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## Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the Deputized Counsel

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# THOMPSON/MCNULTY MEMO INTERNAL INVESTIGATIONS: ETHICAL CONCERNS OF THE “DEPUTIZED” COUNSEL

COLIN P. MARKS\*

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## I. INTRODUCTION

Once upon a time, a corporation facing charges from the Department of Justice (“DOJ”) would hire corporate counsel to collect and review documents, conduct interviews with employees, and report back with its findings. Corporate counsel often faced ethical concerns regarding interviewing employees, but generally, a carefully crafted blanket statement at the beginning of the interview explaining corporate counsel’s role was sufficient to address these concerns. However, in 2003, the DOJ adopted charging policies that drastically changed the rules. These policies, articulated in

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what is now commonly referred to as the "Thompson Memo," after the author and then Deputy General Larry Thompson, allow prosecutors to consider several factors when deciding whether to prosecute and formally charge a corporation. These factors include waivers of the attorney-client privilege and work product protections, and whether the company provides legal fees for employees. These charging policies have led to what some have dubbed the "deputation" of corporate counsel.<sup>1</sup> Though the DOJ recently amended these policies, concerns over privilege waivers and the "deputation" of corporate counsel remain.

With this new role as a "deputy" of the DOJ has come a new set of ethical concerns. These concerns range from whether the initial interview warnings must now be more vigorous to what are the obligations of corporate counsel to reveal what might otherwise be confidential or privileged material in order to avoid *Brady* violations.<sup>2</sup> Furthermore, in light of other factors that the Thompson Memo considers, many corporations now refuse to fund the legal defense of employees and require Fifth Amendment waivers under threat of termination. Thus, corporate counsel must also question whether the employee interviews violate the legal rights of the employees.

This Essay explores some of the possible ethical concerns facing corporate counsel engaged in such investigations. Part II of this Essay discusses the traditional scope and purpose of internal investigations, including the application of the attorney-client privilege and work product protections. Part III tracks the development of the Thompson Memo and how it has led to the "deputation" of corporate counsel. Finally, Part IV explores the ethical concerns the Thompson Memo raises in the context of employee interviews by corporate counsel during internal investigations.

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1. The term "deputation" as used in this Essay does not refer to a formal agreement or grant of power made by the government with corporate counsel, but rather refers to the effect the charging policies have on corporate counsel. See Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003) (expressing that a company's cooperation with a government investigation "will effectively deputize it into becoming a de facto agent of the government").

2. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that, regardless of good faith considerations, any suppression of "[material] evidence favorable to an accused upon request violates due process"). See generally Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205 (2000) (discussing prosecutors' disclosure obligations in light of *Brady* and the Model Rules of Professional Conduct).

## II. THE TRADITIONAL INTERNAL INVESTIGATION

### A. *The Investigation: Purpose and Process*

The purpose and scope of an internal investigation can vary depending on the underlying conduct that triggered the investigation.<sup>3</sup> When the investigation is in response to some sort of government action, outside counsel, and sometimes in-house counsel, are often retained to carry out the investigation, explain the company's legal rights and possible liabilities, and sometimes to represent the company in subsequent legal proceedings.<sup>4</sup> Use of such corporate counsel<sup>5</sup> is seen as having at least two major benefits: (1) the investigation will likely "lead to an analysis of the company's legal rights, obligations and potential liabilities," which are best addressed by legal counsel; and (2) use of an attorney enables the company to protect the investigation from third parties by application of the attorney-client privilege.<sup>6</sup> The purpose of such an investigation is usually to find out what, if any, misconduct has occurred, the scope of the misconduct, what individuals are involved, and whether the misconduct is widespread.<sup>7</sup> The investigating team can then advise as to remedial steps that may be necessary and whether

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3. See Brad D. Brian & Barry F. McNeil, *Overview: Initiating an Internal Investigation and Assembling the Investigative Team*, in INTERNAL CORPORATE INVESTIGATIONS 1, 4-5 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (expressing that corporate conduct can lead to various confrontations and giving examples of different possible reasons for conducting an internal investigation); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 884-86 (citing the myriad of circumstances that trigger internal corporate investigations); see also Thomas R. Mulroy & Eric J. Muñoz, *The Internal Corporate Investigation*, 1 DEPAUL BUS. & COM. L.J. 49, 49 (2002) (mentioning possible reasons for initiating an internal investigation).

4. Brad D. Brian & Barry F. McNeil, *Overview: Initiating an Internal Investigation and Assembling the Investigative Team*, in INTERNAL CORPORATE INVESTIGATIONS 1, 5, 11 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002). The choice between using inside or outside counsel depends upon a variety of factors, including cost, attorney independence, and the possibility of inside counsel being called as a witness. *Id.* at 11-12.

5. The use of the term "corporate counsel" as used throughout this Essay is meant to encompass both outside and/or in-house counsel employed by a corporation.

6. See *id.* at 11; see also Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 889 n.120 (noting the consensus among lawyers that investigations should be conducted by outside counsel as a means of protecting any privileges).

7. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 888.

to disclose the results of the investigation to government authorities.<sup>8</sup>

The first step in the investigation, after putting a team together, is collecting and reviewing relevant documents.<sup>9</sup> This usually begins with submitting a written document request, or call for documents, to the company's employees which describes the types of documents sought and breaks the documents down into well-defined categories.<sup>10</sup> It may also be necessary to talk with employees about the requests and to actually review and personally pull the documents directly from their location.<sup>11</sup> After collection, the documents should be numbered, traditionally by a Bates stamp, and then reviewed for privileged, relevant, and/or "hot" documents.<sup>12</sup>

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8. See *id.* (discussing several questions that internal investigations may answer); Albert Lilienfeld, *Optimizing the Execution and Value of Corporate Investigations*, 1548 PRACTISING L. INST.: CORP. L. & PRAC. HANDBOOK SERIES 461, 465 (2006) (quoting advice of Deloitte Financial Advisory Services LLP partner who says that the investigation tells the company what remedial steps are necessary).

9. See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 890 (2003) (declaring that most commentators believe the first action should be reviewing pertinent documents); Albert Lilienfeld, *Optimizing the Execution and Value of Corporate Investigations*, 1548 PRACTISING L. INST.: CORP. L. & PRAC. HANDBOOK SERIES 461, 465 (2006) (opining that "the most important first step is collecting and preserving data"); Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 94 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (noting that the first step should be analysis of all relevant documents). This step is sometimes preceded by a "do not destroy" memo instructing employees to refrain from carrying out document destruction policies, which are common especially in large corporations, so as to preserve all possibly relevant documents. See MODEL RULES OF PROF'L CONDUCT R. 3.4(a) (2006) (mandating that lawyers must not "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act").

10. Larry A. Gaydos, *Gathering and Organizing Relevant Documents: An Essential Task in Any Investigation*, in INTERNAL CORPORATE INVESTIGATIONS 141, 146 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (summarizing "document gathering, processing, and review," and providing "several tips on maximizing the likelihood of locating the full range of requested documents"). The advent of the electronic age has meant that many documents are now also kept, sometimes exclusively, in electronic format. See *id.* at 148 (stating that electronic information can include data that hard copies do not, such as updates and who has accessed the information). Thus, document retention and review procedures must focus not only on traditional paper documents, but increasingly on electronic files and emails.

11. *Id.* at 146-47.

12. *Id.* at 148-49. "Bates stamping is the traditional method used" to number collected documents. *Id.* at 149. "Hot documents" is a term of art often used in litigation to describe especially important documents. *Id.* at 143.

These documents will give the investigating attorneys insight into the corporate structure, conduct, key events and transactions, and will later help with the interview process.<sup>13</sup>

Though the document review process is important, the most insightful and pivotal step in any internal investigation is the interviewing of employees.<sup>14</sup> The employees—ranging from the lowest echelon to the highest level of management—“are best able to explain critical events and provide relevant background information.”<sup>15</sup> The interview stage is also the stage most likely to raise ethical issues, in particular with regard to the role of corporate counsel.<sup>16</sup>

During the course of an interview, an employee may become confused as to whom the interviewing attorney represents.<sup>17</sup> As the Model Rules of Professional Conduct make clear, “[a] lawyer employed or retained by an organization represents *the organization* acting through its duly authorized constituents.”<sup>18</sup> Thus, in order to avoid any such confusion and to meet ethical obligations, interviewing counsel typically issue pre-interview warnings, sometimes referred to as “Adnarim” warnings (*Miranda* spelled backwards).<sup>19</sup> Counsel may advise the employees orally or in written

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13. See Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 90, 94 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (noting that interviews are too often conducted before critical documents have been reviewed and that review may help the attorney structure the interview and evaluate the witness employee’s honesty); see also Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 891 (2003) (indicating that documents can give “the clearest record of key events or transactions”).

14. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 891-92 (2003); Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 90 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002).

15. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 892 (2003).

16. See *id.* at 892, 934-37 (summarizing the problems and questions surrounding the role of outside counsel).

17. See MODEL RULES OF PROF’L CONDUCT R. 4.3 & cmt. 1 (2006) (warning that an unrepresented person may have a difficult time discerning where a lawyer’s loyalties belong).

