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Addressing Allegations of Corporate Crimes: Initial Considerations for the Corporate Counsel

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I. [§ 6.3.1] Scope

Within the past decade, the prosecution of corporate crimes has been an important priority of the federal government. In many of the cases, conduct that had previously been processed through the civil arena or administrative proceedings has become the subject of criminal investigation and prosecution. The government’s belief is that this type of activity can only effectively be deterred through the utilization of the criminal process. Obviously, this raises the stakes for a corporation, and its officials.

A criminal investigation, even if no charges are filed, can be extremely damaging to a corporation. Unlike civil litigation or administrative proceedings, in which a lawsuit is sometimes viewed as simply another problem of daily corporate life, a criminal investigation can have a negative impact upon many corporate stakeholders, including employees, customers, and financial institutions, and can change the company’s relationships with its competitors.

This chapter’s purpose is to highlight some of the issues that might be faced initially by a corporate counsel when allegations of misconduct arise. The primary focus is upon the federal arena. However, many of the same considerations arise at the state and local levels.¹

¹ Certain books are of great assistance in addressing these issues. These include the following: *Internal Corporate Investigations* (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2003); Otto G. Obermaier & Robert G. Morvillo, *White Collar Crime: Business and Regulatory Offenses* (2000); and Dan K. Webb et al., *Corporate Internal Investigations* (2006).

II. [§ 6.3.2] A Hypothetical Situation

To illustrate how issues of corporate fraud frequently arise, consider the following hypothetical situation regarding ABC, a small Wisconsin manufacturer:

ABC's president advises its outside corporate counsel that he has heard a rumor that the brilliant results obtained by ABC's sales manager during the first half of the year were due to the fact that the sales manager has been paying cash kickbacks to the purchasing agents of various retailers, located around the country. In analyzing sales data, ABC's president has noticed a significant upturn in retailer orders generated by this sales manager.

Some of ABC's initial considerations are set forth in the sections that follow.

III. [§ 6.3.3] Is ABC Subject to Allegations of Criminal Misconduct?

The immediate question is whether the facts of this scenario would support allegations of criminal misconduct. Here, the government might take the position that ABC's sales manager is defrauding the retailers by improperly influencing the decision-making of the retailers' purchasing agents. In essence, ABC's sales manager is depriving the retailers of the purchasing agents' independent judgment.

In the corporate fraud context, the mail fraud and wire fraud statutes are commonly used by federal prosecutors.² Under the allegations suggested by the hypothetical, ABC's sales manager is engaging in a scheme to defraud the retailers and obtain something of value (orders from the retailers' purchasing agents) by false and fraudulent pretenses (through bribing the purchasing agents). As a result, the retailers may be deprived of the purchasing agents' "honest services" through the sales manager's

² 18 U.S.C. §§ 1341, 1343 (mail and wire fraud). Unless otherwise indicated, all references in this chapter to the United States Code (U.S.C.) are current through Public Law No. 109-287 (Sept. 27, 2006).

bribes.³ Significantly, the elements of mail fraud can be satisfied even if the retailers (the victims) did not suffer a loss.⁴

If the United States mail were used to carry out or to attempt to carry out the sales manager's scheme, mail fraud might have occurred. Importantly, the sales manager need not have personally used the mail or even intended to use the mail.⁵ Rather, the mail's use "must be reasonably foreseeable and follow in the course of business of furthering the scheme."⁶ For example, if the sales manager reasonably believed the purchasing agents' orders would be received through the mail, or that the purchasing agents would pay for the goods by mail, then the mailing element would probably be satisfied. Moreover, the item sent through the mail need not contain a fraudulent representation.⁷ Rather, the mailing must simply further or attempt to further the scheme.⁸

The wire fraud statute is parallel to the mail fraud statute, except that an interstate wire communication must be used to carry out or attempt to carry out the scheme.⁹ Thus, if the orders were faxed by purchasing agents located in another state, wire fraud might have been committed.

³ *Pattern Criminal Federal Jury Instructions for the Seventh Circuit* [hereinafter 7th Cir. Fed. Jury Instructions Criminal] (18 U.S.C. §§ 1341 & 1343 (1998)) ("Definition of Scheme to Defraud" and "Definition of Intent to Defraud") (available at the Seventh Circuit's Web site, at <http://www.ca7.uscourts.gov/Rules/pjury.pdf>); 18 U.S.C. § 1346 ("scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services").

⁴ 7th Cir. Fed. Jury Instructions Criminal (18 U.S.C. §§ 1341 & 1343 (Definition of "Loss")).

⁵ 7th Cir. Fed. Jury Instructions Criminal 263 (18 U.S.C. §§ 1341 & 1343 (Use of Mails/Interstate Carrier/Interstate Communication Facility)).

⁶ 7th Cir. Fed. Jury Instructions Criminal 263–64 cmt. (18 U.S.C. §§ 1341 & 1343 (Use of Mails/Interstate Carrier/Interstate Communication Facility)).

⁷ *United States v. Dunn*, 961 F.2d 648, 651 (7th Cir. 1992) ("[t]here is no requirement that the mailings themselves be fraudulent").

⁸ 7th Cir. Fed. Jury Instructions Criminal (18 U.S.C. §§ 1341 & 1343 (Use of Mails/Interstate Carrier/Interstate Communication Facility)).

⁹ 7th Cir. Fed. Jury Instructions Criminal cmt. (18 U.S.C. §§ 1341 & 1343 (Use of Mails/Interstate Carrier/Interstate Communication Facility)) ("wire fraud parallels mail fraud").

The mail and wire fraud statutes are important because prosecutors frequently use them to address a wide variety of activities. Usually, the key issue is whether the defendant knowingly engaged in a scheme to defraud and obtain something of value through false or fraudulent pretenses, representations, or promises. Generally, the mail or wire elements are not difficult to establish and are necessary only to provide the federal jurisdictional basis for the charge.¹⁰

Moreover, the specter of “paying cash kickbacks to the purchasing agents . . . located around the country” raises the possibility of criminal tax violations.¹¹ The payment of cash on an ongoing basis as a part of an improper business practice might be construed as a “badge of fraud,” generating the interest of the taxing authorities.¹² Some concerns would include whether (and how) these funds were accounted for on the tax returns (of ABC as well as the individuals who received the payments),¹³ and whether these acts were part of a conspiracy to defraud the Internal Revenue Service.¹⁴

¹⁰ *United States v. Lanas*, 324 F.3d 894, 901 (7th Cir. 2003) (holding that “mailing in furtherance of a scheme to defraud is merely is simply the element that confers federal jurisdiction under the mail fraud statute”).

¹¹ The U.S. Attorneys’ Manual discusses the manner in which an investigation is initiated by the Internal Revenue Service’s Criminal Investigation Division. U.S. Attorneys’ Manual § 6-4.110 (Mar. 2001), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/.

¹² An example of a federal criminal case charging an underlying Title 18 substantive crime (conspiracy to travel in and use the facilities of interstate commerce to promote, carry on, and distribute the proceeds of unlawful activities involving prostitution) and a tax offense (conspiracy to defraud the United States by obstructing the lawful function of the Internal Revenue Service) is *United States v. Doerr*, 886 F.2d 944, 948–49 (7th Cir. 1989).

¹³ See I.R.C. §§ 7201 (tax evasion), 7206(1) (filing a false tax return); U.S. Dep’t of Justice, Tax Division, 1 *Criminal Tax Manual* §§ 8.00 (“Attempts to Evade or Defeat Tax”), 13.00 (“Aid or Assist False or Fraudulent Document”) (2001).

¹⁴ See 18 U.S.C. § 371 (conspiracy to defraud the Internal Revenue Service, commonly known as a “Klein Conspiracy”); I.R.C. § 7206(2) (aiding and abetting in the filing of a false return); U.S. Dep’t of Justice, Tax Division, 2 *Criminal Tax Manual* §§ 21.00 (“Aiding and Abetting”), 23.00 (“Conspiracy to Commit Offense or to Defraud the U.S.”) (2001).

