JONES DAY

CORPORATE INTERNAL INVESTIGATIONS
BEST PRACTICES, PITFALLS TO AVOID

INTRODUCTION: THE BENEFITS OF AN EFFECTIVE CORPORATE INTERNAL INVESTIGATION

Corporations are being scrutinized today as never before. Public and private companies alike are examined and investigated not only by the U.S. government, but by increasing numbers of local, state, and foreign government agencies. Private plaintiffs are also filing more and more cases with significant allegations that attempt to call a corporation's conduct into question. Frequently, corporate scrutiny focuses on compliance issues: that is, whether companies comply with the legal obligations to run the business ethically around the world. Corporations are clearly facing significant challenges.

There is a path, though, for corporations to best protect themselves in the harsh glare of the spotlight on compliance issues. That is: When a company is confronted with evidence or allegations of potential wrongdoing, the company is well served to respond deliberately and thoughtfully by making sure that it understands all the facts. If the facts evidence a violation of policy—or worse, of law—the company should respond promptly with appropriate discipline, remediation, and (in certain cases) perhaps even discussions with the government.

Under the right circumstances, conducting an effective corporate internal investigation protected by the attorney-client privilege can benefit the company in a number of ways:

- Revealing all of the relevant facts so that management and/or the board can make a fully informed decision as to how best to proceed;
- Stopping the conduct to prevent further violations;
- Memorializing the company's good-faith response to the facts as they become known;
- Insulating management and/or the board against allegations of complicity; and
- Promoting a culture of transparency and compliance throughout the organization.

Each of these benefits can be achieved if the investigation is well designed with a specific work plan that addresses document collection and review, witness interviews, careful analysis, and periodic reporting in the format that best serves the client's interests.

Jones Day has developed one of the deepest benches in the world of former prosecutors and regulators and of lead trial lawyers, all of whom guide and defend companies every day through their most sensitive and urgent issues. The materials in this collection, written by the partners and associates within the Firm's Corporate Criminal Investigations Practice, describe different aspects of our practice as related to corporate internal investigations. The materials cover best practices in witness interviews, reflections on the corporate attorney-client privilege, representation issues in internal investigations, joint defense agreements, the effective use of experts, the growing prevalence of global corporate investigations, and protecting a company's interests after self-disclosure.

We hope that you find these materials instructive and helpful.

Charles Carberry and Richard Deane
Practice Leaders
Corporate Criminal Investigations

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BEST PRACTICES FOR CONDUCTING WITNESS INTERVIEWS

Witness interviews are a critical part of virtually every internal corporate investigation. Witnesses have the facts—the *who*, *what*, *where*, *when*, and *why*—and how successfully interviewers extract those facts can make or break the internal investigation.

In any particular investigation, witnesses can, and often do, run the gamut; some may truthfully recite what they do and do not know and also offer leads that further advance the investigation, while others may obscure the facts, if not flat-out lie, and thereby sidetrack or even obstruct the investigation. Finally, there are witnesses who come clean at the last minute.

From this perspective, a good interview is, fundamentally, one that enables: (i) the discovery of as many relevant facts (or sources of such facts) from the witness as possible; and (ii) an accurate assessment of the witness's credibility.

This section sets forth certain considerations and best practices for conducting an effective witness interview. It should be emphasized, however, that conducting a good interview is at least as much art as science. Meticulous preparation, well-crafted questions, and facility with documents can ensure that the relevant substantive topics are covered during

the interview, but well-honed "soft" skills are often necessary for eliciting information that the witness may be reluctant to share and determining whether the witness is telling the truth. In particular, interviewers should be adept at detecting and interpreting various indicia of veracity, such as signals the witness gives about her candor, interests, and motivations through her body language, speech patterns and other verbal cues, and overall demeanor.

Against this backdrop, it should be clear that each interview in each investigation is a distinctly unique event deserving of careful planning and its own strategy, tailored to the witness in question.

CONSIDER FACTORS THAT MAY IMPACT WHETHER, WHEN, WHERE, AND/OR HOW TO CONDUCT THE INTERVIEW

Internal investigations and related interviews do not occur in a vacuum. Instead, there are invariably surrounding circumstances and potential collateral consequences of which investigators should be cognizant when developing and implementing an investigative plan and preparing for individual interviews.

IS THE INVESTIGATION OVERT OR COVERT?

Investigators should consider whether the subjects of an investigation and other prospective witnesses know of the investigation. Investigators' ability to obtain evidence and information through certain means can be diminished once the investigation goes "overt." The element of surprise can be an especially valuable tool for investigators—substantial covert investigative activity leading up to unscheduled "drop-in" interviews of key subjects can help ensure both that the interviewers are knowledgeable about the conduct within the scope of the investigation and the witness's participation therein and that the witnesses are not afforded the opportunity to individually or collectively rehearse—or, worse, fabricate—answers to difficult questions. Of course, when dealing with a witness, investigators should refrain from misleading or harassing her and should adhere to any applicable legal rules, contractual rights, or corporate policies governing the scheduling and conduct of an interview. Even when an investigation has remained covert, the best investigative approach may very well be to give witnesses ample and explicit notice of the existence and nature of the investigation so that they can likewise be fully prepared (factually and mentally) when they eventually sit for their interviews. The salient point, as with most of the other practice tips outlined in this section, is not that there is a singular best practice to be followed in every instance, but that investigators should understand and use the range of tactical options available to them in a way that avoids certain pitfalls and helps yield the greatest benefit to the investigation.

IS A GOVERNMENT AGENCY ALSO INVESTIGATING THE SAME CONDUCT? IF NOT, IS THE INTERNAL INVESTIGATION LIKELY TO LEAD TO A DISCLOSURE TO THE GOVERNMENT?

If the government is conducting its own investigation into the same conduct at issue in an internal corporate

Theodore T. Chung | Chicago | +1.312.269.4234 | ttchung@jonesday.com

Ted Chung is a trial attorney with substantial experience representing organizations in complex civil litigation, conducting internal corporate investigations, responding to government investigations and enforcement actions, counseling clients on compliance matters, and defending white-collar criminal cases.

Ted has had a distinguished and multifaceted career in both private practice and public service, having previously served as General Counsel to Illinois Governor Pat Quinn, a partner at another major international law firm, an Assistant U.S. Attorney and a Deputy Chief (General Crimes Section) in the Criminal Division of the Chicago U.S. Attorney's Office, the First Assistant Corporation Counsel in the City of Chicago's law department, and a Deputy Chief of Staff for Chicago Mayor Richard M. Daley.

He has participated as a prosecutor, defense counsel, and legal advisor in several of the most high-profile criminal and administrative investigations in Illinois and has handled matters involving accounting irregularities, defalcations, and allegations of financial or regulatory fraud (mail/wire/bank, health-care, and bankruptcy), racketeering, Foreign Corrupt Practices Act violations, murder, extortion, and export violations, among other offenses.

investigation, and if the company is already engaged in discussions with the government, some level of coordination is often highly advisable. For instance, a government agency may be inclined to delay or forgo altogether its own investigation in favor of the internal investigation if the company offers a credible representation that it will fully report its findings to the agency. Conversely, the agency may ask the company to delay or forgo investigative activity out of a concern that an internal investigation would undermine the government's investigation and any subsequent prosecution (e.g., obtaining multiple—and potentially conflicting—statements from the same witness about the same events). In this regard, open and regular communication among the parties involved can facilitate a sensible accommodation, build credibility for the company, and reduce delays or inefficiencies.

ARE THERE WITNESS-SPECIFIC ISSUES TO CONSIDER?

Occasionally, issues related to specific witnesses affect decisions about the interviews. In contrast to law enforcement authorities with subpoena power, companies and their internal investigators are generally limited in their ability to compel cooperation on the part of witnesses. This means that internal investigators may not have access to all witnesses with knowledge and are instead left to obtain information only from those individuals and entities obligated to cooperate with an internal probe by virtue of their employment with the company or as a matter of contract. Investigators should be aware of which witnesses are obligated to cooperate and whether this obligation will terminate, thus ensuring that they don't miss out on the best opportunity to interview these witnesses during the period in which they are most likely to cooperate. For this reason, investigators should monitor the status of witnesses whom the company does control—particularly current employees—and stand ready to adjust the investigative plan should a change in any witness's status so warrant (e.g., expedite an interview of an employee about to leave the company). Similarly, employees who are, or may become, whistleblowers may merit special attention. An employee who has already blown the whistle internally should often be an investigator's first source of information; promptly interviewing the employee is not simply a means of obtaining that information, but also an opportunity to gain the employee's trust and demonstrate to the employee that the

company is treating her allegations with due care. This may convince the employee not to report the allegations outside the company, at least pending the outcome of the internal investigation. An employee who has reported alleged misconduct to a government agency or the media also should be interviewed, though the interviewers should recognize that the employee may in turn report the interview to the same agency or media outlet.

THINK CAREFULLY ABOUT THE LOGISTICS OF THE INTERVIEW

The mental state of the witness and the physical environment for the interview can often affect an interview for better or worse—these details are, in fact, often the key to unlocking the witness's information. While investigators should never lose focus on eliciting the substantive information that a witness may possess, they should give careful thought to how, when, and by whom an important interview will be sought and conducted.

SEQUENCING INTERVIEWS

At an early stage of the internal investigation, the investigators should develop an interview plan that arranges the contemplated interviews in a logical sequence. As the investigation proceeds, this plan should be modified as appropriate. Investigations often commence with "scoping" interviews of witnesses who have little, if any, personal knowledge of the conduct in question, but who can provide an overview of relevant corporate processes, practices, and/or personnel. Exigent circumstances (e.g., the

impending retirement or termination of a key employee witness) may dictate a different approach, but interviews of fact witnesses typically proceed in ascending order of importance. In this way, the investigators can build their knowledge of the matter as they prepare to conduct the highest-priority interviews.[1]

THE INTERVIEW LOCATION AND FORMAT

Unless there is something to be gained from conducting an interview without advance notice and/or at a particular time or location, scheduling the interview is ordinarily a matter of convenience to the witness, the company, and the investigators. The investigators should normally try to avoid unnecessary business disruption and choose a site for the interview that will best induce candor on the witness's part (usually somewhere that puts the witness at ease). Every effort should be made to conduct important interviews in person; when it comes to sizing up a witness and her statements, the opportunity to observe and listen to the witness firsthand is critically important—a telephone interview is a poor substitute, and a videoconference is only marginally better.

PREPARE THOROUGHLY AND ANTICIPATE WITNESS CONCERNS

The key to a successful interview is, of course, intelligent and exhaustive preparation. Best practices for interview preparation include canvassing the investigative file and other information relating to the witness to be interviewed, thoroughly analyzing this information, collecting and organizing any materials for use in the interview, and preparing a detailed outline to guide the questioning of the witness.

DOCUMENT REVIEW AND ORGANIZATION

It is difficult to overstate the importance of document review to an internal corporate investigation. Simply put, without documents, investigators are significantly hampered in their ability to arrive at the truth—documents allow significant events to be pieced together and witnesses to be refreshed, corroborated with consistent statements, and confronted with inconsistent statements, often ones that they themselves put forth in writing. Assuming that investigators have enough time to complete a meaningful document review, they should become very familiar with the key documents pertaining to each witness and think deliberately about how to present each witness with these documents during the interview.[2] Indeed, the mere act of bringing a well-organized stack of documents to an interview as a display of preparation may have a disciplining effect on a witness who, in the absence of documentary proof to the contrary, might have thought that she could stray from the truth and get away with it.

INVESTIGATE THE WITNESS'S BACKGROUND

Oftentimes, it is important to have an understanding of aspects of a witness's background (e.g., financial information, criminal or litigation history, job performance, prior

James C. Dunlop | Chicago | +1.312.269.4069 | jcdunlop@jonesday.com

Jim Dunlop represents organizations and individuals in criminal and civil investigations and enforcement proceedings on a global basis. Jim also counsels, and conducts internal investigations and cross-border due diligence for, companies concerned about corrupt practices prohibited by the FCPA and the U.K. Bribery Act, fraud, other criminal and civil compliance, and unethical conduct.

Jim has represented companies and individuals in the energy, manufacturing, and pharmaceutical sectors in investigations and criminal proceedings in Latin America arising under the laws of local jurisdictions, in FCPA investigations in Latin America and Europe, and in cartel investigations spanning the U.S., Europe, Asia, and the Pacific; he has conducted anti-corruption due diligence and compliance assessments for companies operating on six continents. Other recent representations include the former CEO of a public utility sued by the SEC following a DOJ criminal probe, a Wall Street bank in a lengthy public corruption investigation, and companies and individuals who were the targets of price-fixing and fraud prosecutions led by the DOJ and SEC. In addition, Jim has led internal investigations of alleged computer fraud and trade secret theft, alleged self-dealing by company executives, and probes of alleged accounting fraud at a drug company and within a multistate hospital network.

employment experience, and relationships with other employees) insofar as they shed light on any "agenda" or "baggage" that the witness may have and her general propensity for truth telling. Investigators should consider reviewing, at a minimum, background information maintained by the company (e.g., the witness's personnel file) or available in publicly accessible databases and through internet searches.

PREPARE WITNESS OUTLINES

While an experienced and exceptionally gifted interviewer might be able to "wing it," the best practice is to draft a suitably comprehensive and detailed interview outline that includes all relevant documents and emails to be shown to the witness. Such an outline can help ensure that the major substantive topics are covered during the interview and that particularly important questions are asked. The interviewer should be prepared to deviate from the outline as necessary to follow up and explore answers given during the interview.

ANTICIPATE WITNESS QUESTIONS

Investigators should not be surprised if the witness raises questions during the interview. These questions are often motivated by the witness's concern about the consequences of her statements. Anticipating such questions and consulting with the right company personnel in advance of the interview will enable the investigators to intelligently address the questions, if not conclusively answer them, and perhaps avoid what would otherwise have been a misstatement to the witness or a disruption or postponement of the interview. Set forth below are certain questions that witnesses raise with some regularity, along with suggested responses.

Do I need a lawyer? Before the interview, the investigators should determine whether any company policies, company bylaws, contractual provisions, or statutes would afford the witness the right to counsel or other representation at the interview.

Suggested Answer: "I cannot answer that question for you because, as I have explained, I am not your lawyer. If you think you want a lawyer as we go on, please let me know, and we can talk more about that." (Note that through the initial *Upjohn* warnings, discussed below, the witness will have been advised that the investigators represent the engaging entity, not the witness.)

Will I be fired or disciplined if I don't answer your questions? Before the interview, the investigators should determine what, if any, legal rules or company policies govern an employee's obligation to cooperate in an internal investigation. Generally, employees have a duty to cooperate and may be subject to disciplinary action for failing to do so.

Weston C. Loegering | Dallas | +1.214.969.5264 | wcloegering@jonesday.com

Wes Loegering has represented clients in complex federal and state civil and criminal trials for more than 25 years. He has handled all aspects of litigation involving business and government controversies, with a focus on matters involving federal and state agencies, including the SEC, IRS, and CMS. Wes has led trial teams in a variety of jurisdictions and successfully obtained temporary restraining orders, injunctive and emergency relief, and jury verdicts. He has also helped businesses respond to civil and criminal government investigations.

Wes has successfully represented clients facing FCPA investigations, an Enron senior executive (client sentenced to probation), numerous companies and executives investigated by the SEC and grand juries, the sole corporate defendant in a whistleblower matter seeking more than $1 billion in damages brought under the False Claims Act (*qui tam*), and negotiated settlement of matters investigated by the DOJ, including the Office of Foreign Asset Control. Prior to joining Jones Day, Wes defended numerous class-action cases on behalf of AT&T.

It is imperative for interviewers to clearly set the ground rules for the interview at the very outset, before substantive questioning begins. This can be accomplished by explaining the general subject matter of the investigation, thanking the witness for her cooperation, and reciting the *Upjohn* warnings in a straightforward and nonintimidating manner.

Suggested Answer: "My understanding is that employees are required to cooperate with internal investigations authorized by the company, such as this one. The duty to cooperate includes truthfully answering questions during an interview conducted as part of the investigation. I am not a member of the company's management, however, so I cannot tell you what the company may or may not do if you do not answer my questions."

Whom will you tell if I tell you . . . ? Before the interview, the investigators should determine whether the company has already agreed to disclose the substance of the interview to the government or any other third parties. Typically, the disclosure decision is not made until the investigation is complete.

Suggested Answer: "Again, our conversation is confidential, but this investigation is being conducted on behalf of the company, so what you tell me is information that belongs to the company. As for whether your interview will be disclosed to any third parties, as I mentioned, that's a decision that the company, and the company alone, will make at some point in the future." (Note that the *Upjohn* warnings will have addressed this topic as well; see below.)

I'd like to say something off the record. Can you stop taking notes? In general, investigators should try to avoid accepting off-the-record statements. If a statement is truly "off the record" and therefore not documented, it has essentially not been made and has next to no value for the investigation. Interviewers should ordinarily indicate that they will not accept such statements, but they should also seek to understand the witness's reasons for wanting to go off the record (e.g., fear of attribution, retaliation, or physical harm) and address them to the extent practicable.

Suggested Answer: "I'm sorry, we cannot accept off-the-record comments. I hope you understand. We're trying to discover the facts, and we're interested in hearing anything you have to say that can help us. Can you tell us why you'd like to go off the record? Maybe we can address any issues or concerns that you have."

STRUCTURE THE INTERVIEW WITH CENTRAL FACT-DISCOVERY AND WITNESS-ASSESSMENT OBJECTIVES IN MIND

Asking the right questions in an interview is just the start; the goal is to get meaningful answers that, as noted above, further the investigation because they add to the investigators' knowledge base and/or permit a more informed evaluation of the witness. Giving attention to the interview setting can increase the odds of obtaining meaningful answers.

PARTICIPANTS IN THE INTERVIEW AND THEIR ROLES

Much thought should be devoted to who should participate in the interview of an important witness. The presence or absence of particular persons can significantly affect the tenor of the interview and the witness's cooperation level. There should be at least two participants—a principal questioner and a principal note taker or "prover"[3]—who are fairly regarded as independent of the company and therefore not biased in favor of any particular investigative outcome. The prover should focus on accurately recording the interview and will be available thereafter to testify to the interview, if necessary. Beyond these two participants, others should be permitted to attend only if their presence is likely to serve a legitimate investigative purpose, such as evoking greater candor on the witness's part. For instance, the

presence of an appropriate company representative without a personal stake in the investigation and with whom the witness is familiar (e.g., in-house counsel not involved in the conduct being investigated) may reasonably be believed to have a positive effect on the witness's comfort level and responsiveness.[4] If the witness insists on being accompanied at the interview by counsel or another person, the investigators should determine whether the employee is so entitled by virtue of any legal, policy, or contractual provision. Even if there is no such entitlement, allowing the witness a reasonable accommodation in this regard may be tactically sound as a show of good faith and fairness, so long as it does not threaten harm to the investigation.

SETTING THE BASIC GROUND RULES (*UPJOHN*) UPFRONT

It is imperative for interviewers to clearly set the ground rules for the interview at the very outset, before substantive questioning begins. This can be accomplished by explaining the general subject matter of the investigation, thanking the witness for her cooperation, and reciting the *Upjohn* warnings in a straightforward and nonintimidating manner. In fact, the *Upjohn* recitation can be delivered not as a "warning," but as a gesture of courtesy to assist the witness in understanding the context for the interview and the respective roles of the participants. Substantively, the *Upjohn* warnings should make clear that the investigators have been hired by the engaging entity (e.g., the company or the audit committee) and do not represent the witness; that the investigators are gathering facts in order to provide legal advice to the entity; that the investigation is confidential and covered by the attorney-client privilege; that the privilege belongs to the entity, and only the entity can waive the privilege and disclose privileged information to third parties; and that the witness must maintain the confidentiality of the investigation.[5]

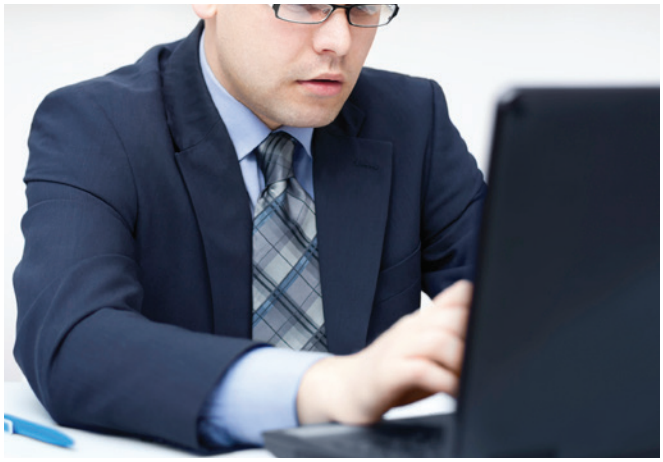
MAINTAIN PROFESSIONALISM AND A TONE OF CIVILITY DURING THE INTERVIEW, BUT DON'T SHY AWAY FROM CONFRONTING WITNESSES ON DEMONSTRABLY FALSE STATEMENTS

Interviews should not normally be hostile "interrogations," and investigators should never attempt to embarrass, berate, or demean a witness. That said, investigators should be prepared to appropriately challenge a witness who exhibits a disregard for the truth or is otherwise unjustifiably uncooperative. Indeed, subtly or dramatically different interview approaches may be necessary in the course of a single interview, particularly where the witness herself vacillates between factually supportable and patently false answers. For investigators, this puts a premium on developing tools and techniques that enhance their adaptability and nimbleness in interviews—investigators who can modulate their questioning and manner in tune with (or in contrast to) the witness, as circumstances warrant, are certain to be more effective than those who are stuck at one speed and in one mode.

George T. Manning | Dallas | +1.214.969.3676 | gtmanning@jonesday.com

George Manning is a trial lawyer who represents individuals and corporations facing significant risks from economic factors, competitors, and governments. In more than 35 years of trial practice, including four years as an Assistant U.S. Attorney in the Southern District of New York, he has been plaintiff and defense counsel in antitrust, securities, governance, health-care, and administrative matters for U.S. and foreign companies operating in the United States, Europe, South America, and Asia. Since leaving the U.S. Attorney's Office in the 1980s, George also has been counsel in antitrust criminal prosecutions, merger challenges, class actions, and parallel criminal and administrative investigations in the U.S. and abroad. He led significant matters for clients in the telecommunications, airline, medical and health-care, and paper and forestry industries.

Since the passage of the FCPA in 1977, George has led internal investigations for companies and board committees investigating accounting, foreign payment, and export control and customs issues. He has defended securities class actions and SEC enforcement proceedings related to loan-loss reserves, software capitalization, revenue recognition, insider trading, and the FCPA.



The most accurate–and therefore most useful–interview report is one that is prepared very soon after the interview and based on the recollections and copious notes of the participants.

WHEN THE OBJECTIVE IS PURELY FACT GATHERING, USE NONLEADING QUESTIONS AND TRY TO GET THE WITNESS TO OPEN UP AS MUCH AS POSSIBLE

The first task in most interviews is determining what, if anything, the witness knows about the subject matter of the investigation. To get there, it is usually helpful to develop some initial rapport with the witness so that the witness feels sufficiently comfortable in the interview setting to "open up" to the interviewers. A good way to build this rapport is to begin an interview with questions about the witness's background, even if this information is not directly relevant to the investigation. This tends to help the witness be less anxious and less guarded by the time the interview transitions to questions focused on the investigation. Throughout a fact-gathering interview, investigators should generally use nonleading questions, which are the best way to elicit narrative answers with as much or as little elaboration from the witness as the interviewers deem appropriate.[6] In addition, interviewers should make intelligent use of any documents relating to the witness (e.g., refreshing the witness, clarifying ambiguous terms or passages, authenticating documents, identifying other persons whose names appear on documents, etc.). Interviewers should also explore the witness's knowledge of other potential sources of relevant information; it is a good practice in such an interview to ask questions like, "Who might know more about [the matter]?" and "Where might there be documents related to [the matter]?" and a catch-all question like, "Is there anything else you think we should know?"

WHEN A WITNESS MAY BE LYING OR MINIMIZING, CONSIDER CONFRONTING HER WITH CONTRARY EVIDENCE

Through document review, forensic analysis, and other interviews, investigators may have already developed a reasonably complete understanding of the facts about which they intend to question a witness. This means that the upcoming interview is in all likelihood more about assessing the

Daniel E. Reidy | Chicago | +1.312.269.4140 | dereidy@jonesday.com

Dan Reidy is a trial lawyer with extensive experience handling numerous high-profile cases. He represents companies and individuals involved in criminal and other enforcement investigations. Dan also represents companies in complex civil litigation of all kinds, including patent, product liability, securities, False Claims Act, antitrust, post-acquisition, labor and employment, and commercial disputes.

As lead counsel, Dan has tried civil and criminal cases to bench and to jury in state and federal courts, representing both defendants and plaintiffs. He has also led the briefing and done the oral arguments in numerous cases in the federal appellate courts, including the Seventh, the Federal, and the Eleventh Circuits. Dan's practice also involves counseling companies, boards of directors, individual directors, and audit and special committees in situations involving financial restatements, derivative claims, and criminal investigations of senior company officers, among others. As a prosecutor and ultimately as first assistant in the Chicago U.S. Attorney's Office, he focused on matters involving allegations of complex financial crimes. He was the lead prosecutor in the "Greylord" judicial corruption project and personally prosecuted a number of judges, lawyers, and court personnel. Dan is Partner-in-Charge of the Chicago Office.

witness than about acquiring additional factual information. For possibly culpable witnesses, in particular, investigators should: (i) anticipate the possibility that the witness will lie about material facts and/or minimize her conduct; and (ii) be prepared to confront the witness with contrary evidence if she does lie (assuming the investigators are then in a position to reveal that evidence). One effective tactic here is to try to preempt any falsehood on the witness's part by presenting her with the contrary evidence before she is questioned on the facts; alternatively, the interviewer can ask the witness about the facts and then confront her with the contrary evidence only if she does not fully "come clean." In choosing between these two approaches in a particular interview, the investigator should determine how important it is to test the witness's truthfulness—the more important such testing is, the more the latter approach is generally preferred.