18. MODEL RULES OF PROF’L CONDUCT R. 1.13 (2006) (emphasis added).

19. Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in INTERNAL CORPORATE INVESTIGATIONS 17, 39-40 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002); see also Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 944-46 (2003) (recognizing United State District Judge Frederick Lacey

memorandum prior to the interview.<sup>20</sup> These warnings should, at a minimum, make clear that counsel is interviewing the employee as counsel for the company and does not represent the employee individually, as well as set forth that the interview is being conducted so that counsel can provide legal advice to the company in anticipation of litigation.<sup>21</sup> One commentator suggests the following warnings as a model:

As you know, [your management] has asked you to meet with us as part of our inquiry into [the matter]. The purpose of our meeting is so that we can gather the information that we need, as counsel, to develop the legal advice that the company has sought and to prepare for possible litigation involving this matter.

I am a lawyer and I represent the company. I do not represent you or any other employee personally. This inquiry is being undertaken pursuant to the company's attorney-client privilege, but the company may decide to waive the privilege at some point in the future. You cannot waive the attorney-client privilege as applied to this interview. If the company decides to waive its attorney-client privilege, it can do so without getting your consent and without even consulting with you. To allow the company to maintain the privileged protection of the information we gather, it is important that you not discuss the substance of this interview with anyone.

Do you have any questions before we begin?<sup>22</sup>

The three main elements present in this warning are: (1) the interviewing attorneys represent the company, not the employees individually; (2) the attorney-client privilege applies in the interview, but the company holds the right to waive the privilege; and (3) the company desires that the employee maintain the interview's confidentiality.<sup>23</sup> Despite these warnings, an employee might, during

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as the creator of the term *Adnarim*); Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 99 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (noting there is little debate that warnings are necessary).

20. See Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 96-98 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (highlighting that regardless of the form, the warning should ensure that the employee knows that counsel does not represent the employee).

21. *Id.* The latter phrase is to help ensure full protection of the interview under the attorney-client privilege and work-product doctrine. *Id.* at 98.

22. *Id.*

23. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 942 (2003) (quoting

the course of an interview, ask for legal advice.<sup>24</sup> In such an instance, the typical protocol is to remind the employee that counsel represents the company, not the employee individually, and cannot give the employee legal advice.<sup>25</sup> However, as discussed in Part IV.A., below, the breadth of these warnings may become muddled in light of an investigation being conducted by “deputized” counsel.

### B. *Application of the Attorney-Client Privilege and Work-Product Doctrine*

As noted above, an important element of the internal investigation, and of the interviews themselves, is the application of the attorney-client privilege and the work-product doctrine. The basic standard for application of the privilege is:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer;
- (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and
- (4) the privilege has been (a) claimed and (b) not waived by the client.<sup>26</sup>

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Susan L. Merrill, *Internal Investigations*, in *SECURITIES LITIGATION: PLANNING AND STRATEGIES* 91, 100 (A.L.I.—A.B.A. Course of Study, May 2-3, 2002)).

24. Randall J. Turk, *The Interview Process*, in *INTERNAL CORPORATE INVESTIGATIONS* 89, 103 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002).

25. *Id.*

26. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358-59 (D. Mass. 1950), *rejected on other grounds*, *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745-46 (Fed. Cir. 1987); *accord* Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in *INTERNAL CORPORATE INVESTIGATIONS* 17, 20 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002). Other courts have identified a similar standard: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser 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 the legal adviser, (8) unless the protection is waived.” *Banner v. City of Flint*, 99 F. App’x. 29, 36 (6th Cir. 2004) (quoting *Reed v. Baxter*, 134 F.3d 351, 355-56 (6th Cir. 1998)); *see also* *United States v. Bisanti*, 414 F.3d 168, 171 (1st Cir. 2005) (quoting *Cavallaro v. United States*, 284 F.3d 236, 245 (1st Cir. 2005)) (articulating a nearly identical standard).



More generally stated, in order to claim protection under the attorney-client privilege, a party must show: “(1) A communication; (2) made between privileged persons; (3) in confidence; (4) for the purpose of seeking, obtaining, or providing legal assistance to the client.”<sup>27</sup>

Related to the attorney-client privilege is work-product immunity. However, work-product immunity “is distinct from and broader than the attorney-client privilege,” extending beyond confidential communications to “any document prepared in anticipation of litigation by or for the attorney.”<sup>28</sup> To qualify as work product, information must be (1) in the form of documents or tangible things; (2) “prepared in anticipation of litigation”; and (3) prepared by the party or its representative, including an attorney.<sup>29</sup>

At one time, many federal courts limited application of the attorney-client privilege to corporations under a “control group” test.<sup>30</sup> This test applied the privilege only where the interviewed employee could control or substantially participate in a corporate decision based upon the attorney’s advice, or if the employee belonged to a group which had the authority, such that he, in effect, personified the corporation.<sup>31</sup> However, this approach was squarely rejected by the Supreme Court in *Upjohn Co. v. United States*.<sup>32</sup>

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27. *Wilson v. Foti*, No. Civ. A. 02-2244, 2004 WL 744874, at \*2 (E.D. La. Apr. 6, 2004) (quoting EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 46 (4th ed. 2001)); see also *Fisher v. United States*, 425 U.S. 391, 403 (1976) (asserting that “[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged”). Though this standard is articulated in terms of communications from a client to an attorney, the privilege also covers communications from an attorney to a client. *Lewis v. UNUM Corp. Severance Plan*, 203 F.R.D. 615, 618 (D. Kan. 2001) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 390 (1981); *Sprague v. Thorn Ams., Inc.*, 129 F.3d 1355, 1370-71 (10th Cir. 1997)).

28. *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986).

29. *Ferko v. NASCAR, Inc.*, 218 F.R.D. 125, 136 (E.D. Tex. 2003). Nevertheless, an exception exists in federal courts, and a party may obtain work-product materials “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.” FED. R. CIV. P. 26(b)(3).

30. See *United States v. Lipshy*, 492 F. Supp. 35, 42-43 (N.D. Tex. 1979) (discussing the test approved and used by several circuits).

31. *Id.* (quoting *City of Philadelphia v. Westinghouse Elec. Co.*, 210 F. Supp. 483, 485 (E.D. Pa. 1962)).

32. 449 U.S. 383, 397 (1981) (rejecting the control group test); cf. also *Nat’l Converting & Fulfillment Corp. v. Bankers Trust Corp.*, 134 F. Supp. 2d 804, 806 n.1 (N.D. Tex.

In *Upjohn*, the petitioner, Upjohn Company (“Upjohn”), maintained that questionnaires sent by its attorneys to its employees were privileged.<sup>33</sup> The questionnaires were part of an internal investigation to discover whether subsidiaries attempted to secure government business by making payments directly to foreign government officials.<sup>34</sup> Upjohn’s attorneys interviewed many of its officers and employees, including those that received the questionnaire, as part of its investigation.<sup>35</sup> Subsequently, the Internal Revenue Service issued a summons demanding production of these materials.<sup>36</sup> Upjohn claimed the documents “were protected from disclosure by the attorney-client privilege and constituted the work product of attorneys prepared in anticipation of litigation.”<sup>37</sup> The district court ordered the production of the disputed materials,<sup>38</sup> and the Sixth Circuit affirmed, holding that the attorney-client privilege did not apply to communications “made by officers and agents not responsible for directing Upjohn’s actions in response to legal advice,”<sup>39</sup> thus adopting the “control group” theory.

The Supreme Court rejected this “control group” approach, stating that it overlooked “that the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice.”<sup>40</sup> The Court noted that lower echelon employees frequently possess information that a corporation’s lawyers need to adequately inform and advise on the existing or potential problems; “[t]he control group test adopted by the court below thus frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the

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2001) (recognizing Texas’s adoption of the “subject matter” test in accordance with the *Upjohn* Court’s reasoning).

33. *Upjohn Co. v. United States*, 449 U.S. 383, 386-88 (1981).

34. *Id.* at 386.

35. *Id.* at 387.

36. *Id.* at 387-88.

37. *Id.* at 388. In *Upjohn*, “the company voluntarily submitted a preliminary report to the Securities and Exchange Commission . . . disclosing certain questionable payments.” *Id.* at 387.

38. *Upjohn*, 449 U.S. at 388. The magistrate also concluded that Upjohn waived the attorney-client privilege, but the Sixth Circuit rejected this finding. *Id.*

39. *Id.*

40. *Id.* at 390.

client to attorneys seeking to render legal advice to the client corporation."<sup>41</sup> The Court concluded that the communications from the Upjohn employees to its corporate counsel were protected under the attorney-client privilege, and thus the questionnaire responses and all notes stemming from interview questions were protected by the privilege.<sup>42</sup> Therefore, "communications from lower echelon employees [are] within the privilege as long as the communications [are] made to the attorney to assist him in giving legal advice to the client corporation."<sup>43</sup>

The application of the attorney-client privilege and work-product immunity are important in the corporate context as corporations do not enjoy Fifth Amendment protections. Internal investigations frequently involve conduct that may be labeled as criminal or fraudulent.<sup>44</sup> Furthermore, aspects of the investigation may reveal information that can be used in third-party suits, such as shareholder derivative suits.<sup>45</sup> The attorney-client privilege and work-product doctrine ensure that disclosure of the results of an internal investigation cannot be compelled, thus protecting the corporation and its employees from having the fruits of the investigation used against them. Though a corporation may later choose to disclose the results of its investigation, the decision should be a voluntary one, made after carefully weighing the risks of disclosure.<sup>46</sup>

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41. *Id.* at 391-92.