IV. [§ 6.3.4] Could ABC Be Criminally Liable for Its Sales Manager's Conduct?

The view of the majority of the federal circuits,¹⁵ including the Seventh Circuit, is that a corporation is “vicariously criminally liable for the crimes committed by its agents acting within the scope of their employment¹⁶—that is, within their actual or apparent authority and on behalf of the corporation”¹⁷—when the agents’ actions were “intended, at least in part, to benefit [the corporation].”¹⁸

A matter is within the sales manager’s scope of employment if it deals with a function “whose performance is generally entrusted” to him.¹⁹ In the hypothetical, the sales manager’s payment of kickbacks would arguably be within his scope of employment because it was his responsibility to sell products to customers.

It is irrelevant that the sales manager’s activities were mainly to benefit himself (through higher commissions) rather than ABC. Even if benefitting ABC were only a secondary motivation to the sales manager, ABC could still be liable because the sales manager’s acts were “intended, at least in part, to benefit” the corporation.²⁰ Moreover, under the doctrine of respondeat superior, ABC could still be charged even if its sales manager “is not a high managerial official.”²¹

¹⁵ A general discussion of criminal corporate liability is provided in Obermaier & Morvillo, *supra* note 1, and in 2 Kirby D. Behre & A. Jeff Ifrah, *Federal Sentencing for Business Crimes* § 15.02 (2005).

¹⁶ 7th Cir. Fed. Jury Instructions Criminal 5.03 cmt.

¹⁷ *Id.*

¹⁸ *Id.* 5.03.

¹⁹ *Id.*

²⁰ *Id.*; see also Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communications with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 Am. Crim. L. Rev. 203, 218 n.55 (2002).

²¹ 7th Cir. Fed. Jury Instructions Criminal 5.03 cmt. The comment to the Seventh Circuit’s instruction cited *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *Continental Baking Co. v. United States*, 281 F.2d 137 (6th Cir. 1960), and *United States v. Armour & Co.*, 168 F.2d 342 (3d Cir. 1948), and contrasted them with *Holland Furnace Co. v. United States*, 158 F.2d 2 (6th Cir.

Finally, if the sales manager was acting within the scope of his duties, ABC is not necessarily “relieved of its responsibility because the acts were illegal, contrary to [ABC’s] . . . instructions,” or against ABC’s “general policies.”²² This is because ABC has a duty “to prevent its employees from committing” criminal acts.²³ Thus, in evaluating ABC’s corporate criminal liability, if ABC maintained corporate policies against paying kickbacks and instructed its employees in this regard, a jury may consider these corporate policies as well as “the diligence of its [the corporation’s] efforts to enforce” these policies.²⁴

Clearly, under the allegations, ABC has possible criminal exposure for the sales manager’s acts.²⁵

V. [§ 6.3.5] How Would the Prosecutor Determine Whether ABC Would Be Charged?

A. [§ 6.3.6] Prosecutorial Discretion

The U.S. Supreme Court has long held “that the government retains broad discretion in determining what persons to prosecute and what charges to bring against those persons.”²⁶ There is a “presumption of regularity” in

1946) (reversing judgment of conviction against corporation for salesman’s action that was “not only without the knowledge of the appellant corporation of his illegal conduct, but also in express violation of its specific instructions to him and to all its agents”).

²² 7th Cir. Fed. Jury Instructions Criminal 5.03.

²³ *Id.* 5.03 cmt.

²⁴ *Id.* 5.03.

²⁵ In some prosecutions, the government utilizes the “collective knowledge doctrine,” in which “a corporation’s knowledge consists of ‘the totality of what all the employees know within the scope of their employment.’” 2 Behre & Ifrah, *supra* note 15, § 15.02[2][b] (citing *United States v. Bank of New England*, 821 F.2d 844, 855 (1st Cir. 1987)). Under this theory of corporate criminal liability, the intent and knowledge of a number of corporate agents is attributed collectively to the corporation even though no particular corporate agent has the requisite knowledge or intent. *Id.*

²⁶ *United States v. Sandoval-Curiel*, 50 F.3d 1389, 1394 (7th Cir. 1995) (citing *Wayte v. United States*, 470 U.S. 598, 607–08 (1985), and *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978)).

a prosecutorial decision.²⁷ As the Seventh Circuit stated, “[i]n the context of criminal cases, courts . . . have indicated a reluctance to interfere with the government’s authority to initiate an investigation and its discretion to proceed with a prosecution.”²⁸ The government has the discretion to prosecute when there is probable cause.²⁹

The federal prosecutor’s discretion is made even greater because of the steady expansion of federal criminal jurisdiction. A commentator, who has studied federal prosecutorial policies, noted that “[f]ederal prosecutors now have the authority to handle cases that, a generation ago, might have fallen under the exclusive jurisdiction of the state police power.”³⁰ Moreover, former Attorney General Dick Thornburgh noted at a conference focusing upon “the growing federalization of criminal law” that as of the end of the 20th century “the statistics tell us that forty percent of all the federal criminal laws passed since the Civil War have been enacted since 1970.”³¹

Notwithstanding this vast discretion and jurisdiction, investigative and prosecutorial resources are scarce. The *United States Attorneys’ Manual*, the guide for federal prosecutors, recognizes this, noting that resources “are not sufficient to permit prosecution of every alleged offense over which Federal jurisdiction exists.”³² Thus, the prosecutor must determine which offenses are most worthy of his or her attention. Therefore, the factors considered by a prosecutor in evaluating whether a particular case should be charged are quite important.³³

²⁷ *United States v. Jarrett*, 447 F.3d 520, 525 (7th Cir. 2006).

²⁸ *United States v. Palumbo Bros., Inc.*, 145 F.3d 850, 865 (7th Cir. 1998).

²⁹ *Jarrett*, 447 F.3d at 525; *United States v. Barnes*, 230 F.3d 311, 314 (7th Cir. 2000) (citing *United States v. Armstrong*, 517 U.S. 456, 464 (1996)); U.S. Attorneys’ Manual, *supra* note 11, § 9-27.200 (Aug. 2002); Michael E. O’Neill, *When Prosecutors Don’t: Trends in Federal Prosecutorial Declinations*, 79 Notre Dame L. Rev. 221, 222–23 (2003).

³⁰ O’Neill, *supra* note 29, at 222.

³¹ Dick Thornburgh et al., *The Growing Federalization of Criminal Law*, 31 N.M. L. Rev. 135, 136 (2001).

³² U.S. Attorneys’ Manual, *supra* note 11, § 9-27.230 (Aug. 2002).

³³ O’Neill, *supra* note 29, at 222–23.

B. [§ 6.3.7] Prosecution of Corporations

A corporation is an artificial entity. Notwithstanding this status, this does not mean that the United States Department of Justice (DOJ) believes that it should be treated leniently. On the other hand, this fact does not necessarily mean that “harsher treatment”³⁴ is warranted.

The DOJ believes that, “in appropriate cases,”³⁵ significant benefits can be reaped by a corporate prosecution. Through a corporate prosecution, the activities of a particular company and its employees might change.³⁶ Further, through this type of prosecution, the “substantial risk of great public harm” might be decreased.³⁷

In addition, a corporate prosecution within a particular industry might occur to address a societal problem or deter other companies in that sector from engaging in similar conduct. For example, this enhanced prosecutorial focus has occurred in the health care industry, where the government vigorously charges health care providers engaged in fraud. Given the fact that “the General Accounting Office (GAO) estimates that such fraud accounts for up to 10% of total health care expenditures,”³⁸ it is logical that the DOJ would “focus . . . [its] resources on halting systematic abuses practiced by nationwide health care providers.”³⁹ A goal of this type of prosecutorial prioritization is to level the corporate playing field within a particular industry by decreasing the possibility that any particular company gains an unfair advantage over its competitors through illegal acts.

³⁴ Memorandum from Deputy Attorney General Larry D. Thompson: *Principles of Federal Prosecution of Business Organizations* § 1A (Jan. 20, 2003) [hereinafter Thompson Memorandum], http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

³⁵ *Id.*

³⁶ *Id.* § 1B.

³⁷ *Id.*

³⁸ Alissa M. Nann et al., *Health Care Fraud*, 42 Am. Crim. L. Rev. 573, 575 (2005).

³⁹ *Id.* at 624.

