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The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics

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2007 SYMPOSIUM

The McNulty Memorandum, the KPMG Decision and Corporate Cooperation: Individual Rights and Legal Ethics

SARAH HELENE DUGGIN*

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INTRODUCTION

One of the hallmarks of a free society is the ongoing endeavor to find an appropriate balance between governmental power and individual liberties. During the last several years, however, in the corporate legal arena this balance has shifted in a way that profoundly impacts individuals caught up in the web of corporate investigations. Since 1990 the number of federal prosecutions of business entities has risen dramatically as prosecutors have increasingly utilized...
corporate "cooperation" strategies to conscript business entities into working with the government against the interests of employees. The most far-reaching of these policies are set forth in the Department of Justice's (DOJ) Holder, Thompson and McNulty Memoranda and in the Securities Exchange Commission's (SEC) Seaboard Report. Corporations are often quick to acquiesce in government demands for cooperation based on these policies. As the Arthur

Recent Trends in Internal Investigations, 25 No. 3 ACC Docket 24 (2007) (discussing increase in size and number of qui tam lawsuits) (citing United States Dep't of Justice News Release (Nov. 7, 2005)).


5. See, e.g., Samuel W. Buell, Criminal Procedure Within the Firm, 59 STAN. L. REV. 1613, 1664 (2007) ("Firms assert that because an indictment sounds a death knell for a business enterprise, they have no choice but to concede liability and settle."); Baker, supra note 2, at 337; Deputizing Company Counsel, supra note 2, at 35 (discussing "administrative death penalties"); see also Testimony of Edwin Meese before the Senate Judiciary Committee (Sept. 12, 2006) at 3 [hereinafter Meese Testimony], available at http://judiciary.senate.gov/testimony.cfm?id=2054/&wit_id=5741 ("The indictment and swift demise of the Arthur Andersen Accounting firm has taught every business organization a stern lesson: Failure to meet federal prosecutors' expectations for your cooperation in the government's criminal investigation of your employees could result in a death sentence, well before a jury is ever impaneled or opening statements are delivered at trial.").
Andersen experience illustrates, resistance is not always futile, but it may be fatal.

Corporate "cooperation" can encompass waiver of corporate attorney-client privilege and work product protections, denial of legal fee advances to employees, refusal to share information or enter into joint defense agreements with individual constituents, and even termination of employees in the absence of any judicial or administrative finding of wrongdoing. Prosecutors justify corporate cooperation demands as a means of leveraging government resources to hold powerful organizations and their managers accountable. Granted, this is no easy task in a world where global corporations have the ability to retain legal teams capable of daunting, if not overwhelming, even the vast resources of DOJ. However, pressure on corporations to cooperate with the government can eviscerate attorney-client privilege protections, undermine internal compliance measures, and alienate even the most law-abiding employees from their employers. Most importantly, when prosecutors coerce corporations to cooperate, individual rights are at risk.
Corporate cooperation compromises individual rights in a variety of ways. Employees interviewed in the course of internal investigations may unknowingly waive their Fifth Amendment privilege against self-incrimination.\textsuperscript{12} Some—such as the KPMG partners involved in the tax shelter prosecutions at issue in \textit{United State v. Stein}\textsuperscript{13}—may find their employers suddenly abandoning longstanding practices of advancing counsel fees, thereby making it virtually impossible to obtain the extensive legal assistance necessary to mount a successful defense in complex cases.\textsuperscript{14} Others may lose their jobs as employers cut ties with individuals who become liabilities in the effort to placate prosecutors.\textsuperscript{15}

Lawyers, too—particularly in-house counsel and corporate defense attorneys—lose something in the process. In the current enforcement environment, ethical obligations to client organizations force corporate lawyers to accept the role of federal deputies in posses formed to appease prosecutors.\textsuperscript{16} Their basic role as

\textit{Ethical Concerns of the "Deputized" Counsel}, 38 St. Mary's L.J. 1065, 1065-66 (2007); Lawton P. Cummings, \textit{The Ethical Minefield: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege}, 109 W. Va. L. Rev. 669 (2007) (discussing utilitarian and rights based approaches to attorney-client privilege in internal investigations); Inna Dexter, Note, \textit{Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations}, 20 Geo. J. Legal Ethics 515, 526 (2007) ("Increased focus on cooperation and individual accountability creates the potential for coercion and violation of individual rights, as the resources of the companies and the prosecutors greatly outweigh the resources available to individual employees.").

As Andrew Weissmann, former Director of the Government's Enron Task Force, has noted, it is not only "culpable" employees who are at risk: "[a]ny person who is employed by a public or private company, a partnership, or a non-profit could get caught up in an investigation into possible infractions as serious as embezzlement and market manipulation or as murky as alleged violations of arcane tax... rules." \textit{Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearing Before the S. Comm. on the Judiciary, 110th Cong. (2007) (statement of Andrew Weissmann)}, \textit{available at} http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6655 [hereinafter Weissmann Testimony].


16. As Richard Janis observes:

To employees of a company... the company's lawyers appear to be acting duplicitously. They are not trying to protect the employees, but only the company; they are extracting waivers of constitutional rights as conditions of employment and/or as a condition of payment of legal fees; and they are prejudicing the employees' ability to defend themselves and to protect their families. Under these circumstances, the sense of abandonment felt by the employees of organizations is palpable and, for attorneys who have witnessed it firsthand, deeply disturbing.

\textit{Deputizing Company Counsel}, supra note 2, at 36; \textit{see also} Lawrence D. Finder, \textit{Internal Investigations: Consequences of the Federal Deputation of Corporate America}, 45 S. Tex. L. Rev. 111 (2003); Robert A. Del Giorno, \textit{Corporate Counsel as Government's Agent: The Holder Memorandum and Sarbanes-Oxley Section
defense attorneys is co-opted, and they become de facto government agents. Moreover, while all lawyers have an ethical obligation to be fair to non-clients, pressure to produce results can influence investigating counsel already struggling to strike the right balance between vigorously pursuing internal investigations and unfairly infringing on individual rights.

For many lawyers, there is a deep-seated sense that something is wrong here—a perception that in our zeal to ferret out and punish those who abuse corporate power we have overextended corporate criminal liability and initiated a pattern of manipulating organizations into undermining the basic civil liberties of their employees. The depth of concern about these issues is evident in the intensive efforts of the ABA and a diverse group of business, law and civil rights advocacy groups to persuade DOJ, SEC and other federal agencies to abandon corporate cooperation strategies and in the ongoing campaign to engage Congress in the battle. In June 2006, in United States v. Stein (Stein I), United States District Judge Lewis Kaplan joined in criticizing the policies embodied in


19. See, e.g., William R. McLucas, Howard M. Shapiro & Julie J. Song, The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006) (suggesting that the process engendered by federal corporate cooperation policies in recent years “has, at a minimum, eroded our traditional adversarial process and skewed the balance of power between government investigators and their corporate targets”); see also Dexter, supra note 11, at 516 (noting that “much of the criticism [of the Thompson Memorandum] has focused on the imbalance of power ... between prosecutors and corporations”); Earl J. Silbert & Demne Doufekias Ioannou, Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System, 43 AM. CRIM. L. REV. 1225, 1229 (2006). But see Christopher A. Wray & Robert K. Hur, Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice, 43 AM. CRIM. L. REV. 1095, 1096-97 (2006) (noting that while “a healthy measure of caution in the [Thompson Memo's] application is well warranted,” “the Memo has largely accomplished its objectives and ... many of the criticisms are overwrought”); cf. Baker, supra note 2, at 312-13 (noting that through delegation “Congress has allowed executive and independent agencies to implement policies that Congress might never approve if it actually voted on them”).

20. See infra note 58 & accompanying text.

21. See infra Part II.A & C.

the Thompson Memorandum. Judge Kaplan's initial opinion on the matter excoriated the government for coercing KPMG to interfere with the Fifth and Sixth Amendment rights of its employees. In a subsequent decision handed down in July 2007 (Stein II) he dismissed indictments against thirteen of the sixteen individual KPMG defendants.

The June 2006 Stein decision, in combination with widespread criticism of corporate cooperation policies and a desire to stave off Congressional intervention, led DOJ to amend the most aggressive of its dictates in December 2006, but the basic framework remains intact. There is little reason to expect significant changes any time soon. The Holder Memorandum originated during the Clinton Administration, and the Thompson and McNulty Memoranda, as well as the Seaboard Report, are products of the Bush Administration. Consequently, even though a new President will take office in 2009, it is not at all clear that either party would materially alter present corporate cooperation policies. In November 2007 the House of Representatives passed legislation designed to constrain implementation of federal corporate cooperation measures, but it is uncertain whether the political will exists to support passage of the Senate counterpart of the House bill. Even if the Senate acts, however, the government will continue to exert powerful influence over entities confronted with criminal investigations, influence that adversely impacts the Constitutional rights of employees.

The purpose of this article is to suggest that the legal profession must look inward—to the ethical standards that govern the practice of law—as well as outward in seeking solutions; As lawyers we are caught up in the crosscurrents of political and societal reactions to recent corporate financial debacles and the resulting loss of trust in corporations and corporate managers. Even so, whether we represent the government, a corporation, or an individual, lawyers have a say in how our services will be used. The corporate cooperation controversy lies uniquely within the province of the legal profession. Lawyers created the policies at issue; lawyers continue to implement the challenged strategies; and lawyers advise client entities to submit to privilege waiver and other corporate cooperation demands. In any given matter, the conduct of a particular lawyer is

23. Id. at 381-82.
26. See, e.g., McNulty Memorandum, supra note 3, at preface; Testimony of ABA President Karen Mathis before the House Judiciary Committee (March 2007) (reporting DOJ's "reluctant decision" to modify the Thompson Memorandum by replacing it with the McNulty Memorandum).
27. The U.S. House of Representatives passed H.R. 3013 on November 13, 2007. Counterpart legislation has been pending in the U.S. Senate since December 2006. The current bill is S. 186, 110th Cong. § 3 (2007). These bills are discussed infra Part II.D.
constricted by the ethical obligation to act in the best interest of the client, but as a profession we have the ability to determine what our ethical standards will be. The ethics of corporate cooperation merit careful consideration, precisely because the line between zealous representation of an entity client and unfairness to its constituents is so hard to locate. Nevertheless, getting the boundaries right is critical to both the civil liberties of individuals entangled in corporate investigations and the integrity of the profession itself.

Part I of this article provides an overview of federal corporate cooperation policies, the principal arguments of their proponents and opponents, and proposals for legislative intervention. Part II discusses recent rulings in the KPMG prosecution and their potential impact, and Part III reviews the implications of the ongoing debate over the scope of corporate criminal liability. Part IV explores the concomitant responsibility of the legal profession to reexamine the rules of ethics that govern the practice of law for both prosecutors and corporate defense counsel in the corporate cooperation arena. The article concludes by offering some concrete suggestions for change and ideas for future consideration.

I. THE CURRENT STATUS OF FEDERAL CORPORATE COOPERATION POLICIES AND ONGOING EFFORTS TO EFFECT ADMINISTRATIVE, LEGISLATIVE, AND DOCTRINAL CHANGE

A. THE ORIGIN AND EVOLUTION OF FEDERAL CORPORATE COOPERATION POLICIES

There is a tendency to link the genesis of federal corporate cooperation strategies to the collapse of Enron and the great awakening to managerial

28. One of the earliest law review discussions of the ethical problems of internal investigations, Kathryn W. Tate, Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection Than the Model Rules Provide?, 23 IND. L. REV. 1 (1990), was published more than seventeen years ago. David Zornow and Keith Krakaur published a seminal article on the death of corporate privilege and its implications in 2000. Zornow & Krakaur, supra note 2. As early as 2000, the American Corporate Counsel Association (now the Association of Corporate Counsel) wrote to DOJ to raise concerns about prosecutors' requests for waiver of attorney-client privilege and work product protections. See Letter from Am. Corp. Counsel Ass'n to the Hon. Eric Holder. (May 12, 2000), http://www.acc.com/public/accapolicy/holder.htm [hereinafter ACC Letter] (cited in Baker, supra note 1, at 329). Other early articles discussing demands for waiver of corporate attorney-client privilege and work product protections include Judson W. Starr & Brian L. Flack, The Government's Insistence on a Waiver of Privilege, 2001 ABA NAT'L INST. ON WHITE COLLAR CRIME J-1 (cited in Am. College of Trial Lawyers, supra note 4, at 330 & n.99) (noting call of U.S. Attorney for Southern District of New York "for a complete waiver of the attorney-client privilege by all corporate targets wishing to obtain credit for their cooperation"), and Jonathan D. Polkes & Renee L. Jarusinsky, Waiver of Corporate Privileges in a government Investigation: Reaction to the New DOJ Policy, 2001 ABA WHITE COLLAR CRIME COMM. ANNUAL MEETING J-31-J-33 (cited in Am. College of Tr. Lawyers, supra note 2, at 308 n.2). I first wrote about these issues in an article published in 2003. Employee Interview, supra note 1. Other articles that have raised ethical concerns in this area include, for example, Deputizing Company Counsel, supra note 2; Griffin, supra note 2; Dexter, supra note 11, at 529; Marks, supra note 11.
infidelity that followed. The origins of the current debate, however, date back to the United States Sentencing Commission’s (USSC) promulgation of the Organizational Sentencing Guidelines in 1991 and the rapid increase in corporate prosecutions that began in earnest in the 1990s. Prior to the late 1960s, prosecution of corporations and other entities was relatively unusual. In the 1970s, however, the Watergate scandal, revelations about payment of bribes to foreign government officials, and the disclosure of illegal campaign contributions to American politicians significantly undermined public trust in major corporations. As law enforcement authorities began to scrutinize businesses, it soon became apparent that some corporations were making illicit payments in the ordinary course of doing business. Corporations too often benefited from such payments, as well as from other illegal actions on the part of individual constituents. Consequently, prosecutorial attention increasingly focused on business entities and the number of federal prosecutions of corporations climbed steadily throughout the 1990s.

In pursuing corporate offenders, federal prosecutors began to consider a variety of factors in determining whether to charge the entities themselves. "Cooperation" soon became a critical component of the charging calculus, and prosecutors began to measure cooperation in terms of a company’s willingness to waive attorney-client privilege and work product protections and to refrain from sharing information or entering into joint defense agreements with individuals likely to be charged with criminal violations. Prosecutors also began to suggest that failing to sanction, continuing to employ, or advancing attorneys’ fees to employees identified as “culpable” evidenced a lack of cooperation on the part of

29. The United States Sentencing Commission promulgated its Organizational Sentencing Guidelines on November 1, 1991 to facilitate “just punishment, adequate deterrence, and incentives for organizations to maintain internal mechanisms for preventing, detecting, and reporting criminal conduct.” U.S. SENTENCING GUIDELINES MANUAL, ch. 8, introductory cmt (2002). For a more detailed discussion of the Organizational Sentencing Guidelines and their impact, see Baker, supra note 2, at 313-25; Buell, supra note 5, at 1662; Employee Interview, supra note 1, at 874-81. In its 2005 decision in United States v. Booker, 543 U.S. 220 (2005), the United States Supreme Court held that mandatory application of the Sentencing Guidelines violated an individual’s Sixth Amendment right to jury trial and concluded that federal courts should view the Guidelines as advisory rather than mandatory in nature. The Sentencing Guidelines, however, continue to influence sentencing in the federal courts. See U.S. SENTENCING COMM., REPORT ON THE IMPACT OF UNITED STATES V. BOOKER, available at http://www.ussc.gov/booker_report/Booker_Report.pdf (last visited Mar. 18, 2008).

30. See BRICKLEY, supra note 1, at § 1:01.

31. See Employee Interview, supra note 1, at 868-80.

32. See Stephen F. Black, Internal Investigations §1.01, at 1-1 (1998); BRICKLEY, supra note 1, at § 1.01; Employee Interview, supra note 1, at 872.

33. See BRICKLEY, supra note 1, at § 1:01.

34. For example, overcharges to the Medicare program and billing for services not performed added significantly to the bottom line for several health care entities. See, e.g., In re Caremark Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996).


36. See BRICKLEY, supra note 1, at § 1:01.
an entity under investigation. By the end of the decade, in the wake of Caremark, Columbia/HCA and other major corporate prosecutions, Deputy Attorney General Eric Holder circulated Principles of Prosecution of Corporations to provide guidance to DOJ attorneys throughout the country. In 2001, the year of Enron’s collapse, the SEC released the Seaboard Report announcing that the Commission would consider many of the same kinds of corporate cooperation factors outlined in the Holder Memorandum in the context of SEC enforcement proceedings. By this time in-house counsel and members of the defense bar were raising serious questions about the government’s approach to


38. See In re Caremark Derivative Litigation, 698 A.2d 959 (Del. Ch. 1996); Employee Interview, supra note 1, at 881-83 (including sources cited therein).

39. Holder Memorandum, supra note 3, at *3-*4. The eight factors set forth in the Holder Memorandum are as follows:

1. The nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime . . .

2. The pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, wrongdoing by corporate management . . .

3. The corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it . . .

4. The corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work product privileges . . .

5. The existence and adequacy of the corporation’s compliance program . . .

6. The corporation’s remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies . . .

7. Collateral consequences, including disproportionate harm to shareholders and employees not proven personally culpable . . .

8. The adequacy of non-criminal remedies, such as civil or regulatory enforcement actions . . .

Id.

40. See Seaboard Report, supra note 4, at 1-3. In the Seaboard Report the SEC resolved a cease-and-desist proceeding against a former controller of Seaboard Corporation. The SEC found that Meredith had caused inaccuracies in Seaboard’s accounting records and then covered up the fact. Id. The SEC, however, announced that it had decided not to take action against the company because of its prompt efforts to address the problem once it was discovered. Id. The SEC listed thirteen factors that, while not binding, would ordinarily be taken into account in determining whether to credit a corporation’s cooperation. These factors include many of those identified in the Holder and Thompson Memoranda, such as the nature, seriousness, and pervasiveness of the problem. Portions of these criteria are particularly noteworthy in terms of this discussion:

8. What steps did the company take upon learning of the misconduct? Did the company immediately stop the misconduct? Are the persons responsible for any misconduct still with the company? If so, are they still in the same positions? Did the company promptly, completely and
corporate cooperation, but the uproar over Enron's collapse and the string of financial debacles that followed drowned out these warnings.