42. *Upjohn Co. v. United States*, 449 U.S. 383, 397 (1981). The Supreme Court also opined that the work-product privilege was possibly applicable to some attorney "notes and memoranda of interviews." *Id.* at 397-401.

43. *United States v. El Paso Co.*, 682 F.2d 530, 538 n.8 (5th Cir. 1982) (citing *Upjohn Co. v. United States*, 449 U.S. 383, 389-97 (1981)); *see also PaineWebber Group, Inc. v. Zinsmeyer Trusts P'ship*, 187 F.3d 988, 991-92 (8th Cir. 1999) (asserting that "[t]he Supreme Court confirmed that the privilege applies broadly to communications made by corporate employees to counsel to secure legal advice from counsel").

44. Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in *INTERNAL CORPORATE INVESTIGATIONS* 17, 84 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002).

45. *See id.* (explaining the "Garner rule," which allows communications normally protected by the privilege to be discovered in shareholder actions where good cause is shown).

46. Brad D. Brian & Barry F. McNeil, *Overview: Initiating an Internal Investigation and Assembling the Investigative Team*, in *INTERNAL CORPORATE INVESTIGATIONS* 1, 10 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002); *see also* Thomas E. Holliday & Charles J. Stevens, *Disclosure of Results of Internal Investigations to the Government or Other Third Parties*, in *INTERNAL CORPORATE INVESTIGATIONS* 279, 280 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (warning of the need to analyze carefully what disclosure will mean for the company).

### III. THE “DEPUTATION” OF CORPORATE COUNSEL

The general principles described above were fundamentally altered by a 1999 memorandum issued by then Deputy Attorney General Eric Holder.<sup>47</sup> Prior to this memorandum, more commonly known as the “Holder Memo,” the DOJ did not have a clear policy regarding the factors to consider in determining whether to formally charge corporations with an indictment.<sup>48</sup> The Holder Memo set out eight factors to be considered:

In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges;
5. The existence and adequacy of the corporation’s compliance program;

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47. See Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations §§ III.B., VI.A. (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html> (focusing on the factors prosecutors should consider when determining whether to bring criminal charges against a particular corporation); see also Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VI. (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) (reiterating the emphasis on evaluating corporate cooperation).

48. Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 113-15 (2003) (noting that prior to the Holder Memo and the 1991 institution of the Federal Sentencing Guidelines chapter regarding sentencing of organizations, the only real guidance came in the form of the United States Attorney’s Manual, which was primarily geared toward individuals).

6. The corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable; and
8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions.<sup>49</sup>

Of particular relevance is factor 4, which provided that cooperation could "includ[e], if necessary, the waiver of the corporate attorney-client and work-product privileges."<sup>50</sup> Despite concerns that this provision essentially gave prosecutors the discretion to pressure corporations to disclose privileged materials even before there was any actual finding of wrongdoing, in 2003, then Deputy Attorney General Larry Thompson reiterated these factors in what has been dubbed the "Thompson Memo."<sup>51</sup>

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49. Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys, Bringing Criminal Charges Against Corporations § II.A. (June 16, 1999), available at [http://www.usdoj.gov/criminal/fraud/policy/Charging\\_corps.html](http://www.usdoj.gov/criminal/fraud/policy/Charging_corps.html) (internal cross-references omitted).

50. *Id.*

51. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm). The Thompson Memo states:

In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. 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;
5. the existence and adequacy of the corporation's compliance program;
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

The Thompson Memo essentially restated the Holder Memo factors with an additional ninth factor regarding the “adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”<sup>52</sup> More importantly, the Thompson Memo also provided that a corporation’s advancement of attorneys’ fees to culpable employees may be considered by prosecutors when evaluating whether a corporation had cooperated.<sup>53</sup> Furthermore, the Thompson Memo made abundantly clear the importance of a corporation lending its full cooperation, stating that:

[I]n assessing the adequacy of a corporation’s cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.<sup>54</sup>

The effect of the Thompson Memo has been profound, leading to what many commentators have dubbed a “culture of waiver” amongst corporations, i.e., the fear of negative impact from failing

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7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution; and

8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance;

9. the adequacy of remedies such as civil or regulatory enforcement actions.

*Id.* § II. (internal cross-references omitted).

52. *Id.* § II.A.8.

53. *Id.* § VI.B. Many view this provision as essentially encouraging corporations to leave their employees “high and dry” despite the presumption of innocence. See *Corporate Injustice*, WALL ST. J., Apr. 6, 2006, at A14 (arguing that the Thompson Memo prompts corporations enduring government investigation to “cut their accused employees adrift” before there has been any adjudication of guilt); Nathan Koppel, *U.S. Urges Firms to Stop Funding Staffs’ Defense*, WALL ST. J., Mar. 28, 2006, at B4 (recounting that the Thompson Memo sparked much of the debate surrounding how a corporation’s unwillingness to pay an accused employee’s legal fees can be equated with willingness to cooperate with a government investigation).

54. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VI.B. (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

to disclose privileged materials has caused corporations to feel obligated to waive the privilege on a regular basis.<sup>55</sup> Though the Thompson Memo does not explicitly require the disclosure of privileged materials for a corporation to be deemed “cooperating,” this factor has been perceived by corporations to be a requirement to avoid indictment.<sup>56</sup>

The existence of this culture of waiver is supported by a recent survey of inside and outside counsel conducted by, among others, the National Association of Criminal Defense Lawyers (“NACDL”) and the Association of Corporate Counsel (“ACC”).<sup>57</sup> Their survey found that nearly 75% of some 1,400 respondents reported that a culture of waiver has arisen where gov-

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55. See Marcia Coyle, *Lawyers Fear a DOJ “Culture of Waiver”*, NAT’L L.J., Mar. 13, 2006, at 13 (disclosing that “[a] survey of in-house and outside counsel by a coalition of business and legal organizations reports that a ‘culture of waiver’ of the attorney-client privilege now exists in corporate investigations by the U.S. Department of Justice (DOJ) and other federal agencies”); *Attorneys—Corporate Counsel Uncertainty Over Attorney-Client Privilege Eroding Client Communication, Speakers Say*, U.S. LAW WEEK, May 10, 2005, at 2661 (reporting that waiver has become the norm rather than an option); U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 35 (2006), available at <http://www.uschamber.com/publications/reports/0603sec.htm> (stating that “[i]nterviewees generally expressed the view that, as a result of the recent policies advanced by the DOJ and the [SEC], corporations have felt intense pressure to waive attorney-client privilege and work-product protection during SEC investigations”).

56. See Testimony of Gerald B. Lefcourt Before the ABA Task Force on Attorney-Client Privilege 1-2, (April 21, 2005), available at [http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/\\$FILE/Lefcourt\\_Testimony.pdf](http://www.nacdl.org/public.nsf/Legislation/WhiteCollar001/$FILE/Lefcourt_Testimony.pdf) (expressing “that corporations have no choice but to waive privilege when it is demanded, requested, or even suggested, because the stakes of corporate prosecution are too high”); U.S. CHAMBER OF COMMERCE, REPORT ON THE CURRENT ENFORCEMENT PROGRAM OF THE SECURITIES AND EXCHANGE COMMISSION 32, 35 (2006) (describing that many corporate personnel reported being fearful of adverse consequences should they refuse to relinquish their privileges); *Attorneys—Corporate Counsel, Uncertainty Over Attorney-Client Privilege Eroding Client Communication, Speakers Say*, U.S. LAW WEEK (LEGAL NEWS), May 10, 2005, at 2661 (supposing that many corporate entities have begun to feel as if “the ‘option’ of waiver of the privilege has eroded into an ‘expectation’ of waiver on the part of regulators, government agencies, and external auditors in exchange for leniency or evidence of cooperation”); see also Nathan Koppel, *U.S. Urges Firms to Stop Funding Staff’s Defense*, WALL ST. J., Mar. 28, 2006, at B1 (noting that companies are concerned about possible indictment as a result of less than full cooperation with government investigators).

57. See ASSOC. OF CORP. COUNSEL, THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT, SURVEY RESULTS PRESENTED TO THE U.S. CONGRESS AND THE U.S. SENTENCING COMM’N 1, 2 (2006), available at <http://www.acca.com/Surveys/attyclient2.pdf> (describing the query made by a coalition of organizations to corporate and criminal defense counsel regarding the supposed erosion of the attorney-client privilege).

ernment agencies expect corporations to waive legal privileges.<sup>58</sup> Furthermore, a recent review of corporate pretrial agreements entered into with the DOJ after the release of the Thompson Memo suggests that privilege waivers were sought in more than two-thirds of those cases.<sup>59</sup> Considering the consequences associated with perceived non-cooperation, i.e., indictment, it is little wonder that corporations choose to waive the applicable privileges rather than risk criminal charges.