C. [§ 6.3.8] Factors Considered by the Government

Because of the “wide latitude” accorded prosecutors “in determining, when, whom, how, and even whether to prosecute” a corporation, the DOJ published the “Principles of Federal Prosecution of Business Organizations” in January 2003. This document, commonly referred to as the “Thompson Memorandum” because it was issued by then Deputy Attorney General Larry D. Thompson, outlines the factors for federal prosecutors to consider when analyzing whether a corporation should be charged.⁴⁰

The Thompson Memorandum states that in determining whether a corporation should be charged, prosecutors should consider the same factors used in reviewing whether an individual should be charged. These factors include “the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches.”⁴¹

Besides the above criteria, the Thompson Memorandum sets forth nine additional factors that should be considered in the corporate context. These include the following:

1. “[T]he nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing” this type of corporate crime;
2. “[T]he pervasiveness of wrongdoing within the corporation,” including the involvement of the corporation’s management;
3. “[T]he corporation’s history of similar conduct”;
4. “[T]he 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. “[T]he existence and adequacy of the corporation’s compliance program”;

⁴⁰ Thompson Memorandum, *supra* note 34. The Thompson Memorandum’s predecessor, known as the “Holder Memorandum,” was issued in June 1999 by then Deputy Attorney General Eric Holder, Jr.: *Bringing Criminal Charges Against Corporations* (June 16, 1999). See John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 Cornell L. Rev. 310, 319 n.65 (1999).

⁴¹ Thompson Memorandum, *supra* note 34, § IIA.

6. “[T]he 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. “[C]ollateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution”;
8. “[T]he adequacy of the prosecution of individuals responsible for the corporation’s malfeasance”; and
9. “[T]he adequacy of remedies such as civil or regulatory enforcement.”⁴²

The Thompson Memorandum notes that these factors “may or may not apply” to a specific case, depending upon the particular facts and circumstances under review. Moreover, the Memorandum does not weigh the importance of any particular factor. The listing is only “guidance” and “illustrative” of the factors that should be considered.⁴³

Nevertheless, the Thompson Memorandum is significant because it provides a framework for how the government might view a corporate client’s activities. Thus, it is not surprising that some defense lawyers outline their presentations to prosecutors based upon the factors set forth in the Thompson Memorandum. As two prosecutors in the United States Attorney’s Office for the District of Columbia write: “In our experience, the vast majority of the white collar defense bar has taken the Thompson Memo quite seriously, and counsel have successfully persuaded their corporate clients to do so as well. Defense attorneys regularly make presentations that endeavor to address each of the Thompson Memo factors.”⁴⁴

At the very least, the Thompson Memorandum provides a starting point for an analysis of the corporation’s position in its interaction with the government.

⁴² *Id.*

⁴³ *Id.* at II.B.

⁴⁴ Mary Patrice Brown & Stevan E. Bunnell, *Negotiating Justice: Prosecutorial Perspectives on Federal Plea Bargaining in the District of Columbia*, 43 Am. Crim. L. Rev. 1063, 1079 (2006).

VI. [§ 6.3.9] The Government's Options

“[T]he vast majority” of the criminal cases handled by the federal government is “shoulder[ed]” by the United States Attorney’s Offices.⁴⁵ Most of their decisions can be made without approval from the DOJ’s main headquarters in Washington, D.C.⁴⁶ In some specific areas (such as in criminal tax, environmental crimes, or criminal antitrust), there are varying degrees of DOJ oversight and participation in the investigation and prosecution.⁴⁷

There are two United States Attorney’s Offices in Wisconsin. The United States Attorney’s Office for the Eastern District of Wisconsin, covering the eastern third of the state, is based in Milwaukee, with a division for the northern portion of that district in Green Bay. The United States Attorney’s Office for the Western District of Wisconsin, covering the western two-thirds of the state, is based in Madison.

When presented with allegations, the United States Attorney’s Office has multiple options. First, it could commence a criminal prosecution against one or more of the potential defendants. For example, in the hypothetical, the United States Attorney’s Office might charge both (the corporation and the sales manager). But it could also conclude that the sales manager alone should be criminally charged because he was the primary actor; ABC would not be prosecuted, on the theory that, as a matter of corporate policy and acts, it was not the moving force behind the violation.

Second, the United States Attorney’s Office might conclude that the matter would be more appropriately handled in the state arena and forward it to the Wisconsin Attorney General’s Office or to a county district attorney.⁴⁸

⁴⁵ O’Neill, *supra* note 29, at 229.

⁴⁶ *Id.*

⁴⁷ U.S. Attorneys’ Manual, *supra* note 11, §§ 9-2.111, 9-2.120 (Aug. 2002) discusses statutory and policy limitations on the taking of certain actions. Certain substantive areas require particular oversight depending upon the matter, such as criminal tax (*id.* § 6-1.100 (Oct. 1997); 6-4.211 (Mar. 2001)); environmental crimes (*id.* §§ 5-11.104, 5-11.105 (Mar. 2001)); and criminal antitrust (*id.* § 7-1.100 (Oct. 1997)).

⁴⁸ U.S. Attorneys’ Manual, *supra* note 11, § 9-27.240 (Aug. 2002).

The referral of the case to the state is a significant decision. When a case is prosecuted federally, the defendant is subject to the Federal Sentencing Guidelines. Prior to the U.S. Supreme Court's decision in *United States v. Booker*,⁴⁹ courts were required to utilize these Guidelines in sentencing defendants "within . . . applicable ranges absent unusual circumstances meriting a 'departure.'"⁵⁰ The court's determination of an offender's sentencing range was based upon such factors as the circumstances surrounding a defendant's offense and the defendant's prior criminal history. Now, as a result of *Booker*, the Guidelines are "advisory" in nature and federal judges have greater discretion in imposing a sentence.⁵¹ However, even after *Booker*, the Guidelines are still accorded varying weight in sentencing.⁵² At this point, the extent that post-*Booker* sentences vary from sentences imposed under the Sentencing Guidelines is still subject to assessment.⁵³ In any event, with the referral of a case to a state prosecutor, the offender does not face sentencing issues raised through a Federal Sentencing Guideline computation.

Third, on some occasions, the federal, state, and local prosecutors and investigators might work together in a joint investigation. Generally, the different government entities will not charge the same criminal conduct. At the federal level, dual prosecution policies are in place to ensure that, except in rare circumstances, the federal government does not charge the same conduct that a local jurisdiction has already prosecuted.⁵⁴

Fourth, the United States Attorney's Office might determine that the case does not warrant a criminal prosecution but that the government should seek civil relief. Thus, it might refer the matter to the civil division of the United States Attorney's Office or to an administrative agency to obtain monetary or injunctive relief.⁵⁵

⁴⁹ 543 U.S. 220 (2005).

⁵⁰ Frank O. Bowman, III, *The Year of Jubilee . . . Or Maybe Not: Some Preliminary Observations About the Operation of the Federal Sentencing System After Booker*, 43 Hous. L. Rev. 279, 283 (2006).

⁵¹ Roger W. Haines, Jr. et al., *Federal Sentencing Guidelines Handbook* § 1A1.1, at 39 (2006).

⁵² Bowman, *supra* note 50, at 290–94.

⁵³ *See generally id.*

⁵⁴ U.S. Attorneys' Manual, *supra* note 11, § 9-2.031 (June 2005).

⁵⁵ *Id.* § 9-27.250 (Aug. 2002); Thompson Memorandum, *supra* note 34, § X.