In the midst of the corporate scandals that rocked the country so soon after the human tragedy of September 11, 2001, President George W. Bush appointed a special Corporate Fraud Task Force, and in 2002 Congress passed the Sarbanes-Oxley Legislation. Within a six-month period DOJ opened more than 150 investigations, filed criminal charges against more than 200 individuals, and delivered more than 60 guilty pleas in federal criminal proceedings against business entities. In 2003, Deputy Attorney General Larry Thompson replaced the Holder Memorandum with a document establishing new Principles of

effectively disclose the existence of the misconduct to the public, to regulators and to self-regulators? Did the company cooperate completely with appropriate regulatory and law enforcement bodies? . . .

9. What processes did the company follow to resolve many of these issues and ferret out necessary information? . . .

10. Did the company commit to learn the truth, fully and expeditiously? Did it do a thorough review of the nature, extent, origins and consequences of the conduct and related behavior? . . .

11. Did the company promptly make available to [SEC] staff the results of its review and provide sufficient documentation reflecting its response to the situation? Did the company identify possible violative conduct and evidence with sufficient precision to facilitate prompt enforcement actions against those who violated the law? Did the company produce a thorough and probing written report detailing the findings of its review? Did the company voluntarily disclose information [SEC] staff did not directly request and otherwise might not have uncovered? Did the company ask its employees to cooperate with [SEC] staff and make all reasonable efforts to secure such cooperation?

Id. For discussion of the Seaboard Report in comparison with DOJ guidance such as the Thompson Memorandum, see Wray & Hur, supra note 19, at 1108-12.

In the wake of Enron, the SEC and other enforcement agencies also expanded enforcement resources. See, e.g., id. at 1108-33 (discussing pre and post-Thompson Memorandum corporate cooperation policies of SEC, Federal Financial Institutions Regulatory Agencies, Department of Defense, Environmental Protection Agency, Department of Health and Human Services, Federal Aviation Administration, Public Company Accounting Oversight Board, Commodity Futures trading Commission, the Treasury Department's Office of Foreign Assets Control, the Federal Energy Regulatory Commission, the Department of Commerce Bureau of Industry and Security, and the Department of Labor Employee Benefits Security Administration). A number of self-regulatory organizations such as the New York Stock Exchange and the National Association of Securities Dealers, also have instituted cooperation policies in assessing the seriousness of violations and responses. See id. at 1125 & n.150; see also Banks, Giller & Lassar, supra note 1, at 27-28 (noting 45% increase in SEC budget in 2003, addition of more than 1000 staff members between 2002 and 2005, highlighting the impact of the Public Company Accounting Oversight Board created by Sarbanes-Oxley, and observing that "directors are increasingly demanding that management investigate possible misconduct" because of concerns over personal and entity liability).

41. See, e.g., ACC Letter, supra note 28; Zornow & Krakaur, supra note 2.
42. Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002), available at http://www.usdoj.gov/dag/cftf/execorder.htm; see Wray & Hur, supra note 19, at 1097 (noting that "the spate of corporate scandals that began with Enron's meltdown in 2001 prompted the Bush Administration to dramatically increase the federal government's focus on rooting out corporate fraud and restoring confidence in the integrity of our markets").
Prosecution of Business Organizations. The declared objective of the Thompson Memorandum was an "increased focus on and scrutiny of a corporation's cooperation" with federal investigators. Mr. Thompson noted that "[t]he revisions also address[ed] the efficacy of corporate governance mechanisms in place within a corporation." Specifically, the new policy pronouncement made consideration of the factors it identified mandatory for prosecutors considering charging business entities. The Thompson Memorandum kept much of the Holder Memorandum principles intact, including the waiver language and negative references to advancement of attorneys fees and other support for "culpable" employees. It also admonished prosecutors to ensure that corporate compliance measures were not just "paper programs," and added consideration of "the adequacy of the prosecution of individuals responsible for the corporation's malfeasance" as a separate factor in corporate prosecution decisions.

The Thompson Memorandum ignited an already smoldering debate, and the ABA, members of the business community, and civil rights advocates joined the Association of Corporate Counsel and the defense bar in challenging federal corporate cooperation policies. In 2004, ABA President Robert Grey appointed a special Task Force on the Attorney-Client Privilege, and a diverse group of business, law and civil rights advocacy groups united to form the Coalition to Preserve the Attorney-Client Privilege. The ABA and the Coalition, joined by a group of former senior DOJ officials, initiated an intensive campaign to

45. Thompson Memorandum, supra note 3.
46. Id. at *1 (preface).
47. Id.
48. Compare id. at *7-*8, with Holder Memorandum, supra note 3, at 7.
49. Thompson Memorandum, supra note 3, at *10.
50. Id. at *3-*4 (adding ninth factor to the eight Holder criteria).
persuade DOJ to pull back from the Thompson Memorandum\textsuperscript{55} and to urge the SEC to modify the principles set forth in the Seaboard Report.\textsuperscript{56} In November 2004, however, the United States Sentencing Commission (USSC) voted to include a reference to voluntary waiver of attorney-client privilege and work product protections in advisory note 8C2.5 to the Organizational Sentencing Guidelines.\textsuperscript{57}

The USSC’s decision provided a focal point for opponents of corporate cooperation policies. During 2005 both the ABA and the Coalition ramped up efforts to undo the USSC’s action, persuade DOJ to modify the Thompson Memorandum, and engage members of Congress in the campaign. In August 2005, in response to a report and recommendations from the Attorney-Client Privilege Task Force, the ABA House of Delegates passed a resolution decrying the assault on the attorney-client privilege.\textsuperscript{58} In November 2005, opponents turned out in force to testify before the USSC in hearings on advisory note 8C2.5.\textsuperscript{59} The efforts bore fruit in April 2006 when the USSC voted to delete the waiver language.\textsuperscript{60}


\textsuperscript{56} See, e.g., Letter of Karen Mathis to Hon. Christopher Cox, supra note 6. A number of legal journals and a handful of major newspapers also published editorials in support of the ABA and Coalition efforts.

\textsuperscript{57} See U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 (2004).


\textsuperscript{60} The USSC voted to delete the challenged language pertaining to waiver of the attorney-client privilege on April 5, 2006. 71 Fed. Reg. 28,063 (May 15, 2006). Several months prior to the USSC’s decision the ABA House of Delegates adopted a resolution urging the USSC to amend Application Note § 8C2.5 in several specific ways. Resolution Adopted by the House of Delegates of the American Bar Association, supra note 58.
Meanwhile those who opposed federal corporate cooperation policies were also making headway on Capitol Hill. In March 2006, the House Judiciary’s Subcommittee on Crime, Terrorism and Homeland Security held the first Congressional hearings on DOJ’s policies. Several weeks later, in May 2006, the ABA sent a letter to Attorney General Alberto Gonzales urging specific revisions to the Thompson Memorandum including deletion of language referring to waiver of corporate attorney-client privilege and work product protections, advancement of legal fees, and sanctioning of culpable employees. In place of these references, the ABA suggested language pertaining to a corporation’s “timely and voluntary disclosure of wrongdoing,” and its willingness to “cooperate in the investigation of its agents,” “identify the culprits within the corporation, including senior executives”; “make witnesses available”; and “disclose the results of its internal investigation.”

It was also in 2006 that a serious challenge to DOJ’s corporate cooperation policies arose in the United States District Court for the Southern District of New York. There the United States Attorney prosecuted nineteen individuals, including seventeen former KPMG partners and employees, in connection with a massive tax fraud estimated to have cost the government more than $2 billion. As discussed in more detail below, Judge Lewis Kaplan held that the government had unconstitutionally interfered with the Fifth and Sixth Amendment rights of individual KPMG defendants as a result of the conduct of prosecutors in tandem with the impact of the Thompson Memorandum. A month later, on the basis of his conclusions that the government’s conduct was unconstitutional, Judge Kaplan granted the motions of two defendants to suppress statements proffered to prosecutors in the course of the investigation. Judge Kaplan’s rulings further galvanized opposition to federal corporate

For a more detailed discussion of the efforts of the ABA and Coalition, as well as the government’s responses through the summer of 2006, see Sarah Helene Duggin, The Impact of the War Over the Corporate Attorney-Client Privilege on the Business of American Health Care, 22 J. CONTEMP. HEALTH L. & POL’Y 301 (2006).


64. Id. at 2 (emphasis added).

65. Stein v. KPMG, LLP, 486 F.3d 753, 756 (2d Cir. 2007). One of the seventeen KPMG defendants pled guilty, but the rest contested the charges. United States v. Stein (Stein II), 495 F. Supp. 2d 390, 394 & n.2 (S.D.N.Y. 2007).

66. See infra Part II.D.

67. United States v. Stein (Stein I), 435 F. Supp. 2d 330, 382 (S.D.N.Y. 2006); see infra Part II.D.

cooperation policies. On August 5, 2006, the ABA’s House of Delegates passed a resolution opposing “government policies, practices and procedures that have the effect of eroding the constitutional and other legal rights of current or former employees, officers, directors and agents.”69 The ABA specifically objected to consideration of advancement of counsel fees, joint defense agreements, sharing of records, and a company’s refusal to sanction employees who choose to exercise Fifth Amendment rights70 as indicative of a company’s failure to cooperate fully with the government. As the controversy intensified, the Senate, too, entered the fray. On September 12, 2006, the Senate Judiciary Committee convened hearings on the Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations.71

In response to these developments, DOJ again amended its Principles of Prosecution of Business Organizations. In October 2006, Acting Deputy Attorney General Robert McCallum instructed United States Attorneys’ Offices to establish written guidelines governing requests for waiver of corporate attorney-client and work product protections.72 The McCallum Memorandum, however, did not require United States Attorneys to make their waiver policies public.73 On December 12, 2006, DOJ took a more significant step when Deputy Attorney General Paul McNulty issued a new set of policy guidelines that modified the Thompson Memorandum in a few important respects.74 In his cover memorandum Mr. McNulty declared: “With this new guidance, the Department will continue its aggressive efforts to route [sic] out corruption in our financial markets and to protect the American investor, while allowing corporations to secure appropriate legal counsel.”75 The McNulty Memorandum is DOJ’s most recent comprehensive pronouncement on corporate cooperation.76

B. THE McNULTY MEMORANDUM

According to DOJ, the McNulty Memorandum “clarifie[d] prior guidance and establish[e[d] new clear approval requirements for requests of sensitive, privi-
leged information," thereby evidencing that "[t]he Department strongly supports the sanctity of the attorney-client privilege and work product protections." The McNulty Memorandum, however, did little to quell the outcry over DOJ's corporate cooperation policies. The following discussion provides an overview of the McNulty Memorandum and the principal arguments raised by DOJ in defense of the document and its predecessors.

1. Principal Provisions

The McNulty Memorandum incorporates most of the provisions of the Thompson Memorandum, and, like the earlier document, it imposes a mandatory obligation on federal prosecutors to consider the factors it sets forth in determining whether and how to charge corporations and other entities. It amends the Thompson Memorandum’s provisions with respect to requests for waiver of corporate attorney-client privilege and work product protections, as well as the consideration to be accorded to an entity’s advancement of legal fees to employees.

a. Waiver Requests

The McNulty Memorandum instructs prosecutors to request materials protected by attorney-client privilege or work product protections only “when there is a legitimate need for the privileged information to fulfill their law enforcement obligations.” The legitimate need calculus is to be based on four factors: Benefit to the government’s investigation, availability of alternative means to obtain the information in a timely manner, completeness of voluntary disclosure, and collateral consequences of a waiver.

If prosecutors determine that a legitimate need for a waiver exists, they are to follow a multi-step approach beginning with “the least intrusive waiver necessary to conduct a complete and thorough investigation.” The McNulty Memorandum differentiates between waiver requests designed to elicit “facts” (Category I information) and “legal advice or non-fact attorney work product” (Category II information). Category I “fact” material includes “witness statements, or purely factual interview memoranda regarding the misconduct, organization charts

78. Id.; see McNulty Memorandum, supra note 3, at 2, 8.
79. See Much Ado About Nothing, supra note 25, at text accompanying note 6 (discussing failure of McNulty Memorandum to make significant changes in approach of Thompson Memorandum and suggesting that the later document may actually raise more problems in some respects).
80. McNulty Memorandum, supra note 3, at 8.
81. Id. at 9.
82. Id.
83. Id. at 9-10.
created by company counsel, factual chronologies, factual summaries or reports (or portions thereof) containing investigative facts documented by counsel," and other material "uncovered in a company's internal investigation of corporate misconduct."  

Requests for Category I information must be approved by the requesting prosecutor's United States Attorney in consultation with the Assistant Attorney General for the Criminal Division. United States Attorneys have authority to approve "requests for (1) legal advice given contemporaneous to the misconduct being investigated, if the company is relying upon an advice-of-counsel defense to justify the conduct; and (2) legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege." Prosecutors may consider a corporation's refusal to waive attorney-client privilege or work product protections as to Category I materials in making charging decisions.

Prosecutors are to request Category II information only when Category I information "provides an incomplete basis to conduct a thorough investigation." Prior to requesting Category II information, prosecutors must obtain written approval from the Deputy Attorney General. They are not to consider a corporation's refusal to waive Category II privilege and work product protections against the company in making charging decisions. Significantly, however, prosecutors need not obtain any authorization if a corporation "voluntarily offers privileged information without a request from the government."

b. Advancement of Attorneys' Fees

The second major difference between the McNulty and Thompson Memoranda is that the McNulty document amends the Thompson Memorandum's instructions with respect to a company's advancement of counsel fees to employees. It instructs that fee advancement may be considered only in "extremely rare circumstances" in which "the totality of the circumstances" suggests that fee advancement is intended "to impede a criminal investigation." In such instances, the McNulty Memorandum requires prosecutors to obtain written approval from the Deputy Attorney General to consider fee advancement.

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84. Id. at 9.
85. Id. at 9.
86. Id. at 9-10.
87. Id. at 9.
88. Id.
89. Id. at 10.
90. Id. at 10.
91. Id. at 11.
92. Id. at 11-12.
93. Id. at 11 n.3.
94. Id.
in deciding whether to prosecute a business organization.\textsuperscript{95}

The McNulty Memorandum, however, does not alter Deputy Attorney General Thompson's approach with respect to other kinds of employee support. Thus, like its predecessor, the McNulty Memorandum provides:

a corporation's promise of support to culpable employees and agents, e.g., through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.\textsuperscript{96}

2. DOJ's Defense of the Holder-Thompson-McNulty Approach

Although the Holder Memorandum preceded the Enron debacle by more than two years, DOJ representatives invariably cite Enron, WorldCom, Adelphia, and similar fiascos to justify waiver demands and other corporate cooperation strategies. For example, in September 2006 hearings before the Senate Judiciary Committee, Mr. McNulty testified that "[t]he guidance contained in the Thompson Memorandum ... must be viewed in the context of [the] massive corporate scandals" that began with the fall of Enron in 2001.\textsuperscript{97} Citing a July 2002 statement by Senator Leahy that "a pickpocket who steals 50 dollars [should] not serve more time than a CEO who steals two million dollars," Mr. McNulty asserted that corporate cooperation strategies are essential tools in holding corporate wrongdoers accountable\textsuperscript{99} and that the policies embodied in the Thompson Memorandum provided "an effective balance between the interests of the business community and the investing public."\textsuperscript{100}

A year later, once again in hearings before the Senate Judiciary Committee,
DOJ spokesperson Karin Immergut, United States Attorney for Oregon and Chair of the Attorney General’s Advisory Committee, began her prepared remarks with a statement building on Mr. McNulty’s theme:

In the aftermath of corporate scandals like Enron, Worldcom and Adelphia, the Department has worked very hard to bring corporate criminals to justice, protect investors, shareholders and our nation’s retirees from the devastating effects of corporate fraud, and return assets to victims of crime. Since 2002, the Corporate Fraud Task Force—a multi-agency Task Force charged with restoring investor confidence in America’s corporations by investigating and prosecuting those who violate the trust of employees and investors—has utilized enhanced statutory tools provided by Congress to pursue corporate wrongdoing through the dedicated and professional efforts of agents and prosecutors whose effective investigation and prosecution of complex schemes have resulted in more than 1200 corporate fraud convictions and the recovery of billions of dollars for investors and shareholders in criminal and civil proceedings.101

Both Mr. McNulty and Ms. Immergut denied that DOJ’s privilege waiver requests are excessive.102 Ms. Immergut asserted that prosecutors seek privilege waivers on “a limited basis” and then only to learn facts necessary to streamline investigations.103 Mr. McNulty insisted that the determination whether to advance legal fees to employees, “[l]ike waiver . . . is the company’s choice alone.”104

Mr. McNulty also defended the Thompson Memorandum as a means of “promot[ing] transparency in the one area [in which] a prosecutor can exercise the most individual choice and judgment—the charging process.”105 He suggested that without such guidance “each individual prosecutor [would be] free to exercise his own unguided discretion about which corporation to charge and which not to[].”106 Ms. Immergut, like Mr. McNulty, similarly emphasized the importance of DOJ policies in “ensur[ing] consistency in corporate charging decisions,”107 and promoting “greater transparency and predictability in the

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102. McNulty Testimony, supra note 97, at 4 (“we do not ask for waiver in every investigation”); Immergut Testimony, supra note 101, at 2 (“privilege waivers [are] sought only from corporations that wish to cooperate”). see also Buchanan, supra note 37, at 598.

103. Immergut Testimony, supra note 101, at 3.

104. McNulty Testimony, supra note 97, at 6.

105. Id. at 3.

106. Id.

investigation and prosecution arena.” She described the McNulty Memorandum as a memorialization of common sense prosecutorial considerations created “in part . . . in response to concerns that prosecutors lacked uniform guidance on what factors to consider when deciding whether to charge a corporation.”

