CHAPTER 1

An Overview of the Attorney-Client Privilege When the Client Is a Corporation

VINCENT S. WALKOWIAK

I. Introduction ................................................................. 2
II. The Attorney-Client Privilege: First Principles ................. 4
   A. Establishing the Privilege .......................................... 4
   B. Determining the Rule of Privilege: Control Group
      versus Subject Matter ............................................. 6
   C. Multiple Roles of In-House Counsel ............................. 10
      1. In-House Counsel as Executive ............................... 10
      2. In-House Counsel as Witness .................................. 13
      3. The Shelton Doctrine: Noticing the Opposing Counsel's Deposition .......................... 14
   D. Other Types of Privilege ........................................... 16
      1. The "Joint Defense" .............................................. 16
      2. Self-Critical Analysis ............................................ 17
   E. Losing the Attorney-Client Privilege ............................ 19
      1. Waiving the Privilege ........................................... 20
      2. Waiver by Selective and Inadvertent Disclosure .......... 20
      3. Protecting the Privilege in Today's Technological Age .... 24
      4. Offensive Use of the Privilege ................................ 26
      5. The "Good Cause" Exception .................................... 26
   F. Distinguishing the Attorney Work-Product Doctrine
      from the Attorney-Client Privilege ............................ 27
      1. The Attorney Work-Product Doctrine ....................... 27
      2. Limits of the Work-Product Doctrine ....................... 29
      3. Asserting the Work-Product Doctrine in Successive Litigation .................................. 29
III. Conclusion and Practical Tips ...................................... 30
    Notes ........................................................................ 31

Appendix 1-1 Memoranda to Accompany "Principles of Federal
Prosecution of Business Organizations" ............................. 43
Appendix 1-2 "Principles of Federal Prosecution of Business Organizations" .... 61
Appendix 1-3 "Principles of Federal Prosecution of Business Organizations" .... 83
I. Introduction

Former Deputy Attorney General Larry D. Thompson released the “Principles of Federal Prosecution of Business Organizations” (the Thompson memo) on January 23, 2003, generating a maelstrom of controversy. In the memo, Thompson instructed federal prosecutors to consider various factors when determining whether to reach a favorable plea agreement with corporations under investigation. Among those factors was a corporation’s willingness to waive the attorney-client privilege and work-product doctrine protection if deemed necessary by the Justice Department. Other federal agencies followed, announcing that they too would implement similar policies. The American Bar Association and other corporate and professional groups lamented this assault on the “sanctity” of the attorney-client privilege.

Thompson’s memo was the Justice Department’s prevailing policy until late 2006. At that time, Deputy Attorney General Paul McNulty announced a policy change in a meeting of the Lawyers for Civil Justice. McNulty’s comments were followed by the release of a highly publicized memo, “Principles of Federal Prosecution of Business Organizations,” that superseded and replaced the Thompson memo. Subsequent deputy attorneys general, including Mark Filip, issued similar memos, emphasizing that “waiving the attorney-client and work-product protections has never been a prerequisite . . . for a corporation to be viewed as cooperative.” Under Filip’s leadership, the department revised its policies so that a corporation may voluntarily share information protected by the attorney-client privilege or work-product doctrine, but prosecutors may not ask for such waivers.

Although significant, Thompson’s memo had no effect on the substantive law of privilege; at bottom, the memo articulated a federal agency’s policy regarding the circumstances under which a corporation might receive a more favorable disposition in a governmental investigation. Also, the memo was limited to attorneys representing entities being investigated for violating federal law. Far more important to the law of attorney-client privilege and work-product protection is the effect of recent legislation and court decisions interpreting the scope of these privileges and protections.

This chapter presents an overview of federal and state law regarding the attorney-client privilege as an evidentiary privilege and the procedures that relate to it, especially as they apply to communications by attorneys representing corporations. Frequently, attorney-client-privileged communications also are protected by the attorney work-product doctrine, which is a rule of civil procedure, and by the attorney’s ethical duty to maintain confidentiality as to information related to representation of a client.

The attorney-client privilege is generally recognized as one of the oldest evidentiary privileges in Anglo-American law. The intended purpose of the attorney-client privilege is to promote the free flow of information between attorneys and their clients by removing the fear that the details of their communications will be disclosed to outsiders. This privilege rests on the presumption that an attorney can render accurate advice only if the client fully
discloses all the relevant facts. The client is encouraged, therefore, to provide complete disclosure, even as to facts that, if disclosed, could adversely affect the client's legal position. After all, it is frequently the most harmful information that the attorney needs in order to provide the best legal advice to a client.

The attorney-client privilege can restrict or totally preclude certain communications from being discovered or admitted into evidence. For this reason, the privilege runs afoul of the general premise that every person is obligated to offer information he or she has about an issue before the courts. This general duty to disclose information is regarded as nearly sacrosanct. One important commentator on evidence, Wigmore, recognized this fact and commented as follows:

For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man’s evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.9

Nor was Professor Wigmore alone in his view that a rule that exempts some information from evidence should be narrowly construed.10 As one court put the matter:

[The attorney-client] privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It is worth preserving for the sake of a general policy, but it is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.11

Many of the situations selected for inclusion in this chapter involve the assertion of attorney-client privilege by corporate in-house or general counsel, as well as by attorneys representing corporations. As will be discussed, the privilege presents special problems in the context of corporations, especially when asserted by in-house counsel. Although every court recognizes that in-house counsel qualify for the privilege, many courts require in-house attorneys to clear a high bar before they can successfully assert the attorney-client privilege. While this position may not be legally warranted, it is nevertheless the attitude of courts, which are typically suspicious of the role that in-house counsel play in a corporation, especially given the many nonlegal assignments that in-house lawyers perform. Further, a court’s approach in resolving a corporation’s attorney-client privilege issues must be considered in light of the courts’ liberal interpretation of discovery rules and the narrow interpretation to which the attorney-client privilege is generally subject.
II. The Attorney-Client Privilege: First Principles

The attorney-client privilege is an evidentiary rule designed to encourage (by protecting) the free flow of information between an attorney and his or her client. The privilege is traditionally and historically a product of the common law, but it has been codified in many jurisdictions across the country. In some states, the attorney-client privilege statute merely restates the common law. Other states, including Arizona and Texas, have codified the privilege in detail, specifically setting forth not only the privilege but also many of the procedural rules regarding its use. Some states have also anticipated and addressed questions on how to interpret the privilege.

The basic definition of the attorney-client privilege is fairly simple. Rule 503(b) of the Texas Rules of Evidence provides a good working definition of the privilege: “[a] client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”

The assumption underlying the privilege is that our legal system is more civilized and efficient because we recognize the attorney-client privilege. Many believe that, if courts do not broadly interpret and enforce the privilege, the legal system will suffer, as clients will have to determine whether confidential disclosures to their attorney could be revealed to a party with opposing legal interests. Undoubtedly, this risk could “chill” full disclosure, causing a client to withhold important facts from the attorney. As a result, the attorney runs the risk of rendering incomplete and, perhaps, incorrect legal advice. It is believed that our adversarial legal system can encourage full disclosure only by eliminating the fear that the communication will be disclosed by the attorney and then used against the client. The attorney-client privilege helps achieve this end.

The free flow of uncensored information between an attorney and client is as important within a corporation as it is between the corporation and outside counsel. In-house counsel owe a duty to their client—the corporation. And like outside counsel, in-house counsel can perform that duty only with full knowledge of the information available to the client. It is important to understand the rationale underlying this legal doctrine, and attorneys should always argue the potential damage to the underlying policies and objectives of the attorney-client privilege when attempting to establish this privilege, regardless of the context in which the privilege is being asserted.

A. Establishing the Privilege

The attorney-client privilege attaches early in the attorney-client relationship. For example, the Rules of Evidence in Texas and Alabama define “client” as someone who consults a lawyer “with a view to obtaining professional legal services from [him].” Once created, the privilege continues and does not end when the representation ends or the client dies.

Because the privilege belongs to the client, the claim of privilege must be made by or on behalf of the client. Thus, although the privilege belongs to
the client, the lawyer may claim the privilege on behalf of the client and is presumed to have the authority to assert the attorney-client privilege in the absence of evidence to the contrary.19

In the case of a corporation, it is generally held that the privilege may only be asserted by an authorized corporate representative on behalf of the corporation.20 Generally speaking, an attorney for the corporation is vested with presumptive authority to assert the privilege.21 A corporation’s attorney is generally in the best position to assert the privilege, whether at a deposition, when responding to written discovery, or at trial.

The attorney-client privilege, naturally, is not self-actuating, and generally a party seeking to protect privileged communication from discovery must, at some stage:

1. Affirmatively and specifically plead or assert the attorney-client privilege;
2. Produce evidence concerning the applicability of the attorney-client privilege; and
3. For written material, allow the trial court to determine whether an in camera inspection is necessary to determine if the privilege applies.

If the trial court orders an in camera inspection of the privileged communication, the party asserting the privilege should segregate and produce to the court those materials the court seeks to inspect. Failure to follow this procedure may waive any complaint of the trial court’s action regarding the privilege.22

Thus, the party resisting discovery of material claimed to be privileged must specifically claim the privilege relied on and establish the justification for its imposition.23 In written discovery, the discovery response must identify the privilege and identify each document to which the privilege applies. General objections will most likely not suffice. Simply listing documents under the heading “Attorney-Client/Attorney Work-Product” is generally insufficient to protect documents from discovery. A global claim that a list of documents is protected by one or more privileges is also too general to prevent their discovery. Further, merely attaching something to a privileged document does not, by itself, make the attachment privileged.24 And while often called an absolute privilege, the attorney-client privilege is subject to exceptions.25

The parameters of the attorney-client privilege in federal court were fully set forth in United States v. United Shoe Machinery Corp.,26 a frequently cited case from 1950, in which the court stated:

The privilege applies only if (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was
informed (a) by his client (b) without the presence of strangers (c) for
the purpose of securing primarily either (i) an opinion of law or (ii)
legal services or (iii) assistance in some legal proceeding, and not (d)
for the purpose of committing a crime or tort; and (4) the privilege has
been (a) claimed and (b) not waived by the client.27

It is well established that the attorney-client privilege applies to the cor-
porate client;28 however, even this principle has not gone unchallenged. In
fact, at least one court, subsequently reversed, has held that the attorney-client
privilege could not be claimed by a corporation.29 Moreover, while the pro-
cedures for asserting the attorney-client privilege are rather straightforward
when applied to a client who is a natural person, they are not so simple when
the client is a corporation. The most obvious difference is that the corporation
speaks through the many voices of its employees, agents, and representatives.
There may be so many corporate employees and agents that it is unrealistic
to permit every corporate employee or agent to be able to assert the attorney-
client privilege in every communication. Thus, when a corporation asserts the
attorney-client privilege, there are questions about (1) which natural persons’
communications are protected, (2) who within the corporation may assert the
privilege, and (3) who within the corporation may waive the privilege.

Not surprisingly, there is no uniform answer to these questions, either
among the states or between state and federal law. In regard to who can assert
the attorney-client privilege, courts have adopted and applied two general
tests: (1) the control group test and (2) the subject matter test. Determining
which test applies depends on knowing a particular jurisdiction’s privilege
laws, which are typically found in a state’s rules of evidence. Because the rule
as applied may be affected by various factors, it is important for an attorney
representing a corporation to understand both tests, notwithstanding the fact
that few jurisdictions still follow the control group test. That said, it is not
enough to know only the applicable test of a particular state because corporate
litigation frequently involves parties from different states. Also, it is likely that
a corporation may be sued in a state in which it is not a resident. Therefore,
attorneys should be familiar with the conflicts of law rules that govern differ-
ent jurisdictions because such laws could also impact the applicable privilege
test.

B. Determining the Rule of Privilege:
Control Group versus Subject Matter

Courts have taken two approaches in resolving attorney-client privilege issues
in the context of corporations.30 The first, or “control group test,” provides that
the client may be an entity and have confidential communications only if the
corporate representative can act on the legal advice rendered or if the corpo-
rate representative has authority to obtain legal representation on behalf of the
corporation.31 This test is by far the minority rule.
The control group concept originated with *City of Philadelphia v. Westinghouse Electric Corp.* In that case, defendant Westinghouse asserted the attorney-client privilege to prevent disclosure of an employee's statement to Westinghouse's general counsel. In rejecting the application of the attorney-client privilege to this communication, the court adopted the following definition of the scope of the attorney-client privilege in the corporate setting:

If the employee making the communication, of whatever rank he may be, is in a position to control or even to take a substantial part in a decision about any action which the corporation may take upon the advice of the attorney, or if he is an authorized member of a body or group which has that authority, then, in effect, he is (or personifies) the corporation when he makes his disclosure to the lawyer and the privilege would apply. In all other cases the employee would be merely giving information to the lawyer to enable the latter to advise those in the corporation having the authority to act or refrain from acting on the advice.

It is obvious that the control group test is extremely narrow in defining the group of persons who may have privileged communications. Even though low-level employees frequently possess information that may be vital to addressing a corporation's legal issues, the control group test offers the protection of the attorney-client privilege only to communications of top management. And while the limited protection afforded by the work-product doctrine might be available for communications with counsel when litigation is anticipated, communications of a nonmanagement group employee in the absence of anticipated litigation may be unprotected. Some states, recognizing the restrictive nature of the test, have expanded the control group to include those advising top managers on legal issues.

Despite the control test's limits, a minority of states continue to follow the control group test for corporations. Change is constantly occurring, however, as the scope of the attorney-client privilege for corporate communications is reconsidered and more states abandon the control group test for the more liberal and realistic subject matter test.

In 1993, the Texas Supreme Court, in *National Tank Company v. Brotherton*, determined the scope of a corporation's attorney-client privilege under Texas law. In a plurality opinion (which was effectively joined by all the other justices on this issue), Chief Justice Phillips wrote that Rule 503 of the then Texas Rules of Civil Evidence adopted the “control group test” by virtue of its definition of “representative of the client”—that is, “one having authority to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf of the client.” Thus, even if legal matters were discussed between attorneys and employees, the communications would not be considered privileged unless they were between an appropriate “control group” corporate representative...
and counsel. Of course, this sort of communication might be protected by the work-product doctrine if taken in anticipation of litigation. For this and other reasons, the narrow control group test was criticized and the state began to reevaluate the rule.38

The control group test defined the scope of the attorney-client privilege in Texas until 1998. At that time, the Texas Rules of Evidence were amended to include the subject matter test in addition to the control group test for communications by corporate employees to attorneys. In Texas, the attorney-client privilege may now be asserted on behalf of a corporation for communications by

(A) A person having authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client; or
(B) Any other person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.39

As Texas did in amending its rule for the attorney-client privilege, the Seventh Circuit Court of Appeals, some years earlier in the leading case of Harper & Row Publishers, Inc. v. Decker,40 adopted the subject matter test. The Seventh Circuit recognized that an employee, while not a member of the control group, is sufficiently identified with the corporation so that the employee’s communication to the corporation’s attorney should be privileged when the employee makes that communication at the direction of his or her corporate supervisor.41 However, the court imposed the additional condition that the communication between the employee and the corporation’s legal counsel must be done in furtherance of the employee’s official duties. As the court said, the privilege is allowed “where the subject matter upon which the attorney’s advice is sought by the corporation and dealt with in the communication is the performance by the employee of the duties of his employment.”42

While generally accepted, the principles expressed by the court in Harper43 were viewed by some courts as being too broad. Thus, the court in Diversified Industries, Inc. v. Meredith44 adopted what became known as the modified subject matter test. This test set forth five elements that need to be satisfied before a corporate employee’s communications with counsel can be privileged:

1. The communication must be made for the purpose of securing legal advice;
2. The employee making the communication should be doing so at the direction of his corporate supervisor;
3. The employee’s superior made the request for the communication in order for the corporation to secure legal advice;
4. The subject matter of the communication was within the scope of the employee’s corporate duties; and
5. The communication was not disseminated beyond those persons who, because of the corporate structure, needed to know its contents.\textsuperscript{45}

These principles ultimately gained acceptance by the U.S. Supreme Court. For instance, in *Upjohn Co. v. United States*,\textsuperscript{46} the U.S. Supreme Court rejected the “control group” test and held that the attorney-client privilege protected communication between corporate counsel and lower-level corporate employees. This version of the “subject matter” test is employed in federal courts in nondiversity cases. In reaching its decision, the Court followed this reasoning:

In the case of the individual client the provider of information and the person who acts on the lawyer’s advice are one and the same. In the corporate context, however, it will frequently be employees beyond the control group as defined by the court below—“officers and agents . . . responsible for directing [the company’s] action in response to legal advice”—who will possess the information needed by the corporation’s lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties.\textsuperscript{47}

While the Court in *Upjohn* limited its holding to the facts before it and expressly declined to lay down a broad rule, the Court did determine the availability of the attorney-client privilege to corporations facing litigation in federal court. The holding clearly states that confidential communications by corporate employees about matters within the scope of their employment, and made for the purpose of enabling counsel to provide legal advice to the corporation, fall within the scope of the attorney-client privilege. To be sure, the Court cautioned that because the attorney-client privilege suppresses information, it could obstruct the truth-finding process; therefore, the Court said, the privilege should be narrowly construed.

Case law suggests that this perceived need for a narrow construction arises most often when a corporation seeks to invoke the privilege to protect communications of or to in-house counsel. This is primarily due to the fact that in-house counsel may play a dual role of legal advisor and business advisor. In such instances, the courts must apply a greater level of scrutiny to the contested communications to ensure that the communication occurred for legal, not business, purposes. After all, the attorney-client privilege applies only if the communication’s purpose is to gain or provide legal assistance. The varied scope of responsibility of some corporate in-house attorneys suggests that courts will continue to closely analyze a corporation’s claim of privilege to determine whether the communications fall outside the realm of privilege afforded to corporations.
Since *Upjohn*, the majority of states have adopted some version of the subject matter test. The subject matter test has also been cited formally by a number of states that have not adopted a specific rule.\(^{38}\)

While *Upjohn* establishes that cases arising under federal law require the application of the subject matter test to corporate communications, the Federal Rules of Evidence adopt a policy consistent with the limits of federal authority in diversity cases. The Federal Rules of Evidence address this issue:

> [T]he [attorney-client] privilege of a witness [or] person . . . shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which [s]tate law supplies the rule of decision, the privilege of a witness [or] person . . . shall be determined in accordance with [s]tate law.\(^{49}\)

Therefore, in cases involving state laws, the applicable privilege rule will depend on the laws governing a particular jurisdiction. The incongruity of this principle has not been lost upon some commentators, who have pointed out that a single corporation might be involved in two cases—one based on diversity jurisdiction and the other based on federal law—in the same federal court before the same judge. In such a situation, the judge would be expected to apply *Upjohn*’s subject matter test in the case implicating federal law. In the diversity case, the judge would apply the privilege rule unique to the particular forum state, which could easily be the control group test. This incongruity, while perhaps a little far-fetched, dictates a cautionary note, and relying upon rules for traditional conflicts offers little comfort. The *Restatement (Second) of Conflicts* favors the forum’s laws that will more likely hold that the communication is unprotected by the privilege.\(^{50}\) Consequently, a jurisdiction that follows the subject matter test and the *Restatement’s* view of conflicts might find itself in the awkward position of being asked to set aside its own rules regarding the attorney-client privilege and apply the control group test of another jurisdiction. This could cause a court to hold that communications typically considered privileged are no longer protected due to the imposition of a different rule. Even if this is not the result, the possibility alone suggests that a forum selection clause and choice of law clause should be a standard provision in any contract where the parties are in a position to control which standard will apply.

### C. Multiple Roles of In-House Counsel

#### 1. In-House Counsel as Executive

In addition to determining which laws courts will use to determine the scope of the attorney-client privilege, in-house counsel must also distinguish their role as legal advisor from that of business executive. In-house counsel must
make this distinction because the attorney-client privilege extends only to communications pertaining to legal matters. The privilege does not exist for business communications.

It is presumed that communications with outside counsel are for the purpose of seeking legal advice. This presumption is not given to in-house counsel because in-house counsel are perceived as being equally capable of having provided business as well as legal advice. For instance, in some corporate settings, in-house attorneys are asked only to serve as the corporation's attorney, managing litigation or otherwise performing purely legal work. In other corporations, especially those that engage a single in-house counsel, the range of responsibilities is much broader, causing in-house lawyers to provide both business and legal services to their clients.