CONCLUDE THE INTERVIEW WITH IMPORTANT REMINDERS

The conclusion of an interview can be just as important as its initiation and content. Investigators may need to have continuing contact with the witness after her interview (or even re-interview the witness), and the terms on which they leave the witness can affect such future communications. Moreover, the end of the interview is a good time to remind the witness of key admonitions and instructions, including the following:

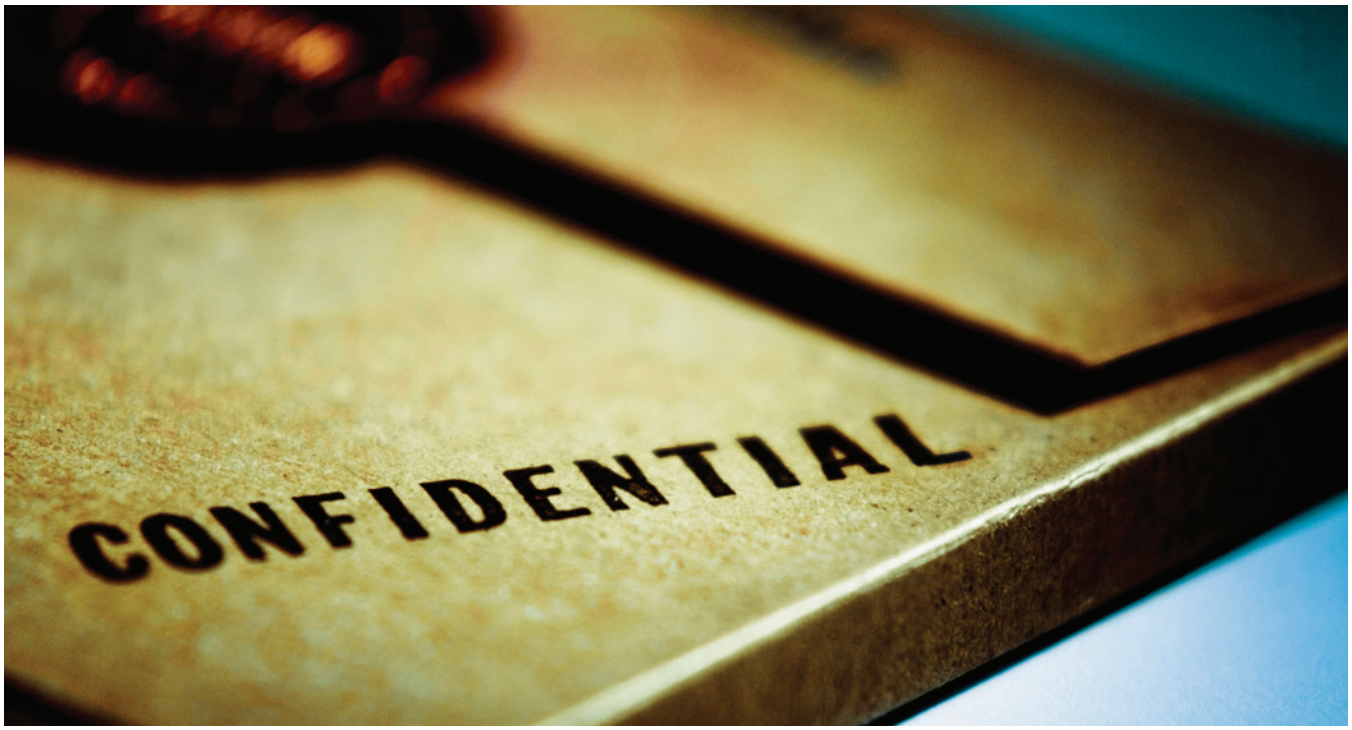
- Maintaining the confidentiality of the investigation, especially refraining from discussing the investigation with persons other than her counsel (if represented);
- Preserving relevant documents and data, consistent with any previously issued preservation notice (if no notice has been issued, the witness should be told to preserve specified documents and data, and a written notice should follow as soon as possible);
- Providing the witness with an investigator's contact information so that the witness knows whom to call with any questions or additional information; and
- Advising the witness of any company policy or practice, or providing other appropriate guidance, on what the witness should do in the event she is contacted by a government investigator or third party regarding the same subject matter.[7]

PROMPTLY AND ACCURATELY MEMORIALIZE THE INTERVIEW IN A WRITTEN REPORT

An interview is only as good as the report that memorializes it. Memories fade and interview notes do not always cogently reflect what was said during the interview. Failing to accurately summarize in a written report the relevant information obtained from the witness can defeat the central purpose of the interview: to incorporate that information into the collective knowledge base of the investigation.

The most accurate—and therefore most useful—interview report is one that is prepared very soon after the interview and based on the recollections and copious notes of the participants. The principal note taker should ordinarily prepare the first draft of the report and then circulate it to other participants for editing and comment. The result of this process, which may involve multiple drafts, should be a final report that reflects the shared recollection of the interview participants and contains an accurate and complete summary of the information gathered.[8]

The interview report should identify the witness and all other persons who participated in the interview; specify the date, time, duration, and location of the interview; and summarize the information conveyed by the witness. In addition, the interview report should describe any admonitions or instructions given to the witness (e.g., *Upjohn* warnings; *see also* a more elaborate discussion of this at "Representation Issues in Corporate Internal Investigations: Identifying and Addressing Risks") and indicate that it contains the interviewers' mental impressions and thought processes related to the interview. The inclusion of mental impressions and thought processes, specifically denoted as such, should ensure that the report will be protected from disclosure to third parties by the attorney-client privilege and the work-product doctrine.[9]



THE CORPORATE ATTORNEY-CLIENT PRIVILEGE TODAY: IS WAIVER STILL A WORRY?

Corporations facing the question of whether to waive the attorney-client or work-product privilege during a government investigation should carefully consider the present-day benefits and pitfalls of doing so. Beginning with the "voluntary disclosure policy" of the Securities and Exchange Commission ("SEC") in the 1970s, government consideration of corporate cooperation in making charging decisions—including waiver of the attorney-client and work-product protections—has been a part of the fabric of corporate criminal investigations.[10] Since the issuance of the Holder Memorandum by the Department of Justice ("DOJ") in 1999, waiver of the attorney-client and work-product doctrines has taken center stage. The policy of the DOJ and numerous other governmental investigative agencies has evolved in response to changing investigative needs and the outcry of many against government intrusion into the attorney-client relationship. Now, more than three years after the DOJ released its most recent pronouncement on the issue of waiver, many wonder whether waiver is still a worry. The short answer is yes.

The DOJ's nuanced stance on waiver does not guarantee that a corporation can keep its privileged material privileged and still get the full benefit of a cooperation credit. Further, the DOJ is not the only government

agency conducting investigations, and other agencies have varying approaches to waiver of the attorney-client and work-product protections. Even now, corporate counsel must be keenly aware of government interest in a corporation's waiver of the attorney-client and work-product protections and be prepared to counsel her clients on the benefits and drawbacks of waiving the privilege or withholding that waiver. This section outlines the pitfalls associated with the question of waiver today and identifies certain best practices for corporate counsel addressing the issue of waiver.

THE GOVERNMENT'S HISTORICAL APPROACH TO WAIVER OF THE CORPORATE ATTORNEY-CLIENT AND WORK-PRODUCT PROTECTIONS

"The DOJ's longstanding policy and practice on cooperation credit has arguably always been a coercive one."[11] In 1999, in an attempt to counter the growing belief that the DOJ was inconsistently exercising prosecutorial discretion in the context of corporate investigations, Deputy Attorney General Eric Holder issued a memorandum listing guidelines for federal prosecutions of corporations. Included in the list of nonmandatory factors meant to guide DOJ attorneys in deciding whether to charge a corporation was the corporation's "willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges."[12] The SEC followed suit in 2001, issuing the Seaboard Report, which permits SEC attorneys to consider whether a corporation waived the attorney-client and work-product protections in evaluating corporate cooperation.[13]

As Enron and other corporate scandals ushered in a new decade, Deputy Attorney General Larry D. Thompson issued a new memorandum in 2003 aimed at developing an aggressive approach toward corporate prosecution. The Thompson Memorandum made the factors guiding the decision to charge mandatory. It also "increased emphasis on and scrutiny of the authenticity of a corporation's cooperation," including its waiver of the attorney-client and work-product protections.[14] While the Thompson Memorandum indicated that the DOJ did not "consider waiver of a corporation's attorney-client and work product protection an *absolute* requirement," such waivers became the status quo for companies seeking to avoid criminal prosecution.[15]

In 2004, the DOJ's and SEC's waiver policies were buttressed by amendments to the commentary to Section 8C2.5 of the United States Sentencing Guidelines.[16] The amended commentary stated: "Waiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . *unless such waiver*

Roman E. Darmer | Irvine | +1.949.553.7581 | rdarmer@jonesday.com

Roman Darmer litigates securities and complex commercial cases. He represents public and foreign companies and their directors, board committees, executives, and employees as well as private companies, investment firms, public accounting firms, and legal professionals in a wide array of proceedings related to securities law issues. These engagements involve accounting and financial statement issues, disclosure matters, fiduciary duty, insider trading, Regulation FD issues, and broker/dealer supervision, as well as False Claims Act and Foreign Corrupt Practices Act matters. Roman has extensive experience defending enforcement actions by the SEC and other federal and state regulators. He has led numerous internal investigations on behalf of corporations and board committees.

As an Assistant U.S. Attorney in the Southern District of New York, Roman served in the Securities Fraud Unit and handled grand jury investigations and prosecutions. He also tried numerous cases to verdict and handled many appeals.

is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization."[17] Coupled with the Thompson Memorandum and Seaboard Report, the new Sentencing Guidelines commentary led to "a culture of waiver."[18]

Challenges to the Thompson Memorandum, including the 2006 case of *United States v. Stein*, dominated the corporate criminal landscape in the mid-2000s. By late 2006, the rancor had become loud enough that Senator Arlen Specter introduced the Attorney-Client Privilege Protection Act of 2006, aimed at rolling back portions of the Thompson Memorandum regarding the near-mandatory waiver of the attorney-client privilege.[19] The DOJ responded with a revised corporate prosecution memorandum from Deputy Attorney General Paul J. McNulty, announcing that DOJ attorneys could request a waiver of the attorney-client or work-product protections only "when there is a *legitimate need* for the privileged information."[20]

The McNulty Memorandum further separated attorney-client information into two categories. Category I included "purely factual information," such as copies of key documents, witness statements, or "purely factual interview memoranda regarding the underlying misconduct." Category II included attorney-client communications and non-factual attorney work product, including "legal advice given

to the corporation before, during, and after the underlying misconduct occurred." While waiver of Category I information could be requested when a "legitimate need" was shown, Category II information was to be requested only in "rare circumstances" when "the purely factual information provides an incomplete basis to conduct a thorough investigation." Waiver requests for both categories of information required high-level authorization.[21] Despite the changes adopted by the McNulty Memorandum, corporations continued to feel enormous pressure to waive the privilege in order to receive credit for cooperating.

In 2008, the DOJ attempted once again to hone its policy on waiver of the attorney-client privilege after Senator Specter introduced another version of the Attorney-Client

Karen P. Hewitt | San Diego | +1.858.314.1119 | kphewitt@jonesday.com

Karen Hewitt is a former United States Attorney and an experienced trial lawyer who has successfully litigated hundreds of cases in federal court over two decades. She currently represents companies in civil and criminal investigations and in complex business litigation. Karen's practice focuses on defending matters involving possible violations of federal law, including the Anti-Kickback Statute, the Foreign Corrupt Practices Act, the False Claims Act, and the Food, Drug, and Cosmetic Act.

Before joining Jones Day in 2010, Karen served as San Diego's chief federal law enforcement officer, where she led the federal effort to protect the safety and security of the three million people residing in the region. Karen focused on national security, border security, cyber and intellectual property crime, white-collar and financial crime, civil fraud, violent crime, narcotics, and immigration enforcement. During Karen's tenure, the U.S. Attorney's Office also investigated and prosecuted violations of the securities laws and bankruptcy fraud. Under her direction, the U.S. Attorney's Office achieved a record number of convictions, including cases involving the prosecution of numerous high-ranking members of a deadly Mexican drug cartel, a defense contractor for bribing a congressman, the executive director of the CIA for fraud, a man who made an internet threat to kill a presidential candidate, a man for the murder of a U.S. Border Patrol agent, a Chinese resident for conspiring to steal U.S. military encryption technology, three individuals who bombed the federal courthouse, a Space and Naval Warfare Systems Command employee for accepting bribes, and a former Assistant Secretary of the Navy for possession of child pornography.

Karen is Partner-in-Charge of the San Diego Office. She is a director of the San Diego North Chamber of Commerce and the National Association of Former U.S. Attorneys.

While the Filip Memorandum may have ushered in a kinder, gentler DOJ approach to waiver of the attorney-client privilege and attorney work-product doctrine, waiver remains a significant and complex issue in corporate investigations.

Privilege Protection Act. In the Filip Memorandum, Deputy Attorney General Mark Filip recognized that "a wide range of commentators and members of the American legal community and criminal justice system have asserted that the [DOJ's] policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection." The memorandum confirmed that the DOJ "understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system."[22]

The Filip Memorandum focuses on the DOJ's policy regarding corporate cooperation on the "relevant facts," mandating that cooperation credit be based not on the waiver of the attorney-client and work-product protections, but on disclosure of the relevant facts about the underlying misconduct, whether they are privileged or not. That focus has been adopted by the United States Attorneys' Manual:

> [T]he government's key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the *relevant facts* about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—*not* whether the corporation discloses attorney-client or work product materials.[23]

The Filip Memorandum also prohibits prosecutors from explicitly requesting waiver of "core" attorney-client or attorney work-product material (essentially, the McNulty Memorandum's Category II information) or from crediting corporations that do waive the privilege with respect to this type of information. The Filip Memorandum also encourages corporate counsel who feel pressured to waive the privilege in violation of the memorandum's guidance to take their concerns up the ladder in the DOJ. The SEC's new Enforcement Manual similarly discourages explicit requests for waiver of the privilege.[24]

IS WAIVER STILL A WORRY?

While the Filip Memorandum may have ushered in a kinder, gentler DOJ approach to waiver of the attorney-client privilege and attorney work-product doctrine, waiver remains a

Stephen G. Sozio | Cleveland | +1.216.586.7201 | sgsozio@jonesday.com

Steve Sozio's practice involves the representation of businesses, health-care organizations, and their employees during investigations by federal and local governmental authorities for potential criminal charges; prosecuting and defending civil actions on behalf of clients involved with allegations of fraud, false claims, and other business-related wrongdoing; and advising health-care and corporate clients regarding compliance issues to help them avoid government sanctions.

Since joining Jones Day, Steve has represented corporations, hospitals, and executives that were the subjects of investigations by federal and local grand juries and/or regulatory agencies involving alleged health-care fraud, defense contractor fraud, FCPA violations, SEC and securities fraud, HUD fraud, FDA actions, prevailing wage violations, import/export issues, federal campaign contribution violations, and economic espionage. He also has conducted many internal and external investigations on behalf of boards of directors and senior management.

Prior to joining Jones Day, Steve was an investigating prosecutor for the Organized Crime Strike Force Unit of the U.S. Attorney's Office for the Northern District of Ohio for 10 years. Steve has tried cases in federal court under the federal racketeering, criminal tax, money-laundering, customs, fraud, public corruption, drug, forfeiture, and conspiracy laws.

When weighing the cooperation decision, corporate counsel should be aware that there are still times when the best strategy is to not waive the privilege and to decline to cooperate at all.

significant and complex issue in corporate investigations. First, the Filip Memorandum applies only to investigations and prosecutions undertaken by the DOJ. While the DOJ prohibits requests for waiver of "core" attorney-client and work-product material, numerous other government agencies have yet to adopt such clear demarcations.[25] And, while the Filip Memorandum and SEC Enforcement Manual instruct DOJ and SEC attorneys not to explicitly ask for a waiver, an organization may still enhance its cooperation credit with those agencies by voluntarily waiving the privilege and turning over attorney notes and memoranda.

Further, even with the prohibition of requests for waiver of "core" privileged materials, cooperation under the Filip Memorandum requires full disclosure of the "relevant facts"—establishing a new pitfall of which companies should be aware. A corporation that does not disclose relevant facts to the government for whatever reason is not entitled to receive credit for cooperation. "The obvious problem is that the 'facts' uncovered in an internal investigation are actually an attorney's distillation of numerous interviews and documents and therefore work product."[26] While the Filip Memorandum states that it is up to the organization to decide whether to conduct internal investigations in a privileged or nonprivileged manner, "there is still a pressure to waive attorney-client privilege if you have 'relevant factual information' covered by attorney-client privilege . . . [a]nd quite a bit of 'relevant factual information' is subject to privilege claims."[27] As a result, the Filip Memorandum's requirement of full factual disclosure may have actually reduced the protection afforded to Category I privileged information under the McNulty Memorandum.

Because of these waiver considerations, corporate counsel should be careful to clearly identify and separate

attorney-client and work-product material from factual matter. When deciding to reduce the results of interviews to writing, therefore, corporate counsel should consider whether the corporation will choose to turn over those interviews to provide full disclosure of the relevant facts. If so, all attorney impressions and strategy should be excluded. Similarly, corporate counsel should carefully consider how to present factual findings to investigative agencies. Rather than turning over interview memoranda or notes, corporations may want to consider as an alternative an oral attorney proffer of factual information coupled with an explicit agreement from the investigating agency that such proffers do not constitute waiver of the privilege. These considerations may also impact the degree of detail included in notes memorializing a witness interview.

Anytime a corporation considers waiving the attorney-client privilege, corporate counsel should keep in mind that waiver of the privilege in response to a government inquiry almost always results in waiver regarding that same subject matter in any other litigation, whether it is an investigation by another government agency, civil enforcement based

on the investigation, or litigation instituted by a private party.[28] Before suggesting that a corporation waive the privilege, corporate counsel should instruct her client that the waived communications could be presented in any civil suit brought against that company, and the client should consider the consequences.

Likewise, it is important to consider that waiver of the privilege on a narrow set of documents could result in a broader waiver of the entire subject matter to which those documents refer. Under Federal Rule of Civil Procedure 502, intentional waiver of any communication will generally result in the waiver of any document related to the subject matter of that communication. For this reason, counsel should not take a document-by-document approach to waiver, but instead should consider the implications of waiving the attorney-client privilege or work-product protection of all documents involving a single subject matter.

Finally, when weighing the cooperation decision, corporate counsel should be aware that there are still times when the best strategy is to not waive the privilege and to decline to cooperate at all. The circumstances requiring that decision may vary, from circumstances in which cooperation is not likely to prevent prosecution or significantly reduce a penalty, to cases in which the government is unlikely to seek to obtain evidence in a corporation's control without corporate assistance. In those circumstances, not waiving the privilege permits legal advice and strategies to remain confidential throughout the entire course of the investigation and the subsequent legal or administrative proceeding.

CONCLUSION

While the Filip Memorandum and the new SEC Enforcement Manual have strengthened a corporation's ability to keep core attorney-client and work-product material protected, it has not eliminated the possibility that the privilege should be waived to maximize cooperation credit. Until such time as waiver of the privilege is no longer a factor in determining cooperation credit, corporate counsel must continue to vigilantly protect the privilege of her corporate clients throughout an internal investigation and counsel them on the advantages and disadvantages of waiver during government investigations.

James R. Wooley | Cleveland | +1.216.586.7345 | jrwooley@jonesday.com

Jim Wooley's practice involves representing public and private corporations and business professionals in federal, state, and local criminal investigations. He also conducts internal investigations into allegations of employee misconduct, fraud, and other business crimes.

Jim's matters involve antitrust, criminal tax, health-care fraud, securities fraud, public corruption (including the FCPA), environmental crimes, customs law violations, and other criminal statutes. He has successfully represented clients in matters before the U.S. Department of Justice, as well as the SEC, IRS, EPA, FDA, NASA, NRC, and other federal, state, and local law enforcement agencies.

Jim served as a federal prosecutor handling criminal cases involving racketeering, public corruption, murder, fraud, money laundering, and other federal crimes. At the DOJ, he received awards for his work prosecuting notable cases, including RICO cases against organized-crime families, a landmark forensic DNA case, and the largest police-corruption case in FBI history at that time. He also served as an assistant in the office of Manhattan D.A. Robert Morgenthau.

REPRESENTATION ISSUES IN CORPORATE INTERNAL INVESTIGATIONS: IDENTIFYING AND ADDRESSING RISKS

Corporate entities compelled to respond to allegations of corporate malfeasance are often required to undertake internal investigations in order to uncover the facts, maintain management integrity, and fulfill their obligations to shareholders. Once a complaint is generated, whether internally by an employee or externally by a governmental inquiry, both in-house and outside counsel engaged by the corporation must be cognizant of the complexities of client representation that are present in virtually every corporate internal investigation. Most significantly, it is important to determine "who is the client" and clarify the application of the attorney-client privilege and the reporting relationships for the attorney conducting the investigation. This process necessarily requires a full understanding of the scope and objectives of the internal investigation and the hazards posed by failure to appreciate the potential conflicts of interest that might emerge during the course of the investigation.

This section will discuss some of the practical issues that arise in representing a corporate client in an internal investigation. From the inception of the investigation to the delivery of the report summarizing its conclusions, the client and its counsel must be vigilant about preserving the attorney-client privilege, dealing with potential conflict issues inherent in multiple representation, and avoiding the pitfalls

associated with an investigation that has "too many chefs in the kitchen" or conflicting agendas by different principals within the corporate client.

The adoption of a disciplined, pragmatic approach to these issues will go a long way toward maintaining the integrity of an internal investigation and avoiding the costly consequences that can result from failure to anticipate these potentially problematic areas.

REPRESENTING A CORPORATION OR AN INDIVIDUAL: CONFLICTS OF INTEREST AND PRIVILEGE CONSIDERATIONS

When faced with a whistleblower complaint or an administrative or criminal subpoena that suggests possible management or corporate misconduct, corporate counsel will generally retain an outside attorney to respond and conduct an internal investigation. Outside counsel who have not previously represented the company are viewed by the government as more independent than the company's usual outside counsel and may have more credibility if the company later decides to share the findings of the investigation with the government or other third parties.

The scope of the engagement generally depends on the scope of the subpoena or the nature of the allegations. While the investigation should stay focused on what is perceived to be the alleged misconduct, counsel cannot turn a "blind eye" to related conduct or other questionable activities, especially if the company intends to seek credit for its investigatory efforts at a later time.

The investigating outside counsel often will be hired by the corporation itself or by the corporation's general counsel. In either case, the corporation is the client, and as the client, the corporation is the holder of the attorney-client privilege. The attorney-client privilege provides, generally, as follows: (i) When legal advice of any kind is sought (ii) from a professional legal advisor in his capacity as such, (iii) the communications relating to that purpose, (iv) made in confidence (v) by the client, (vi) are, at the client's insistence, permanently protected (vii) from disclosure by the client or by the legal advisor (viii) unless the protection is waived.[29]

Navigating the twists and turns of the attorney-client privilege can become tricky in the context of corporate representation. For instance, when a corporation undertakes an internal investigation, it can conduct the review in-house through its attorneys or compliance officer. While this is generally the most cost-effective approach in the short term, it runs the risk that management, tasked with investigating itself, will not be viewed as sufficiently objective or may not be experienced enough to adequately protect the corporation in the investigative process. If the corporation retains an outside consultant to head up the effort and the consultant retains outside counsel to assist with the legal analysis, the advice of that outside attorney may not be viewed as privileged because the attorney is providing legal advice to the consultant, not to the corporation. If, on the other hand, the corporation itself hires the outside counsel to conduct the investigation, and the outside counsel retains the third-party consultant pursuant to a *Kovel* agreement,[30] the attorney can share information with the consultant without risking waiver of the attorney-client privilege.[31]

After an internal investigation is concluded, the question often arises whether to share the results of the investigation with the Department of Justice ("DOJ") and/or government regulators, such as the Securities and Exchange Commission ("SEC"), in order to obtain "cooperation credit" and

increase the chance of avoiding indictment or reaching a favorable settlement. Under the DOJ's Filip Memorandum,[32] a corporation deserves cooperation credit if it discloses "relevant facts" uncovered in its internal investigation.[33] Similarly, the SEC's Seaboard Report states that the Commission will consider the extent to which the company made available the results of its internal review.[34]

The decision to disclose the results of an internal investigation frequently highlights the tension between representation of the company and representation of an individual officer, director, or employee of the company.

While communications between company counsel and employees of the company are privileged,[35] the privilege belongs only to the company, not to the individual. As a result, it is within the company's sole discretion to waive privilege and attempt to obtain cooperation credit for the company by sharing with the government information revealed during the course of an internal investigation. The company need not obtain permission from the employee to disclose the employee's interview statements, nor need it even advise the employee of its decision to disclose.

However, *prior to* conducting the employee interview, the lawyer must sufficiently and unequivocally advise the employee that the lawyer represents the company, not the individual; that the company is the holder of the attorney-client privilege; and that the individual has no control over

whether the company may elect to waive the privilege, including by disclosing facts of the investigation to the government, and that it is not uncommon in general for corporations to do so. This is the *Upjohn* warning—based on the seminal Supreme Court decision in *Upjohn Co. v. United States*[36] and commonly referred to as the "corporate Miranda warning"—that the investigating lawyer must provide to a company employee at the start of any interview. Otherwise, individual officers, directors, and employees may erroneously conclude that the lawyer represents not only the corporation, but each of them as individuals. The absolute

R. Christopher Cook | Washington | +1.202.879.3734 | christophercook@jonesday.com

Chris Cook has more than 20 years of experience in corporate investigations, white-collar defense, and civil litigation. His practice is focused in particular on international investigations, the Foreign Corrupt Practices Act, and health-care litigation, but it also involves a wide range of disputes between private parties and against the government.

Chris's corporate investigations work relates primarily to the FCPA and other issues unique to international business. He has counseled scores of clients regarding anti-corruption compliance in contexts such as responding to investigations, creating compliance policies, undertaking due diligence, and negotiating business relationships. Drawing on his extensive experience, Chris advises boards of directors, audit committees, and senior management on the manner and scope of conducting an appropriate corporate investigation, as well as the complex issues surrounding voluntary self-disclosure. Health-care litigation likewise has formed a mainstay of Chris's practice since he left the Chicago U.S. Attorney's Office in 1997; he has represented a number of pharmaceutical companies in litigation relating to drug marketing and pricing.

As a former federal prosecutor, Chris defends clients being investigated by the Department of Justice, the Securities and Exchange Commission, and state attorneys general. His civil litigation work includes commercial disputes, class actions, False Claims Act enforcement actions, and nationwide federal cases consolidated by the Judicial Panel on Multidistrict Litigation.