In contrast to the testimony of former Attorney General Edwin Meese that “[c]ompanies reasonably consider each of the Thompson Memorandum factors to be mandatory,” Mr. McNulty asserted that “privilege waiver is often volunteered or agreed to by a company for specific, business reasons,” in order to expedite the resolution of an investigation. Expressing the view that DOJ’s corporate cooperation policies often benefit corporations and their constituents, he contended that in many instances the Thompson Memorandum actually caused prosecutors to refrain from charging corporations. This is because it required them “to consider not simply the legally possible and traditional factors like the harm done by the crime, but the collateral consequences of their charging decisions—such as the impact to innocent shareholders.” In a somewhat fanciful statement in his cover letter to the December 2006 memorandum, Mr. McNulty declared that DOJ’s “corporate charging principles are not only familiar, but they are welcomed by most corporations in our country because good corporate leadership shares many of our goals.” In a similar vein, Ms. Immergut described the McNulty Memorandum as the product of a dialog between DOJ and members of the legal and business communities, particularly with respect to the new waiver request approval process.

DOJ officials have responded to arguments that corporate cooperation policies infringe on individual rights in a number of ways. During his tenure as Deputy Attorney General, Mr. Thompson apparently dismissed concerns over the chilling effect of DOJ policies on advancement of counsel fees. A 2004 article in the *Wall Street Journal* quoted Mr. Thompson as saying “they don’t need fancy legal representation to defend themselves. There are lots of reasonably priced
lawyers.” Similarly, in 2004, Mary Beth Buchanan, United States Attorney for the Western District of Pennsylvania, wrote that “[w]hile an employee may have a legitimate concern, cooperation with the corporation is part of the individual’s employment obligation.”

Mr. McNulty justified adverse consideration of a corporation’s advancement of legal fees in instances where that fact, taken together with other facts, gives rise to a real concern that the corporation is ‘circling the wagons,’ or, in other words, is using or conditioning the payment of attorneys’ fees as a tool to limit or prevent the communication of truthful information from current and former employees to the government in order to protect either the employees or the corporation itself.

In September 2007 Ms. Immergut took a somewhat more nuanced tack. Acknowledging the existence of tensions between individual rights and corporate cooperation, she suggested that the tensions’ real source inheres in the artificial nature of the corporate form. Ms. Immergut, however, stressed that legislative interference with DOJ’s policies would eliminate corporate incentives to cooperate with prosecutors, and allow “individual wrongdoers like Jeffery Skilling and Kenneth Lay to shield their misconduct, and elevate the interests of a culpable CEO over that of the shareholder.”

She asserted that the McNulty Memorandum strikes the right balance between protecting the attorney-client privilege and the government’s legitimate information requirements.

Although the reaction of the bar generally has been negative, some commentators support DOJ’s insistence on adherence to the Holder-Thompson-McNulty approach. In 2006, former Assistant Attorney General Christopher Wray and Richard Hur, for example, suggested that, if properly approached, the Thompson Memorandum could be a useful tool in promoting cooperation from corporations.

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116. Buchanan, supra note 37, at 602.

117. McNulty Testimony, supra note 97, at 6. According to Mr. McNulty,

You typically see this in combination with other indicators of non-cooperation—overly broad assertions of corporate representation of employees, a refusal to sanction wrongdoers, a failure to comply with document subpoenas and a failure to preserve documents. In contrast, when those factors aren’t present . . . a company’s advancement of legal fees will not cause the same concerns.

Id.

118. Immergut Testimony, supra note 101, at 9.

119. Id. at 10.

120. Id. at 12.

Memorandum could "continue to serve as a valuable tool for maintaining the integrity and prosperity of the American marketplace and for ensuring fairness and consistency in corporate criminal enforcement,"\(^{122}\) although they noted potential pitfalls and acknowledged the risks of misapplication of the Thompson Memorandum. Law professors Daniel Richman and Michael Siegel both testified in the September 2007 Senate Judiciary Committee hearings against legislation constraining DOJ's ability to implement corporate cooperation strategies and suggested that the McNulty Memorandum, with minor changes, could offer workable standards.\(^{123}\)

Of particular interest for purposes of this discussion, the latter two witnesses also suggested that the rights of individual employees should be protected in some fashion. Professor Siegel acknowledged that "[t]he most troubling arguments against privilege waiver stem from the impact it is said to have on the behavior of corporate employees who face questioning during an internal investigation and the lack of fairness that the prospect of waiver creates with respect to these individuals."\(^{124}\) He noted that "[t]he remedy lies with the rules regarding when and how corporate counsel must advise an employee that counsel does not represent the employee . . . rules [that] should be strengthened to protect employees in this situation."\(^{125}\) Professor Siegel also emphasized that "care must be taken to prevent a corporate employee from being double-teamed by the government and his employer simultaneously . . . [and that] the government should not encourage a cooperating corporation to exercise its authority over an employee to force the employee's cooperation with the government's investigation."\(^{126}\)

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122. Wray & Hur, supra note 19, at 1188.
124. Siegel Testimony, supra note 123, at 6.
125. Professor Siegel recommended that "[T]he McNulty memorandum should go further by making clear that the government will never pressure a company to use any power it holds over an employee (such as the power of termination) to coerce the employee into individual cooperation." Id. at 7. Surprisingly, he also suggested, however, that "the employee's trilemma is of her own making; that is, it is a result of her apparent participation in criminal activity. If she suffers consequences as a result of this behavior—be it termination from employment or a criminal conviction—she is not a candidate for a whole lot of sympathy," and that "only an employee truly mired in criminality would suffer [termination] rather than cooperate." Id.
126. Id.
C. THE ONGOING CAMPAIGN TO ALTER THE McNULTY MEMORANDUM AND OTHER FEDERAL CORPORATE COOPERATION POLICIES

1. EFFORTS TO INFLUENCE LAW ENFORCEMENT POLICY MAKERS

Although some commentators have argued in favor of corporate cooperation policies as important enforcement tools, the overwhelming reaction of the bar has been negative. DOJ released the McNulty Memorandum on December 12, 2006. On the same day, ABA President Karen Mathis issued a statement describing the memorandum as

but a modest improvement over the Department's previous policy as outlined in the Thompson Memorandum ... [that] threatens to further erode the ability of corporate leaders to seek and obtain the legal guidance they need to effectively comply with the law ... [and fails to] fully protect employees' legal rights.\(^\text{127}\)

In March 2007, in hearings before the House Judiciary Committee's Subcommittee on Crime, Terrorism and Homeland Security, Ms. Mathis testified that "[b]ecause companies will continue to feel extreme pressure to waive in virtually every case, the 'culture of waiver' created by the Thompson Memorandum will continue under the McNulty Memorandum. As a result, the applicability of the privilege will remain highly uncertain in the corporate context."\(^\text{128}\) In a similar vein, representatives of the Coalition to Preserve the Attorney-Client Privilege characterized the McNulty modifications as "largely procedural" and unlikely to "meaningfully diminish the threat that the [Thompson Memorandum] poses to the attorney-client privilege, the work product doctrine, employee rights or—as a result—the ability of organizations to assure compliance or investigate possible noncompliance."\(^\text{129}\) The ABA contends that the McNulty Memorandum continues to "cause the routine compelled waiver of attorney-client privilege and work product protections"; further "weaken[s] the attorney-client privilege between companies and their lawyers and undermines companies' internal compliance programs"; and "erode[s] employees' legal rights by pressuring companies to take unfair punitive actions against them during investigations."\(^\text{130}\) The Coalition raises particular concerns that the McNulty Memorandum leaves open the possibility of coercion with respect to discretionary decisions to advance legal


\(^{128}\) Mathis March 2007 Testimony, supra note 9, at 6; see also Mathis Statement, supra note 127 (describing the McNulty Memorandum as "fall[ing] far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee protections ... ").

\(^{129}\) Coalition March 2006 Testimony, supra note 53, at 4.

\(^{130}\) Id.
fees to employees;\textsuperscript{131} fails to amend language pertaining to joint defense agreements and information sharing between employers and employees; and encourages termination of employees who choose to exercise Fifth Amendment rights.\textsuperscript{132} Consequently, both the ABA and the Coalition continue to press DOJ and other federal agencies to modify these policies,\textsuperscript{133} and the ABA has encouraged its more than 400,000 members to join in the campaign.\textsuperscript{134} In the words of a recent Coalition statement, it is necessary to curtail federal corporate cooperation policies because they "allow prosecutors and enforcement personnel to assume the mantle of a role properly reserved to courts and judges."\textsuperscript{135} These kinds of concerns also prompted a group of former senior DOJ officials to join in the effort to persuade DOJ and SEC officials to change direction.\textsuperscript{136}

As of this writing, the ABA, the Coalition and other opponents of the McNulty Memorandum continue to urge replacement of DOJ's current cooperation standards, as well as those of the SEC and other agencies,\textsuperscript{137} with a different, less intrusive calculus. (To date, however, neither DOJ nor SEC has agreed to material changes in the controversial policies. Consequently, the ABA, the Coalition, and other opponents of federal corporate cooperation also continue to focus considerable effort on persuading Congress to intervene legislatively to override federal corporate cooperation strategies.)

2. LEGISLATIVE INITIATIVES TO CONSTRAIN FEDERAL CORPORATE COOPERATION POLICIES

By 2005, ABA and Coalition efforts to engage Congress in the controversy over federal corporate cooperation policies\textsuperscript{138} began to bear fruit. In August of...
that year, Representative Dan Lungren wrote to the USSC to support elimination of all references to waiver of attorney-client and work product protections in the Organizational Guidelines, and a few months later Representative James F. Sensenbrenner, then Chairman of the House Judiciary Committee, and Senator Arlen Specter, then Chairman of the Senate Judiciary Committee, publicly questioned DOJ’s policies.

Congress has intervened to overturn DOJ prosecution policies in the past. The most notable instance of legislative intervention in recent years, known as the McDade Amendment, became law in 1999. The McDade Amendment culminated a bitter ten-year debate over DOJ policies pertaining to the applicability of state ethics rules corresponding to the prohibitions set forth in Model Rule of Professional Conduct 4.2 against direct contact with persons known to be represented by counsel. The dispute involved a policy directive initiated by Dick Thornburgh during his tenure as Attorney General. In June 1989, Mr. Thornburgh issued a memorandum instructing DOJ attorneys that, notwithstanding contrary state ethics rules, they could communicate directly with “any person who has not been made the subject of formal federal adversarial proceedings arising from that investigation, regardless of whether that person is known to be represented by counsel.” Subsequently, under Mr. Thornburgh’s successor, Attorney General Janet Reno, DOJ promulgated regulations permitting its attorneys to make direct contact with employees of organizations under investigation, even if the organization was represented by counsel, provided that the employees were not at a high level in the organization or “known by the government to be participating as a decision maker in the determination of the organization’s legal position.” Ultimately, despite DOJ’s reliance on the

Chairman, S. Comm. on the Judiciary (June 4, 2007) (on file with author) (advocating support for passage of S. 186, the “Attorney-Client Protection Act of 2007” on grounds that the McNulty Memorandum “falls far short of what is needed to prevent further erosion of fundamental attorney-client privilege, work product, and employee legal protections”).


Supremacy Clause to argue that federal law enforcement policy trumped state ethics rules, Congress legislatively overruled DOJ.¹⁴⁵ The McDade Amendment specifically requires government attorneys to abide by the ethics rules of the states in which they practice.¹⁴⁶

a. S. 186 and H.R. 3013

Mindful of the McDade Amendment precedent, opponents of DOJ’s corporate cooperation policies consistently have sought legislative intervention to override first the Thompson Memorandum and then the McNulty Memorandum. As noted earlier, shortly before the USSC’s April 2006 decision to delete the waiver language of Advisory Committee note 8C2.5, the House Judiciary Committee’s Subcommittee on Crime, Terrorism, and Homeland Security held the first Congressional hearings on federal corporate cooperation policies.¹⁴⁷ The Senate Judiciary Committee subsequently convened hearings in September 2006,¹⁴⁸ and in December 2006 Senator Specter introduced legislation designed to address the corporate cooperation debate.¹⁴⁹

S. 186, the bill currently pending in the Senate, would create the “Attorney-Client Privilege Protection Act of 2007” for purposes of delineating “clear and practical limits designed to preserve the attorney-client privilege and work product protections available to an organization and preserve the constitutional rights and other legal protections available to employees of such an organization.”¹⁵⁰ The pivotal provisions of S. 186 state:

In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not—

(1) demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product;

(2) condition a civil or criminal charging decision relating [to a [sic] organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government—

(A) any valid assertion of the attorney-client privilege or privilege for attorney work product;

¹⁴⁶. Id.
¹⁴⁷. See supra text accompanying note 61.
¹⁵⁰. S. 186, 110th Cong. § 3 (as received by S. Comm. on the Judiciary, Nov. 14, 2007).
(B) the provision of counsel to, or contribution to the legal defense fees or expenses of, an employee of that organization;

(C) the entry into a joint defense, information sharing, or common interest agreement with an employee of that organization if the organization determines it has a common interest in defending against the investigation or enforcement matter;

(D) the sharing of information relevant to the investigation or enforcement matter with an employee of that organization; or

(E) a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee or other legal protections of that employee in response to a Government request; or

(3) demand or request that an organization, not take any action described in paragraph (2).

The legislation, however, would not "prohibit an organization from making, or an agent or attorney of the United States from accepting, a voluntary and unsolicited offer to share the internal investigation material of such organization."152

In March 2007, the House Judiciary Subcommittee on Crime, Terrorism, and Homeland Security again held hearings on the controversy, specifically to examine "[t]he McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations."153 On July 12, 2007, Representative Scott and several co-sponsors154 introduced H.R. 3013, the House counterpart of S. 186.155 The House moved relatively quickly to address the proposed legislation. On August 1, 2007, the House Judiciary Committee reported out the bill.156

b. The September 2007 Hearings

On September 18, 2007, the Senate Judiciary Committee held hearings on "Examining Approaches to Corporate Fraud Prosecutions and the Attorney-
Client Privilege Under the McNulty Memorandum.' This round of hearings featured testimony discussed earlier from Ms. Immegut and Professors Richman and Siegel in support of DOJ's position. In addition to statements from the ABA and the Coalition to Preserve the Attorney-Client Privilege, former Attorney General Dick Thornburgh, a member of the group of former senior DOJ officials, testified in support of legislative action. He characterized the McNulty Memorandum as little different from its predecessor:

No matter what its procedural requirements or how reasonably the Justice Department may promise to implement it, a waiver policy poses overwhelming temptations to target organizations, often desperate to save their very existence. Prosecutors do not need to issue express requests for privileged documents to receive them. The same insidious result arises from policies that offer credit to organizations if they take adverse actions against employees that prosecutors deem culpable. Andrew Weissmann, former Director of DOJ's Enron Task Force, joined in testifying in favor of Congressional action to override the McNulty Memorandum. He stressed four points. First, corporations of significant size are likely to be subject to investigation and prosecution at some point and "the mere indictment of a company carries with it the risk of it being the equivalent of a death sentence for the company and resulting in severe consequences to hundreds or even thousands of innocent people." Second, a lack of national oversight by Main

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158. See id.
159. See id.
160. In a July 30, 2007, letter to the House and Senate Judiciary Committees, the former DOJ officials continue to stress their belief "that the McNulty Memorandum maintains the fundamental flaws of the prior regime." Letter from Stuart M. Gerson, Edwin Meese III, Richard Thornburgh, Carol E. Dinkins, Jamie Gorelick, Walter E Dellingar, III, Theodore B. Olson, Kenneth, W. Starr, and Seth P. Waxman to the Hon. Patrick Leahy, Chairman, S. Comm. on the Judiciary; Hon. Arlen Specter, Ranking Member, S. Comm. on the Judiciary; Hon. John T. Conyers, Chairman, House Comm. on the Judiciary; and Hon. Lamar S. Smith, Ranking Member, House Comm. on the Judiciary (July 30, 2007), http://www.abanet.org/poladv/priorities/privilegewaiver/ (follow link to letter).
162. Weissmann Testimony, supra note 11, at 5. Mr. Weissmann explained:

The McNulty Memorandum's examples of purported "purely factual" information illustrate the problem. As examples of "purely factual" material, the memorandum lists: "witness statements, or purely factual interview memoranda regarding the underlying misconduct, organization charts created by company counsel, factual chronologies, factual summaries, or reports (or portions thereof) containing investigative facts documented by counsel." But who an attorney interviews, what questions an attorney asks, and what information is chosen as important to memorialize can reveal important information about the company's defense strategy and the attorney's evaluation of the strength and weaknesses of the issues in a particular case. For this reason, courts have repeatedly held
Justice over decisions to charge corporations exacerbates the risk of current policies, especially in light of the relative inexperience of many line prosecutors in corporate matters.\textsuperscript{163} Third, DOJ policies unfairly impact individuals and tend to reward companies that punish employees for asserting their constitutional rights. Fourth, federal corporate cooperation strategies undermine the attorney-client privilege, particularly because much of the material described by the McNulty Memorandum as "purely factual" is protected by the attorney-client and/or work product privileges.\textsuperscript{164}

The committee also received a statement from a highly respected and influential newcomer to the proceedings—Delaware's former Chief Justice E. Norman Veasey.\textsuperscript{165} Chief Justice Veasey summarized information from defense counsel reporting on encounters with prosecutors using heavy handed tactics to obtain corporate cooperation, Chief Justice Veasey noted accounts of prosecutors ridiculing the idea that they needed to obtain permission from Main Justice to proceed with waiver requests or to construe advancement of attorneys’ fees to employees against a company.\textsuperscript{166} Chief Justice Veasey concluded with the observation that "the defense rights of employees and decisions regarding the application of the attorney-client privilege and work product doctrine are protections the courts, not the executive branch, should regulate."\textsuperscript{167} He stressed that the critical question "is whether Congress should enact legislation that will require prosecutors to return to practices that successfully served them for decades and were acknowledged as fair to all parties involved."\textsuperscript{168}

Following the September 2007 effort to persuade Congress to intervene in the corporate cooperation controversy continued to build momentum. On November 13, 2007, the House of Representatives passed H.R. 3013.\textsuperscript{169} As of this writing, it remains unclear whether S. 186 will garner enough support to result in legislation.