This “culture of waiver” transforms the internal investigation from one driven purely by the corporation’s interests into one driven by the DOJ’s interests.<sup>60</sup> Corporate counsel no longer begin investigations from the standpoint that privileges and protections may be waived, but rather begin their investigations knowing that

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58. Marcia Coyle, *Lawyers Fear a DOJ “Culture of Waiver”*, NAT’L L.J., Mar. 13, 2006, at 13; accord ASSOC. OF CORP. COUNSEL, *THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT, SURVEY RESULTS PRESENTED TO THE U.S. CONGRESS AND THE U.S. SENTENCING COMM’N 3* (2006), available at <http://www.acca.com/Surveys/attyclient2.pdf>. A similar study conducted by the NACDL found that 87% of respondents believed the attorney-client and work-product privileges were currently being challenged by various entities, including federal government agencies. NAT’L ASS’N OF CRIMINAL DEF. LAWYERS SURVEY: *THE ATTORNEY-CLIENT PRIVILEGE IS UNDER ATTACK 2* (2005), available at [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC\\_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf). Despite these results, some point to a survey conducted in 2002 by a DOJ Ad Hoc Advisory Group where prosecutors were asked about the frequency with which waivers were requested. Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 597-98 (2004). According to this survey, “requests for waiver of the attorney-client privilege or work product protection were the exception rather than the rule . . . .” *Id.* at 598. The accuracy of this survey has been called into question, however, due to the results of the more recently conducted NACDL and ACC surveys, as well as on the basis of the questions asked. See Marcia Coyle, *Lawyers Fear a DOJ “Culture of Waiver”*, NAT’L L.J., Mar. 13, 2006, at 13 (expressing opinions concerning the narrowness of the DOJ’s 2002 survey compared to “the coalition’s more recent and detailed survey”); see also *Corporate Lawyers Launch Attack on “Culture of Waiver”*, CORP. CRIME REP., Mar. 6, 2006, at 4, available at [www.corporatecrimereporter.com/waiver030606.htm](http://www.corporatecrimereporter.com/waiver030606.htm) (quoting Stephanie Martz, National Association of Criminal Defense Lawyers, who said that, in its survey, the government asked the U.S. Attorneys if they formally requested “‘privilege waivers on a routine basis’”—but that “‘they could all say no and still be asking on a periodic basis’”).

59. See Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice’s Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 22 (2006) (noting that out of “thirty-eight post-Thompson Memo pre-trial agreements [reviewed], . . . twenty-six included privilege waivers”).

60. See Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003) (contending that federal officials now begin their investigations with an advantage because, through privilege waivers, they have access to evidence gathered during the corporation’s internal investigation).



everything they discover, every note they take, and every interview they conduct will be reviewed by the DOJ and federal prosecutors.<sup>61</sup> In this vein, cooperation essentially deputizes the corporation, and corporate counsel, as de facto agents of the government.<sup>62</sup> Thus the term “deputation” does not refer to a formal deputation of corporate counsel whereby the DOJ explicitly grants powers to the corporate counsel, but rather refers to the effect the charging policies have had, i.e., to have corporate counsel conduct aspects of the investigation for the DOJ.<sup>63</sup>

Additionally, the “deputation” of corporate counsel may go even further than simply collecting documents and conducting interviews for the government; in some cases, misrepresentations made to corporate counsel during such an investigation may lead to charges for obstruction of justice. For instance, three executives of a software company, Computer Associates, pled guilty to federal charges for obstruction of justice in 2004, based on statements made, not to federal prosecutors, but to corporate counsel hired by the company to investigate the company’s accounting practices, which were called into question by the DOJ and the Securities and Exchange Commission.<sup>64</sup> Further allegations brought against the former CEO of Computer Associates alleged that the executive provided false information regarding the company’s accounting practices, with knowledge that the misinformation would be relayed to the United States Attorney’s Office, and that he, there-

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61. *See id.* (urging that corporations are expected to hand over to government prosecutors “employee interviews, documents, and evidentiary analyses” accumulated by the corporation through internal investigation).

62. *Id.*; *see also* George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 993 (2005) (noting that “employees who answer questions of company counsel or seek their advice are effectively speaking to prosecutors if the company later becomes the subject of a federal investigation”).

63. *See* Robert J. Sussman, *Practicing White Collar Criminal Defense in the Post-Enron Era: Some Changes in the System*, THE Hous. LAW., Nov./Dec. 2005, at 28 (noting that in response to allegations that the Thompson Memo essentially allowed the government to piggyback on the company’s investigation, U.S. Attorney James B. Comey stated that this was correct and that “there is nothing wrong with that”).

64. Alex Berenson, *3 Plead Guilty in Computer Associates Case*, N.Y. TIMES, Apr. 9, 2004, at C1; George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 985-86 (2005).

fore, had knowingly conspired to impede the official proceedings.<sup>65</sup> Thus, through these circumstances, corporate counsel can in effect become a representative of the government so that “misleading counsel carries the same criminal sanctions as misleading federal authorities.”<sup>66</sup>

Due to concerns over what has been perceived as a developing culture of waiver, a coalition of diverse parties, including the NACDL, ACC, American Civil Liberties Union, and the U.S. Chamber of Commerce, has lobbied against the Thompson Memo in favor of legislation to prohibit practices that erode the attorney-client privilege.<sup>67</sup> These groups have argued that the practice of

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65. George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 985-86 (2005) (quoting Grand Jury Indictment, United States v. Kumar, No. 1:04-cr-00846-ILG-ALL (E.D.N.Y. Sept. 22, 2004)).

66. *Id.* at 986; see also ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE ET AL., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 302B, § II., n.15 (2006), available at <http://abanet.org/media/docs/302BRevised.pdf> (remarking that people may be prosecuted “under 18 U.S.C. § 1512(c)(2) for impeding an ‘official proceeding’” after making false statements to private legal counsel assisting in a corporation’s internal investigation).

67. See Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A. J. EREPORT, Dec. 15, 2006, available at <http://www.abanet.org/journal/ereport/d15specter.html> (describing that “a coalition of strange bedfellows . . . called for the Attorney-Client Privilege Protection Act of 2006 to be enacted into law” in order to prevent further degradation of the protections intended by the privilege). The coalition won a significant victory recently with regards to the United States Sentencing Guidelines. Under § 8C2.5(g) of the Organizational Guidelines, entitled “Self-Reporting, Cooperation, and Acceptance of Responsibility,” an organization is capable of earning a reduction in its culpability score (and fine range) where it has “fully cooperated in the investigation.” See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) (2005). Prior to 2004, the Guidelines made no mention of waiver of the attorney-client privilege, but on May 1, 2004, the Sentencing Commission amended Application Note Twelve to § 8C2.5, adding the following sentence: “Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score under subdivisions (1) and (2) of subsection (g) unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.” See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) app. C, amend. 673 (2005) (showing the 2004 changes). In response, the coalition expressed their concerns and opposition to the amendment, through letters and testimony, before the Sentencing Commission. See Rhonda McMillion, *Matters of Privilege*, ABA J., Feb. 2006, at 70 (explaining the coalition’s response to the Sentencing Guidelines adoption of the privilege-waiver amendment); see also Elkan Abramowitz & Barry A. Bohrer, *Waiver of Corporate Attorney-Client and Work Product Protection*, N.Y.L.J., Nov. 1, 2005, at 3, available at [www.magislaw.com/articles/07011050001Morvillo.pdf](http://www.magislaw.com/articles/07011050001Morvillo.pdf) (noting that the coalition gave notice it would fight further “erosion of the attorney-client privilege”). The Sentencing Commission responded by reconsidering the addition of the waiver language, and the “coalition of business, civil rights, and bar organizations scored a significant victory” in April 2006, when the Sentencing Commission unanimously voted to delete the waiver language. Marcia Coyle, *Business Coalition Wins Big on Thorny Waiver Issue*, NAT’L L.J., April 11,

conditioning cooperation upon waiver of the attorney-client privilege has significantly eroded the principles underlying the privilege: full and frank communication with one's attorney.<sup>68</sup>

In response to pressure exerted by these groups and other critics, the DOJ issued new charging policies in a memorandum issued by Deputy Attorney General Paul J. McNulty on December 12, 2006.<sup>69</sup> The McNulty Memo makes two significant changes to the Thompson Memo. First, the McNulty Memo states that prosecutors "generally should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment," except "[i]n extremely rare cases, . . . when the totality of the circumstances show that it was intended to impede a criminal investigation."<sup>70</sup> Second, the McNulty Memo requires that prosecutors obtain written approval before seeking

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2006, at 4; *see also* Anne Marie Squeo, *Agency Weighs Ending Leniency For Executive Cooperation Probes*, WALL ST. J., Jan. 28, 2006, at A4 (noting that the U.S. Sentencing Commission added a potential rule change, altering the current leniency companies get for waiving legal privileges, in the Federal Register for public comment).