While communications between company counsel and employees of the company are privileged, the privilege belongs only to the company, not to the individual.

worst-case scenario for inside and outside counsel is to be deemed by a court to have unintentionally misled the witness-employee into believing she was personally represented by the corporate counsel.

This can present a conundrum for the attorney. On the one hand, it is in the interest of the company to encourage the employee to be candid and complete during the fact-finding interview, but on the other hand, the *Upjohn* warning risks silencing the employee, who may hesitate to reveal incriminating information, knowing that it is entirely the company's decision whether to disclose that information to the authorities.

If the attorney fails to give an adequate warning and the employee concludes reasonably and in accordance with the applicable law[37] that the company counsel also represents her personally, the company—which generally cannot waive the *employee's* attorney-client privilege[38]—may be prohibited from disclosing the employee's interview statements and may thus be limited in its ability to secure cooperation credit for the company and may suffer a host of more serious consequences.

This was sharply illustrated in *United States v. Nicholas*,[39] where the company's outside counsel, in an effort to secure cooperation credit, turned over to the government the interview statements of the company's CFO, William Ruehle, ostensibly without Ruehle's consent. Ruehle was subsequently indicted and moved to suppress his statements on the ground that he believed that company counsel represented him personally and that the statements he made to those attorneys were protected by the attorney-client privilege. The district court agreed, suppressed Ruehle's statements, and lambasted the law firm that conducted the interview for failing to give a proper *Upjohn* warning.[40] The Ninth Circuit reversed on appeal, finding that Ruehle's statements were made not "in confidence" but for the purpose of disclosure to the company's outside auditors—a fact of which Ruehle was well aware—and that therefore Ruehle could not rely on the attorney-client privilege to suppress the use of the statements in his criminal prosecution.[41]

Although *Ruehle* was reversed, the lessons from the district court opinion linger:

- First, the attorney representing the corporation in the internal investigation must assess the existence of potential conflicts of interest early on in the investigation, before substantive information is obtained from individuals, and then continue to reassess potential conflicts as the matter proceeds so that separate counsel can be retained timely.

- Second, the attorney should advise any employee who is, or is likely to become, a subject, target, or material

witness to retain separate counsel. This should be done before the individual provides substantive information to company counsel.

- Third, the *Upjohn* warning must make it clear that the lawyer represents the company only and not the individual. A comprehensive *Upjohn* warning advises the individual being interviewed that: (i) the lawyer represents the corporation, not the individual; (ii) the lawyer is conducting the investigation in order to gather information and provide legal advice to the company; (iii) the attorney-client privilege belongs to the company, and the company may elect to waive the privilege and disclose to third parties—including the government—any information learned from the interview, without the individual's consent; and (iv) in order to maintain the privilege, the substance of the interview is and should remain confidential.[42] If the company is cooperating with law enforcement authorities and there is a reasonable expectation that the company will share the substance of its investigation with the authorities, counsel should advise the employees of this likelihood. The lawyer should memorialize, either in a memorandum or in contemporaneous notes, that a full *Upjohn* warning was given and that the individual acknowledged understanding it.

- Fourth, if the attorney concludes that simultaneous representation of the company and one or more individuals is appropriate, the lawyer should obtain a written conflict waiver from both the company and the individual client, possibly vetted by independent counsel for each potential client. Even a complete, well-documented *Upjohn* warning is not sufficient to guard against the possibility that an actual, irreconcilable conflict of interest could arise that would prevent the attorney from representing *any* client in the matter. Ideally, the written conflict waiver or engagement letter will expressly state that if an irreconcilable conflict arises and the attorney is forced to withdraw as counsel for one client, she may nonetheless continue to represent another client in the matter.

REPRESENTING A CORPORATION AND BOARD OF DIRECTORS OR COMMITTEE OF THE BOARD: CONFLICTS OF INTEREST AND PRIVILEGE CONSIDERATIONS

Other thorny issues may arise when a conflict of interest comes to light between the corporation and senior management. For example, if corporate counsel retains an outside attorney to respond to a grand jury subpoena and conduct an internal investigation, the outside counsel normally would report to the legal department that initiated the engagement.

However, the investigation may reveal that the legal department itself has exposure for the conduct under investigation such that it becomes impossible for the outside attorneys to continue reporting to corporate counsel. This requires walling off the legal department from the internal investigation and offering separate counsel to the in-house lawyers involved in the matter under investigation. In such a situation, where the corporation effectively is investigating its own management, the audit committee or a special

Harriet Beegun Leva | Los Angeles | +1.213.243.2319 | hleva@jonesday.com

Harriet Leva, a former federal prosecutor, has extensive experience representing and advising public and private corporations and individuals in federal criminal and regulatory matters. Her practice focuses on the full range of federal fraud cases, including securities fraud, government procurement fraud, bank fraud, and civil and criminal violations of the False Claims Act, as well as FDA, U.S. Customs, and environmental offenses. She also conducts internal investigations on behalf of boards of directors and committees of boards faced with criminal or regulatory investigations and whistleblower complaints.

Harriet has been particularly successful convincing federal prosecutors not to file criminal charges at all or to resolve pending matters on terms favorable to her clients. Recently, in a multimillion-dollar criminal securities fraud prosecution of a biotech company and its senior management, Harriet persuaded prosecutors to dispose of the case against her client with a guilty plea not involving fraud and a sentence of straight probation. In a multimillion-dollar civil False Claims Act case, after months of intense negotiations, Harriet persuaded the government to settle for less than 6 percent of its initial settlement demand.

committee of the board of directors would likely be convened for the specific purpose of supervising the internal investigation. Outside counsel would report to the committee, keep it abreast of the factual and legal developments, and present to it the oral or written report of investigation. When an internal investigation focuses on conduct that potentially implicates corporate management, it is especially important that the investigating attorneys be viewed as independent. They should not be from the same firm as the corporation's regular outside counsel; indeed, regular outside counsel may themselves be percipient witnesses to the conduct under investigation.

When outside counsel report to a committee of the board of directors, privilege considerations often result in walling off senior management or certain members of senior management. Committees of a board of directors have their own attorney-client privilege, separate from that of the corporation.[43] The privilege extends only to those directors who are members of the special committee or audit committee, i.e., those who are outside directors or who otherwise have no involvement in or exposure for the conduct under investigation.[44] As a result, when outside counsel reports on the status of its investigation, those board members who are not part of the special committee must leave the boardroom, and the minutes of the meeting, which are privileged and confidential, must be kept separate from the regular board minutes. If the committee members or the attorneys conducting the internal investigation communicate about the investigation with anyone other than the special committee of the board, they risk waiving the privilege.[45]

Walling off senior management or an influential or controlling shareholder raises delicate issues for the attorney conducting the investigation. The excluded individuals cannot have any role in directing the investigation, nor can they receive any feedback on the results of the investigation as it progresses. Both in-house and outside counsel must take measures to ensure that walled-off individuals do not exert any inappropriate influence on the investigation. Any perceived pressure from such individuals must be firmly dealt with from the outset, by putting in place explicit guidelines or, if necessary, establishing recusal procedures in order to maintain the integrity and the independence of the internal review. Failure to timely and firmly address these issues could seriously undermine the ultimate credibility and effectiveness of the internal investigation and its findings.

When an internal investigation focuses on conduct that potentially implicates corporate management, it is especially important that the investigating attorneys be viewed as independent.

Brian A. Sun | Los Angeles | +1.213.243.2858 | basun@jonesday.com

Brian Sun has earned a national reputation as a distinguished trial lawyer in complex business litigation and white-collar criminal defense. He has successfully litigated cases against some of the nation's top trial lawyers. His cases have included representing Dr. Wen Ho Lee in his successful civil suit against the U.S. government; former Clinton fundraiser Johnny Chung; and former Orange County Sheriff Michael Carona. Brian is a fellow of the American College of Trial Lawyers, and in 2005 he was named one of America's "500 Leading Lawyers" by *Lawdragon* magazine.

Brian's practice covers a wide range of areas, including matters involving unfair competition, intellectual property disputes, entertainment litigation, executive compensation, and shareholder rights. His practice covers the full spectrum of business crimes, such as securities fraud, corporate internal investigations and fraud, tax fraud, bank fraud, FCPA investigations, technology transfer violations, fraud in government procurement, and public corruption prosecutions involving prominent elected officials.

In sum, the representation of a corporation in an internal review presents varied and complex issues. When asked to represent a corporate entity, the practitioner should consider the following types of questions:

- To whom will you report?

- If you are retained by corporate counsel, does the general counsel or someone else in the legal department have potential exposure for the conduct under investigation? If so, can that individual be walled off, or will the entire legal department have to be disqualified from the internal investigation? Is there a way to keep the legal department in the loop without sharing investigation details?

- Sometimes the legal department itself will have conducted a due diligence review, and outside counsel will be called in as independent outside counsel. Can you report to the legal department, or does the legal department have an irreconcilable conflict of interest such that it should be walled off from the investigation?

- If the legal department is implicated in the alleged wrongdoing or has itself conducted a review, to whom do you report? Do you report to the board of directors? Are any of the directors potentially implicated? If so, can you report to the audit committee? Or if members of the audit committee are potentially involved, must the board of directors convene a special committee, comprising individuals having no connection to the conduct under investigation, for the purpose of supervising the investigation?

- If you report to a special committee, how will you protect privileged communications? Can you share the results of your investigation with the entire board? Can you share it with the company's regular outside litigation counsel?

- If the goal is to conduct an internal investigation and implement remedial measures in order to secure cooperation credit, how do you position yourself so that, as independent outside counsel, you have maximum credibility with the government? Can you share the results of your investigation with corporate counsel? With outside litigation counsel? And if not, how can the corporation and individual targets mount a meaningful defense to allegations of corporate wrongdoing?

- What steps must you take to ensure that the reporting relationship is free of any internal conflicts? When is it necessary to exclude an in-house attorney, senior executive, or major shareholder who might have an interest in influencing the direction of the investigation?

CONCLUSION

The issues addressed in this section often arise in the context of a corporate internal investigation. The integrity of the investigation can be seriously compromised if the company and its counsel are not mindful of the hazards inherent in the process. And, even more importantly, the potential adverse consequences of creating unintentional attorney-client relationships are draconian.There are no easy answers. But it is important that the practitioner be alert, at the outset, to the different issues of privilege and conflicts of interest that arise when counsel is called upon to represent a corporation in an internal investigation. Anticipating these complexities is the best way to ensure the credibility and effectiveness of the representation.

BEST PRACTICES REGARDING JOINT DEFENSE AGREEMENTS

The joint defense privilege—whereby multiple defendants in a case and their legal counsel are allowed to communicate with one another without jeopardizing the attorney-client privilege and risking disclosure of the substance of those communications to the government—can be a powerful tool in corporate criminal defense. Indeed, it can be so powerful that for years the Department of Justice ("DOJ") actively discouraged joint defense agreements ("JDAs") by considering their use among a corporation and its employees as evidence that the corporation was "protecting its culpable employees and agents" and thus more deserving of prosecution.[46] However, the JDA is also a tool that is fraught with pitfalls and uncertain interpretation across jurisdictions. Thus, though JDAs are often a necessity in corporate criminal defense, they should not be entered into without foresight and due attention to several key aspects.[47]

JOINT DEFENSE AGREEMENTS: WHAT THEY ARE, WHY THEY ARE IMPORTANT

The joint defense privilege, also known as the "common interest privilege," was recognized by courts as early as 1964 as an exception to the normal rule that attorney-client privilege and attorney work-product protections are waived

when otherwise privileged communications or materials are disclosed to a third party.[48] Pursuant to this exception, privileged communications between a client and his attorney, and that attorney's work product, remain protected even if disclosed to certain third parties.[49] The privilege can be asserted defensively (to avoid having to disclose information to the government) and also offensively (to prevent another party of the joint defense from disclosing information that was gained through the joint defense effort). The party seeking to establish the existence of a joint defense privilege and assert the protections it conveys must show, at a minimum, that: (i) the communications were made in the course of a joint defense effort; (ii) the statements were designed to further the effort; (iii) the communications were intended to be kept confidential; and (iv) the privilege has not otherwise been waived.[50] JDAs need not be written and can be formed by anything from simple oral undertakings to detailed written agreements.[51]

The benefits of such agreements among codefendants can be extremely valuable. Without the privilege, codefendants represented by separate counsel would not be able to share information or work product without making the communications subject to disclosure by compulsion to the government. The prospect of such disclosure would greatly increase the cost of litigation and require significant duplication of investigative and litigation work. Fear of disclosure could also significantly hinder the effectiveness of investigations (for example, a company's ability to conduct an internal investigation would be severely curtailed because employees would be wary of sharing information with the company or other employees) and formation of a unified legal strategy. In contrast, the government has the power of the grand jury to gather and compile information from all sources and present a single prosecution strategy while leaving defendants guessing about what the others know or intend to do. Thus, the privilege allows codefendants to somewhat counter the government's information-gathering and unified legal strategy advantage. Essentially, pursuant to the joint defense privilege, information is allowed to flow among defendants as if they were represented by joint counsel, but with each defendant having the benefit of individual counsel to fully protect and advocate for their own separate interests.

Jean-Paul Boulee | Atlanta | +1.404.581.8456 | jpboulee@jonesday.com

Jean-Paul Boulee focuses his practice on commercial and securities litigation, as well as white-collar criminal defense. He has defended several class actions and has considerable experience with accounting and securities fraud cases and commercial contract disputes. Jean-Paul frequently represents companies and individuals being investigated by the Department of Justice and the Securities and Exchange Commission and also has successfully defended clients under investigation by the Department of Energy, the Department of Justice's Antitrust Division, the Department of the Treasury, the Environmental Protection Agency, the Federal Emergency Management Agency, the Office of the Special Inspector General for the Troubled Asset Relief Program, the U.S. Army Corps of Engineers, and the U.S. Army Criminal Investigation Division.

In addition to his civil litigation experience, Jean-Paul has handled a wide variety of white-collar criminal cases involving antitrust violations, bribery of public officials, the FCPA, defense contractor fraud, false claims, insider trading, mail and wire fraud, securities fraud, tax fraud, public corruption, and unlawful campaign contributions. Prior to joining Jones Day, he served as an officer in the U.S. Army Judge Advocate General's Corps. While stationed at Fort Campbell, Kentucky, with the 101st Airborne Division (Air Assault), he tried 50 courts-martial and separation boards and acted as the operational law advisor to the 502nd Infantry Regiment in the field.

The DOJ, recognizing the benefits to defendants of JDAs, effectively discouraged their use for years. In addition to a widespread practice of routinely asking if defendants had entered into a joint defense arrangement (which had the implicit effect of discouraging their use), in 1999 the DOJ explicitly included in its statement of principles of prosecution of business organizations that prosecutors should consider a company's "providing information to the employees about the government's investigation pursuant to a joint defense agreement" in evaluating whether it was "protecting its culpable employees and agents," and thus in weighing whether the company was cooperating with an investigation.[52] Consequently, a corporation's participation in a JDA could make a federal prosecutor more likely to bring charges against the corporation. This principle was included in subsequent restatements of DOJ policy in 2003[53] and 2006.[54] Facing intense criticism and proposed legislation[55] over this and other provisions that discouraged corporations from asserting privilege or paying the legal fees of employees, the DOJ revised its policy in August 2008 to state that "the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements."[56] The protection offered by this revision, however, is suspect, given that the revised policy also includes important caveats stating that the government may withhold cooperation credit if a corporation—notwithstanding the existence of a JDA—fails to share information with the government or shares sensitive information with other defendants that the government has provided to the corporation.[57]

PITFALLS AND BEST PRACTICES

Though there are a number of advantages to utilizing JDAs to communicate among codefendants, entering into one should not be done lightly. There are a number of pitfalls—some explicitly noted in the DOJ Principles of Prosecution, and others that can be latent traps for the unwary—so deliberate attention should be given to a number of issues prior to the exchange of communication with codefendants. A few of the primary ones are discussed below.

WRITTEN V. ORAL AGREEMENTS

There is no requirement that JDAs be reduced to writing.[58] Consequently, many JDAs remain oral, despite courts' stated preference for written agreements.[59] Some attorneys purposely choose not to reduce agreements to writing so that the agreements are not subject to production.[60] At other times, oral agreements are made for the sake of expediency (it can take time to draft a document and get signatures from multiple defendants and their respective attorneys) or perhaps to avoid a breakup of the joint defense effort that may be instigated by uncomfortable negotiation of the fine points of waivers and limitations discussed below (concerning eventualities that may never even come to pass). Very few such agreements ever end up being challenged in court, so the lack of a written agreement does not often become an issue. Nonetheless, courts have expressed a preference for written agreements that are clear, set forth all parties' obligations and responsibilities, and contain knowing and informed waivers and commitments. Memorializing the agreement in writing also makes it less likely that a court would find that no joint defense—express or implied—was ever formed. Furthermore, the existence of a written agreement

Richard H. Deane, Jr. | Atlanta | +1.404.581.8502 | rhdeane@jonesday.com

Rick Deane represents clients who are facing all types of criminal or civil investigations by the Department of Justice and other investigative agencies. He has extensive experience dealing with federal grand jury investigations. In addition to his criminal trial work, Rick handles general litigation matters.

Rick has broad experience trying cases in state and federal courts and has gained extensive experience appearing before the Fifth and Eleventh Circuit Courts of Appeal. He recently served as lead counsel in defending criminal charges against a major design-build company. All charges against the company were dismissed, and the company paid a civil assessment.

Rick is head of the litigation group for the Atlanta Office and cochair of the Firm's Corporate Criminal Investigations Practice.

Though the analysis varies by jurisdiction and by various ethics rules, some courts have held that entering into a JDA does not create a duty of loyalty between an attorney and other joint defense members.

with explicit waivers may be the only way to avoid serious conflict issues that can be imputed to an attorney's current and subsequent firms, or to resolve a conflict about what information can or cannot be disclosed to the government.

To the extent that lack of time to draft a written agreement is a factor, it should be noted that at least two courts have specifically endorsed a form JDA published by the ALI-ABA.[61]

WAIVER REGARDING CROSS-EXAMINATION OF TESTIFYING WITNESS

One of the most common ways in which JDAs become problematic—and thus one of the issues that deserves the most significant thought and attention before entering into a JDA—is when, in the event a participant ultimately becomes a testifying witness for the government, that person waives confidentiality of his own privileged materials such that another member of the joint defense may use those materials to cross-examine the witness. Thus, a defendant who withdraws from the JDA and agrees to testify for the government against other defendants may be cross-examined by use of the materials and information he disclosed in the course of the joint defense. At least one court has held that this waiver is an inherent aspect of the joint defense privilege.[62]

Due to the conflicts of interest that may arise when an attorney cross-examines a former JDA participant with his own confidential communications, this is the situation resulting from JDAs that is of most concern to courts. Accordingly, attorneys should make sure that clients fully understand this waiver (and that the waiver is clearly stated in a written JDA).[63]

WAIVER REGARDING CREATION OF ATTORNEY-CLIENT RELATIONSHIP

Attorneys should, for their own benefit, include explicit disclaimers of the creation of an attorney-client relationship with other members of the joint defense group. Though the analysis varies by jurisdiction and by various ethics rules, some courts have held that entering into a JDA does not create a duty of loyalty between an attorney and other joint defense members.[64] However, there is still a duty to avoid future conflicts of interest arising from the receipt of confidential information from, and resulting fiduciary obligations to, the joint defense members.

The Bar of the District of Columbia has issued a detailed ethics opinion that analyzes various issues arising from exchange of confidential information among JDA participants.[65] That opinion explains that although a JDA does not make parties "clients" of the participating lawyers, the agreement creates an obligation for the participating lawyers to maintain the confidentiality of the information shared pursuant to the JDA.[66] Such confidentiality obligations can give rise to a conflict of interest and preclude a lawyer from undertaking a representation adverse to JDA parties in a substantially related matter that implicates the confidential information.[67] The opinion concludes that attorneys are—absent a release from the obligations—personally disqualified from substantially related matters adverse to a joint defense member.[68] However, it is possible to prevent this disqualification from following the attorney and being imputed to a new law firm if the attorney is screened from adverse matters.[69] It may also be possible to prevent the conflict from being imputed to the attorney's current law firm, depending on the circumstances, if the attorney takes proactive measures from the outset, such as screening the matter from other attorneys at the firm and signing the attorney's own name to the JDA instead of signing on behalf of the firm.[70]

ABILITY TO WITHHOLD INFORMATION

A well-drafted JDA should also include a disclaimer of any affirmative duty to share information with the joint defense group. Though this element may be implicit in any JDA, it would be prudent to explicitly state it. This is even more important in light of the statement in the current DOJ Principles of Prosecution that the DOJ may make cooperation credit for an individual or corporation contingent upon that person or entity not transmitting certain sensitive information to others in the group.[71]

RESERVATION OF RIGHT TO PROVIDE INFORMATION TO THE GOVERNMENT

A much more sensitive waiver issue, and one that has not been addressed by many courts, is whether one party can reserve the right to provide to the government certain information gathered during the course of the joint defense effort. This issue will typically be raised by a corporation that may, pursuant to SEC or other agency regulations, have obligations to disclose evidence of wrongdoing by employees or may be facing pressure from the DOJ to demonstrate cooperation in an effort to avoid indictment. While the current DOJ Principles of Prosecution state that "mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit," that document also contains a caveat which significantly undermines that statement. Specifically, the DOJ Principles go on to state:

> Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and thereby limiting its ability to seek such cooperation credit. Such might be the case if the corporation gathers facts from employees who have entered into a joint defense agreement with the corporation, and who may later seek to prevent the corporation from disclosing the facts it has acquired. Corporations may wish to address this situation by crafting or participating in joint defense agreements, to the extent they choose to enter them, that provide such flexibility as they deem appropriate.[72]

It is not clear exactly what "flexibility" the DOJ envisions corporations including in JDAs to account for this concern.

Peter J. Romatowski | Washington | +1.202.879.7625 | pjromatowski@jonesday.com

Peter Romatowski oversees the Firm's Securities Litigation & SEC Enforcement Practice and also practices white-collar criminal defense. Peter represents a range of clients—U.S. public companies and foreign issuers; their directors, board committees, and executives; and broker/dealers, private investment firms, and law firms—in regulatory and criminal investigations of the full range of securities law issues. These engagements involve accounting and financial statement issues, disclosure matters, securitization of subprime mortgage assets, faulty earnings guidance, FCPA payments, recordkeeping and controls matters, insider trading, Regulation FD issues, mutual fund trading practices, and broker/dealer supervision, trading, and sales practice issues.

In his criminal practice, Peter has represented corporate and individual clients from four continents before grand juries, courts, and committees of Congress concerning all manner of suspected violations. He also serves as a monitor selected by a company and approved by the Department of Justice to oversee the company's compliance with a settlement of FCPA charges.

As a federal prosecutor in the Southern District of New York from 1979 to 1986 and Chief of the Securities and Commodities Fraud Unit, Peter tried cases involving insider trading based on stories that appeared in *The Wall Street Journal*, a successful manipulation that tripled the price of an NYSE-listed stock, and other offenses from narcotics to bank fraud.

Courts may be hesitant to accept efforts by a corporation to reserve a unilateral right to disclose joint defense communications—such a unilateral right might indicate that the information disclosed by other parties was not intended to be kept confidential and thus might prevent the privilege from ever attaching.

A more likely option would be for the corporation to request a temporary limited waiver of the joint defense privilege when disclosure is necessary. At least one court confronted with such a situation upheld a temporary deviation from the JDA where a corporation's counsel announced a desire to interview employees (who had entered into a JDA with the corporation) and provide notes of the interview to the government.[73] The employees acquiesced to the interview, and the corporation did in fact provide notes of the interview to the government. The court found that the employees had accepted the proposed carve-out of the joint defense privilege as to the notes of the interview, with the JDA otherwise continuing in force. Corporations relying on this approach, however, obviously run the risk that the employees will not agree to the requested waiver at the time of the request.

Furthermore, even if members of a JDA agreed to a limited waiver, a corporation that discloses information to the government should be mindful of inadvertently making a broader waiver of privilege. For example, disclosure of attorney work product to a government agency, even if the disclosure is made pursuant to a confidentiality agreement, may destroy the privilege and make the materials subject to disclosure to all other government entities and even private parties.[74] Most courts have shown hostility to the concept of selective waiver, i.e., providing otherwise privileged materials to a third party, such as the DOJ or SEC, without waiving privilege to underlying or related materials. Thus, if such a limited disclosure is necessary, attorneys should take care to limit the scope of potential waiver. One possible method is to confine disclosed information to solely factual materials by drafting separate memoranda after interviews—one memoranda to reflect factual information and a separate one (which is not disclosed) to reflect the attorney's thoughts, impressions, legal analysis, and strategy.

TAKEAWAY

JDAs can be a powerful tool to counter the inherent advantages enjoyed by the government in criminal and related civil litigation and can also be a way to greatly reduce litigation costs by encouraging the sharing of information and coordination of efforts among defendants. However, attorneys should not enter into such agreements without due consideration of the potentially serious complications that may arise and without taking prospective steps prior to committing to the agreement to ensure that the form and content of the agreement meet their clients' needs. In the case of counsel for a corporation, attorneys should be particularly mindful of the DOJ's vague principles of prosecution in relation to JDAs and of other potential competing disclosure requirements. Different courts' interpretations of similar language and concepts can vary and must be explained clearly to the client.

Matthew D. Orwig | Dallas: +1.214.969.5267 | Houston: +1.832.239.3798 | morwig@jonesday.com

Matt Orwig has more than 25 years of experience litigating complex civil and criminal cases, including high-profile money-laundering, public corruption, securities fraud, insider-trading, health-care fraud, and civil and criminal fraud cases.

Matt focuses his practice on white-collar criminal litigation and investigations; SEC investigations, including defense of insider-trading and accounting fraud allegations; health-care fraud and abuse; *qui tam* litigation; internal corporate investigations; complex civil litigation; and litigation involving government agencies. He has handled a wide array of civil and criminal cases involving hospitals, health-care providers, pharmaceutical companies, and medical equipment and device companies.

