Make the witnesses that you interviewed available to the Government for independent interviews. Provide the underlying facts. In other words, make all the information available without sharing the actual privileged investigation or conclusions

FREEDOM OF INFORMATION ACT CONCERNS

Understand that third parties may access information you share with the Government through the FOIA.

Seek confidential treatment whenever you can. Getting confidential treatment does not automatically protect the information, but it does provide a procedure to have people think about the issue when they get an FOIA request. This may allow you the opportunity to weigh in and appeal an adverse decision.

PRESERVE YOUR DOCUMENTS - - THE COVER UP (OR SUGGESTION OF A COVER-UP) IS ALWAYS WORSE THAN THE "CRIME"

You know the obstruction of justice concerns by now: Arthur Anderson, Frank Quattrone at CSFB, Martha Stewart.

Sarbanes Oxley arguably raises the stakes. Section 1102 and 802 makes it a crime punishable by fine and imprisonment of up to 20 years to corruptly alter, destroy, mutilate or conceal a record, document or other object "with the intent to impair the object's integrity or availability or use in an official proceeding" or to obstruct or impede an official proceeding, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States. NOTE: There is no requirement of a "pending proceeding."

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

Read and know the series of decisions issued by Judge Shira A. Scheindlin in Zublake v. UBS Warburg LLC. The latest was issued July 20, 2004. These decisions are a great cautionary tale and provide practical guidance on the retention of electronic data in the face of a threat of a claim (in that case a private lawsuit). The decisions address "counsel's obligation to ensure that relevant information is preserved by giving clear instructions to the client to preserve such information and, perhaps most importantly, a client's obligation to heed those instructions.." See also, Residential Funding Corp. v. DeGeorge Financial Corp, 53 Fed. R. Serv. 3d 1105 (2d Cir. 2002); Stevenson v. Union Pacific Railroad Co., 354 F. 3d 739 (8th Cir. 2004).

The General Rules (once you know of a claim or threat) are:

- You must suspend your routine document retention/destruction policy.
- You must put in place a "litigation hold" to ensure preservation of relevant documents.
- After the issuance of the "hold" take steps to ensure: (1) that all relevant information (or at least all sources of relevant information) is identified; (2) that relevant information is retained on a continuing basis; and (3) that relevant non-privileged material is produced.
- As a general rule, the "hold" does not apply to back-up tapes (e.g. those typically maintained solely for the purpose of disaster recovery).
- On the other hand, if backup tapes are accessible (i.e. actively used for information retrieval), then such tapes would likely be subject to the "hold."
- If you can identify where particular employee documents are stored on back-up tapes, then the tapes storing the documents of "key players" should be preserved.
- Move "key players" to protected segregated servers.

To effectively follow these rules you must:

- Become familiar with the company's document retention policies as well as the company's data retention architecture including computer systems, both in respect to active and stored data. To do this effectively you have to get your technology group involved.
- Talk to "key players" to understand how they personally store their data.
- Run a system-wide key word search if possible.
- Periodically re-issue "hold" reminders.
- Communicate and focus of "key players."
- Make sure that anyone who gets the "hold notice" understands the implications for electronic data.
- In other words: Understand! Communicate! Follow-up!

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

SUGGESTED NOTICE RE: RETAING ALL DOCUMENTS

TO: [Anyone who may have documents]
CC: (Records Retention Department)

Until further notice it is important that you do not destroy or discard any documents (no matter in what form, including electronically stored documents) relating to [brief description]. You must also preserve any documents that may otherwise be destroyed in the regular course of business pursuant to the Company's document retention schedules. If you cannot store any documents because of space limitations or other concerns please contact [fill in] to make alternative arrangements.

You should preserve paper as well as electronically stored documents. Examples of electronic documents include e-mail, web-based files, files stored on a PDA, and any word-processing, spreadsheet or electronically imaged documents, whether stored on computer desktops, shared drives, servers or portable media such as diskettes or CDs. These examples are illustrative only, and should not be considered an exhaustive list of all possible electronically stored documents. For assistance in preserving such files, please contact the GCO and/or the Technologies group (see contact names below).

The time to think about documents is before they are created. Be proactive: Roll out "Think Before You Write Training" to personnel that are most likely to be creating sensitive documents. Improve "litigation instincts" so that personnel understand how documents are used and abused in litigation and regulatory proceedings. Emphasize the basic rules (and give some concrete examples).The basic rules are:

1. Don't Write Unless You Have To
2. Before you write think about what you are writing and ask: (1) How would this look on the front page of the Wall Street Journal with my name on it?; and (2) How would I feel being cross-examined under oath about this document?
3. If you have to write, protect what you write and limit distribution.
4. Know the basics of privileges.
5. Protect the privileges.
6. Don't destroy documents that are relevant to existing or threatened litigation or regulatory proceedings.

RESERVE SETTING

You need to ask yourself: Is the investigation or inquiry of such a nature that the company may need to reserve for contingent losses (fines, etc.) and continually ask yourself that question as the investigation unfolds.

LOSS CONTINGENCY RESERVE SETTING PRINCIPLES

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

FAS 5

The FASB's Statement of Financial Accounting Standards No. 5, "Accounting for Contingencies," (FAS 5) (paragraph 8) provides: An estimated loss from a loss contingency shall be accrued if: (a) information is available that it is probable that an asset has been impaired or a liability has been incurred; and (b) the amount of the loss can be reasonably estimated.

Examples of loss contingencies include "pending or threatened litigation," and "actual or possible claims and assessments." FAS 5 (paragraph 4).

"Those conditions are not intended to be so rigid that they require virtual certainty before a loss is accrued." FAS 5 (paragraph 84).

PROBABILITY

Probable" means that "the future event or events are likely to occur." FAS 5 (paragraph 3). Contrast "reasonably possible" which means "the chance of the future event or events occurring is more than remote but less than likely," and "remote" which means "the chance of the future event or events occurring is slight." Id.

Factors that should be considered in determining "probability" include (FAS 5 paragraph 36):

The nature of the litigation, claim or assessment
The progress of the case
The opinions and views of legal counsel and other advisors
The experience of the company in similar cases
The experience of other companies in similar cases
Any decision of the company as to how it intends to respond (e.g. vigorously defend or settle)

FAS 5 (paragraph 38) states: "An investigation by a governmental agency, if enforcement proceedings have been or are likely to be instituted, is often followed by private claims for redress, and the probability of their assertion and the possibility of loss should be considered in each case."

In the context of environmental liabilities (that often present multiple potential site liabilities and many uncertainties) the American Institute of Certified Public Accountants provided that the probability condition is met if: (1) litigation seeking to hold the company responsible has commenced or it is probable that such a claim will be made; and (2) based on available information it is

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

probable that the outcome will be "unfavorable" meaning the company "will be held responsible for participation in the remediation process." AICPA Statement of Position 96-1.

ESTIMATABLE

Condition (b) does not delay accrual until only a single amount can be reasonably estimated. FASB Interpretation No. 14 (paragraph 2).

When the reasonable estimate is a range condition (b) is met and if some amount within that range appears to be a better estimate than any other amount within the range than that amount shall be used. Id. (paragraph 3).

When no amount within the range is a better estimate than any other amount the minimum amount in that range shall be accrued. Id.

In a the context of environmental clean up costs the SEC cautioned that "in light of the growing amount of available data on the costs of environmental liabilities, any range of estimates should no longer have zero as the low end of the range." 11-SPG Nat. Resources & Env't 31; SEC Staff Accounting Bulletin 92. It should be noted that the SEC's view was in the context of probable liabilities for which sufficient remediation cost information was available to enable estimations.

DISCLOSURE

"If an unfavorable outcome is determined to be reasonably possible but not probable, or if the amount of loss cannot be reasonably estimated, accrual would be inappropriate, but disclosure would be required by paragraph 10" of FAS 5 (paragraph 37). Disclosure is subject to whether the issue in question is material.