For instance, some corporate counsel have been described as the persons who advise the corporation on compliance with the myriad regulations and business practices. Because of their legal training, these attorneys conduct internal investigations, chair committees, serve on the board of directors, and become de facto human resources managers, among other responsibilities. As such, these corporate attorneys may be expected to give advice of a business or legal nature, or a combination of both. The commingling of legal and business services creates problems for courts that are asked to define whether a particular communication is privileged. After all, the attorney-client privilege attaches only to communications between attorneys and clients made for the purpose of giving or securing legal advice. As expected, courts give increased scrutiny to corporate communications because of the broad nature of in-house counsel's responsibilities and the type of advice frequently requested of them. Basically, the courts look to whether counsel was acting in the capacity of an attorney when receiving the communication or giving the advice. If the communication of in-house counsel is made to render business advice, even to a small degree, the protection afforded by the attorney-client privilege may not be provided to that communication.

The fact that corporate counsel is an attorney does not render all communications with employees of the corporation as privileged. Counsel must be acting in the capacity of an attorney when receiving or making a communication, and therefore must be communicating with the corporate employees, officers, or directors of the corporation for the purpose of formulating legal opinions or advice. The corporation, for this reason, cannot merely pass questionable documents through the legal department for review and thereby have them declared protected from outside scrutiny, just as it cannot provide such documents to outside counsel to protect the documents from disclosure.

Even when courts recognize that communications by corporate employees with in-house counsel are entitled to the protection of the attorney-client privilege, they seem to apply a heightened standard for determining when that privilege applies. When presented with the issue of whether the attorney-client privilege protected the communication of an in-house attorney who also
served as the company’s vice president, one judge concluded that the company “can shelter [in-house counsel’s] advice only upon a clear showing that [in-house counsel] gave it in a professional legal capacity.” In this instance, the heightened standard that the communication be made for legal and not business reasons meant that the proponent of the privilege was required to show by affidavit the precise facts that existed to support the claim of privilege.

A few precautions could assist in satisfying a court’s standards. For example, in-house counsel could develop internal procedures that indicate when the in-house counsel is acting as an attorney. This will distinguish counsel’s legal work, which is privileged, from the work they must perform when they are acting as an “executive” within the company. For instance, if oral communication between an employee and in-house counsel occurs for legal purposes, the in-house counsel should make sure the employee understands the purpose of such communication. If the communication is written, the document should expressly state that it is for a legal purpose and that there are no business aspects to the communications. The communication should also include the other elements of the privilege. The document should state that it is requested by the employee’s superior, that it is confidential, and that it is addressed to in-house counsel in the counsel’s capacity as in-house counsel.

While a lawyer’s membership in a particular state’s bar may not be a prerequisite for asserting the attorney-client privilege, such membership is worthwhile because it supports the proposition that corporate counsel is first and foremost an attorney. The importance of this precaution is best illustrated in the context of whether internal reports and investigations are privileged. Of all the documents prepared by in-house counsel, internal reports can prove to be the most difficult to protect as privileged. Indeed, as courts continue to struggle with whether particular communications were made to corporate counsel in their business or legal capacity, the federal courts have been reluctant to protect the communications of in-house counsel who prepare client tax returns, patent viability reports, or investigative reports that are solely for internal use.

The issue of corporate counsel bar membership has recently been an extremely heated topic of debate. In *Gucci America, Inc. v. Guess?, Inc.*, a magistrate judge held that communications to Gucci’s in-house counsel were not protected under the attorney-client privilege because its in-house counsel was not an active member of the state’s bar at the time the communications were made. Nor could Gucci benefit from the privilege under the theory that it reasonably believed that in-house counsel was authorized to practice law. The court stated that a corporation must inquire into the professional licensure status of in-house counsel to ensure application of the attorney-client privilege. This decision struck a bad chord with corporations across the nation, who believed they had been burdened with the onerous task of continuously monitoring the bar status of in-house counsel.

The decision in *Gucci*, however, was short-lived; in 2011, the district court overruled the magistrate’s judgment. Relying on the privilege standard
established by the Supreme Court in *U.S. v. United Shoe Machinery Corp.*, the district court held that Gucci’s in-house counsel could receive the attorney-client privilege because he was “a member of the bar of a court.” The district court went further and stated that as long as the client had a reasonable belief that it was communicating with an attorney, the attorney-client privilege would be applied to in-house counsel to protect such communications. Pursuant to this decision, corporations may continue to communicate freely with in-house lawyers without having to constantly monitor each attorney’s bar membership status, so long as there is some reasonable factual basis for a belief that the lawyer is an active licensed member of a bar.

In *Simon v. G.D. Searle & Co.*,61 the court applied Minnesota law in a diversity action regarding the attorney-client privilege.62 In *Simon*, the defendant’s risk management department developed aggregate risk statements from individual case loss information statements prepared by in-house counsel. The district court held that the individual case loss materials were privileged on the basis that Minnesota law protects statements made by a client to the attorney, as well as the attorney’s advice given to the client in response to the client’s inquiry.63 An Eighth Circuit standard was next applied to the communications. This standard provided that “[w]hen a client acts on privileged information from his attorney, the results are protected from discovery to the extent that they disclose the privileged matter, directly or inferentially.”64 Ultimately the privilege claimed in *Simon* was denied in regard to the documents. The court determined that the individual figures prepared by an attorney were privileged but lost their status as privileged communications when they were given to the client and combined by the client in order to create the aggregate information. The aggregate figures were not direct compilations of the individual figures. Rather, the individual figures were factored by variables such as inflation, and thus, were changed as to be untraceable to the privileged communication.

2. *In-House Counsel as Witness*

In-house counsel is most frequently exposed to the risk of being called as a witness when the attorney signs or verifies a pleading, responds to discovery, or signs an affidavit, although this may occur in other circumstances as well.65 To avoid being noticed for deposition, in-house counsel should make sure that all attesting matters are performed by a corporate officer rather than in-house counsel.

Attorneys who perform corporate functions beyond representation of the corporate client invite their own depositions. Admittedly, this is unavoidable in some instances. *Johnston Development Group v. Carpenters Local Union No. 1578*66 involved a RICO action in which plaintiff’s in-house counsel also served as the corporation’s vice president. In that dual capacity, she was the sole person to take notes at important meetings between the parties before the litigation began, and she was the sole witness to certain prelitigation conversations of which highly disputed accounts had been given. The court was somewhat
receptive to limiting the practice of deposing opposing counsel, but it acknowledged that it was forced to allow a limited examination of the in-house counsel/vice president because she had witnessed the crucial conversations that were in controversy in the litigation.

Again, to reduce the likelihood of in-house counsel being deposed, in-house counsel should witness or attest to as few documents or purely business transactions as possible. That is, in-house counsel should not sign affidavits of discovery compliance or witness transactions if a corporate official is in a position to do so. Also, in-house counsel should not get involved with the mechanics of discovery, such as searching files, because this increases the likelihood of becoming a fact witness when the scope of that discovery compliance is at issue.

3. The Shelton Doctrine: Noticing the Opposing Counsel’s Deposition
The attorney is not permitted to testify (and may therefore refuse to answer questions) as to communications made to him or her by the client unless the client consents. However, the right to refuse to testify exists only if

- The holder of the privilege is a client (or a potential client);
- The person to whom the communication was made is a lawyer;
- The communication relates to a fact of which the attorney was informed
  - by the client;
  - not in the presence of strangers; and
  - for the purpose of receiving a legal service; and
- The privilege has been asserted and has not been waived by the client.67

Parties typically attempt to notice the deposition of opposing counsel, including in-house counsel, for several reasons. First, it can be a shortcut to information available through more traditional and legitimate methods of discovery. Second, it may create grounds for the disqualification of opposing counsel under ethical rules forbidding attorneys to serve both as advocate and witness in the same trial. Third, it may be used as an inappropriate means of harassing the opposing party.

Courts have attempted to prevent such abusive depositions. To be sure, there is no total bar to deposing in-house counsel. Some federal courts have even supported efforts to depose opposing counsel, noting that the Federal Rules of Civil Procedure permit a party to “depose any person.”68 Other courts, however, have imposed strict burdens on parties seeking to depose opposing counsel. One of the first courts to do so was the Eighth Circuit in Shelton v. American Motors Corp.,69 where the court granted a protective order against the taking of the deposition of an opposing party’s counsel. The court in Shelton determined that opposing counsel can be deposed only when a party demonstrates that (1) no other means exist to obtain the information than to depose
opposing counsel, (2) the information sought is relevant and nonprivileged, and (3) the information is crucial to the preparation of the case. As a practical matter, the law on this issue generally seems to follow Shelton, meaning that most courts will permit the deposition of opposing counsel only upon a showing of substantial need and only after alternate discovery avenues have been exhausted or proven impractical.

When the deposition of counsel has been noticed, and not quashed, in-house counsel should rely on the Shelton policy arguments set out below to protect privileged information:

- The deposition will inevitably hinder the attorney-client relationship and inhibit counsel’s preparation of the client’s case;
- It is unlikely that counsel has any more nonprivileged information than is available from other sources;
- Routine attempts to depose counsel will inevitably tie up the court’s time with disputes over the scope of privilege and related matters; and
- There should be no interrogation of an attorney to impeach discovery unless prior substantial evidence shows that a significant violation of the discovery obligation has occurred.

In some instances, the need to depose opposing counsel can be obviated by stipulating that certain witnesses will not be called and that certain issues will not be raised at trial. For example, in Perry v. Jeep Eagle Corp., the defendants avoided the deposition of their in-house counsel by arguing that the information sought was not relevant to plaintiff’s claims. The defendants also stipulated that the study about which plaintiff sought to question the attorney would not be offered in evidence during the trial. The court recognized that, where a matter is not at issue, there is no need to pursue information about the matter by deposing in-house counsel.

Another alternative to deposing counsel is a discovery conference. A discovery conference allows attorneys and the court to learn why counsel intend to depose certain witnesses. The purpose is to focus the court’s attention on the opponent’s overall discovery plan instead of the mere discovery details. This permits the court to determine whether a party can obtain the necessary information without deposing an opposing counsel.

In federal court, as in many states, parties must meet and confer before a scheduling conference “to discuss any issues about preserving discoverable information” and “any issues relating to claims of privilege or of protection as trial preparation material.” The parties should attempt to resolve these issues as well as discuss a procedure for handling inadvertently produced material, placing such an agreement into an order of the court.

Some courts considering whether to compel counsel’s deposition have required attorneys to prove that the protection of attorney-client privilege or work-product immunity is justified. For example, in In re Shopping Carts Antitrust Litigation, the court stated that a party seeking to assert the attorney-client
privilege must provide information from which the court could reasonably conclude that the communication (1) concerned the seeking of legal advice; (2) was between a client and an attorney acting in his or her professional capacity; (3) was related to legal matters; and (4) was and is, at the client’s instance, permanently protected. The court found that the defendants in the Shopping Carts litigation failed to meet this burden.

D. Other Types of Privilege

1. The “Joint Defense”

Parties represented by separate lawyers often have legal interests in common. In some situations, these parties might need to communicate with one another, for example, to discuss joint strategies of defense. As long as the communications relate to a matter of common legal interest, there should not be a waiver of the attorney-client privilege or work-product immunity. This protection of shared information is known as the joint defense privilege.

While courts vary as to the elements required to support a claim of joint defense privilege, a few common requirements emerge. First, as discussed above, the parties need to have a common legal interest. Courts have different interpretations of the degree of commonality required for parties. For instance, some courts, including the Ninth Circuit, permit parties to assert the privilege based on only a common legal interest. Other courts, however, such as the Third Circuit, require a common defense strategy. For instance, the Third Circuit held that “[t]he joint defense privilege protects communications between an individual and an attorney for another when the communications are ‘part of an on-going and joint effort to set up a common defense strategy.’” Several circuit and district courts have applied similar standards. Parties with adverse interests may claim joint defense privilege for communications relating to their common legal interests.

Second, the parties must be engaged in litigation; however, courts disagree over the degree to which litigation must loom over the relationship. At one extreme, Uniform Rule of Evidence 502(b) limits joint defense privilege to cases in which there is a “pending action.” This provision has been interpreted as requiring the actual institution of legal proceedings, such that communications made in the course of prelitigation settlement efforts will be denied privilege. Most federal courts require the communication to involve a matter of common interest that either is currently the subject of litigation or may reasonably be expected or anticipated to become the subject of litigation.

Third, the parties do not always need to be involved in the same litigation. Fourth, even though parties might share a common interest, their communications may not be protected unless they are made in furtherance of that interest. Finally, the shared interest of joint defense participants generally must be a shared legal interest rather than merely a shared commercial interest.

If two parties plan to assert the joint defense privilege, they might want to first obtain a signed writing (letter or formal agreement) indicating their intent.
to share information pertaining to a common legal interest. Such an agreement might specify that

- The information transmitted contains confidential, privileged attorney-client communications;
- It is being sent only to counsel for other defendants in the pending matter;
- The disclosure is only to further common defenses;
- The information will not be furnished to any other person, either through copying of the joint defense letter or through disclosure of its contents, in whole or part;
- All signatories to the document voluntarily waive on behalf of their client any actions they may have at any time against any or all signatories; and
- All parties agree that no protective orders ban disclosure of such information.

A variation of the joint defense privilege is the “pooled information” situation. To assert the attorney-client privilege after “pooling information,” parties should establish that they are

- Parties in the same lawsuit;
- Parties who are about to be in the same lawsuit, making the communications in anticipation of litigation; or
- Parties with common defenses against a plaintiff.

The rule does not apply to situations where there is no common interest to be promoted by a joint consultation, or where the parties meet on a purely adversarial basis. Moreover, the privilege does not apply to matters irrelevant to the pending litigation or to communications with other parties themselves. The principle applies only to communications with a party’s lawyer or a lawyer’s representative.

2. Self-Critical Analysis

Another distant cousin of the attorney-client privilege is sometimes termed the “self-critical analysis” privilege. This privilege was created to prevent or limit disclosure of potentially damaging information uncovered as a result of an internal evaluation or analysis. However, the continued viability of a broad self-critical analysis privilege is perhaps doubtful, partly because of the inconsistency with which courts have recognized and applied the privilege. Circuit courts of appeal have declined to recognize a privilege for self-evaluation but have noted district court and state authorities applying analogues in specialized contexts.

This privilege was first explicitly recognized in Bredice v. Doctors Hospital, Inc. and is based upon strong public policy considerations. In Bredice, a
malpractice action, the plaintiff sought production of the minutes and reports of the defendant hospital board concerning the death of a patient. The court denied the discovery requests on the grounds that “[t]here is an overwhelming public interest in having those staff meetings held on a confidential basis so that the flow of ideas and advice can continue unimpeded.”

The court also stated that “[t]he purpose of these staff meetings is the improvement, through self-analysis, of the efficiency of medical procedures and techniques . . . and that the value of these discussions [involving constructive criticism] would be destroyed if the meetings were opened to the discovery process.”

This privilege for healthcare providers has been codified in some states and protects from disclosure medical committee or peer review reports of the medical staff of a healthcare facility.

Since Bredice, however, the privilege has not been uniformly accepted nor, for the most part, categorically denied. In cases where the self-critical analysis privilege has been applied, courts require various elements to invoke the privilege. First, the information sought must come from an internal investigation conducted to improve or evaluate the products or procedures of a party. Second, the party must have originally intended to keep the disputed information confidential. Third, there must be a significant public interest in maintaining the confidentiality of that information. Fourth, the information must be of a type whose flow would be curtailed if discovery were allowed.

The self-critical analysis privilege has been considered in nonmedical contexts, including product liability cases. In Lloyd v. Cessna Aircraft Co., plaintiff’s counsel sought information regarding a “top ten list” of confidential memoranda from staff meetings “designed to review, analyze, and evaluate operations for the continued self-improvement in the quality of their respective products.” Cessna objected to the request, alleging that the information sought was protected under a qualified privilege.

The court, after noting that the plaintiff was not seeking actual production of the list, permitted questioning of Cessna’s witness. In reaching its holding, however, the court noted that “[w]here the government seeking herein to obtain copies of the minutes or other reports of the actual discussions of Cessna’s ‘top ten’ meetings, this Court might be inclined to follow the principles enunciated in the afore cited [self-critical analysis] cases; under such circumstances the Court would feel obligated to apply a balancing approach before allowing the wholesale disclosure of the specific details of any such meetings.”

In Bradley v. Melroe Co., the court limited the discovery of in-house investigative files of previous accidents to the factual data contained in those files. Applying a standard similar to the one required under the work-product rule, the court held that the defendant manufacturer could redact all mental impressions, opinions, evaluations, recommendations, and theories of counsel. In reaching its holding, the court noted that “in many instances, and it certainly appears to be so in this case, manufacturers study reports of accidents involving their products for the purpose of ascertaining if preventive measures can be taken to avoid future accidents.” The court went on to say:
In such cases, courts have recognized a privilege of self-critical analysis precluding the discovery of impressions, opinions, and evaluations but allowing the discovery of factual data. The reasoning behind this approach is that the ultimate benefit to others from this critical analysis of the product or event far outweighs any benefits from disclosure.¹⁰²

The U.S. Supreme Court has never recognized the self-critical analysis privilege, and historically it has been very reluctant to expand common law testimonial privileges.¹⁰³ In University of Pennsylvania v. EEOC, the Court reasoned that it should not adopt a privilege “where it appears that Congress has considered the relevant competing concerns but has not provided the privilege itself.”¹⁰⁴

Further, no circuit court of appeals has recognized the privilege; numerous courts, in fact, have refused to apply it. Most recently, the Third Circuit Court of Appeals has declined to apply the privilege in a case involving the production of an accident investigation report.¹⁰⁵ While the court acknowledged the policy considerations behind the privilege, it was not persuaded that they warranted the application of the privilege, “especially in light of the liberal scope of discovery afforded litigants under Rule 26, and the view that evidentiary privileges are disfavored as inconsistent with the broad scope of discovery.”¹⁰⁶

E. Losing the Attorney-Client Privilege

Although the rules of the privilege are relatively easy to state, their implementation is multifaceted and sometimes extremely complex. It is especially important, therefore, for attorneys to understand the privilege rules because certain threshold or procedural mistakes can lead to loss or waiver of the privilege. For instance, when assertion of the attorney-client privilege is rejected, often the statements or disclosure in question was, ab initio, beyond the scope of the privilege (that is, the communication was not between an attorney, acting as attorney, and his or her client).

In addition, the privilege is potentially waived by failing to assert it when a question about a confidential communication is asked and answered. Thus, in West v. Solito,¹⁰⁷ the court stated that neither a motion in limine nor an objection at trial would prevent the admission into evidence of privileged information that was disclosed without objection in a deposition. The court held that even though the trial court ordered that privilege objections be reserved for trial, “once the matter has been disclosed, it cannot be retracted or otherwise protected.”¹⁰⁸ Therefore, an attorney whose client is asked for privileged information in a deposition or a trial must object and instruct the client not to answer in order to protect the privilege. If privileged documents have been produced, the attorney must attempt to regain custody of those privileged documents.¹⁰⁹

In the ever-growing age of technology, lawyers are faced with new challenges in protecting the attorney-client privilege. With the rise of e-mail as the primary method of communication in the workplace, the risks of inadvertent
disclosure of the attorney-client privilege have also risen. Additionally, the boom in social media as an everyday means of communication has placed more pressure on attorneys to monitor and advise their clients about the perils of disclosing otherwise privileged communications.

1. Waiving the Privilege

As noted earlier, in order to preserve the attorney-client privilege, not only must the privilege be claimed, but it must also be established that the privilege has not been waived. In many instances, however, the issue for the attorney representing the corporation is not whether to waive the privilege but rather who can waive it.

It has been held that an employee whose communications have been claimed as privileged under the attorney-client privilege on behalf of the corporation may waive that privilege. Most courts, however, follow the principles of the Restatement (Third) of the Law Governing Lawyers, which provides that only an authorized agent of the corporation may waive the privilege of the corporation. Accordingly, it is the general rule that a corporation's privileged communication cannot be waived by the unauthorized disclosure by either a current or former employee. Corporate counsel should, of course, be proactive rather than reactive in this area. Rarely does privileged information disclosed by a current or former corporate employee in an unauthorized fashion have a positive consequence, regardless of whether a court subsequently declares the waiver as ineffective. The attorney should, therefore, instruct employees with whom he or she communicates that the communication is confidential. In addition, in-house counsel should note the possibility of a waiver occurring at an employee's deposition. When corporate employees are being deposed, the corporate attorney should be prepared to object and instruct the employee (or former employee) not to answer a question that calls for the disclosure of privileged attorney-client communications. If necessary, the attorney should terminate the deposition, seek a protective order from the court, or contact the court for instructions on how to protect the privileged information. Failure to take these measures may be construed by the court as waiver of the privilege.

