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Featured Article

New DOJ Cooperation Principles: Substituting the Culture of Avoidance for the Culture of Waiver

Contributed by:
Thomas O. Gorman, Porter Wright

Introduction

The Department of Justice (DOJ or Department) revised its charging and cooperation principles for business organizations by adding a new chapter to the U.S. Attorney's Manual on August 28, 2008.[1] These revisions, by Deputy Attorney General Mark R. Filip, are the latest effort by the Department to respond to critics who claim that its policies on cooperation have created a "culture of waiver" that strips business organizations of key rights, such as the attorney-client privilege and the work product doctrine.[2] The Department's prior attempt to quell its critics came in a November 2006 DOJ memorandum familiarly known as the McNulty memo, which placed procedural and substantive limitations on the circumstances under which prosecutors could request waivers of privilege from business organizations.[3] Many claim those restrictions were ineffective, if not ignored.[4]

Ironically, Mr. Filip's revisions were issued on the same day that the Second Circuit Court of Appeals affirmed *United States v. Stein*[5] and at a time when Congress is threatening to legislate limits on prosecutorial request for waivers.[6] In *Stein*, the district court dismissed indictments against 13 former KPMG partners based on violations of the individuals' Sixth Amendment right to counsel under the DOJ's Thompson memo, the predecessor to the McNulty memo and Filip revisions.[7]

The new revisions respond to the Department's critics by precluding prosecutors from asking for what it calls "core" attorney-client communications. This would cover conversations such as those by a director and his or her counsel not related to an internal investigation.[8]

The revisions are keyed to the notion of choice. Corporations can choose whether they want to cooperate. If they decline to cooperate, that, in and of itself, will not justify being charged. At the same time, cooperation credit can mitigate any potential charges. The key to earning that credit, according to the revisions, is the production of all the facts, regardless of whether they are privileged or not. Waiver by itself will not yield cooperation credit—only the production of all the facts.

To facilitate production of all the facts, the Filip revisions revert to the concept of choice: the company may choose to have significant portions of its internal investigation—typically the source for the company of most facts about an incident—done by non-lawyers. This eliminates the waiver question by avoiding the creation of privilege—the culture of waiver becomes the culture of avoidance. Unfortunately, this idea ignores the purpose of the attorney-client privilege and work product doctrine and the difficult problems any organization conducting a self-evaluative internal investigation in full public view would experience. Thus, while the revisions are a step in the right direction, it is doubtful that they will end the culture of waiver and its assault on the attorney-client privilege and the rights of corporate employees.

Filip Revisions: A Response to Each Key Point of Criticism

The Filip revisions substantially alter the Department's approach to cooperation and privilege waivers while preserving many of its basic organizational charging principles. This new approach responds directly to each of the "culture of waiver" critics while trying to redefine the debate from one that focuses on the conduct of the prosecutor under the McNulty memo, to the choices made by the company.

The new approach, consistent with past approaches, encourages self-reporting and cooperation,[9] but poses this as a choice for the organization, not a requirement. Cooperation may yield cooperation credit that can be beneficial in the charging process. Conversely, a failure to cooperate in and of itself is not a basis for being charged.[10] The revisions caution, however, that in view of the complexity of many business transactions and the difficulty of assessing precisely what occurred and who is responsible, it may well be in the interest of the organization to cooperate.[11] Stated differently, if the organization chooses not to cooperate that alone will not justify charging it. That choice, however, could result in a charging decision being made on incomplete facts or inappropriately enhance the prospect of being charged. Accordingly, the choice not to cooperate may not be beneficial to the company. This "organizational choice" approach threads through the revisions.

In the first of five key points clearly designed to assuage DOJ critics, the revisions define cooperation in terms of providing facts to the Department. Cooperation credit is a function of furnishing the DOJ all the facts, regardless of their source.[12] When read in conjunction with the discussion about the difficulty of ascertaining what happened and who is responsible in a corporate setting, it is clear that a full report of the facts includes identifying who is responsible for the actions. This point is consistent with earlier Department policy.[13] The corollary to this principle, however, reflects the new approach: the revisions state that privilege waivers in and of themselves will not result in cooperation credit. This contrasts with earlier policy which noted that waivers might be necessary.[14] Now, cooperation credit is a function of the organization's choice to either furnish all the facts or not. Waiver is no longer the issue under the revisions.