Before joining Jones Day, Matt served in the U.S. Department of Justice, first as an Assistant U.S. Attorney for the Northern and Eastern Districts of Texas and then as the U.S. Attorney for the Eastern District of Texas. During his 20 years with the DOJ, Matt acquired extensive experience in civil, criminal, and appellate law and received the prestigious Director's Award for his work. Prior to his six years serving as U.S. Attorney for the Eastern District of Texas, Matt was the lead civil enforcement attorney for the district, responsible for bringing all False Claims Act cases on behalf of the U.S. Attorney's Office.

CHOOSING AND USING EXPERTS EFFECTIVELY

Retaining qualified and experienced experts early in an internal corporate investigation or litigation can be exceptionally valuable. Many lawyers, however, wait until late in the process even to start thinking about retaining experts, when key interviews have already taken place, strategic decisions have been made, and time for a thorough search and vetting of potential experts is limited. Starting the search early maximizes the expert's ability to develop a comprehensive understanding of the facts, potential claims, and objectives in the case to add significant value. This section addresses the pitfalls counsel may encounter in the process of retaining experts and outlines best practices in working with experts in corporate investigations and litigation.

CONSULTING EXPERTS AND TESTIFYING EXPERTS

Procedurally, there are two types of experts: consulting experts and testifying experts. Appreciating the difference—namely, how they are used and what information may be discoverable by the opposition—will impact the selection of experts and the way in which lawyers work with experts throughout the case. A consulting expert is retained in confidence, and the fact of his retention need not be disclosed

When an in-house expert does not exist or is not appropriate for a particular case, such as when that individual has actual knowledge relevant to the matter and may be a fact witness, the legal team must look elsewhere for an expert.

to anyone. The consulting expert's work, advice, and opinions are not discoverable as long as you segregate the consultant's work from that of any testifying experts.

In contrast, the methodology, opinions, and credentials of a potential testifying expert must be disclosed in civil and criminal cases, and the testifying expert likely will be subject to a pre-trial deposition in civil litigation.[75] Thanks to a December 2010 change in the Federal Rules of Civil Procedure, drafts of testifying experts' reports are protected work product and not discoverable, regardless of the form in which the draft is recorded.[76] That said, communications between a party's attorney and any potential testifying expert are discoverable in civil cases in three circumstances: (i) if they relate to compensation for the expert's "study or testimony"; (ii) if they identify facts or data the attorney provided and the expert considered in forming his opinions; or (iii) if they identify assumptions the attorney provided to the expert that the expert relied upon in forming an opinion.[77] If litigation could ensue in state court, counsel should review relevant state and local rules regarding discoverability of expert drafts and other information before beginning work with any experts.

The protections afforded consulting experts are often useful for testing theories, data, and analyses—including through strategy meetings with the attorneys—that you would not want disclosed to your opponent. Often, however, when the outcome of the consulting expert's analysis is immaterial or is affirmatively helpful, the team considers converting the consultant into a testifying expert. For this reason, it is important to keep the applicable disclosure rules in mind so that the consulting expert is not tainted with information you would not want disclosed, which could foreclose the opportunity to use that person as a testifier. Discussed below are considerations for choosing and using both consulting and testifying experts effectively in the investigation and litigation stages of a matter, all of which may overlap.

CHOOSING THE RIGHT EXPERT

Selecting an expert begins with an open-minded approach to the pool of potential candidates. Certainly, in some cases it may be easier or more cost-effective to use an in-house company employee as an expert, but this will not always be possible or advisable. Assuming there is an in-house employee with the relevant expertise, if the employee lacks objectivity, his analysis may be flawed. When an in-house expert does not exist or is not appropriate for a particular case, such as when that individual has actual knowledge relevant to the matter and may be a fact witness, the legal team must look elsewhere for an expert.

Many lawyers simply canvass friends, colleagues, or search firms for expert recommendations. While this is generally a good starting point, the search can and should be much broader. Consider, for example, authors of pertinent articles relevant to your subject matter or other sources cited

within those articles. University professors who teach in the relevant field may make good consulting or testifying experts. Indeed, professors typically are well versed in how to break complex concepts down into understandable pieces, a valuable skill for working with the legal team and for deposition or trial testimony. Industry organizations can also be excellent sources of potential experts who are respected in their fields.

Lawyers must also consider *what* to look for in a particular expert. Clearly, it is critical to retain an expert with significant education and experience in the relevant subject matter, ideally with premier credentials in his field. Take time to investigate the expert's resume, as some credentials are relatively meaningless and require little more than an application fee and a basic test. In contrast, meaningful credentials generally require difficult tests, lengthy experience requirements, and peer or even client evaluations. An investigation of the expert's educational background and credentials, including a thorough reference check, is particularly important if you were not referred to the expert by a trusted source. If the expert is "puffing" in his resume or marketing materials and ends up serving as a testifying expert, you can be sure your opponent will discover and exploit the inflated information.

The expert's attitude toward the case is also important. Identify imaginative people with energy and enthusiasm for their work. Someone who is interested only in his own small piece of the case is not likely to contribute as much strategic thinking as a more interested and participatory expert, who can add significant value to the case by helping the lawyers shape discovery and investigation.

The expert's substantive attitude toward the investigation is also relevant. Make sure the expert is truly comfortable with the nature of the investigation and/or the position he has been asked to support in litigation. Even if the final strategy has not yet been determined and data has not yet been analyzed, your expert should understand your position and be comfortable generally with the directions in which the case could go. Certainly, the data will speak for itself, and you want an expert who will not support an untenable position, but if a potential expert expresses discomfort with the investigation, litigation, or your likely position, that expert may not be the best match for the engagement. At the same time, however, be wary of an expert who is too quick to agree with your position or jumps to conclusions. A critical expert who can thoughtfully explain and justify his position will be more effective and add greater value to your team.

Henry W. Asbill | Washington | +1.202.879.5414 | hasbill@jonesday.com

Hank Asbill has extensive first-chair national jury trial and appellate experience. He has successfully defended individual and corporate clients in more than 100 major jury trials against a broad spectrum of criminal and related civil charges. Hank was profiled in *The National Law Journal*'s special "Winning" report highlighting successful strategies from 11 of the nation's top litigators. In addition, he has been regularly listed by *Chambers* and *Euromoney* for white-collar defense, by *Best Lawyers in America* for "Bet-the-Company Litigation," and by *Super Lawyers* as a top 100 D.C. area practitioner.

Hank is a fellow of the American College of Trial Lawyers, a past president and current fellow of the American Board of Criminal Lawyers, and a former director of the National Association of Criminal Defense Lawyers. He has also taught criminal and civil trial practice as an adjunct professor at Georgetown University Law Center and at the Federal Judicial Center training program for new federal court judges.

Consider also the expert's availability for any known key dates, as well as his flexibility for dealing with changing deadlines. Explore the expert's general accessibility, including at night and on weekends. Determine how—and how well—the expert juggles multiple projects on his plate.

The expert's flexibility may be influenced in large part by his access to staff and colleagues. Therefore, it is also important to inquire about the depth and breadth of the potential expert's access to staff and how he works with his staff. Consider talking to or meeting the expert's key staff, or at least reviewing the resumes of those individuals the expert intends to rely on during the investigation. At the same time, it is important that the expert be personally conversant in the case facts and strategies, particularly those that impact his role in the case. If the expert relies on a quick review of deposition and fact summaries prepared by others, he may not have the depth of knowledge necessary to perform effectively as a strategist, advisor, or testifier. By requiring timely, task-based billing from experts (while being mindful not to reveal work product when bills may be discoverable), you can see who is doing the work and can make sure the expert has personally developed detailed knowledge of key case information.

Once you have narrowed the field of potential experts, the inquiry shifts from whether the expert *can* perform the required tasks to whether the expert is someone with whom you *want* to work. In addition to interviewing the expert, talk to other lawyers who have worked with him and ask about all aspects of that experience. Did the expert return calls and emails timely, deliver timely and quality drafts, and explain complex concepts to the case team and others in a clear, concise, and noncondescending manner? When the expert attended strategy sessions, interviews, depositions, or court proceedings, did he provide useful observations about the evidence, other witnesses, the judge, the jury, opposing counsel, or his expert counterpart? Ultimately, you should feel comfortable working with this expert.

SPECIAL CONSIDERATIONS FOR HIRING TESTIFYING EXPERTS

Additional considerations are at issue when selecting testifying experts. Perhaps most importantly, the lawyer should be confident that the expert can survive a challenge to his credentials, his analytical methodology, and the relevance of his proposed testimony. The Supreme Court has held that before admitting testimony from a purported expert, the trial court must make a "preliminary assessment of whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue."[78] The Supreme Court further held that the basic principles of *Daubert* apply to all expert testimony whether it is scientific, technical, or based on other specialized knowledge.[79] But not all courts consistently adopt *Daubert* principles. Generally, the proposed testimony will not be admitted if it is found to be irrelevant or unreliable; irrelevant or unreliable testimony wastes time and money and significantly jeopardizes case strategies.

Thomas P. McNulty | Chicago | +1.312.269.4142 | tpmcnulty@jonesday.com

Tom McNulty's practice focuses on commercial litigation and white-collar criminal defense. Tom defends companies and individuals in civil and criminal litigation involving federal and state governments and in enforcement actions by government regulatory agencies. He also regularly advises businesses and their executive management regarding compliance issues to help them avoid government sanctions, and he has conducted numerous internal investigations on behalf of corporate boards of directors and senior management.

Tom currently represents Erwin Mayer, a former tax partner/shareholder at the law firm Jenkens & Gilchrist, in a complex multiple-defendant tax evasion and conspiracy indictment pending in the Southern District of New York. He has represented Simon Property Group and its affiliates in a range of commercial litigation matters, including trademark, contract, and fraud actions. Tom also represents Woodward, Inc., an energy and aerospace systems manufacturer, in sealed whistleblower complaints alleging violations of the federal False Claims Act; additionally, he advises Woodward in connection with acquisitions and suspension and debarment matters. Tom represents CHS Acquisition Corp., a specialty steel manufacturer, in a variety of commercial litigation and product liability matters.

When considering potential testifying experts, lawyers often operate with tunnel vision and are determined to hire only those experts with substantial testifying experience. In reality, there are positive and negative aspects of using experienced and nonexperienced testifiers. Once again, the best practice is to be open-minded at the outset of your search.

Experts with experience testifying hopefully have learned how to successfully communicate opinions and methodologies in the contrived and high-stress setting of depositions or a courtroom. Such experts will have experienced firsthand—and learned how to successfully defeat—cross-examination traps and other courtroom challenges. And, theoretically, experienced experts should require less time (and thus less expense) to prepare for testifying, whether at trial or during depositions.

That said, if the expert is an experienced testifier, make sure he does not come across as *too* experienced or "slick." If the expert looks like a "hired gun," his credibility and effectiveness with a jury are materially reduced. The same problem can occur when an expert has almost exclusively testified or worked for your side of the litigation. To avoid the appearance of bias, consider an expert who has worked for both sides or, in appropriate circumstances, an expert who has worked extensively for your opponent's side. In fact, retaining an expert you think is likely to be retained by the other side can have substantial credibility if he agrees with your position, and if the engagement ultimately is not successful, you will have conflicted him out of assisting your opponent in this matter.

Perhaps the most important piece of due diligence when selecting an expert with extensive prior testifying experience is to determine whether the expert's library of deposition and trial transcripts will provide fodder for cross-examination. Likewise, investigate the expert's written work for positions inconsistent with your position in the present case. If your expert has ever testified or written in a manner contrary to the position he will be taking in your case, see if those positions are reconcilable before retaining that expert. Finally, find out if the experienced testifier you are considering has ever failed to qualify as an expert or if his testimony has ever been stricken and, if so, why.

At the other end of the spectrum are potential testifying experts who are eminently qualified in the relevant subject matter but have little or no prior experience testifying. Many attorneys shy away from hiring such experts, which can be a short-sighted and counterproductive approach. It is often possible to get a strong sense of how an individual will perform as a testifier after meeting him in person. Ask questions designed to assess the expert's ability to explain simply, comprehensively, quickly, and clearly the subject matter and his preliminary opinion. And ask questions to determine whether the expert can defend attacks on his competency, integrity, and potential bias.

Whether or not the expert has substantial experience testifying, you must evaluate the expert's likely effect on a jury, including his appearance, demeanor, and manner of answering questions. Consider retaining an expert with a connection to the jurisdiction. If the expert lived or worked there, went to school there, has family there, etc., the expert is more likely to connect with the jurors. Keeping in mind that jurors make snap decisions about witnesses, evaluate whether your expert "looks" the part and whether he sounds credible explaining complex concepts. Ask the expert some relevant, substantive questions so that you can evaluate the expert's ability to provide short, direct responses and to explain difficult concepts quickly and simply without being overly defensive, arrogant, pedantic, or

argumentative. The expert should also be able to concede obvious points in a manner that deflates their impact. If possible, obtain a transcript of recent prior testimony from your expert, which will help you evaluate his style and how he holds up under cross-examination. Ask the expert or lawyers he has worked with for a transcript of the expert's best and worst testimony. With a few recent transcripts, you will get a sense of the expert's style, clarity, and overall competency.

Finally, the choice of a testifying expert should also be analyzed in the context of where the case is venued. Different jurisdictions and judges often have track records for accepting or rejecting certain types of experts. Accordingly, the choice of venue may be outcome-determinative as to whether your expert may be permitted to present his views to the trier of fact.

USING EXPERTS EFFECTIVELY

Of critical importance to the effective use of an expert is retaining the expert in the early stages of an investigation. Strategizing early with an expert can inform every aspect of the matter, including more strategic and less costly document review and collateral investigation, development of case themes and damages theories, and strategic focus for interviews, depositions, and trial. If managed efficiently, the cost of engaging an expert early is no more than engaging them late and will likely save money over the life of the case.

Ultimately, you should allow sufficient time: (i) to identify the right experts; (ii) to allow the consulting expert to perform analysis sufficient to show whether it will help or hurt your position; and (iii) for you potentially to modify your case strategy on the basis of the expert's preliminary conclusions. To accomplish these goals, give the expert access to relevant documents to the greatest extent possible, bearing in mind the differing discovery rules pertaining to consulting and testifying experts. An expert who studies and understands relevant pleadings and motions beyond those

Henry Klehm III | New York | +1.212.326.3706 | hklehm@jonesday.com

Henry Klehm's practice focuses on regulatory examinations, investigations, enforcement actions, and other proceedings with U.S. and foreign regulators and on corporate governance matters. Henry also counsels boards, corporations, and financial institutions on internal investigations, crisis management, and effective compliance and ethics programs.

Henry recently represented financial institutions and senior corporate officers in government investigations involving the trading of CDOs and CDSs, insider trading, the FCPA, and money laundering. In addition to global banks, he represents senior financial and risk officers in investigations related to accounting for contingencies, fair value, and related disclosure matters.

Prior to joining Jones Day, Henry was the global head of compliance for Deutsche Bank AG. From 1999 until 2002, he was the deputy general counsel and senior regulatory lawyer for Prudential Financial. Before joining Prudential, he was with the Enforcement Division of the Securities and Exchange Commission for 10 years, serving as head of the enforcement section for the northeastern United States for five years. At the SEC, Henry investigated, litigated, and supervised more than 500 enforcement actions pertaining to insider trading, financial frauds, Ponzi schemes, rogue traders, market manipulations, investment companies, advisor matters, and other issues.

Since 2006, Henry has served as an independent director and chair of the audit committee of RenaissanceRe Holdings Ltd., a NYSE-listed catastrophe reinsurance firm.

The forensic accountant can examine the company's books and records together with bank records to help unravel complex payments and money transfers, thereby tracing the money to further an investigation of fraud or malfeasance.

case documents related to his area of expertise is likely to add more value during strategy sessions, interview or deposition preparation, and ultimately plea or settlement discussions or even trial.

For testifying experts, make sure he is conversant with the facts, and have him review the demonstrative exhibits you plan to have him use with the jury. The exhibits should be effective teaching aids that will communicate the facts accurately and persuasively. The expert must be able to understand and defend the exhibits, as well as use them effectively during his testimony so that they aid his testimony rather than compete with it.

SOME USEFUL EXPERTS FOR CORPORATE INVESTIGATIONS AND LITIGATION

Many types of experts can provide valuable assistance to the legal team. Bear in mind, however, that the lawyers must retain and direct the expert's work so that his analysis and opinions are protected by the work-product privilege to the greatest extent possible.

In the context of corporate investigations, forensic accountants often are called upon as experts. Sometimes it is advisable to engage them when companies merely suspect they have a legal problem, particularly where the issue might involve accounting or financial-statement functions. The forensic accountant can examine the company's books and records together with bank records to help unravel complex payments and money transfers, thereby tracing the money to further an investigation of fraud or malfeasance. Forensic accountants may also be a useful part of a corporate compliance program. More and more, companies must be proactive in preventing and detecting violations of the Foreign Corrupt Practices Act ("FCPA") and other unlawful activity. A forensic accountant, or even an auditor, can come to the company on a regular basis (e.g., one or two times per year) to look for red flags of fraud by testing and examining accounting and banking records. If counsel limits the scope of the expert's review for cost reasons, ensure nonetheless that this limited work will still produce reliable conclusions.

Economists also provide tremendous value in the context of investigations and litigation. Like accountants, economists can offer valuable assistance with document production, data collection and review, estimation of damages, reviewing the opposing expert's report, and developing lines of questioning for interviews and depositions. Economists also conduct "but for" analyses (i.e., if the event at issue had not occurred, what damages would result), evaluate concepts like fair market value, and analyze case information and data from a perspective that differs from the attorneys'. Economists can also evaluate the impact of potentially improper activities that may be relevant to future fines or damages.

The use of accountants and economists as experts often can overlap and/or can be complimentary. Economists typically are involved when the case requires economic modeling, forecasts, statistical analysis, and market assessments. Accountants may be more appropriate when the case involves accounting data, cost analysis, and income taxes.

The services of an expert in computer forensics can also be exceptionally useful as the investigation is beginning. With so much company data and communication stored electronically, a computer forensic expert is usually the most proficient at quickly finding information critical to the investigation and scoping a work plan for the collection of electronically stored information that will be credible upon review by third parties. Such an expert can also help shape the investigation by working with the legal team to

develop the best search terms, interview questions, and overall investigative strategy.

Experienced investigators also can be valuable assets to legal teams. Investigators can find, for example, relevant background information on potential witnesses efficiently and cost-effectively. And, when all or part of an investigation will take place outside the United States, retaining an investigator with experience in foreign jurisdictions can be essential. Such investigative experts can provide guidance on relevant regulations and unwritten rules that will affect the efficiency and success of the foreign investigation. These experts often have access to resources that the legal team does not have and are likely to have contacts and a cultural understanding of the foreign jurisdiction that are essential for getting information, finding witnesses, and otherwise developing case facts.

Investigative experts often have access to resources that the legal team does not have and are likely to have contacts and a cultural understanding of the foreign jurisdiction that are essential for getting information, finding witnesses, and otherwise developing case facts.

Finally, subject-matter experts can add value from the early stages of an investigation all the way through any ensuing litigation. For example, individuals with specialized knowledge or expertise in esoteric financial products, industry compliance requirements, supply chain logistics, manufacturing quality control, or any industry-specific issues can help fine-tune a corporate investigation from the outset and provide ongoing advice and instruction to the legal team throughout any subsequent litigation.

In all, skilled experts provide a valuable service that helps produce favorable outcomes and increased efficiency in the investigation and in the case in its entirety.

Kerri L. Ruttenberg | Washington | +1.202.879.5419 | kruttenberg@jonesday.com

Kerri Ruttenberg centers her national trial practice on criminal defense, representing clients in a broad spectrum of white-collar and complex criminal cases. She has successfully first- and second-chaired jury trials, as well as successfully briefed and argued appeals, in federal and state courts around the country. Kerri recently acted as lead counsel in a three-week jury trial in the Eastern District of Virginia wherein her client was accused of multiple violations of the federal False Claims Act. The case involved multiple issues of first impression and resulted in significant victories at trial and in post-trial litigation.

Before joining Jones Day, Kerri cocounseled two highly publicized jury trials, representing a former AOL executive charged with accounting fraud and other crimes by the Department of Justice and the Securities and Exchange Commission. After a nearly four-month criminal trial, the jury acquitted on all charges. One year later, after a seven-week trial in the U.S. District Court for D.C., the civil jury issued the same positive result. Kerri also first-chaired a two-week jury trial in New York, winning a full acquittal for her client on all 12 counts of violent offenses.

THE WEIGHT OF THE WORLD: MEETING THE CHALLENGES OF GLOBAL CORPORATE INVESTIGATIONS

Traveling the world to collect evidence and artifacts has long been romanticized in novels and movies, from *Around the World in 80 Days* to *Raiders of the Lost Ark*. The international fact gatherer is a Hollywood archetype: in film, the protagonists' journey is depicted by a moving line on a world map as the plane crosses oceans and continents. Most often, it is a journey to discover hidden truths in faraway places.

Much less romantic than Phileas Fogg, Indiana Jones, or James Bond, but much more true to life these days, are the very real stories of international fact gathering that have become a growing part of the legal profession in the service of our corporate clients. Every day, in-house and outside attorney-investigators search the globe, collecting facts and evidence for multinational clients in global investigations. Moviegoers might not find it fascinating to watch these women and men in business suits shuttle between airports and hotels and conference rooms, interview witnesses with translators, and examine accounts in foreign currencies. But these real-life explorers also face traps and pitfalls, complex puzzles, and ticking clocks that test their skill and resolve in surprising ways, with stories and cliffhangers that many screenwriters would struggle to concoct. The needs of global corporations, more and

more, merit well-designed and well-implemented international inquiries by trusted counselors and advocates, with the benefit of the attorney-client privilege, to discover and respond appropriately to the true and full facts from business dealings overseas. And, frequently, companies rely on this work to show the enforcement community (e.g., the U.S. Department of Justice ("DOJ"), the Division of Enforcement at the Securities and Exchange Commission ("SEC"), and scores of other domestic and foreign regulators that have jumped into the act) that the company and its leaders "get it" and are committed to doing the right thing.

Global investigations are a phenomenon, to be sure, one that occupies the minds and schedules of thousands of in-house and outside attorneys and their clients every day. This section summarizes the phenomenon and where it came from; discusses why, when, and how international investigations can benefit a corporation; and highlights certain best practices and pitfalls to avoid when conducting a privileged inquiry in a foreign country.

THE WEIGHT OF THE WORLD: THE PHENOMENON OF GLOBAL INTERNAL INVESTIGATIONS

In the current era of the Foreign Corrupt Practices Act ("FCPA"), antitrust, export controls, insider trading, earnings management, and money-laundering enforcement (to name just a few of the "hot" areas of white-collar crime), the leaders of multinational corporations carry the weight of the world on their shoulders. Not only must CEOs, CFOs, and corporate general counsel assure their boards and shareholders that they are running a profitable and efficient global operation, but they must also devote significant thought, time, and resources to the area of compliance. The days are long gone when business leaders could simply rely on employees to adhere to the company's written code of ethics.

AS COMPLIANCE OBLIGATIONS INTENSIFY, INVESTIGATIONS RISE

Compliance is now viewed and understood as an elaborate activity unto itself. In addition to the never-ending requirement to generate revenue and grow the business, corporate leaders are now expected and required to build and maintain an intricate global ethics and compliance program and to affirmatively monitor and test that program to ensure its effectiveness. The compliance cycle never stops:

- Assess the company's compliance risks;
- Devise and document clear and good rules;
- Disseminate them widely and in the right languages;
- Train and certify completion of training;
- Monitor and test compliance around the world;
- Punish and remediate violations;
- Rinse and repeat.[80]

In particular, being the general counsel of a multinational corporation in this era means that the sun never sets on your compliance responsibilities: during the night hours in the United States, the compliance program must work effectively during the workday in China, Russia, and India.

Charles M. Carberry | New York: +1.212.326.3920 | Washington: +1.202.879.5453 | carberry@jonesday.com

Charles Carberry practices in the areas of business crime and civil litigation. He cochairs the Firm's Corporate Criminal Investigations Practice and has substantial experience in federal trials and defending enforcement investigations and actions brought by the SEC and other agencies.

Charles has represented corporations and individuals in environmental, customs, tax, securities, and government contract criminal investigations. He has conducted internal investigations for the boards of brokerages and other companies into allegations of management misconduct. In 1989, he was appointed by the federal district court to investigate and administratively prosecute allegations of corruption and dishonesty in the Teamsters Union.

Charles currently serves on the Mayor's Commission to Combat Police Corruption, which oversees the NYPD's efforts to address officer corruption.

Global investigations are a phenomenon, to be sure, one that occupies the minds and schedules of thousands of in-house and outside attorneys and their clients every day.

The program must effectively influence and govern the judgments, actions, communications, documents, and accounting entries created by people on different continents and raised in different cultures, most of whom the GC has never met. And, when evidence surfaces that something may not be working properly, or worse—that someone lied or acted unlawfully—the company and its leaders are expected to respond, swiftly and appropriately. Put another way, nighttime may come here in the United States, but for the GC of global corporations, there is little time to rest.

As compliance requirements and expectations have become more detailed and onerous, privileged reviews conducted by trusted advisors have become more and more important to a company's ability to address those obligations. The symbiosis between compliance and investigations is clear: inquiries by counsel allow the company to gather and understand the facts in a confidential setting when a question arises about whether the compliance program is working effectively. Gathering the facts, and responding to them the right way, allows the company to say that the program is effective.

The impetus to conduct an investigation can come from all kinds of different sources: whistleblowers on the company's anonymous reporting hotline, a red flag in acquisition due diligence, an unprompted inquiry from a government investigator, or the company's own assessment of its compliance program. Common to all of these is the need to determine the answers to two fundamental questions: (i) "What happened?" and (ii) "How should we respond?"

For a small, domestic company, where all of the employees and operations are in one place, answering these questions might be as simple as walking down the hall and speaking to someone informally. Even then, if the issue is sensitive or there is potential wrongdoing, the company might ask legal counsel to conduct a more formal investigation with the benefit of the attorney-client privilege (see introduction, "The Benefits of an Effective Corporate Internal Investigation"). This is particularly true if the company feels that it may be second-guessed later by outside parties (for instance, a government enforcement agency or outside auditor) about how it handled the matter.

However, when a company stretches across multiple countries and continents, with hundreds or thousands of employees who speak different languages, and when the issue occurs overseas, determining what happened, and what to do next, can be much more complicated. But under the right circumstances, the benefits of conducting a privileged international review, when done the right way, are very real.