"If no accrual is made for a loss contingency because one or both of the conditions in paragraph 8 are not met, or if an exposure to loss exists in excess the amount accrued pursuant to the provisions of paragraph 8, disclosure of the contingency shall be made when there is at least a reasonable possibility that a loss or an additional loss may have been incurred. The disclosure shall indicate the nature of the contingency and shall give an estimate of the possible loss or range of loss or state that such an estimate cannot be made." FAS 5 (paragraph 10).

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

804: How to Respond to a Government Investigation/Inquiry: The First 30 Days

Tom Hanusik

Senior Counsel for Securities Fraud
Fraud Section, Criminal Division
U.S. Department of Justice

What guides us?

The Thompson Memo

Federal Prosecution of Business Organizations

Deputy Attorney General Larry Thompson,
Chairman of the Corporate Fraud Task Force
January 20, 2003

> "While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself"

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

ACC Association of Corporate Counsel

Thompson Memo Factors

- **nature and seriousness of the offense** — risk of harm to the public
- **pervasiveness of wrongdoing** — corporate management
- **history of similar conduct** — prior criminal, civil, and regulatory enforcement actions
- **timely and voluntary disclosure of wrongdoing —** self report, proactive or reactive
- **cooperation with the government** — helping us catch the bad guys
- **compliance program —** existence and adequacy
- **remedial actions** — implement/improve compliance program, discipline or terminate wrongdoers, pay restitution
- **collateral consequences** — to shareholders, pension holders, and non-culpable employees
- **adequacy of the prosecuting individuals** — no trade offs
- **adequacy of non-criminal remedies** — civil or regulatory enforcement actions

ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago

ACC Association of Corporate Counsel

The key factor in the first 30 days: summed up in three words:

- COOPERATION
- COOPERATION
- COOPERATION

ACC's 2004 Annual Meeting: The New Face of In-house Counsel October 25-27, Sheraton Chicago

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

Cooperation = working together for a mutual benefit

- Government benefit: catch bad guys quickly
  - serves justice
  - restores faith in markets
  - deterrent value
- Company benefit: credit for cooperation
  - charging decision
  - type of remedy
  - sentencing

What benefits the government?

HELP US CATCH THE CROOKS

What happened?
Why it happened?
How it happened?
Who did it?
Evidence to support

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

How much Cooperation is enough?

Like being Guilty
Like being Pregnant

You can't do it just a little bit

All or nothing

The First 30 Days: Establish a Dialogue

- Consent Search/Warrant: work with us
  - Reasonable copying to keep business operational
  - Provide guidance to minimize disruption
- Subpoena: Document Retention/Collection
  - Confirm preservation
    - Secure from suspected wrongdoers
    - Destruction/alteration in contemplation of a federal inquiry = 18 USC 1519 felony violation
    - PAPER and ELECTRONIC Files
      - Twins separated at birth
  - Discuss organization/production
  - Produce a "KEY DOX" file
    - Not 100 boxes, not the warehouse
    - Probably 1 or 2 binders

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

The First 30 Days (cont.)

- Organizational Chart
- Employee Witnesses
  - Tell everyone to cooperate
  - Impose Sanctions for non-cooperation
  - Do not make overly broad assertions of representation

The First 30 Days (cont.)

Internal Investigation

- Help or hurt Government
  - Responsibility to markets
- Limited or broad
- Witnesses to avoid
- International Employees
- Will you generate a report?
- Will you produce it?

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

The First 30 Days (cont.)

- Waiver Issues
  - Not an absolute requirement
  - Extent is negotiable
    - We want the facts
    - Witness statements/summaries
    - Key documents
    - Advice of counsel
      - To do or not to do

BE CREATIVE – GET US THE FACTS

The First 30 Days (cont.)

- Compliance Program
  - Cover the conduct at issue?
  - How enforced?
  - Dissemination and Training
  - Periodic Certifications
  - Independent reporting of violations
  - Adequate resources to investigate

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

The First 30 Days (cont.)

- Whistleblowers
  - No retaliation
    - 18 USC 1513(e) (persons)
    - 18 USC 1514A (issuers)

The First 30 Days (cont.)

- CEO/CFO bonuses
- Stock trading
  - By those involved
  - 10b5-1(c) Trading Plans
- Extraordinary Payments
  - Officers/employees/directors/agents

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

ACC Association of Corporate Counsel

The Next 30 Days . . . .

The End.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

This article is scheduled to be published in Volume 8, Issue 2 of *NY Litigator* magazine, the official publication of the Commercial and Federal Litigation Section of the New York State Bar Association. We thank *NY Litigator* for agreeing to permit re-publication of this article as part of these materials."

TRUTH OR DARE: Navigating the Minefield of Voluntary Disclosures
By Thomas F. O'Neil III and Eliot J. Kirshnitz

The most recent era of corporate scandals has only increased the expectation by federal and state prosecutors and regulatory enforcement authorities that corporations seeking leniency will voluntarily disclose, promptly upon discovery, any problematic conduct and will cooperate fully during any ensuing investigations.[1] Senior management and boards of directors, moreover, now routinely investigate concerns voiced by internal auditors, compliance officers, regulators and putative whistleblowers. Consequently, a corporation or a Special Committee of a Board of Directors is likely to confront the question of whether to disclose to enforcement officials the findings and conclusions generated by a highly confidential and comprehensive internal probe. That dilemma raises the critical question of whether any such revelation constitutes a waiver of evidentiary privileges that could later haunt a company in future ancillary proceedings, such as class actions, commercial litigation or parallel enforcement or debarment inquiries. Equally important is the scope of the waiver: is it confined to the materials revealed or does it arguably extend to all related information and corporate records?

Recent case law makes clear that in deciding whether to self-police and/or self-report, companies must assume that a voluntary disclosure of factual findings and analytical work product will be deemed a waiver of one or more privileges.[2] But in an ongoing effort to reconcile incongruous policy considerations, courts have applied the doctrines of selective and partial waiver. The first "permits the client who has disclosed

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

privileged communications to one party to continue asserting the privilege against other parties."[3] The second enables "a client who has disclosed a portion of privileged communications to continue asserting the privilege as to the remaining portions of the same communications."[4] This article delineates the parameters of the relevant privileges, traces the evolution and likely trajectory of these doctrines, and reviews the current positions of various enforcement agencies with respect to voluntary disclosures.

I. OVERVIEW

A. The Attorney-Client Privilege

The attorney-client privilege protects "communications between an attorney and a client, made in confidence, for the purpose of obtaining legal advice or services from the attorney."[5] Judge Cedarbaum recently enunciated the elements of the privilege:

> (1) [W]here legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor, (8) except the protection be waived.[6]

The attorney-client privilege seeks to safeguard a client's ability to obtain informed legal advice.[7] By safeguarding communication between a client and her counsel, it encourages "full and free discussion, better enabling the client to conform h[er] conduct to the dictates of the law and to present legitimate claims and defenses if litigation ensues."[8]

B. The Work Product Doctrine

The work product doctrine generally bars a litigant from discovering material "obtained or prepared by an adversary's counsel in the course of his legal duties, provided that the work was done with an eye toward litigation."[9] In short, a party may discover:

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

> documents and tangible things … prepared in anticipation of litigation … by or for another party or … that other party's representative … only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.[10]

At its core, the doctrine "shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[11] Thus, while factual materials falling within the scope of the doctrine may be discovered upon a showing of substantial need, an attorney's mental impressions, conclusions, opinions, and legal theories — "core" or "opinion" work product — are more sacrosanct.[12] The work product doctrine promotes the adversary system by "enabling attorneys to prepare cases without fear that their work product will be used against their clients."[13]

C. The Self-Evaluative Privilege

The so-called self-evaluative privilege[14] seeks to encourage "self-improvement through uninhibited self-analysis and evaluation."[15] It is grounded on the notion that "disclosure of documents reflecting candid self-examinations will deter or suppress socially useful investigations and evaluations or compliance with the law or with professional standards."[16] Some courts have, therefore, held that materials reflecting self-appraisals and proposed remedial measures are presumptively protected from discovery.