68. *See* Letter from Griffin B. Bell et al., former senior Justice Department Officials, to Alberto Gonzales, U.S. Attorney General 1-2 (Sept. 5, 2006), available at [http://www.abanet.org/media/docs/ag\\_sept52006.pdf](http://www.abanet.org/media/docs/ag_sept52006.pdf) (protesting the government's tactics in investigating corporate wrongdoing that they see as "seriously eroding" attorney-client privilege and noting the inability of employees to be fully open due to the lack of the privilege); *see also* ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE ET AL., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 302B, § I (2006), available at <http://abanet.org/media/docs/302Brevised.pdf> (purporting that the Thompson Memo has caused the erosion of individuals' constitutional rights).

69. *See id.* (contending that the McNulty Memo, which replaced the Thompson Memo, asserts that federal investigators should follow a milder approach when seeking privilege waivers from corporations); Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VII.B.2., at 8-9 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf) (instructing that federal prosecutors should only pursue "waiver of attorney-client or work product protections when there is a legitimate need for the privileged information," and even then, to the least expansive extent possible).

70. Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VII.B.3., at 11 & n.3 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf); *see also* Marcia Coyle, *The "McNulty Memo": Real Change, or Retreat?*, NAT'L L.J., Dec. 15, 2006, at 25 (reiterating that federal prosecutors may take into account a corporation's payment of an employee's legal fees when such payment is made only to hinder the government's investigation of the company).

privilege waivers.<sup>71</sup> What kind of approval depends on the type of waiver sought as the McNulty Memo designates two categories of waiver.<sup>72</sup>

The first category, Category I, includes “purely factual information, which may or may not be privileged, relating to the underlying misconduct . . . .”<sup>73</sup> In order to seek a waiver of such Category I materials, “prosecutors must obtain written authorization from the United States Attorney who must . . . consult with[ ] the Assistant Attorney General for the Criminal Division before granting or denying the request.”<sup>74</sup> The second category, Category II, includes attorney-client communications and non-factual work product.<sup>75</sup> Before requesting a Category II waiver, the United States Attorney must receive the Deputy Attorney General’s written authorization by setting forth the legitimate need for the waiver as well as the scope of the waiver being sought.<sup>76</sup> To establish a legitimate need for material from either category, the McNulty Memo sets forth four factors:

- (1) the likelihood and degree to which the privileged information will benefit the government’s investigation;

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71. Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VII.B.2., at 10 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

72. Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VII.B.2., at 10 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

73. *Id.* This category seems akin to ordinary or “fact” work product. Ordinary or fact work product is the “written or oral information transmitted to the attorney and recorded as conveyed by the client.” *In re Antitrust Grand Jury*, 805 F.2d 155, 163 (6th Cir. 1986). Such ordinary or fact work product may be obtained, despite the privilege, upon a showing of substantial need and an inability to otherwise obtain the privileged work product without material hardship. *Toledo Edison Co. v. G.A. Techs., Inc.*, 847 F.2d 335, 339-40 (6th Cir. 1988); *Castle v. Sangamo Weston, Inc.*, 744 F.2d 1464, 1467 (11th Cir. 1984) (*per curiam*). The McNulty Memo would thus allow prosecutors to avoid these burdens if a waiver was granted.

74. Memorandum of Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VII.B.2., at 9 (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

75. *Id.* at 10.

76. *Id.*

- (2) whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
- (3) the completeness of the voluntary disclosure already provided; and
- (4) the collateral consequences to a corporation of a waiver.<sup>77</sup>

At first glance, the McNulty Memo appears to resolve many of the Thompson Memo's critics' concerns. However, many feel that the McNulty Memo does little in terms of meaningful change.<sup>78</sup> With regard to the advancing of legal fees, some critics believe that the exception regarding impeding an investigation may be too easily met.<sup>79</sup> And there are many criticisms of the new two-tiered waiver system.

First, rather than do away with privilege waivers all together, the McNulty Memo continues to allow such waivers to be considered in charging decisions, just with a higher level of oversight.<sup>80</sup> Some charge that this position will not halt the erosion of the attorney-client privilege because as long as the possibility that the privilege may be waived exists, communications between attorneys and corporate clients may be chilled.<sup>81</sup> Also, the guidelines are internal policies with no remedy at law to corporations under investigation if a prosecutor fails to follow the proper protocols.<sup>82</sup> Thus, it is

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77. *Id.* at 9.

78. See Marcia Coyle, *The "McNulty Memo": Real Change, or Retreat?*, NAT'L L.J., Dec. 15, 2006, at 25 (explaining that many business people, lawyers, and legal scholars are doubtful that the McNulty Memo will bring about any change in the way that waivers are sought from corporations by federal prosecutors); Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A. J. EREPORT, Dec. 15, 2006, available at <http://www.abanet.org/journal/ereport/d15specter.html> (contending that instead of representing an improvement in the legal system, the McNulty Memo "threatens to further erode the ability of corporate leaders to seek and obtain the legal guidance they need to effectively comply with the law").

79. Marcia Coyle, *The "McNulty Memo": Real Change, or Retreat?*, NAT'L L.J., Dec. 15, 2006, at 25.

80. Martha Neil, *Thompson Memo Changes Not Enough, ABA Says*, A.B.A. J. EREPORT, Dec. 15, 2006, available at <http://www.abanet.org/journal/ereport/d15specter.html> (quoting ABA President Karen J. Mathis).

81. See *id.* (opining that the McNulty Memo may cause further damage to a corporate leader's ability to obtain necessary legal counseling (quoting ABA President Karen J. Mathis)).

82. Marcia Coyle, *The "McNulty Memo": Real Change, or Retreat?*, NAT'L L.J., Dec. 15, 2006, at 25.

uncertain whether the policy will be strictly enforced internally or whether rogue prosecutors can continue implicitly to demand privilege waivers. And even if the proper channels are followed, it is as of yet unclear whether the request to seek a privilege waiver will simply be met with rubber stamp approval, making the approval process meaningless.<sup>83</sup> Furthermore, the two-category system itself has problems as it is very difficult to separate purely factual materials from materials that reflect an attorney's core work product, i.e., the attorney's opinion work product.<sup>84</sup> Finally, though the McNulty Memo attempts to address some of the concerns raised by the Thompson Memo, it noticeably fails to change other important considerations, such as that prosecutors may still weigh a corporation's information sharing between the corporation and employees regarding the investigation or a corporation's retention or failure to sanction employees who assert Fifth Amendment rights.<sup>85</sup>

The McNulty Memo is still in its infancy and whether the concerns raised by the Thompson Memo are fully alleviated has yet to be seen. It appears doubtful, however, in light of the immediate criticism the McNulty Memo has received, that concerns regarding the "culture of waiver" will go away within the foreseeable future.<sup>86</sup> In light of the continued allowance of privilege waivers, the potential for "deputized" counsel appears to remain and thus the ethical implications for "deputized" counsel remain a relevant concern.

#### IV. ETHICAL CONCERNS OF "DEPUTIZED" COUNSEL

The "deputation" of corporate counsel has serious ethical ramifications. Because corporate counsel now often begins its investigation knowing that the results will be handed over to the DOJ, it

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83. *See id.* (asserting a Washington D.C. lawyer's opinion that the DOJ and the changes to the government's charging system proposed by the McNulty Memo are under a probationary period as no one is sure whether they will be effective).

84. *See id.* (noting that "Stephanie Martz, director of the white-collar crime project at the National Association of Criminal Defense Lawyers, called the two new categories of protected materials 'very deceiving'").

85. *See id.* (stating that federal prosecutors may still evaluate a company's internal communications and its behavior toward employees accused of wrongdoing when deciding whether to pursue waiver).

86. *See generally id.* (expressing that there is still much concern among lawyers and business people about the government's continued use of waiver as an element in charging companies for alleged wrongdoing).

should no longer rely on the standard boilerplate warnings that have sufficed for years. But the ramifications go beyond the initial warnings. Counsel conducting interviews where employees have been coerced into waiving Fifth Amendment protections, under threat of termination, and/or who have been denied funding for legal fees, may be violating the legal rights of the employees they interview. Finally, "deputized" counsel may face a moral dilemma with regard to exculpatory materials it discovers which the DOJ either has failed to notice or chosen to ignore.

### A. *Interview Warnings*

The most obvious impact on "deputized" counsel is with regard to the initial warnings. As noted above, the interview process typically begins with some sort of boiler-plate disclaimer intended to make clear to the interviewee that the interviewing attorney represents the corporation, not the employee, and that the privilege protecting the interview notes may be waived by the corporation.<sup>87</sup> At the very least, "deputized" counsel who knows that the results in fact *will be* waived and handed over to the DOJ should make the interviewees aware of that fact. To continue to advise the employee that the results may remain privileged at the corporation's discretion, when the attorney knows that the corporation is in fact waiving the privilege, would be clearly misleading and in violation of Model Rule 4.1(a): "[i]n the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . . ."<sup>88</sup> But beyond simply informing employees that the interview will not be protected, does the "deputized" counsel have any further duties, such as to warn the witness that his or her statements could be used against him or her, or to advise the witness to retain separate counsel?<sup>89</sup>

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87. See, e.g., Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 103 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (charging retained counsel to be forthcoming in informing the interviewing employee that counsel represents the company, to whom the privilege belongs).