2. Waiver by Selective and Inadvertent Disclosure

One of the ways a party can waive its privilege is by voluntary disclosure. Rule 511 of the Texas Rules of Evidence is representative of the “voluntary disclosure” doctrine. According to Texas Rule of Evidence 511, a party waives the privilege if “the person or a predecessor of the person while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter unless such disclosure itself is privileged.”

For example, in Axelson, Inc. v. McIlhaney, a Texas court found that a company waived the attorney-client privilege concerning information relating to the company's internal investigation of kickbacks to its employees. The information from the company's investigation was at issue in a federal trial initiated...
by the company, and the information was revealed to federal law enforcement agencies as well as a national publication.

In another case, *United States v. Ruehle*, the Ninth Circuit determined that statements made by a corporation’s chief financial officer (CFO) to in-house counsel were not privileged because the CFO understood that in-house counsel would disclose the information to third-party auditors conducting an internal investigation of corporate stock-granting practices. Because the CFO repeatedly admitted that he knew his statements to in-house counsel would be conveyed to the auditors, he had no expectation of confidentiality, and therefore, the attorney-client privilege did not apply.

Some of the more frequently encountered “high-risk” areas for waiving the privilege by selective disclosure of information may occur in the following situations:

- Response to a government investigation
- Information supplied to a government agency
- Insurance renewals
- Auditor or accountant inquiry
- Public financial disclosure documents (Securities and Exchange Commission [SEC] forms)
- Any disclosure to third parties not working under the attorney or at the attorney’s direction, or for nonlegal purposes

In addition to making a voluntary disclosure, parties can waive the privilege inadvertently. For instance, on some occasions, particularly in large document productions, a party will inadvertently produce privileged documents to the opposing party. In such situations, the question is whether the inadvertent production constitutes “voluntary disclosure” and therefore waives the privilege of all communications relating to the subject matter of the disclosed documents.

The Texas Supreme Court first addressed this issue in *Granada Corp. v. First Court of Appeals*. The court reasoned that, depending upon the facts, an inadvertent production of a privileged document could be either “voluntary” or “involuntary.” Only a voluntary production would constitute a waiver of the privilege. In *Granada*, the court held that the producing party carries the burden of showing specific circumstances confirming the involuntary nature of an inadvertent disclosure of a privileged document. The court identified the following factors as relevant to whether a particular inadvertent disclosure is “voluntary” and therefore results in waiver:

- whether “precautionary measures” were taken (“efforts reasonably calculated to prevent the disclosure”);
- whether there was “delay in rectifying the error”;
- the “extent of any inadvertent disclosure”; and
- the “scope of discovery.”
A few years after the Texas Supreme Court distinguished “voluntary” from “involuntary” disclosure in *Granada*, the Texas Legislature adopted a rule simplifying the procedures for recovering inadvertently produced privileged materials. The Texas Rules of Civil Procedure now provide that

A party who produces material or information without intending to waive a claim of privilege does not waive that claim under these rules or the Rules of evidence if—within ten days or a shorter time ordered by the court, after the producing party actually discovers that such production was made—the producing party amends the response, identifying the material or information produced and stating the privilege asserted. If the producing party thus amends the response to assert a privilege, the requesting party must promptly return the specified material or information and any copies pending any ruling by the court denying the privilege.121

Until a few years ago, there was no comparable procedure under the Federal Rules of Civil Procedure. With the following observation, the Civil Rules Advisory Committee began its discussion of the need for a simplified procedure for handling inadvertent production: “[e]ver since the [Advisory] Committee began its intensive examination of discovery in 1996, a frequent complaint has been the expense and delay that accompany privilege review.”122

Charged with proposing amendments to the Federal Rules of Civil Procedure, the committee further acknowledged that the federal procedures for dealing with inadvertent disclosure of privileged material lacked uniformity and insufficiently addressed discovery of electronic communications. To remedy this problem, the committee adopted procedures similar to those established in Texas.

The new federal procedures were implemented under, inter alia, Rule 26(b) (5)(B) of the Federal Rules of Civil Procedure, providing that when material “subject to a claim of privilege or of protection as trial preparation material” is produced, the producing party shall give notice to the party who received the material.123 The notice shall be in writing unless the circumstances preclude written notice, such as when the production is at a deposition. The notice should state the basis for the claim of privilege. The “[receiving] party must promptly return, sequester, or destroy the specified information and any copies it has . . . and [may] not use or disclose the information until the claim is resolved.”124 If the receiving party disclosed the information before the claim of privilege, it must also take reasonable steps to retrieve the information. The receiving party need do nothing further, but it can present the information to the court for determination of whether the claim of privilege is valid, and the producing party must preserve the information until that determination is made. It is significant to note that while the Texas and Federal Rules establish a procedure for the return of certain materials, neither address the appropriate
standard courts should use in determining whether an inadvertent production constituted a waiver of privilege.

The Federal Rules of Evidence were amended in September 2008 to also address inadvertent disclosure issues. Under the new Federal Rule of Evidence 502, an inadvertent disclosure does not waive the privilege if three standards are satisfied: “1) the disclosure is inadvertent; 2) the holder of the privilege . . . took reasonable steps to prevent disclosure; and 3) the holder [of the privilege] promptly took reasonable steps to rectify the [mistaken disclosure], including, (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B).”

Additionally, the new rule contemplates that litigants may enter Privilege Disclosure Agreements. Also, when federal courts enter Privilege Disclosure Orders consistent with these agreements or enter a Privilege Disclosure Order in the absence of such an agreement, Rule 502(d) provides that the order is enforceable in subsequent federal and state court proceedings. Further, subdivision (c) of Rule 502 addresses the effect in federal court of privilege disclosures that occur in state court.

To be sure, Federal Rule of Evidence 502 does not make any substantive changes to the attorney-client privilege or work-product doctrine. Rather, the primary purpose of the new rule is to reduce the costs associated with the production of documents in discovery. As a few commentators have said, the new rule “aims to reduce the time and effort lawyers spend screening documents before producing them by limiting the risk that disclosure of documents or information protected by the attorney-client privilege or work-product doctrine will result in broad waiver of that protection.” Rule 502 achieves this in several ways. For one, the rule limits the situations where an inadvertent disclosure constitutes waiver. Also, the rule limits the extent of a waiver, providing that when a waiver occurs, it does not automatically extend beyond the communications or information actually disclosed.

A recent decision from a federal district court in Maine provides an example of how courts approach inadvertent disclosure claims in light of recent developments in the Federal Rules. In Ergo Licensing, LLC v. Carefusion 303, Inc. the district court heard a discovery dispute involving 31 pages included in the production of a 540-page document by the plaintiff. The plaintiff and defendant disagreed as to whether a waiver of the attorney-client privilege had occurred by the inadvertent disclosure of the 31 pages. The court relied on the following three-factor test to answer this question: “1) the disclosure must be inadvertent; 2) the holder of the privilege took reasonable steps to prevent the disclosure; and 3) the holder promptly took steps to rectify the error.”

In regard to the first prong, the court quickly decided that the plaintiff did inadvertently disclose the 31 pages. The second and third prongs were not as easy to determine. To help its analysis, the court expanded the last two elements into the following factors: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of the document production; (2) the number of inadvertent disclosures; (3) the extent of the disclosure; (4) any delay and measures taken to rectify the disclosure; and
whether the overriding interests of justice would or would not be served by relieving the party of its errors. After considering these factors, the court concluded that the inadvertent disclosure did not constitute a waiver of the attorney-client privilege.

In light of this case law, the attorney responsible for a large document production should create a plan (preferably reduced to writing) for the production of documents that will minimize the chances of an inadvertent production of a privileged document. Also, an attorney who discovers that he or she has inadvertently produced a privileged document should immediately master the governing procedures and, if necessary, file any appropriate motion with the court (for example, a Motion to Compel Return of Privileged Documents Inadvertently Produced). The attorney should then become familiar with the burdens of proof expected by courts dealing with inadvertent disclosure issues (see Granada and Ergo Licensing for examples). Further, the attorney should assemble, by affidavit, the evidence needed to sustain that burden, file the affidavits in a timely manner, and have the motion set for hearing.

Moreover, it is important to note that written client communications may also lose the protection of the attorney-client privilege if they are used at trial or in a deposition to refresh the witness’s recollection. The Federal Rules of Evidence provide that “if a witness uses a writing to refresh memory . . . for the purpose of testifying . . . an adverse party is entitled to have the writing produced at the hearing.” Accordingly, if the attorney uses an otherwise privileged document to refresh his or her client’s memory on the witness stand, or in preparation for a deposition, waiver has occurred. Courts typically consider the work-product doctrine to be inadequate protection from disclosure when work-product documents have been used to prepare a witness for depositions. Some courts have even found that the use of work-product materials for deposition purposes is an automatic waiver of the protection, meaning that a party requesting disclosure does not have to show a substantial need or undue hardship. Also, privileged material used by a testifying expert to formulate an opinion generally must also be produced upon request by opposing counsel.

3. Protecting the Privilege in Today’s Technological Age

As technology evolves and the market is flooded with new means of communication—e-mail, texting, blogs, instant messaging, Facebook, MySpace, Twitter—the potential for both clients and attorneys to waive protections for attorney-client-privileged communications increases.

Two recent cases demonstrate that although e-mail has been a dominant mode of communication between attorneys and clients for the past decade, new issues concerning e-mailed communications and waiver of attorney-client privilege continue to emerge. For instance, in an attempt to efficiently keep clients informed, some lawyers blind-copy (“bcc”) their clients when sending e-mails to opposing counsel. A federal court recently confirmed that this method of communication can be very risky and can result in the loss of the attorney-client privilege. In Charm v. Kohn, Kohn’s counsel sent an e-mail
to opposing counsel and blind-copied Kohn. Kohn responded to the e-mail by inadvertently using the “Reply All” button, thereby sending his response, intended only for his attorney, to opposing counsel as well. Kohn’s counsel immediately caught the error and requested opposing counsel to delete the message, which opposing counsel refused to do. When opposing counsel submitted the e-mail as an exhibit to a motion, Kohn moved to strike on the basis that the communication was protected by the attorney-client privilege. In determining whether the privilege survived Kohn’s inadvertent disclosure, the court weighed several factors: whether Kohn and his counsel had taken reasonable steps to preserve the confidentiality of the communication, whether the action of “bcc-ing” the client gave rise to a foreseeable risk that he would respond as he did, and whether the delay in asking the court for relief suggested waiver of the privilege. Although the court ultimately held that the privilege was not waived, it warned the parties and others that “reply all is risky. So is bcc. Further carelessness may compel a finding of waiver.” This decision instructs lawyers to “advise client to be careful” and “avoid practices that exacerbate risks.” Instead of bcc-ing clients, a better method is to forward clients any e-mails to opposing counsel, thereby eliminating the risk that a reply to the e-mail will be sent to third parties.

Another attorney-client privilege issue that has seen recent litigation is whether e-mails regarding action against the employer and sent between client and attorney on the client’s employer’s computer are protected by the attorney-client privilege. The 2010 case of Holmes v. Petrovich Development Co. held that e-mails sent by an employee to her attorney regarding possible legal action against her employer were not subject to attorney-client privilege because the employee used her work computer even though she knew that the company’s policy prohibited the use of company e-mail for personal reasons. Almost every employer that has a policy on use of company computers and e-mail has substantively similar warnings, even if they are never enforced. The holding itself may not come as a surprise to most attorneys because the law in many jurisdictions states that employees have no reasonable expectation of privacy when using their employer’s electronic resources. Nonetheless, even if they are aware of the general rule, clients may not consider that an employer might be able to read e-mail sent to an attorney. While this approach is not the controlling law in all jurisdictions, it is an important reminder that attorneys must remain mindful of the risk, even if their clients are not.

An even more recent technological trend that poses great threat to the preservation of the attorney-client privilege is the boom in social media, as both a personal and business tool. In McMillen v. Hummingbird Speedway, Inc., the plaintiff was rear-ended in a stock car accident and claimed significant personal injury, including loss of health, strength, and the ability to enjoy certain pleasures of life. The court compelled the plaintiff to provide his Facebook and MySpace information to defense counsel after defendants reviewed the public portion of plaintiff’s Facebook account and discovered comments about his vacations and attendance at the Daytona 500 race. The court reasoned that
“[w]hen a user communicates through Facebook or MySpace . . . he or she understands and tacitly submits to the possibility that a third-party recipient, i.e., one or more site operators, will also be receiving his or her messages and may further disclose them if the operator deems disclosure to be appropriate. The fact is wholly incommensurate with a claim of confidentiality. Accordingly, McMillen cannot successfully maintain that the element of confidentiality protects his Facebook and MySpace accounts from discovery.”147

It is especially difficult in the corporate context for lawyers to monitor and protect against a client’s unintentional disclosure of attorney-client-privileged communications via social media outlets. Managers, supervisors, or employees who disclose work-related issues in status updates, chats, or blogs run the risk of waiving the privilege, thereby forcing a company to produce documents it ordinarily would have the right to withhold in litigation. It is therefore essential that in-house counsel ensure that corporate personnel understand the implications of discussing work-related issues online. An additional concern for in-house counsel is the risk that a company will waive attorney-client privilege by posting statements on its website. Nowadays, it is often part of a company’s business strategy to post statements on its website to keep the public informed on various activities and to ensure continued public confidence in the company’s products and services. However, if the company discloses too much (or too often), it could risk waiving privilege protections.148

4. Offensive Use of the Privilege
The “offensive use” doctrine applies when privileged material is used as a “sword” rather than as a “shield.”149 For example, if the client claims that “my former attorney didn’t tell me I had a claim until the statute of limitations had expired,” then the former attorney may be deposed on this topic to prevent “manifest unfairness.”150 Whether the client was aware of a fact is now relevant and relates to the heart of the claim. For this reason, if there is information that would reveal that a fact was made known to the client by the attorney, then the adversary may discover this information. The assertion of the attorney-client privilege in this setting goes well beyond the intended purposes of the attorney-client privilege, and, consequently, the privilege is unavailable to protect this type of communication. The pursuit of this type of claim is analogous to an unintentional waiver, making otherwise protected discussions and conversations discoverable.

5. The “Good Cause” Exception
The “good cause” exception is invoked when concerns of countervailing policy dictate that the attorney-client privilege or the work-product doctrine should be ignored. In shareholder suits, for example, courts have sometimes reasoned that the corporate attorney’s true client is the shareholder and, accordingly, that communications with corporate executives cannot be privileged when the substance of the conversation is at issue. Such an analysis puts in peril many communications between in-house counsel and corporate executives because a privilege-negating shareholder suit is always possible. But one state has held
that in the case of closely held corporations, the attorney’s duty is owed to the corporation itself, and not to the shareholders or directors. Suffice it to say, this is a dynamic area.

Some courts attribute the “good cause” exception to the Fifth Circuit’s Garner v. Wolfinbarger decision. In Garner, the court held that when a corporation is sued by its stockholders, the availability of the corporation’s attorney-client privilege is subject to the right of the stockholders to show cause why the corporation should not be allowed to invoke the privilege. The court reasoned that although the attorney-client privilege is important in the corporate context, management owes a duty to the corporation’s stockholders, and this duty should be considered by the court in determining the applicability of the privilege. Toward that end, the court concluded, when breaches of duty occur, the privilege should not be allowed if the stockholders can demonstrate why the privilege should not be allowed.

It is important to note that in a subsequent case, the Fifth Circuit determined that the good cause exception does not apply to work-product claims. In In re International Systems & Controls Corp., the court held that the Garner rationale was premised upon a “mutuality of interest” between shareholders and management that does not exist for work-product items prepared in anticipation of litigation by the shareholders.

That said, a leading case where the “good cause” waiver was almost successfully argued by a party seeking the discovery of privileged documents is Sporck v. Peil. In Sporck, the court denied the plaintiff’s motion to compel the production of documents that the defendant acknowledged had been provided to him by his attorney in preparation for his deposition. The defendant claimed that the selection of documents was protected from disclosure by the work-product doctrine, a less restrictive rule against nondisclosure than the attorney-client privilege. Stressing that defendant’s counsel had culled the selected documents from the documents produced by defendants, the court found that the process of sifting relevant documents from the mass of produced documents was protected as attorney work product: “[w]e believe that the selection and compilation of documents by counsel in this case in preparation for pretrial discovery falls within the highly-protected category of opinion work product. . . . Rule 26(b)(3) placed an obligation on the trial court to protect against unjustified disclosure of defense counsel’s selection process.” Notably, the court engaged in an analysis to determine whether there was “good cause” to compel production or whether the attorney-client privilege and work-product doctrine protection should be respected.

F. Distinguishing the Attorney Work-Product Doctrine from the Attorney-Client Privilege

1. The Attorney Work-Product Doctrine

The attorney work-product doctrine, which is codified in Federal Rule of Civil Procedure 26(b)(3), provides a qualified protection to materials prepared by a party’s counsel or other representative in anticipation of litigation.
doctrine is important in the American legal system because it helps to ensure that attorneys are able to “work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.”\footnote{159} As the Supreme Court explained in \textit{Hickman v. Taylor} in 1947, without the work-product doctrine, “the effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.”\footnote{160} The Court cautioned that absent work-product protections, an attorney’s thought process and preparation for trial would be stifled, causing “inefficiency” and “unfairness.”\footnote{161}

The attorney-client privilege should be distinguished from the attorney work-product doctrine. Work-product immunity, which may be asserted by either the lawyer or the client, is unlike attorney-client privilege, which “belongs” to the client.\footnote{162} Also, “the work-product doctrine is distinct from and broader than the attorney-client privilege”\footnote{163} in that it covers all material prepared in anticipation of litigation; it is not limited to communications between attorney and client.\footnote{164} This greater scope is, however, met by a concomitant reduction in the strength of protection offered by the \textit{doctrine}, as compared to the \textit{privilege}. For instance, the attorney-client privilege covers communications made by the client to the attorney or communications by the attorney to the client that incorporate or are based on a client’s communications. Once properly invoked, the attorney-client privilege is virtually inviolate. The attorney work-product doctrine, on the other hand, is a qualified protection that can be overcome by showing “substantial need” and “undue hardship.”\footnote{165} The party claiming work-product protections has the burden of establishing that the doctrine applies. Once that protection has been demonstrated, the burden of showing “substantial need” and “undue hardship” falls on the party seeking production.

As noted earlier, an attorney’s work product is protected because it would be patently unfair and contrary to the adversarial nature of the U.S. legal system to permit discovery of materials containing an attorney’s mental impressions, conclusions, opinions, or legal theories that have been created in preparation for trial.\footnote{166} For material to be considered prepared in anticipation of litigation, the prospect of litigation must be identifiable even if the litigation has yet to commence.\footnote{167} Thus, a party may not simply claim that materials have been prepared in anticipation of litigation. Rather, a party asserting attorney work-product protection may also be required to actually prove this claim.\footnote{168}

Work-product materials include a variety of information. They can include legal memoranda, impressions of witness statements, documents collected by counsel to provide an understanding of the claims or defenses, memoranda or reports from outside consultants, statistical data compiled electronically as a result of (or to evaluate) a claim or lawsuit, and the identity of confidential consultants. Federal Rule of Civil Procedure 26(b)(3) protects not only materials prepared by lawyers, but also materials, mental impressions, or opinions of other representatives concerning the litigation, including consultants and the system specialist who may have designed a computer litigation support
system. Not surprisingly, items otherwise considered privileged or protected under the work-product rule might lose that status by being sent to testifying experts to review. It is also critical to note that documents that are merely kept in the ordinary course of business will not be protected, even though they are stored in a computerized litigation support system.

2. Limits of the Work-Product Doctrine

The attorney work-product doctrine is a qualified protection. In fact, Rule 26(b)(3) of the Federal Rules of Civil Procedure provides specific exceptions to the general prohibition against discovery of documents and tangible things “prepared in anticipation of litigation or for trial by or for another party or its representative.” For instance, information prepared in anticipation of litigation can be discovered if the party seeking discovery shows “substantial need” and is unable to obtain such information by other means without “undue hardship.” In determining whether the requisite showing has been made, courts will consider various factors, including the importance of the information sought and the availability of, and difficulty in, obtaining such information from alternative sources.