Neither the Supreme Court nor the Second Circuit has determined whether the privileged should be recognized as a matter of federal law, and the privilege has "led a checkered existence in the federal courts."[17] Documents and information subject to this qualified privilege must

> [first], result from a critical self-analysis undertaken by the party seeking protection; second, the public must have a strong interest in preserving the free flow of the type of information sought; finally, the information must be of the type whose flow would be curtailed if discovery were allowed.[18]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

Even those courts that have recognized the privilege have "limited its reach and declined to utilize it to block production of purely factual materials."[19] Hence, it applies only to the analysis and recommendations resulting from the self-evaluations and not the underlying facts discovered during the investigation.[20] In addition, it may not be asserted against the government in civil litigation[21] or in administrative[22] or grand jury proceedings.[23]

E. The Law of Waiver

Because protections from disclosure "obstruct the truth-finding process," they have long been narrowly construed, [24] and a waiver analysis depends on the nature of the privilege asserted and its fundamental purpose.[25] In short, an assertion of an evidentiary privilege or doctrine may be sustained only so long as it promotes the underlying rationale; it will be waived "when it no longer serves its useful purpose."[26] What follows is an overview of the circumstances that typically constitute a waiver of the key privileges discussed above.

1. The Attorney-Client Privilege

Because the attorney-client privilege seeks to encourage candor between clients and their counsel, it protects only those communications that are necessary to obtain informed legal advice, "which might not have been made absent the privilege."[27] Accordingly, courts generally hold that "any voluntary disclosure of such a privilege is inconsistent with the confidential relationship and thus waives the privilege."[28] As one court explained:

> If clients themselves divulge such information to third parties, chances are that they would also have divulged it to their attorneys, even without the protection of the privilege. Thus, once a client has revealed privileged

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

> information to a third party, the basic justification for the privilege no longer applies.[29]

2. The Work Product Doctrine

The work product doctrine protects the adversary system rather than preserving confidentiality and, therefore, the doctrine "is not automatically waived by any disclosure to a third party."[30] Given its purpose, "only disclosing material in a way inconsistent with keeping it from an adversary waives work product protection."[31] If a party "allows an adversary to share the otherwise privileged thought processes of counsel, the need for the privilege disappears."[32]

Generally, to constitute a waiver as a matter of law, the disclosure must be "inconsistent with maintaining secrecy against opponents."[33] Thus, the doctrine is not waived where the disclosing party has a reasonable expectation that its disclosure will remain confidential vis-à-vis an adversary.[34] The courts have recognized two situations in which such a reasonable expectation of privacy exists: (1) where the disclosing party and the recipient "share a common interest in developing legal theories and analyzing information"; and (2) where the disclosing party and the recipient "have entered into an explicit agreement that the [recipient] will maintain the confidentiality of the disclosed materials."[35] Not surprisingly, then, over the past several decades, subjects and targets of criminal and regulatory enforcement investigations have entered into written joint defense agreements to bolster their assertions of the work product doctrine.[36]

3. The Self-Evaluative Privilege

While there is a dearth of case law analyzing waiver of the self-evaluative privilege, one court has observed that:

> if a party has conducted a confidential analysis of its own performance in a matter implicating a substantial public interest, with a view towards

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

> correction of errors, the disclosure of that analysis in the context of litigation may deter the party from conducting such a candid review in the future.[37]

The privilege is grounded on the policy that compelling a party to disclose the results of a confidential self-examination will chill future voluntary self-critical analysis.[38] Thus, it may be argued that the circumstances constituting waiver of the self-evaluative privilege should be analogous to those constituting waiver of the attorney-client privilege, and the few cases in the Second Circuit to touch on this issue — albeit without any analysis — appear to be in accord.[39]

II. The Selective Waiver Doctrine

While the case law concerning selective waiver undeniably is "in a state of hopeless confusion,"[40] it is helpful to review the decisions that have grappled with the concept.

A. The Seminal Eighth Circuit Ruling

In 1978, the Eighth Circuit became the first Circuit Court of Appeals to recognize the doctrine of selective waiver.[41] That case, *Diversified Industries, Inc. v Merideth*, arose out of a proxy fight, and, among other things, alleged that Diversified had maintained a slush fund to pay bribes to obtain business.[42] The company retained outside counsel to conduct a confidential internal inquiry and the law firm produced an internal report summarizing its findings and conclusions.[43] In the meantime, the United States Securities and Exchange Commission (the "SEC" or the "Commission") initiated its own investigation of Diversified's business practices, and, in response to a Commission subpoena, Diversified voluntarily disclosed its internal report to the SEC.[44] One of the firms that allegedly had been harmed thereafter brought a civil action against Diversified and sought production of the report.[45] The district court held that the document was not

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

protected by either the attorney-client privilege or the work product doctrine, and a three-judge panel of the court of appeals affirmed that ruling.[46]

On rehearing *en banc*, the Eighth Circuit reversed, holding, first, that the report was indeed protected by the attorney-client privilege.[47] The court then turned to the question "whether Diversified [had] waived its attorney-client privilege with respect to the privileged material by voluntarily surrendering it to the SEC pursuant to an agency subpoena."[48] The Eighth Circuit concluded that, because the document was disclosed "in a separate and non-public SEC investigation," only a "selective waiver" had occurred, and the document was shielded from discovery by other parties.[49] As a matter of policy, the court stressed the importance of encouraging publicly-traded companies to self-police their operations and business practices:

> To hold otherwise may have the effect of thwarting the developing procedure of corporations to employ independent counsel to investigate and advise them in order to protect stockholders, potential stockholders, and customers.[50]

Because the court of appeals determined that the report had not been prepared in anticipation of litigation, it did not adjudicate the applicability of the selective waiver doctrine to attorney work product.[51]

B. The Aftermath of *Diversified*

Three years later, the Court of Appeals for the District of Columbia Circuit expressly rejected *Diversified*, finding the selective waiver doctrine "wholly unpersuasive."[52] In *Permian Corp. v. U.S.*, Circuit Judge Mikva, writing for the panel, held that a company's voluntary disclosure of documents to the SEC effectively waived any protection afforded by the attorney-client privilege, rendering the materials

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

discoverable by the U.S. Department of Energy in other administrative litigation.[53] The court squarely disagreed with the rationale enunciated in *Diversified*:

> The privilege depends on the assumption that full and frank communication will be fostered by the assurance of confidentiality …. The Eighth Circuit's [selective waiver] rule has little to do with this confidential link between the client and his legal advisors. Voluntary cooperation with government investigations may be a laudable activity, but it is hard to understand how such conduct improves the attorney-client relationship. If the client feels the need to keep his communications with his attorney confidential, he is free to do so under the traditional rule by consistently asserting the privilege, even when the discovery request comes from a "friendly" agency.[54]

The District of Columbia Circuit Court also perceived the selective waiver doctrine as inherently unfair, inasmuch as it would allow a party to "pick and choose among his opponents, waiving the privilege for some and resurrecting [it] to obstruct others, or to invoke [it] as to communications he has already compromised for his own benefit."[55]

Soon thereafter, the same court addressed the "harder question" whether the selective waiver doctrine shields attorney work product from discovery, and it answered that question in the negative.[56] In *In re Subpeonas Duces Tecum*, the District of Columbia Circuit held that a corporation cannot selectively assert the work product doctrine with respect to an internal investigative report produced to the SEC in connection with that agency's voluntary disclosure program.[57] The opinion rested on three factors. First, the court was convinced that the adversary system would "not be well served by allowing [parties] the advantages of selective disclosure to particular adversaries, a differential disclosure often spurred by considerations of self interest."[58] In other words, when the company decided to participate in the Commission's voluntary disclosure program, it relinquished "some of the traditional protections of the adversary system in order to avoid some of the traditional burdens that accompany adversary