\textsuperscript{163} Id. at 2.
\textsuperscript{164} Id. There are many ways for companies to provide the government with valuable information without waiving privilege protections. For instance, a company can provide the government with nonprivileged documents that will further the investigation and steer investigators to company employees with critical information. They can also proffer salient information through their attorneys.
\textsuperscript{166} See id. at 13.
\textsuperscript{167} Id.
\textsuperscript{168} Id.
\textsuperscript{169} CONG. REC. H13,562-63 (daily ed. Nov. 13, 2007).
3. THE POTENTIAL IMPACT OF POLICY CHANGES AND LEGISLATIVE INTERVENTION

The threat of legislative action to constrain federal corporate cooperation strategies was undoubtedly a factor in persuading DOJ to modify the Thompson Memorandum. Nevertheless, despite ongoing opposition to the McNulty Memorandum, to date efforts to persuade DOJ and other federal agencies, to make major changes to their corporate cooperation policies have been unsuccessful. Congress undoubtedly could place significant limitations on the ability of prosecutors and other government attorneys to demand waivers of corporate attorney-client privilege and work product protections or consider employee financial support in making charging decisions, but the overall impact of legislative change may not be quite as striking as proponents hope. Given the vast array of federal crimes and the number of potential defendants within the purview of every U.S. Attorney's office, prosecutors necessarily must exercise discretion in determining investigative targets and the nature of any charges to be filed. Consequently, legislative intervention in the corporate cooperation controversy would be unlikely to have results as dramatic as the McDade Amendment.

The McDade Amendment directly addressed DOJ instructions that permitted government attorneys to disregard state professional ethics rules. Following the enactment of the new law it was a relatively straightforward matter to ensure compliance by holding government attorneys to the same standards as other attorneys in particular jurisdictions. The situation is somewhat different with respect to federal corporate cooperation policies. First, as Mr. McNulty himself pointed out, there is a transparency issue. Prosecutors operating with finite resources will inevitably select some corporations to prosecute and permit others to sidestep the criminal process. Somehow prosecutors need to decide which organizations to charge. In the absence of mandatory policies like those set forth in the McNulty Memorandum, prosecutors need not focus on factors such as privilege waiver, advancement of attorneys' fees or other specific criteria. It blinks reality, however, to suggest that they will ignore corporate cooperation in exercising their prosecutorial discretion. Even more importantly, neither S. 186 nor H.R. 3013 blocks voluntary waiver of attorney-client privilege or work product protections. Indeed, it would be impractical and counterproductive to do so, but in light of the relevant history, many corporations are likely to continue

170. See sources cited supra note 25.
171. Of course, problems of multi-jurisdictional practice confront prosecutors just as they do other attorneys.
172. See supra Part I.B.2.
173. See, e.g., Baker, supra note 2, at 312 ("Given the enormous number of federal crimes and the limited number of federal judges, the Justice Department can bring only a relatively small number of criminal cases . . . [s]o the Department is highly selective.").
175. See supra Part I.C.2.a.
to "volunteer" cooperation for some time in the hope of placating prosecutors and diverting their attention elsewhere.\textsuperscript{176}

If the pending bills become law, they will have a significant impact, but whether even federal legislation is unlikely to undo the prevailing "culture of waiver."\textsuperscript{177} Whether or not Congress acts, it seems likely that individual rights will remain at risk for some time to come.

II. \textbf{UNITED STATES v. STEIN}

Perhaps the most dramatic events in the battle over corporate cooperation policies have taken place in a courtroom in the United States District Court for the Southern District of New York in connection with the investigation of KPMG LLP and several former KPMG partners and employees for tax fraud. The following sections discuss the KPMG matter and the potential impact of Judge Kaplan's decisions.

A. THE 2006 STATE ACTION HOLDING, SUPPRESSION AND ATTORNEYS' FEES DECISIONS

1. \textbf{THE STATE ACTION DECISION}\textsuperscript{178}

In 2002, the Internal Revenue Service initiated an investigation into a matter reported to be the largest tax shelter fraud in United States history.\textsuperscript{179} Shortly thereafter, the Permanent Subcommittee on Investigations of the Senate Committee on Governmental Affairs held hearings on the alleged fraud.\textsuperscript{180} Witnesses included several current and former KPMG partners and employees;\textsuperscript{181} they did not receive a friendly reception.\textsuperscript{182} Concerned about the hostile reaction to KPMG partners in the Senate hearing and well aware of Arthur Andersen's fate, KPMG's chair moved quickly to find a way to avoid indictment.\textsuperscript{183} The firm retained well known defense attorney Robert Bennett of Skadden Arps Slate Meagher & Flom and instructed him to find "a new cooperative approach" to

\textsuperscript{176} Even in the absence of other consequences, the specter of shareholder derivative lawsuits and other civil proceedings looms large for the directors and officers of corporations facing criminal prosecutions and civil enforcement actions. So long as corporate managers face the possibility of significant personal liability as a result of corporate criminal violations, they are likely to want to do everything possible to minimize the risk to the entities they serve, including cooperating with the government against employees.


\textsuperscript{178} The term "state action" is used broadly herein to connote action by the federal government as well as state or local governments.

\textsuperscript{179} See Stein I, 435 F. Supp. 2d, at 338.

\textsuperscript{180} Id.

\textsuperscript{181} Id.

\textsuperscript{182} Id. at 338-39.

\textsuperscript{183} Id.
save the firm. KPMG then “cleaned house” by terminating a number of senior personnel. The firm asked several senior partners to leave, including deputy chair Jeffrey Stein. The firm negotiated a generous retirement agreement with Mr. Stein, including a promise that the firm would pay counsel fees he incurred in defending charges related to his tenure at KPMG.

Despite its housecleaning, KPMG’s efforts to prevent a criminal referral to DOJ proved unsuccessful. Early in 2004, the United States Attorney’s Office for the Southern District of New York opened an investigation into the matter and issued “subject” letters to somewhere between twenty and thirty KPMG partners and employees. A few weeks after the U.S. Attorney’s Office issued the letters, KPMG’s counsel met with government attorneys. Although KPMG’s lawyers emphasized the firm’s intent to cooperate fully with the government, they also noted that KPMG was contemplating advancing counsel fees to current and former partners and employees involved in the investigation and sought the government’s view on the plan.

Judge Kaplan found that the prosecutors’ responses to KPMG’s counsel in exchanges that followed during and after the initial meeting underscored the threat inherent in the Thompson Memorandum—that prosecutors would consider advancement of counsel fees to “culpable” employees as evidence of a non-cooperative attitude on the part of an organization under investigation. In the court’s view, “While the USAO did not say in so many words that it did not want KPMG to pay legal fees, no one at the meeting could have failed to draw that conclusion.” Subsequent events emphasized the point. KPMG responded to negative indications from prosecutors with a novel approach. The firm offered to advance counsel fees to individuals under investigation, but only upon their agreement to cooperate fully and inform the government of the plan. KPMG applied this policy to everyone under investigation, including Mr. Stein.

During the next two years prosecutors and KPMG lawyers regularly communicated about employees’ cooperation with the government. Judge Kaplan found that “the government took full advantage” of KPMG’s eagerness to cooperate, “repeatedly notifying] KPMG’s counsel when KPMG personnel failed to

184. Id.
185. Id.
186. Id.
187. Id.
188. The letters informed the addressees that conduct was under investigation by a grand jury. Id. at 341.
189. Id.
190. Id.
191. Id.
192. Id. at 344.
193. Id. at 346-47.
194. Id.
195. Id. at 347.
comply with the government demands." KPMG advised the individuals' counsel that the payments would cease if their clients refused to cooperate, then cut off payments to those who failed to comply with government interview demands. In August 2005, KPMG entered into a deferred prosecution agreement in which the firm agreed to cooperate fully with the government. In August 2005, the grand jury indicted nineteen individuals, including sixteen former KPMG partners and employees, in connection with the alleged tax fraud.

Shortly thereafter, in January 2006, the individual defendants formerly associated with KPMG ("the KPMG defendants") moved either to dismiss the indictments against them or to obtain alternative relief. In so doing, the KPMG defendants raised a question that had been hovering at the margins of the corporate cooperation controversy for several years: Whether the conduct of a business entity in connection with a criminal investigation will be attributed to the government if prosecutors encourage the entity to coerce its employees to cooperate in the investigation? Ruling on the motions, Judge Kaplan characterized this question as one "arising at the intersection of three principles of American law"—the Fifth Amendment substantive due process right to a fundamentally fair trial, the Sixth Amendment right to assistance of counsel, and the principle that "an employer often must reimburse an employee for legal expenses when the employee is sued, or even charged with a crime, as a result of doing his or her job."

The court concluded that the government—through the actions of prosecutors from the United States Attorneys Office for the Southern District of New York in combination with the impact of the Thompson Memorandum—had violated the constitutional rights of several KPMG defendants.

In its analysis, the court noted the evolution of DOJ's formal corporate cooperation policies and then recounted the history of KPMG's interactions with the government following the initiation of the tax shelter investigation. In particular, the court emphasized three key facts stipulated to by the parties. First, although neither KPMG's partnership agreement nor its bylaws addressed advancement of counsel fees, KPMG had a "longstanding voluntary practice" of

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196. Id.
197. Id.
198. Id.
199. Id. at 349. One of the original seventeen KPMG defendants pled guilty. See United States v. Stein (Stein I), 495 F. Supp. 2d 390, 394 n.2 (S.D.N.Y. 2007).
201. See id. at 335.
202. Id.
203. Id. It bears mentioning that the United States Attorney for the Southern District of New York earlier had called for complete waivers of attorney-client privilege and work product protections by targeted companies. See American College of Trial Lawyers, supra note 2, at 330 n.98-99.
204. Stein I, 435 F. Supp. 2d at 338.
advancing legal fees without preset caps or conditions such as cooperation with the government. Second, KPMG had adhered to this practice without regard to defense costs, paying more than $20 million in fees to defend four partners in one criminal investigation and related SEC inquiry. Third, at least since 1974, KPMG had never denied advancement of legal fees to any partner or employee.

Judge Kaplan stressed that once KPMG decided to cooperate, the firm worked tirelessly to persuade the government not to indict the partnership by “touting its cooperation with the investigation and its limitation of attorneys’ fees for individuals.” The court concluded that the Thompson Memorandum caused KPMG to consider departing from its longstanding fee advancement policy; prosecutors deliberately reinforced the threat inherent in the Thompson Memorandum; and the government’s conduct revealed a desire to minimize the involvement of defense attorneys for the individuals it deemed culpable. Most significantly, the court found that “KPMG’s decision to cut off all payments of legal fees and expenses to anyone who was indicted and to limit and to condition such payments prior to indictment upon cooperation with the government was the direct consequence of the pressure applied by the Thompson Memorandum and the USAO.”

Judge Kaplan then considered the individuals’ claims that the government’s conduct violated constitutional rights guaranteed by the Fifth and Sixth Amendments. The court began by examining the parameters of the Fifth Amendment right to a fundamentally fair trial, emphasizing that “the government may not both prosecute a defendant and then seek to influence the manner in which he or she defends the case.” Judge Kaplan observed that the defense of a case of the magnitude of the KPMG litigation requires significant resources, and that “the government had interfered with the ability of the KPMG Defendants to obtain resources they would otherwise have had,” as well as their choice of counsel. Turning to the Thompson Memorandum and its impact, the court criticized the memorandum insofar as it was directed toward “punish[ing] those whom prosecutors deem culpable” by “depriving employees of corporate aid.” Judge Kaplan admonished: “The job of prosecutors is to make the government’s best case to a jury and to let the jury decide guilt or innocence.”

205. Id. at 340.
206. Id.
207. Id.
208. Id. at 348.
209. Id. at 352-53.
210. Id. at 357.
211. Id.
212. Id.
213. Id.
214. Id.
The court analyzed "the right to a fair trial in criminal proceedings [as] a fundamental liberty interest subject to substantive due process protection." Judge Kaplan observed that the investigation at issue was "no garden-variety criminal case," but "the largest tax fraud case in United States history." He concluded that "[t]here is no necessary inconsistency between an entity cooperating with the government and, at the same time paying defense costs of individual employees and former employees." Accordingly, the court held that "the Thompson Memorandum [was] not narrowly tailored to achieve a compelling objective." Citing testimony by KPMG's new chief legal officer, former U.S. District Judge Sven Erik Holmes, Judge Kaplan concluded that "[f]ew if any competent defense lawyers would advise a corporate client at risk of indictment that it should feel free to advance legal fees to individuals," because to do so might appear to be protecting culpable employees. Consequently, in practice the Thompson Memorandum operated to discourage advancement of legal fees. The court further reasoned that the prosecutors handling the KPMG matter understood . . . that the threat inherent in the Thompson Memorandum, coupled with their own reinforcement of that threat, was likely to produce exactly the result that occurred—KPMG's determination to cut off the payment of legal fees for any employees or former employees who were indicted and to limit and condition their payment during the investigative stage.

The court therefore concluded that, like the Thompson Memorandum, the prosecutors' actions could not withstand strict scrutiny under the Due Process Clause.

Judge Kaplan then turned to the KPMG defendants' Sixth Amendment claims. After canvassing relevant precedent, the court held that the government had acted with the purpose of minimizing the defendants' access to resources necessary to mount their defenses or, at least, "in reckless disregard that this would be the likely result of its actions." In the court's view: "The Thompson Memorandum discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves . . . [and] undermines the proper

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215. Id. at 361.
216. Id. at 362.
217. Id. at 364.
218. Id.
219. Id.
220. Id.
221. Id. at 365.
222. Id.
223. Id. at 366.
functioning of the adversary process that the Constitution adopted."\textsuperscript{224} The court viewed the events at issue as creating a structural error that permeated the entire proceedings against the KPMG defendants.\textsuperscript{225} Concluding that the KPMG defendants did not need to establish prejudice, and that it was present in any event, the Court held that the government had violated the KPMG Defendants’ Sixth Amendment right to counsel.\textsuperscript{226}

Finally, the court turned to the question of remedy. Judge Kaplan rejected the possibility of ordering the government to pay the KPMG defendants’ counsel fees as prohibited by sovereign immunity principles.\textsuperscript{227} Rather than dismiss the indictments, however, the court held that it could exercise ancillary jurisdiction over the fee dispute matter and order KPMG to pay the individuals’ legal fees.\textsuperscript{228} The court informed the parties that it would open a civil case file and permit the individual defendants to file complaints seeking to compel KPMG to pay their legal fees.\textsuperscript{229}

2. THE COURT’S RULING ON THE SUPPRESSION MOTIONS

A few weeks later, the court ruled on motions filed by nine of the KPMG defendants to suppress statements previously made to the government.\textsuperscript{230} Judge Kaplan held that, as a result of the pressure it had exerted on KPMG, the government had improperly coerced statements from two of the nine moving defendants.\textsuperscript{231} The court, denied the other motions to suppress, because the defendants failed to establish that they would not have made the statements they sought to exclude but for the government’s improper conduct.\textsuperscript{232} The Court held that “state action will be found where the government commands or significantly encourages a private entity to take the specific action alleged to violate the Fifth Amendment, as well as where the government is ‘entwined’ in the management or control of specific conduct at issue,”\textsuperscript{233} In so doing, Judge Kaplan cited the Supreme Court’s decision in \textit{Garrity v. New Jersey}\textsuperscript{234} for the proposition that “[t]he state is prohibited in either event from compelling a statement through

\textsuperscript{224} Id.
\textsuperscript{225} Id.
\textsuperscript{226} Id.
\textsuperscript{227} Id. at 374-76.
\textsuperscript{228} Id. at 378.
\textsuperscript{229} Id. at 380. The court gave the KPMG defendants fourteen days to file their complaints, obtain summonses, and serve KPMG and remarked that they also could seek declaratory relief and an expedited hearing. Id.
\textsuperscript{231} Id. at 331, 333.
\textsuperscript{232} Id. at 330.
\textsuperscript{233} Id.
In light of this analysis, Judge Kaplan found "that the government, both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights." Accordingly, the court suppressed the statements made by two of the KPMG defendants.

3. THE FEE LITIGATION

Meanwhile, in accordance with Judge Kaplan's June 6th ruling, the KPMG defendants filed civil actions seeking to compel the firm to advance counsel fees. KPMG moved to dismiss the complaint for lack of jurisdiction or, alternatively, to compel arbitration on the fee issue. In a decision issued on September 6, 2006, the court treated KPMG’s pleading as a motion for summary judgment, denied it, and set the case for trial.