Fifth, the United States Attorney's Office might decide to commence parallel, simultaneous, civil and criminal proceedings.⁵⁶ Some federal statutes contain civil as well as criminal provisions.⁵⁷ Courts have held that it is constitutional for the government to conduct parallel criminal and civil proceedings.⁵⁸ By a memorandum dated July 28, 1997, then Attorney General Janet Reno required the development of a system for coordinating the criminal, civil, and administrative aspects of all white-collar crime matters within every United States Attorney's Office and each Department Litigating Division.⁵⁹

Sixth, in some instances, the United States Attorney's Office could place the subject on "pretrial diversion," an informal mechanism by which criminal charges are either not issued or will be dismissed if the subject successfully completes a probationary period.⁶⁰

Seventh, the United States Attorney's Office could decline to investigate or prosecute for a number of reasons, such as an insufficiency of evidence

⁵⁶ See Brandon Bortner & Douglas Miller, *Procedural Issues*, 40 Am. Crim. L. Rev. 933, 964 (2003); Alvin K. Hellerstein & Gary P. Naftalis, "Defending Parallel Civil and Criminal Proceedings," in *Civil Practice and Litigation Techniques in Federal and State Courts* (ALI-ABA May 31, 2006), available at SL081 ALI-ABA 775, 812-39 in Westlaw; Anthony A. Joseph & R. Marcus Givhan, *The New Litigative Environment: Defending a Client in Parallel Civil and Criminal Proceedings*, 60 Ala. Law. 48, 49 (1999); cf. *Hudson v. United States*, 522 U.S. 93 (1997) (focusing upon the imposition of double jeopardy when there is a civil proceeding at the same time as or after criminal prosecution).

⁵⁷ Bortner & Miller, *supra* note 56, at 953 n.127.

⁵⁸ *Id.* at 953-54 & n.134 (citing *United States v. Kordel*, 397 U.S. 1, 11-12 (1970)).

⁵⁹ U.S. Attorneys' Manual, *supra* note 11, § 1-12.000 (June 1998); Memorandum from Janet Reno, U.S. Att'y Gen. to All U.S. Attorneys, Assistant U.S. Attorneys, Litigating Divisions, and Trial Attorneys, *Coordination of Parallel Criminal, Civil and Administrative Proceedings* (July 28, 1997), available at <http://www.usdoj.gov/ag/readingroom/970728.htm>.

⁶⁰ U.S. Attorneys' Manual, *supra* note 11, §§ 9-2.022, 9-22.000 (Oct. 1997); Richard S. Gruner, "Three Painful Lessons: Corporate Experience with Deferred Prosecution Agreements," in *Corporate Compliance Institute 2006* (PLI Corp. Law & Practice, Course Handbook Series No. 8917, 2006); Christopher J. Christie & Robert M. Hanna, *A Push Down the Road of Good Corporate Citizenship: The Deferred Prosecution Agreement Between the U.S. Attorney for the District of New Jersey and Bristol-Myer Squibb Co.*, 43 Am. Crim. L. Rev. 1043 (2006).

or a determination that the case is unworthy of federal interest.⁶¹ It is not surprising that a United States Attorney's Office might decline a case as a result of limited resources. As one commentator noted, "[t]he number of federal investigators dwarfs the number of federal prosecutors. Consequently, the number of matters referred is likely consistently to outstrip the number of prosecutors available to pursue them."⁶²

Eighth, the United States Attorney's Office might decide that the matter should be handled by another United States Attorney's Office that has a greater interest in the matter. Accordingly, it might refer the case to that office.⁶³

In reaching its decision, the United States Attorney's Office will utilize the factors set forth in the Thompson Memorandum as a guide. In addition, each particular office has generally developed its own prosecutorial guidelines, either formally or informally, based upon the district's priorities and needs, as well as the available investigative and prosecutorial resources. The *U.S. Attorneys' Manual* recognizes that each office will exercise its discretion in commencing prosecutions, noting that "individual United States Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance."⁶⁴

VII. [§ 6.3.10] The Government's Investigative Tools

In analyzing allegations, the United States Attorney's Office works with investigators from federal, state, and local law enforcement agencies. To a large degree, the particular investigative agency that will review the matter depends upon a number of factors, including the nature of the allegations, the available investigative resources, the investigative skills necessary for the particular matter, and the agency that initially received the allegations.

⁶¹ U.S. Attorneys' Manual, *supra* note 11, §§ 9-2.020, 9-2.111 (June 2005).

⁶² O'Neill, *supra* note 29, at 225 (footnote omitted).

⁶³ U.S. Attorneys' Manual, *supra* note 11, § 9-27.240 (Aug. 2002).

⁶⁴ *Id.* § 9-27.230 (Aug. 2002); *see also* Thornburgh et al., *supra* note 31, at 145.

As a part of its investigation, the government will sometimes present the matter to the federal grand jury sitting in a particular district.⁶⁵ The grand jury's role is to determine whether there is probable cause that a federal crime has been committed. The scope of a grand jury's power to investigate criminal activity is wide.⁶⁶

The grand jury "is supervised by the district court."⁶⁷ However, the court is not present during the grand jury's proceedings. During its proceedings (but not during its deliberations and voting),⁶⁸ the prosecutor plays a significant role in presenting matters.⁶⁹ The grand jury's proceedings have a presumption of regularity.⁷⁰

The grand jury consists of between 16 to 23 members.⁷¹ It is empanelled for 18 months,⁷² and generally meets one or more times per month. It is subject to renewal for an additional six months.⁷³ Twelve votes are needed to return an indictment.⁷⁴ The grand jury meets in secret, and defense

⁶⁵ The U.S. Department of Justice's policy on the use of the grand jury is at U.S. Attorneys' Manual, *supra* note 11, § 9-11.010 (Aug. 2002). An overview of grand jury practice from the government's perspective is provided in the U.S. DOJ Antitrust Division Grand Jury Practice Manual (Nov. 1991), available at <http://www.usdoj.gov/atr/public/guidelines/4371.htm>.

⁶⁶ Obermaier & Morvillo, *supra* note 1, § 8.01; U.S. Attorneys' Manual, *supra* note 11, § 9-11.120 (Aug. 2000); U.S. DOJ Antitrust Division Grand Jury Manual, *supra* note 65, at I.F.1; *Costello v. United States*, 350 U.S. 359, 362 (1956); *In re Special February 1975 Grand Jury*, 565 F.2d 407, 411 (7th Cir. 1977).

⁶⁷ Obermaier & Morvillo, *supra* note 1, § 8.01.

⁶⁸ Fed. R. Crim. P. 6(d).

⁶⁹ Obermaier & Morvillo, *supra* note 1, § 8.01.

⁷⁰ *United States v. Lisinski*, 728 F.2d 887, 893 (7th Cir. 1984); *Velsicol Chem. Corp. v. United States (In re November 1979 Grand Jury)*, 616 F.2d 1021, 1027 (7th Cir. 1980).

⁷¹ Fed. R. Crim. P. 6(a)(1).

⁷² Fed. R. Crim. P. 6(g).

⁷³ *Id.*

⁷⁴ Fed. R. Crim. P. 6(f).

counsel are not permitted in the grand jury proceedings.⁷⁵ The proceedings are transcribed, except for deliberations and voting.⁷⁶

During the grand jury's investigation, subpoenas can be issued for testimony and the production of documents. Frequently records from financial institutions are subpoenaed.⁷⁷ A grand jury subpoena can be issued anywhere in the United States.⁷⁸ A corporation does not possess the Fifth Amendment privilege against self-incrimination to withhold documents.⁷⁹

One of the government's effective tools during a grand jury investigation is to obtain formal use immunity upon a witness under 18 U.S.C. §§ 6001–6005.⁸⁰ Under such immunity, the court (upon the government's application that the testimony of the witness "may be necessary to the public interest")⁸¹ issues an order that a witness must testify before the grand jury, and that any statement (and leads from the statement) to the grand jury cannot be used against the witness in a subsequent prosecution (except for perjury or making a false statement).⁸² The refusal of an immunized witness to testify subjects the witness to contempt, and the witness can be fined or imprisoned for the life of the grand jury until there is compliance.⁸³

⁷⁵ Fed. R. Crim. P. 6(d).

⁷⁶ Fed. R. Crim. P. 6(e).

⁷⁷ The U.S. Attorneys' Manual, *supra* note 11, § 9-11.142 (Aug. 2002), discusses subpoenas to financial institutions.

⁷⁸ Fed. R. Crim. P. 17(e)(1).

⁷⁹ Hellerstein & Naftalis, *supra* note 56, at 791–95; *Braswell v. United States*, 487 U.S. 99 (1988) (assertion of Fifth Amendment privilege by custodian in producing records); *Fisher v. United States*, 425 U.S. 391, 410 (1976) (assertion of Fifth Amendment privilege by corporate representative in producing records).