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

resolution of disputes, especially disputes with such formidable adversaries as the SEC."[59] Second, when the corporation disclosed the internal report to the Commission, it had no reasonable expectation that the agency would maintain the confidentiality of the materials.[60] Finally, the court once again rejected the Eighth Circuit's rationale in *Diversified*:

> [W]e cannot see how "the developing procedure of corporations to employ independent counsel to investigate and advise them" would be thwarted by telling a corporation that it cannot disclose the resulting reports to the SEC if it wishes to maintain their confidentiality.[61]

Significantly, the court left open the possibility that a party could "insist on a promise of confidentiality before disclosure to the SEC" as a means of protecting attorney work product from future disclosure by third parties.[62]

At least four other federal appellate courts have endorsed these rulings, declining to recognize the selective waiver doctrine with respect to both the attorney-client privilege and the work product doctrine. Moreover, the Third and the Sixth Circuits have refused to do so even where the disclosure to the government occurred pursuant to a confidentiality agreement.[63]

C. The Second Circuit

The Second Circuit is somewhat more receptive to the notion of selective waiver of evidentiary privileges but only under very specific circumstances. *In re Steinhardt Ptrs., L.P.*, addressed the question "whether disclosure of attorney work product in connection with a government investigation waives the privilege in later discovery."[64] In 1991, Steinhardt was the target of an SEC investigation concerning alleged manipulation of the market for Treasury notes.[65] In response to a request from the Enforcement Division of the Commission, Steinhardt voluntarily produced a memorandum drafted by

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

its counsel that addressed the facts, issues, and legal theories relevant to the company's participation in the Treasury market.[66] Although the materials Steinhardt submitted were marked "FOIA Confidential Treatment Requested," the company had not, in fact, negotiated an agreement that the SEC would maintain the confidentiality of the memorandum.[67] Subsequently, when Steinhardt was named as a defendant in a consolidated a securities class action, it refused to produce the work product.[68] Ruling on a motion to compel Steinhardt to produce requested discovery, the district court held that because Steinhardt had voluntarily disclosed its work product to an adversary, it had waived the protection of the work product doctrine in the civil action.[69]

The Second Circuit agreed. Writing for the panel, District Judge Tenney, sitting by designation, explained that the work product doctrine shields a lawyer's thought processes from opposing counsel, and once a litigant allows an adversary to share them, "the need for the privilege disappears."[70] The fact that Steinhardt had cooperated with the SEC did not transform its relationship with the agency from "adversarial to friendly."[71] The court found "determinative" the fact that "Steinhardt knew that it was the subject of an SEC investigation, and that the memorandum was sought as part of this investigation."[72]

As had both the Third and the District of Columbia Circuits, the court explicitly rejected the Eighth Circuit's policy justification for selective waiver.[73] The court cautioned that the waiver doctrine "allows a party to manipulate use of the privilege through selective assertion" and that "selective assertion of privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage."[74] The court of appeals reasoned that companies have incentives to

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

cooperate in investigations quite apart from any legal ramifications of a disclosure of their internal findings:

> Voluntary cooperation offers a corporation an opportunity to avoid extended formal investigation and enforcement litigation by the SEC, the possibility of leniency for prior misdeeds, and an opportunity to narrow the issues in any resulting litigation. These incentives exist regardless of whether private third party litigants have access to attorney work product disclosed to the SEC.[75]

The Second Circuit also rejected the argument that its decision would leave a corporation subject to a Hobson's choice between waiving work product protection through cooperation or incurring the wrath of enforcement authorities: "An allegation that a party facing a federal investigation and the prospect of a civil fraud suit must make difficult choices is insufficient justification for carving a substantial exception to the waiver doctrine."[76]

While it declined to apply the selective waiver doctrine on the facts presented, the court made clear that it was not adopting "a *per se* rule that all voluntary disclosures to the government waive work product protection."[77] It suggested that no waiver would occur where there existed a reasonable expectation that the disclosure would remain confidential and not fall into the hands of an adversary. More specifically, the court of appeals identified as viable settings for the selective waiver doctrine "situations in which the disclosing party and the government may share a common interest in developing legal theories and analyzing information," and "situations in which the SEC and the disclosing party have entered into an explicit agreement that the SEC will maintain the confidentiality of the disclosed materials."[78]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

D. *Steinhardt* and Beyond

As a practical matter, the common interest exception envisioned by the Second Circuit is rarely tenable because the fact that a company voluntarily cooperates with government investigators "does not transform the relationship from adversarial to friendly."[79] Indeed, sovereign investigators have generally been found to be adversaries of the subjects and targets of their inquiries.[80]

In *Bank of America, N.A. v. Terra Nova Ins. Co.*,[81] reinsurer Terra Nova voluntarily disclosed to the New York State Insurance Department and the U.S. Attorney's Office for the Southern District of New York a report prepared by outside investigators[82] concerning the activities of one of its agents. It later asserted that in so doing, it had not waived its work product protection because the governmental authorities had not been in "an adversarial position" at the time of the disclosure.[83] Terra Nova had initiated its dialogue with the enforcement officials, and was not the subject of any probe when it produced its report.[84] The Southern District nevertheless found that the Insurance Department was "at least a potential adversary" of Terra Nova.[85] In reaching its decision, the court observed that Terra Nova's motive in contacting officials was to forestall or narrow any enforcement investigation by highlighting the exculpatory evidence it had unearthed.[86] Accordingly, the relationship between the parties was "appropriately characterized as that of potential adversaries," necessitating a finding of waiver of work product protection.[87]

The Delaware Court of Chancery likewise addressed this question, concluding that voluntary cooperation with investigators "does not transform the relationship from

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

adversarial to friendly."[88] In essence, that court reasoned that incentives to cooperate do not render "common" or "harmonious" interests that are otherwise adverse:

> Even though they may be considered foes, a party under investigation has significant incentives to cooperate with authorities. The disclosing party often decides that the benefits of cooperation outweigh the possible damage that may be caused by the information it discloses. Such benefits often include more lenient treatment, avoidance of extensive formal investigation and enforcement litigation, and an opportunity to narrow the issues. By yielding to these formidable opponents in order to minimize future damages, a disclosing party does not make those opponents its friend. It merely concedes that it prefers not to anger such a foe.[89]

But a recent opinion from the Court of Appeals of Georgia suggests that a disclosing party might share a common interest with government investigators where inquiry focuses on rogue former officers and employees rather than on current officers and employees or the corporation itself.[90] While it is unclear whether this distinction will be endorsed by other courts, it certainly is consistent with the case law in this area.

As previously noted, while the Third and Sixth Circuits have expressly held that a confidentiality agreement does not validate an assertion of selective waiver, some district court decisions in the Second Circuit suggest otherwise. Several opinions rejecting selective waiver of work product protection expressly found relevant the absence of a written agreement of confidentiality with government investigators.[91] And recently, in *Maruzen Co., Ltd. v. HSBC USA, Inc.*, the District Court for the Southern District of New York held that a party's voluntary disclosure of an internal investigation to the U.S Attorney's Office, the SEC, and other government authorities does not waive work product protection because of an extant confidentiality agreement.[92] There, the disclosing party convinced Judge Owen that it had an oral confidentiality agreement with government investigators based on a declaration by its attorney and a letter from the U.S. Attorney confirming that his office had agreed to treat the information as confidential.[93]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

Thus, the court was able to conclude that because the disclosing party had "explicit confidentiality agreements with the authorities satisfying *Steinhardt*," it had not waived its work product protection .[94]

More recently, the application of the selective waiver doctrine has been explored in some depth in three cases, from disparate jurisdictions, arising out of a high-profile corporate accounting scandal. In January 1999, McKesson HBOC, Inc. ("McKesson") was formed through the merger of McKesson Corporation and HBOC & Company.[95] Some three months later, McKesson announced the first of several downward revisions of its actual financial information for the prior several years,[96] and its board of directors authorized an audit committee and outside counsel to conduct an investigation of its accounting practices. The SEC, in turn, launched a formal investigation of the company which also was soon defending 80 securities civil actions.[97] In May 1999, McKesson negotiated confidentiality agreements with the SEC and U.S. Attorney's Office for the Northern District of California pursuant to which the company agreed to produce its investigative report. In executing the agreement, McKesson expressly declined to waive any of its privileges.[98] Litigants subsequently demanded that McKesson produce the report and McKesson resisted, asserting various evidentiary privileges. The rulings to date make clear that the selective waiver doctrine promises to remain a strategic minefield for companies and their counsel.