However, even if the party requesting work-product information can show a substantial need or undue hardship, Federal Rule of Civil Procedure 26(b)(3) limits discovery of the lawyer’s mental impressions and opinions concerning the litigation. Courts generally classify this type of information as “opinion work product.” As some commentators point out, a few courts have determined that the privilege afforded to opinion work product is absolute and that a showing of necessity cannot overcome the protection. Other courts have held that opinion work product can be discovered, but only in rare and extraordinary circumstances. In Holmgren v. State Farm Mutual Auto Insurance Co., the Ninth Circuit determined that discovery of opinion work product is permissible when mental impressions are at issue in the case and the need for the material is compelling.

3. Asserting the Work-Product Doctrine in Successive Litigation

As noted in the above-quoted portion of Rule 26, some items protected by work-product immunity can be discoverable if the discovering party makes a sufficient showing of substantial need and undue hardship. It is unwise to assume that this showing will be more difficult for a plaintiff in an already closed case. Indeed, because of the passage of time, the work-product-protected data held by corporate counsel may be the only source of pertinent information available to the plaintiff, and therefore, a court may find that the substantial need or undue hardship test is met.

The case of Shelton v. American Motors Corp. provides insight on this matter. In that case, plaintiffs filed notices to take the depositions of several individuals, including Rita Burns, a staff attorney for American Motors Corporation. Burns was the supervising in-house counsel on certain Jeep “rollover” cases. She was deposed, but she refused to answer many questions on the
basis of work-product and attorney-client privilege. These questions primarily involved the existence or nonexistence of various documents regarding the model Jeep involved in the case at hand. The work-product privilege was for materials prepared “in anticipation” of previous litigation. Burns’s standard reply was as follows:

Any information I have concerning documents which might possibly be responsive to your question, I’ve acquired solely through my capacity as an attorney for American Motors in my efforts to find information which would assist me in defending the company in litigation, and therefore, I decline to respond to the question.181

In its opinion, the lower court noted that the mere fact that documents or knowledge of documents came to an attorney while acting for a client was not sufficient to invoke the attorney-client privilege.182 In addition, the court held that the work-product doctrine from past cases did not protect discovery of the existence or nonexistence of documents.183 Ultimately, the district court entered a default judgment against American Motors Corporation as a sanction for Burns’s repeated refusals to answer the deposition questions.

The limited issue on appeal to the Eighth Circuit was whether a deponent’s mere acknowledgment of the existence of corporate documents was protected by the work-product or attorney-client privileges. The Eighth Circuit reversed the district court’s judgment, holding that Burns’s acknowledgment of the existence of certain documents would reveal her mental impressions, which are protected as work product.184 In the course of its opinion, the Eighth Circuit acknowledged that the boundaries of discovery had expanded and that the practice of taking the depositions of opposing counsel was becoming increasingly popular.185 The court stressed, however, that opposing counsel’s depositions should be taken only when the party seeking to take the deposition can show that “1) no other means exist to obtain the information than to depose opposing counsel . . . ; 2) the information sought is relevant and not privileged; and 3) the information is crucial to the preparation of the case.” The Shelton court concluded that the facts in the case did not present these “limited circumstances.”186

III. Conclusion and Practical Tips

The attorney-client privilege is a cornerstone of the American legal system. Although deeply rooted in our nation’s history, the privilege is continuously being shaped as courts interpret it and apply it to new and evolving circumstances—especially in the context of corporations. By carefully preparing and adhering to the rules that define and set the parameters of the attorney-client privilege, lawyers working for corporations can effectively use the privilege to better serve their clients.

In sum, attorneys representing corporations should consider the following tips when performing tasks involving the creation of confidential documents
or conversations. In general, counsel should periodically conjure up the mental image of an adversarial proceeding in which they are attempting to establish the attorney-client privilege against an aggressive opponent. This will inevitably result in counsel paying closer attention to the formalities necessary to help preserve the privilege. In addition to the principles articulated earlier in this chapter, the attorney should consistently and judiciously follow the formalities associated with the privilege. Toward that end, they should

- Follow or refer to the *Upjohn* factors in letters and memoranda;
- Mark all appropriate documents as “privileged” and “prepared as confidential communications at request of counsel”;
- Ensure that memos seeking information identify counsel by title as “counsel” and in legal opinions state that they are “in my opinion as counsel”; and
- Keep circulation and distribution of legal memos severely limited to “control group” personnel.

Thus, in order to maintain the attorney-client privilege, a company should specify on reports prepared by employees that the report was prepared for counsel regarding legal services. Also, the signature of counsel and statements that the report is to be confidential will help enhance the likelihood that the document is protected. In the realm of privilege and protection from waiver, it is truly the case that an ounce of prevention is worth a pound of cure.

**Notes**

4. See also appendix 1-3.
6. See, e.g., *Model Rules of Prof'l Conduct* R. 1.6 cmt [3].
9. 8 J.H. Wigmore, *Wigmore on Evidence* § 2192 (3d ed.).
10. Fisher v. United States, 425 U.S. 391, 403 (1976) (stating that “since the privilege has the effect of withholding relevant information from the fact finder, it applies only where necessary to achieve its purpose”).
14. Lawyers should educate themselves in the rules of unfamiliar jurisdictions in which they are handling matters. Even what many consider basic attorney-client privilege principles can differ between jurisdictions. For example, in 2011, a Pennsylvania court clarified the scope of the state’s attorney-client statute: “We hold that, in Pennsylvania, the attorney-client privilege operates in a two-way fashion to protect confidential client-to-attorney or attorney-to-client communications made for the purpose of obtaining or providing professional legal advice.” Gillard v. AIG Ins. Co., 2011 LEXIS 393 (Pa. Feb. 23, 2011). Prior to this ruling, Pennsylvania common law inconsistently interpreted the attorney-client privilege statute; some courts narrowly read the statute to limit the privilege to client-to-lawsyers communications only. Id.
15. Tex. R. Evid. 503(b)(1).
16. See Tex. R. Evid. 503(a)(1) (emphasis added); Ala. R. Evid. 502(a)(1) (emphasis added). See also State v. Tally, 102 Ala. 25, 15 So. 722 (1894).
17. It has been held that the privilege remains after the death of the client. Wesp v. Everson, 33 P.3d 191 (Colo. 2001); In re Busse’s Estate, 332 Ill. App. 258, 75 N.E.2d 36 (Ill. App. 1947); Eloise Bauer & Assocs. v. Elec. Realty Assocs., 621 S.W.2d 200, 204 (Tex. Civ. App.–Texarkana 1981, writ ref’d n.r.e.).
19. See, e.g., Ala. R. Evid. 502(c). See also Tex. R. Evid. 503(c) (“The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.”). This point was also made in Cole v. Gabriel, 822 S.W.2d 296 (Tex. App.–Fort Worth 1991 orig. proceeding) in a slightly different way when it was held that a lawyer had no standing to assert the attorney-client privilege in his individual capacity. See also Fisher v. United States, 425 U.S. 391 (1976); Klitzman, Klitzman & Gallagher v. Krut, 744 F.2d 955 (3d Cir. 1984).
20. In re Grand Jury Proceedings, 469 F.3d 24 (1st Cir. 2006) (holding that the CEO of a corporation could not intervene in a proceeding to prevent counsel for the corporation from testifying to a conversation between the CEO and counsel in his personal capacity (absent evidence the counsel represented him in his personal capacity as well as the corporation)). In a context similar to that of the corporate world, it was held that White House lawyers could not claim that their conversations with the First Lady were privileged from disclosure in an investigation in which the President and First Lady were being investigated because the attorneys represented the White House and not the First Lady or the President. In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997). See also In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1979).
21. See, e.g., Tex. R. Evid. 503(c) ("The person who was the lawyer or the lawyer’s representative at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the client.").


25. A number of jurisdictions have patterned their codification of the rules of privilege after the Supreme Court draft that was ultimately not accepted by Congress in enacting the Federal Rules of Evidence but was substantially included in the 1974 Uniform Rules of Evidence. See Edward J. Imwinkelried, Draft Article V of the Federal Rules of Evidence on Privileges, One of the Most Influential Pieces of Legislation Never Enacted: The Strength of the In-group Loyalty of the Federal Judiciary, 28 ALA. L. REV. 41 (2006). Thus, the Texas Rules of Evidence set forth the following categories of situations in which the attorney-client privilege may not be claimed:

   (1) Furtherance of crime or fraud. If the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud;

   (2) Claimants through same deceased client. As to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by inter vivos transactions;

   (3) Breach of duty by a lawyer or client. As to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

   (4) Document attested by a lawyer. As to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness; or

   (5) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.

Tex. R. Evid. 503(d). See also Ky. R. Evid. 403(d); La. CODE EVID. art. 506(c); Florida sets forth the following situations in which the privilege does not apply:

   (a) The services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or fraud.

   (b) A communication is relevant to an issue between parties who claim through the same deceased client.

   (c) A communication is relevant to an issue of breach of duty by the lawyer to the client or by the client to the lawyer, arising from the lawyer-client relationship.
(d) A communication is relevant to an issue concerning the intention or competence of a client executing an attested document to which the lawyer is an attesting witness, or concerning the execution or attestation of the document.

(e) A communication is relevant to a matter of common interest between two or more clients, or their successors in interest, if the communication was made by them to a lawyer retained or consulted in common when offered in a civil action between the clients or their successors in interest.


27. Id. at 358–59.
30. Because of ambiguities surrounding choice of law issues, if the stricter “control group” test is followed then the communication will always qualify for protection if it involves only control group personnel.
31. The “control group test” is discussed in In re Grand Jury Investigation, 599 F.2d 1224 (3d Cir. 1978).
35. See, e.g.,
   Alaska    Alaska R. Evid. 503(a)(2)
   Hawaii    Haw. R. Evid. 503(a)(2)
   Maine     Me. R. Evid. 502(a)(2)
   New Hampshire N.H. R. Evid. 502(a)(2)
36. 851 S.W.2d 193 (Tex. 1993).
37. Id. at 197 (quoting then-prevailing Tex. R. Civ. Evid. 503(a)(2)).
40. 423 F.2d 487 (7th Cir. 1970) (per curiam), aff’d, 400 U.S. 348 (1971).
41. Id. at 491–92.
42. Id.
43. Id. at 489.
44. 572 F.2d 596 (8th Cir. 1977).
45. Id. at 609.
47. Id. at 391. See also So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994).
48. See, e.g.,

Alabama  
AL. R. EVID. 502(a)(2)  

Arizona  

Arkansas  

California  
D.I. Chadbourne, Inc. v. Superior Court, 60 Cal. 2d 723, 36 Cal. Rptr. 468 (1964)  

Colorado  
Denver Post Corp. v. Univ. of Colo., 739 P.2d 874 (Colo. App. 1987)  

Connecticut  

Florida  
So. Bell Tel. & Tel. Co. v. Deason, 632 So. 2d 1377 (Fla. 1994)  

Georgia  

Kentucky  
Ky. R. EVID. 503(a)(2)  

Louisiana  
LA. CODE EVID. art. 506(A)(2)  

Massachusetts  

Michigan  

Mississippi  
Miss. R. EVID. 502(a)(2)  

Missouri  

Nevada  

North Dakota  
N.D. R. EVID. 502(a)(2)  

Oregon  
OR. REV. STAT. 40.225, Rule 503(1)(d) (2001)  

Tennessee  

Texas  
TEX. R. EVID. 503(a)(2)  

Utah  
UTAH R. EVID. 504(a)(4)  

Vermont  
50. Restatement (Second) of Conflicts § 139. See also Atl. Coast Line R.R. v. Daugherty, 111 Ga. App. 144, 141 S.E.2d 112 (1965), for the proposition that the privilege should be narrowly construed to permit liberal discovery.
51. Diversified Indus., Inc. v. Meredith, 572 F.2d 596, 610 (8th Cir. 1977).
54. This statement presupposes that corporate counsel will be an attorney admitted to the bar of a state, not necessarily the bar of the state in which the corporation is located in order to assert the privilege. See Paper Converting Mach. Co. v. FMC Corp., 215 F. Supp. 249 (E.D. Wis. 1963); Ga.-Pac. Plywood Co. v. U.S. Plywood Corp., 18 F.R.D. 463 (S.D.N.Y. 1956). Failure to be a member of the bar may be fatal to the claim of privilege. It has been held that communications with an unlicensed in-house counsel are not privileged. Fin. Techs. Int’l, Inc. v. Smith, 247 F. Supp. 2d 397 (S.D.N.Y. 2002). But see Hawes v. State, 88 Ala. 37, 7 So. 302 (1889).
55. In re Sealed Case, 737 F.2d at 99.
61. 816 F.2d 397 (8th Cir. 1987).
63. Simon, 816 F.2d 397 at 402 n.4.
64. Id. at 403 n.6.
65. See Tex. R. Evid. 503(d)(4).
70. Id. at 1327.
72. Rule 26(f)(4) of the Federal Rules of Civil Procedure requires a conference to discuss such matters.
75. Id.
76. 95 F.R.D. 299 (S.D.N.Y. 1982).
77. Id. at 305–06 (emphasis added).
79. United States v. Austin, 416 F.3d 1016, 1021 (9th Cir. 2005) (holding that privilege can apply where parties decide on and undertake a joint defense effort or strategy).
81. In re Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 126 (3d Cir. 1986) (quoting Eisenberg v. Gagnon, 766 F.2d 770, 787 (3d Cir. 1985)).
82. See Snider & Ellins, supra note 78.
83. See Snider & Ellins, supra note 78.
84. U.L.A. UNIF. R. EVID. 502(b)(iii): “A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client . . . (iii) by the client or a representative of the client or the client’s lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.”
86. See, e.g., Dexia Credit Local v. Rogan, 2004 U.S. Dist. LEXIS 25635, at *13 (N.D. Ill. Dec. 20, 2004) (refusing to limit common interest rule to parties perfectly aligned on same side of single litigation; rather require demonstration of “actual cooperation toward a common legal goal with respect to the document they seek to withhold”).
87. See Snider & Ellins, supra note 78.
89. Tex. R. Evid. 503(b)(1) provides:

“A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client [and made] . . . (C) [by him or his representative or his lawyer] or a
representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein."

91. Alaska Pen. Fund v. Pharmacia Corp., 554 F.3d 342, 351 n.12 (9th Cir. 2009) (“The self-critical analysis privilege has never been recognized by this Court and we see no reason to recognize it now.”); *In re Qwest Commc’ns Int’l Inc. Sec. Litig.*, 450 F.3d 1179, 1198 n.8 (10th Cir. 2006) (noting “a privilege for reports required to be made by law, which has been adopted by only a small minority of states”) (citations omitted); *In re Kaiser Alum. & Chem. Co.*, 214 F.3d 586, 593 (5th Cir. 2000) (“We need not decide whether a self-evaluation privilege should ever be recognized. We decline to recognize such a privilege in the circumstances presented, namely a case where a government agency seeks pre-accident documents.”); Dowling v. Am. Haw. Cruises, Inc., 971 F.2d 423, 427 (9th Cir. 1992) (holding that “voluntary routine pre-accident safety reviews are not protected by a privilege of self-critical analysis”); Coates v. Johnson & Johnson, 756 F.2d 524, 551–52 (7th Cir. 1985) (noting lower court decisions applying a self-critical analysis privilege to an employer’s affirmative action plans).
94. *Id.* at 250.
98. *Id.* at 520.
99. *Id.* at 522.
101. *Id.* at 2–3.
102. *Id.*
103. *See, e.g., Univ. of Penn. v. EEOC*, 493 U.S. 182, 189 (1990) (declining to recognize peer review materials privilege); United States v. Gillock, 445 U.S. 360, 373 (1980) (declining to create a state legislator privilege); Branzburg v. Hayes, 408 U.S. 665, 706 (1972) (declining to recognize a privilege allowing newsmen to avoid testifying about confidential sources and suggesting that the creation of such a privilege is best left to the legislature).
104. Univ. of Penn., 493 U.S. at 189.
106. Id. (citing Herbert v. Lando, 441 U.S. 153, 175 (1979)).
107. 563 S.W.2d 240 (Tex. 1978).
108. Id. at 245.
115. 583 F.3d 600 (9th Cir. 2009).
116. See United States v. Reyes, 239 F.R.D. 591 (N.D. Cal. 2006) (finding that voluntary disclosure to a federal investigative agency effected a waiver of the attorney-client privilege and work-product protection for the materials produced as to other litigants).
118. 844 S.W.2d 223 (Tex. 1992) (orig. proceeding).
119. Id. at 226.
120. Id. at 226–27. See Abamar Hous. & Dev. v. Lisa Daly Lady Decor, 698 So. 2d 276 (Fla. App. 1997), rev. denied, 704 So. 2d 520 (Fla. 1997).
121. Tex. R. Civ. P. 193.3(d).
124. Id.
126. See Fed. R. Evid. 502(c); Fed. R. Civ. P. 26(f); Schaefer, supra note 125.
127. See Fed. R. Evid. 502(d).
128. See Fed. R. Evid. 502(c).
130. Id.
131. See id.
133. Id. at 46.
134. Id.
135. Id. at 47.
137. Id.

140. See Berkey Photo, Inc. v. Eastman Kodak Co., 74 F.R.D. 613, 617 (S.D.N.Y. 1977) (Although the court did not order disclosure in Berkey, it stated, “To put the point succinctly, there will be hereafter powerful reasons to hold that materials considered work product should be withheld from prospective witnesses if they are to be withheld from opposing parties.”).


143. Id. at *5.

144. 119 Cal. Rptr. 3d 878 (2011).

145. See Stengart v. Loving Care Agency Inc., 990 A.2d 650 (N.J. 2010) (holding that communications between attorney and client sent on employer’s computer were privileged because employer’s policy was ambiguous and did not clearly permit employer to access otherwise protected attorney-client communications).


147. Id. at *9.


149. Allstate Ins. Co. v. Levesque, 263 F.R.D. 663, 667 (M.D. Fla. 2010); see GAB Bus. Servs., Inc. v. Syndicate, 809 F.2d 755 (11th Cir. 1987); HSH Nordbank AG N.Y. Branch v. Swerdlow, 259 F.R.D. 64, 74 (S.D.N.Y. 2009) (holding that in an order to prevent the attorney-client privilege from at once being used as a shield and a sword, the “at issue” doctrine precludes a party from disclosing only self-serving communications while barring discovery of other communications that an adversary could use to challenge the truth of the claim).


153. Id. at 1103–04.


155. 693 F.2d 1235 (5th Cir. 1982).

156. 759 F.2d 312 (3d Cir. 1985).

157. Id. at 316.


160. Id. at 511.

161. Id.


164. In re Sealed Case, 676 F.2d 793, 808 (D.C. Cir. 1982).


166. See Hickman, 329 U.S. at 511.
167. See Toledo Edison Co. v. G.A. Techs., Inc. Torrey Pines Tech. Div., 847 F.2d 335, 339–40 (6th Cir. 1988) (stating that a party need only show anticipation of litigation, and need not establish the identities, positions, and responsibilities of the persons creating the materials with respect to the litigation expected). See also Simon v. G.D. Searle & Co., 816 F.2d 397, 401 (8th Cir. 1987) (holding that risk management and aggregate records were discoverable because they were not prepared in anticipation of any particular litigation).


174. See Hickman, 329 U.S. at 511.


177. Id.; In re Allen, 106 F.3d 582 (4th Cir. 1997) (holding that opinion work product is immune from discovery).

178. See In re Cendant Corp. Sec. Litig., 343 F.3d 658, 663 (3d Cir. 2003) (holding that opinion work product receives greater protection than ordinary work product and is discoverable only upon a showing of rare and exceptional circumstances).

179. 976 F.2d 573, 577 (9th Cir. 1992).

180. 805 F.2d 1323 (8th Cir. 1986).

181. Id. at 1325.

182. Id. at 1326.

183. Id. at 1329.

184. Id. at 1326.

185. Id. at 1327.

186. Id. at 1327–28.
APPENDIX 1-1

Memoranda to Accompany “Principles of Federal Prosecution of Business Organizations”

U.S. Department of Justice
Office of the Deputy Attorney General

The Deputy Attorney General
Washington, D.C. 20530
January 20, 2003

MEMORANDUM

TO: Heads of Department Components
   United States Attorneys

FROM: Larry D. Thompson
   Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

As the Corporate Fraud Task Force has advanced in its mission, we have confronted certain issues in the principles for the federal prosecution of business organizations that require revision in order to enhance our efforts against corporate fraud. While it will be a minority of cases in which a corporation or partnership is itself subjected to criminal charges, prosecutors and investigators in every matter involving business crimes must assess the merits of seeking the conviction of the business entity itself.
Attached to this memorandum are a revised set of principles to guide Department prosecutors as they make the decision whether to seek charges against a business organization. These revisions draw heavily on the combined efforts of the Corporate Fraud Task Force and the Attorney General’s Advisory Committee to put the results of more than three years of experience with the principles into practice.