⁸⁰ U.S. Attorneys' Manual, *supra* note 11, § 9-23.000 (Oct. 1997).

⁸¹ The factors utilized in determining "the public interest" are discussed in the U.S. Attorneys' Manual, *supra* note 11, § 9-23.210 (Oct. 1997).

⁸² 18 U.S.C. § 6002.

⁸³ The DOJ's policy on resubpoenaing contumacious witnesses before successive grand juries is discussed in the U.S. Attorneys' Manual, *supra* note 11, § 9-11.160 (Aug. 2002).

Formal use immunity is not transactional immunity. With transactional immunity, the witness cannot be prosecuted for the offense.⁸⁴ With formal use immunity, the witness can still be charged with violating the underlying offense; however, the witness's statement and leads from that statement cannot be used against the witness⁸⁵ (except in a prosecution for perjury or making a false statement).⁸⁶

On some occasions, the government may confer informal use immunity ("pocket" or "letter" immunity) upon a witness. This immunity is provided by an agreement between the witness and the government; this immunity is not compelled by a court order. Generally, under the terms of such an agreement, a statement (and the leads from the statement) may or may not be used against the witness with informal use immunity, except for perjury or making a false statement.⁸⁷

During an investigation, the government might apply to the court to use such investigative tools as search warrants, trap and trace orders (which compile numbers made to a telephone), and pen registers (which compile numbers made from a telephone).⁸⁸ With the consent of one party to a conversation, the government may intercept a conversation (without a court order).⁸⁹ Court-ordered electronic surveillance (when none of the parties to a conversation consent to the interception) is rare; "a high level Department official" must "specifically approve . . . prior to an Assistant United States Attorney obtaining a court order authorizing interception."⁹⁰

⁸⁴ U.S. Attorneys' Manual, Title 9, Criminal Resource Manual, *supra* note 11, § 717 (Oct. 1997).

⁸⁵ *Id.* In such a prosecution of the witness, the government has the burden of establishing that its evidence was independent of the statement provided by the witness. *Kastigar v. United States*, 406 U.S. 441 (1972); *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52 (1964).

⁸⁶ U.S. Attorneys' Manual, Title 9, Criminal Resource Manual, *supra* note 11, § 717 (Oct. 1997).

⁸⁷ *Id.* § 719.

⁸⁸ Webb et al., *supra* note 1, § 13.07.

⁸⁹ *Id.* § 13.05[2].

⁹⁰ U.S. Attorneys' Manual, *supra* note 11, § 9-7.010 (Sept. 2004). Section 9-7.000 of the U.S. Attorneys' Manual provides the DOJ's policy on electronic surveillance. A discussion of court-ordered electronic surveillance is at *Thirty-Fifth Annual Review of Criminal Procedure*, 35 Geo. L.J. Ann. Rev. Crim. Proc. 1, 128

The duration of an investigation varies according to the matter under investigation.⁹¹ The investigation of a complex financial matter can take literally years. Testimony and documents presented to one grand jury can, upon its expiration, be presented to a subsequent grand jury.

VIII. [§ 6.3.11] ABC's Considerations in Addressing the Allegations

Perhaps ABC's knee-jerk response would be to ignore the allegations regarding the sales manager. After all, at this point, ABC's president simply heard only a somewhat substantiated rumor. However, ABC would take considerable risks by not addressing the allegations.

Depending upon the circumstances, ABC might initially be considered a victim of its sales manager's misdeeds. At a later point, particularly if the sales manager's conduct continues and ABC benefits by it, ABC would probably no longer be considered a victim. In fact, the prosecutors might later conclude that the corporation ratified the sales manager's acts and would view the corporation as a coconspirator.

It is no defense for ABC to close its eyes to the sales manager's misconduct. A commonly utilized jury instruction, known as "the ostrich instruction," demonstrates the risks faced by ABC if it sticks its head in the proverbial sand. The instruction advises the jury, in part, as follows: "If you find that a person had a strong suspicion that things were not what they seemed or that someone had withheld some important facts, yet shut his [or her] eyes for fear of what he [or she] would learn, you may conclude that he [or she] acted knowingly"⁹²

(2006).

⁹¹ Nathan A. Fishbach, *Submitting False Lab Reports: An Environmental Crime*, Nat'l Envtl. Enforcement J., July 1992, at 3; Wis. Law., May 1992, at 10 (discusses manner in which government might conduct complex white collar investigation focusing upon alleged environmental crimes).

⁹² 7th Cir. Fed. Jury Instructions Criminal—4.06; see also *United States v. Fallon*, 348 F.3d 248, 253 (7th Cir. 2003) ("ostrich instruction" discussed).

In some highly regulated industries (such as in the environmental arena), the corporation has an affirmative obligation to report certain events.⁹³ Moreover, under some conditions, a failure to report could be evidence of a misprision of a felony (a federal criminal felony).⁹⁴

Even if there is no legal obligation to report, ABC's efforts to investigate the problem is indicative of the effectiveness of its compliance plan under the Thompson Memorandum⁹⁵ and is a favorable factor under the Sentencing Guidelines.⁹⁶ In addition, as a result of the internal investigation, the corporation might choose to voluntarily report the matter to law enforcement, which is also considered favorably under the Thompson Memorandum⁹⁷ and the Sentencing Guidelines.⁹⁸ By contrast, if ABC fails to address the issue, it might later be faced with the government's argument that its corporate compliance plan had no teeth, and is merely a "paper program" sitting in a desk drawer.⁹⁹

One of the more debated portions of the Thompson Memorandum relates to the government's consideration of whether the corporation is willing "to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."¹⁰⁰ Regardless of whether this is an appropriate consideration or whether such a waiver should occur, its inclusion in the Thompson Memorandum

⁹³ Theodore R. Lotchin, Note, *No Good Deed Goes Unpunished? Establishing a Self-Evaluative Privilege for Corporate Internal Investigations*, 46 Wm. & Mary L. Rev. 1137, 1147 (Dec. 2004).

⁹⁴ The applicable statute, 18 U.S.C. § 4, provides as follows:
[w]hoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined . . . or imprisoned not more than three years, or both.

⁹⁵ Thompson Memorandum, *supra* note 34, § VII.

⁹⁶ U.S. Sentencing Commission, *Guidelines Manual* § 8C2.5(g) (2005).

⁹⁷ Thompson Memorandum, *supra* note 34, § VI.

⁹⁸ U.S. Sentencing Commission, *Guidelines Manual* § 8C2.5(g) (2005).

⁹⁹ Thompson Memorandum, *supra* note 34, § VII (B).

¹⁰⁰ Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 Am. Crim. L. Rev. 1095, 1100 (2006).

demonstrates the importance that the DOJ places on a corporation's internal investigation.¹⁰¹

Moreover, ABC should address the employment status of the sales manager, particularly while the investigation is pending. For example, depending upon the circumstances, the sales manager could possibly be suspended with pay while the investigation is pending. In this way, the company is ensured that the sales manager will not impede the inquiry. This will also demonstrate the company's good faith efforts in conducting an internal review of the matter.

In addition, ABC should consider whether it could face governmental action in the civil or administrative arenas. Further, ABC could face civil action from the victims of its actions. Conducting an internal investigation is a proactive way of addressing these possibilities.¹⁰²

Finally, ABC's failure to analyze the allegations would expose it to blackmail by its employees, customers, competitors, or to anyone else who could threaten to blow the whistle. Moreover, by ignoring the sales manager's activities, ABC would be in an anomalous position if, at a later point, it has to address different allegations raised about the misconduct of another ABC employee.¹⁰³

IX. [§ 6.3.12] ABC's Representation

A. [§ 6.3.13] Multiple Representation Issues

As part of the litigation defense, corporate counsel might interview employees. Even though the counsel represents the corporation rather than the employee, the employee might erroneously believe that the corporate counsel is acting as his or her individual attorney.

¹⁰¹ Other governmental agencies have similar memoranda relating to corporate cooperation with law enforcement. *See id.* at 1107–35.

¹⁰² Lotchin, *supra* note 93, at 1147–50.

¹⁰³ *See* Beth A. Wilkinson & Steven H. Schulman, *When Talk Is Not Cheap: Communication with the Media, the Government and Other Parties in High Profile White Collar Criminal Cases*, 39 Am. Crim. L. Rev. 203 (2002).