GLOBAL INVESTIGATIONS: NOT NEW, BUT NEVER THIS PREVALENT

The device of global corporate investigations, of course, is not new. International companies have been looking at themselves with the assistance of counsel for decades. In 1977, for instance, in the months leading up to the enactment of the FCPA, the SEC reported that more than 400 corporations, including Lockheed, Exxon, and Mobil Oil, identified (through international corporate reviews) questionable or illegal bribe payments to foreign government

officials in amounts totaling over $300 million.[81] In the 1980s, the concept of the global law firm began to take hold, to address the international needs of large and growing corporate clients with business dealings in multiple countries.[82] International enforcement and the use of whistleblowers to make cases also are not new: in the 1990s, the Archer Daniels Midland price-fixing investigation crossed multiple continents and affected numerous multinational companies, culminating in one of the largest enforcement settlements then known.[83] While all of this has existed for many years, international corporate investigations have never been more prevalent than they are today. Why?

THE DATA CONUNDRUM: EASY ACCESS, MORE ACCOUNTABILITY

The world is shrinking rapidly in a number of important ways, perhaps none more important than the real-time availability of data. Emails and instant text messages track and record business conversations for future review by insiders and outsiders. Many global communications are now not only instantaneous but visual and high-resolution, permitting businesspeople in different hemispheres to sit across the table from one another using life-size video and sound systems that capture the smallest furrow of an eyebrow or clearing of the throat. For large companies, the monthly and quarterly financial close for an international division can reach headquarters in the U.S. in nanoseconds at the touch of a button.

All of these innovations make information more accessible to leadership, which is good, but they also increase the (often unfair) perception by outsiders that leadership should be knowledgeable about and accountable for everything that happens, down to the finest detail, everywhere around the world. And the accessibility of the same data here in the U.S. makes our government feel that all of it is fair game for subpoenas and voluntary requests—even data that never crossed the U.S. border. Relatedly, prosecutors and regulators are sometimes surprised or even appalled to learn that a large company maintains a manual system in a foreign location where some of that data may be difficult to access remotely.

CORPORATE ENFORCEMENT: FERTILE GROUND FOR PROSECUTORS

At the same time, the U.S. government has learned that corporate investigations and prosecutions are profitable, high-profile, and an endless and fruitful source of interesting work. Prosecutors, like all participants in the economy,

Brian Hershman | Los Angeles | +1.213.243.2445 | bhershman@jonesday.com

Brian Hershman focuses on civil litigation and white-collar criminal defense in state and federal courts. He has been lead trial counsel in more than 10 state and federal trials that proceeded to verdict and maintains an unblemished trial record.

Brian's recent experience since joining Jones Day includes prevailing in a bench trial for the County of Los Angeles in a dispute concerning the proper recording of reconveyances, obtaining summary judgment for the County of Los Angeles in a dispute concerning judicial compensation, obtaining reversal of a $56.7 million tax assessment against a *Fortune* 500 company in a writ of mandate trial, obtaining reversal of a $21 million tax assessment against various online travel companies, obtaining dismissal at the pleading stage of a class action against the Metropolitan Transit Authority alleging meal and rest period violations, and prevailing in a California Environmental Quality Act trial on behalf of the MTA.

In 2005, the DOJ granted Brian its Director's Award for Superior Performance as an Assistant U.S. Attorney for his successful prosecution of *United States v. Meredith*, a 13-week federal trial resulting in guilty verdicts against all seven defendants; he also received the Federal Law Enforcement Officers Association's National Award of Investigative Excellence in connection with that case. Brian was given the FLEOA's Prosecutorial Award for work in *United States v. James Davis*, and he is cochair of the Firm's Pro Bono Committee in Los Angeles.

have to find productive things to do with their time. For a prosecutor, that means finding fertile cases where people under pressure made bad and improper judgments to benefit themselves or others. Of course, uncovering and punishing wrongdoing is the mission of the prosecutors, but they need to know where to look. U.S. prosecutors have learned from experience that the world of business—and, in particular, the world of large corporations—presents stories where people under pressure to show results, in a competitive environment, have both access to funds and discretion over how to handle sensitive matters. When you add in an international component, and local culture and business practices that sometimes condone conduct that the U.S. government would call fraud, prosecutors see the perfect recipe for a vibrant docket of corporate enforcement cases.

Adding to the complexity is an age-old dynamic which can be found in many criminal cases, but which corporate clients find endlessly frightening and frustrating: prosecutors often see the world as black and white, right and wrong. Businesspeople, on the other hand, spend their lives and careers finding ways to succeed through negotiation and pragmatic compromise, frequently in perfectly ethical and legitimate ways. Finding a common vocabulary between these two world views is how a good corporate defense lawyer earns her keep.

BIG INTERNATIONAL CASES LEAD TO MORE BIG INTERNATIONAL CASES

Despite press reports about the DOJ's supposed setbacks in its FCPA enforcement program,[84] the U.S. government has very successfully framed the dialogue about the punishment of international corporate crime with one big settlement after another: Siemens ($450 million for a global bribery scheme); Daimler AG ($93.6 million for the systematic bribery of foreign officials in more than 18 countries); Panalpina World Transport ($236 million for making illicit payments to public officials in Africa, Asia, and South America). While the FCPA grabs many of the headlines, international enforcement of corporations continues to escalate in other areas: LG Display, AU Optronics, and Toshiba ($571 million for artificially inflating the price of LCD panels); Barclays ($453 million to U.S. and British authorities to settle charges of manipulating the LIBOR lending rate); ING ($619 million for violating U.S. sanctions against Iran and Cuba). Additionally, numerous financial institutions are being investigated for potential money laundering in connection with international drug cartel activity.

Corporate board members and executives read about these settlements and understand the playing field.

Jonathan Leiken | Cleveland: +1.216.586.7744 | New York: +1.212.901.7256 | jleiken@jonesday.com

Jonathan Leiken, a former federal prosecutor in the Southern District of New York, represents businesses and individuals in significant government investigations, in complex civil lawsuits, and at trial. He conducts internal investigations for boards of directors and senior management and defends clients before a wide range of government agencies, including the DOJ, the SEC, and other regulators.

Jonathan represents organizations that include financial institutions, manufacturers, universities, professional sports teams, and private equity concerns, as well as their executives and employees, in government inquiries and litigation involving allegations of fraud (securities, accounting, valuation, mortgage, disclosure, lending, self-dealing), insider trading, and violations of anti-corruption laws, such as the FCPA and the U.K. Bribery Act. Jonathan conducts international inquiries for U.S. public companies, provides guidance on international acquisitions, and advises clients on developing effective worldwide compliance programs.

As a federal prosecutor in New York City, Jonathan first-chaired federal trials and appeals, worked cooperatively with the SEC, and received commendations from numerous federal agencies, including the FBI.

The most important pointer for conducting international investigations is to know the territory where the investigation is being conducted. This includes not only the country (cultural and local business practices that present risk, which languages are spoken, what local laws may impact the review), but also as many background details about the local business as are possible to collect before the factual investigation begins.

Compliance obligations are intense; the U.S. government wants to make cases (and big ones). Companies can best protect themselves by knowing the facts and responding to them appropriately, even if those facts are overseas. Having trusted advisors gather those facts and advise what to do, in a confidential setting, is increasingly helpful.

GLOBAL CORPORATE INVESTIGATIONS: BEST PRACTICES, PITFALLS TO AVOID

Books can be written on the best way to conduct a global corporate investigation. But the core ideas and primary pitfalls are relatively straightforward and should be remembered and revisited as an investigation unfolds and becomes, as they always do, more and more complex.

WHEN TO INVESTIGATE AND WHO SHOULD CONDUCT THE INVESTIGATION

The first and most important decision involves when to investigate an international matter. Corporations, for instance, frequently receive whistleblower reports that relate to human resources issues which are more appropriately resolved through a process other than a privileged internal review. Or, if an allegation of wrongdoing is so vague or incredible that it does not merit follow-up, the company should document why it chooses to close the file without a formal inquiry. Conversely, when the company is presented with facts or allegations that are detailed and credible in an area of real risk, the company is well served to respond with an appropriately scoped internal review. Determining whether to use counsel, and whether outside or in-house counsel should lead, should be determined on the basis of the nature of the issues, the kind of expertise required, and the relevant experience of the potential investigator. Also, if the issue may come to the attention of the government, having an outside advocate who has credibility and who can attest to the validity of the investigative procedures can be helpful.

HAVE A WORK PLAN, AND SET THE RIGHT SCOPE

All investigations should begin with a work plan, approved by the client, which defines the subject and scope of the review, the tasks to be performed, the timeline and, if any, the expected mode of reporting. The work plan should address document collection (both hard copy and electronic, including emails) and review (including who will review and at what expense); interviews (including overseas interviews and whether they will occur in person, telephonically, or via video conference, as well as the need for translators for foreign-language interviews); whether forensic accountants or other consultants will be retained and what their work scope will be; and how and when the client expects to receive reports of the results of the review. The scope of the review should be determined according to a careful assessment of the risks to the client, based on the impetus for the inquiry, for instance, anticipating questions from the government about the allegation and related facts. A good work plan must be flexible enough to permit the investigation to go where the facts may lead, but defined enough that both the client and counsel understand what is being investigated. Clients despise “project creep,” the perception that lawyers and consultants are delving unnecessarily into areas that are unrelated to the subject of the review. Investigations are expensive and unsettling to businesspeople, and the client decision makers must have confidence that the scope of the review is appropriate and being pursued in a deliberate, agreed-upon fashion.

PROVING A NEGATIVE

Many investigations involve an effort to prove a negative: the company receives an allegation of wrongdoing and seeks to determine whether or not the wrongdoing occurred. In some cases it is possible to prove a negative this way. In others, the company and counsel should agree on specific investigative tasks that are designed to provide reasonable assurances that relevant areas were searched and relevant issues were scoped.

KNOW THE TERRITORY

The most important pointer for conducting international investigations is to know the territory where the investigation is being conducted. This includes not only the country (cultural and local business practices that present risk, which languages are spoken, what local laws may impact the review), but also as many background details about the local business as are possible to collect before the factual investigation begins. Reviewing organizational charts and understanding how the business functions, along with the reporting lines, streams of revenue, customer base, and accounting systems, are important steps that frequently can occur before any kind of travel takes place (if travel and in-person interviews are contemplated as part of the review). Identifying good local counsel, with knowledge of the law and language capability, is usually a critical step in any inquiry involving a foreign jurisdiction.

PRIVACY

Another important consideration in conducting a global corporate investigation relates to local data protection law. Outside the U.S., many countries, particularly those that have a history of authoritarian rule, have enacted comprehensive data protection laws, such as European Union Directive 95/46/EC on data protection (the "EU Directive"),[85] which regulate the collection, use, cross-border transfer, and other "processing"[86] of personal data in order to protect individual privacy. Unlike those in the U.S., which regulate specific categories of personal data,[87] these comprehensive data protection laws, such as the EU Directive, define regulated personal data broadly to include any information that can be used to identify a natural person,

Beong-Soo Kim | Los Angeles | +1.213.243.2503 | bkim@jonesday.com

Beong Kim is an accomplished litigator who represents corporate clients in high-stakes and especially complex legal disputes before trial and appellate courts across the United States. He has served as lead or colead counsel in 20 jury trials, has argued before the U.S. Court of Appeals 20 times, and is well recognized for his skill in briefing, arguing, and winning case-dispositive trial court motions and significant appeals. Beong has successfully litigated cases involving a broad array of subject matter, including securities fraud, class actions, unfair competition, trade secret theft, and federal and state constitutional law. As a former senior federal prosecutor, Beong also conducts internal investigations and advises clients on whistleblower and governmental enforcement actions.

Prior to joining Jones Day, Beong served as Chief of the Major Frauds Section of the U.S. Attorney's Office for the Central District of California. In that capacity, he led the largest federal white-collar prosecution unit in the country (comprising approximately 36 federal prosecutors) in investigating and prosecuting offenses involving securities and accounting fraud, insider trading, healthcare fraud, procurement fraud, financial institution fraud, corporate embezzlement, tax evasion, bankruptcy fraud, the Foreign Corrupt Practices Act, and money laundering.

such as a name, email address, or employee identification number.[88] Of course, other local laws, such as local labor and employment laws, or China's state secrets laws, may impose additional relevant restrictions on internal investigations or access to certain types of data.

Despite certain high-level similarities, each country's laws are different, even within the European Union, where the individual Member States have enacted legislation implementing the EU Directive.[89] Enforcement mechanisms and enforcement activity also vary in this rapidly developing area of law. Each of the EU Member States has a data protection authority charged with the administration of the local legislation implementing the EU Directive. Other countries outside the EU also have designated regulatory bodies charged with and generally active in enforcing the local data protection law.[90]

Global investigations can become significantly bogged down by data privacy issues. The key is to have a pragmatic and thoughtful approach to working through the issues, often with the benefit of advice from a local attorney in the region. The DOJ and SEC generally express an understanding that data privacy laws must be considered, but prosecutors and regulators can become impatient if they feel that a foreign data privacy law is standing in the way of their timely receipt of relevant facts. Having a deliberate approach to these issues is critical and should be addressed in the work plan at the outset of the global review.

REMEDIATION, SELF-REPORTING, AND OTHER CONSIDERATIONS

Another reason to use counsel in conducting global investigations is to facilitate confidential discussion regarding the appropriate response to allegations and facts as they are uncovered. Good compliance requires good remediation, which can include employee discipline, altering or severing business relationships, internal control enhancements, and/or self-reporting. Each of these items should be considered and discussed at the outset of the review and throughout the investigative process.

CONCLUSION

As with all legal work, the most important feature of an effective global corporate investigation is good judgment. As advisors and advocates for our clients, we must determine at each step of the review how the investigation and the company's reactions to the facts are received by the intended audiences. Making good judgments while searching and traveling the world presents challenges that are unique and compelling, in areas of critical importance to our clients. The work we do overseas may not be the stuff of a novel or movie, but it is fascinating work. And, when the end credits roll, knowing that the work was done well, thoroughly, with good judgment, and in the client's best interests is a satisfying way to leave the theater.

PROTECTING A COMPANY'S INTERESTS AFTER SELF-DISCLOSURE

Once a company decides to self-disclose, it is quickly placed in an awkward position across the table from a Department of Justice prosecutor, a Securities and Exchange Commission enforcement attorney, or a representative from another government agency that has the power to significantly harm, if not destroy, the company. It must now balance two obligations that are in some ways contradictory: the company must share with the government confidential information that is both damaging to the company and often protected by the attorney-client privilege and work-product doctrine, without characterizing the underlying facts in a way that makes the government doubt the accuracy or completeness of the company's disclosure. At the same time, the company must attempt to avoid prosecution—or at least minimize the penalty and collateral consequences associated with any prosecution—and protect itself from broad waivers of the attorney-client privilege.

Some of the most important issues to consider in crafting post-disclosure strategy for protecting and defending the company are: (i) charges the company could face as a result of the disclosure; (ii) form of corporate resolution; (iii) potential criminal and civil fines and penalties; (iv) collateral consequences of any future prosecution; and (v) terms of any post-resolution cooperation. A company that has

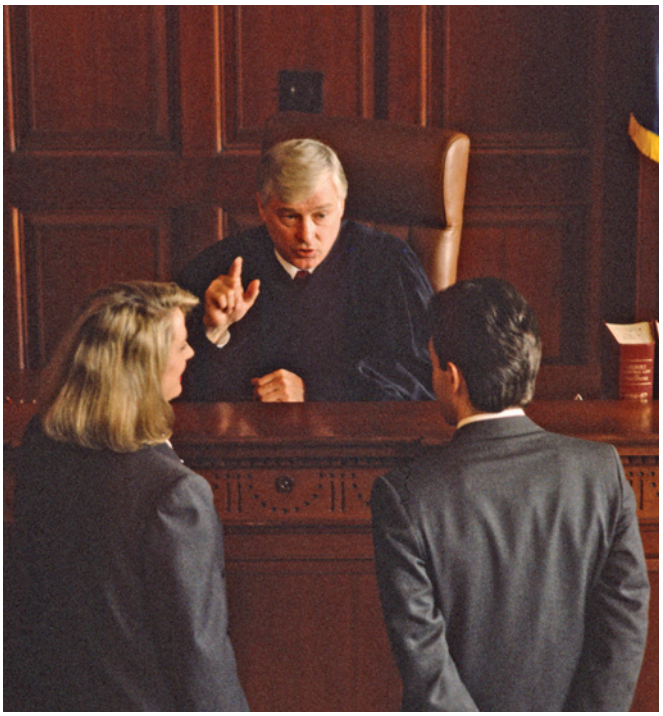
considered these five issues in the context of the facts that triggered the self-disclosure will be in the best position to protect itself from the direct and indirect consequences of a government investigation and prosecution.

POTENTIAL CHARGES

Before making a self-disclosure, a company should already have considered the potential consequences of the disclosure, including the criminal and civil laws it may have violated and the administrative actions to which it could be subjected as a result of the conduct being disclosed. The United States Attorneys' Manual states that when criminal laws are violated, a prosecutor must charge the most serious crime that is likely to result in a sustainable conviction.[91] Notwithstanding this provision, a criminal prosecutor has significant discretion to choose what charges to file, and a company facing criminal liability can influence what—if any—charges are filed.

This concept is best illustrated through a review of two recent Foreign Corrupt Practices Act ("FCPA") resolutions. At its most basic level, the FCPA prohibits companies from providing anything of value to a government official for the purpose of assisting in obtaining or retaining business.[92] The consequences of FCPA violations can be significant and include debarment and suspension from U.S. government programs,[93] debarment and suspension from government programs in the European Union,[94] and the public taint of being branded a corrupt organization.[95] In a few large, high-profile prosecutions, the Department of Justice ("DOJ") agreed to prosecute foreign bribery offenses without actually charging a substantive violation of the FCPA, due to the company's self-disclosure and/or cooperation in the government investigation and the potential collateral consequences of filing such a charge. These cases are examples of how a company that has self-disclosed its own potential misconduct and/or cooperated with government investigations can influence the government's charging decisions.

The *Siemens* case, in which one of Germany's largest conglomerates admitted to paying more than $800 million in bribes across "literally thousands of contracts over many years" in many different countries,[96] has been touted by



the DOJ as its most significant FCPA prosecution in history, with the combined penalties constituting "the largest monetary sanction ever imposed in an FCPA case."[97] The facts in *Siemens* were among the more egregious of any corruption case prosecuted by the DOJ, including taking tax deductions for corrupt payments as "useful expenditures" and maintaining a system of slush funds from which Siemens employees could withdraw up to €1 million at a time.[98] Those facts ultimately led to a $1.6 billion criminal and civil resolution with the DOJ, the Securities and Exchange Commission ("SEC"), and the Munich Public Prosecutor's Office.[99]

Notwithstanding the scope of the bribery and the fact that this case generated the largest FCPA penalty in history, Siemens never pled guilty to paying bribes. Instead, Siemens was allowed to plead guilty to maintaining inadequate internal accounting controls and false corporate books and records, offenses that carry far fewer collateral consequences and sound much less serious to most investors and the public at large.[100] The DOJ cited Siemens' thorough internal investigation, self-disclosure, and cooperation as bases for allowing Siemens to plead guilty to nonbribery offenses and for paying a fine that was far below the range contemplated by the Sentencing Guidelines.[101]

The consequences of FCPA violations can be significant and include debarment and suspension from U.S. government programs, debarment and suspension from government programs in the European Union, and the public taint of being branded a corrupt organization.

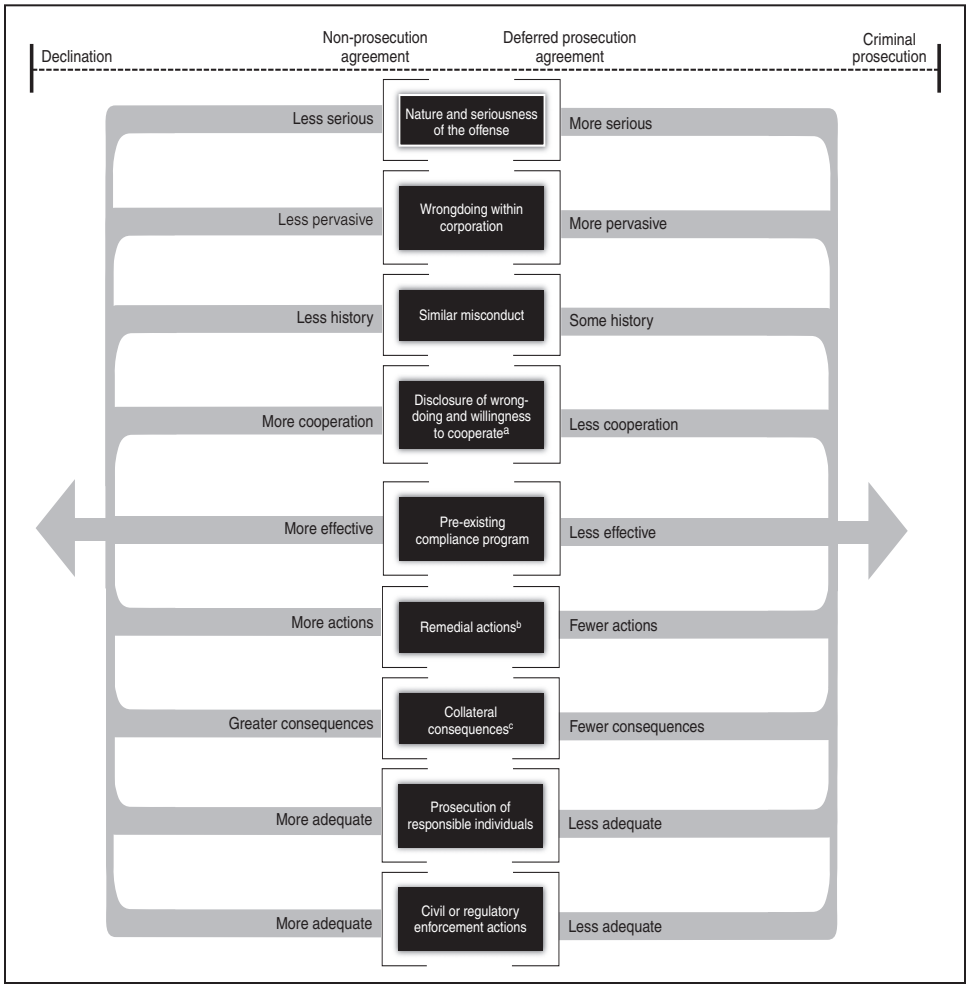
BAE Systems plc ("BAE") was another high-profile FCPA matter in which the DOJ alleged that a major multinational company—in this case, a defense contractor—paid millions of dollars to third parties through a network of shell companies, purportedly for the purpose of paying bribes.[102] In 2000, while undertaking a significant expansion into the U.S. market, BAE represented to the U.S. Departments of Defense and State that it would create compliance mechanisms to ensure that its U.S. and non-U.S. businesses would comply with the FCPA.[103] Subsequently, BAE won tenders in several Eastern European and Middle Eastern countries by making "undisclosed payments" to third parties, who used that money to influence government decision makers.[104] Although BAE admitted to making improper payments and failing to implement policies and procedures to comply with the FCPA, which formed the basis for the DOJ's investigation, BAE negotiated a guilty plea to the charge of conspiracy to make false statements to the U.S. government and to submit false export license applications to the United States.[105]

The concept of leveraging an internal investigation and self-disclosure into lesser charges applies in all corporate criminal cases, not just FCPA cases. The DOJ has recently targeted the health-care industry as a top priority for criminal and civil prosecution of both individuals and corporations.[106] In a case touted as the largest DOJ health-care resolution in U.S. history, on July 2, 2012, GlaxoSmith-Kline LLC ("GSK") pled guilty to a misdemeanor offense of violating the Food, Drug, and Cosmetic Act ("FDCA") in connection with its improper marketing of the drugs Paxil and Wellbutrin and its failure to report information about Avandia to the U.S. Food and Drug Administration, and it agreed to pay $3 billion in criminal and civil penalties and fines.[107] While GSK's conduct likely constituted a felony offense under the FDCA,[108] those charges would have led to mandatory exclusion from the Medicare and Medicaid programs, which is the equivalent of the death penalty for companies in the health-care industry.[109] The GSK case is not unique among large-scale FDCA prosecutions in which the company is allowed to plead guilty to a misdemeanor rather than a felony in order to avoid the harsh collateral consequence of exclusion from government health-care programs.

FORM OF CORPORATE RESOLUTION

Even if the conduct self-disclosed to the government amounts to a clear violation of federal laws, that does not necessarily mean the company will be compelled to plead guilty to any crimes. Instead, a guilty plea is only one of the three most common forms of corporate resolution: guilty pleas, deferred prosecution agreements ("DPAs"), and non-prosecution agreements ("NPAs"). The government's decision of whether to insist on a guilty plea, as opposed to the lesser punishments of a DPA or NPA, is based on an analysis of nine factors: (i) seriousness of the conduct; (ii) pervasiveness of the wrongdoing within the company; (iii) history of similar misconduct within the company; (iv) disclosure of the misconduct to the authorities and willingness to cooperate with them; (v) pre-existence of a compliance program; (vi) undertaking of remedial actions; (vii) collateral consequences that could arise from prosecuting the company; (viii) adequacy of prosecution of individuals; and (ix) adequacy of civil or regulatory enforcement actions.[110] After self-disclosing potentially criminal conduct, the company must be prepared to describe for the government why an analysis of these nine factors mitigates in favor of the least severe punishment possible.

The chart at right, which was prepared by the Government Accountability Office ("GAO"), illustrates how an analysis of these nine factors should impact the form of corporate resolution.[111]



Source: GAO analysis of DOJ's Principles of Federal Prosecution of Business Organizations.

Described below are the differences among the three forms of corporate resolution and the factors a company should consider in negotiating such resolutions.

GUILTY PLEA

A guilty plea is the most severe punishment that can result from self-disclosure and one a company typically seeks to avoid at all costs. The consequences of a guilty plea can be severe and can affect both the ongoing reputation and the viability of the business.[112] But not all pleas are created equal. For example, a company may plead guilty to a felony or a misdemeanor. A misdemeanor is less damaging to a company than a felony because it carries lower financial penalties and less severe collateral consequences. And as discussed above in "Potential Charges," because the penalties and collateral consequences associated with some felonies are more damaging than others, a company must consider the criminal laws that might be implicated by the conduct disclosed and must develop persuasive arguments for why the least damaging offenses are most appropriate.