The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation’s cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Further experience with these principles may lead to additional adjustments. I look forward to hearing comments about their operation in practice. Please forward any comments to Christopher Wray, the Principal Associate Deputy Attorney General, or to Andrew Hruska, my Senior Counsel.

Federal Prosecution of Business Organizations1

I. Charging a Corporation: General

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain

1 While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.
crimes that carry with them a substantial risk of great public harm, e.g., environ-
mental crimes or financial frauds, are by their nature most likely to be com-
mitted by businesses, and there may, therefore, be a substantial federal interest in
indicting the corporation.

Charging a corporation, however, does not mean that individual directors, of-
icers, employees, or shareholders should not also be charged. Prosecution
of a corporation is not a substitute for the prosecution of criminally culpa-
able individuals within or without the corporation. Because a corporation can
act only through individuals, imposition of individual criminal liability may
provide the strongest deterrent against future corporate wrongdoing. Only
rarely should provable individual culpability not be pursued, even in the face
of offers of corporate guilty pleas.

Corporations are “legal persons,” capable of suing and being sued, and
capable of committing crimes. Under the doctrine of respondeat superior, a cor-
poration may be held criminally liable for the illegal acts of its directors, offi-
cers, employees, and agents. To hold a corporation liable for these actions, the
government must establish that the corporate agent’s actions (i) were within
the scope of his duties and (ii) were intended, at least in part, to benefit the
corporation. In all cases involving wrongdoing by corporate agents, prosecu-
tors should consider the corporation, as well as the responsible individuals, as
potential criminal targets.

Agents, however, may act for mixed reasons—both for self-aggrandize-
ment (both direct and indirect) and for the benefit of the corporation, and a cor-
poration may be held liable as long as one motivation of its agent is to benefit
the corporation. In United States v. Automated Medical Laboratories, 770 F.2d 399
(4th Cir. 1985), the court affirmed the corporation’s conviction for the actions
of a subsidiary’s employee despite its claim that the employee was acting for
his own benefit, namely his “ambitious nature and his desire to ascend the
corporate ladder.” The court stated, “Partucci was clearly acting in part to ben-
efit AML since his advancement within the corporation depended on AML’s
well-being and its lack of difficulties with the FDA.” Similarly, in United States
v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982), the court held, “criminal liability
may be imposed on the corporation only where the agent is acting within the
scope of his employment. That, in turn, requires that the agent be performing
acts of the kind which he is authorized to perform, and those acts must be
motivated—at least in part—by an intent to benefit the corporation.” Applying
this test, the court upheld the corporation’s conviction, notwithstanding the
substantial personal benefit reaped by its miscreant agents, because the fraud-
ulent scheme required money to pass through the corporation’s treasury and
the fraudulently obtained goods were resold to the corporation’s customers in
the corporation’s name. As the court concluded, “Mystic—not the individual
defendants—was making money by selling oil that it had not paid for.”

Moreover, the corporation need not even necessarily profit from its agent’s
actions for it to be held liable. In Automated Medical Laboratories, the Fourth
Circuit stated:
[B]enefit is not a “touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact.” Thus, whether the agent’s actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; quoting Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945), cert. denied, 326 U.S. 734 (1945)).

II. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals. See USAM §9-27.220, et seq. Thus, the prosecutor should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. See id. However, due to the nature of the corporate “person,” some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

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

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

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

9. the adequacy of remedies such as civil or regulatory enforcement actions (see section X, infra).

B. Comment: As with the factors relevant to charging natural persons, the foregoing factors are intended to provide guidance rather than to mandate a particular result. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list.

Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. The nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of Federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate “person.”

III. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above.
IV. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, e.g., salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority
who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG § 8C2.5, comment. (n. 4).

V. Charging a Corporation: The Corporation’s Past History

A. General Principle: Prosecutors may consider a corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and yet it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. See USSG § 8C2.5(c) & comment. (n.6).

VI. Charging a Corporation: Cooperation and Voluntary Disclosure

A. General Principle: In determining whether to charge a corporation, that corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government’s investigation may be relevant factors. In gauging the extent of the corporation’s cooperation, the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a
corporation's cooperation may be critical in identifying the culprits and locating relevant evidence.

In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. See USAM § 9-27.600-650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation's "timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective." Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. See USAM § 9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the SEC and the EPA, as well as the Department's Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation's timely and voluntary disclosure in evaluating the adequacy of the corporation's compliance program and its management's commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation's willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anticompetitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation's business is permeated with fraud or other crimes.

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

2. In addition, the Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation's offense level. See USSG § 8C2.5(g).
Prosecutors may, therefore, request a waiver in appropriate circumstances. The Department does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement, and prosecutors should consider the willingness of a corporation to waive such protection when necessary to provide timely and complete information as one factor in evaluating the corporation's cooperation.

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

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation (whether or not rising to the level of criminal obstruction). Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

Finally, a corporation's offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation's willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation's past history and the role of management in the wrongdoing.

VII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate

---

3. This waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation.

4. Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate.
activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior. See United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983) (“a corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.”). In United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent’s actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, “intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.” It concluded that “general policy statements” and even direct instructions from the agent’s superiors were not sufficient; “Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.” See also United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979) (“[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit

5. Although this case and Basic Construction are both antitrust cases, their reasoning applies to other criminal violations. In the Hilton case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses “usually motivated by a desire to enhance profits,” thus, bringing the case within the normal rule that a “purpose to benefit the corporation is necessary to bring the agent’s acts within the scope of his employment.” 467 F.2d at 1006 & n.4. In addition, in United States v. Automated Medical Laboratories, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated “that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws.”
the corporation."); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer’s participation in price-fixing scheme, despite corporation’s defense that officer’s conduct violated its “rigid anti-fraternization policy” against any socialization (and exchange of price information) with its competitors; “When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.”).

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: “Is the corporation’s compliance program well designed?” and “Does the corporation’s compliance program work?” In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal conduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including restitution, disciplinary action, and revisions to corporate compliance programs. Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government and the corporation’s cooperation in the government’s investigation. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation’s directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers’ recommendations; are the directors provided with information sufficient to enable the exercise of independent judgment; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy and have the directors established an information and reporting system in the organization reasonable designed to provide management and the board of directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization’s compliance with the law. In re: Caremark, 698 A.2d 959 (Del. Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation’s compliance program is merely a “paper program” or whether it was designed and implemented in an effective manner. In addition, prosecutors should

---

6. For a detailed review of these and other factors concerning corporate compliance programs, see United States Sentencing Commission, Guidelines Manual, § 8A1.2, comment. (n.3(k)) (Nov. 1997). See also USSG § 8C2.5(f).
determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation’s compliance efforts. In addition, prosecutors should determine whether the corporation’s employees are adequately informed about the compliance program and are convinced of the corporation’s commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that, when consistent with other federal law enforcement policies, may result in a decision to charge only the corporation’s employees and agents.

Compliance programs should be designed to detect the particular types of misconduct most likely to occur in a particular corporation’s line of business. Many corporations operate in complex regulatory environments outside the normal experience of criminal prosecutors. Accordingly, prosecutors should consult with relevant federal and state agencies with the expertise to evaluate the adequacy of a program’s design and implementation. For instance, state and federal banking, insurance, and medical boards, the Department of Defense, the Department of Health and Human Services, the Environmental Protection Agency, and the Securities and Exchange Commission have considerable experience with compliance programs and can be very helpful to a prosecutor in evaluating such programs. In addition, the Fraud Section of the Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys’ Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

VIII. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation’s willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation’s response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes

7. For example, the Antitrust Division’s amnesty policy requires that “[w]here possible, the corporation [make] restitution to injured parties. . . .”
necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation's employees. In evaluating a corporation's response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its "acceptance of responsibility" and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

IX. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care.
Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, supra.

X. Charging a Corporation: Non-Criminal Alternatives

**A. General Principle:** Although non-criminal alternatives to prosecution often exist, prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, e.g., civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on Federal law enforcement interests.

**B. Comment:** The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor
should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority’s interest; the regulatory authority’s ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority’s enforcement action is upheld; and the effect of a non-criminal disposition on Federal law enforcement interests. See USAM §§9-27.240, 9-27.250.

XI. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant’s conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require “a faithful and honest application of the Sentencing Guidelines” and an “individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime.” See USAM §9-27.300. In making this determination, “it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” See Attorney General’s Memorandum, dated October 12, 1993.

XII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM §§9-27.400–500. This means, inter alia, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making
this determination should do so “on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” See Attorney General’s Memorandum, dated October 12, 1993.

In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later “proclaim lack of culpability or even complete innocence.” See USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate “person” and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. See USSG §§ 8B1.1, 8C2.1, et seq. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency’s right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VII, supra.
In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VIII, supra.
The Department experienced unprecedented success in prosecuting corporate fraud during the last four years. We have aggressively rooted out corruption in financial markets and corporate board rooms across the country. Federal prosecutors should be justifiably proud that the information used by our nation’s financial markets is more reliable, our retirement plans are more secure, and the investing public is better protected as a result of our efforts. The most significant result of this enforcement initiative is that corporations increasingly recognize the need for self-policing, self-reporting, and cooperation with law enforcement. Through their self-regulation efforts, fraud undoubtedly is being prevented, sparing shareholders from the financial harm accompanying corporate corruption. The Department must continue to encourage these efforts.

Though much has been accomplished, the work of protecting the integrity of the marketplace continues. As we press forward in our enforcement duties, it is appropriate that we consider carefully proposals which could make our efforts more effective. I remain convinced that the fundamental principles that
have guided our enforcement practices are sound. In particular, our 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. Like federal prosecutors, corporate leaders must take action to protect shareholders, preserve corporate value, and promote honesty and fair dealing with the investing public.

We have heard from responsible corporate officials recently about the challenges they face in discharging their duties to the corporation while responding in a meaningful way to a government investigation. Many of those associated with the corporate legal community have expressed concern that our practices may be discouraging full and candid communications between corporate employees and legal counsel. To the extent this is happening, it was never the intention of the Department for our corporate charging principles to cause such a result.

Therefore, I have decided to adjust certain aspects of our policy in ways that will further promote public confidence in the Department, encourage corporate fraud prevention efforts, and clarify our goals without sacrificing our ability to prosecute these important cases effectively. The new language expands upon the Department’s long-standing policies concerning how we evaluate the authenticity of a corporation’s cooperation with a government investigation.

MEMORANDUM

TO: Heads of Department Components
   United States Attorneys

FROM: Paul J. McNulty
       Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Federal Prosecution of Business Organizations

1. Duties of the Federal Prosecutor; Duties of Corporate Leaders

The prosecution of corporate crime is a high priority for the Department of Justice. By investigating wrongdoing and bringing charges for criminal conduct, the Department plays an important role in protecting investors and ensuring public confidence in business entities and in the investment markets in which those entities participate. In this respect, federal prosecutors and corporate leaders share a common goal. Directors and officers owe a fiduciary duty to a corporation’s shareholders, the corporation’s true owners, and they owe duties of honest dealing to the investing public in connection with the corporation’s regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal prosecutions are designed to serve.

A prosecutor’s duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors—the professionalism we

---

1. While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.
demonstrate, our resourcefulness in seeking information, and our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation—impacts public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion, and that professionalism and civility have always played an important part in putting these principles into action.

II. Charging a Corporation: General Principles

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed herein. First and foremost, prosecutors should be aware of the important public benefits that may flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal conduct that is pervasive throughout a particular industry, and thus an indictment often provides a unique opportunity for deterrence on a massive scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm, e.g., environmental crimes or financial frauds, are by their nature most likely to be committed by businesses, and there may, therefore, be a substantial federal interest in indicting the corporation.

Charging a corporation, however, does not mean that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are “legal persons,” capable of suing and being sued, and capable of committing crimes. Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent’s actions (l) were within
the scope of his duties and (II) were intended, at least in part, to benefit the corporation. In all cases involving wrongdoing by corporate agents, prosecutors should consider the corporation, as well as the responsible individuals, as potential criminal targets.

Agents, however, may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. See United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated—at least in part—by an intent to benefit the corporation). In United States v. Automated Medical Laboratories, 770 F.2d 399 (4th Cir. 1985), the Fourth Circuit affirmed a corporation’s conviction for the actions of a subsidiary’s employee despite its claim that the employee was acting for his own benefit, namely his “ambitious nature and his desire to ascend the corporate ladder.” The court stated, “Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML’s well-being and its lack of difficulties with the FDA.” Furthermore, in United States v. Sun-Diamond Growers of California, 138 F.3d 961, 969–70 (D.C. Cir. 1998), aff’d on other grounds, 526 U.S. 398 (1999), the D.C. Circuit rejected a corporation’s argument that it should not be held criminally liable for the actions of its vice-president since the vice-president’s “scheme was designed to—and did in fact—defraud [the corporation], not benefit it.” According to the court, the fact that the vice-president deceived the corporation and used its money to contribute illegally to a congressional campaign did not preclude a valid finding that he acted to benefit the corporation. Part of the vice-president’s job was to cultivate the corporation’s relationship with the congressional candidate’s brother, the Secretary of Agriculture. Therefore, the court held, the jury was entitled to conclude that the vice-president had acted with an intent, “however befuddled,” to further the interests of his employer. See also United States v. Cinotta, 689 F.2d 238, 241–42 (1st Cir. 1982) (upholding a corporation’s conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation’s treasury and the fraudulently obtained goods were resold to the corporation’s customers in the corporation’s name).

Moreover, the corporation need not even necessarily profit from its agent’s actions for it to be held liable. In Automated Medical Laboratories, the Fourth Circuit stated:

[B]enefit is not a “touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact.” Thus, whether the agent’s actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted
with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (emphasis added; quoting Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945), cert. denied, 326 U.S. 734 (1945)).

III. Charging a Corporation: Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals. See USAM § 9-27.220, et seq. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. See id. However, due to the nature of the corporate “person,” some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors must consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see section IV, infra);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management (see section V, infra);
3. the corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it (see section VI, infra);
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see section VII, infra);
5. the existence and adequacy of the corporation’s pre-existing compliance program (see section VIII infra);
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 (see section IX, infra);
7. collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution (see section X, infra);
8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions (see section XI, infra).

B. Comment: In determining whether to charge a corporation, the foregoing factors must be considered. The factors listed in this section are intended to be illustrative of those that should be considered and not a complete or exhaustive list. Some or all of these factors may or may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive. Further, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their judgment in applying and balancing these factors and this process does not mandate a particular result.

In making a decision to charge a corporation, the prosecutor generally has wide latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following general statements of principles that summarize appropriate considerations to be weighed and desirable practices to be followed in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate “person.”

IV. Charging a Corporation: Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal conduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, taxation, and criminal law enforcement policies. In applying these principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. See USAM §9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges
to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government’s investigation of their own and others’ wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation’s pre-indictment conduct, e.g. voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation’s business and for which the Antitrust Division has therefore established a firm policy, understood in the business community, that credit should not be given at the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, and Environmental and Natural Resources Divisions, if appropriate or required.

V. Charging a Corporation: Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees or by all the employees in a particular role within the corporation, e.g., salesmen or procurement officers, or was condoned by upper management. On the other hand, in certain limited circumstances, it may not be appropriate to impose liability upon a corporation, particularly one with a compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of per-
vasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization. See USSG § 8C2.5, comment. (n. 4).

VI. Charging a Corporation: The Corporation’s Past History

A. General Principle: Prosecutors may consider a corporation’s history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges.

B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar conduct may be probative of a corporate culture that encouraged, or at least condoned, such conduct, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the conduct in spite of the warnings or enforcement actions taken against it. In making this determination, the corporate structure itself, e.g., subsidiaries or operating divisions, should be ignored, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates should be considered. See USSG § 8C2.5(c) & comment. (n.6).

VII. Charging a Corporation: The Value of Cooperation

A. General Principle: In determining whether to charge a corporation, that corporation’s timely and voluntary disclosure of wrongdoing and its cooperation with the government’s investigation may be relevant factors. In gauging the extent of the corporation’s cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation’s willingness to provide relevant evidence and to identify the culprits within the corporation, including senior executives.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation’s cooperation may be critical in identifying the culprits and locating relevant evidence. Relevant considerations in determining whether a corporation has cooperated are set forth below.
1. Qualifying for Immunity, Amnesty or Pretrial Diversion

In some circumstances, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government’s investigation. In such circumstances, prosecutors should refer to the principles governing non-prosecution agreements generally. See USAM § 9-27.600–650. These principles permit a non-prosecution agreement in exchange for cooperation when a corporation’s “timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective.” Prosecutors should note that in the ease of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. See USAM § 9-27.641.

In addition, the Department, in conjunction with regulatory agencies and other executive branch departments, encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose their findings to the appropriate authorities. Some agencies, such as the Securities and Exchange Commission and the Environmental Protection Agency, as well as the Department’s Environmental and Natural Resources Division, have formal voluntary disclosure programs in which self-reporting, coupled with remediation and additional criteria, may qualify the corporation for amnesty or reduced sanctions. Even in the absence of a formal program, prosecutors may consider a corporation’s timely and voluntary disclosure in evaluating the adequacy of the corporation’s compliance program and its management’s commitment to the compliance program. However, prosecution and economic policies specific to the industry or statute may require prosecution notwithstanding a corporation’s willingness to cooperate. For example, the Antitrust Division offers amnesty only to the first corporation to agree to cooperate. This creates a strong incentive for corporations participating in anti-competitive conduct to be the first to cooperate. In addition, amnesty, immunity, or reduced sanctions may not be appropriate where the corporation’s business is permeated with fraud or other crimes.

2. Waiving Attorney-Client and Work Product Protections

The attorney-client and work product protections serve an extremely important function in the U.S. legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under U.S. law. See Upjohn v. United States, 449 U.S. 383, 389 (1976). As the Supreme Court has stated, “its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of

---

2. The Sentencing Guidelines reward voluntary disclosure and cooperation with a reduction in the corporation’s offense level. See USSG § 8C2.5(g). The reference to consideration of a corporation’s waiver of attorney-client and work product protections in reducing a corporation’s culpability score in Application Note 12, was deleted effective November 1, 2006. See USSG § 8C2.5(g), comment. (n.12).
law and administration of justice.” *Id.* The work product doctrine also serves similarly important interests.

Waiver of attorney-client and work product protections is not a prerequisite to a finding that a company has cooperated in the government’s investigation. However, a company’s disclosure of privileged information may permit the government to expedite its investigation. In addition, the disclosure of privileged information may be critical in enabling the government to evaluate the accuracy and completeness of the company’s voluntary disclosure.

Prosecutors may only request waiver of attorney-client or work product protections when there is a legitimate need for the privileged information to fulfill their law enforcement obligations. A legitimate need for the information is not established by concluding it is merely desirable or convenient to obtain privileged information. The test requires a careful balancing of important policy considerations underlyng the attorney-client privilege and work product doctrine and the law enforcement needs of the government’s investigation.

Whether there is a legitimate need depends upon:

1. the likelihood and degree to which the privileged information will benefit the government’s investigation;
2. whether the information sought can be obtained in a timely and complete fashion by using alternative means that do not require waiver;
3. the completeness of the voluntary disclosure already provided; and
4. the collateral consequences to a corporation of a waiver.

If a legitimate need exists, prosecutors should seek the least intrusive waiver necessary to conduct a complete and thorough investigation, and should follow a step-by-step approach to requesting information. Prosecutors should first request purely factual information, which may or may not be privileged, relating to the underlying misconduct (“Category I”). Examples of Category I information could include, without limitation, copies of key documents, 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.

Before requesting that a corporation waive the attorney-client or work product protections for Category I information, prosecutors must obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request. A prosecutor’s request to the United States Attorney for authorization to seek a waiver must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category I information must be maintained in the files of the United States Attorney. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.
A corporation’s response to the government’s request for waiver of privilege for Category I information may be considered in determining whether a corporation has cooperated in the government’s investigation.