To avoid this confusion, to comply with the attorney's ethical requirements,¹⁰⁴ and "to maximize the company's choices in deciding what to do with the investigative results,"¹⁰⁵ litigation counsel should provide what are sometimes known as "corporate Mirandas" or "Adnarim warnings" (Miranda spelled backwards).¹⁰⁶ Commentators differ as to the scope of the admonitions.¹⁰⁷ Minimally, it appears that corporate counsel should advise the employee that counsel represents the entity rather than the employee; that the interview is being conducted pursuant to the company's attorney-client privilege; and that this privilege can be waived by the company—and only the company—at any time and without the employee's consent.¹⁰⁸

This notification is particularly important if, at a later point, the corporation decides to waive its privilege and disclose the contents of the interview to the government. This might be in the corporation's interest since, under the Thompson Memorandum, a federal prosecutor may, "in assessing the adequacy of a corporation's cooperation," consider whether it waived the attorney-client and work product privileges in connection with employee communications.¹⁰⁹

Moreover, care should be exercised if the internal investigators interview the whistle-blowing employee. Adverse inferences can be drawn against the corporation if there is inappropriate interaction with this individual. Under the Sarbanes-Oxley Act, it is a "crime to 'interfere with the lawful employment or livelihood of any person' in retaliation for 'providing to a

¹⁰⁴An excellent analysis of the ethical issues arising in a whistleblower situation is provided at Sean O'Donnell Bosack, Godfrey & Kahn S.C., *When the Whistle Blows: Navigating Conflicts That Arise for In-House Counsel When a Whistleblower Comes Forward*, Address at the ABA Section of Litigation Committee on Corporate Counsel (Feb. 16–19, 2006).

¹⁰⁵ *Internal Corporate Investigations*, *supra* note 1, at 97.

¹⁰⁶ *Id.* at 40, 99.

¹⁰⁷ See, e.g., John F. Savarese, *Protecting Privilege and Dealing Fairly with Employees While Conducting an Internal Investigation*, PLI Order No. B0 01NM, 1367 PLI/Corp 1027, 1060–68 (Apr.–June 2003); Sarah H. Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 Colum. Bus. L. Rev. 859, 916, 957.

¹⁰⁸ SCR 20:4.3 ("Dealing with unrepresented person"); *Internal Corporate Investigations*, *supra* note 1, at 97.

¹⁰⁹ Thompson Memorandum, *supra* note 34, § VI B.

law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense.”¹¹⁰

An issue that frequently arises in the factual scenario of this hypothetical is whether the same attorney can (or should) represent ABC, the president, and the sales manager. Even in the context of a closely held corporation, these parties might have different interests. For example, in the hypothetical, the sales manager could have individual liability, ABC could have liability under respondeat superior, and ABC’s president could have no liability. These representation issues should be addressed at the earliest stage.¹¹¹ In analyzing whether separate counsel should be retained, consideration should be given to the ethical rules for multiple representation.¹¹²

Moreover, even if it is ethically permissible, such a joint representation might be viewed negatively by the government in assessing the government’s willingness to cooperate.¹¹³ The Thompson Memorandum notes that in weighing a corporation’s cooperation, “[a]nother factor to be weighed by the prosecutor” is whether the corporation “impede[d] the investigation” through such conduct as “overly broad assertions of corporate representation of employees or former employees.”¹¹⁴

Under certain circumstances, the subjects of an investigation might enter into joint defense agreements in which information is shared without having it disclosed to a third party.¹¹⁵ This occurs when there is a commonality of

¹¹⁰ Eugene Scalia, “The Developing Law Under the Sarbanes-Oxley “Whistleblower” Protection Provision,” in *Understanding Developments in Whistleblower Law 3 Years After Sarbanes-Oxley*, at 297 (PLI Litig. & Admin. Practice, Course Handbook Series No. 8327, 2006) (citing 18 U.S.C. § 1513(e)); see also 18 U.S.C. § 1512 (“tampering with a witness, victim, or an informant”); Pub. L. No. 107-204, 116 Stat. 745 (2002) (Sarbanes-Oxley Act).

¹¹¹ David Cannon & Steven Biskupic, *When the FBI Comes to the Door*, Wis. Law., Feb. 2000, 10, 12–13.

¹¹² *Id.*; see also SCR 20:1.7 (conflict of interest).

¹¹³ Issues under the Thompson Memorandum were the focus of U.S. District Judge Kaplan’s decision in *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006).

¹¹⁴ Thompson Memorandum, *supra* note 34, § VI B.

¹¹⁵ Savarese, *supra* note 107, at 1080–86.

interests between the potential defendants.¹¹⁶ Care should be utilized in entering joint defense agreements; in particular, counsel must consider whether the court will enforce the agreement and that it meets the ethical requirements.¹¹⁷

Even when a current or former employee has separate counsel from the corporation, care must still be taken in the corporate counsel's interaction with the employee's counsel. Negative inferences can arise in certain circumstances under the Thompson Memorandum, such as through the corporation's payment of a current or former employee's legal fees or the entering of a joint defense agreement with such an employee. The Thompson Memorandum states as follows:

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, *a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement*, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation. By the same token, the prosecutor should be wary of attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.¹¹⁸

With respect to the payment of attorney fees for current and former employees, the Thompson Memorandum recognizes the existence of state statutory indemnification provisions. Footnote four of the Thompson Memorandum states that “[s]ome states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their

¹¹⁶ See *United States v. Evans*, 113 F.3d 1457, 1467 (7th Cir. 1997); *United States v. McPartlin*, 595 F.2d 1321, 1336 (7th Cir. 1979).

¹¹⁷ See Obermaier & Morvillo, *supra* note 1, ch. 17 (“The Joint Defense Agreement”); Amy Foote, Note, *Joint Defense Agreements in Criminal Prosecutions: Tactical and Ethical Implications*, 12 Geo. J. Legal Ethics 377 (1999); Rebecca J. Wilson & Elizabeth A. Houlding, *Using Joint Defense Privilege Agreements in Parallel Civil and Criminal Proceedings*, 68 Def. Couns. J. 449 (2001).

¹¹⁸ Thompson Memorandum, *supra* note 34, § VI B (emphasis added).

guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.¹¹⁹

It is clear that, at the outset, the nature of the representation of the corporation, and its current and former employees, should be considered carefully. Obviously, the steps that are taken by the corporation have wide-ranging implications to how the government will view the corporation, particularly as to its cooperation.

B. [§ 6.3.14] Initial Considerations for the Formation of ABC's Representation Team

Depending upon the allegations, at an early point, the corporation should consider the formation of a team to review the matter.¹²⁰ The in-house counsel and outside corporate counsel might appear to be the logical individuals, because they likely have great knowledge of the corporation and presumably the corporate officers' trust. However, they might not have sufficient knowledge of the criminal process. Further, the government might view these individuals as not sufficiently independent from the corporation to be objective and, depending upon the allegations, somehow tied to the events at issue.¹²¹

Another choice might be to appoint a special outside counsel, specifically retained to focus upon the allegations. The main disadvantage is that this attorney would have limited knowledge of the corporation. On the other hand, this individual should have familiarity with the criminal process and should possess credibility with the prosecutors because he or she is not closely tied to the corporation. Moreover, by working with the in-house counsel and corporate counsel, the special counsel can glean knowledge about the corporation.¹²²

¹¹⁹ *Id.* § VI B n.4; *see, e.g.*, Wis. Stat. §§ 180.0851 (mandatory indemnification of officers and directors), 180.0856 (indemnification of employees and agents).

¹²⁰ Webb et al., *supra* note 1, § 3.03 provides an excellent discussion of this issue.

¹²¹ *See* Joseph T. McLaughlin & J. Kevin McCarthy, *Corporate Internal Investigations: Boon or Bane*, PLI Order No. 4867, 1438 PLI/Corp 245, 274 (July 2004).

¹²² *Id.*

It is frequently necessary for a company to retain another counsel who concentrates in the substantive area under investigation. For example, in the environmental arena, it is necessary to understand the regulatory framework that forms the foundation for the investigation. An environmental attorney, who could work with the special outside corporate counsel, might provide this knowledge.