DEFERRED PROSECUTION AGREEMENT

DPAs have existed for many years but have become more prevalent since the 2002 criminal prosecution of Arthur Andersen, which resulted in the accounting firm's collapse.[113] A DPA allows the DOJ to file criminal charges against a company—typically through a criminal information[114]—but then defer the actual prosecution of the case for a period of time that typically ranges from two to four years. During the period in which prosecution is deferred, the company is prohibited from engaging in further wrongdoing and usually must implement policies and procedures designed to prevent future violations of the law. If the company complies with the terms of the DPA, the DOJ dismisses the charges at the completion of the period of deferred prosecution. The end result to the company is no guilty plea, no criminal record, and fewer collateral consequences than those associated with a plea and criminal record.

While the end result is more favorable than a guilty plea, DPAs contain terms that are difficult for some companies to swallow. For example, before the DOJ agrees to file a DPA, the company must admit to facts that prove the company is guilty of the charges filed with the court. So, if the allegations involve securities fraud, the company must admit that it engaged in securities fraud; if the allegations involve

bribery, the company must admit that it paid bribes. The terms of the DPA allow a company to avoid pleading guilty to the charged offense, but admitting to these facts can harm a company's reputation and may constitute admissions that can be used by third parties in civil litigation against the company.[115]

Additionally, the DOJ will often require a mechanism by which a company's compliance with the DPA will be monitored and assessed. In some circumstances, to avoid a guilty plea, the company subject to the DPA agrees to retain an independent compliance monitor who is tasked with monitoring the company's compliance with the DPA and reporting its findings to both the company and the DOJ. The independent compliance monitor has been criticized as unreasonably expensive and overly intrusive, and companies negotiating resolutions with the DOJ seek to avoid—or to limit—such a monitorship and the consequences of the intense scrutiny it brings.[116]

A GAO review of 152 DPAs and non-prosecution agreements entered into between 1993 and September 2009 indicates that an independent compliance monitor was required in approximately one-third of these cases (48 of 152, or 31.6 percent).[117] Additionally, of the 32 corporate DPAs and NPAs executed in 2010, 10 of them (31.25 percent) required an independent compliance monitor.[118] In the FCPA context, "[f]rom 2004 to 2010, more than 40 percent of all companies that resolved an FCPA investigation with [the DOJ or SEC] through a settlement or plea agreement retained an independent compliance monitor as a condition of that agreement."[119]

Due in part to the cost and intrusiveness of an independent compliance monitor, there is a growing trend at the DOJ toward allowing corporate self-monitoring and self-reporting of compliance milestones and subsequent violations. For example, on November 4, 2010, both Pride International and Tidewater Marine International entered into DPAs to resolve allegations that the oil services and freight-forwarding companies had participated in a bribery scheme which "paid thousands of bribes totaling at least $27 million to foreign officials in at least seven countries, including Angola, Azerbaijan, Brazil, Kazakhstan, Nigeria, Russia and Turkmenistan."[120] Specifically, the Pride International and Tidewater Marine International DPAs provided for "corporate compliance reporting" in lieu of mandating the appointment of an independent compliance monitor.[121]

Likewise, in April 2011, Johnson & Johnson ("J&J") paid $70 million to resolve an FCPA case in which the company admitted to paying bribes to government officials in Greece, Poland, Romania, and Iraq.[122] J&J and its subsidiaries entered into a three-year DPA that requires the company—rather than an independent compliance monitor—to report the results of its ongoing compliance efforts to the DOJ biyearly throughout the duration of the DPA.[123] Similarly, on August 7, 2012, Pfizer entered into a DPA and agreed to pay a $15 million criminal fine and $45 million in civil disgorgements to resolve an FCPA case in which the company admitted that between 1997 and 2006, it paid more than $2 million in bribes to government officials in Bulgaria, Croatia, Kazakhstan, and Russia.[124] Like the J&J DPA, Pfizer's DPA allows the company, rather than an independent compliance monitor, to "report [evidence of further FCPA violations] to the Department in the course of periodic communication to be scheduled between Pfizer and the Department. The first such update shall take place within 60 days after the entry of the Pfizer HCP DPA."[125]

The trend toward allowing self-monitoring is not limited to cases involving large, publicly traded companies. On June 18, 2012, Data Systems & Solutions LLC ("DS&S") resolved an FCPA case in which the company must "report to the Department periodically, at no less than twelve-month intervals during a two-year term, regarding remediation and implementation of the compliance program and internal controls, policies, and procedures" described in DS&S's DPA.[126]

A company that has self-disclosed facts that clearly demonstrate wrongdoing is often pleased to reach a DPA and avoid the harmful effects of a guilty plea. It should be careful, however, to consider what facts it must admit to demonstrate the company's guilt, what charges it will be admitting (but not pleading guilty) to, the effects of those admissions on the company's exposure to civil lawsuits (discussed in "Collateral Consequences" herein), and what form of monitorship—if any—will be required by the government.

NON-PROSECUTION AGREEMENT

A prosecutorial decision not to prosecute or, alternatively, the decision to accept an NPA is the goal of any company that self-discloses potential violations of criminal laws. The simplest form of a non-prosecution agreement is an oral or written statement by the DOJ indicating that it has decided not to prosecute the company for any offenses. It carries no financial penalties, no monitor, and no period of deferred prosecution. A recent example of the DOJ's giving this type of non-prosecution agreement is the Morgan Stanley FCPA matter.[127] This case involved a former managing director of Morgan Stanley's real estate business in China who engaged in a conspiracy to transfer a multimillion-dollar ownership interest in a Shanghai building to an influential Chinese government official who in return steered business to Morgan Stanley.[128] On April 25, 2012, the DOJ announced that Garth Ronald Peterson, the former managing director, pled guilty to conspiracy to violate the FCPA and also announced that it had declined to prosecute Morgan Stanley.[129]

The DOJ's decision not to prosecute Morgan Stanley for the criminal acts of one of its managing directors was based on the company's robust system of internal controls, its decision to self-disclose the misconduct, and its cooperation during the DOJ's investigation.[130] The DOJ uncharacteristically went out of its way to recognize the internal controls Morgan Stanley had in place at the time Peterson engaged in his criminal act. In the criminal information filed against Peterson and in the press release announcing Peterson's plea, the DOJ specifically cited the following about Morgan Stanley's internal controls:

- Morgan Stanley maintained a system of internal controls meant to prevent employees from paying anything of value to foreign government officials;
- Morgan Stanley's internal policies prohibited bribery and addressed corruption risks associated with the giving of gifts, business entertainment, travel, lodging, meals, charitable contributions, and employment;
- Morgan Stanley frequently trained its employees on its internal policies, the FCPA, and other anti-corruption laws;
- Morgan Stanley trained Peterson on the FCPA seven times and reminded him to comply with the FCPA at least 35 times; and
- Morgan Stanley's compliance personnel regularly monitored transactions; randomly audited particular employees, transactions, and business units; and tested to identify illicit payments.[131]

If a company cannot obtain this form of non-prosecution, then the next-best option is an NPA. An NPA is a written agreement between the DOJ and a company in which the DOJ agrees not to file criminal charges against the

Neal J. Stephens | Silicon Valley | +1.650.687.4135 | nstephens@jonesday.com

Neal Stephens is a trial lawyer who focuses on white-collar criminal defense and complex civil litigation. He has experience responding to government actions brought by the DOJ, the SEC, and other state and federal agencies. He also conducts internal corporate investigations and counsels companies on compliance issues regarding the FCPA. Neal has defended clients on matters related to securities fraud, the FCPA, misappropriation of trade secrets, insider trading, antitrust, banking fraud, unfair competition, and off-label marketing.

Prior to joining Jones Day in 2012, Neal's recent engagements included defending a CEO regarding bank fraud allegations, defending a pharmaceutical company regarding an FCPA investigation, conducting an internal investigation for an audit committee regarding alleged accounting improprieties, defending a CEO and general counsel indicted in stock option backdating cases, representing several companies under investigation for misappropriation of trade secrets, and representing a company in an insider-trading investigation regarding the use of expert referral networks.

As a federal prosecutor in Miami, Neal served as Chief of the Narcotics Section and Regional Coordinator of the Organized Crime Drug Enforcement Task Force for the Florida/Caribbean Region. He ran investigations that resulted in the extradition and prosecution of high-level Colombian narcotics traffickers, including relatives and associates of Pablo Escobar, the former head of the Medellín cartel. Neal received national recognition from the Attorney General, the FBI, and the DEA.

An NPA is a written agreement between the DOJ and a company in which the DOJ agrees not to file criminal charges against the company for a set period of time (as with a DPA, the period is typically two to four years), and the company agrees to comply with certain conditions over that period of time.

company for a set period of time (as with a DPA, the period is typically two to four years), and the company agrees to comply with certain conditions over that period of time. Because the DOJ does not file any charging documents with the court when an NPA is reached, the agreement itself is not filed with the court but is instead maintained by the DOJ and the corporation. Simply put, when a company enters into an NPA, unlike a DPA, there is typically no public record of the agreement. In some NPAs (but not all), the company is not required to admit any facts that can later be used against it.

An NPA differs from a simple non-prosecution because, with an NPA, there is a written agreement between the company and the government that includes terms the company must abide by to receive the benefit of a non-prosecution. The terms and requirements of NPAs vary, but the most common terms include: (i) a fine; (ii) a requirement that the company cooperate in an ongoing government investigation; (iii) a prohibition on future violations of the law for a set period of time;[132] (iv) defined improvements in the company's internal controls; and/or (v) some form of government oversight of the company's compliance with the terms of the NPA.

CRIMINAL AND CIVIL FINES AND PENALTIES

A plea, DPA, or NPA can carry significant fines and penalties. One benefit of self-disclosure is that it leads to a negotiated settlement with the authorities and increases the likelihood of obtaining a reduced monetary penalty.[133] One factor a prosecutor may consider in charging a company and negotiating a disposition is the company's "timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."[134] There is no formula, however, for calculating how much a corporate fine or penalty should be reduced for self-disclosure and cooperation, and several commentators have argued that there is little tangible evidence to support the DOJ's argument that it rewards companies that self-disclose and cooperate with lower fines and penalties.[135] Conversely, however, some commentators have indicated that self-disclosure may increase the likelihood of convincing the DOJ to enter into an NPA rather than a DPA[136] and may increase the likelihood of convincing the DOJ to permit self-monitoring rather than requiring the appointment of an independent compliance monitor.

The starting point for determining any corporate fine for criminal conduct is the United States Federal Sentencing Guidelines (the "Guidelines" or "USSG"), which contain complicated guidance about appropriate fine ranges, based on the facts underlying the wrongful conduct.[137] The primary drivers in calculating a fine under the Guidelines are: (i) base offense level, which is determined on the basis of the criminal conduct the company admits to or is convicted of after trial; (ii) characteristics of the offense, like the monetary loss or gain related to the offense or the number of victims impacted by the offense; and (iii) the company's culpability in the offense, which is calculated on the basis of factors like the company's size, the effectiveness of the company's compliance program in place at the time the conduct occurred, whether the company self-reported the offense, and the company's cooperation in the investigation.[138]

A company that has self-disclosed its own misconduct and cooperated with the government should obtain lower fines and penalties than a company that has not self-disclosed or cooperated. The potential benefits here are twofold. First, there is a tangible benefit of self-disclosure and cooperation under the advisory Guidelines. These tangible benefits are described in USSG § 8C2.5(g). The relevant portions of this Guideline provide as follows:

> (1) If the organization (A) prior to an imminent threat of disclosure or government investigation; and (B) within a reasonably prompt time after becoming aware of the offense, reported the offense to appropriate governmental authorities, fully cooperated in the investigation, and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **5** points; or
>
> (2) If the organization fully cooperated in the investigation and clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **2** points; or
>
> (3) If the organization clearly demonstrated recognition and affirmative acceptance of responsibility for its criminal conduct, subtract **1** point.[139]

Additionally, and more importantly, a company that has self-disclosed and cooperated with the government is often able to negotiate a fine that falls far below the fine range called for under the Guidelines.

These concepts are best illustrated by examining the fine paid in a recent high-profile corporate resolution negotiated after the company cooperated significantly in the DOJ's investigation. In the *Siemens* case discussed above, the company admitted to making $805.5 million in "corrupt payments to foreign officials."[140] Of the $1.6 billion in fines and penalties Siemens paid to U.S. and German officials, $450 million was designated as a criminal fine to resolve the DOJ component of the prosecution.[141] Although a $450 million criminal fine is a significant amount of money to most companies, it pales in comparison with the possible criminal penalty of $1.35 to $2.7 *billion* that the company

faced under the Guidelines.[142] This Guidelines fine range, while incredibly large, included the two types of benefits described above. First, Siemens received a two-point discount from its culpability score due to its "full cooperation and acceptance of responsibility."[143] This resulted in a lower advisory Guidelines fine range than would have resulted without the cooperation. Second, and more importantly, the $450 million fine was a significant reduction from the bottom of the advisory Guidelines range of $1.35 to $2.7 billion.

While *Siemens* demonstrates that cooperation with the government can lead to a significant benefit in the government's recommended fine amount, there are many cases involving smaller companies and less-widespread misconduct that illustrate the same point. For example, in the *Nordam* FCPA resolution, the DOJ agreed to an NPA that included a downward departure from the advisory fine range called for under the Guidelines. In announcing the case's resolution, the DOJ stated:

> The department entered into a non-prosecution agreement with NORDAM as a result of NORDAM'S timely, voluntary and complete disclosure of the conduct, its cooperation with the department and its remedial efforts. In addition, the agreement recognizes that a fine below the standard range under the U.S. Sentencing Guidelines is appropriate because NORDAM fully demonstrated to the department, and an independent accounting expert retained by the department verified, that a fine

exceeding $2 million would substantially jeopardize the company's continued viability.[144]

Accordingly, by self-disclosing its conduct and cooperating with the DOJ, Nordam appears to have avoided the risks associated with trial, including the potential for a significant criminal fine that could have destroyed the company and had severe collateral consequences.

The Nordam resolution also highlights how an "inability to pay" argument can minimize fines called for under the Guidelines or even fines a prosecutor agrees to recommend that are well below those calculated under the Guidelines. When a company truly cannot pay a fine, it can argue that paying such a fine would effectively put the company out of business, risk putting the company out of business, or have some other severe consequence. Before accepting such an argument, the DOJ, the SEC, and other enforcement agencies will typically demand that a company open its books and prove its inability to pay, a process that can be burdensome and time-consuming. But in some circumstances, this is an effective way to minimize criminal, civil, and administrative fines.

Another important consideration in negotiating a fine with the DOJ is what penalty or penalties will be assessed by other U.S. regulators and foreign law enforcement and/or regulators, as well as the likely collateral consequences of those penalties. Negotiating a plea, DPA, or NPA with the DOJ does not occur in a vacuum, and companies placed in the unfortunate position of self-disclosing wrongdoing to the DOJ are also likely self-disclosing to other regulatory bodies, both in the U.S. and abroad. So when negotiating the terms of any resolution, a company should consider keeping all investigations moving on track at the same pace (a Herculean task, should a company decide that doing so would be beneficial), making sure each government and regulatory body knows about all of the other investigations the company is facing and making sure the DOJ and all other government entities consider the fines, penalties, and collateral consequences associated with resolving the other investigations.

COLLATERAL CONSEQUENCES

In most cases, a company's decision to self-disclose potential misconduct, cooperate with the government, and negotiate a resolution is driven by the need to minimize the potential "collateral consequences" of failing to do so. These collateral consequences can range from a prohibition on conducting business with the U.S. government, to loss of investor and customer confidence (which, in the case of Arthur Andersen, led to the destruction of the company), to a barrage of civil lawsuits based on the conduct. A company that has self-disclosed its potential misconduct and cooperated with the government is often in the best possible position to avoid or minimize these types of

Hank Bond Walther | Washington | +1.202.879.3432 | hwalther@jonesday.com

Hank Walther is a trial lawyer who has extensive experience investigating and trying health-care fraud, Foreign Corrupt Practices Act, securities fraud, and other financial fraud cases. Prior to joining Jones Day, Hank served as Chief of the Health Care Fraud Unit in the Department of Justice, where he supervised all health-care fraud investigations and prosecutions pursued by the Criminal Division, including violations of the False Claims Act, the Anti-Kickback Statute, and the Food, Drug, and Cosmetic Act. He also led the DOJ's Medicare Fraud Strike Force, which over the course of five years prosecuted more than 1,100 defendants responsible for approximately $3 billion in health-care fraud, and he cosupervised the Criminal Division's FCPA investigations into the pharmaceutical industry.

During his tenure at the DOJ, Hank was also a supervisor in the Foreign Corrupt Practices Act Unit, where he oversaw foreign corruption investigations and prosecutions and coordinated with U.S. and foreign law enforcement, the Securities and Exchange Commission, and other federal agencies. He participated in the U.S. delegation to the Organisation for Economic Co-operation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and worked with foreign governments in connection with anti-bribery and anti-corruption enforcement and legislation. Prior to joining the FCPA Unit, Hank was a trial attorney in the Criminal Division, where he prosecuted a variety of white-collar criminal matters, including securities, health-care, procurement, bank fraud, FCPA, and money-laundering cases.

collateral harm to the company and its "innocent" related parties, such as employees, shareholders, and customers.

DEBARMENT AND SUSPENSION

One of the most severe collateral consequences of resolving a government investigation is the possibility of being debarred or suspended from federal procurement programs, which means that the company can no longer do business with the federal government. Federal procurement rules provide for the debarment or suspension of a company from contracting with the U.S. government upon "a conviction of or a civil judgment for" various offenses, including: (i) "embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, receiving stolen property, making false claims, or obstruction of justice"; and (ii) any "offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor."[145] Similarly, companies in the health-care industry, which rely on government dollars from the Medicare and Medicaid programs, are excluded from doing business with the federal government when convicted of a "criminal offense related to the delivery of an item or service" in connection with a federal health-care program.[146]

Being debarred, suspended, or excluded from doing business with one federal government entity can easily snowball into an exclusion from all government programs because a debarment, suspension, or exclusion order entered by one U.S. government agency has a government-wide impact once the party is added to the government's "Lists of Parties Excluded from Federal Procurement and Nonprocurement Programs."[147] This list tracks entities and individuals who are debarred, suspended, proposed for debarment, excluded, or disqualified from participating in federal procurement.[148] Furthermore, many state and local governments operate debarment, suspension, and exclusion programs similar to those of the federal government.[149] An adverse procurement action at the federal level may prompt local and state officials to take similar action.[150]

Many international organizations have also adopted procurement rules and guidelines that provide for suspension or debarment. For example, a corruption conviction may result in a prohibition on participating in any World

Bank-financed projects.[151] Similarly, a corruption conviction in the U.S. could trigger mandatory debarment in Europe pursuant to the European Union's procurement rules.[152]

In some industries, such as health care, defense, and construction, a debarment, suspension, or exclusion order could have a severe adverse impact upon the company's survival. In industries where the federal government accounts for a significant portion of a company's revenues, it is particularly important for the company to avoid putting itself in a position where there is even a small chance of being debarred, suspended, or excluded. Even outside these industries, the threat of debarment, suspension, or exclusion, and losing the federal government as a customer, is still a consequence to avoid at all costs. Therefore, the manner in which a company self-discloses its potential misconduct, cooperates with the government, and negotiates a resolution is particularly important, since the charges filed and the form of the resolution will dictate whether debarment, suspension, or exclusion is mandatory, optional, or unlikely to occur.

As discussed above, the recent blockbuster multibillion-dollar DOJ resolution with GlaxoSmithKline involved a misdemeanor plea, rather than a felony plea, primarily for

In industries where the federal government accounts for a significant portion of a company's revenues, it is particularly important for the company to avoid putting itself in a position where there is even a small chance of being debarred, suspended, or excluded. Even outside these industries, the threat of debarment, suspension, or exclusion, and losing the federal government as a customer, is still a consequence to avoid at all costs.

the purpose of allowing the pharmaceutical giant to avoid mandatory exclusion from the Medicare and Medicaid programs.[153] Likewise, in the December 2008 resolution of the *Siemens* FCPA case, in which the engineering giant made $805.5 million in corrupt payments to foreign officials, the company was not charged with violating the FCPA's anti-bribery prohibitions because of the DOJ's concern for the "risk of debarment and exclusion from government contracts."[154] These cases illustrate the importance of persuading the government that if charges must be filed and a plea, DPA, or NPA cannot be avoided, the charges and resolution should be crafted in a way that avoids the risk of debarment, suspension, and exclusion.

LOSS OF INVESTOR AND CUSTOMER CONFIDENCE AND EXPOSURE TO CIVIL LAWSUITS

When a company resolves a case through a guilty plea or a DPA (in which the company admits to criminal conduct), this can lead to a loss of confidence among the investing public and customers. As discussed above, the prosecution of Arthur Andersen and the post-conviction demise of the company demonstrate that the consequences of being convicted of criminal wrongdoing cannot be minimized. This is particularly true when the case involves companies, like accounting firms, where customer confidence is essential to business success. Every company that has self-disclosed potential misconduct must understand the consequences of admitting to criminal misconduct and be prepared to convince the government that those consequences are real.

In addition to a loss of confidence, an admission of guilt through a plea or DPA can subject the company, and its officers and directors, to civil litigation. Typically, these civil actions fall into two categories: (i) shareholder class actions alleging that a company did not adequately disclose the facts which led to the plea or DPA; and (ii) derivative actions against officers and directors alleging that they failed in their corporate duties.[155] In most instances, civil litigants attempt to "piggyback" on government investigations and use a company's admissions of guilt made in connection with resolving a government investigation to prove the conduct at issue in the civil case.[156] For example, a derivative complaint was filed against 11 members of J&J's board of directors alleging breach of fiduciary duty, mismanagement, and violations of the federal securities laws on the basis of the company's recent settlements with the DOJ and SEC regarding violations of the FCPA.[157] The complaint relied on admissions made by J&J in its criminal and civil resolutions with the DOJ and SEC to support its allegations.[158] In resolving a DOJ investigation or any other government investigation in which an admission of facts is required, a company should consider whether any required admissions can be used collaterally and offensively by civil plaintiffs. If the answer is "yes," the company must consider how to minimize that risk.

TERMS OF POST-RESOLUTION COOPERATION

Once a company resolves its case through a plea, DPA, or NPA, its work is usually not complete. This is because most corporate resolutions require ongoing "cooperation" with government investigations. Cooperation often includes agreeing to continue to produce documents requested by the government, making witnesses available to the government, and generally allowing the government to continue to use the company as a resource in its ongoing investigation into other companies and/or individual defendants. A company should pay close attention to what cooperation

the government seeks and the terms of any cooperation language contained in a plea, DPA, or NPA.

One of the perils of overly broad post-resolution cooperation is best illustrated through the notorious *KPMG* tax-shelter case. In this case, KPMG admitted to "assist[ing] high net worth United States citizens . . . evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters."[159] One section of KPMG's DPA was titled "Cooperation" and required the company to:

- "[C]ompletely and truthfully disclos[e] all information in its possession" to the DOJ and the Internal Revenue Service ("IRS"), including "all information about activities of KPMG, present and former partners, employees, and agents of KPMG";
- Provide the DOJ with "a complete and truthful analysis and complete detailed description of the design, marketing and implementation" by KPMG of all the at-issue transactions;
- Volunteer and provide to the DOJ any relevant documents that come to KPMG's attention and cooperate with future DOJ and IRS document requests pursuant to their ongoing investigation;
- Not assert any claim of privilege over documents requested by the DOJ or IRS, subject to limited exceptions;
- Use "reasonable and best efforts to make available [KPMG's] present and former partners and employees to provide information and/or testimony as requested by" the DOJ and IRS;
- Provide evidence or testimony in any criminal or other proceeding as requested by the DOJ or IRS; and
- Consent to the admission into evidence of all documents, disclosures, testimony, records, and other physical evidence provided by KPMG to the DOJ and/or IRS in any proceeding as the DOJ or IRS deems appropriate.[160]

Subsequently, several KPMG employees who were also charged with crimes relating to the alleged illegal tax shelters filed a motion to obtain discovery of KPMG documents from the government, on the theory that, according to the terms of KPMG's DPA, all of KPMG's documents were in the "constructive possession of the government"; the court agreed.[161] This decision, which essentially found that the terms of KPMG's DPA made the company an agent of the U.S. government, should make companies think twice about the far-reaching cooperation language contained in many corporate pleas, DPAs, and NPAs.

Randy S. Grossman | San Diego | +1.858.314.1157 | rsgrossman@jonesday.com

Randy Grossman is an experienced trial lawyer who has tried more than 80 cases to jury verdict. He has successfully represented clients both in complex civil litigation and as a white-collar criminal defense attorney. He has tried cases in federal and state courts and has successfully represented clients in complex administrative proceedings.

Randy's experience includes defending companies in health-care fraud investigations involving alleged violations of the Federal Food, Drug, and Cosmetic Act and the Federal Anti-Kickback Statute; defending companies in Foreign Corrupt Practices Act investigations; defending a government contractor in investigations by the Department of Justice, NASA, and the Defense Contract Management Agency; acting as trial counsel for a mortgage fund in a case against the SEC; acting as trial counsel for a hospital in a criminal case against the U.S. Attorney's Office involving alleged violations of anti-kickback statutes; and defending a national retailer in franchise and class-action litigation and an unfair competition investigation by the California Attorney General. A former Deputy District Attorney for San Diego County, Randy also has investigated and tried high-profile cases as a prosecutor, including a lengthy trial featured on NBC's *Crime and Punishment*.

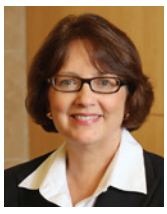
Randy is a former lawyer representative to the U.S. District Court for the Southern District of California (2008–2011) and is an active member of the San Diego Enright Inn of Court. He also served for two years on the San Diego County Bar Association Legal Ethics Committee.

A company should also be careful to ensure that any post-resolution cooperation does not waive the attorney-client privilege or further waive the privilege beyond any waivers that have already occurred. While the DOJ can no longer consider waiver of the attorney-client privilege in assessing a company's cooperation, waiver is often an unintended consequence of cooperation. Whether to waive, and how to limit waiver, is an important consideration when deciding whether to self-disclose and how to share information with the government, but companies often forget that additional waivers can occur after a resolution has been reached. Post-resolution waiver may not impact the company's dealings with the first government entity that resolved the case and required ongoing cooperation, but it could impact the resolutions reached with other government entities investigating the company and the resolutions of civil lawsuits that are based on the same set of facts.