88. MODEL RULES OF PROF'L CONDUCT R. 4.1(a) (2006); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 944 (2003) (noting that even if statements of a corporation's intentions for disclosure are not technically false, they are still likely misleading and violate Model Rule 4.1).

89. Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 90 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (noting that an inter-

If the interviewing attorney is a prosecutor, the ethical rules are clearer. Model Rule 3.8, titled “Special Responsibilities of a Prosecutor,” provides that “[t]he prosecutor in a criminal case shall . . . make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel.”<sup>90</sup> These rules also prohibit a prosecutor from seeking a waiver of pretrial rights from an unrepresented accused.<sup>91</sup> Thus, it would appear that a prosecutor should advise an interviewee that the interviewee has the right to obtain counsel. The procedure United States Attorneys must go through to interview “target” witnesses often requires issuance of a subpoena by a grand jury, which in turn will put the interviewee on notice of the right to remain silent and for the need to obtain an attorney.<sup>92</sup> But the corporate “deputized” counsel is not a prosecutor, so do similar ethical obligations apply with regard to pre-interview warnings?

The Model Rules provide some bare guidance, stating that “[i]n dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”<sup>93</sup> The Model Rule’s comments clarify this mandate, stating that when the company’s interests are adverse to the employee’s, the interviewing attorney should advise the employee that the attorney cannot represent the employee and that they “may wish to obtain independent representation.”<sup>94</sup> Similarly, Model Rule 4.3 provides that, in dealing with an unrepresented person, “[t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the inter-

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viewing attorney’s obligations with regard to these further warnings is the subject of debate).

90. MODEL RULES OF PROF’L CONDUCT R. 3.8(b) (2006).

91. *Id.* 3.8(c).

92. *See* U.S. ATTORNEY’S MANUAL §§ 9-11.150, .151 (2006) (discussing the issuance of subpoenas before the questioning of witnesses and the substance of advice given to them when they are served with a subpoena).

93. MODEL RULES OF PROF’L CONDUCT R. 1.13(f) (2006).

94. *Id.* 1.13(f) cmt. 10. Whether such a warning should be given turns on the facts of each case. *See id.* 1.13(f) (indicating that a lawyer has a duty to warn when he or she reasonably knows the company’s interests are adverse to the employee to be interviewed).



ests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”<sup>95</sup> In a situation in which an internal investigation is being conducted, particularly if the interviewee is the subject of the interview, it can be argued that the attorney should know that there is a “reasonable possibility” of there being a conflict of interest. And even if this is not clear from the outset of the interview, as an interview progresses it may become clear that an interviewee’s interests are at odds with the corporation’s interests.

To meet the obligations imposed on counsel under the Model Rules, some commentators suggest giving very broad warnings, similar to *Miranda* warnings.<sup>96</sup> For instance, United States District Judge Frederick Lacey suggests the following model instructions:

I am not your lawyer, I represent the corporation. It is the corporation’s interests I have been retained to serve. You are entitled to have your own lawyer. If you cannot afford a lawyer, the corporation may, or may not, pay his fee. You may wish to consult with him before you confer with me. Among other things, you may wish to claim the privilege against self-incrimination. You may wish not to talk to me at all.

What you tell me, if it relates to the performance of your duties, and is confidential, will be privileged. The privilege, however, requires explanation. It is not your privilege to claim. It is the corporation’s privilege. Thus, not only can I tell, I must tell, others in the corporation what you have told me, if it is necessary to enable me to provide the legal services to the corporation it has retained me to provide.

Moreover, the corporation can waive its privilege and thus, the president, or I, or someone else, can disclose to the authorities what you tell me if the corporation decides to waive its privilege.

Also, if I find wrongdoing, I am under certain obligations to report it to the Board of Directors and perhaps the stockholders.

Finally, the fact that our conversation is privileged does not mean that what you did, or said, is protected from disclosure just because you tell me about it. You may be subpoenaed, for example, and re-

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95. MODEL RULES OF PROF'L CONDUCT R. 4.3 (2006).

96. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 944 (2003) (pointing out that some commentators suggest going beyond mere pre-interview warnings by adopting “full-fledged *Miranda*-type warnings”).

quired to tell what you did, or said or observed, even though you told me about it.

Do you understand?<sup>97</sup>

While some commentators believe such a dire warning is needed to ensure that the employee is clear on the role of the corporate attorney, other commentators disagree, arguing that such warnings are likely to bring the interview to a screeching halt.<sup>98</sup> Indeed, such warnings may run counter to the attorney's obligations to his or her client. Telling an employee that he can obtain outside counsel or stopping an interview where the employee is revealing personally damaging information will likely hinder the attorney's ability to get information from the employee. Though it may be permissible for an attorney to advise an employee that he may seek outside representation, it may not be in the corporation's best interest for the employee actually to secure such representation.<sup>99</sup> As the New York City Bar Association recently articulated: "Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice—at least in the absence of the consent of his client to do so."<sup>100</sup> Thus,

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97. Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in INTERNAL CORPORATE INVESTIGATIONS 17, 40 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (quoting Frederick B. Lacey, former judge, U.S. Dist. of N.J.). Presumably, the phrase relating to waiver of the attorney-client privilege would be altered in cases in which it was known the privilege was in fact being waived to reflect the same.

98. See Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 946 (2003) (lamenting that such a warning could "bring an internal investigation to a grinding halt"); see also Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 99 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (finding that existing case law does not require such extensive warnings). But see Dennis J. Block & Nancy E. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in INTERNAL CORPORATE INVESTIGATIONS 17, 40 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (acknowledging the potential fear such a warning may elicit, but emphasizing that employees need sufficient information to understand that the interviewing attorney is not their attorney).

99. See Paul B. Murphy & Lucian E. Dervan, *Watching Your Step: Avoiding the Pitfalls and Perils of Corporate Internal Investigations*, 16 ALAS LOSS PREVENTION J. 2, 4-5 (2005) (stating that advising an employee who has relevant information to obtain counsel might go against the company's interests).

100. Ass'n of the Bar of N.Y. Comm. on Prof'l and Judicial Ethics, Formal Op. 2004-02 (2004), available at [http://www.nycbar.org/Publications/reports/print\\_report.php?rid=240&searchterm=2004-02](http://www.nycbar.org/Publications/reports/print_report.php?rid=240&searchterm=2004-02).

advising an employee to obtain individual representation may be counter to the interviewing attorney's ethical obligations to his or her corporate client.

Under most state's ethical standards, corporate counsel has few obligations beyond the bare warnings already given.<sup>101</sup> Yet corporate counsel's unique new role as a "deputy" of the government, especially in light of the dire consequences, such as obstruction of justice charges, that may befall the employee who does not understand that role, makes the traditional boilerplate warnings seem lacking and incomplete.<sup>102</sup> As one commentator has characterized the dilemma: "If the bar does not better define ethical rules for these situations, there will also be substantial variations in practice that serve neither the client and its employees nor the reputation of the legal profession."<sup>103</sup>

### B. *Respecting the Legal Rights of Interviewee*

With regard to the individual employees, the "deputation" of corporate counsel has serious Fifth and Sixth Amendment implications when a corporation feels pressure to require its employees to waive their Fifth Amendment rights or refuses to pay its employees' legal fees.<sup>104</sup> In considering whether a corporation has cooperated, the Thompson Memo provides that prosecutors may consider whether the organization is supporting "culpable employees and

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101. See, e.g., Randall J. Turk, *The Interview Process*, in INTERNAL CORPORATE INVESTIGATIONS 89, 98-99 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002) (asserting that existing case law does not require any additional warnings beyond making sure the employee knows who the lawyer represents and that the company controls the attorney-client privilege).

102. See Marvin G. Pickholz & Jason R. Pickholz, *Investigations Put Employees in Tough Spot*, N.Y.L.J., Jul. 24, 2006, at 10, available at [www.akerman.com/documents/PickholzWhiteCollarNYLJ7-24-06.pdf](http://www.akerman.com/documents/PickholzWhiteCollarNYLJ7-24-06.pdf) (noting that the question of outside counsel acting as "state actors" renews focus on whether employers should explain to employees, prior to the interview process, their constitutional rights).

103. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 946 (2003).