In *McKesson HBOC, Inc. v. Adler*,[99] the Court of Appeals of Georgia found "some evidence" in support of McKesson's contention that it was not the adversary of the SEC, noting that the focus of the Commission's investigation was McKesson's former officers and employees, rather than current officers and employees or the company itself,

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

and that the disclosure was made pursuant to a confidentiality agreement.[100] Indeed, the SEC went so far as to argue that it shared "certain interests" with the new managers of the corporation, who had obtained their positions largely in reaction to the allegations of wrongdoing by former officers and employees.[101] Unable to resolve what it considered material factual issues in the record, the court remanded the matter to the trial court to determine whether the fact that McKesson was not the focus of the investigation indicated that McKesson and the SEC shared a common interest.[102]

In *Saito v. McKesson HBOC, Inc.*, the Delaware Court of Chancery rejected the notion that McKesson and the SEC shared a common interest, but found that the company's voluntary disclosure to the SEC had not waived work product protection in view of the confidentiality agreement.[103] Indeed, the court explicitly adopted "a selective waiver rule for disclosures made to law enforcement pursuant to a confidentiality agreement."[104] In reaching its decision, the court carefully analyzed all facets of the relevant public policies, noting that while the subject of a government investigation has incentives to cooperate with authorities, that cooperation often requires it to divulge sensitive and incriminating information. Consequently, a company must balance whether it should "air its dirty laundry in exchange for mercy or whether to force the law enforcement agency to do its own legal work (and possibly overlook or fail to discover some of the incriminating evidence) at the cost of more stringent treatment."[105] If courts "amplify the risk of disclosure" by allowing private plaintiffs to obtain the information and materials produced to enforcement authorities, "the scales begin to tip further in favor of corporate noncompliance."[106] Moreover, by encouraging full cooperation, the doctrine enables the SEC to resolve a higher volume of investigations with greater speed

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

and efficiency. This, in turn, enhances the protection of investors because "the integrity of the capital markets is preserved at a lower cost to society."[107] In short, the court concluded that it is "inconsistent to deny a selective waiver rule and expect continued cooperation with law enforcement agencies when a confidential disclosure is such a double-edged sword for the corporation."[108]

By contrast, in *United States v. Bergonzi*, the District Court for the Northern District of California rejected both the common interest and confidentiality agreement theories and found that McKesson had waived its work product protection by disclosing its internal report to the SEC.[109] As for the common interest exception, the court determined that McKesson and the Commission did not share a "true common goal," because the SEC could seek to impose liability on the company.[110] The court was also troubled by the fact that McKesson's confidentiality agreement was "not unconditional."[111] Because the agreement authorized the SEC, in its discretion, to disclose the materials as "required by federal law or in … discharge of its duties and responsibilities," the court found that McKesson could not have had a reasonable expectation of confidentiality.[112]

III. The Partial Waiver Doctrine

Another question that arises in this setting is whether disclosing a portion of a protected communication waives protection as to the remaining portions of the same communication. Generally, "[w]hen a party discloses a portion of otherwise privileged materials while withholding the rest, the privilege is waived only as to those communications actually disclosed, unless a partial waiver would be unfair to the party's adversary."[113] If a partial waiver does disadvantage an adversary — for example, by

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

presenting a one-sided story to the court — the privilege is deemed waived as to all communications on the same subject matter.[114] Central to this analysis is the "fairness doctrine," which seeks to prevent the "prejudice to a party and distortion of the judicial process that may be caused by the privilege-holder's selective disclosure during litigation of otherwise privileged information."[115] For example, in *In re Subpoena Duces Tecum*, Judge Martin found subject matter waiver where a disclosing party attempted to use the attorney-client privilege as both "as both a sword and shield" by relying on an audit report to disclaim liability while refusing to reveal the factual basis of the report.[116] In the same vein, in *Bank of America*, Magistrate Judge Gorenstein found it "only fair," to require disclosure of the salient facts underlying the disclosure to government investigators.[117]

Courts in the Second Circuit have now made clear that a broad subject matter waiver occurs "only when confidential communications are selectively disclosed *in the course of an ongoing litigation* to gain tactical advantage."[118] While information revealed publicly loses its confidentiality, "there exists no reason in logic or equity to broaden the waiver beyond those matters actually revealed."[119] The Court of Appeals has explained that even though public disclosures may be misleading, so long as they remain "extrajudical," "there is no *legal* prejudice that warrants broad court-imposed subject matter waiver,"[120] since even one-sided public disclosures create no risk of legal prejudice "until put at issue in … litigation by the privilege holder."[121] While the Southern District has suggested, in dicta, that disclosure to the SEC might qualify as "extrajudicial," and, therefore, is not susceptible to subject matter waiver,[122] other courts

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

have observed that disclosures to government investigators are sufficiently "testimonial" to be subject to the limitations on the partial waiver doctrine.[123]

IV. Current Enforcement Oversight Policies

Against the ever-evolving case law, clients and their counsel must weigh the often inconsistent policies and practices of regulatory enforcement and legislative oversight authorities as detailed below.

A. United States Department of Justice

In January 2003, then Deputy Attorney General Larry D. Thompson within the United States Department of Justice ("DOJ") distributed a memorandum revising previously-established principles governing the prosecution of corporations.[124] Among the factors a prosecutor must consider in deciding whether to charge a company is "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."[125] In evaluating a company's cooperation and its disclosures, prosecutors may request "a waiver of the attorney-client and work product protections, both with respect to its internal investigations and with respect to communications between specific officers, directors and employees and counsel."[126] While waiver is not an "an absolute requirement," prosecutors "should consider the willingness of a corporation to waive such protection."[127] Even though the memorandum notes that waiver should normally be limited to factual investigations and contemporaneous advice of counsel, in "unusual circumstances," prosecutors may seek a waiver "with respect to communications and work product related to advice concerning the government's criminal investigation."[128]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

The Antitrust Division of DOJ (the "Division") has established a voluntary disclosure program that also places a premium on corporate waivers of attorney-client and work product protections. Under that policy, a company can avoid criminal prosecution "by confessing its role in illegal activities, fully cooperating with the Division, and meeting other specified conditions."[129] The Division has adopted the very firm position that "[o]nly the first corporation to come forward with regard to a particular violation may be considered for leniency as to that violation."[130] With minor differences depending on whether a company makes its voluntary disclosures before or after the Division begins its investigation, a key condition for receiving leniency is whether the corporation "reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation" in the inquiry.[131]

To offer cooperating companies contractual protection against waiver assertions and adverse rulings, the Division's model conditional leniency letter provides that the disclosure is made in furtherance of an application for amnesty and "will not constitute a waiver of the attorney-client privilege or the work product privilege."[132] Further, as explained by Former Deputy Attorney General Gary R. Spratling, "the Division will not consider disclosures made by counsel in furtherance of the amnesty application to constitute a waiver of the attorney-client privilege or work product privilege."[133] Similarly, the former United States Attorney for the Southern District of New York, James B. Comey, recently emphasized that DOJ does not require waiver, and does not even require cooperation.[134] Indeed, "if a corporation that chooses to cooperate can do so fully without waiving any privileges, that is fine. Waiver is not required as a measure of cooperation."[135]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