These are just a few illustrations of how the cooperation language in a company's plea, DPA, or NPA can have unintended consequences that cost the company time and money. Cooperation language must be carefully written to minimize the risk of turning the company into an agent of the government and to prevent the company from waiving privileges beyond those already waived during the self-disclosure.

CONCLUSION

Once a company walks into the offices of the DOJ, the SEC, or any other enforcement agency to disclose potential misconduct, it sets into motion a series of events that often leads to some combination of fines; attorney-client privilege waivers; monitorships; admissions of wrongdoing; threats of debarment, suspension, or exclusion; and other events that collectively amount to a corporate nightmare. The process is unpleasant and expensive. The only thing worse is the thought of what might happen if the government found out that the company knew about the wrongdoing, did not disclose the wrongdoing, and (most often, negligently) continued to engage in the wrongdoing. Once a company self-discloses, it places itself at the mercy of the government by showing that it is a good corporate citizen intent on fixing any historic problems and working with the government to get past those problems. Well before the company discloses its misconduct, however, it must consider the series of events that is certain to transpire after the disclosure and must know how to influence those events to maximize the benefits of cooperation and minimize the harm to the company. A thoughtful analysis of the issues discussed above, both before and after the disclosure, will help the company frame the issues presented to the government in a manner that is most advantageous to the company and minimizes the potentially severe direct and collateral effects of a government resolution.



Joan E. McKown | Washington | +1.202.879.3647 | jemckown@jonesday.com

Joan McKown's practice focuses on investigations, enforcement actions, and other proceedings with U.S. and foreign regulators. Joan also counsels financial institutions, boards, corporations, and individuals on issues related to the U.S. Securities and Exchange Commission, as well as corporate governance, compliance, and ethics matters.

Joan recently represented corporations and corporate officers in SEC investigations involving corporate disclosure, books and records, internal controls, insider trading, and the FCPA.

Prior to joining Jones Day, Joan was the longtime chief counsel of the SEC's Division of Enforcement. During her 24-year career at the SEC, she played a key role in establishing enforcement policies at the agency and worked closely with the Commission and senior SEC staff. Her substantive experience extends across the full range of Division of Enforcement matters, including corporate disclosure, insider trading, investment companies and investment advisors, broker-dealers, and the FCPA. She oversaw the drafting of the Enforcement Manual and played a significant role in recent organizational changes in the Division.

Joan served as a key liaison between the Division of Enforcement and other regulatory authorities, including the Department of Justice, the Commodity Futures Trading Commission, federal banking regulators, and state securities regulators. She also led Wells meetings and settlement negotiations of thousands of SEC enforcement matters.

Joan frequently lectures on SEC topics related to enforcement, Dodd-Frank, financial institutions, disclosure, the FCPA, and insider trading. She is a member of the board of trustees of the Legal Aid Society of the District of Columbia.

ENDNOTES

1 Complex investigations are iterative processes, and for this reason, a key witness may need to be interviewed multiple times. Interviewers should anticipate this possibility and advise the witness of the same so that she can expect to be called back for additional questioning as the investigation progresses. Such a notification can also serve to let the witness know that her statements will be verified and that she may be re-questioned on discrepancies between her statements and other evidence subsequently developed.

2 The documents should be marked or labeled for ease of identification, and enough copies should be made that each participant in the interview can refer to her own copy.

3 Notes may be taken by hand or electronically, but investigators should be sensitive to how a witness may perceive the use of a computer for note taking. Some witnesses are chilled if they believe, despite representations to the contrary, that their statements are being transcribed verbatim. Of course, if a complete transcript of the interview is desired, a court reporter may be used, with the witness's consent, to record and transcribe the interview, as in a court-reported deposition. It is important to note, however, that a verbatim transcription of an interview is much more easily discoverable than a summary of the interview derived from attorney notes and containing attorney mental impressions and thought processes (i.e., attorney work product). *See*, *e.g.*, FED. R. CRIM. P. 26.2.

4 The apparent reasonableness of such a belief should be tested against: (i) the possibility that the witness might have quite the opposite reaction—i.e., being chilled by the presence of a company colleague—and (ii) any concern that the participation of that corporate representative—or any corporate representative—will be viewed with skepticism by the government should the company later disclose the interview.

5 *See generally Upjohn v. United States*, 449 U.S. 383 (1981). In 2009, a working group of the American Bar Association proposed the following *Upjohn* warning as a model:

> I am a lawyer for or from Corporation A. I represent only Corporation A, and I do not represent you personally.
>
> I am conducting this interview to gather facts in order to provide legal advice for Corporation A. This interview is part of an investigation to determine the facts and circumstances of X in order to advise Corporation A how best to proceed.
>
> Your communications with me are protected by the attorney-client privilege. But the attorney-client privilege belongs solely to Corporation A, not you. That means that Corporation A alone may elect to waive the attorney-client privilege and reveal our discussion to third parties. Corporation A alone may decide to waive the privilege and disclose this discussion to such third parties as federal or state agencies, at its sole discretion, and without notifying you.
>
> In order for this discussion to be subject to the privilege, it must be kept in confidence. In other words, with the exception of your own attorney, you may not disclose the substance of this interview to any third party, including other employees or anyone outside of the company. You may discuss the facts of what happened but you may not discuss *this* discussion.
>
> Do you have any questions?
>
> Are you willing to proceed?

Available at http://meetings.abanet.org/webupload/commupload/CR301000/newsletterpubs/ABAUpjohnTaskForceReport.pdf (all web sites herein last visited January 4, 2013).

6 Of course, for an interviewer, good listening skills are absolutely essential. These skills allow the interviewer to mentally process the witness's statements, ask appropriate follow-up questions, and pick up on telling verbal cues. An interviewer who speaks too much is one who is probably not listening enough—this is another reason that the use of nonleading questions is generally preferred. Similarly, interviewers should avoid cutting witnesses off, thereby not receiving the information that the witness was about to offer, and also avoid rushing to fill silence in an interview, which the witness might fill herself with valuable information.

7 Investigators should refrain from explicitly or implicitly encouraging witnesses not to speak with the government.

8 Interview reports should not be bogged down with extraneous, nonpertinent information. And while a report should also not read like a transcript of the interview, the report should include any direct quotations from the witness (words, phrases, or sentences) that may have significance to the investigation.

9 To protect the privilege after an interview report is prepared, the report should be distributed only to persons within the client group.

10 William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 621, 622 (2006).

11 Carol Poindexter, *Recent Developments in Corporate "Cooperation" Credit: Opening Pandora's Box or Slamming the Privilege Waiver Lid Shut?*, 22 No. 3 HEALTH LAWYER 48, 52 (2010).

12 Memorandum from Eric H. Holder, Deputy Att'y Gen., U.S. Dept. of Justice, to All Component Heads and United States Attorneys (June 16, 1999), *available at* http://federalevidence.com/pdf/Corp__Prosec/Holder__Memo__6__16__99.pdf.

13 Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 44969 (Oct. 23, 2001) (the "Seaboard Report"), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

14 Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://federalevidence.com/pdf/Corp__Prosec/Thompson__Memo__1-20-03.pdf.

15 *Id*. (emphasis added). In fact, a 2005 survey of outside counsel conducted by the National Association of Criminal Defense Lawyers found that approximately 85 percent of respondents "reported that DOJ and the SEC frequently require 'discussions' of waiver as part of 'settlement' negotiations." Nat'l Assoc. of Criminal Defense Lawyers, Executive Summary, *National Association of Criminal Defense Lawyers Survey: Attorney-Client Privilege Is Under Attack* (July 2005), *available at* http://nacdl.org/Champion.aspx?id=14498.

16 Don R. Berthiaume, *"Just the Facts": Solving the Corporate Privilege Waiver Dilemma*, 46 No. 1 CRIM. LAW BULLETIN, Art. 1 (2010).

17 U.S. Sentencing Guidelines Manual, § 8C2.5 App. (2004) (emphasis added).

18 Berthiaume, *supra* n.16.

19 S. 30, 109th Cong. (2006).

20 Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Dec. 12, 2006), *available at* http://federalevidence.com/pdf/Corp__Prosec/McNulty__Memo12__12__06.pdf (emphasis added).

21 *Id*.

22 Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Aug. 28, 2008), *available at* http://federalevidence.com/pdf/Corp__Prosec/Filip.Memorandum.2008.pdf, at 8.

23 United States Attorneys' Manual, § 9-28.720(a) (emphasis added).

24 SEC Enforcement Manual, *available at* http://sec.gov/divisions/enforce/enforcementmanual.pdf.

25 *See*, *e.g.*, Letter from American Bar Association to Hon. Shaun Donovan, Secretary, U.S. Dept. of Housing and Urban Development ("HUD") (Feb. 8, 2011) (requesting a change to HUD's current guidance, which "urges" public housing agencies to attach to all contracts with outside counsel for professional legal services an addendum that restricts the ability of the lawyers to assert privileges on behalf of public housing agency clients); SEC Enforcement Manual, § 6.1.2 (considering factors relevant to corporate cooperation, including "[c]ooperation with law enforcement authorities, including providing the Commission staff with all information relevant to the underlying violations *and the company's remedial efforts*") (emphasis added); the Seaboard Report, *supra* n.13 (stating that the SEC is not taking action against a company because "it did not invoke the attorney-client privilege, work product protection or other privileges or protections with respect to any facts uncovered in the investigation").

26 Mark J. Stein and Joshua A. Levine, *The Filip Memorandum: Does It Go Far Enough?,* NYLJ (Sept. 10, 2008).

27 Poindexter, *supra* n.11, at 53, quoting Stein and Levine, *supra* n.26 (alterations in original).

28 *See, e.g., In re Qwest Communications International, Inc.,* 450 F.3d 1179, 1192 (10th Cir. 2006) (rejecting selective waiver).

29 8 Wigmore, Evidence § 2292, at 554 (McNaughton rev. 1961); *United States v. Martin*, 278 F.3d 988, 999–1000 (9th Cir. 2002).

30 Lawyers who engage other professionals to assist them may share privileged information with the third-party consultants without waiving privilege, so long as the consultants are assisting the attorney in providing legal advice. *United States v. Kovel*, 296 F.2d 918, 921 (2nd. Cir. 1961).

31 *See United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir. 1989).

32 Memorandum from Mark Filip, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Aug. 28, 2008), *available at* http://federalevidence.com/pdf/Corp__Prosec/Filip.Memorandum.2008.pdf.

33 Principles of Federal Prosecution of Business Organizations, United States Attorneys' Manual, § 9-28.720. Note that the Filip Memorandum expressly forbids government requests for legal advice and attorney work product, except in extremely limited circumstances. *Id*. § 9-28.720(b). Despite the cost, it may be advisable to retain two law firms to conduct the internal investigation: one to interview witnesses and conduct the fact investigation, and the other to apply the legal analysis to the facts. If the decision is made to seek cooperation credit by disclosing "relevant facts" to the government, using separate law firms may reduce the risk that a court will find waiver of the privilege.

34 *See* Securities and Exchange Commission, Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Release No. 44969 (Oct. 23, 2001) (the "Seaboard Report"), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm, at 4.

35 *Upjohn Co. v. United States*, 449 U.S. 383, 389–97 (1981).

36 *Upjohn Co. v. United States*, 449 U.S. 383, 389–97 (1981).

37 The circuits are split on the showing required to establish the existence of an attorney-client relationship with a corporate employee. The Fourth Circuit requires the individual to demonstrate a subjective belief that an attorney-client relationship was formed and that the belief was reasonable under the circumstances (*In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 339 (4th Cir. 2005)). Other circuits apply a five-part test established in *In re Bevill, Bresler & Schulman Asset Mgmt Corp*., 805 F.2d 120, 123–24 (3d Cir. 1986), namely, that: (i) the individual approached counsel for the purpose of obtaining legal advice; (ii) the individual made it clear that he was seeking legal advice in an individual, rather than representative, capacity; (iii) counsel communicated with the individual in his individual capacity; (iv) the conversation was confidential; and (v) the substance of the conversation did not concern matters pertaining to the company.

38 The First Circuit would allow a corporation, without the consent of an executive asserting privilege, to waive the privilege in a dual-representation context where the subject matter of the waiver concerns matters of interest to the corporation, so long as the statements were made in the officer's corporate capacity. *In re Grand Jury Subpoena (Custodian of Records, Newparent, Inc.)*, 274 F.3d 563, 572–74 (1st Cir. 2001).

39 No. SACR 08-00139, 2009 WL 890633 (C.D. Cal. Apr. 1, 2009).

40 Under Rule 4.3, Model Rules of Professional Conduct, if the investigating lawyer knows or reasonably should know that the interests of the individual "are or have a reasonable possibility of being in conflict with the interests of the [company]," the lawyer should not give the individual any legal advice other than to seek counsel.

41 *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009).

42 *See Upjohn* at 395 for the formula for a proper "*Upjohn* warning." *See also supra* n.5.

43 *See In re OM Group Sec. Litig.*, 226 F.R.D. 579, 558–84 and n.3 (N.D. Ohio 2005).

44 *See id.* at 590–94; *SEC v. Roberts*, 254 F.R.D. 371, 383 (N.D. Cal. 2008).

45 *In re OM Group Sec. Litig.*, 226 F.R.D. at 590–94.

46 *See* Memorandum from Eric H. Holder, Deputy Att'y Gen., U.S. Dept. of Justice, to All Component Heads and United States Attorneys (June 16, 1999) (stating that whether a company provides information to employees about a government investigation pursuant to a JDA should be considered in weighing the extent and value of the company's cooperation and thus whether the company appears to be protecting its culpable employees and agents), *available at* http://federalevidence.com/pdf/Corp__Prosec/Holder__Memo__6__16__99.pdf.

47 This section is intended to provide general information related to the use of joint defense agreements, with a focus on federal law. Courts' recognition of the existence and scope of the joint defense privilege varies significantly across federal and state jurisdictions, so practitioners should research local law to determine applicability to their specific circumstances.

48 *See Continental Oil Co. v. United States*, 330 F.2d 347, 350 (9th Cir. 1964).

49 *United States v. Stepney*, 246 F. Supp. 2d 1069, 1074–75 (N.D. Cal. 2003).

50 *See In re Bevill, Bresler & Schulman Asset Mgmt. Corp.*, 805 F.2d 120, 126 (3rd Cir. 1986); *United States v. Bay State Ambulance & Hosp. Rental Serv., Inc.*, 874 F.2d 20, 28 (1st Cir. 1989).

51 *See, e.g.*, *Continental Oil Co.*, 330 F.2d at 350.

52 Holder Memorandum, at 6.

53 Memorandum from Larry D. Thompson, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Jan. 20, 2003), *available at* http://federalevidence.com/pdf/Corp__Prosec/Thompson__Memo__1-20-03.pdf.

54 Memorandum from Paul J. McNulty, Deputy Att'y Gen., U.S. Dept. of Justice, to Heads of Department Components, United States Attorneys (Dec. 12, 2006), *available at* http://federalevidence.com/pdf/Corp__Prosec/McNulty__Memo12__12__06.pdf.

55 On November 13, 2007, the U.S. House of Representatives passed the Attorney-Client Privilege Protection Act of 2007 (H.R. 3013), which would have prohibited government agents from asking that corporations not enter into JDAs or considering the participation in JDAs as a factor for evaluating a corporation's cooperation. This legislation stalled in the Senate (S. 186, later reintroduced as S. 3217), likely due at least in part to the 2008 voluntary policy revisions made by the DOJ that addressed some of the same concerns. The bill was later reintroduced as the Attorney-Client Privilege Protection Act of 2009 (H.R. 4326 and S. 445) because of the nonmandatory nature and incompleteness of the DOJ's voluntary 2008 policy revisions, as well as to make the principles applicable to other government agencies, such as the Securities and Exchange Commission ("SEC"). The 2009 legislation also stalled in committee.

56 Principles of Federal Prosecution of Business Organizations, United States Attorneys' Manual, § 9-28.730 (hereinafter the "DOJ Principles of Prosecution").

57 *Id.*

58 *See*, *e.g.*, *Continental Oil Co.*, 330 F.2d at 350.

59 *See, e.g., United States v. Almeida*, 341 F.3d 1318, 1326 n.21 (11th Cir. 2003); *United States v. Stepney*, 246 F. Supp. 2d 1069, 1086 (N.D. Cal. 2003).

60 Some courts have held that JDAs are not privileged and are subject to production for at least *in camera* review. *See Stepney*, 246 F. Supp. 2d at 1078.

61 The Eleventh Circuit and the Northern District of California endorsed a form agreement published by the ALI-ABA in 1999. *See Almeida*, 341 F.3d at 1326 n.21; *Stepney*, 246 F. Supp. 2d at 1084–86 (citing Joint Defense Agreement, Am. Law Institute-Am. Bar Ass'n, *Trial Evidence in the Federal Courts: Problems and Solutions* (1999)). More recently, the ALI-ABA and Patrick J. Sharkey have published an article including an updated model JDA. *See* Patrick J. Sharkey, *Unwrapping the Mystery of Joint Defense Agreements (With Form)*, A.L.I., ALI-ABA Course of Study (May 1, 2008).

62 *See Almeida*, 341 F.3d at 1325–26 ("It is also an ancient rule in many jurisdictions that 'where an accomplice turns state's evidence and attempts to convict others by testimony which also convicts himself, he thereby waives the privilege against disclosing communications between himself and counsel.' ").

63 *See Almeida*, 341 F.3d at 1326 n.21; *Stepney*, 246 F. Supp. 2d at 1084–86.

64 *Id.* at 1323.

65 District of Columbia Bar Legal Ethics Comm., Op. 349, Sept. 2009, *available at* http://www.dcbar.org/for__lawyers/ethics/legal__ethics/opinions/opinion349.cfm.

66 *Id.* § B.

67 *Id.*

68 *Id.*

69 *Id.* § C(1).

70 *Id.* § C(2).

71 Principles of Federal Prosecution of Business Organizations, United States Attorneys' Manual, § 9-28.730.

72 *Id.*

73 *See United States v. LeCroy*, 348 F. Supp. 2d 375 (E.D. Pa. 2004).

74 *See SEC v. Vitesse Semiconductor Corp.*, No. 10 Civ. 9239, 2011 WL 2899082 (S.D.N.Y. July 14, 2011) (holding that work-product protections for attorneys' handwritten notes relating to an internal investigation were waived when a company provided detailed oral summaries of employee interviews to the SEC, even though disclosed pursuant to a nonwaiver agreement).

75 *See* FED. R. CIV. P. 26 (requiring disclosure of witnesses who may provide expert testimony, an expert report, and pre-trial

deposition); FED. R. CRIM. P. 16 (parties must, at request of opposing party, disclose written summary of any potential expert testimony that describes expert's opinions, the bases and reasons for those opinions, and expert's qualifications); FED. R. EVID. 705 (expert may be required to disclose underlying facts or data on cross-examination).

76 FED. R. CIV. P. 24(4)(C); *see also* Rule 24(3)(A) and (B).

77 FED. R. CIV. P. 26(4)(C).

78 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 592 (1993); *see also* FED. R. EVID. 104(a) (court makes preliminary determination whether person is qualified to be an expert and admissibility of his testimony), 402 (irrelevant evidence is inadmissible), 403 (relevant evidence may be excluded if unfairly prejudicial, confusing, or a waste of time), 702 (governing when expert testimony is admissible), and 703 (regarding bases of expert testimony).

79 *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–49 (1999).

80 The most frequently cited reference for the components of an effective compliance program is Section 8B2.1 of the United States Sentencing Guidelines, titled "Effective Compliance and Ethics Program."

81 H.R. REP. No. 95-640, at 6 (1977).

82 Jones Day was one of the first U.S. law firms to expand significantly overseas, beginning in 1986 with the Firm's opening of offices in London, Paris, and Riyadh. Increasingly, global Firm clients utilize the resources available in Jones Day's 37 offices around the world, which provide a home base for attorneys conducting international investigations and a valuable resource for consultation on issues of local law or in local languages.

83 Archer Daniels Midland was fined $100 million in 1997, then the largest antitrust fine in U.S. history.

84 *See, e.g.*, Rachel G. Jackson, *Sting Case Failure Should Be Lesson To Justice Department, Judge Says*, JUST ANTI-CORRUPTION (Feb. 21, 2012), *available at* http://www.mainjustice.com/justanticorruption/2012/02/21/sting-case-failure-should-be-lesson-to-justice-department-judge-says/.

85 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

86 The EU Directive defines regulated "processing" as "any operation or set of operations which is performed upon personal data, whether or not by automatic means, such as collection, recording, organization, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, blocking, erasure or destruction." (EU Directive, Art. 2(b).)

87 For example, health information and financial information are regulated at the federal level by the Health Insurance Portability and Accountability Act ("HIPAA") and the Gramm-Leach-Bliley Act ("GLB"), respectively, and certain defined types of personal data (generally consisting of name in combination with Social Security number, driver's license number, or financial account number and access code) are subject to data breach notification laws at the state level.

88 In the European Union, "personal data" is defined as "any information relating to an identified or identifiable natural person ('data subject'); an identifiable person is one who can be identified, directly or indirectly, in particular by reference to an identification number or to one or more factors specific to his physical, physiological, mental, economic, cultural or social identity." (EU Directive, Art. 2(a).) Similarly, the Mexican Federal Law for Protection of Personal Data held by Private Persons defines "personal data" as any information concerning an identified or identifiable physical person. (*Ley Federal de Protección de Datos Personales en Posesión de los Particulares*, Art. 3, subsection V.)

89 The required registration or notification with the local data protection authority regarding the processing of personal data is one point of difference among the Member States. For example, subject to certain exceptions, data controllers in the United Kingdom must notify the Information Commissioner's Office of any processing of personal data, and failure to do so is a criminal offense. (*See* U.K. Data Protection Act 1998, Part III, § 17 *et seq.*; *see also* Information Commissioner's Office guidance re notification, *available at* http://www.ico.gov.uk/for_organisations/guidance_index/~/media/documents/library/Data_Protection/Detailed_specialist_guides/notification_handbook_final.ashx.) In Italy, by contrast, data controllers are required only to notify the *Garante per la protezione dei dati personali* of certain types of processing of personal data (*see* Legislative Decree no. 196 of 30 June 2003, Title VI, § 37 *et seq.*), and in Germany, notification is generally not required if the data controller has appointed an internal data protection officer. (*See* Federal Data Protection Act ("BDSG"), Part 1, § 4d *et seq.*)

Such registration or notification requirement is less common outside the European Union. For example, Australia, Canada, India, and Mexico do not impose such notification or registration requirements.

90 Examples include the Office of the Australian Information Commissioner in Australia; the Federal Service for Supervision over Telecommunications, Informational Technologies and Mass Communications (*Roskomnadzor*) in Russia; and the Office of the Privacy Commissioner in Canada, as well as their provincial counterparts. India, by contrast, does not have a national regulator charged with enforcing the provisions of the Information Technology Act, 2000 (the "IT Act"), and although the Secretary of the Ministry of Information Technology in each state is appointed as an adjudicating officer charged with adjudicating certain sections of the IT Act, there has been little enforcement of the IT Act, violations of which are generally subject to penalties or damages payable to the person(s) affected by the violation.

91 United States Attorneys' Manual, § 9-27.300 (2011).

92 15 U.S.C. § 78dd-1 *et seq.* (2011).

93 *See* 48 C.F.R. § 9.406-2(a)(3) (2010) (stating that a criminal conviction or civil judgment arising from "embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, or receiving stolen property" is cause for debarment); 48 C.F.R. § 9.406-2(a)(5) (2010) (providing that the "[c]ommission of any other offense indicating a lack of business integrity or business honesty that seriously and directly affects the present responsibility of a Government contractor or subcontractor" is grounds for debarment).

94 *See*, *e.g.*, Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts, and public service contracts, Article 45 (stating that natural or legal persons convicted of corruption, participation in organized crime, fraud, money laundering, or terrorism are automatically excluded from participation in public contracts).

95 *See*, *e.g.*, Brian Glaser, *News Corp. GC Zweifach Put in Charge of Anticorruption Review*, CORPORATE COUNSEL (Aug. 17, 2012), *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202567754389&News__Corp__GC__Zweifach__Put__in__Charge__of__Anticorruption__Review (noting the "intense scrutiny" of News Corp. following a bribery scandal and quoting News Corp.'s Rupert Murdoch: "We recognise that strengthening our compliance programmes will take time and resources, but the costs of non-compliance—in terms of reputational harm, investigations, lawsuits, and distraction from our mission to deliver on our promise to consumers—are far more serious.").

96 *U.S. v. Siemens Aktiengesellschaft*, 08-CR-367-RJL (D.D.C. Dec. 12, 2008) (DOJ Sentencing Memorandum at 13), *available at* http://www.justice.gov/opa/documents/siemens-sentencing-memo.pdf.

97 Press Release, U.S. Dept. of Justice, Siemens AG and Three Subsidiaries Plead Guilty to Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), *available at* http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html.

98 *U.S. v. Siemens Aktiengesellschaft*, 08-CR-367-RJL (D.D.C. Dec. 12, 2008) (Statement of Offense at 7–8).

99 Siemens Press Release, *supra* n.97.

100 While the Siemens corporate parent avoided a bribery prosecution, three of its subsidiaries—Siemens Argentina, Siemens Bangladesh, and Siemens Venezuela—pled guilty to the offense. *See U.S. v. Siemens S.A. (Argentina)*, 08-CR-368-RJL (D.D.C. Dec. 12, 2008) (Plea Agreement); *U.S. v. Siemens Bangladesh Ltd.*, 08-CR-369-RJL (D.D.C. Dec. 12, 2008) (Plea Agreement); *U.S. v. Siemens S.A. (Venezuela)*, 08-CR-370-RJL (D.D.C. Dec. 12, 2008) (Plea Agreement).

101 Siemens Sentencing Memorandum, *supra* n.96, at 15 ("The Department believes the above-proposed penalties are appropriate based on Siemens' substantial assistance to the Department in the investigation of other persons and entities, its extraordinary efforts to uncover evidence of prior corrupt activities, and in its extensive commitment to restructure and remediate its operations to make it a worldwide leader in transparent and responsible corporate practices going forward.").