104. See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 365-66 (S.D.N.Y. 2006) (finding that the Thompson Memo, as applied by the government, violated interviewed employees' Fifth Amendment due process rights and Sixth Amendment right to representation by counsel); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 121-22 (2003) (explaining that, by disfavoring the practice of employers covering the attorney fees of their employees, employees' Fifth Amendment protection against self-incrimination could be circumvented).

agents, either through the advancing of attorneys fees, [or] through retaining the employees without sanction for their misconduct . . . .”<sup>105</sup> By implementing this provision, prosecutors have sometimes “made it known that, as a condition of complete cooperation, an organization will be expected to discharge [e]mployees who assert their right against self-incrimination when requested to provide interviews or other information by the government’s criminal or civil enforcement investigators.”<sup>106</sup> Prosecutors also rely on this provision to discourage the advancing of legal fees to corporate employees, thus depriving employees of “the support and resources they need to defend themselves.”<sup>107</sup> Though the McNulty Memo has generally stated that seeking a waiver of attorneys’ fees should not be considered, it accepts that it may be a relevant consideration if the advancing of legal fees is done to impede an investigation—a standard that some fear may be too easily met.<sup>108</sup> Furthermore, the McNulty Memo does not address the pressuring of employees to waive their Fifth Amendment rights. The constitutionality of both of these practices is suspect and has been called into question on both legal and practical grounds.<sup>109</sup>

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105. Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys, Principles of Federal Prosecution of Business Organizations § VI.B. (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

106. ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE ET AL., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 302B, § VI. (2006), available at <http://abanet.org/media/docs/302Brevised.pdf>; see also *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Before the S. Comm. on the Judiciary*, 109th Cong. 12 (2006) (statement of Karen J. Mathis, President, ABA), available at [http://www.abanet.org/poladv/letters/attyclient/060912\\_testimony\\_mathis-acpriv.pdf](http://www.abanet.org/poladv/letters/attyclient/060912_testimony_mathis-acpriv.pdf) (explaining that the Thompson Memo discourages cooperation credit for companies if they fail to punish or fire employees who exercise their Fifth Amendment rights when the government requests information).

107. ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE ET AL., REPORT TO THE HOUSE OF DELEGATES: RECOMMENDATION 302B, § VI. (2006), available at <http://abanet.org/media/docs/302Brevised.pdf>; see also *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Before the S. Comm. on the Judiciary*, 109th Cong. 12 (2006) (statement of Karen J. Mathis, President, ABA), available at [http://www.abanet.org/poladv/letters/attyclient/060912testimony\\_mathis-acpriv.pdf](http://www.abanet.org/poladv/letters/attyclient/060912testimony_mathis-acpriv.pdf).

108. Marcia Coyle, *The “McNulty Memo”: Real Change, or Retreat?*, 29 NAT’L L.J. 16, Dec. 15, 2006, at 25.

109. See *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Before the S. Comm. on the Judiciary*, 109th Cong. 49 (2006) (statement of Andrew Weissmann, Partner, Jenner & Block LLP), available at [http://www.abanet.org/poladv/letters/attyclient/060912testimony\\_hrgsjud.pdf](http://www.abanet.org/poladv/letters/attyclient/060912testimony_hrgsjud.pdf) (noting that regardless of the legal

By utilizing corporate counsel and pressuring corporations under the guise of "cooperation," government agencies are capable of achieving what they could not otherwise achieve by conducting the interviews themselves—coerce a waiver of an individual's Fifth Amendment rights.<sup>110</sup> The Supreme Court of the United States has held that self-incriminating statements made under threat of termination by a state actor are coerced and, therefore, in violation of the Fifth Amendment.<sup>111</sup> Similarly, the Supreme Court has held that a state cannot terminate an employee for exercising his or her Fifth Amendment rights. For example, in *Uniform Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation of New York*,<sup>112</sup> the Supreme Court considered whether fifteen employees of the Department of Sanitation of New York City were wrongly dismissed from employment in violation of their constitutional rights when they refused to waive their Fifth Amendment guarantees.<sup>113</sup> These specific employees had been questioned during the course of an investigation as to whether sanitation employees were failing to charge fees for the use of certain city facilities or keeping fees for themselves.<sup>114</sup> The employees were told that if they refused to testify based on self-incrimination grounds, their employment and eligibility for any other employment with the city would terminate.<sup>115</sup> The employees refused to testify and were subsequently dismissed from employment.<sup>116</sup> The Supreme Court held that the state could not terminate employees if the plain impact of the proceedings against the employees was to "present them with a choice between surren-

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soundness of such practices, there is a need to re-think the Thompson Memo's dictates as a policy matter).

110. T.H. Waters III, *Between a Rock and a Hard Place: An Examination of a "Costly" Right to Silence for Corporate Employees in Criminal Investigations*, 25 REV. LITIG. 603, 604-06 (2006).

111. *Garrity v. New Jersey*, 385 U.S. 493, 497-98 (1967) (holding that statements made by police officers under threat of termination were obtained in violation of the Constitution and could not be used in subsequent criminal prosecution at state court).

112. 392 U.S. 290 (1968).

113. *Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation of New York*, 392 U.S. 280, 281-83 (1968). Out of fifteen individuals, twelve refused to testify and were dismissed because of their refusal. *Id.* at 282. The other three individuals were brought in front of a grand jury and asked to sign waivers of immunity and were dismissed after they refused. *Id.* at 282-83.

114. *Id.* at 281.

115. *Id.* at 281-82.

116. *Id.* at 282-83.

dering their constitutional rights or their jobs.”<sup>117</sup> The Supreme Court has extended its reasoning in a variety of contexts, including losses of: job, state contracts, future contracting privileges with the state, political office, and the right to run for political office in the future.<sup>118</sup> Yet, governmental agencies are able to obtain such waivers, even if it is indirectly, through the “cooperating” corporation, which imposes substantial penalties on witnesses who might otherwise seek to exercise their Fifth Amendment rights.

The constitutionality of both seeking Fifth Amendment waivers and refusing to advance legal fees under the Thompson Memo was recently called into question in two opinions issued by Judge Lewis Kaplan of the Southern District of New York in *United States v. Stein (Stein I)*<sup>119</sup> and *United States v. Stein (Stein II)*.<sup>120</sup> The events in the *Stein* cases stemmed from an investigation by the IRS into abusive tax shelters set up by accounting firm KPMG.<sup>121</sup> In response to the investigation, KPMG hired an outside firm to help

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117. *Uniform Sanitation Men*, 392 U.S. at 284-85. Had the state demanded that petitioners answer “questions specifically, directly, and narrowly relating to the performance of their official duties on pain of dismissal from public employment without requiring relinquishment of the benefits of the constitutional privilege, and if they had refused to do so,” the case may have been decided differently. *Id.* at 284.

118. See *Lefkowitz v. Cunningham*, 431 U.S. 801, 803-08 (1977) (finding unconstitutional a statute that automatically terminated a politician’s status as office holder for five years if he refused to waive self-incrimination immunity); *Lefkowitz v. Turley*, 414 U.S. 70, 76, 82-83 (1973) (acknowledging the unconstitutionality of a statute that disqualified the contractor from existing and future public contracts if the contractor did not waive his immunity when testifying to the state about his contract); *Gardner v. Broderick*, 392 U.S. 273, 276-79 (1968) (discussing a city charter provision discharging a police officer for not waiving his immunity from prosecution); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation of New York*, 392 U.S. 280, 284-85 (1968) (determining that a city charter which forced city employees to choose between giving up their jobs or their constitutional rights denied the discharged employees “the benefit of the Constitution”); *Garrity v. State of New Jersey*, 385 U.S. 493, 499-500 (1967) (explaining that testimony from a police officer forced to testify under threat of removal may not be used against such officer); cf. *Minnesota v. Murphy*, 465 U.S. 420, 434, 440 (1984) (discussing the threat of revocation of probation for not answering, although ultimately finding the disclosures were not compelled because the witness was not “required . . . to choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent”). See generally *United States v. Frierson*, 945 F.2d 650, 657-58 (3rd Cir. 1991) (summarizing previous cases which “held that the government may not impose a penalty on a person for asserting the Fifth Amendment privilege”).

119. 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

120. 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

121. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 338-39 (S.D.N.Y. 2006).

develop a cooperative strategy with the government.<sup>122</sup> As part of this strategy, KPMG decided to “clean house,” essentially terminating high-level employees who later became the subject of a criminal investigation along with other retained KPMG employees.<sup>123</sup>

In the first of the two opinions, issued on June 26, 2006, the court found that prosecutors exerted pressure upon KPMG by implementing policies under the Thompson Memo.<sup>124</sup> This pressure caused KPMG to deny advancement of legal fees to employees under criminal investigation—legal fees which KPMG normally paid for its employees.<sup>125</sup> The court held that the prosecutors’ actions infringed on the employees’ Fifth Amendment right to due process as well as their Sixth Amendment right to counsel.<sup>126</sup> The court continued to question the Thompson Memo’s constitutionality one month later with regard to KPMG’s threat to terminate certain employees who refused to talk to prosecutors.<sup>127</sup> In *Stein II*, the court held that where prosecutors pressured KPMG to threaten termination of employees who did not make statements to prosecutors, such statements were obtained in violation of the Fifth Amendment privilege against compelled self-incrimination.<sup>128</sup> Quoting the United States Supreme Court’s decision, *Garrity v. New Jersey*,<sup>129</sup> the court stated, “[i]t no longer may be doubted that economic coercion to secure a waiver of the privilege against self-incrimination, where it is attributable to the government, violates the Fifth Amendment if the pressure is sufficient ‘to deprive [ ] [the accused] of his “free choice to admit, to deny, or to refuse to answer.”’”<sup>130</sup> The court concluded that such statements should therefore be suppressed.<sup>131</sup>

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122. *Id.* at 339.

123. *Id.*

124. *Id.* at 336, 338.

125. *Id.* at 336, 347.

126. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 365-66 (S.D.N.Y. 2006).

127. *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315, 319-20 (S.D.N.Y. 2006).

128. *Id.* at 334-35, 337.

129. 385 U.S. 493 (1967).