Only if the purely factual information provides an incomplete basis to conduct a thorough investigation should prosecutors then request that the corporation provide attorney-client communications or non-factual attorney work product ("Category II"). This information includes legal advice given to the corporation before, during, and after the underlying misconduct occurred.

This category of privileged information might include the production of attorney notes, memoranda or reports (or portions thereof) containing counsel’s mental impressions and conclusions, legal determinations reached as a result of an internal investigation, or legal advice given to the corporation.

Prosecutors are cautioned that Category II information should only be sought in rare circumstances.

Before requesting that a corporation waive the attorney-client or work product protections for Category II information, the United States Attorney must obtain written authorization from the Deputy Attorney General. A United States Attorney’s request for authorization to seek a waiver must set forth law enforcement’s legitimate need for the information and identify the scope of the waiver sought. A copy of each waiver request and authorization for Category II information must be maintained in the files of the Deputy Attorney General. If the request is authorized, the United States Attorney must communicate the request in writing to the corporation.

If a corporation declines to provide a waiver for Category II information after a written request from the United States Attorney, prosecutors must not consider this declination against the corporation in making a charging decision. Prosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.

Requests for Category II information requiring the approval of the Deputy Attorney General do not include:

1. legal advice contemporaneous to the underlying misconduct when the corporation or one of its employees is relying upon an advice-of-counsel defense; and
2. legal advice or communications in furtherance of a crime or fraud, coming within the crime-fraud exception to the attorney-client privilege.

In these two instances, prosecutors should follow the authorization process established for requesting waiver for Category I information.

For federal prosecutors in litigating Divisions within Main Justice, waiver requests for Category I information must be submitted for approval to the Assistant Attorney General of the Division and waiver requests for Category II information must be submitted by the Assistant Attorney General for approval to the Deputy Attorney General. If the request is authorized, the
Assistant Attorney General must communicate the request in writing to the corporation.

Federal prosecutors are not required to obtain authorization if the corporation voluntarily offers privileged documents without a request by the government. However, voluntary waivers must be reported to the United States Attorney or the Assistant Attorney General in the Division where the case originated. A record of these reports must be maintained in the files of that office.

3. Shielding Culpable Employees and Agents

Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation’s promise of support to culpable employees and agents, 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.

Prosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment. Many state indemnification statutes grant corporations the power to advance the legal fees of officers under investigation prior to a formal determination of guilt. As a consequence, many corporations enter into contractual obligations to advance attorneys’ fees through provisions contained in their corporate charters, bylaws or employment agreements. Therefore, a corporation’s compliance with governing state law and its contractual obligations cannot be considered a failure to cooperate. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney’s representation of a corporation or its employees.

4. Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation, while purporting to cooperate, has engaged in conduct intended to impede the investigation (whether or not rising to the level of criminal obstruction).

---

3. In extremely rare cases, the advancement of attorneys’ fees may be taken into account when the totality of the circumstances show that it was intended to impede a criminal investigation. In these cases, fee advancement is considered with many other telling facts to make a determination that the corporation is acting improperly to shield itself and its culpable employees from government scrutiny. See discussion in Brief of Appellant-United States, United States v. Smith and Watson, No. 06-3999-cr (2d Cir. Nov. 6, 2006). Where these circumstances exist, approval must be obtained from the Deputy Attorney General before prosecutors may consider this factor in their charging decisions. Prosecutors should follow the authorization process established for waiver requests of Category II information (see section VII-2, infra).

4. Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys’ fees are paid, frequently arise in the course of an investigation. They may be necessary to assess other issues, such as conflict-of-interest. Such questions are appropriate and this guidance is not intended to prohibit such inquiry.
Examples of such conduct include: overly broad assertions of corporate representation of employees or former employees; overly broad or frivolous assertions of privilege to withhold the disclosure of relevant, non-privileged documents; inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed; making presentations or submissions that contain misleading assertions or omissions; incomplete or delayed production of records; and failure to promptly disclose illegal conduct known to the corporation.

5. Offering Cooperation: No Entitlement to Immunity

Finally, a corporation’s offer of cooperation does not automatically entitle it to immunity from prosecution. A corporation should not be able to escape liability merely by offering up its directors, officers, employees, or agents as in lieu of its own prosecution. Thus, a corporation’s willingness to cooperate is merely one relevant factor, that needs to be considered in conjunction with the other factors, particularly those relating to the corporation’s past history and the role of management in the wrongdoing.

VIII. Charging a Corporation: Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and to detect misconduct and to ensure that corporate activities are conducted in accordance with all applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal conduct undertaken by its officers, directors, employees, or agents. Indeed, the commission of such crimes in the face of a compliance program may suggest that the corporate management is not adequately enforcing its program. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: A corporate compliance program, even one specifically prohibiting the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior. See United States v. Basic Construction Co., 711 F.2d 570 (4th Cir. 1983) (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.”). [As explained in United States v. Potter, 463 F.3d 9 (1st Cir. 2006),] a corporation cannot “avoid liability by adopting abstract rules” that forbid its agents from engaging in illegal acts; “even a specific directive to an agent or employee or honest efforts to police such rules
do not automatically free the company for the wrongful acts of agents.” Similarly, in United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), cert. denied, 409 U.S. 1125 (1973), the Ninth Circuit affirmed antitrust liability based upon a purchasing agent for a single hotel threatening a single supplier with a boycott unless it paid dues to a local marketing association, even though the agent’s actions were contrary to corporate policy and directly against express instructions from his superiors. The court reasoned that Congress, in enacting the Sherman Antitrust Act, “intended to impose liability upon business entities for the acts of those to whom they choose to delegate the conduct of their affairs, thus stimulating a maximum effort by owners and managers to assure adherence by such agents to the requirements of the Act.”\(^5\) It concluded that “general policy statements” and even direct instructions from the agent’s superiors were not sufficient; “Appellant could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks.” See also United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979) (“[A] corporation may be liable for the acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be considered in determining whether the employee in fact acted to benefit the corporation.”); United States v. American Radiator & Standard Sanitary Corp., 433 F.2d 174 (3rd Cir. 1970) (affirming conviction of corporation based upon its officer’s participation in price-fixing scheme, despite corporation’s defense that officer’s conduct violated its “rigid anti-fraternization policy” against any socialization (and exchange of price information) with its competitors; “When the act of the agent is within the scope of his employment or his apparent authority, the corporation is held legally responsible for it, although what he did may be contrary to his actual instructions and may be unlawful.”).

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation’s employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formal guidelines for corporate compliance programs. The fundamental questions any prosecutor should ask are: “Is the corporation’s compliance program well designed?” and “Does the corporation’s compliance program work?” In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program;

\(^5\) Although this case and Basic Construction are both antitrust cases, their reasoning applies to other criminal violations. In the Hilton case, for instance, the Ninth Circuit noted that Sherman Act violations are commercial offenses “usually motivated by a desire to enhance profits,” thus, bringing the case within the normal rule that a “purpose to benefit the corporation is necessary to bring the agent’s acts within the scope of his employment.” 467 F.2d at 1006 & n4. In addition, in United States v. Automated Medical Laboratories, 770 F.2d 399, 406 n.5 (4th Cir. 1985), the Fourth Circuit stated “that Basic Construction states a generally applicable rule on corporate criminal liability despite the fact that it addresses violations of the antitrust laws.”
the extent and pervasiveness of the criminal conduct; the number and level of
the corporate employees involved; the seriousness, duration, and frequency of
the misconduct; and any remedial actions taken by the corporation, includ-
ing restitution, disciplinary action, and revisions to corporate compliance pro-
grams. Prosecutors should also consider the promptness of any disclosure of
wrongdoing to the government and the corporation's cooperation in the gov-
ernment's investigation. In evaluating compliance programs, prosecutors may
calculate whether the corporation has established corporate governance mech-
anisms that can effectively detect and prevent misconduct. For example, do the
corporation's directors exercise independent review over proposed corporate
actions rather than unquestioningly ratifying officers' recommendations; are
the directors provided with information sufficient to enable the exercise of
independent judgment, are internal audit functions conducted at a level suffi-
cient to ensure their independence and accuracy and have the directors estab-
lished an information and reporting system in the organization reasonably
designed to provide management and the board of directors with timely and
accurate information sufficient to allow them to reach an informed decision
regarding the organization's compliance with the law. In re: Caremark, 698 A.2d
959 (Del Ct. Chan. 1996).

Prosecutors should therefore attempt to determine whether a corporation's
compliance program is merely a "paper program" or whether it was designed
and implemented in an effective manner. In addition, prosecutors should
determine whether the corporation has provided for a staff sufficient to audit,
document, analyze, and utilize the results of the corporation's compliance
efforts. In addition, prosecutors should determine whether the corporation's
employees are adequately informed about the compliance program and are
convinced of the corporation's commitment to it. This will enable the prosecu-
tor to make an informed decision as to whether the corporation has adopted
and implemented a truly effective compliance program that, when consistent
with other federal law enforcement policies, may result in a decision to charge
only the corporation's employees and agents.

Compliance programs should be designed to detect the particular types of
misconduct most likely to occur in a particular corporation's line of business.
Many corporations operate in complex regulatory environments outside the
normal experience of criminal prosecutors. Accordingly, prosecutors should
consult with relevant federal and state agencies with the expertise to evalu-
ate the adequacy of a program's design and implementation. For instance,
state and federal banking, insurance, and medical boards, the Department of
Defense, the Department of Health and Human Services, the Environmental
Protection Agency, and the Securities and Exchange Commission have con-
siderable experience with compliance programs and can be very helpful to a
prosecutor in evaluating such programs. In addition, the Fraud Section of the

---

6. For a detailed review of these and other factors concerning corporate compliance programs, see
USSG § 8B2.1.
Criminal Division, the Commercial Litigation Branch of the Civil Division, and the Environmental Crimes Section of the Environment and Natural Resources Division can assist U.S. Attorneys’ Offices in finding the appropriate agency office and in providing copies of compliance programs that were developed in previous cases.

IX. Charging a Corporation: Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money, a prosecutor may consider the corporation’s willingness to make restitution and steps already taken to do so. A prosecutor may also consider other remedial actions, such as implementing an effective corporate compliance program, improving an existing compliance program, and disciplining wrongdoers, in determining whether to charge the corporation.

B. Comment: In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline and full restitution. A corporation’s response to misconduct says much about its willingness to ensure that such misconduct does not recur. Thus, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel, operational, and organizational changes necessary to establish an awareness among employees that criminal conduct will not be tolerated. Among the factors prosecutors should consider and weigh are whether the corporation appropriately disciplined the wrongdoers and disclosed information concerning their illegal conduct to the government.

Employee discipline is a difficult task for many corporations because of the human element involved and sometimes because of the seniority of the employees concerned. While corporations need to be fair to their employees, they must also be unequivocally committed, at all levels of the corporation, to the highest standards of legal and ethical behavior. Effective internal discipline can be a powerful deterrent against improper behavior by a corporation’s employees. In evaluating a corporation’s response to wrongdoing, prosecutors may evaluate the willingness of the corporation to discipline culpable employees of all ranks and the adequacy of the discipline imposed. The prosecutor should be satisfied that the corporation’s focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation’s remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target’s ability to pay restitution. A corporation’s efforts to pay restitution even in advance of any court order is, however, evidence of its “acceptance of responsibility” and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal
laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider.

X. Charging a Corporation: Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction in determining whether to charge the corporation with a criminal offense.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's officers, directors, employees, and shareholders, many of whom may, depending on the size and nature (e.g., publicly vs. closely held) of the corporation and their role in its operations, have played no role in the criminal conduct, have been completely unaware of it, or have been wholly unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federal funded programs such as health care. Whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the severity of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division (or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity.

Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.
The appropriateness of considering such collateral consequences and the weight to be given them may depend on the special policy concerns discussed in section III, supra.

XI. Charging a Corporation: Non-Criminal Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution, e.g., civil or regulatory enforcement actions, the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to an egregious violation, a pattern of wrongdoing, or a history of non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied without the necessity of instituting criminal proceedings. In determining whether federal criminal charges are appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority’s interest; the regulatory authority’s ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority’s enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. See USAM §§ 9-27.240, 9-27.250.

XII. Charging a Corporation: Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant’s conduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require “a faithful and honest application of the Sentencing Guidelines” and an “individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime.” See USAM § 9-27300. In making
this determination, “it is appropriate that the attorney for the government consider, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” See Attorney General’s Memorandum, dated October 12, 1993.

XIII. Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, prosecutors should seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.

B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM §§ 9-27.400–500. This means, inter alia, that the corporation should be required to plead guilty to the most serious, readily provable offense charged. As is the case with individuals, the attorney making this determination should do so “on the basis of an individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the federal criminal code, and maximize the impact of federal resources on crime. In making this determination, the attorney for the government considers, inter alia, such factors as the sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” See Attorney General’s Memorandum, dated October 12, 1993. In addition, any negotiated departures from the Sentencing Guidelines must be justifiable under the Guidelines and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later “proclaim lack of culpability or even complete innocence.” See USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate “person” and ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context,
punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters. See USSG §§8B1.1, 8C2.1, et seq. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in government contracting fraud, a prosecutor may not negotiate away an agency’s right to debar or to list the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See section VIII, supra.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is complete and truthful. To do so, the prosecutor may request that the corporation waive attorney-client and work product protection, make employees and agents available for debriefing, disclose the results of its internal investigation, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible culprits are identified and, if appropriate, prosecuted. See generally section VII, supra.

This memorandum provides only internal Department of Justice guidance. It is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.
MEMORANDUM

TO: Heads of Department Components
United States Attorneys

FROM: Mark Filip
Deputy Attorney General

SUBJECT: Principles of Federal Prosecution of Business Organizations

Attached to this memorandum is a revision of the Principles of Federal Prosecution of Business Organizations, previously issued by Deputy Attorney General Paul McNulty in December 2006. The revised Principles will be set forth for the first time in the United States Attorneys’ Manual, and will be binding on all federal prosecutors within the Department of Justice. The revised Principles will be effective immediately, on a prospective basis.

The Department of Justice, through the Deputy Attorney General’s Office, has undertaken periodic revision of its policies concerning factors to consider in the prosecution of business organizations. Such revisions should not be understood as criticism of prosecutors who applied the prior policies diligently and in good faith, but rather as an effort to refine the Department’s policy guidance in light of lessons learned from the Department’s prosecutions as well as comments from other actors within the criminal justice system, the judiciary, and the broader legal community. As explained further below, the principal revisions to the Principles concern what measures a business entity must take to qualify for the long-recognized “cooperation” mitigating factor, as well as how payment of attorneys’ fees by a business organization for its officers or employees, or participation in a joint defense or similar agreement, will be considered in the prosecutive analysis. Much of the remainder of the Principles is unchanged.
General policy guidance is, of course, important. So too is thorough training and supervision, which the Department will provide to ensure compliance with these revised Principles. But there is no substitute for the application of considered judgment by line prosecutors and United States Attorneys throughout the Nation, and by their counterparts at Main Justice in Washington, D.C. The Department and Nation are best served when federal prosecutors thoughtfully and fairly consider these Principles and apply them consistent with our concurrent mandates: (1) to aggressively enforce the law; (2) to respect the rights of criminal defendants and others involved in the criminal justice process; and (3) to promote fair outcomes for the American people.

Thank you to the many leaders of the Department who participated in the dialogue that led to these revisions. This was truly a collective effort, which is why these Principles should not bear the name of any particular individual at the Department, as prior iterations sometimes became known. In addition, that earlier practice has drawn criticism from some quarters for implying that Department policy is subject to revision with every changing of the guard. Accordingly, these Principles please should henceforth be referred to as the Department’s “Principles of Federal Prosecution of Business Organizations,” or the “Corporate Prosecution Principles,” or by the relevant section of the United States Attorneys’ Manual, as other sections typically are.

**Title 9, Chapter 9-28.000**

*Principles of Federal Prosecution of Business Organizations*

9-28.000 Principles of Federal Prosecution of Business Organizations

9-28.100 Duties of Federal Prosecutors and Duties of Corporate Leaders

9-28.200 General Considerations of Corporate Liability

9-28.300 Factors to Be Considered

9-28.400 Special Policy Concerns

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

9-28.600 The Corporation’s Past History

9-28.700 The Value of Cooperation

9-28.710 Attorney-Client and Work Product Protections

9-28.720 Cooperation: Disclosing the Relevant Facts

9-28.730 Obstructing the Investigation

9-28.740 Offering Cooperation: No Entitlement to Immunity

---

1. While these guidelines refer to corporations, they apply to the consideration of the prosecution of all types of business organizations, including partnerships, sole proprietorships, government entities, and unincorporated associations.
The prosecution of corporate crime is a high priority for the Department of Justice. By investigating allegations of wrongdoing and by bringing charges where appropriate for criminal misconduct, the Department promotes critical public interests. These interests include, to take just a few examples: (1) protecting the integrity of our free economic and capital markets; (2) protecting consumers, investors, and business entities that compete only through lawful means; and (3) protecting the American people from misconduct that would violate criminal laws safeguarding the environment.

In this regard, federal prosecutors and corporate leaders typically share common goals. For example, directors and officers owe a fiduciary duty to a corporation’s shareholders, the corporation’s true owners, and they owe duties of honest dealing to the investing public in connection with the corporation’s regulatory filings and public statements. The faithful execution of these duties by corporate leadership serves the same values in promoting public trust and confidence that our criminal cases are designed to serve.

A prosecutor’s duty to enforce the law requires the investigation and prosecution of criminal wrongdoing if it is discovered. In carrying out this mission with the diligence and resolve necessary to vindicate the important public interests discussed above, prosecutors should be mindful of the common cause we share with responsible corporate leaders. Prosecutors should also be mindful that confidence in the Department is affected both by the results we achieve and by the real and perceived ways in which we achieve them. Thus, the manner in which we do our job as prosecutors—including the professionalism we demonstrate, our willingness to secure the facts in a manner that encourages corporate compliance and self-regulation, and also our appreciation that corporate prosecutions can potentially harm blameless investors, employees, and others—affects public perception of our mission. Federal prosecutors recognize that they must maintain public confidence in the way in which they exercise their charging discretion. This endeavor requires the thoughtful analysis of all facts and circumstances presented in a given case. As always, professionalism and civility play an important part in the Department’s discharge of its responsibilities in all areas, including the area of corporate investigations and prosecutions.
9-28.200 General Considerations of Corporate Liability

A. General Principle: Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to be a force for positive change of corporate culture, and a force to prevent, discover, and punish serious crimes.

B. Comment: In all cases involving corporate wrongdoing, prosecutors should consider the factors discussed further below. In doing so, prosecutors should be aware of the public benefits that can flow from indicting a corporation in appropriate cases. For instance, corporations are likely to take immediate remedial steps when one is indicted for criminal misconduct that is pervasive throughout a particular industry, and thus an indictment can provide a unique opportunity for deterrence on a broad scale. In addition, a corporate indictment may result in specific deterrence by changing the culture of the indicted corporation and the behavior of its employees. Finally, certain crimes that carry with them a substantial risk of great public harm—e.g., environmental crimes or sweeping financial frauds—may be committed by a business entity, and there may therefore be a substantial federal interest in indicting a corporation under such circumstances.

In certain instances, it may be appropriate, upon consideration of the factors set forth herein, to resolve a corporate criminal case by means other than indictment. Non-prosecution and deferred prosecution agreements, for example, occupy an important middle ground between declining prosecution and obtaining the conviction of a corporation. These agreements are discussed further in Section X, infra. Likewise, civil and regulatory alternatives may be appropriate in certain cases, as discussed in Section XI, infra.

Where a decision is made to charge a corporation, it does not necessarily follow that individual directors, officers, employees, or shareholders should not also be charged. Prosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation. Because a corporation can act only through individuals, imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing. Only rarely should provable individual culpability not be pursued, particularly if it relates to high-level corporate officers, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation.

Corporations are “legal persons,” capable of suing and being sued, and capable of committing crimes. Under the doctrine of respondeat superior, a corporation may be held criminally liable for the illegal acts of its directors, officers, employees, and agents. To hold a corporation liable for these actions, the government must establish that the corporate agent’s actions (i) were within the scope of his duties and (ii) were intended, at least in part, to benefit the
corporation. In all cases involving wrongdoing by corporate agents, prosecutors should not limit their focus solely to individuals or the corporation, but should consider both as potential targets.