If DOJ convicts a company of one or more criminal offenses, self-policing and self-reporting again become relevant. The Federal Sentencing Guidelines Manual for the Sentencing of Organizations establishes detailed rules determining the fines to impose on corporations that have been convicted of wrongdoing.[136] In a nutshell, after calculating a "base fine" amount, based on the nature and circumstances of the crime, a court must assess a set of factors to determine the company's "culpability score," which, after application to the base fine, will determine the actual range of monetary penalties that may be imposed.[137] A trial court is permitted to reduce the culpability score — and, therefore, lower the range of potential fines — if the corporation: (1) reported the violation to authorities soon after learning of it and before an "immanent threat" of disclosure; (2) fully cooperated with the government investigation; and (3) affirmatively recognized and accepted responsibility for its criminal conduct.[138]

B. The SEC

The Commission has its own leniency policy aimed at rewarding companies for their cooperation. In a 2001 Report of Investigation,[139] the SEC declined to take enforcement action against a corporation for the accounting irregularities of one of its employees, explaining its reasoning as follows:

> The company pledged and gave complete cooperation to our staff. It provided the staff with all information relevant to the underlying violations. Among other things, the company produced the details of its internal investigation, including notes and transcripts of interviews …; and it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation.[140]

Then, in January 2003, the SEC withdrew a proposed rule that would have provided that disclosures made to the Commission pursuant to a confidentiality agreement, "shall not constitute a waiver of any otherwise applicable privilege or protection as to other

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

persons."[141] Nevertheless, the SEC has remained sensitive to the privilege concerns of cooperating corporations. While recognizing that the desire for leniency may cause some companies to consider not to assert the attorney-client privilege or the work product doctrine, the SEC has acknowledged that these protections "serve important social interests" and that waiver is not "an end in itself" but only a "means (where necessary) to provide relevant and sometime critical information to the Commission staff."[142] Accordingly, the SEC follows a policy of "entering into confidentiality agreements where it determines that its receipt of information pursuant to those agreements will ultimately further the public interest, and will vigorously argue in defense of those confidentiality agreements where litigants argue that the disclosure of information pursuant to such agreements waives any privileges or protection."[143]

The Commission quite clearly honors its obligations in this regard. By way of example, in *McKesson HBOC, Inc. v. Adler*, the SEC submitted an a*micus* brief arguing that McKesson's voluntary disclosure to the Commission should not have been deemed a waiver of work product protection.[144] The SEC advised the court that it enters into confidentiality agreements with disclosing parties "only when it has reason to believe that obtaining the work product will significantly improve the quality and timeliness of its investigations."[145] It further noted that it had executed twenty such agreements between 1998 and 2001 and only when it believed that the documents sought "would enable the Commission to save substantial time and resources in conducting investigations and/or provide prompt monetary relief to investors."[146]

The Commission then explained why McKesson's work product qualified for confidential treatment. First, it allowed the SEC to complete its investigation

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

"significantly earlier" than it otherwise would have.[147] Second, McKesson had demonstrated that it was likely to produce reliable work product because the officers who had committed the wrongdoing were no longer with the firm and the company had hired an independent law firm to determine the nature, extent, magnitude, and persons responsible for the illegality.[148] As a matter of public policy, the Commission stated that it seeks to enlist the support of the courts in upholding the provisions of its confidentiality agreements because the SEC "cannot compel parties to produce work product, and parties are much less likely to produce work product if they believe producing it to the Commission will give private litigants access to the documents."[149]

C. The United States Department of Defense

The United States Department of Defense ("DOD") also has a voluntary disclosure program that creates incentives for Defense contractors "to adopt a policy of voluntarily disclosing potential civil or criminal fraud matters affecting their corporate contractual relationship" with DOD.[150] It recognizes that "voluntary disclosure, coupled with full cooperation and complete access to necessary records, are strong indications of an attitude of contractor integrity even in the wake of disclosures of potential criminal liability."[151]

DOD has addressed sensitive privilege issues in its model voluntary disclosure agreement (known as the "XYZ Agreement"), in which DOD acknowledges that the disclosing entity may assert both the attorney-client privilege and the work product doctrine. While DOD reserves the right to agree or disagree with any such assertion, it agrees "not to contend that the … production … will constitute a waiver of the attorney-client and work product privileges."[152]

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

D. The United States Department of Health and Human Services

The Office of the Inspector General (the "OIG") of the United States Department of Health and Human Services has adopted a voluntary disclosure program to "promote a higher level of ethical and lawful conduct throughout the health care industry."[153] In establishing guidelines for conducting internal investigations and voluntary disclosures, the OIG addressed its need to verify voluntary submissions as follows:

> In the normal course of verification, the OIG will not request production of written communications subject to the attorney-client privilege. There may be documents or other materials, however, that may be covered by the work product doctrine, but which the OIG believes are critical to resolving the disclosure. The OIG is prepared to discuss with the providers' counsel ways to gain access to the underlying information without the need to waive the protections provided by an appropriately asserted claim of privilege.[154]

The OIG expects "diligent and good faith cooperation throughout the entire process," and anything falling short is "considered an aggravating factor" in assessing the appropriate resolution of the matter, which could include referral to the DOJ or other federal agencies, criminal or civil sanctions, or exclusion from participation in federal health care programs.[155]

E. The United States Environmental Protection Agency

The United States Environmental Protection Agency ("EPA") also has a long-standing voluntary disclosure program intended to encourage companies "to voluntarily discover, promptly disclose and expeditiously correct" violations of federal environmental requirements.[156] As with other agencies, EPA offers mitigation of enforcement for companies that meet specified criteria. Chief among them is the expectation that the corporation "must cooperate as required by EPA and provide the Agency with the information it needs" to determine program applicability.[157] While the

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

program has not yet dealt with privilege waivers, it quite clearly envisions production of otherwise protected information and documents:

> In criminal cases, entities will be expected to provide, at a minimum, the following: access to all requested documents; access to all employees of the disclosing entity; assistance in investigating the violation, any noncompliance problems related to the disclosure, and any environmental consequences related to the violations; access to all information relevant to the violations disclosed, including that portion of the environmental audit report or documentation from the compliance management system that revealed the violation; and access to that individuals who conducted the audit or review.[158]

F. Congressional Investigations

While Congressional Committees and Subcommittees have not sought to create any meaningful incentives for corporations to cooperate in their inquiries, their general refusal to recognize evidentiary privileges creates a similar risk with respect to a subsequent finding of a waiver. Often within hours of the announcement of a high-profile crisis or scandal, one or more congressional committees issue subpoenas requiring companies to produce not only commercially and legally-sensitive records, but testimony at hastily-convened hearings that typically precede the more comprehensive regulatory enforcement investigations as well as class actions and debarment proceedings. Under such circumstances, corporations must make a clear record that they are asserting, and not waiving, the privileges in question.

V. Conclusion

Regrettably, the current unsettled case law offers companies and their counsel little in the way of concrete protection when confronting the question of whether to make a voluntary disclosure to enforcement authorities without waiving evidentiary privileges in future proceedings. Consequently, the first step in the analysis is to review recent rulings in all potentially relevant jurisdictions. If senior management or the board of

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

directors (or a committee thereof) concludes that the potential benefits of a disclosure outweigh the risks, counsel should consider negotiating at the outset a written confidentiality agreement that, among other things, not only provides expressly that the company is not waiving any otherwise applicable privileges, but also requires the agency to support the corporation's position before any tribunal. However, given the uncertain state of the law, attorneys conducting internal investigations should proceed with care, under the assumption that the documents created may eventually be seen by third parties — be they sovereign entities, private litigants, or members of the public at large.

---

[1] "Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection," United States Attorneys' Bulletin (November 2003) (explaining that a corporation under investigation by the United States Department of Justice can demonstrate its good corporate citizenship by helping the government "catch the crooks").