130. *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315, 326 (S.D.N.Y. 2006) (quoting *Garrity v. New Jersey*, 385 U.S. 493, 496 (1967)).

131. *Id.* at 338. The court concluded:

In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick—it

The *Stein* rulings have important potential impacts on the “deputized” counsel. An attorney may arguably be in violation of the Model Rules of Professional Conduct when questioning an employee who has been pressured by such tactics into talking or who has been denied legal fees. Model Rule 4.4 states: “In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”<sup>132</sup> This provision has been held to prohibit conduct that violates the rights of third persons, such as surreptitiously tapping or recording conversations with witnesses in violation of wiretapping laws.<sup>133</sup> Under the *Stein* reasoning, “deputized” counsel may violate an employee’s constitutional rights by interviewing him or her in certain circumstances. If an employee consents to the interview and waives Fifth Amendment protections only out of a fear of termination, it could be argued that the attorney is using methods of obtaining evidence that violate the employee’s constitutional rights. A similar argument could be made with regard to the deprivation of advancing attorneys’ fees. These concerns are heightened in situations where it is in the corporation’s best interest to find a scapegoat, thus making the relationship with the employee adversarial.

### C. Heightened Brady Concerns

Another consideration for corporate counsel is what responsibility, if any, does “deputized” counsel have to reveal exculpatory materials to employees who are later indicted. To illustrate, consider the following hypothetical. Imagine attorney J. Doe inter-

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threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the USAO employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made. . . . The coerced statements and their fruits must be suppressed.

*Id.* at 337-38.

132. MODEL RULES OF PROF'L CONDUCT R. 4.4 (2006) (emphasis added).

133. Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 579 (2005) (discussing the potential problems lawyers face when they secretly record conversations); see also ABA Comm. On Ethics & Prof'l Responsibility, Formal Op. 01-422, at 1201:106 (2001) (outlining the rules and conduct lawyers must follow when electronically recording conversations).



views employee A. During the course of the interview, it becomes apparent to Doe that employee A may have been involved in an accounting fraud scheme. Two days later, however, Doe interviews employee B and during the course of the interview, B reveals information that exculpates A or mitigates A's role in the fraud. One year later, Doe discovers that A is under indictment for accounting fraud, a charge that in light of the evidence revealed to Doe by employee B, should probably not be brought against A. Does Doe have any obligation to reveal the exculpatory evidence to employee A?

If Doe were an actual prosecutor, the answer would likely be "yes." As a matter of law, the Supreme Court has held that due process requires prosecutors to disclose evidence upon request to the defense that could assist the defendant.<sup>134</sup> This rule, commonly referred to as the *Brady* Rule, has been summarized as follows: "a criminal defendant has a constitutional right to disclosure of exculpatory evidence that is material to guilt or punishment."<sup>135</sup> The *Brady* Rule expands to include evidence that would be useful to impeach a prosecution witness,<sup>136</sup> and even extends to evidence that is known only to police investigators and not to the prosecutor, thus placing a burden on the prosecution to learn of any favorable evidence known to others acting on behalf of the government.<sup>137</sup> Therefore, turning back to our hypothetical, a prosecutor would have a duty under *Brady* to disclose the exculpatory evidence learned from employee B.

Beyond the legal duty to disclose, a prosecutor would also have an ethical duty to disclose. Under Model Rule 3.8(d), a prosecutor in a criminal case is required to:

[M]ake timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the

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134. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of favorable evidence from the accused is a due process violation).

135. Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205, 1213 (2000) (citing *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995)).

136. See *United States v. Bagley*, 473 U.S. 667, 676 (1985) (explaining that impeachment evidence is within the scope of the *Brady* Rule); see also Lisa M. Kurcias, Note, *Prosecutor's Duty to Disclose Exculpatory Evidence*, 69 *FORDHAM L. REV.* 1205, 1214 (2000) (explaining *Bagley*).

137. *Kyles v. Whitley*, 514 U.S. 419, 437-38 (1995) (explaining that a "prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.<sup>138</sup>

The Canons of Professional Ethics provide that a prosecutor “should make timely disclosure to the defense of available evidence, known to him, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”<sup>139</sup> The justification of these rules is based on the premise that a prosecutor’s primary duty “is not to convict, but to see that justice is done.”<sup>140</sup> These disclosure obligations are also based on the fact that prosecutors have a police force that investigates their cases and gathers evidence for them which could lead to a “great inequity between the prosecution and the defense in a criminal trial.”<sup>141</sup> Turning again to our hypothetical, it would appear that a prosecutor would be required to disclose the information learned from employee B.

But while the duty of a prosecutor is defined in both case law and the Model Rules, no such guidance exists for an attorney conducting an investigation essentially for the government. The rules generally acknowledge a lawyer’s role as “a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.”<sup>142</sup> As an officer of the legal system who has a special responsibility for the quality of justice, it would seem that the “deputized” counsel should, at the very

138. MODEL RULES OF PROF’L CONDUCT R. 3.8(d) (2006). The ethical obligations are generally broader than the *Brady* Rule in that they require disclosure of all evidence, not just that which is material, but narrower in that they do not extend to impeachment evidence or impose a duty upon prosecutors to discover evidence in the hands of its agents. Lisa M. Kurcias, Note, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1216 (2000). The United States Attorney’s Manual further recognizes that exculpatory evidence should be disclosed to the grand jury before seeking an indictment against a person. U.S. ATTORNEY’S MANUAL § 9-11.233 (2006).

139. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-13 (1980). The Model Code was replaced by Model Rules in 1983. Robert W. Meserve, *Chairperson’s Introduction to MODEL RULES OF PROF’L CONDUCT 2* (2001).

140. Lisa M. Kurcias, Note, *Prosecutor’s Duty to Disclose Exculpatory Evidence*, 69 FORDHAM L. REV. 1205, 1212 (2000) (quoting CANONS OF PROF’L ETHICS Canon 5 (1908)).

141. *Id.* at 1209 (citing Fred C. Zacharias, *Structuring the Ethics of Prosecutorial Trial Practice: Can Prosecutors Do Justice?*, 44 VAND. L. REV. 45, 54-55, 59 (1991)).

142. MODEL RULES OF PROF’L CONDUCT Preamble (2006).

least, have a duty to try and inform the prosecution of such evidence. But if the prosecutor does not make the evidence available to the defense, does the “deputized” counsel have any obligation to actually reveal the information to the defense?

As with so many situations already discussed, the Model Rules do not provide clear guidance, perhaps because the “deputized” role was never envisioned. While an argument could certainly be made that disclosure of some sort is required,<sup>143</sup> what if such disclosure is counter to the interests of the corporate client? For instance, a limited number of jurisdictions allow disclosure of privileged materials to the government without waiving the privilege to third parties.<sup>144</sup> The “deputized” counsel’s corporate client may not wish the exculpatory material to be made public for fear of negative publicity or third-party civil suits. In such a situation, the “deputized” counsel may feel a tension between zealously representing his client and allowing an innocent employee to stand trial. Without further guidance, the deputized counsel will likely

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143. Model Rule 3.3(a), dealing with the candor and respect lawyers must show towards a tribunal, could arguably apply:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

MODEL RULES PROF’L CONDUCT R. 3.3 (2006). The major obstacle to this argument is that Rule 3.3 is couched in terms of applying to a lawyer before the tribunal. *See id.* R. 3.3 cmt. 1 (stating, “[t]his Rule governs the conduct of a lawyer who is representing a client in the proceedings of a tribunal”). Thus, if corporate counsel is not representing a party before the tribunal, no obligation under Model Rule 3.3 would appear to apply.

144. *See, e.g., Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 611 (8th Cir. 1978) (adopting “limited” or “selective” waiver of attorney-client privilege in a case where disclosure was made to a government agency pursuant to an internal investigation); *see also* Zach Dostart, Comment, *Selective Disclosure: The Abrogation of the Attorney-Client Privilege and the Work Product Doctrine*, 33 PEPP. L. REV. 723, 734 (2006) (noting the various jurisdictions adopting selective waiver). *See generally* Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155 (2006) (discussing the relative merits of selective waiver).

feel obligated to remain silent, a result that does not further the “quality of justice” or the reputation of the profession in general.

#### V. CONCLUSION

The Thompson Memo has brought dramatic changes to the way corporations approach internal investigations—changes which will not likely be reversed by the McNulty Memo. Where waiving the attorney-client privilege and work-product immunity was once a true choice, today many corporations feel compelled to waive such protections to avoid indictment. The result of this “culture of waiver” has been the “deputation” of corporate counsel. But this “deputation” has created a class of attorneys that fall between the ethical rules of a private attorney, representing a client, and an attorney, such as a prosecutor, who represents the public’s interests. The result is that “deputized” counsel may face ethical issues much larger than they even realize, ranging from heightened warning requirements, to the possibility that the interviews themselves are violating the legal rights of the employees being interviewed. While no clear guidance is readily available, such “deputized” attorneys should make themselves aware of such issues in an effort to act ethically until the Model Rules are amended, or the Thompson Memo policies are altered or retracted, thus alleviating the many tensions that currently exist for the “deputized” counsel.