B. THE SECOND CIRCUIT’S RULING ON ANCILLARY JURISDICTION

Following the district court’s September 6th order, KPMG appealed both the district court’s assertion of ancillary jurisdiction and the denial of the firm’s motion to compel arbitration to the United States Court of Appeals for the Second Circuit. After reviewing the jurisdictional complexities relevant to the proceedings, the Second Circuit decided to treat the matter as a motion for a writ of mandamus against the District Court. The appellate court then vacated the portions of Judge Kaplan’s June 6th and September 6th orders to the extent that they asserted ancillary jurisdiction over KPMG with respect to the fee claims. The court held that it was beyond the power of the district court to assert jurisdiction in these circumstances, and it dismissed the fee payment issue complaint against KPMG. In so doing, the appellate court noted that it viewed the necessity of initiating an ancillary proceeding as "far less pressing" than Judge Kaplan, observing that more direct remedies were available, such as dismissal of the indictments against individuals whose Fifth and Sixth Amend-

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236. Id. at 337.
237. Id. at 338.
239. Id. at 237-39.
240. Id.
241. Stein v. KPMG, LLP, 486 F.3d 753, 775-76 (2d Cir. 2007).
242. Id. at 756.
243. Id.
244. Id. at 764.
ment rights were violated.\textsuperscript{245} The appellate court, however, specifically declined to express any opinion on the merits of the criminal case.\textsuperscript{246}

C. THE 2007 ORDER DISMISSINGINDICTMENTS AGAINST THIRTEEN KPMG DEFENDANTS

In July 2007, on remand following the Second Circuit's grant of mandamus, Judge Kaplan dismissed the indictments against thirteen of the sixteen individual KPMG defendants.\textsuperscript{247} The court began its analysis by reexamining the factual bases of its \emph{Stein I} decision in response to the government's claim that the court's constitutional holdings rested on clearly erroneous findings of fact.\textsuperscript{248} In so doing, the court emphasized that both "the Bar in general and KPMG's counsel in particular" shared the Court's understanding that the Thompson Memorandum "discourage[d] payment of legal fees for company employees by increasing the risk of indictment of a company under investigation that chooses to make such payments."\textsuperscript{249} The court cited various communications and Congressional testimony authored by the ABA and the Coalition to Preserve the Attorney-Client Privilege, among others,\textsuperscript{250} and noted the admonition of another District Judge that the Thompson Memorandum was "fraught with risk of constitutional harm."\textsuperscript{251} Judge Kaplan also cited a recent work co-authored by KPMG counsel Robert Bennett advising businesses against fee advancement because of the risk that they would be deemed uncooperative by prosecutors;\textsuperscript{252} as well as several law review articles.\textsuperscript{253} The Court forcefully stated that the Thompson Memorandum had influenced KPMG and its counsel even before the pivotal meetings with prosecutors, reiterating that the critical decisions with respect to payment of attorneys' fees "were prompted by the Thompson Memorandum and the USAO's negative reaction . . . to the possibility that KPMG would pay any legal fees in the absence of a legal obligation to do so, despite ample evidence that KPMG would otherwise have advanced these costs."\textsuperscript{254} Judge Kaplan further noted that KPMG had paid counsel fees for eleven of the KPMG defendants in related civil litigation, citing new evidence that had come to light since \emph{Stein I}.\textsuperscript{255}

\textsuperscript{245} Id. at 762.

\textsuperscript{246} Id.

\textsuperscript{247} United States v. Stein (\emph{Stein II}) 495 F. Supp. 2d 390, 394 (S.D.N.Y. 2007).

\textsuperscript{248} Id. at 393 & n.1.

\textsuperscript{249} Id. at 397.

\textsuperscript{250} Id. at 397-98.

\textsuperscript{251} Id. at 397 (citing United States v. Rosen, 487 F. Supp. 2d 721, 737 (E.D. Va. 2007)).


\textsuperscript{253} \emph{Stein II}, 495 F. Supp. 2d at 339 & n.28.

\textsuperscript{254} Id. at 404.

\textsuperscript{255} Id. at 406.
After reaffirming the validity of its earlier factual findings, the court revisited its legal analysis, focusing on the substantive due process holding. The court clarified that it viewed the Thompson Memorandum as a regulation in substance. Judge Kaplan therefore analyzed the memorandum as legislation rather than employing the "shocking to the conscience" standard applicable to the acts of government officials.\textsuperscript{256} In the court's view, "a substantive due process challenge to the Thompson Memorandum properly is analyzed first by determining whether it impinged upon a fundamental right, and if it did, by then considering whether it was narrowly tailored to serve a compelling governmental interest."\textsuperscript{257} Judge Kaplan ruled that the Thompson Memorandum was insufficiently narrowly tailored to pass muster. He also concluded that the KPMG prosecutors' "deliberate interference with the defendants' rights was outrageous and shocking in the constitutional sense because it was fundamentally at odds with two of our most basic constitutional values—the right to counsel and the right to fair criminal proceedings."\textsuperscript{258} The court, however, emphasized that it would have reached the same result, whether the relevant measure was deliberate indifference or the shocking to the conscience standard.\textsuperscript{259}

The court then reviewed the impact of the government's conduct on the KPMG defendants, noting the millions of documents in both electronic and tangible form produced by the government,\textsuperscript{260} as well as the complexity of pretrial motions and the anticipated length and scope of trial.\textsuperscript{261} Judge Kaplan concluded that the preparation of counsel for the KPMG defendants had been constrained by the firm's refusal to advance attorneys' fees. This refusal "caused [the individuals] to restrict the activities of their counsel" in pretrial motions practice and other important respects "and/or left them without information technology assistance necessary for dealing with the mountains of electronic discovery."\textsuperscript{262}

Finally, the court returned to the question of remedy. Rejecting the government's arguments with respect to the availability of Criminal Justice Act funds to defendants in need of financial assistance,\textsuperscript{263} and stressing that the government had denied the KPMG defendants their choice of counsel,\textsuperscript{264} the court concluded that none of the KPMG defendants could "afford to defend this case at any meaningful level."\textsuperscript{265} Although it emphasized that the there is no constitutional

\textsuperscript{256} Id. at 412.
\textsuperscript{257} Id.
\textsuperscript{258} Id. at 414.
\textsuperscript{259} Id.
\textsuperscript{260} Id. at 417.
\textsuperscript{261} Id. at 418.
\textsuperscript{262} Id.
\textsuperscript{263} Id. at 420 (citing 18 U.S.C. § 3006A (2004)) (maximum of $7000 available to financially eligible persons charged with felony violations).
\textsuperscript{264} Id.
\textsuperscript{265} Id. 425.
guarantee of “a ‘Dream Team’ or a multimillion dollar defense,” the court held that the Constitution does guarantee those who can afford it the

right to spend their money for the best (or what is not always the same thing, the most expensive) defense that money can buy, free of unjustified interference by the government and prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one.266

On the basis of this reasoning, the court dismissed the indictments against thirteen of the sixteen KPMG defendants.267 It denied the other three KPMG defendants’ motions to dismiss on grounds that they had failed to establish that KPMG would have paid their defense costs absent the government’s misconduct.268

In reaching the decision to dismiss the indictments, the court stressed “that prosecutors can and should be aggressive in the pursuit of the public interest. But there are limits on the permissible actions of even the best prosecutors.” Judge Kaplan closed with a pointed statement about the Thompson Memorandum and the government’s conduct:

The Department of Justice in promulgating the aspects of the Thompson Memorandum here at issue, and the USAO deliberately or callously prevented many of these defendants from obtaining funds for their defense that they lawfully would have had absent the government’s interference. They thereby foreclosed these defendants from presenting the defenses they wished to present and, in some cases, even deprived them of counsel of their choice. This is intolerable in a society that holds itself out to the world as a paragon of justice. The responsibility for the dismissal of this indictment as to thirteen defendants lies with the government.270

D. THE POTENTIAL IMPACT OF THE STEIN RULINGS

Judge Kaplan’s rulings in the KPMG prosecutions breathed new life into the state action doctrine in the context of corporate cooperation, particularly because the court took such care to lay out the analysis supporting its rulings. Nevertheless, it seems unwise to place too much stock in state action jurispru-
dence as a constraint on federal corporate cooperation strategies for several reasons. First, despite Judge Kaplan's analysis and academic literature suggesting other bases to find state action in connection with the impact of corporate cooperation policies, it remains to be seen whether the Second Circuit will uphold the district court's dismissal of the indictments and whether other federal courts will agree with Judge Kaplan's reasoning. Judge Kaplan rejected the government's argument that Sixth Amendment rights attach only upon the formal initiation of adversarial proceedings. Second, the nature of the issues at stake makes it unlikely that these types of cases will get to the courts in significant numbers. Third, even judicial decisions in favor of individual defendants are unlikely to diminish the in terrorem effect of the McNulty Memorandum or undercut the "culture of waiver" for some time to come, particularly in light of the fact-specific nature of state-action jurisprudence, the inconsistency of Supreme Court precedent, and the potentially draconian consequences of indictment for companies.

1. The Stein Analysis as Precedent for State Action Holdings

The threshold question is whether the United States Court of Appeals for the Second Circuit will uphold Judge Kaplan's dismissal of the indictments of the thirteen KPMG defendants. In granting mandamus and vacating the district court's assertion of ancillary jurisdiction over KPMG, the Second Circuit emphasized that it "express[ed] no opinion" on Judge Kaplan's Fifth and Sixth Amendment rulings. As noted above, in the district court's July 2007 ruling Judge Kaplan cited language from an opinion of Judge T.S. Ellis, III of the Eastern District of Virginia commenting on the constitutional dangers inherent in the Thompson Memorandum. However, at least one district court has disagreed with Judge Kaplan's Stein I analysis. In United States v. Stodder, the United States District Court for the Central District of California found the Stein

272. See infra text accompanying notes 293-313.
274. Yet, as Professor Griffin observes, "executive branch self-regulation in the McNulty Memorandum does not... provide clear remedies or sufficient protection. Griffin, supra note 2, at 380.
276. See supra text accompanying note 5.
277. Stein v. KPMG, LLP, 486 F.3d 753, 762 (2d Cir. 2007).
279. 2006 WL 3066196 (C.D. Cal. 2007) (finding that a company's decision to discontinue advancement of attorneys' fees was a response to employee's conduct and a threat to embarrass company rather than a product of government coercion).
decision “scholarly but ultimately unpersuasive,” because the court “found no support for [the Stein holding] either in the Supreme Court decisions cited in Stein or in any appellate court decisions . . .”

In general, when courts find state action on the part of ostensibly private actors, they do so on grounds that: (1) the actor is really a creature of the state rather than a private actor; (2) the actor is performing a public or inherently governmental function; (3) the government has become so pervasively entangled in private activity that purportedly private conduct should be attributed to the state; or (4) the government has encouraged or facilitated the challenged activity. Stein illustrates application of the latter two categories. Long before the current controversy arose, however, employees were raising state action claims based on similar assertions in contesting the legality of workplace investigations. State action arguments sometimes have been successful in the context of workplace searches and alcohol and drug testing alleged to violate the Fourth Amendment. Claims pertaining to Fifth and Sixth Amendment rights have proven far more difficult, however.

In the particular context of United States v. Stein it was clear that KPMG’s decision was directly linked to the Thompson Memorandum and prosecutors’ refusal to back away from the threat inherent in the memorandum’s provisions with respect to support of culpable employees. There may be other circumstances in which individuals are able to demonstrate that the government interfered with an employer’s advancement of counsel fees, but it seems unlikely that a court would uphold such a claim in the absence of evidence of questionable prosecutorial conduct directly related to the counsel fee provisions of the Thompson or McNulty Memoranda. While Judge Kaplan condemned the impact of the Thompson Memorandum on the balance critical to an adversarial system of justice, he emphasized that KPMG prosecutors underscored the threat inherent

280. Id. at *2; see also Rosen, 487 F. Supp. 2d at 732-34 (questioning when right to counsel attaches in decision denying defendants’ constitutional claim on grounds of failure to show prejudice).
282. See, e.g., Lebron v. Nat’l R.R. Passenger Corp., 513 U.S. 374 (1995) (holding that Amtrak is an agency or instrumentality of the federal government and therefore subject to the First Amendment and that Congress could not evade constitutional strictures on government entities by adopting the corporate form but maintaining the power to control the entity it created). See generally Chemerinsky, supra note 275, at 514-15.
283. See Chemerinsky, supra note 275, at 518-19.
284. See id. at 527.
285. See id. at 532-538.
288. Griffin, supra note 2, at 378; Marks, supra note 11, at 1090-91.
289. See supra Part III.C. Judge Kaplan noted that KPMG’s approach was “something never heard of before.” United States v. Stein (Stein I), 435 F. Supp. 2d 330, 435 (S.D.N.Y. 2006).
290. Stein I, 435 F. Supp. 2d at 351; Stein II, 495 F. Supp. 2d at 427.
in the memorandum, thereby exacerbating the problem. Moreover, at least part of the conduct complained of by the individuals occurred after KPMG entered into a deferred prosecution agreement with the government that mandated ongoing cooperation, thereby strengthening the state action claim.

Much of the impact of the Thompson and McNulty Memoranda, however, occurs in circumstances in which the link between an employer's conduct and federal policy is far less direct. An example involves interviews of individual employees in the context of an internal investigation. When corporate counsel undertake an internal investigation—whether in-house lawyers or attorneys from an outside law firm handle the inquiry—the heart of the investigative process is the interview stage. In most states employees face sanctions, including termination, if they decline to cooperate with an investigation, yet they may be unaware that by participating in an interview they may waive their Fifth Amendment protection against self-incrimination, or that they may even be prosecuted for failure to speak truthfully. The rules of professional ethics governing attorney conduct require investigating counsel to disclose the clients' identity only when they have reason to believe a constituent misunderstands the lawyer's role. This admonition, however, leaves room for the exercise of considerable discretion, particularly because investigating counsel have no clear obligation to warn employees that they may waive their Fifth Amendment privilege against self-incrimination by participating in investigative interviews.

Individuals employed by the government—federal or state—do not face quite so difficult a dilemma. In Garrity v. New Jersey the Supreme Court ruled that a state's threat of dismissal or other significant economic sanction to persuade individuals to waive the protection of the Fifth Amendment constituted unconsti-

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291. Disputes in federal court Sixth Amendment claims pertaining to fee advancement sometimes arise in connection with financial constraints related to seizure of corporate assets, thereby requiring a judicial ruling to access corporate funds as a source of attorneys' fees for individual constituents otherwise entitled to indemnification. The facts of Stein were quite different. See United States v. Galante, 2006 WL 3826701 (D. Conn. 2006) (distinguishing Stein circumstances from matter in which government had frozen corporation's assets and individual defendants sought to free assets for advancement of attorneys' fees pursuant to both Sixth Amendment right to counsel and Fifth Amendment substantive due process claims).


293. See Employee Interview, supra note 1, at 891-92 & sources cited therein.

294. Id.


297. See infra Part IV.B.2.b.

tutional coercion. The Garrity Court held that the government cannot constitutionally coerce an employee to yield the protection of the Fifth Amendment by threatening termination of employment, disbarment, or other significant economic sanctions unless the government also offers the employee immunity against the use of the coerced statements against her in a subsequent criminal prosecution. Courts, however, have proven reluctant to find state action sufficient to extend the protection of the Fifth Amendment into the private sector, even where there is an arguable connection between the government and the conduct of private actors. Recently, though, particularly since the June 2006 decision in United States v. Stein, some commentators have argued that in certain contexts the Garrity principle should be extended to cover employees interviewed in the course of internal corporate investigations.

Colin Marks, for example, has suggested that "under the Stein reasoning, 'deputized' counsel may violate an employee's constitutional rights by interviewing him." In another recent article, Lisa Griffin argues in favor of application of the state action doctrine in the specific context of internal investigations conducted in connection with deferred prosecution agreements. Professor Griffin reasons that when a corporation or other entity has entered into a deferred prosecution agreement with the government, the government becomes "entwined in the specific conduct leading to the deprivation of constitutional rights," and that "statements received under these circumstances are obtained through state action." Professor Griffin further argues that the constitutional issues created by deferred prosecutions agreements requiring employers to engage in internal investigations are exacerbated by recent prosecutions of employees interviewed in internal investigation for obstruction of justice for concealing or failing to fully disclose relevant knowledge. Consequently, she suggests that "employees interviewed in the course of an internal investigation... should enjoy immunity analogous to the Garrity shield that protects public employees." The argument for extension of the Garrity doctrine is underscored by the indictments in recent cases.

300. Garrity, 385 U.S. at 497-98.
301. See, e.g., United States v. Antonelli, 434 F.2d 335 (2d Cir. 1970) (declining to extend constitutional protections to interrogation by private security guards).
302. In reaching his decision on state action, Judge Kaplan quoted Garrity v. New Jersey with respect to economic coercion. See supra Part II.A.
303. See Griffin, supra note 2, at 353; Marks, supra note 11, at 1091-92.
304. Marks, supra note 11, at 1095.
305. Id.
306. Griffin, supra note 2, at 369.
307. Id. at 370.
308. Id. at 371.
309. Id. It is unclear, however, who would make the decision to extend use immunity, if applicable, or how that decision would be made. The likely judicial remedy in most cases would be suppression, assuming that the individual involved declined to plead guilty.
years of employees on obstruction of justice charges on the basis of statements made to corporate counsel in internal investigative interviews\textsuperscript{310} in the high profile \textit{Computer Associates} case. In the \textit{Computer Associates} matter the government prosecuted senior executives on obstruction of justice charges based on statements the executives made to outside counsel and auditors conducting an internal investigation.\textsuperscript{311} Prosecutors also charged the company’s general counsel with “proxy obstruction” pertaining to materials provided to auditors and statements in press releases.\textsuperscript{312} As Professor Griffin observes, the \textit{Computer Associates} defendants “were convicted of lying to prosecutors without ever talking to them.”\textsuperscript{313}

The argument for application of the \textit{Garrity} analysis to internal investigations makes sense in the context of deferred prosecution agreements, and perhaps in other circumstances in which the government agrees to forego indicting an organization on the basis of its cooperation in pursuing individual constituents. In these circumstances the government both demands an investigation and anticipates receiving the information acquired through it in circumstances where employees believe that they must speak or lose their livelihood.\textsuperscript{314} This situation is arguably analogous to circumstances in which courts have applied the Fourth Amendment to suppress the fruits of workplace searches on grounds that the government’s instigation of the search constituted state action.\textsuperscript{315} While Judge Kaplan suppressed the statements of three KPMG defendants on analogous Fifth Amendment due process and Sixth Amendment right to counsel grounds, it remains to be seen whether other courts will follow suit.\textsuperscript{316}

Absent a deferred prosecution agreement, or other evidence of direct government involvement in an internal investigation or decision with respect to attorneys’ fees, fashioning a compelling state action argument becomes vastly more difficult. Consequently, much of the impact of federal corporate cooperation policies on individuals results from the mere release of policy documents such as the McNulty Memorandum in combination with information that

\begin{footnotesize}
\begin{itemize}
  \item [312.] See Kumar Indictment, supra note 310, at paras. 72-73.
  \item [313.] Griffin, supra note 2, at 373.
  \item [314.] “The government’s current approach [to corporate corruption] . . . is both questionable policy and the cause of significant unfairness.” Id. at 379.
  \item [315.] See Griffin, supra note 2, at 370-71.
  \item [316.] In the context of an internal corporate investigation it would be difficult to provide use immunity without direct prosecutorial involvement. Corporate counsel would not be in a position to extend immunity, nor is it realistic to require a company that suspects an employee of breaking the law to refrain from yielding its right to sanction or terminate an employee who refuses to assist an internal investigation. The more realistic remedy would be suppression of any statements made by the employee, but it is questionable whether the courts would go this far.
\end{itemize}
\end{footnotesize}
INDIVIDUAL RIGHTS AND LEGAL ETHICS

2. THE LIKELIHOOD OF SIMILAR CASES IN FEDERAL COURT

Even if the Second Circuit were to uphold the dismissal of the KPMG indictments and the courts were to prove receptive to extension of the Garrity shield to private sector employees interviewed pursuant to deferred prosecution agreements, the impact of the Holder-Thompson-McNulty approach ranges far beyond the parameters of this kind of prosecutorial involvement. In many instances, the damage done to individuals in the course of internal investigations arises long before the government becomes directly engaged. In the current enforcement environment, organizations regularly launch internal investigations, and when they do, disclosure to the government is possible, even probable, if problems are uncovered. Perhaps even more importantly, litigating these claims requires significant financial resources. Employees who are most at risk—those without a basis to seek advancement of attorneys' fees or those whose employers have decided not to advance fees to avoid the wrath of prosecutors—are least likely to be able to afford to pursue appropriate relief. In these instances, the pressure on individuals to enter into guilty pleas is particularly strong.