[2] *See, e.g., U.S. v. Mass. Inst. of Tech.*, 129 F.3d 681 (1st Cir. 1997) (finding that University forfeited attorney-client privilege and work product protection by disclosing documents to Defense Contract Audit Agency); *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414 (3d Cir. 1991) (finding that corporation's voluntary disclosures to the Securities and Exchange Commission and Department of Justice waived attorney-client privilege and work product protection); *In re Martin Marietta Corp.*, 856 F.2d 619 (4th Cir. 1988) (finding that employee's disclosure of otherwise privileged materials to a U.S. Attorney and the Defense Logistics Agency of the Department of Defense waived both the attorney-client privilege and non-case work product); *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289 (6th Cir. 2002) (finding that healthcare corporation waived attorney-client privilege and work product protection by disclosing documents to the Department of Justice and the Health Care Finance Administration); *In re Subpeonas Duces Tecum*, 738 F.2d 1367, 1369 (D.C. Cir. 1984) (finding that corporation's disclosure to the Securities and Exchange Commission and to a grand jury waived the attorney-client privilege and work product protection).

[3] *Westinghouse Elec. Corp. v. Philippines*, 951 F.2d 1414, 1423 n.7 (3d Cir. 1991).

[4] *Id.* Many courts use the less precise phrase "limited waiver" to refer to either or both doctrines, most commonly using "limited waiver" interchangeably with "selective waiver."

[5] *In re Leslie Fay Cos., Inc. Sec. Litig.*, 161 F.R.D. 274, 282 (S.D.N.Y. 1995) ("*Leslie Fay II*").

[6] *U.S. v. Stewart*, 287 F. Supp. 2d 461, 464 (S.D.N.Y. 2003) (citing *In re Grand Jury Subpoena Duces Tecum*, 731 F.2d 1032, 1036 (2d Cir. 1984)). Under Judge Wyzanski's widely-cited judicial test, the privilege applies if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client. *U.S. v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950).

[7] *See Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

[8] *In re Keeper of the Records*, 348 F.3d 16, 22 (1st Cir. 2003) (citing *Upjohn*, 449 U.S. at 389).

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

[9] *In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir. 1982) (quoting *Hickman v. Taylor*, 329 U.S. 495, 511 (1947)).
[10] Fed. R. Civ. P. 26(b)(3).
[11] *U.S. v. Nobles*, 422 U.S. 225, 238 (1975).
[12] *See Leslie Fay II*, 161 F.R.D. at 279; *see also* Fed. R. Civ. P. 26(b)(3) (stating that the court "shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation").
[13] *Westinghouse*, 951 F.2d at 1428.
[14] The privilege has also been referred to as the peer review privilege, critical self-evaluative privilege, self-critical analysis privilege, self-examination privilege, and others. *See Tharp v. Sivyer Steel Corp.*, 149 F.R.D. 177, 185 (S.D. Iowa 1993) (listing names).
[15] *In re Ashanti Goldfields Sec. Litig.*, 213 F.R.D. 102, 104 (E.D.N.Y. 2003).
[16] *Sheppard v. Consolidated Edison Co.*, 893 F. Supp 6, 7 (E.D.N.Y. 1995) (*quoting Hardy v. New York News, Inc.*, 114 F.R.D. 633, 640 (S.D.N.Y 1987).
[17] *Wimer v. Sealand Serv., Inc.*, 1997 WL 375661, at *1 (S.D.N.Y. July 3, 1997) (noting that some courts have rejected the privilege outright).
[18] *Sheppard*, 893 F. Supp at 7 (*quoting Chemical Bank v. Affiliated FM Ins. Co.*, No. 87 Civ. 0150, 1994 WL 89292, at *1 (S.D.N.Y. March 16, 1994)).
[19] *Robinson v. U.S.*, 205 F.R.D. 104, 108-09 (W.D.N.Y. 2001).
[20] *See In re Crazy Eddie Sec. Litig.*, 792 F. Supp. 197, 205 (E.D.N.Y. 1992).
[21] *See U.S. v. Dexter Corp.*, 132 F.R.D. 8, 8-10 (D. Conn. 1990).
[22] *See F.T.C. v. TRW, Inc.*, 628 F.2d 207, 210-11 (D.C. Cir. 1980).
[23] *See In re Grand Jury Proceedings*, 861 F. Supp. 386, 389-90 (D. Md. 1994).
[24] *University of Pa. v. E.E.O.C.*, 493 U.S. 182, 189 (1990).
[25] *Permian Corp. v. U.S.*, 665 F.2d 1214, 1219 (D.C. Cir. 1981).
[26] *Saito v. McKesson HBOC, Inc.*, No. Civ.A. 18553, 2002 WL 31657622, at *3 (Del. Ch. Nov. 13, 2002).
[27] *Westinghouse*, 951 F.2d at 1423-24 (*quoting Fisher v. U.S.*, 425 U.S. 391 (1976); *see also In re Keeper of the Records*, 348 F.3d at 22.
[28] *In re Subpeonas Duces Tecum*, 738 F.2d at 1369 (quoting *U.S. v. A.T.&T.*, 642 F.2d 1285, 1299 (D.C. Cir. 1980)).
[29] *Westinghouse*, 951 F.2d at 1424 (citation omitted).
[30] *In re Sealed Case*, 676 F.2d at 809, *see also Permian*, 665 F.2d at 1219 (quoting *A.T.&T.*, 642 F.2d at 1299) (explaining that the work product doctrine exists not to protect a confidential relationship, but "to promote the adversary system by safeguarding the fruits of an attorney's trial preparations from the discovery attempts of the opponent").
[31] *Mass. Inst. of Tech.*, 129 F.3d at 687.
[32] *In re Steinhardt Partners, L.P.*, 9 F.3d 230, 235 (2d Cir. 1993).
[33] *Bank of Am., N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002) (quoting *A.T.&T.*, 642 F.2d at 1299).
[34] *Saito*, 2002 WL 31657622, at *4.
[35] *Steinhardt*, 9 F.3d at 236.
[36] *Viacom, Inc. v. Sumitomo Corp.*, 200 F.R.D. 213, 221 n.6 (S.D.N.Y. 2001); *Lugosch v. Congel*, 219 F.R.D. 220, 241 (S.D.N.Y. 2003) (explaining that co-parties asserting the joint defense privilege are required to demonstrate that they have a shared common interest and prior to sharing the work product amongst them, there existed an agreement to pursue a joint defense strategy).
[37] *Wimer*, 1997 WL 375661, at *1.
[38] *Sheppard*, 893 F. Supp at 7.
[39] *See In re Subpoena Duces Tecum*, M8-85 (JSM), 1997 U.S. Dist. LEXIS 2927, at *6 n.1 (S.D.N.Y. March 14, 1997) (declining to decide whether documents relating to an internal investigation were protected by the self-evaluative privilege because the court had already found waiver of the attorney-client privilege); *see also In re Leslie Fay Cos., Inc. Sec. Litig.*, 152 F.R.D. 42, 46 n.7 (S.D.N.Y. 1993) ("Leslie Fay I") (finding it "unnecessary" to address whether internal audit report was protected by either the attorney-client or self-evaluative privileges, because those privileges had been waived when the party had waived its work product protection). A waiver of work product protection will also waive the attorney-

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

client privilege for the particular communication at issue. *See In re Sealed Case*, 676 F.2d at 812 ("An exception or waiver of the work product privilege will also serve as an exception or waiver of the attorney-client privilege, since the coverage and purposes of the attorney-client privilege are completely subsumed into the work product privilege.").

[40] *Columbia/HCA Healthcare*, 293 F.3d at 294-95 (noting that "some courts have even taken internally inconsistent opinions").

[41] *Diversified Industries, Inc. v Merideth*, 572 F.2d 596 (8th Cir. 1978) (en banc).

[42] *Diversified*, 572 F.2d at 607.

[43] *Id.*

[44] *Id.* at 611.

[45] *Id.* at 600.

[46] *Id.* at 602-03.

[47] *Id.* at 610-11.

[48] *Id.* at 611.

[49] *Id.*

[50] *Id.*

[51] *Id.* at 611 n.4.

[52] *Permian*, 665 F.2d at 1219-20.

[53] *Id.* at 1220.

[54] *Id.* at 1220-21.