Agents may act for mixed reasons—both for self-aggrandizement (both direct and indirect) and for the benefit of the corporation, and a corporation may be held liable as long as one motivation of its agent is to benefit the corporation. See United States v. Potter, 463 F.3d 9, 25 (1st Cir. 2006) (stating that the test to determine whether an agent is acting within the scope of employment is “whether the agent is performing acts of the kind which he is authorized to perform, and those acts are motivated, at least in part, by an intent to benefit the corporation.”). In United States v. Automated Medical Laboratories, Inc., 770 F.2d 399 (4th Cir. 1985), for example, the Fourth Circuit affirmed a corporation’s conviction for the actions of a subsidiary’s employee despite the corporation’s claim that the employee was acting for his own benefit, namely his “ambitious nature and his desire to ascend the corporate ladder.” Id. at 407. The court stated, “Partucci was clearly acting in part to benefit AML since his advancement within the corporation depended on AML’s well-being and its lack of difficulties with the FDA.” Id.; see also United States v. Cincotta, 689 F.2d 238, 241–42 (1st Cir. 1982) (upholding a corporation’s conviction, notwithstanding the substantial personal benefit reaped by its miscreant agents, because the fraudulent scheme required money to pass through the corporation’s treasury and the fraudulently obtained goods were resold to the corporation’s customers in the corporation’s name).

Moreover, the corporation need not even necessarily profit from its agent’s actions for it to be held liable. In Automated Medical Laboratories, the Fourth Circuit stated:

[B]enefit is not a “touchstone of criminal corporate liability; benefit at best is an evidential, not an operative, fact.” Thus, whether the agent’s actions ultimately redounded to the benefit of the corporation is less significant than whether the agent acted with the intent to benefit the corporation. The basic purpose of requiring that an agent have acted with the intent to benefit the corporation, however, is to insulate the corporation from criminal liability for actions of its agents which may be inimical to the interests of the corporation or which may have been undertaken solely to advance the interests of that agent or of a party other than the corporation.

770 F.2d at 407 (internal citation omitted) (quoting Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945)).

9-28.300 Factors to Be Considered

A. General Principle: Generally, prosecutors apply the same factors in determining whether to charge a corporation as they do with respect to individuals.
See USAM § 9-27.220, et seq. Thus, the prosecutor must weigh all of the factors normally considered in the sound exercise of prosecutorial judgment: the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction; and the adequacy of noncriminal approaches. See id. However, due to the nature of the corporate “person,” some additional factors are present. In conducting an investigation, determining whether to bring charges, and negotiating plea or other agreements, prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime (see infra section IV);
2. the pervasiveness of wrongdoing within the corporation, including the complicity in, or the condoning of, the wrongdoing by corporate management (see infra section V);
3. the corporation’s history of similar misconduct, including prior criminal, civil, and regulatory enforcement actions against it (see infra section VI);
4. the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents (see infra section VII);
5. the existence and effectiveness of the corporation’s pre-existing compliance program (see infra section VIII);
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 (see infra section IX);
7. collateral consequences, including whether there is disproportionate harm to shareholders, pension holders, employees, and others not proven personally culpable, as well as impact on the public arising from the prosecution (see infra section X);
8. the adequacy of the prosecution of individuals responsible for the corporation’s malfeasance; and
9. the adequacy of remedies such as civil or regulatory enforcement actions (see infra section XI).

B. Comment: The factors listed in this section are intended to be illustrative of those that should be evaluated and are not an exhaustive list of potentially relevant considerations. Some of these factors may not apply to specific cases, and in some cases one factor may override all others. For example, the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors. In most cases, however, no single factor will be dispositive.
In addition, national law enforcement policies in various enforcement areas may require that more or less weight be given to certain of these factors than to others. Of course, prosecutors must exercise their thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome and promote respect for the law.

In making a decision to charge a corporation, the prosecutor generally has substantial latitude in determining when, whom, how, and even whether to prosecute for violations of federal criminal law. In exercising that discretion, prosecutors should consider the following statements of principles that summarize the considerations they should weigh and the practices they should follow in discharging their prosecutorial responsibilities. In doing so, prosecutors should ensure that the general purposes of the criminal law—assurance of warranted punishment, deterrence of further criminal conduct, protection of the public from dangerous and fraudulent conduct, rehabilitation of offenders, and restitution for victims and affected communities—are adequately met, taking into account the special nature of the corporate “person.”

9-28.400 Special Policy Concerns

A. General Principle: The nature and seriousness of the crime, including the risk of harm to the public from the criminal misconduct, are obviously primary factors in determining whether to charge a corporation. In addition, corporate conduct, particularly that of national and multi-national corporations, necessarily intersects with federal economic, tax, and criminal law enforcement policies. In applying these Principles, prosecutors must consider the practices and policies of the appropriate Division of the Department, and must comply with those policies to the extent required by the facts presented.

B. Comment: In determining whether to charge a corporation, prosecutors should take into account federal law enforcement priorities as discussed above. See USAM § 9-27-230. In addition, however, prosecutors must be aware of the specific policy goals and incentive programs established by the respective Divisions and regulatory agencies. Thus, whereas natural persons may be given incremental degrees of credit (ranging from immunity to lesser charges to sentencing considerations) for turning themselves in, making statements against their penal interest, and cooperating in the government’s investigation of their own and others’ wrongdoing, the same approach may not be appropriate in all circumstances with respect to corporations. As an example, it is entirely proper in many investigations for a prosecutor to consider the corporation’s pre-indictment conduct, e.g., voluntary disclosure, cooperation, remediation or restitution, in determining whether to seek an indictment. However, this would not necessarily be appropriate in an antitrust investigation, in which antitrust violations, by definition, go to the heart of the corporation’s business. With this in mind, the Antitrust Division has established a firm policy, understood in the business community, that credit should not be given at
the charging stage for a compliance program and that amnesty is available only to the first corporation to make full disclosure to the government. As another example, the Tax Division has a strong preference for prosecuting responsible individuals, rather than entities, for corporate tax offenses. Thus, in determining whether or not to charge a corporation, prosecutors must consult with the Criminal, Antitrust, Tax, Environmental and Natural Resources, and National Security Divisions, as appropriate.

9-28.500 Pervasiveness of Wrongdoing Within the Corporation

A. General Principle: A corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons fairly attributable to it. Charging a corporation for even minor misconduct may be appropriate where the wrongdoing was pervasive and was undertaken by a large number of employees, or by all the employees in a particular role within the corporation, or was condoned by upper management. On the other hand, it may not be appropriate to impose liability upon a corporation, particularly one with a robust compliance program in place, under a strict respondeat superior theory for the single isolated act of a rogue employee. There is, of course, a wide spectrum between these two extremes, and a prosecutor should exercise sound discretion in evaluating the pervasiveness of wrongdoing within a corporation.

B. Comment: Of these factors, the most important is the role and conduct of management. Although acts of even low-level employees may result in criminal liability, a corporation is directed by its management and management is responsible for a corporate culture in which criminal conduct is either discouraged or tacitly encouraged. As stated in commentary to the Sentencing Guidelines:

Pervasiveness [is] case specific and [will] depend on the number, and degree of responsibility, of individuals [with] substantial authority . . . who participated in, condoned, or were willfully ignorant of the offense. Fewer individuals need to be involved for a finding of pervasiveness if those individuals exercised a relatively high degree of authority. Pervasiveness can occur either within an organization as a whole or within a unit of an organization.

USSG § 8C2.5, cmt. (n. 4).

9-28.600 The Corporation's Past History

A. General Principle: Prosecutors may consider a corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it, in determining whether to bring criminal charges and how best to resolve cases.
B. Comment: A corporation, like a natural person, is expected to learn from its mistakes. A history of similar misconduct may be probative of a corporate culture that encouraged, or at least condoned, such misdeeds, regardless of any compliance programs. Criminal prosecution of a corporation may be particularly appropriate where the corporation previously had been subject to non-criminal guidance, warnings, or sanctions, or previous criminal charges, and it either had not taken adequate action to prevent future unlawful conduct or had continued to engage in the misconduct in spite of the warnings or enforcement actions taken against it. The corporate structure itself (e.g., the creation or existence of subsidiaries or operating divisions) is not dispositive in this analysis, and enforcement actions taken against the corporation or any of its divisions, subsidiaries, and affiliates may be considered, if germane. See USSG § 8C2.5(c), cmt. (n. 6).

9-28.700 The Value of Cooperation

A. General Principle: In determining whether to charge a corporation and how to resolve corporate criminal cases, the corporation's timely and voluntary disclosure of wrongdoing and its cooperation with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider, among other things, whether the corporation made a voluntary and timely disclosure, and the corporation's willingness to provide relevant information and evidence and identify relevant actors within and outside the corporation, including senior executives.

Cooperation is a potential mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution. Of course, the decision not to cooperate by a corporation (or individual) is not itself evidence of misconduct, at least where the lack of cooperation does not involve criminal misconduct or demonstrate consciousness of guilt (e.g., suborning perjury or false statements, or refusing to comply with lawful discovery requests). Thus, failure to cooperate, in and of itself, does not support or require the filing of charges with respect to a corporation any more than with respect to an individual.

B. Comment: In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying potentially relevant
actors and locating relevant evidence, among other things, and in doing so expeditiously.

This dynamic—i.e., the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions—can have negative consequences for both the government and the corporation that is the subject or target of a government investigation. More specifically, because of corporate attribution principles concerning actions of corporate officers and employees (see, e.g., supra section II), uncertainty about exactly who authorized or directed apparent corporate misconduct can inure to the detriment of a corporation. For example, it may not matter under the law which of several possible executives or leaders in a chain of command approved or authorized criminal conduct; however, that information if known might bear on the propriety of a particular disposition short of indictment of the corporation. It may not be in the interest of a corporation or the government for a charging decision to be made in the absence of such information, which might occur if, for example, a statute of limitations were relevant and authorization by any one of the officials were enough to justify a charge under the law. Moreover, and at a minimum, a protracted government investigation of such an issue could, as a collateral consequence, disrupt the corporation’s business operations or even depress its stock price.

For these reasons and more, cooperation can be a favorable course for both the government and the corporation. Cooperation benefits the government—and ultimately shareholders, employees, and other often blameless victims—by allowing prosecutors and federal agents, for example, to avoid protracted delays, which compromise their ability to quickly uncover and address the full extent of widespread corporate crimes. With cooperation by the corporation, the government may be able to reduce tangible losses, limit damage to reputation, and preserve assets for restitution. At the same time, cooperation may benefit the corporation by enabling the government to focus its investigative resources in a manner that will not unduly disrupt the corporation’s legitimate business operations. In addition, and critically, cooperation may benefit the corporation by presenting it with the opportunity to earn credit for its efforts.

9-28.710 Attorney-Client and Work Product Protections

The attorney-client privilege and the attorney work product protection serve an extremely important function in the American legal system. The attorney-client privilege is one of the oldest and most sacrosanct privileges under the law. See Upjohn v. United States, 449 U.S. 383, 389 (1981). As the Supreme Court has stated, “[i]ts purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice.” Id. The value of promoting a corporation’s ability to seek frank and comprehensive legal advice is particularly important in the contemporary global business environment, where corporations often face complex and dynamic legal and
regulatory obligations imposed by the federal government and also by states and foreign governments. The work product doctrine serves similarly important goals.

For these reasons, waiving the attorney-client and work product protections has never been a prerequisite under the Department’s prosecution guidelines for a corporation to be viewed as cooperative. Nonetheless, a wide range of commentators and members of the American legal community and criminal justice system have asserted that the Department’s policies have been used, either wittingly or unwittingly, to coerce business entities into waiving attorney-client privilege and work-product protection. Everyone agrees that a corporation may freely waive its own privileges if it chooses to do so; indeed, such waivers occur routinely when corporations are victimized by their employees or others, conduct an internal investigation, and then disclose the details of the investigation to law enforcement officials in an effort to seek prosecution of the offenders. However, the contention, from a broad array of voices, is that the Department’s position on attorney-client privilege and work product protection waivers has promoted an environment in which those protections are being unfairly eroded to the detriment of all.

The Department understands that the attorney-client privilege and attorney work product protection are essential and long-recognized components of the American legal system. What the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of those protections, but rather the facts known to the corporation about the putative criminal misconduct under review. In addition, while a corporation remains free to convey non-factual or “core” attorney-client communications or work product—if and only if the corporation voluntarily chooses to do so—prosecutors should not ask for such waivers and are directed not to do so. The critical factor is whether the corporation has provided the facts about the events, as explained further herein.

**9-28.720 Cooperation: Disclosing the Relevant Facts**

Eligibility for cooperation credit is not predicated upon the waiver of attorney-client privilege or work product protection. Instead, the sort of cooperation that is most valuable to resolving allegations of misconduct by a corporation and its officers, directors, employees, or agents is disclosure of the relevant facts concerning such misconduct. In this regard, the analysis parallels that for a non-corporate defendant, where cooperation typically requires disclosure of relevant factual knowledge and not of discussions between an individual and his attorneys.

Thus, when the government investigates potential corporate wrongdoing, it seeks the relevant facts. For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual. In both cases, the government needs to
know the facts to achieve a just and fair outcome. The party under investigation may choose to cooperate by disclosing the facts, and the government may give credit for the party's disclosures. If a corporation wishes to receive credit for such cooperation, which then can be considered with all other cooperative efforts and circumstances in evaluating how fairly to proceed, then the corporation, like any person, must disclose the relevant facts of which it has knowledge.2

(a) Disclosing the Relevant Facts—Facts Gathered Through Internal Investigation

Individuals and corporations often obtain knowledge of facts in different ways. An individual knows the facts of his or others’ misconduct through his own experience and perceptions. A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts. Some of those facts may be reflected in documentary or electronic media like emails, transaction or accounting documents, and other records. Often, the corporation gathers facts through an internal investigation. Exactly how and by whom the facts are gathered is for the corporation to decide. Many corporations choose to collect information about potential misconduct through lawyers, a process that may confer attorney-client privilege or attorney work product protection on at least some of the information collected. Other corporations may choose a method of fact-gathering that does not have that effect—for example, having employee or other witness statements collected after interviews by non-attorney personnel.

Whichever process the corporation selects, the government’s key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.3 On this point the Report of

---

2. There are other dimensions of cooperation beyond the mere disclosure of facts, of course. These can include, for example, providing non-privileged documents and other evidence, making witnesses available for interviews, and assisting in the interpretation of complex business records. This section of the Principles focuses solely on the disclosure of facts and the privilege issues that may be implicated thereby.

3. By way of example, corporate personnel are typically interviewed during an internal investigation. If the interviews are conducted by counsel for the corporation, certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product. To receive cooperation credit for providing factual information, the corporation need not produce, and prosecutors may not request, protected notes or memoranda generated by the lawyers’ interviews. To earn such credit, however, the corporation does need to produce, and prosecutors may request, relevant factual information—including relevant factual information acquired through those interviews, unless the identical information has otherwise been provided—as well as relevant non-privileged evidence such as accounting and business records and emails between non-attorney employees or agents.
the House Judiciary Committee, submitted in connection with the attorney-client privilege bill passed by the House of Representatives (H.R. 3013), comports with the approach required here:

[A]n . . . attorney of the United States may base cooperation credit on the facts that are disclosed, but is prohibited from basing cooperation credit upon whether or not the materials are protected by attorney-client privilege or attorney work product. As a result, an entity that voluntarily discloses should receive the same amount of cooperation credit for disclosing facts that happen to be contained in materials not protected by attorney-client privilege or attorney work product as it would receive for disclosing identical facts that are contained in materials protected by attorney-client privilege or attorney work product. There should be no differentials in an assessment of cooperation (i.e., neither a credit nor a penalty) based upon whether or not the materials disclosed are protected by attorney-client privilege or attorney work product.


In short, so long as the corporation timely discloses relevant facts about the putative misconduct, the corporation may receive due credit for such cooperation, regardless of whether it chooses to waive privilege or work product protection in the process. Likewise, a corporation that does not disclose the relevant facts about the alleged misconduct—for whatever reason—typically should not be entitled to receive credit for cooperation.

Two final and related points bear noting about the disclosure of facts, although they should be obvious. First, the government cannot compel, and the corporation has no obligation to make, such disclosures (although the government can obviously compel the disclosure of certain records and witness testimony through subpoenas). Second, a corporation’s failure to provide relevant information does not mean the corporation will be indicted. It simply means that the corporation will not be entitled to mitigating credit for that cooperation. Whether the corporation faces charges will turn, as it does in any case, on the sufficiency of the evidence, the likelihood of success at trial, and all of the other factors identified in Section III above. If there is insufficient evidence to warrant indictment, after appropriate investigation has been completed, or if the other factors weigh against indictment, then the corporation should not be indicted, irrespective of whether it has earned cooperation credit. The converse is also true: The government may charge even the most cooperative corporation pursuant to these Principles if, in weighing and balancing the factors described herein, the prosecutor determines that a charge is required in the interests of justice. Put differently, even the most sincere and thorough effort

---

4. In assessing the timeliness of a corporation’s disclosures, prosecutors should apply a standard of reasonableness in light of the totality of circumstances.
to cooperate cannot necessarily absolve a corporation that has, for example, engaged in an egregious, orchestrated, and widespread fraud. Cooperation is a relevant potential mitigating factor, but it alone is not dispositive.

* (b) Legal Advice and Attorney Work Product

Separate from (and usually preceding) the fact-gathering process in an internal investigation, a corporation, through its officers, employees, directors, or others, may have consulted with corporate counsel regarding or in a manner that concerns the legal implications of the putative misconduct at issue. Communications of this sort, which are both independent of the fact-gathering component of an internal investigation and made for the purpose of seeking or dispensing legal advice, lie at the core of the attorney-client privilege. Such communications can naturally have a salutary effect on corporate behavior—facilitating, for example, a corporation's effort to comply with complex and evolving legal and regulatory regimes. Except as noted in subparagraphs (b)(i) and (b)(ii) below, a corporation need not disclose and prosecutors may not request the disclosure of such communications as a condition for the corporation's eligibility to receive cooperation credit.

Likewise, non-factual or core attorney work product—for example, an attorney's mental impressions or legal theories—lies at the core of the attorney work product doctrine. A corporation need not disclose, and prosecutors may not request, the disclosure of such attorney work product as a condition for the corporation's eligibility to receive cooperation credit.

  *(i) Advice of Counsel Defense in the Instant Context

Occasionally a corporation or one of its employees may assert an advice-of-counsel defense, based upon communications with in-house or outside counsel that took place prior to or contemporaneously with the underlying conduct at issue. In such situations, the defendant must tender a legitimate factual basis to support the assertion of the advice-of-counsel defense. See, e.g., Pitt v. Dist. of Columbia, 491 F.3d 494, 504–05 (D.C. Cir. 2007); United States v. Wenger, 427 F.3d 840, 853–54 (10th Cir. 2005); United States v. Cheek, 3 F.3d 1057, 1061–62 (7th Cir. 1993). The Department cannot fairly be asked to discharge its responsibility to the public to investigate alleged corporate crime, or to temper what would otherwise be the appropriate course of prosecutive action, by simply accepting on faith an otherwise unproven assertion that an attorney—perhaps even an unnamed attorney—approved potentially unlawful practices. Accordingly,

5. These privileged communications are not necessarily limited to those that occur contemporaneously with the underlying misconduct. They would include, for instance, legal advice provided by corporate counsel in an internal investigation report. Again, the key measure of cooperation is the disclosure of factual information known to the corporation, not the disclosure of legal advice or theories rendered in connection with the conduct at issue (subject to the two exceptions noted in Section VII(2)(b)(i-ii)).
where an advice-of-counsel defense has been asserted, prosecutors may ask for the disclosure of the communications allegedly supporting it.

(ii) Communications in Furtherance of a Crime or Fraud

Communications between a corporation (through its officers, employees, directors, or agents) and corporate counsel that are made in furtherance of a crime or fraud are, under settled precedent, outside the scope and protection of the attorney-client privilege. See United States v. Zolin, 491 U.S. 554, 563 (1989); United States v. BDO Seidman, LLP, 492 F.3d 806, 818 (7th Cir. 2007). As a result, the Department may properly request such communications if they in fact exist.

9-28.730 Obstructing the Investigation

Another factor to be weighed by the prosecutor is whether the corporation has engaged in conduct intended to impede the investigation. Examples of such conduct could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.