102 *U.S. v. BAE Sys. plc*, 1:10-cr-00035-JDB (D.D.C. Feb. 22, 2010) (Plea Agreement, Appendix B, Statement of Offense at 7). While BAE negotiated a criminal resolution that did not actually mention the word "bribe," the nature of BAE's conduct was clear. For example, in one portion of the Statement of Offense, BAE admitted that "[a]fter May and November 2001, BAES made payments to certain advisors through offshore shell companies even though in certain situations there was a high probability that part of the payments would be used in order to ensure that BAES was favored in the foreign government decisions regarding the sales of defense articles." *Id*.

103 *Id.* at 3–4.

104 *Id.* at 9–13.

105 *U.S. v. BAE Sys. plc*, 1:10-CR-00035-JDB (D.D.C. Mar. 1, 2010) (Plea Agreement). The charging decision in BAE was also likely influenced by a bizarre series of events that took place in the United Kingdom's parallel investigation into BAE's alleged bribery scheme. Approximately one year before the DOJ and SEC resolved their cases, the U.K. dropped its foreign bribery investigation into BAE due to purported "national security" concerns. *See* James Lumley, *BAE Probe Was Halted on Security Concerns, U.K. Says*, BLOOMBERG (July 7, 2008), *available at* http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aPVjiYMZoMQo&refer=uk; Jackie Bennion, *BAE Will Pay $450 Million to Settle Long-Running Bribery Case*, FRONTLINE (Feb. 5, 2010), *available at* http://www.pbs.org/frontlineworld/stories/bribe/2010/02/bae-to-pay-more-than-400-million-in-us-and-uk-fines.html ("As allegations mounted against BAE, Britain's Serious Fraud Office began investigating the arms deal in September 2003 but dropped the case in late 2006 after then prime minister Tony Blair directly intervened. Blair defended his decision to shut down the inquiry for national security reasons on the grounds that the Saudis could stop cooperating with Britain on vital terrorism intelligence.").

106 *See*, *e.g.*, U.S. Dept. of Justice, Strategic Plan, Fiscal Years 2012–2016, at 27 (2012), *available at* http://www.justice.gov/jmd/strategic2012-2016/DOJ-Strategic-Plan-2-9-12.pdf ("Health care fraud is one of the most urgent, destructive, and widespread national challenges facing our country. Billions of dollars in public and private health care spending [are] lost each year to health care fraud. In addition to the losses to the federal health benefit programs Medicare and Medicaid, private insurance programs lose billions of dollars each year to blatant fraud schemes in every sector of the health care industry. The Department has responded, and will continue to fight this battle by aggressively investigating and litigating matters involving a variety of health care fraud schemes utilizing Department-wide task forces.").

107 *U.S. v. GlaxoSmithKline LLC*, 12-CR-842 (D. Mass. July 2, 2012) (Criminal Information). GSK was charged with distributing misbranded drugs and failing to report data to the Food and Drug Administration in violation of 21 U.S.C. §§ 331(a), 331(e), 333(a)(1), 352, and 355(k)(1). *Id*. Under the terms of the plea agreement, GSK agreed to pay a total of $1 billion, including a criminal fine of $956,814,400 and forfeiture in the amount of $43,185,600. GSK paid another $2 billion to resolve civil liabilities under the False Claims Act. *See* Press Release, U.S. Dept. of Justice, GlaxoSmithKline to Plead Guilty and Pay $3 Billion to Resolve Fraud Allegations and Failure to Report Safety Data—Largest Health Care Fraud Settlement in U.S. History (July 2, 2012), *available at* http://www.justice.gov/opa/pr/2012/July/12-civ-842.html.

108 The FDCA prohibits, among other things: (i) the introduction or delivery for introduction into interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded; (ii) the adulteration or misbranding of any food, drug, device, or cosmetic in interstate commerce; (iii) the receipt in interstate commerce of any food, drug, device, or cosmetic that is adulterated or misbranded and the delivery or proffered delivery thereof for pay or otherwise; and (iv) the introduction or delivery for introduction into interstate commerce of any article in violation of Section 344 or 355 of this title. 21 U.S.C. § 331 (2011). Where there are multiple violations of the FDCA or where there is an intent to defraud, violations of the FDCA are felonies. 21 U.S.C. § 333 (2011).

109 *See* Social Security Act, § 1128, 42 U.S.C. 1320a–7 (2011) ("Exclusion of Certain Individuals from Participation in

Medicare and State Health Care Programs"). At least two observers have calculated that federal-government health-care spending accounts for 45 to 56 percent of the entire U.S. health-care market. Thomas M. Selden and Merrile Sing, *The Distribution Of Public Spending For Health Care In The United States, 2002*, HEALTH AFF. (July 29, 2008), w349–w359, *available at* http://content.healthaffairs.org/content/early/2008/07/29/hlthaff.27.5.w349.full.pdf. Exclusion from the Medicare and Medicaid programs would prevent a health-care company from selling its goods and services to the largest health-care customer in the world: the federal government of the United States of America.

110 United States Attorneys' Manual, § 9-28.300 (2011).

111 United States Government Accountability Office, GAO-10-110, *Corporate Crime: DOJ Has Taken Steps to Better Track Its Use of Deferred and Non-Prosecution Agreements, but Should Evaluate Effectiveness*, at 10 (Dec. 2009), *available at* http://www.gao.gov/new.items/d10110.pdf (the "2009 GAO Report") (footnotes omitted).

112 The collateral consequences of a plea are discussed in "Collateral Consequences" herein.

113 *See* 2009 GAO Report at 1 (stating that the prosecution and conviction of the accounting firm Arthur Andersen for obstruction of justice and the firm's subsequent high-profile collapse caused the DOJ to recognize the "potentially harmful effects that criminally prosecuting a company can have on investors, employees, pensioners, and customers who were uninvolved in the company's criminal behavior").

114 A "criminal information" is "an accusation exhibited against a person for some criminal offense, without an indictment. An accusation in the nature of an indictment, from which it differs only in being presented by a competent public officer on his oath of office, instead of a grand jury on their oath. A written accusation made by a public prosecutor, without the intervention of a grand jury." BLACK'S LAW DICTIONARY 772 (6th ed. 1990).

115 *See*, *e.g.*, *Wollman v. Coleman*, No. 11-CV-02511 (D.N.J. May 2, 2011) (Complaint) (citing admissions made by Johnson & Johnson in its criminal and civil resolutions with the DOJ and SEC in alleging that Johnson & Johnson's board of directors failed to implement appropriate procedures to ensure FCPA compliance and wrongfully concealed FCPA violations from shareholders); *see also* "Collateral Consequences: Loss of Investor and Customer Confidence and Exposure to Civil Lawsuits" on p. 55 herein.

116 *See*, *e.g.*, Michael Freedman, *Trust Us*, FORBES (Dec. 25, 2006), *available at* http://www.forbes.com/free_forbes/2006/1225/132.html ("Cases like [Schnitzer Steel, whose negotiated resolution of corruption allegations included an independent compliance monitor] are prompting corporate defense lawyers to question the strategy of voluntary confessions. No one is condoning bribery, but companies are finding that by turning themselves in they are opening themselves up to years of negative publicity, fines, criminal investigations, indictments and highly intrusive compliance monitors that have billed companies for as many as 40,000 hours, at rates up to $700 an hour."); David Kocieniewski, *Usually on Attack, U.S. Attorney in Newark Finds Himself on the Defensive*, N.Y. TIMES (Feb. 13, 2008), *available at* http://www.nytimes.com/2008/02/13/nyregion/13christie.html?_r=1 (stating that then-U.S. Attorney Chris Christie had "dr[awn] the attention of the Justice Department's criminal division and Congress after awarding tens of millions of dollars in no-bid contracts to his friends and political allies" and that Christie "may face more scrutiny if the Government Accountability Office, as requested, investigates one of those contracts, worth at least $28 million, awarded to his previous boss, John Ashcroft, the former United States attorney general, to monitor a medical-prosthetics company after it acknowledged defrauding consumers.").

117 *Corporate Crime: Prosecutors Adhered to Guidance in Selecting Monitors for Deferred Prosecution and Non-Prosecution Agreements, but DOJ Could Better Communicate Its Role in Resolving Conflicts: Hearing Before the Subcomm. on Commercial and Admin. Law of the H. Comm. on the Judiciary*, 111th Cong. 11 (2009) (Statement of Eileen R. Larence, Director, Homeland Security and Justice, Government Accountability Office), *available at* http://judiciary.house.gov/hearings/pdf/Larence091119.pdf.

118 F. Joseph Warin, Brian Bladrate, and Trent Benishek, *The Expanding Role of Deferred and Nonprosecution Agreements: The New Normal for Handling Corporate Misconduct*, Bureau of Nat'l Affairs, 6 WCR 121 (Feb. 11, 2011).

119 F. Joseph Warin, Michael S. Diamant, and Veronica S. Root, *Somebody's Watching Me: FCPA Monitorships and How They Can Work Better*, 13 U. PA. J. OF BUS. L. REV., 321, 322 (Winter 2011).

120 Press Release, U.S. Dept. of Justice, Oil Services Companies and a Freight Forwarding Company Agree to Resolve Foreign Bribery Investigations and to Pay More Than $156 Million in Criminal Penalties (Nov. 4, 2010), *available at* http://www.justice.gov/opa/pr/2010/November/10-crm-1251.html.

121 *U.S. v. Pride Int'l*, 4:10-CR-00766 (S.D. Tex. Nov. 4, 2010) (Deferred Prosecution Agreement at 13–14); *U.S. v. Tidewater Marine Int'l, Inc.*, 4:10-CR-00770 (S.D. Tex. Nov. 4, 2010) (Deferred Prosecution Agreement at 14).

122 Press Release, U.S. Dept. of Justice, Johnson & Johnson Agrees to Pay $21.4 Million Criminal Penalty to Resolve Foreign Corrupt Practices Act and Oil for Food Investigations; Company to Pay Total Penalties of $70 Million in Resolutions with Justice Department and U.S. Securities and Exchange Commission (Apr. 8, 2011), *available at* http://www.justice.gov/opa/pr/2011/April/11-crm-446.html; *U.S. v. DePuy*, 1:11-CR-00099-JDB (D.D.C. Apr. 8, 2011) (Deferred Prosecution Agreement, Attachment A (Statement of Facts), at 16–28), *available at* http://www.justice.gov/criminal/fraud/fcpa/cases/depuy-inc/04-08-11depuy-dpa.pdf.

123 *See* DePuy DPA, *supra* n.122, Attachment A (Statement of Facts), at 7.

124 *United States v. Pfizer H.C.P. Corp.*, No. 1:12-CR-169 (D.D.C. Aug. 7, 2012) (DPA, Attachment A (Statement of Facts)), at A6–A15.

125 *Id.*, Attachment C-3 (Corporate Compliance Reporting).

126 *U.S. v. Data Sys. & Solutions LLC*, 12-CR-00262-LO (E.D. Va. June 18, 2012) (Deferred Prosecution Agreement), at 9.

127 *See* Press Release, U.S. Dept. of Justice, Former Morgan Stanley Managing Director Pleads Guilty for Role in Evading Internal Controls Required by FCPA (Apr. 25, 2012), *available at* http://www.justice.gov/opa/pr/2012/April/12-crm-534.html. Another recent example is the DOJ's decision not to prosecute Goldman Sachs for allegedly engaging in financial fraud in connection with the sale of collateral debt obligations. *See* Reed Albergotti and Elizabeth Rappaport, *U.S. Not Seeking Goldman Charges*, WALL ST. J. (Aug. 9,

2012), *available at* http://online.wsj.com/article/SB10000872396390443537404577579840698144490.html (reporting that "[a]fter a yearlong investigation, the Justice Department said Thursday that it won't bring charges against Goldman Sachs Group Inc. or any of its employees for financial fraud related to the mortgage crisis").

128 *U.S. v. Peterson*, 12-CR-224 (JBW) (E.D.N.Y. Apr. 25, 2012) (Criminal Information).

129 Morgan Stanley Press Release, *supra* n.127.

130 *Id*.

131 Peterson Information, *supra* n.128, at 5–9; *see also* Morgan Stanley Press Release, *supra* n.127. These are the types of facts companies can use to persuade the government to decline prosecution, even when there is no question that criminal misconduct occurred.

132 Companies are always prohibited from violating the law, but when this prohibition is included as a term of the NPA, a subsequent violation of the law may form the basis for the government's prosecution of the company for the conduct that led to the NPA.

133 This section is based on the assumption that a self-disclosure has already occurred, so it does not address the question of whether the benefits of self-disclosure outweigh the risks. Persuasive arguments can and have been made that the fines companies are forced to pay after self-disclosure and cooperation are not significantly lower than the fines they would face without self-disclosure or cooperation and that in some instances, self-disclosure is not the best course of action.

134 United States Attorneys' Manual, § 9-28.300(A)(4).

135 *See*, *e.g.*, Samuel Rubenfeld, *Study Says Voluntary Disclosure Doesn't Change FCPA Penalties*, CORRUPTION CURRENTS, WALL ST. J. (Sept. 6, 2012), *available at* http://blogs.wsj.com/corruption-currents/2012/09/06/study-says-voluntary-disclosure-doesnt-change-fcpa-penalties/.

136 *See*, *e.g.*, Melissa Aguilar, *DPA-NPA Tally Marks Decade's Second Highest*, COMPLIANCE WEEK (Jan. 10, 2011) (stating "[r]oughly half of the NPAs entered into in 2010 involved self-disclosure, versus 35 percent of DPAs"); Lauren Giudice, *Regulating Corruption: Analyzing Uncertainty in Current Foreign Corrupt Practices Act Enforcement*, 91 B.U. L. REV. 347, 373 (2011) ("NPAs are gaining in popularity: in 2008, only thirty-two percent of the pre-trial diversion agreements were NPAs, while in 2009 that number increased to fifty percent. One potential explanation is that more corporations are self-reporting alleged violations of the FCPA, because Assistant Attorney General Lanny A. Breuer indicated that the DOJ will give the company 'meaningful credit for that disclosure and that cooperation.' ") (citations omitted).

137 Since 2005, the Federal Sentencing Guidelines have been merely advisory, and neither the government nor the courts are required to follow them. *U.S. v. Booker*, 543 U.S. 220 (2005). In practice, however, the Guidelines are an important metric used by the DOJ and the courts to determine a range of potentially appropriate punishments. "In fiscal year 2010, the courts imposed sentences within the applicable advisory guideline range or below the range at the request of the government in 80.4 percent of all cases: 55.0 percent of all cases were sentenced within the applicable guideline range, 25.4 percent received a government sponsored below range sentence. In fiscal year 2010, the non-government sponsored below-range rate was 17.8 percent, and the rate of sentences imposed above the guidelines range was 1.8 percent." *Uncertain Justice: The Status of Federal Sentencing and the U.S. Sentencing Commission Six Years After U.S. v. Booker*, *Hearing before the H. S. Comm. on Crime, Terrorism, and Homeland Security*, 112th Cong. 20 (2011) (prepared statement of the Hon. Patti B. Saris, Chair, U.S. Sentencing Commission), *available at* http://judiciary.house.gov/hearings/pdf/Saris%2010122011.pdf.

138 *See* U.S. Sentencing Guidelines Manual (2011).

139 *Id*. § 8C2.5(g)(1)–(3).

140 Siemens Statement of Offense, *supra* n.98, at 22.

141 Siemens Press Release, *supra* n.97.

142 Siemens Sentencing Memorandum, *supra* n.96, at 12. The DOJ calculated that the amount of Siemens' loss or gain was at least $843.5 million ($805.5 million in bribes and at least $38 million in illicit profits), which led to a total offense level of 44, and that Siemens had a total culpability score of 8. *Id*. Multiplying the improper payments by 1.6–3.2, as required by a culpability score of 8, yielded a Guidelines criminal fine of $1.35 billion to $2.7 billion. *Id*. This Guidelines fine range, as calculated by the DOJ, may have underestimated Siemens' true exposure because according to the DOJ's Sentencing Memorandum, calculating the appropriate fine under the Guidelines "would be overly burdensome, if not impossible," given the "literally thousands of contracts over many years." *Id*. at 13.

143 *Id*. at 12.

144 Press Release, U.S. Dept. of Justice, The Nordam Group Inc. Resolves Foreign Corrupt Practices Act Violations and Agrees to Pay $2 Million Penalty (July 17, 2012), *available at* http://www.justice.gov/opa/pr/2012/July/12-crm-881.html.

145 21 C.F.R. § 1404.800 (2012).

146 42 U.S.C. § 1320a-7(a) (2010).

147 *See* United States Government Accountability Office, GAO-09-174, *Excluded Parties List System: Suspended and Debarred Businesses and Individuals Improperly Receive Federal Funds* (Feb. 2009), at 1.

148 *Id*. The database of Parties Excluded is publicly available at https://www.sam.gov/portal/public/SAM/.

149 *See*, *e.g.*, Texas Governor's Office of Budget and Planning, *Uniform Grant Management Standards* (June 2004).

150 For example, the Texas Uniform Grant Management Standards reference the federal Lists of Parties Excluded. *See id*. at 80 ("Grantees and subgrantees must not make any award or permit any award (subgrant or contract) at any tier to any party which is debarred or suspended or is otherwise excluded from or ineligible for participation in federal assistance programs under Executive Order 12549, 'Debarment and Suspension.' ").

151 The World Bank, *Guidelines: Procurement of Goods, Works, and Non-Consulting Services under IBRD Loans and IDA Credits & Grants by World Bank Borrowers* (Jan. 2011), at § 1.16, *available at* http://web.worldbank.org/WBSITE/EXTERNAL/PROJECTS/PROCUREMENT/0,,contentMDK:20060840~menuPK:84282~pagePK:84269~piPK:60001558~theSitePK:84266,00.html.

152 *See supra* n.94.

153 *See* "Potential Charges" herein.

154 Siemens Sentencing Memorandum, *supra* n.96, at 11.

155 *See*, *e.g.*, *Strong, derivatively on behalf of Tidewater, Inc. v. Taylor*, 2:11-CV-392 (E.D. La. July 2, 2012) (Order Dismissing Complaint) (dismissing derivative action seeking to recover damages against the defendant officers and directors for breaches of fiduciary duties, abuse of control, gross mismanagement, waste of corporate assets, and unjust enrichment and to enjoin Tidewater's implementation and administration of a system of internal controls and accounting systems sufficient to satisfy the requirements of the FCPA).

156 Under the Federal Rules of Evidence, a guilty plea would be admissible evidence in a subsequent civil proceeding. *See* F.R.E. 803(22) (providing a hearsay exception for facts admitted pursuant to a guilty plea); F.R.E. 803(8)(A)(iii) (providing a hearsay exception in civil litigation for factual findings of a legally authorized government investigation); F.R.E. 801(d)(2)(A) (stating that statements and admissions made by a party or a party's representative are not hearsay).

157 *See Wollman v. Coleman*, No. 11-CV-02511 (D.N.J. May 2, 2011) (Complaint) (alleging that the board failed to implement appropriate procedures to ensure FCPA compliance and wrongful concealment of FCPA violations from the shareholders).

158 *Id*.

159 *U.S. v. KPMG LLP*, 5-CR-903(LAP) (S.D.N.Y. Aug. 29, 2005) (Statement of Facts), at 1.

160 *U.S. v. KPMG LLP*, 5-CR-903(LAP) (S.D.N.Y. filed Aug. 29, 2005) (Deferred Prosecution Agreement), at 9–12.

161 *U.S. v. Stein*, 488 F. Supp. 2d 350, 362–64 (S.D.N.Y. 2007) (holding that the broad terms of the KPMG DPA render KPMG documents within the possession, custody, or control of the DOJ and ordering the production of those documents to the individual defendants).

JONES DAY'S GLOBAL PRESENCE

ALKHOBAR
Oliver Passavant
Partner-in-Charge
+966.3.849.6606

AMSTERDAM
Luc Houben
Partner-in-Charge
+31.20.240.22.96

ATLANTA
Lizanne Thomas
Partner-in-Charge
+1.404.521.3939

BEIJING
H. John Kao
Partner-in-Charge
+86.10.5866.1111

BOSTON
Traci L. Lovitt
Partner-in-Charge
+1.617.960.3939

BRUSSELS
Bernard E. Amory
Partner-in-Charge
+32.2.645.14.11

CHICAGO
Daniel E. Reidy
Partner-in-Charge
+1.312.782.3939

CLEVELAND
Christopher M. Kelly
Partner-in-Charge
+1.216.586.3939

COLUMBUS
Elizabeth P. "Liza" Kessler
Partner-in-Charge
+1.614.469.3939

DALLAS
Patricia J. Villareal
Partner-in-Charge
+1.214.220.3939

DUBAI
Sheila Shadmand
Partner-in-Charge
+971.4.709.8484

DÜSSELDORF
Sandra-Christiane Kamper
Partner-in-Charge
+49.211.5406.5500

FRANKFURT
Juergen Reemers
Partner-in-Charge
+49.69.9726.3939

HONG KONG
Robert L. Thomson
Partner-in-Charge
+852.2526.6895

HOUSTON
Nancy MacKimm
Partner-in-Charge
+1.832.239.3939

IRVINE
Richard J. Grabowski
Partner-in-Charge
+1.949.851.3939

JEDDAH
Fahad A. Habib
Partner-in-Charge
+966.2.616.3939

LONDON
John R. Phillips
Partner-in-Charge
+44.20.7039.5959

LOS ANGELES
Christopher Lovrien
Partner-in-Charge
+1.213.489.3939

MADRID
Mercedes Fernández
Partner-in-Charge
+34.91.520.3939

MEXICO CITY
Fernando de Ovando
Partner-in-Charge
+52.55.3000.4000

MILAN
Marco Lombardi
Partner-in-Charge
+39.02.7645.4001

MOSCOW
Vladimir Lechtman
Partner-in-Charge
+7.495.648.9200

MUNICH
Friederike Goebbels
Partner-in-Charge
+49.89.20.60.42.200

NEW YORK
Wesley Johnson
Partner-in-Charge
+1.212.326.3939

PARIS
Sophie Hagège
Partner-in-Charge
+33.1.56.59.39.39

PITTSBURGH
Laura E. Ellsworth
Partner-in-Charge
+1.412.391.3939

RIYADH
Yusuf Giansiracusa
Partner-in-Charge
+966.1.462.8866

SAN DIEGO
Karen P. Hewitt
Partner-in-Charge
+1.858.314.1200

SAN FRANCISCO
Aaron Agenbroad
Partner-in-Charge
+1.415.626.3939

SÃO PAULO
Luis Riesgo
Partner-in-Charge
+55.11.3018.3939

SHANGHAI
Peter J. Wang
Partner-in-Charge
+86.21.2201.8000

SILICON VALLEY
Tharan G. "Greg" Lanier
Partner-in-Charge
+1.650.739.3939

SINGAPORE
Sushma Jobanputra
Partner-in-Charge
+65.6538.3939

SYDNEY
Chris Ahern
Partner-in-Charge
+61.2.8272.0500

TAIPEI
Jack J.T. Huang
Partner-in-Charge
+886.2.7712.3399

TOKYO
Masatomo Suzuki
Partner-in-Charge
+81.3.3433.3939

WASHINGTON
Gregory M. Shumaker
Partner-in-Charge
+1.202.879.3939

LAWYER CONTACTS

Henry W. Asbill
Washington
+1.202.879.5414
hasbill@jonesday.com

Jean-Paul Boulee
Atlanta
+1.404.581.8456
jpboulee@jonesday.com

Charles M. Carberry
New York: +1.212.326.3920
Washington: +1.202.879.5453
carberry@jonesday.com

Theodore T. Chung
Chicago
+1.312.269.4234
ttchung@jonesday.com

R. Christopher Cook
Washington
+1.202.879.3734
christophercook@jonesday.com

Roman E. Darmer
Irvine
+1.949.553.7581
rdarmer@jonesday.com

Richard H. Deane, Jr.
Atlanta
+1.404.581.8502
rhdeane@jonesday.com

James C. Dunlop
Chicago
+1.312.269.4069
jcdunlop@jonesday.com

Randy S. Grossman
San Diego
+1.858.314.1157
rsgrossman@jonesday.com

Brian Hershman
Los Angeles
+1.213.243.2445
bhershman@jonesday.com

Karen P. Hewitt
San Diego
+1.858.314.1119
kphewitt@jonesday.com

Beong-Soo Kim
Los Angeles
+1.213.243.2503
bkim@jonesday.com

Henry Klehm III
New York
+1.212.326.3706
hklehm@jonesday.com

Jonathan Leiken
Cleveland: +1.216.586.7744
New York: +1.212.901.7256
jleiken@jonesday.com

Harriet Beegun Leva
Los Angeles
+1.213.243.2319
hleva@jonesday.com

Weston C. Loegering
Dallas
+1.214.969.5264
wcloegering@jonesday.com

George T. Manning
Dallas
+1.214.969.3676
gtmanning@jonesday.com

Joan E. McKown
Washington
+1.202.879.3647
jemckown@jonesday.com

Thomas P. McNulty
Chicago
+1.312.269.4142
tpmcnulty@jonesday.com

Matthew D. Orwig
Dallas: +1.214.969.5267
Houston: +1.832.239.3798
morwig@jonesday.com

Daniel E. Reidy
Chicago
+1.312.269.4140
dereidy@jonesday.com

Peter J. Romatowski
Washington
+1.202.879.7625
pjromatowski@jonesday.com

Kerri L. Ruttenberg
Washington
+1.202.879.5419
kruttenberg@jonesday.com

Stephen G. Sozio
Cleveland
+1.216.586.7201
sgsozio@jonesday.com

Neal J. Stephens
Silicon Valley
+1.650.687.4135
nstephens@jonesday.com

Brian A. Sun
Los Angeles
+1.213.243.2858
basun@jonesday.com

Hank Bond Walther
Washington
+1.202.879.3432
hwalther@jonesday.com

James R. Wooley
Cleveland
+1.216.586.7345
jrwooley@jonesday.com

JONES DAY GLOBAL LOCATIONS

ALKHOBAR
AMSTERDAM
ATLANTA
BEIJING
BOSTON
BRUSSELS
CHICAGO
CLEVELAND
COLUMBUS
DALLAS
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SAN DIEGO
SAN FRANCISCO
SÃO PAULO
SHANGHAI
SILICON VALLEY
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