3. THE IMPACT OF SPECIFIC JUDICIAL DECISIONS ON THE IN TERROR EM EFFECT OF FEDERAL CORPORATE COOPERATION POLICIES

DOJ made an effort to modify at least a portion of the McNulty Memorandum in light of Judge Kaplan's Stein I ruling—perhaps in response to the court's holding that the Thompson Memorandum was not narrowly tailored to accomplish a compelling objective. As of this writing, however, DOJ has not made any other visible efforts to tailor the provisions of its corporate cooperation policies more narrowly. In any event, DOJ can choose not to modify national policy on the basis of judicial decisions in a few jurisdictions. Absent a clear trend, or a decision on the part of DOJ to change course, as Irvin Nathan has pointed out, "Corporations are likely to be more influenced by the hope of

317. United States v. Rosen, 487 F. Supp. 2d 721, 737 (E.D. Va. 2007) (denying motions to dismiss indictment because defendants failed to show prejudice as a result of government's alleged interference with their employers' payment of their counsel fees).
318. See, e.g., Kestenbaum & Criss, supra note 12, at 10,630; Employee Interview, supra note 1, at 884.
319. See, e.g., Deputizing Corporate Counsel, supra note 2, at 35-36.
320. See United States v. Stein (Stein I), 435 F. Supp. 2d 330, 362-64 (S.D.N.Y. 2006) (finding that financial constraints caused individual KPMG defendants to restrict their lawyers' activities).
321. See sources cited supra note 25.
avoiding a corporate indictment than by eloquent court opinions about the
impropriety and unconstitutionality of government pressure against company
advancement of legal fees.\footnote{322}

In sum, Judge Kaplan’s state action rulings in the KPMG prosecutions offer
some promise for application of the doctrine in the corporate cooperation context,
but the decision is unlikely to have a major impact in the near term. At best, the
state action doctrine offers a means of vindicating Fifth and Sixth Amendment
rights for a limited number of individuals caught in the web of corporate
cooperation. While it is important to consider the possibility of state action in
every situation involving cooperation between the government and an employer
that infringes on an individual’s freedom in one way or another, it is unlikely that
the \textit{Stein} precedent will end the alliances of government and corporate authority
that so often result in the compromise of individual rights.\footnote{323}

III. THE DEBATE OVER THE “CRIMINALIZATION” OF CORPORATE LAW

Another long-disputed subject that has come to the fore in the midst of the
current controversy over federal corporate cooperation policies is the question of
the proper scope of corporate criminal liability. This is a topic that has stimulated
scholarly debate for decades.\footnote{324} However, the rapid expansion of business
prosecutions since 1990, followed by the public outcry for greater corporate
accountability since 2001, has focused renewed attention on the question
whether, and to what extent, corporations should be subjected to criminal
liability. While some commentators contend that the current reach of corporate
criminal liability is appropriate, others argue that the “criminalization” of
corporate law has gone too far. The following discussion offers a brief survey of
the relevant issues, with a particular focus on recent calls for redefinition of
corporate criminal liability.

A. THE “CRIMINALIZATION” OF CORPORATE LAW AND ITS
CONSEQUENCES

In its 1909 decision in \textit{New York Central & Hudson River Railroad v. United.}
States, the United States Supreme Court provided a conceptual framework for holding corporations and other entities criminally liable for the misconduct of their constituents. The particular issue in *New York Central* was the constitutional authority of Congress to impose criminal liability on a corporation on the basis of wrongdoing by its agents. In the decades that followed courts and legislatures proved willing to expand the scope of corporate criminal liability to hold organizations liable for individual misconduct that benefited, or potentially benefited, the entity in virtually any way. In Gerhard Mueller's famous words, "Nobody bred it, nobody cultivated it, nobody planted it. It just grew." Corporate criminal liability grew, but it took several decades before prosecutors began to harvest the fruits of the legal doctrine on a regular basis. As noted earlier, it was not until the 1990s that federal prosecutors regularly set their sights on holding corporations criminally accountable for constituent wrongdoing. In recent years, however, as the Holder, Thompson and McNulty Memoranda reveal, DOJ has relied heavily on the broad scope of corporate criminal liability in pursuing corporate cooperation strategies.

Pursuant to current law, "a corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and murder." The prerequisites to criminal liability for corporations are few and relatively easy to establish. To hold the entity accountable an employee or other agent must have acted within the scope of her employment. Neither intentional misconduct nor criminal intent on the part of the individual precludes entity liability so long as one of the purposes of the employee's act or omission was to benefit the corporation, even if that purpose was never effectuated. Conversely, it is not necessary for any single constituent to have the requisite criminal intent. *Mens rea* can be established pursuant to the "collective entity" doctrine by showing that the entity's employees collectively possessed the requisite knowledge, even if any one of them did not possess the

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325. 212 U.S. 481 (1909).
326. *Id.* at 492.
329. See supra note 1 and accompanying text.
330. See Holder Memorandum, supra note 3, at *2-*3; Thompson Memorandum, supra note 3, at *2-*3; McNulty Memorandum, supra note 3, at 2-3.
331. See BRICKEY, supra note 1, at § 1.04.
333. BRICKEY, supra note 1, at §§ 3.01, 3.04, 3.08; Khanna, supra note 35, at 1489.
334. BRICKEY, supra note 1, at §§ 3.01, 3.04, 3.08.
335. *Id.*
B. THE CASE FOR NARROWING THE SCOPE OF CORPORATE CRIMINAL LIABILITY

For nearly a century commentators have debated whether broad corporate criminal liability is necessary to hold business entities and other organizations accountable. Some have questioned whether "we have done a poor job of policing corporate misdeeds and have squandered the power of the criminal law." Recently, a few observers have suggested that the controversy over the McNulty Memorandum and similar policies is directly related to the broad scope of contemporary corporate criminal liability. Larry Ribstein, for example, suggests that the current structure of corporate criminal liability pressures both corporate agents and prosecutors "to bend the rules and risks imposing convictions based on misconceptions about business instilled by the media." Preet Bharara takes a similar tack, suggesting that a century of expansive jurisprudence in the corporate criminal liability field has both enabled prosecutors to impose inappropriately broad liability on organizations and undercut the defenses available to entities scrutinized by law enforcement authorities. In Mr. Bharara's view, "efforts to reduce the risk of prosecutorial excess are, in the long run, better directed at the source of prosecutors' leverage rather than at their conduct." Consequently, he suggests that narrowing the scope of corporate criminal liability not only makes sense from a substantive law perspective, but redefinition of corporate criminal liability offers the best means of restraining...
overzealous prosecutors.\textsuperscript{343}

In another recent article, former DOJ Enron Task Force Director Andrew Weissmann and David Newman cite the broad scope of criminal liability as the reason the balance of power essential to our adversary system is askew.\textsuperscript{344} Observing that the prevailing expansive view of corporate criminal liability has given the government "virtually unfettered discretion to exact a deferred prosecution agreement,"\textsuperscript{345} they argue that "[r]ethinking the standard for criminal corporate liability will...serve to correct an imbalance in power between the government and a corporation facing possible prosecution for the action of an errant employee."\textsuperscript{346} They suggest that "[w]here a corporation has effective policies and procedures to deter and detect criminal actions by its employees, none of the legitimate concerns animating criminal corporate liability is implicated."\textsuperscript{347} Citing Supreme Court cases restricting the reach of civil liability pursuant to civil rights statutes such as Title VII of the Civil Rights Act of 1964, Messrs. Weissmann and Newman propose undoing the imposition of vicarious criminal liability.\textsuperscript{348} Specifically, they advocate "requiring the government to prove the absence of an effective compliance program, as opposed to placing the burden on a corporate defendant to establish as a defense that it had such a program."\textsuperscript{349}

\begin{thebibliography}{99}
\bibitem{343} Id. at 86.
\bibitem{345} Weissmann & Newman, \textit{supra} note 338, at 414.
\bibitem{346} \textit{Id.} Messrs. Weissmann and Newman argue that "unless one adopts the extreme view that merely employing a person who commits a crime is a 'wrong' deserving of criminal punishment of the employer—a view that has never been part of our shared values regarding criminal corporate law and has been rejected by law enforcement and regulatory agencies—there is no organizational conduct deserving of criminal sanction." \textit{Id.} at 412.
\bibitem{347} \textit{Id.}
\bibitem{348} \textit{Id.} at 412, 413 (citing Title VII, 42 U.S.C. § 2000e (2000 & Supp. III (2003)).

Samuel Buell, however, reaches a different conclusion on the basis of an analysis of the application of current criminal procedure rules within organizations. Buell, \textit{supra} note 5, at 1614, 1670. Professor Buell suggests that the doctrinal framework of contemporary criminal procedure developed in a binary model of the individual and the state that becomes problematic when applied to the tripartite model of individual, state and firm. \textit{Id.} at 1626. Professor Buell examines the ways in which the government uses employee statements coerced by employers and negotiates with employers with respect to advancement of defense fees for employees. On the basis of his exploration he concludes that (1) Congressional intervention in a form such as S. 186 is not appropriate; and (2) that further reforms are needed but that abolition of the use of employer coerced statements is unnecessary. He stresses that "criminal procedure should be thought of differently in the firm context" and that "[c]urrent public debate about criminal procedure within the firm has produced some misguided proposals, such as to ban the state from encouraging firms to pursue policies toward their employees and evidence in firms' control that as long as state practices are appropriately guided and constrained, advance regulatory objectives without undue cost." \textit{Id.} at 26.
Arguments over the propriety of “criminalizing” corporate law reflect a broader social struggle over how to limit the burgeoning power of major corporations and other significant entities.\textsuperscript{350} The issue is plain: Society needs to find ways to hold organizations accountable for constituent wrongdoing and ensure that these entities have powerful incentives to promote legal compliance as well as the pursuit of profits. Nevertheless, there is clearly a link between the criminalization of corporate law and the aggressive prosecutorial tactics embodied in the Holder, Thompson and McNulty Memoranda. The expansion of corporate criminal liability has provided prosecutors with powerful tools against corporations and other entities and added another significant dimension to the oft-repeated argument that imposing criminal liability on corporations is neither economically rational nor socially desirable.

Even so, there are problems with the notion that redefinition of corporate criminal liability will resolve the corporate cooperation controversy. First, even if the legal and business communities were to band together in support of narrowing the scope of corporate criminal liability, it is unlikely that the weed so firmly entrenched in American jurisprudence could be uprooted quickly. Realistically, redefining the parameters of corporate criminal liability may be possible over a period of years, but it is unlikely that courts and legislatures would more quickly, even if persuaded of the need for change. This is particularly true in the current environment given ongoing concerns over corporate corruption. More than half of all Americans own corporate securities in one form or another.\textsuperscript{351} So long as the public remains suspicious of major corporations and their managers, movements to limit corporate criminal liability legislatively are unlikely to garner much support,\textsuperscript{352} and the courts’ ability to effect change currently is constrained by thousands of federal and state statutes.\textsuperscript{353}

Second, even if legislatures and courts begin to revisit the question whether

\textsuperscript{350} See, e.g., ROBERT REICH, SUPERCAPITALISM 218 (2007).

\textsuperscript{351} The Investment Company Institute reports that in 2005, 50.3% of all American households and more than 91.1 million investors owned some form of equity securities. INVESTMENT COMPANY INSTITUTE & SECURITIES INDUSTRY ASSOCIATION, EQUITY OWNERSHIP IN AMERICA 44 fig. 48 (2005). In 1998, the last year for which reliable statistics are available, approximately 52% of Americans owned stock outright through mechanisms such as individual investment, mutual funds, pension plans, in comparison with 1% in 1900 and 13% in 1980. See THEODORE CAPLOW ET AL., THE FIRST MEASURED CENTURY: AN ILLUSTRATED GUIDE TO TRENDS IN AMERICA, 1900-2000, at 252-53 (2000), available at http://www.pbs.org/fmc/book/14business6.htm (last visited Mar. 18, 2008).


\textsuperscript{353} See Baker, supra note 1, at 546 (noting that more than 4000 criminal statutes apply to corporate entities).
corporate criminal liability has gone too far, redefining the reach of corporate
criminal law would be a lengthy process. There is no easy way to undo a doctrine
resting on a host of judicial decisions and legislative actions at the state and
federal level that have become entrenched in law enforcement policies. Change,
if it comes, will take considerable effort on many levels and a great deal of time.
It seems quite likely that the basic concept of corporate criminal responsibility
will remain a part of our legal system for many years to come.

Finally, so long as organizations can be held criminally liable in at least some
contexts there will be significant potential for infringement of individual rights in
any instance in which law enforcement authorities have the ability to turn entities
against their employees by raising the specter of criminal prosecution.

**IV. THE LEGAL PROFESSION AND THE ETHICS OF CORPORATE
COOPERATION**

Whatever developments take place in the administrative, legislative, and
judicial arenas, the controversy surrounding corporate cooperation policies is
ultimately about the manner in which lawyers fulfill their obligations to entity
clients and how lawyers treat third parties in the process. An often overlooked
aspect of the current debate is that it is lawyers—and not FBI agents, SEC
investigators, or other law enforcement personnel—who have generated the
controversial policies at issue. Prosecutors forged corporate cooperation policies
in the midst of demands to hold corporate entities and other organizations
accountable, and these demands increased dramatically in the wake of the Enron
debacle and other major corporate financial scandals.

The pressure on prosecutors to obtain convictions of businesses and business
executives plays out in the personal as well as the public sphere. A fundamental
obligation of all prosecutors is to serve the ends of justice, but prosecutors do
not get ahead in the government, or further their own career ambitions, on the
basis of decisions not to prosecute. DOJ does not publish statistics about
decisions of prosecution on its website, and no former U.S. Attorney runs for
office on a platform of being “reasonable” about crime. Moreover, many innocent
people have been hurt by the corporate financial decades of the last several years,
and the public has demanded retribution from corporations and corporate
managers who have broken the legal rules on which our market economy rests.
We have made celebrities of business leaders, but, particularly in the
post-Enron world, it has become a popular pastime to follow the latest corporate

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355. See Meese Testimony, supra note 5, at *2 (observing that “[t]he tension ... between obtaining
impressive conviction statistics and taking care to do justice has always confronted prosecutors and probably
always will”).
356. For example, Martha Stewart and Donald Trump, to name just two.
scandals and the sagas of Fortune 100 executives toppled from their corporate thrones, sometimes to be led off to prison.357

Conversely, lawyers who represent corporations and other entities encounter equally intense, albeit different, pressures.358 Corporate counsel have had to do their work in an atmosphere in which indictment, or even a high profile investigation, can cripple or destroy an organization.359 While the deference accorded to compliance advice from corporate counsel has undoubtedly increased in the post-Sarbanes-Oxley world,360 corporate lawyers, especially in-house counsel, must work hard to keep lines of communication with employees open. Investigating counsel know that employees are likely to lose their jobs for failing to cooperate, yet employees may waive important constitutional protections if they respond to the investigating lawyer’s questions. Yet they must always keep in mind that their actual client is an abstract legal fiction, and not the human beings with whom they work.361 Corporate lawyers charged with responsibility for conducting internal investigations confront difficult ethical issues, but there are ample rewards for serving up employees “to the government on a silver platter.”362 As KPMG counsel Robert Bennett points out, in the current law enforcement environment it is safer for companies not to advance attorneys’ fees to constituents whose conduct is under investigation363— even though all but the wealthiest individuals will face financial ruin if forced to pay, on their own, for to defend against criminal charges in complex financial cases. This is precisely why Judge Kaplan found the government’s conduct shocking to the conscience in the KPMG matter.364

Nor is it any answer to say, as have some who support federal corporate cooperation policies, that innocent employees have no reason to fear.365 Scapegoating is a time-honored practice—an employer’s decision not to advance attorneys’ fees affects the innocent as well as the guilty. More importantly, every person is entitled to the protections of the Fourth, Fifth and Sixth Amendments; prosecutors should not enlist entity lawyers in circumventing these important

357. For a discussion of the fate of various deposed corporate executives who have been prosecuted, see Kathleen Brickey, In Enron’s Wake: Corporate Executives on Trial, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006).
358. See supra note 28 and sources cited therein.
359. For example, the fall of Arthur Andersen, despite the Supreme Court’s subsequent reversal of the firm’s conviction. See Arthur Andersen LLP v. United States, 544 U.S. 696 (2005).
361. See MODEL RULES R. 1.13(a); see, e.g., Employee Interview, supra note 1, at 934-36; Geoffrey C. Hazard, Jr., Ethical Dilemmas of Corporate Counsel, 46 EMORY L.J. 1011 (1997); George Reycraft, Conflicts of Interest and Effective Representation: The Dilemma of Corporate Counsel, 39 HASTINGS L.J. 605, 608 (1988).
362. See Deputizing Company Counsel, supra note 2, at 36 & 44.
364. See supra Part I.B.2.
365. See supra Part II.D.3 (discussing comments of DOJ representatives and Professor Michael Siegel).
constitutional guarantees. Nor should entity lawyers be required to assist the government in circumventing the rights of employees in order to safeguard client organizations. Law enforcement officials regularly identify people as criminally culpable, but the Constitution requires prosecutors to prove their case before the government imposes sanctions. An individual suspected of a business crime should be entitled to the same protections as a person suspected of an assault or murder. As Dick Janis has pointed out, current corporate cooperation policies turn the presumption of innocence on its head, particularly because "in the context of white-collar enforcement . . . often the conduct itself may be clear but its legality (or illegality) is not."