In evaluating cooperation, however, prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers, or directors under investigation or indictment. Likewise, prosecutors may not request that a corporation refrain from taking such action. This prohibition is not meant to prevent a prosecutor from asking questions about an attorney’s representation of a corporation or its employees, officers, or directors, where otherwise appropriate under the law. Neither is it intended to limit the otherwise applicable reach of criminal obstruction of justice statutes such as 18 U.S.C. § 1503. If the payment of attorney fees were used in a manner that would otherwise constitute criminal obstruction of justice—for example, if fees were advanced on the condition that an employee adhere to a version of the facts that the corporation and the employee knew to be false—these Principles would not (and could not) render inapplicable such criminal prohibitions.

Similarly, the mere participation by a corporation in a joint defense agreement does not render the corporation ineligible to receive cooperation credit, and prosecutors may not request that a corporation refrain from entering into such agreements. Of course, the corporation may wish to avoid putting itself in the position of being disabled, by virtue of a particular joint defense or similar agreement, from providing some relevant facts to the government and

6. Routine questions regarding the representation status of a corporation and its employees, including how and by whom attorneys’ fees are paid, sometimes arise in the course of an investigation under certain circumstances—to take one example, to assess conflict-of-interest issues. Such questions can be appropriate and this guidance is not intended to prohibit such limited inquiries.

---

81563_01_c01_p001-106.indd  97
11/29/11  3:12 PM
thereby limiting its ability to seek such cooperation credit. Such might be the
case if the corporation gathers facts from employees who have entered into a
joint defense agreement with the corporation, and who may later seek to pre-
vent the corporation from disclosing the facts it has acquired. Corporations
may wish to address this situation by crafting or participating in joint defense
agreements, to the extent they choose to enter them, that provide such flexibil-
ity as they deem appropriate.

Finally, it may on occasion be appropriate for the government to consider
whether the corporation has shared with others sensitive information about
the investigation that the government provided to the corporation. In appro-
priate situations, as it does with individuals, the government may properly
request that, if a corporation wishes to receive credit for cooperation, the infor-
mation provided by the government to the corporation not be transmitted to
others—for example, where the disclosure of such information could lead to
flight by individual subjects, destruction of evidence, or dissipation or conceal-
ment of assets.

9-28.740 Offering Cooperation: No Entitlement to Immunity

A corporation’s offer of cooperation or cooperation itself does not auto-
matically entitle it to immunity from prosecution or a favorable resolution of
its case. A corporation should not be able to escape liability merely by offering
up its directors, officers, employees, or agents. Thus, a corporation’s willing-
ness to cooperate is not determinative; that factor, while relevant, needs to be
considered in conjunction with all other factors.

9-28.750 Qualifying for Immunity, Amnesty, or Reduced
Sanctions Through Voluntary Disclosures

In conjunction with regulatory agencies and other executive branch
departments, the Department encourages corporations, as part of their compli-
ance programs, to conduct internal investigations and to disclose the relevant
facts to the appropriate authorities. Some agencies, such as the Securities and
Exchange Commission and the Environmental Protection Agency, as well as
the Department’s Environmental and Natural Resources Division, have formal
voluntary disclosure programs in which self-reporting, coupled with reme-
diation and additional criteria, may qualify the corporation for amnesty or
reduced sanctions. Even in the absence of a formal program, prosecutors may
consider a corporation’s timely and voluntary disclosure in evaluating the ade-
quacy of the corporation’s compliance program and its management’s commit-
ment to the compliance program. However, prosecution and economic policies
specific to the industry or statute may require prosecution notwithstanding a
corporation’s willingness to cooperate. For example, the Antitrust Division has
a policy of offering amnesty only to the first corporation to agree to cooperate.
Moreover, amnesty, immunity, or reduced sanctions may not be appropriate
where the corporation’s business is permeated with fraud or other crimes.
9-28.760 Oversight Concerning Demands for Waivers of Attorney-Client Privilege or Work Product Protection by Corporations Contrary to This Policy

The Department underscores its commitment to attorney practices that are consistent with Department policies like those set forth herein concerning cooperation credit and due respect for the attorney-client privilege and work product protection. Counsel for corporations who believe that prosecutors are violating such guidance are encouraged to raise their concerns with supervisors, including the appropriate United States Attorney or Assistant Attorney General. Like any other allegation of attorney misconduct, such allegations are subject to potential investigation through established mechanisms.

9-28.800 Corporate Compliance Programs

A. General Principle: Compliance programs are established by corporate management to prevent and detect misconduct and to ensure that corporate activities are conducted in accordance with applicable criminal and civil laws, regulations, and rules. The Department encourages such corporate self-policing, including voluntary disclosures to the government of any problems that a corporation discovers on its own. However, the existence of a compliance program is not sufficient, in and of itself, to justify not charging a corporation for criminal misconduct undertaken by its officers, directors, employees, or agents. In addition, the nature of some crimes, e.g., antitrust violations, may be such that national law enforcement policies mandate prosecutions of corporations notwithstanding the existence of a compliance program.

B. Comment: The existence of a corporate compliance program, even one that specifically prohibited the very conduct in question, does not absolve the corporation from criminal liability under the doctrine of respondeat superior. See United States v. Basic Constr. Co., 711 F.2d 570, 573 (4th Cir. 1983) (“[A] corporation may be held criminally responsible for antitrust violations committed by its employees if they were acting within the scope of their authority, or apparent authority, and for the benefit of the corporation, even if . . . such acts were against corporate policy or express instructions.”). As explained in United States v. Potter, 463 F.3d 9 (1st Cir. 2006), a corporation cannot “avoid liability by adopting abstract rules” that forbid its agents from engaging in illegal acts, because “[e]ven a specific directive to an agent or employee or honest efforts to police such rules do not automatically free the company for the wrongful acts of agents.” Id. at 25–26. See also United States v. Hilton Hotels Corp., 467 F.2d 1000, 1007 (9th Cir. 1972) (noting that a corporation “could not gain exculpation by issuing general instructions without undertaking to enforce those instructions by means commensurate with the obvious risks”); United States v. Beusch, 596 F.2d 871, 878 (9th Cir. 1979) (“[A] corporation may be liable for acts of its employees done contrary to express instructions and policies, but . . . the existence of such instructions and policies may be
considered in determining whether the employee in fact acted to benefit the corporation.

While the Department recognizes that no compliance program can ever prevent all criminal activity by a corporation's employees, the critical factors in evaluating any program are whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives. The Department has no formulaic requirements regarding corporate compliance programs. The fundamental questions any prosecutor should ask are: Is the corporation's compliance program well designed? Is the program being applied earnestly and in good faith? Does the corporation's compliance program work? In answering these questions, the prosecutor should consider the comprehensiveness of the compliance program; the extent and pervasiveness of the criminal misconduct; the number and level of the corporate employees involved; the seriousness, duration, and frequency of the misconduct; and any remedial actions taken by the corporation, including, for example, disciplinary action against past violators uncovered by the prior compliance program, and revisions to corporate compliance programs in light of lessons learned. Prosecutors should also consider the promptness of any disclosure of wrongdoing to the government. In evaluating compliance programs, prosecutors may consider whether the corporation has established corporate governance mechanisms that can effectively detect and prevent misconduct. For example, do the corporation's directors exercise independent review over proposed corporate actions rather than unquestioningly ratifying officers' recommendations; are internal audit functions conducted at a level sufficient to ensure their independence and accuracy; and have the directors established an information and reporting system in the organization reasonably designed to provide management and directors with timely and accurate information sufficient to allow them to reach an informed decision regarding the organization's compliance with the law. See, e.g., In re Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 968–70 (Del. Ch. 1996).

Prosecutors should therefore attempt to determine whether a corporation's compliance program is merely a “paper program” or whether it was designed, implemented, reviewed, and revised, as appropriate, in an effective manner. In addition, prosecutors should determine whether the corporation has provided for a staff sufficient to audit, document, analyze, and utilize the results of the corporation's compliance efforts. Prosecutors also should determine whether the corporation's employees are adequately informed about the compliance program and are convinced of the corporation's commitment to it. This will enable the prosecutor to make an informed decision as to whether the corporation has adopted and implemented a truly effective compliance program that,

7. For a detailed review of these and other factors concerning corporate compliance programs, see USSG §8B2.1.
when consistent with other federal law enforcement policies, may result in a
decision to charge only the corporation’s employees and agents or to mitigate
charges or sanctions against the corporation.

Compliance programs should be designed to detect the particular types of
misconduct most likely to occur in a particular corporation’s line of business.
Many corporations operate in complex regulatory environments outside the
normal experience of criminal prosecutors. Accordingly, prosecutors should
consult with relevant federal and state agencies with the expertise to evalu-
ate the adequacy of a program’s design and implementation. For instance,
state and federal banking, insurance, and medical boards, the Department of
Defense, the Department of Health and Human Services, the Environmental
Protection Agency, and the Securities and Exchange Commission have consid-
erable experience with compliance programs and can be helpful to a prosecu-
ator in evaluating such programs. In addition, the Fraud Section of the Criminal
Division, the Commercial Litigation Branch of the Civil Division, and the Envi-
ronmental Crimes Section of the Environment and Natural Resources Division
can assist United States Attorneys’ Offices in finding the appropriate agency
office(s) for such consultation.

9-28.900 Restitution and Remediation

A. General Principle: Although neither a corporation nor an individual target
may avoid prosecution merely by paying a sum of money, a prosecutor may
consider the corporation’s willingness to make restitution and steps already
taken to do so. A prosecutor may also consider other remedial actions, such
as improving an existing compliance program or disciplining wrongdoers, in
determining whether to charge the corporation and how to resolve corporate
criminal cases.

B. Comment: In determining whether or not to prosecute a corporation, the
government may consider whether the corporation has taken meaningful
remedial measures. A corporation’s response to misconduct says much about
its willingness to ensure that such misconduct does not recur. Thus, corpo-
rations that fully recognize the seriousness of their misconduct and accept
responsibility for it should be taking steps to implement the personnel, opera-
tional, and organizational changes necessary to establish an awareness among
employees that criminal conduct will not be tolerated.

Among the factors prosecutors should consider and weigh are whether the
corporation appropriately disciplined wrongdoers, once those employees are
identified by the corporation as culpable for the misconduct. Employee disci-
pline is a difficult task for many corporations because of the human element
involved and sometimes because of the seniority of the employees concerned.
Although corporations need to be fair to their employees, they must also be
committed, at all levels of the corporation, to the highest standards of legal
and ethical behavior. Effective internal discipline can be a powerful deterrent
against improper behavior by a corporation’s employees. Prosecutors should
be satisfied that the corporation's focus is on the integrity and credibility of its remedial and disciplinary measures rather than on the protection of the wrongdoers.

In addition to employee discipline, two other factors used in evaluating a corporation's remedial efforts are restitution and reform. As with natural persons, the decision whether or not to prosecute should not depend upon the target's ability to pay restitution. A corporation's efforts to pay restitution even in advance of any court order is, however, evidence of its acceptance of responsibility and, consistent with the practices and policies of the appropriate Division of the Department entrusted with enforcing specific criminal laws, may be considered in determining whether to bring criminal charges. Similarly, although the inadequacy of a corporate compliance program is a factor to consider when deciding whether to charge a corporation, that corporation's quick recognition of the flaws in the program and its efforts to improve the program are also factors to consider as to appropriate disposition of a case.

9-28.1000 Collateral Consequences

A. General Principle: Prosecutors may consider the collateral consequences of a corporate criminal conviction or indictment in determining whether to charge the corporation with a criminal offense and how to resolve corporate criminal cases.

B. Comment: One of the factors in determining whether to charge a natural person or a corporation is whether the likely punishment is appropriate given the nature and seriousness of the crime. In the corporate context, prosecutors may take into account the possibly substantial consequences to a corporation's employees, investors, pensioners, and customers, many of whom may, depending on the size and nature of the corporation and their role in its operations, have played no role in the criminal conduct, have been unaware of it, or have been unable to prevent it. Prosecutors should also be aware of non-penal sanctions that may accompany a criminal charge, such as potential suspension or debarment from eligibility for government contracts or federally funded programs such as health care programs. Determining whether or not such non-penal sanctions are appropriate or required in a particular case is the responsibility of the relevant agency, and is a decision that will be made based on the applicable statutes, regulations, and policies.

Virtually every conviction of a corporation, like virtually every conviction of an individual, will have an impact on innocent third parties, and the mere existence of such an effect is not sufficient to preclude prosecution of the corporation. Therefore, in evaluating the relevance of collateral consequences, various factors already discussed, such as the pervasiveness of the criminal conduct and the adequacy of the corporation's compliance programs, should be considered in determining the weight to be given to this factor. For instance, the balance may tip in favor of prosecuting corporations in situations where the scope of the misconduct in a case is widespread and sustained within a corporate division.
(or spread throughout pockets of the corporate organization). In such cases, the possible unfairness of visiting punishment for the corporation's crimes upon shareholders may be of much less concern where those shareholders have substantially profited, even unknowingly, from widespread or pervasive criminal activity. Similarly, where the top layers of the corporation's management or the shareholders of a closely-held corporation were engaged in or aware of the wrongdoing, and the conduct at issue was accepted as a way of doing business for an extended period, debarment may be deemed not collateral, but a direct and entirely appropriate consequence of the corporation's wrongdoing.

On the other hand, where the collateral consequences of a corporate conviction for innocent third parties would be significant, it may be appropriate to consider a non-prosecution or deferred prosecution agreement with conditions designed, among other things, to promote compliance with applicable law and to prevent recidivism. Such agreements are a third option, besides a criminal indictment, on the one hand, and a declination, on the other. Declining prosecution may allow a corporate criminal to escape without consequences. Obtaining a conviction may produce a result that seriously harms innocent third parties who played no role in the criminal conduct. Under appropriate circumstances, a deferred prosecution or non-prosecution agreement can help restore the integrity of a company's operations and preserve the financial viability of a corporation that has engaged in criminal conduct, while preserving the government's ability to prosecute a recalcitrant corporation that materially breaches the agreement. Such agreements achieve other important objectives as well, like prompt restitution for victims. Ultimately, the appropriateness of a criminal charge against a corporation, or some lesser alternative, must be evaluated in a pragmatic and reasoned way that produces a fair outcome, taking into consideration, among other things, the Department's need to promote and ensure respect for the law.

9-28.1100 Other Civil or Regulatory Alternatives

A. General Principle: Non-criminal alternatives to prosecution often exist and prosecutors may consider whether such sanctions would adequately deter, punish, and rehabilitate a corporation that has engaged in wrongful conduct. In evaluating the adequacy of non-criminal alternatives to prosecution—e.g., civil or regulatory enforcement actions—the prosecutor may consider all relevant factors, including:

1. the sanctions available under the alternative means of disposition;
2. the likelihood that an effective sanction will be imposed; and
3. the effect of non-criminal disposition on federal law enforcement interests.

8. Prosecutors should note that in the case of national or multi-national corporations, multi-district or global agreements may be necessary. Such agreements may only be entered into with the approval of each affected district or the appropriate Department official. See id. § 9-27.641.
B. Comment: The primary goals of criminal law are deterrence, punishment, and rehabilitation. Non-criminal sanctions may not be an appropriate response to a serious violation, a pattern of wrongdoing, or prior non-criminal sanctions without proper remediation. In other cases, however, these goals may be satisfied through civil or regulatory actions. In determining whether a federal criminal resolution is appropriate, the prosecutor should consider the same factors (modified appropriately for the regulatory context) considered when determining whether to leave prosecution of a natural person to another jurisdiction or to seek non-criminal alternatives to prosecution. These factors include: the strength of the regulatory authority’s interest; the regulatory authority’s ability and willingness to take effective enforcement action; the probable sanction if the regulatory authority’s enforcement action is upheld; and the effect of a non-criminal disposition on federal law enforcement interests. See USAM §§ 9-27.240, 9-27.250.

9-28.1200 Selecting Charges

A. General Principle: Once a prosecutor has decided to charge a corporation, the prosecutor at least presumptively should charge, or should recommend that the grand jury charge, the most serious offense that is consistent with the nature of the defendant’s misconduct and that is likely to result in a sustainable conviction.

B. Comment: Once the decision to charge is made, the same rules as govern charging natural persons apply. These rules require “a faithful and honest application of the Sentencing Guidelines” and an “individualized assessment of the extent to which particular charges fit the specific circumstances of the case, are consistent with the purposes of the Federal criminal code, and maximize the impact of Federal resources on crime.” See USAM § 9-27.300. In making this determination, “it is appropriate that the attorney for the government consider, inter alia, such factors as the [advisory] sentencing guideline range yielded by the charge, whether the penalty yielded by such sentencing range . . . is proportional to the seriousness of the defendant’s conduct, and whether the charge achieves such purposes of the criminal law as punishment, protection of the public, specific and general deterrence, and rehabilitation.” Id.

9-28.1300 Plea Agreements with Corporations

A. General Principle: In negotiating plea agreements with corporations, as with individuals, prosecutors should generally seek a plea to the most serious, readily provable offense charged. In addition, the terms of the plea agreement should contain appropriate provisions to ensure punishment, deterrence, rehabilitation, and compliance with the plea agreement in the corporate context. Although special circumstances may mandate a different conclusion, prosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.
B. Comment: Prosecutors may enter into plea agreements with corporations for the same reasons and under the same constraints as apply to plea agreements with natural persons. See USAM §§ 9-27.400–530. This means, inter alia, that the corporation should generally be required to plead guilty to the most serious, readily provable offense charged. In addition, any negotiated departures or recommended variances from the advisory Sentencing Guidelines must be justifiable under the Guidelines or 18 U.S.C. § 3553 and must be disclosed to the sentencing court. A corporation should be made to realize that pleading guilty to criminal charges constitutes an admission of guilt and not merely a resolution of an inconvenient distraction from its business. As with natural persons, pleas should be structured so that the corporation may not later “proclaim lack of culpability or even complete innocence.” See USAM §§ 9-27.420(b)(4), 9-27.440, 9-27.500. Thus, for instance, there should be placed upon the record a sufficient factual basis for the plea to prevent later corporate assertions of innocence.

A corporate plea agreement should also contain provisions that recognize the nature of the corporate “person” and that ensure that the principles of punishment, deterrence, and rehabilitation are met. In the corporate context, punishment and deterrence are generally accomplished by substantial fines, mandatory restitution, and institution of appropriate compliance measures, including, if necessary, continued judicial oversight or the use of special masters or corporate monitors. See USSG §§ 8B1.1, 8C2.1, et seq. In addition, where the corporation is a government contractor, permanent or temporary debarment may be appropriate. Where the corporation was engaged in fraud against the government (e.g., contracting fraud), a prosecutor may not negotiate away an agency’s right to debar or delist the corporate defendant.

In negotiating a plea agreement, prosecutors should also consider the deterrent value of prosecutions of individuals within the corporation. Therefore, one factor that a prosecutor may consider in determining whether to enter into a plea agreement is whether the corporation is seeking immunity for its employees and officers or whether the corporation is willing to cooperate in the investigation of culpable individuals as outlined herein. Prosecutors should rarely negotiate away individual criminal liability in a corporate plea.

Rehabilitation, of course, requires that the corporation undertake to be law-abiding in the future. It is, therefore, appropriate to require the corporation, as a condition of probation, to implement a compliance program or to reform an existing one. As discussed above, prosecutors may consult with the appropriate state and federal agencies and components of the Justice Department to ensure that a proposed compliance program is adequate and meets industry standards and best practices. See supra section VIII.

In plea agreements in which the corporation agrees to cooperate, the prosecutor should ensure that the cooperation is entirely truthful. To do so, the prosecutor may request that the corporation make appropriate disclosures of relevant factual information and documents, make employees and agents available for debriefing, file appropriate certified financial statements, agree to governmental or third-party audits, and take whatever other steps are
necessary to ensure that the full scope of the corporate wrongdoing is disclosed and that the responsible personnel are identified and, if appropriate, prosecuted. *See generally supra section VII.* In taking such steps, Department prosecutors should recognize that attorney-client communications are often essential to a corporation’s efforts to comply with complex regulatory and legal regimes, and that, as discussed at length above, cooperation is not measured by the waiver of attorney-client privilege and work product protection, but rather is measured by the disclosure of facts and other considerations identified herein such as making witnesses available for interviews and assisting in the interpretation of complex documents or business records.

These Principles provide only internal Department of Justice guidance. They are not intended to, do not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal. Nor are any limitations hereby placed on otherwise lawful litigative prerogatives of the Department of Justice.