[55] *Id.* at 1221.

[56] *In re Subpeonas Duces Tecum*, 738 F.2d at 1370-11.

[57] *Id.* at 1371.

[58] *Id.* at 1372.

[59] *Id.*

[60] *Id.* The opinion notes that the SEC, while the case at bar was pending in 1984, had announced its intention to propose legislation that would provide that information submitted to the Commission would be exempt from disclosure to third parties under the Freedom of Information Act ("FOIA"). The court suggests that this statement indicated the SEC's belief that, under then current law, submission of information to the Commission was not exempt from FOIA. *Id.* at 1375.

[61] *Id.* at 1375.

[62] *Id.*

[63] *See Westinghouse*, 951 F.2d at 1427; *Columbia/HCA Healthcare*, 293 F.3d at 306-07.

[64] 9 F.3d 230, 233 (2d Cir. 1993).

[65] *Id.* 232.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.* at 234.

[70] *Id.* at 235

[71] *Id.* at 234

[72] *Id.*

[73] The Second Circuit acknowledged that *Diversified* addressed the attorney-client privilege rather than the work product doctrine, but found that "much of the reasoning in *Diversified* has equal, if not greater, applicability in the context of the work product doctrine." *Id.* at 235.

[74] *Id.*

[75] *Id.* at 236 (citing *In re Subpeonas Duces Tecum*, 738 F.2d at 1369).

[76] *Id.*

[77] *Id.*

[78] *Id.*

[79] *Cooper Hosp./Univ. Med. Ctr. v. Sillivan*, 183 F.R.D. 119, 119 (D.N.J. 1998).

[80] *See Saito*, 2002 WL 31657622, at *5 (collecting cases).

[81] 212 F.R.D. 166 (S.D.N.Y. 2002)

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

[82] The investigation had been performed by an outside insurance consultancy. The court acknowledged that the majority of the materials gathered by the investigation were not work product, but states, without explanation, that "some work product" had been produced in the investigation. *Id.* at 168.
[83] *Id.*
[84] *Id.*
[85] *Id.* at 172 (quoting *Mass. Inst. of Tech.*, 129 F.3d at 686).
[86] *See id.*
[87] *Id.* (quotation omitted).
[88] *Saito*, 2002 WL 31657622, at *5.
[89] *Id.*
[90] *McKesson HBOC, Inc. v. Adler*, 562 S.E.2d 809, 813 (Ga. Ct. App. 2002).
[91] *See, e.g., Leslie Fay I*, 152 F.R.D. at 46.
[92] No. 00 CIV. 1079(RO), 00 CIV. 1512(RO), 2002 WL 1628782, at *2 (S.D.N.Y. July 23, 2002).
[93] *Id.* at *1.
[94] *Id.* at *2.
[95] *Saito*, 2002 WL 31657622, at *1.
[96] *Id.*
[97] *Adler*, 562 S.E.2d at 811, 811 n.1.
[98] *U.S. v. Bergonzi*, 216 F.R.D. 487, 490-91 (N.D. Cal. 2003)
[99] 562 S.E.2d 809, 813 (Ga. Ct. App. 2002)
[100] *Id.* at 813-14.
[101] *Id.* at 813; *but see Leslie Fay I*, 152 F.R.D. at 46 ("the SEC is not in a position to decide what constitutes waiver").
[102] *Adler*, 562 S.E.2d at 813.
[103] *Saito*, 2002 WL 31657622, at *5-*11.
[104] *Id.* at *11.
[105] *Id.* at *8.
[106] *Id.*
[107] *Id.*
[108] *Id.* at *9.
[109] *U.S. v. Bergonzi*, 216 F.R.D. 487, 495-98 (N.D. Cal. 2003).
[110] *Id.* at 496.
[111] *Id.* at 498.
[112] *Id.* at 494, 497 n.10.
[113] *Westinghouse*, 951 F.2d at 1426 n.12.
[114] *Id.*
[115] *von Bulow v. von Bulow*, 828 F.2d 94, 101 (2d Cir. 1987).
[116] 1997 U.S. Dist. LEXIS 2927, at *10-*11.
[117] *Bank of America*, 212 F.R.D. at 171
[118] *Leslie Fay II*, 161 F.R.D. at 283 n.5 (emphasis added).
[119] *von Bulow*, 828 F.2d at 103.
[120] *Id.*
[121] *Id.*
[122] *Leslie Fay II*, 161 F.R.D. at 283 n.5
[123] See, e.g., *In re Martin Marietta Corp.*, 856 F.2d at 625 (concluding that disclosure to government investigators while the government is an adversary "constitutes testimonial use").
[124] "Principles of Federal Prosecution of Business Organizations," Memorandum from Deputy Attorney General Larry D. Thompson, to Heads of Department Components and U.S. Attorneys (Jan. 20, 2003).
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*
[129] U.S. Dept. of Justice Antitrust Div. Manual III-111 (3d. ed. Rev. 2002).
[130] *Id.* at III-112.
[131] *Id.* at III-112, III-113.

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).

[132] Model Corporate Conditional Leniency Letter, *attached to*, Gary R. Spratling, "Making Companies and Offer they Shouldn't Refuse," *addressed at* the District of Columbia Bar Association's 35th Annual Symposium on Associations and Antitrust (February 16, 1999).
[133] Gary R. Spratling, "The Corporate Leniency Policy: Answers to Recurring Questions," *addressed at* the American Bar Association Antitrust Section 1998 Spring Meeting (April 1, 1998) (transcript available at the Department of Justice website).
[134] "Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection," United States Attorneys' Bulletin (November 2003).
[135] *Id.*
[136] *See FEDERAL SENTENCING GUIDELINES MANUAL*, 8(c) (1998) Ch. 8, Part C.
[137] *See id.* §§ 8C2.4-8C2.8.
[138] *See id.* § 8C2.5(g).
[139] Report of Investigation, Securities Exchange Act of 1934 § 21(a) and Comm'n Statement on the Relationship of Cooperation to Agency Enforcement Decisions Release No. 34-44969 (Oct. 23, 2001).
[140] *Id.*
[141] Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (proposed January 2003) (to be codified at 17 C.F.R. pt. 205.3(e)(3)).
[142] Report of Investigation, Securities Exchange Act of 1934 § 21(a) and Comm'n Statement on the Relationship of Cooperation to Agency Enforcement Decisions Release No. 34-44969 (Oct. 23, 2001).
[143] Implementation of Standards of Professional Conduct for Attorneys, 17 C.F.R. pt. 205 (proposed January 2003) (to be codified at 17 C.F.R. pt. 205.3(e)(3)).
[144] S*ee Brief of the United States Securities and Exchange Commission, Amicus Curiae, McKesson HBOC, Inc. v. Adler*, 562 S.E.2d 809 (Ga. Ct. App. 2002).
[145] *Id.*
[146] *Id.*
[147] *Id.* Other situations in which work product was deemed sufficiently beneficial included an instance in which the SEC obtained a report on which an accounting firm had spent 29,000 hours preparing and another in which it received the results of an investigation that had cost $9 million to conduct. *See id.*
[148] *Id.*
[149] *Id.*
[150] "Department of Defense Voluntary Disclosure Program – A Description of the Process." IGDPH 5505.50 (amended April 1990).
[151] Letter from Deputy Secretary of Defense William H. Taft, IV, to defense contractors (July 24, 1985).
[152] "Department of Defense Voluntary Disclosure Program – A Description of the Process." IGDPH 5505.50 (amended April 1990).
[153] "Publication of the OIG's Provider Self-Disclosure Protocol," 62 Fed. Reg. 58399, 58399 (Oct. 30, 1998).
[154] *Id.* at 58403.
[155] *Id.*
[156] "Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations," 65 Fed. Reg. 19618, 19618 (April 11, 2000).
[157] *Id.* at 19623.
[158] *Id.*

This material is protected by copyright. Copyright © 2004 various authors and the Association of Corporate Counsel (ACC).