But lawyers are members of a self-governing profession. As partakers in this privilege, lawyers have a say in how clients—including the government—use their services. Our professional integrity requires us to define limits on what we will and will not do in performing our duties. We will not, for example, reveal client confidences except in extraordinary circumstances; we will not file frivolous lawsuits even to satisfy client demands; and we will not lie to tribunals or third parties on behalf of clients. As a profession we also have the ability and the responsibility to revise and clarify the basic tenets that govern the practice of law whenever it becomes necessary to do so. While it takes time for states to review these kinds of changes and to decide whether or not to adopt them, in general the ABA, together with state and local bar associations, has tremendous influence in setting the ethical boundaries of the practice of law. For example, in the wake of the Enron debacle the ABA revised Model Rules of Professional Conduct 1.6 and 1.13 to emphasize the responsibilities of entity counsel and to facilitate gate-keeping functions in appropriate circumstances. The legal profession needs to take steps to protect individuals caught in the intricate web spun by prosecutors and employers seeking to avoid Arthur Andersen’s fate. Reasonable lawyers may disagree about the propriety of

366. Id.
367. HAZARD & HODES, supra note 18, at § 1.01; see also e.g., Michael S. Frisch, No Stone Left Unturned: The Failure of Attorney Self-Regulation in the District of Columbia, 18 GEO. J. LEGAL ETHICS 325 (2005) ("Self-governance is a cherished and well-entrenched prerogative of the legal profession.").
369. See MODEL RULES R. 1.6.
370. See MODEL RULES R. 3.1.
371. See MODEL RULES R. 3.4, 4.1.
corporate cooperation policies, but even proponents of the Thompson-McNulty approach have noted the need to safeguard the constitutional rights of individuals caught up in corporate investigations. It is time to act.

A. THE ROLE OF LAWYERS IN CREATING AND PERPETUATING THE CORPORATE COOPERATION CONTROVERSY

The perception that conscientious lawyers must act aggressively to protect client interests despite the costs to third parties raises particular concerns when the client is a corporation capable of acting only through the human beings associated with it. While we indulge the fiction that entities have an existence separate and apart from their constituents, in reality organizations cannot act without human agents. The notion of entities as legal persons incorporated into contemporary corporate law and professional ethics appropriately leads to the conclusion that diligent representation of an entity client requires lawyers to put the entity’s interests first. The question is where the boundary lies between the ethical obligation to protect the entity’s interests and the risk of unacceptable unfairness to individuals. This quandary over where and how to draw the line between diligent representation of a client and fairness to the interests of third parties is not unique to lawyers involved in the corporate cooperation controversy. The same dilemma infuses lawyer-client relationships in a wide variety of areas. Nevertheless, at present the problem is particularly pointed for lawyers who represent entities that wield great power over the lives and livelihoods of their human constituents.

Whatever else is going on, the very diligence of prosecutors and corporate counsel accounts for at least part of the problem. The Model Rules of Professional Conduct (“Model Rules”), however, do not require lawyers to engage in extreme tactics. Model Rule 1.3 provides that “[a] lawyer shall act with reasonable diligence and promptness in representing a client.” Comment 1 notes that “[a] lawyer must... act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf,” but it.

374. See, e.g., Richman Testimony, supra note 123 (opposing legislative intervention to override McNulty Memorandum); Siegel Testimony, supra note 123 (same).
375. See supra text accompanying notes 125-26.
376. See Model Rules R. 1.13(a).
378. For example, counsel investigating a crime, accident, or domestic dispute must often talk with witnesses who may be confused about the lawyer’s role or have interests adverse to her client.
379. Deputizing Company Counsel, supra note 2, at 36 (“Given the low esteem in which the legal profession is already held, is it any wonder that the lesson learned is ‘don’t trust the lawyers’ and that lawyers representing companies are held in contempt by the company’s employees? Moreover it is worth noting that this phenomenon makes it harder for the company to police itself and promotes distrust for the legal profession.”).
381. Model Rules R. 1.3 cmt. 1.
also emphasizes that "[a] lawyer is not bound . . . to press for every advantage that might be realized for a client . . . or preclude the treating of all persons involved in the legal process with courtesy and respect."382 In addition, standards pertaining to government lawyers contain similar admonitions with respect to the role of government attorneys. The federal government's Standards of Ethical Conduct for Employees of the Executive Branch begin with the reminder that "[p]ublic service is a public trust,"383 and the ABA's Criminal Justice Standards provide that "[t]he duty of the prosecutor is to seek justice, not merely to convict."384

Despite these admonitions, hard-driving prosecutors—or those looking for ways to lighten their workload—find effective tools in corporate cooperation policies.385 As earlier noted, particularly in the post-Enron era, DOJ representatives repeatedly characterize the Department as tough on corporate crime and aggressively engaged in rooting out corporate wrongdoing by entities and managers.386 The notion that aggressive tactics are essential to effective lawyering has contributed to an environment in which prosecutors may believe that they have not acted diligently on behalf of the government unless they have persuaded obtained at least some evidence of cooperation from a putative corporate wrongdoers to "cooperate." The Veasey Report underscores this reality, suggesting that in at least some instances line prosecutors ignore DOJ policies requiring Main Justice approval for corporate cooperation demands.387

By the same token, in light of both the current law enforcement environment and applicable ethics standards, there are few situations in which a defense lawyer could in good conscience refrain from urging a client entity to acquiesce in government cooperation demands, no matter what the client's theoretical rights.388 The costs are too high, as illustrated by the fate of Arthur Andersen. The Supreme Court ultimately overturned the firm's conviction, but far too late to save the company.389 Despite the premium placed on employee loyalty and the efforts companies make to inspire allegiance in the workforce,390 in the current enforcement environment conscientious lawyers are almost always forced to advise corporations to cooperate with the government. The employees then face

382. MODEL RULES R. 1.3 cmt. 1 (emphasis added).
384. STANDARDS FOR CRIMINAL JUSTICE, The Prosecution Function, Standard 3-1.3 (Am. Bar Ass'n 3d ed. 1993). For example, "[a] prosecutor should advise a witness who is to be interviewed of his or her rights against self-incrimination and the right to counsel whenever the law so requires." Id. § 3-3.2(b).
385. See Baker, supra note 1, at 313; Deputizing Company Counsel, supra note 2, at 34-35; Veasey Report, supra note 165.
386. See supra Part I.B.1.
388. Siegel Testimony, supra note 123, at 5
390. Employee Interview, supra note 1, at 913-14.
not only the awesome might of the federal government, but the combined power of their government and their employer. "No longer foes, the corporation and the government can team up to unmask the individuals who were at the center of the criminal activity"—or at least those they decide up front are "culpable." And it is not just upper echelon employees who are at risk. Middle and lower level employees also face perhaps even graver consequences because they may be less sophisticated with respect to legal matters, and their financial resources are likely to be more limited.

Lawyers generally have not acted inappropriately or unprofessionally in the corporate cooperation context given the standards that currently govern our conduct. The impact of corporate cooperation policies on individuals, however, should prompt us to ask whether there are at least some fundamental flaws in our rules of ethics. As lawyers we are part of a profession that enjoys the privilege of self-regulation. While administrative policies, legislative measures, state action doctrine, and the parameters of corporate criminal law and procedure are all important, like the proverbial physician, we need to ask what we can do to heal ourselves. Any one individual may have little ability to effect change, but as a profession we can make a difference. In the longer run, we need to come to grips with the reality that our rules may be becoming a bit dated. Now, more than ever, a large percentage of lawyers represent corporate entities and constituents rather than unaffiliated individuals. We need to recognize that a whole different set of power dynamics applies when individuals are caught at the intersection of government and corporate power—and that we may need to reorient our ethical rules in response. However, in the near term, we can begin by considering a variety of ethical issues, including the ways in which we define diligence, standards for privilege waiver demands, fairness to employees in investigative interviews, and the propriety of discouraging fee advancement.

The purpose of considering how ethical rules function in connection with corporate investigations and criminal prosecutions is neither to denigrate prosecutors who give their all to pursuing corporate crime nor to question the response of corporate lawyers to the needs of entity clients facing the specter of criminal prosecution. Ethical standards are not simply vehicles for sanctioning conduct that exceeds agreed upon norms. They help us navigate dangerous waters, and they provide an anchor to hold us firm in the crosscurrents that assail

391. See, e.g., Weissmann Testimony, supra note 11, at 2.
392. See Employee Interview, supra note 1, at 910-12; Tate, supra note 28, at 3-4. Moreover, in recent years, the National Labor Relations Board has eliminated basic protections once available to non-union employees. See Sarah Helene Duggin, The Ongoing Battle Over Weingarten Rights for Non-union Employees in Investigative Interviews: What Do Terrorism, Corporate Fraud, and Workplace Violence Have To Do With It?, 20 NOTRE DAME J. L. ETHICS & PUB. POL’Y 655 (2006) (discussing National Labor Relations Board’s termination of the right of non-union workers to have a co-worker present in investigative interviews where the employee reasonably believes the interview may result in disciplinary sanctions).
393. See, e.g., Frisch, supra note 367, at 325.
us in the practice of our profession. They remind us that there are boundaries we should not cross, and they offer a way to explain to others why we cannot always accede to their requests. Ethics rules also promote public understanding of a lawyer's role and, properly designed, enhance public trust.

B. PROPOSALS TO REVAMP SPECIFIC RULES TO ADDRESS ISSUES RAISED BY CORPORATE COOPERATION POLICIES

There are many avenues of approach to the ethical issues that infuse the corporate cooperation controversy. The following discussion looks at a few of these possibilities. It turns first to prosecutorial obligations under the Model Rules of Professional Conduct, then to provisions relevant to counsel involved in internal investigations and other corporate defense work; it concludes with a brief discussion of the concept of diligent representation.

1. THE SPECIAL RESPONSIBILITIES OF PROSECUTORS

As the United States Supreme Court has emphasized, and applicable ethics standards reflect, the first duty of prosecutors is to seek justice. Prosecutors also have particular obligations pursuant to the Model Rules. Model Rule 3.8(b) is especially relevant to the corporate cooperation controversy. It provides:

The prosecutor in a criminal case shall:

* * *

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel . . . .

As discussed below, the notions of fairness and justice inherent in Model Rule 3.8(b) pertain to issues related to both sanctions against employees—particularly refusal to advance counsel fees—and the consequences of privilege waiver demands.

394. For other discussions of these issues, see, e.g., Deputizing Company Counsel, supra note 2, at 35-36; Employee Interview, supra note 1, at 916-67; Marks, supra note 11, at 1086-98. See also Tanina Rostain, The Emergence of Law Consultants, 75 FORDHAM L. REV. 1397 (2006) (discussing law consulting model as a means of “decoupling . . . legal expertise from traditional professional institutions . . . in particular, those that attach to the representation of clients”).

395. See Berger v. United States, 295 U.S. 78, 88 (1935) (noting that “[w]hile [a prosecutor] may strike hard blows, he is not at liberty to strike foul ones”).

396. MODEL RULES R. 3.8; cf. Dexter, supra note 11 (suggesting modification of Model Rule 3.8 “to include more constraints on a prosecutor’s solicitation of evidence or testimony”).
The Impropriety of Discouraging Entities From Advancing Attorneys' Fees to Constituents

Individuals identified as “culpable” by prosecutors investigating corporate entities may not qualify as “accused” within the meaning of Rule 3.8, but they are vulnerable to many of the same adverse consequences as persons actually charged with crimes. The McNulty Memorandum, like the Thompson Memorandum, requires prosecutors to pursue strategies that encourage corporations to sanction individuals because they have been identified as “culpable” by prosecutors. By encouraging companies to cease “support” of “culpable” employees, DOJ policies prompt employers to sanction individuals without any judicial or administrative determination of wrongdoing. While individuals in this position have not yet been formally charged in a criminal “case,” the damage can be as great as that contemplated in Model Rule 3.8. As United States v. Stein illustrates, a decision not to advance legal fees or to cut off payments once begun can have devastating effects on an individual’s ability to defend against charges involving complex financial transactions. While the McNulty Memorandum ostensibly limits the situations in which prosecutors may consider advancement of legal fees as a negative factor in making charging decisions, the climate created by the Thompson Memorandum still overshadows corporate criminal investigations. Moreover, the McNulty Memorandum does not instruct prosecutors unequivocally that they are to refrain from considering advancement of legal fees as evidence of an uncooperative attitude.

Pressure on organizations to cut off legal fees to employees involved in criminal investigations may not violate the letter of Model Rule 3.8(b), but it is certainly contrary to the rule’s spirit. When the government discourages an employer from paying an employee’s counsel fees, it effectively calls upon the employer to impose severe financial hardship on individuals because they have chosen to exercise constitutional rights. It is hard to imagine any legitimate basis for doing so. State laws establish standards for indemnification, including payment of counsel fees. Inappropriate advancement of legal fees is a matter to be dealt with by boards of directors and shareholders, not by prosecutors. If the government’s point is that defense counsel file frivolous motions or otherwise engage in improper litigation tactics, the appropriate remedy is to seek judicial

397. As Richard Janis and Andrew Weissmann have noted, in this regard DOJ has failed to exercise restraint on the conduct of line prosecutors, instead encouraging, in the words of Mr. Janis, “a state-sponsored shakedown scheme in which corporations are extorted to pay penalties grossly out of proportion to any actual misconduct.” Deputizing Company Counsel, supra note 2, at 34; see Weissmann Testimony, supra note 11.

398. The relevant opinions are discussed in Part III supra.


400. See McNulty Memorandum, supra note 3; see generally Much Ado About Nothing, supra note 25, at text accompanying notes 22-23.
sanctions or invoke the provisions of the applicable state counterparts of Model Rules 3.1 through 3.5. As noted earlier, Mr. McNulty has suggested that advancement of attorneys’ fees could be part of an effort to impede a criminal investigation—but the same argument could be made any time someone retains defense counsel. Defense counsel interfere with the ability of prosecutors to obtain quick and easy convictions. This is part of the cost of an adversary system, but it is the system quite clearly guaranteed by the United States Constitution.

When the government considers advancement of legal fees as a negative factor in corporate charging decisions, the practical effect is to deprive individuals of the means of obtaining the kind of legal representation essential to the defense of complex cases. Major corporate prosecutions involve many witnesses, innumerable documents, and myriad facts and figures that require extensive analysis. Without the funds to obtain appropriate legal assistance the KPMG defendants were unable to defend themselves in any meaningful way. In the context of a multi-million dollar financial fraud case—or a multi-billion dollar matter such as the KPMG tax fraud prosecution—the sheer number of hours counsel must devote to understand the case makes it difficult, if not impossible, for many individuals to mount a defense without an employer’s advancement of counsel fees. This is particularly true when the accused individuals have lost their jobs, or they are middle managers or lower echelon employees rather than senior executives. Other cooperation policies that discourage corporations from sharing information with individuals under investigation or entering into joint defense agreements with them compound the difficulty. Former Deputy Attorney General Larry Thompson may well be correct that “there are lots of reasonably priced lawyers,” but reviewing thousands, or even millions, of pages of documents costs a great deal even if the charge is fifty dollars an hour rather than several hundred. Ethical standards should not permit prosecutors deliberately to interfere with the ability of an unrepresented person to obtain counsel with the resources necessary to mount an effective defense. As Judge Kaplan recognized, the government’s attempt to do so is inconsistent with the mores of a society that prides itself on dispensing justice under law.

401. See McNulty Memorandum, supra note 3, at 11 n.3; McNulty Testimony, supra note 97, at 4.
402. See Deputizing Company Counsel, supra note 2, at 44 (suggesting that DOJ’s real concern is “that employees who have capable defense counsel will be more difficult to coerce into pleading guilty and ‘cooperating,’ and may actually put the government to the test of a trial of often dubious theories of criminal law that the company itself cannot risk testing”).
403. See, e.g., Stein I, 435 F. Supp. 2d at 371 (observing that the “government has spent years investigating the KPMG case, presumably reviewing millions of pages of documents and interviewing scores of witnesses”)
404. See Employee Interview, supra note 1, at 910-12.
405. See McNulty Memorandum, supra note 3, at 11; Thompson Memorandum, supra note 3, at 10-11.
406. See supra text accompanying note 115.
b. Respect for the Rights of Employees Interviewed in the Course of Internal Investigations

Ethical issues also arise with respect to the conduct of internal corporate investigations. If a prosecutor interrogated an individual whose conduct was the subject of a criminal investigation without providing a *Miranda* warning,⁴⁰⁸ statements made in the course of the interview would be subject to exclusion in a subsequent prosecution.⁴⁰⁹ In the employment context, at some point the government’s involvement should require a *Garrity* analysis.⁴¹⁰ But even without government involvement significant enough to create cognizable state action, the interviewee might well react very differently to questioning by a prosecutor rather than a lawyer representing his or her employee.⁴¹¹ Consequently, when prosecutors encourage employers to interview employees—or require them to conduct internal investigations pursuant to deferred prosecution agreements or other special arrangements—the government invites, and even encourages, vicarious violation of interviewees’ Fifth Amendment rights.