As part of reviewing the allegations, it might be necessary for litigation counsel to retain investigators and computer forensics experts who could assist in the representation of the client. This often “builds credibility by showing that the company takes the investigation seriously and is committed to bringing about an appropriate resolution,” and demonstrates that the company is not merely “white-wash[ing]” the event at issue.¹²³ Moreover, by having outsiders (as opposed to internal personnel) conduct the investigation, it is less likely that the corporation’s investigative steps will be viewed “as attempts to conceal or alter the evidence.”¹²⁴ Frequently, former federal and state investigators are likely candidates for these roles, and their retention by counsel should be reviewed.¹²⁵

As the investigation commences, consideration should be given as to the form that the documentation takes to ensure that the attorney–client privilege is not waived. To the extent that the memoranda contain “subject assessments, opinions, strategic observations, and references to the legal issues present,” the greater the likelihood that they will be protected.¹²⁶

¹²³ Joseph W. Martini & Karen Mignone, *Minimizing Client Exposure to Criminal Enforcement for Environmental Violations*, Natural Resources & Env’t, Spring 2004, at 27, 29.

¹²⁴ *Id.*

¹²⁵ See *United States v. Kovel*, 296 F.2d 918, 921–22 (2d Cir. 1961) (examining scope of attorney-client privilege when attorney hired accountant to assist in providing legal advice); *In re Grand Jury Proceedings*, 220 F.3d 568, 571 (7th Cir. 2000) (discussion of role of accountant to attorney); Paul C. Curnin & Jonathan D. Cogan, “Federal Attorney-Client Privilege and Work Product Doctrine,” in *Current Developments in Federal Civil Practice 2004* (PLI Litig & Admin. Practice, Course Handbook Series No. HO-OO QB, 2004).

¹²⁶ McLaughlin & McCarthy, *supra* note 121, at 275.

In addition, consideration should be given as to whether a written report of the investigation should be prepared and disclosed to the government.¹²⁷ With respect to some regulated industries, such a disclosure is required.¹²⁸ However, even if the disclosure is not required, it might assist in reaching a favorable resolution with the government.¹²⁹ Under the Thompson Memorandum and the Sentencing Guidelines,¹³⁰ the disclosure of such a report is viewed positively.¹³¹ A disclosure could also be viewed as consistent with a corporate director's fiduciary duty, could "deter . . . future misconduct," and "restore the public's trust by demonstrating the company's integrity."¹³² However, such a disclosure might be construed as a waiver¹³³ of the attorney-client privilege, thereby possibly causing

¹²⁷ Laurie Smilan, "Dealing with Governmental Investigations, Internal Investigations, and Civil Matters in Corporate Crisis Situations," in *Securities Litigation & Enforcement Institute 2004*, PLI Order No. 2773, 1442 PLI/Corp 757, 763 (Sept.–Oct. 2004).

¹²⁸ Lotchin, *supra* note 93, at 1147.

¹²⁹ McLaughlin & McCarthy, *supra* note 121, at 275–76.

¹³⁰ Thompson Memorandum, *supra* note 34, § VI; U.S. Sentencing Commission, *Guidelines Manual* § 8C 2.5(g) & n.12 (2005).

¹³¹ On October 21, 2005, Acting Deputy Attorney General Robert D. McCallum, Jr. directed Head of Department Components and United States Attorneys to establish a process for federal prosecutors to undertake "before seeking a waiver of the attorney-client privilege or work product protection." Memorandum from Deputy Attorney General Robert D. McCallum, Jr., *Waiver of Corporate Attorney-Client and Work Product Protection* (Oct. 21, 2005), available at <http://abanet.org/poladv/mccallummemo212005.pdf>; Interview with U.S. Atty. James B. Comey Regarding Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, U.S. Attorney's Bulletin 1 (Nov. 2003), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf.

¹³² Lotchin, *supra* note 93, at 1148; *Internal Corporate Investigation*, *supra* note 1, at 287. To some extent, there are different considerations for disclosure between public and private companies. William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. Crim. L. & Criminology, 621, 640–41 (2006).

¹³³ Lotchin, *supra* note 93, at 1149.

problems in another arena (such as civil lawsuits).¹³⁴ It might also be viewed as an admission.¹³⁵

X. [§ 6.3.15] ABC's Preservation of Evidence

During a government investigation, the improper acts of the corporation after the start of the investigation may become the focus. The recent Arthur Anderson and Martha Stewart prosecutions are noteworthy in that the defendants in these cases were charged with offenses relating to obstruction of justice crimes (“‘cover-up’ conduct”¹³⁶) as opposed to the underlying substantive crimes that started the investigation.¹³⁷ This highlights the importance for the corporation to take appropriate steps when it believes that there is an inquiry into its activities.

The federal government has numerous statutes available in its arsenal to charge obstruction, depending upon the circumstances.¹³⁸ Moreover, even if only the substantive criminal offenses are charged (and not the obstruction violations), obstructionist conduct might be construed as evidence of consciousness of guilt or of guilt of the underlying substantive offenses;¹³⁹ moreover, an adverse inference could be drawn from the

¹³⁴ McLaughlin & McCarthy, *supra* note 121, at 275–76.

¹³⁵ *Id.* at 276; Fed. R. Evid. 801(d)(2).

¹³⁶ Ellen S. Podgor, *Arthur Andersen, LLP and Martha Stewart: Should Materiality be an Element of Obstruction of Justice?*, 44 Washburn L.J. 583, 585 (2005).

¹³⁷ *Id.*

¹³⁸ See, e.g., 18 U.S.C. §§ 1503, 1505, 1512, 1513, 1519; see also Sarah Roadcap, *Obstruction of Justice*, 41 Am. Crim. L. Rev. 911 (2004); Peter M. Panken, *The Sarbanes-Oxley Act: Employment Implications for Privately Held and Publicly Traded Companies*, SL040 ALI-ABA 813 (Apr. 6–8, 2006); Gary G. Grindler & Jason A. Jones, *Please Step Away From the Shredder and the ‘Delete’ Key: §§ 802 and 1102 of the Sarbanes-Oxley Act*, 41 Am. Crim. L. Rev. 67 (2004).

¹³⁹ *United States v. Pointer*, 17 F.3d 1070, 1072 (7th Cir. 1994) (“It is well established in this Circuit that ‘evidence of flight and concealment is admissible to show consciousness of guilt, as well as guilt itself.’”) (citations omitted).

spoliation of evidence.¹⁴⁰ In addition, obstructionist conduct might increase¹⁴¹ the corporation's sentence under the Sentencing Guidelines, particularly because it might reflect an unwillingness to accept responsibility for its conduct.¹⁴² Finally, such obstructionist conduct is inconsistent with maintaining the type of corporate culture that is the focus of the Thompson Memorandum.¹⁴³

When a corporation has knowledge of a likely investigation or subpoena or knows of allegations of corporate misconduct, it must take the appropriate steps to preserve evidence.¹⁴⁴ With the increased use of electronic documents (it is estimated “that at least ‘93 percent of information created today is first generated in digital format” and “‘70 percent of corporate records may be stored in electronic format”¹⁴⁵), the

¹⁴⁰ *Crabtree v. National Steel Corp.*, 261 F.3d 715, 721 (7th Cir. 2001) (“The prevailing rule [in this circuit] is that bad faith destruction of a document relevant to proof of an issue at trial gives rise to a strong inference that production of the document would have been unfavorable to the party responsible for its destruction.”).

¹⁴¹ At sentencing, the court can increase a corporation's offense level under the Sentencing Guidelines for “obstructing or impeding the administration of justice.” U.S. Sentencing Commission, *Guidelines Manual* § 3C1.1 (Nov. 2005); Roger W. Haines, Jr. et al., *supra* note 51, § 3C1.1 at 1072–1100.

¹⁴² At sentencing, the court might find that the corporation did not accept responsibility for its conduct and accordingly, the court might not reduce the corporation's offense level under the Sentencing Guidelines for such acceptance. U.S. Sentencing Commission, *Guidelines Manual* § 3E1.1 (Nov. 2005); Roger W. Haines, Jr. et al., *supra* note 51, § 3C1.1, at 1097–1098, nn.707, 708; § 3E1.1, at 1150–1152.

¹⁴³ See Paul E. McGreal, “The Amended Organizational Sentencing Guidelines: Top Ten Things Attorneys Should Know,” in *Advanced Corporate Compliance 2005*, at 49, 58 (PLI Corp. Law & Practice, Course Handbook Series No. 8917, 2006).

¹⁴⁴ Christopher R. Chase, *To Shred Or Not To Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 *Fordham J. Corp. & Fin. L.*, 721, 757–58 (2003).

¹⁴⁵ Brian Organ, *Discoverability of Electronic Evidence*, 2005 *Syracuse Sci. & Tech L. Rep.* 5 (Spring 2005) (citations omitted); *In re Bristol-Myers Squibb Securities Litigation*, 205 F.R.D. 437, 440 n.2 (D.N.J. 2002), cited in Mary Kay Brown & Paul D. Weiner, *Digital Dangers: A Primer on Electronic Evidence in the Wake of Enron*, 74 *Pa. Bar Ass'n Q.* 1, 2 (2003).

likelihood of the alteration or destruction of records (even inadvertent) increases.¹⁴⁶ Accordingly, an outside forensics expert should be consulted to assist the representation team in document preservation, particularly of electronic documents.¹⁴⁷ By having outside experts involved in this process, greater credibility is given to the document preservation efforts. With outside experts, it is likely that the corporation's internal investigative efforts will not be construed as an effort to interfere with the government's investigation.¹⁴⁸

To the extent that the corporation has an appropriate (and preexisting) document preservation policy in place when such a situation arises, this policy should be followed,¹⁴⁹ except that it should suspend document destruction and the president should issue a document preservation directive.¹⁵⁰ In this way, the corporation can argue that it followed “a consistently applied and routinely followed retention policy”¹⁵¹ that was drafted prior to the events at issue¹⁵² but took the appropriate steps in light of these events.

¹⁴⁶ Steven C. Bennett & Thomas M. Niccum, *Two Views from the Data Mountain*, 36 Creighton L. Rev. 607, 618 (June 2003).

¹⁴⁷ See Alan E. Brill, *Computer Forensics, Corporations, and Criminal Offenses*, Fed. Law., Aug. 2002, at 38.

¹⁴⁸ Martini & Mignone, *supra* note 123, at 28–29.

¹⁴⁹ Chase, *supra* note 144, at 758–59.

¹⁵⁰ See Merri A. Baldwin, “The Ethics of Information Management: Knowing What You Have, Why You Have It, and How To Dispose of It (Without Breaking The Law or Violating Ethical Duties,” in *Seventh Annual Institute on Privacy Law: Evolving Laws and Practices in a Security-Driven World*, at 779–82 (PLI Patents, Copyrights, Trademarks & Literary Property, Course Handbook Series No. 8966, 2006) (provides steps relating to “litigation hold”); Chase, *supra* note 144, at 757.

¹⁵¹ Chase, *supra* note 144, at 759.

¹⁵² Grindler & Jones, *supra* note 138, at 89–91 (“provides suggestions on document retention and destruction policies in the post-Sarbanes-Oxley environment”).

XI. [§ 6.3.16] Corporate Compliance Program

As noted above, a factor considered by prosecutors in the corporate charging decision is the nature and extent of the corporate compliance program. Besides being a factor in charging, such a program provides guidance to the corporation as to the steps to take when a possible violation is suspected.

The Thompson Memorandum notes that the fact that an organization has a comprehensive plan is not a complete defense, and it will not necessarily prevent the issuance of charges.¹⁵³ On the other hand, the government recognizes that an effective program is not foolproof, noting that “no compliance program can ever prevent all criminal activity by a corporation’s employees.”¹⁵⁴

The Thompson Memorandum states that the two “fundamental questions that any prosecutor should ask are: ‘Is the corporation’s compliance program well designed’ and ‘Does the corporation’s compliance program work?’”¹⁵⁵ The Thompson Memorandum cites the Federal Sentencing Guidelines as providing guidance as to the components of an effective compliance program.¹⁵⁶ The Memorandum also recognizes that the regulatory programs of particular industries might be “outside the normal experience of criminal prosecutors.”¹⁵⁷ Therefore, prosecutors are directed to “consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program’s design and implementation.”¹⁵⁸

The Guidelines set forth criteria for determining whether an organization has “an effective compliance and ethics program.”¹⁵⁹ The Guidelines state that in such a program, an organization “shall exercise due diligence to

¹⁵³ Thompson Memorandum, *supra* note 34, § VII B; John F. Fatino, *Corporate Compliance Programs: An Approach to Avoid or Minimize Criminal and Civil Liability*, 51 Drake L. Rev. 81, 89–92 (2002).

¹⁵⁴ Thompson Memorandum, *supra* note 34, § VII B.

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* n.6.

¹⁵⁷ *Id.* § VII B.

¹⁵⁸ *Id.*

¹⁵⁹ U.S. Sentencing Commission, *Guidelines Manual* § 8B2.1(a) (Nov. 2005).

prevent and detect criminal conduct”¹⁶⁰ and “otherwise promote an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”¹⁶¹ The Guidelines then set forth the various components that are “minimally require[d]” for such a program.¹⁶² These components should be reviewed as an organization develops and implements its corporate compliance program.

Significantly, as the Guidelines have evolved through amendment, these components have become more specific based upon the “best practices” of many corporations.¹⁶³ Moreover, under the amended Guidelines, there is an increased focus on whether the corporation has “an ethical corporate culture.”¹⁶⁴ As one commentator noted, the amended Guidelines reflect the philosophy that “[the corporate] culture should not be legalistic, where employees focus on what they can get away with. Rather, the company should sincerely articulate core values that employees believe define the organization’s culture.”¹⁶⁵

Obviously, the appropriateness of a particular program depends upon the specific organization at issue. The Application Notes to the Guidelines recognize that each program must be different dependent upon the “applicable industry practice or the standards called for by any applicable governmental regulation”,¹⁶⁶ “the size of the organization”,¹⁶⁷ and the organization’s history.¹⁶⁸

¹⁶⁰ *Id.* § 8B2.1(a)(1).

¹⁶¹ *Id.* § 8B2.1(a)(2).

¹⁶² *Id.* § 8B2.1(b).

¹⁶³ McGreal, *supra* note 143, at 53.

¹⁶⁴ *Id.* at 58.

¹⁶⁵ *Id.*

¹⁶⁶ U.S. Sentencing Commission, *Guidelines Manual* § 8B2.1 Application n.2(B) (Nov. 2005).

¹⁶⁷ *Id.* n.2(C).

¹⁶⁸ *Id.* n.2(D).

XII. [§ 6.3.17] Conclusion

As shown here, a criminal investigation into a corporation's conduct can be a significant event in the organization's life. The existence of an ethical corporate culture and a sound corporate compliance plan are useful in establishing a defense when allegations of such misconduct are made. More importantly, they are excellent tools for the deterrence of corporate crime in the first place.

It goes without saying that the best time to change a corporate culture, as well as to adopt and implement an effective compliance program, is before allegations of misconduct are made. However, in taking these steps, the organization must be serious in its resolve. A compliance plan should be used as a working operational guide for a company. This is quite significant because the Thompson Memorandum states that "the commission of . . . crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program."¹⁶⁹ Thus, it is important that companies "[maintain] the proper tone at the top."¹⁷⁰ As a high ranking federal law enforcement official said, "senior corporate officers must 'talk the talk' and 'walk the walk.'"¹⁷¹

¹⁶⁹ Thompson Memorandum, *supra* note 34, § VII A; Fatino, *supra* note 153, at 100–04 (cites some of the issues that arise in the preparation of a compliance plan). See generally H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post Caremark Era*, 26 Del. J. Corp. L. 1 (2001).

¹⁷⁰ Theodore N. Mirvis, "The New Regulatory and Enforcement Environment," in *Securities Litigation & Enforcement Institute 2005*, 761, 770 (PLI Corp. Law & Practice, Course Handbook Series No. 6746, 2005).

¹⁷¹ *Id.*