In an environment in which a “culture of waiver” prevails,⁴¹² the danger that employees will inadvertently waive Fifth Amendment rights or believe that they have no choice but to do so is even greater.⁴¹³ Consequently, prosecutors should be ethically required to refrain from encouraging employers to violate employees’ constitutional rights in this manner. This goal could be accomplished in several ways. One approach would be to enlarge the scope of Model Rule 3.8 to encompass corporate investigations, or to add a comment clarifying that prosecutors should use good faith efforts to ensure that persons questioned in the course of internal investigations conducted by agreement with the government are warned that their statements may be turned over to prosecutors and used against them in a criminal prosecution.⁴¹⁴


⁴⁰⁹. See *Meese Testimony*, supra note 5, at 3 (observing that “[w]hen an individual’s constitutional rights are implicated the government may not do indirectly—through others—what it is forbidden to do directly”).

⁴¹⁰. See *Griffin*, supra note 2, at 365.

⁴¹¹. *Employee Interview*, supra note, at 910-11; see also *Deputizing Company Counsel*, supra note 2, at 35-36; *Zornow & Krakaur*, supra note 2, at 157.

⁴¹². See, e.g., *Mathis March 2007 Testimony*, supra note 9, at 6.

⁴¹³. See sources cited supra note 12.

⁴¹⁴. See *Corporate Compliance: The Role of Company Counsel*, 21 GEO. J. LEGAL ETHICS 491, 508-511 (2008) (remarks of N. Richard Janis). For other examples of suggested warnings exceeding the bare minimum, see *Bennett et al.*, supra note 131, at 71; *Employee Interview*, supra note 1, at 941-64 & 958-60; *Marks supra* note 11, at 1090.
2. Ethical Obligations of Corporate Counsel

a. Conditions on Advancement of Counsel Fees to Constituents

As noted above, Judge Kaplan's dismissal of the indictments against thirteen of the KPMG defendants rested principally on the court's conclusion that the government had interfered with KPMG's longstanding practice of advancing counsel fees to its partners and employees. In addition to the state action question, this issue raises ethical dilemmas for corporate defense counsel as well as for prosecutors. Model Rule 1.8 specifically addresses the potential for conflict when someone other than the client pays for an attorney's services. Subsection 1.8(f) provides:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;
(2) there is no interference with the lawyer's independence of professional judgment or with the lawyer-client relationship; and
(3) information relating to the representation of a client is protected as required by [the client confidentiality provisions] of Rule 1.6.

The critical issue with respect to the advancement of counsel fees to individuals in the corporate cooperation context pertains to interference with the lawyer-client relationship. While the McNulty Memorandum at least ostensibly limits the occasions when prosecutors are permitted to hold advancement of counsel fees to employees against an entity, the risk remains that prosecutors will find ways around these limitations. If so, even in the absence of a direct threat, organizations will still refuse to advance counsel fees to employees to avoid the risk of invoking prosecutorial wrath. This kind of enforcement environment invites companies to look for creative alternatives. KPMG, for example, advanced pre-indictment counsel fees so long as recipients cooperated fully with the government. Conditioning fee advancement on the recipient's a priori agreement to cooperate with prosecutors arguably does not violate Model Rule 1.8 because the condition is placed on the client rather than counsel. Consequently, it does not interfere with the lawyer's independent professional

415. As used herein, "corporate counsel" includes both inside and outside counsel.
417. MODEL RULES R. 1.8(f); see also STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-3.5(e) (Am. Bar Ass'n 3d ed. 1993).
418. See McNulty Memorandum, supra note 3, at 11.
419. See, e.g., Mathis March 2007 Testimony, supra note 9, at 6; Much Ado About Nothing, supra note 25, at 5.
judgment or with the attorney's relationship with the client per se.\textsuperscript{421} Even so, such a condition effectively prevents the client from accepting any advice against cooperating unless he or she is prepared to assume the financial burden of paying counsel fees, a situation that surely interferes with the attorney-client relationship in a very real way.

Given the circumstances of the KPMG matter, if the firm had not found a way to condition advancement of attorneys' fees on cooperation with the government, it seems clear that KPMG would have declined to pay counsel fees or cut off payment in short order once prosecutors indicated their concern about advancement of fees to the individuals. The approach KPMG followed permitted the firm to pay for at least some of the crushing defense costs faced by former partners and employees. Even so, this benefit came with a significant price tag, one that the individuals later had cause to regret. However well-intentioned, KPMG's approach was inherently coercive.\textsuperscript{422}

It is quite likely that KPMG's approach was the product of advice of its own counsel, advice that appears to have worked well for the firm itself.\textsuperscript{423} In any event, while the KPMG rulings may cause prosecutors to pause in future investigations, defense lawyers could well advise corporate clients to follow a similar approach in the future. Consequently, it is worth considering whether Model Rule 1.8(f) or the accompanying commentary should take a position on the propriety of advising entities to condition advancement of counsel fees on constituents' willingness to follow a particular course of action. To permit lawyers to advise conditioning payment of legal fees on restrictions placed on a client's ability to follow her counsel's advice surely defeats one of the principal purposes of the rule.

b. Fairness to Corporate Employees in Internal Investigations

For corporate counsel, one of the hardest aspects of conducting or participating in internal investigations is dealing with corporate constituents in investigative interviews. Few tasks are more difficult in the current enforcement environment. As Richard Janis points out, lawyers conducting internal investigations

must make it clear to employees that they represent the company and not the individual employees to whom they are speaking. But in their role as deputy for the Department of Justice, and in order to serve their client in the name of

\textsuperscript{421} \textit{Model Rules R. 1.8(f)(2).}

\textsuperscript{422} \textit{See supra Part III} (discussing Judge Kaplan's rulings in \textit{Stein I, II, and III}).

cooperation, they need to extract as much information as possible to curry favor with the government so that the company can be seen as cooperative.\footnote{Deputizing Company Counsel, supra note 2, at 35.}

Balancing these competing tensions is never an easy task. As I wrote several years ago, and continue to believe today, there are times when any individual will find it difficult to hear a warning, no matter what is said, in the context of an internal investigation.\footnote{Employee Interview, supra note 1, at 956.} There are also times when simple actions, or the manner in which cautionary statements are delivered, can impact how an employee responds far more than the words themselves.\footnote{Id.} This is particularly true when lawyers with whom individual employees have a longstanding relationship—e.g., in-house counsel or attorneys from law firms that have handled other matters for the company—serve as investigating counsel or accompany those who act in this role.\footnote{Id.} Nevertheless, appropriate warnings are important.

The provisions of the \textit{Model Rules} most relevant to investigative interviews are found in Model Rules 4.1, 4.3, 4.4, and 1.13. Model Rule 4.1 addresses truthfulness in statements to others and prohibits lawyers from “mak[ing] false statements of material fact or law to a third person.”\footnote{Model Rules R. 4.1(a).} The comments to the rule, however, emphasize that, a lawyer “generally has no affirmative duty to inform an opposing party of relevant facts,”\footnote{Model Rules R. 4.1(a) cmt. 1.} and that “[w]hether a particular statement should be regarded as one of fact can depend on the circumstances.”\footnote{Model Rules R. 4.1(a) cmt. 2.}

Model Rule 4.3 focuses on fairness in a lawyer’s dealings with third parties. The rule sets forth three key requirements. First, a lawyer must not imply to a third party that he or she “is disinterested.” Second, a lawyer who “knows or reasonably should know that [an] unrepresented person misunderstands the lawyer’s role in the matter . . . shall make reasonable efforts to correct the misunderstanding.” Third, lawyers are not to give legal advice to the unrepresented person, other than the advice to obtain counsel, except where “the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.”\footnote{Model Rules R. 4.3}

Model Rule 4.4 mandates respect for the rights of persons other than one’s client\footnote{Model Rule 4.2 addresses contact with persons represented by other counsel.} and admonishes that lawyers must not “use methods of obtaining evidence that violate the legal rights of” third persons.\footnote{Model Rules R. 4.4(a).}

Finally, Model Rule 1.13(f) addresses issues of truthfulness and fairness in particular situations in which corporate counsel deal with the human constituents
of the entities they represent. It requires a lawyer to "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." 434

The net import of these various provisions is that counsel conducting interviews of current or former employees as part of a corporate investigation must inform the interviewee of who they represent when they have reason to believe that confusion and/or adversity of interests exists. 435 Jurisdictions vary in their particular approaches to the issue, but an ethics opinion issued by the Bar of the District of Columbia in 1997 is often cited as an example of a relatively expansive interpretation of the rule's disclosure requirements. 436 This opinion mandates disclosure of counsel's role "when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee." 437 Even with this guidance, however, the determination of what kind of disclosure is required and when is extremely difficult.

Many commentators advise providing at least some form of what is commonly termed a "corporate Miranda warning." 438 They do so for two reasons. First, in the absence of such a warning there is a risk that a court will hold that an attorney-client relationship was established with the interviewee, 439 and, second, there is a sense that to skip this kind of warning would be unfair. 440 Thus, practice

434. MODEL RULES R. 1.13(f).
435. Marks, supra note 11, at 1088; Employee Interview, supra note 1, at 946-47.
436. D.C. Bar Legal Ethics Comm, Op. 269 (1997). The opinion cautions that adversity may arise "even when the corporation has not yet irretrievably committed itself to a position in the matter, but where one such position might be adverse to the employee." Id. But, because the duty arises only when potential adversity is "apparent," the obligation of disclosure would not arise in those situations where the lawyer had no reason to believe that there was any possibility of adversity between corporation and employee when the interview was conducted." Id. This standard leaves considerable room for interpretation in the context of an internal investigative interview, particularly when investigating counsel has little prior knowledge of the circumstances or the interviewee's role. The opinion makes clear, however, that "[w]hile a lawyer's obligation to represent a client zealously (Rule 1.3(a)) might suggest that the client's need for information from the constituent is the lawyer's only concern, the Rules specifically require that the lawyer be mindful of the interests of the constituent." Id.
437. Id.
438. See, e.g., Bennett, et al., supra note 131, at 65-68. One federal judge has proposed the term Adnarim (Miranda spelled backwards) warnings for cautionary statements delivered to employees in the course of an internal investigations. Frederick B. Lacey, Remarks on Employee Interviews (reprinted in Denis J. Block & Nancy E. Barton, Internal Corporate Investigations: Implications of the Attorney-Client Privilege and Work Product Doctrine, in INTERNAL CORPORA, supra note 271, at 40); Employee Interview, supra note 1, at 941-47 & sources cited therein; Marks, supra note 11, at 1090-98 and sources cited therein.
439. See, e.g., Waggoner v. Snow, Becker, Kroll, Klaus & Krauss, 991 F.2d 1501 (9th Cir. 1993) (upholding interviewee's right to invoke attorney-client privilege because she reasonably believed that firm's attorney was also acting as her personal attorney).
440. Cf. Cummings, supra note 11, at 673-74 (discussing human dignity and rights-based approach to warnings concerning attorney-client privilege) (citing MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 4 (1975) and DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 197 (1988)).
has outdistanced the rule, at least for many lawyers experienced in this work.\textsuperscript{441} Even so, Rule 1.13(f), and possibly Rule 4.1, should be amended to require that, at a minimum, lawyers must inform constituents of their role, their representation, and the possibility that the client will disclose the discussion whenever an internal investigation has commenced. This would help to ensure consistency by clarifying the ethical dimensions of investigative interviews.

In addition, serious consideration should be accorded to specifying that lawyers conducting internal interviews should warn the employees they interview that what they say may be used against them,\textsuperscript{442} particularly in circumstances in which there is a deferred prosecution agreement or other arrangement with the government that requires the company to conduct an internal investigation and deliver its fruits to government attorneys. In such circumstances, investigating counsel should reveal this fact and indicate the potential consequences of a misrepresentation on the part of the interviewee. Including this kind of provision in the ethical rules would not simply restrict defense counsel, it would free them to act in accordance with the same kinds of standards that led to the \textit{Miranda} rule itself. Such an ethical standard is entirely appropriate in situations in which investigating counsel are acting as de facto government agents. The criminal justice system has managed to proceed with the \textit{Miranda} requirement, and it will undoubtedly survive if corporate counsel are ethically bound to provide a similar warning in the context of internal investigations. The critical point is that the current \textit{Model Rules} are too vague to ensure fairness to individuals interviewed in the course of corporate investigations. The legal profession needs to consider how to redress the imbalance created by this situation.

3. \textbf{DILIGENCE ON THE PART OF ALL COUNSEL}

Model Rule 1.3 requires a lawyer to “act with reasonable diligence and promptness in representing a client.”\textsuperscript{443} As noted earlier, Model Rule 1.3 does not obligate lawyers “to press for every advantage that might be realized for a client,” “require the use of offensive tactics[,] or preclude the treating of all persons involved in the legal process with courtesy and respect.”\textsuperscript{444} It remains unclear, however, what diligence means for prosecutors and defense attorneys in connection with corporate cooperation, particularly with respect to the conduct of internal investigations, government requests for waiver of corporate attorney-client and work product protections, and the treatment of individual employees. It

\textsuperscript{441} See sources cited supra note 438. But see Cummings, supra note 11, at 670 (noting temptation to provide “watered down warnings”).

\textsuperscript{442} See Lacey, supra note 438.

\textsuperscript{443} Model Rules R. 1.3.

\textsuperscript{444} Model Rules R. 1.3 cmt 1.
would be impractical, even undesirable, to attempt to address each of these concerns specifically in the context of ethical rules, but some clarification could help both prosecutors and corporate defense counsel.

Once again, the critical question is where to draw the line between diligence on behalf of the government or a client entity and fairness to constituents. In the wake of Enron’s collapse and the series of corporate scandals that rocked the corporate world thereafter, the President, Congress, and the public, as well as the vast majority of business leaders interested in the honesty and fair dealing essential to maintaining a level playing field, focused on preventing future problems of this ilk. It was in this context that DOJ released the Thompson Memorandum to expand on the principles set forth in the Holder Memorandum and make them mandatory for prosecutors considering charging corporations.445 It was also during the same time period that the ABA created its Corporate Governance Task Force and amended Model Rules 1.13 and 1.6 to ensure that corporate lawyers understand that the interests of the entities they represent take precedence over those of constituents and to facilitate up-the-ladder reporting of constituent wrongdoing.446

The 2003 amendments to Model Rules 1.13 and 1.6 were connected to resolutions pertaining to the role of lawyers in corporate representation, but the ABA has yet to modify the Model Rules in connection with resolutions opposing corporate cooperation policies that undermine the attorney-client privilege and encourage entities to withhold advancement of counsel fees or otherwise sanction employees for exercising constitutional rights.447 As a profession we need to consider how to take steps to address the issues raised by the 2005 and 2006 resolutions pertaining to corporate attorney-client privilege protections and the impact of the culture of waiver and associated corporate cooperation policies on individuals. Consideration of additional comments discussing the application of Rule 1.3 in connection with corporate investigations would be a good place to start.

C. FUTURE CONSIDERATIONS

In the era of globalization, economic power crosses borders far more easily than political influence, and the economic well being of hundreds of millions of people depends on major corporations. In the United States alone more than half of the population owns stock in one form or another448 and tens of millions of

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445. See supra text accompanying notes 42-51.
446. See Report of the American Bar Association Task Force on Corporate Responsibility, supra note 368.
447. See ABA Attorney-Client Privilege Resolution, supra note 11; ABA Employee Rights Resolution, supra note 69.
448. See supra note 351.
Americans are employed by corporations and other business entities. Yet, to a large extent, the Model Rules have just begun to come to grips with the ways in which organizations affect both lives and legal practice. While it is true that most ethical rules should apply to lawyers acting in any capacity, as a profession we still have work to do in recognizing the importance of organizations in contemporary practice. This is a point in-house lawyers have been making for years.

In suggesting the need to reconsider ethical standards relevant to corporate cooperation and the ways in which they operate, or fail to operate, to safeguard individual rights, I do not mean to propose undermining the ability of prosecutors to hold corporations and their constituents accountable. Nor do I suggest that corporate counsel should lose sight of the reality that the entity itself is the ultimate client. My goal is to point out that, in addition to seeking other avenues of mitigating the unfairness of corporate cooperation policies to individual employees and diminishing the difficulties faced by corporate counsel caught between fidelity to client interests and unfair compromise of individual rights, the legal profession needs to consider amending its own ethical standards.

V. CONCLUSION

Federal corporate cooperation policies profoundly impact the rights of individuals caught up in the investigation and prosecution of corporations and other organizations. A multifaceted approach encompassing administrative, legislative and judicial action is necessary if meaningful changes are to occur, but it may not be sufficient. As lawyers, it is also incumbent upon us to safeguard individual rights by considering the ethical dimensions of corporate criminal practice. In the end, it is integrity that is at stake—our own ethical grounding and that of our profession.

450. The necessity of acknowledging the importance of the ethical rules of other countries is already quite clear. See, e.g., Ethan S. Burger, International Legal Malpractice: Not Only Will the Dog Eventually Bark, It Will Also Bite, 38 ST. MARY'S L. J. 1025 (2007) (underscoring the need to clarify our own professional standards).
451. The Model Rules focus more on the role and ethical obligations of lawyers engaged in adversary matters rather than advisory capacities. Too often mistakes occur because lawyers acting in an advisory capacity fail to recognize the distinction between zealous advocacy and advice work in which common sense suggests a different, less aggressive approach. This is particularly true for lawyers who serve as in-house counsel and for all attorneys who advise corporations and other entities. The guidance offered by the Model Rules in these areas is limited.