Second, the Filip revisions prohibit prosecutors from requesting "core" attorney-client privilege communications.[15] The example given in the revisions is of a corporate official seeking legal counsel outside of the fact gathering process of an internal investigation.[16] The new approach contrasts with that of the McNulty memo, which placed procedural and substantive limitations on the circumstances under which prosecutors could request waivers of attorney work-product (what the memo called Category I material) or attorney-client communications (essentially Category II material). By abolishing the McNulty categories and prohibiting requests by prosecutors for certain attorney-client communications, the new policy adopts, in part, the approach used in the pending Attorney-Client Privilege Protection Act, which essentially bans requests by prosecutors for privileged material.

Third, the revisions state that in "evaluating cooperativeness," prosecutors cannot consider whether a corporation has advanced attorneys' fees to its employees, officers or directors.[17] This point responds directly to *Stein* where the district court concluded that under the Thompson memo, prosecutors violated the defendants' Sixth Amendment right to counsel.[18]

Fourth, prosecutors are prohibited from considering the fact that a business organization has entered into a joint defense agreement with some or all of its current or former employees in evaluating the cooperation of the entity.[19] Using cooperation or joint defense agreements, an organization can share documents and information about an investigation with its employees under the protection of privilege. Many organizations are reluctant to enter into these agreements, or restrict their scope, out of fear that it may undermine their claims of cooperation, particularly if a number of employees decline to cooperate with the government. Yet without these agreements, employees would typically not have access to key materials from an organization's files, which are often necessary to prepare for an interview with internal investigators or prosecutors or which may be necessary to prepare a defense.[20]

Finally, the revisions indicate that prosecutors will not consider whether a business organization has disciplined or terminated employees in assessing corporate cooperation.[21] Like the other key points in the new policy, this prohibition speaks directly to Department critics who have repeatedly complained that prosecutors are interfering unnecessarily in personnel decisions by essentially demanding that anyone the government thought might be involved be fired.

Analysis: No Real Change

Mr. Filip's revisions take a good first step by addressing each of the key points raised by critics of the Department—and for that matter, those of the Securities and Exchange Commission

(SEC), which is a co-equal creator of the "culture of waiver."[22] At the same time, however, careful consideration of the revisions demonstrates that in fact they do little to end the culture of waiver.

The ban on requests for core attorney-client communications is a good beginning. Banning prosecutors from asking for waivers of this material aids in protecting the privilege and ensuring that business organizations and its employees seek and obtain legal advice that may be critical to resolving the situation without fear that their discussions will become subject to public scrutiny.

The protection offered by the directive is limited, however. Under the revisions, the only protected attorney-client communications are those where legal advice is sought *and* which are "[s]eparate from (and usually preceding) the fact-gathering process in an internal investigation . . . ."[23] As the McNulty memo made clear, it should be a rare circumstance in which prosecutors would have a need for this type of material.[24]

The key issue has never been the "core" communications but, rather, waiver as it relates to the internal investigation a business organization typically conducts following the discovery of possible malfeasance. The McNulty, Thompson, and Holder memos all suggested that cooperation may require a waiver of the privileges that protect an internal corporate investigation.[25] In practice, many believed waiver was mandatory.[26]

Corporate internal investigations are an important part of a critical corporate process of seeking legal advice and assuring future compliance with the law.[27] As the Filip revisions acknowledge, the company as an artificial construct does not have personal knowledge. To analyze possible malfeasance and evaluate what needs to be done, the first step is for the company to conduct an internal inquiry. During this inquiry, it is critical that investigators and witnesses feel free to fully explore all pertinent issues, theories and facts. It is also essential that investigators carefully document the course of the inquiry and make notes of key points that can later be used as the situation is analyzed. Privilege facilitates this process. As the Supreme Court made clear in its seminal decision in *Upjohn v. United States*, the purpose of the attorney-client privilege 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."[28] Applying the protections of the privilege to the internal inquiry thus helps ensure a full and complete investigation and future compliance with the law.[29]

A key focus of the waiver question has been witness interviews conducted by internal investigators. Those witness interviews are often critical to the inquiry and the ability of a company to assess a situation. In many instances, an employee may want to cooperate with the organization but not the government. Conducting the inquiry in a privileged setting gives a company the opportunity to obtain information from the employee and complete its inquiry.[30] As the *Upjohn* court made clear: "While it would probably be more convenient for the Government to secure the results of petitioner's internal investigation by simply subpoenaing the questionnaires and notes taken by petitioner's attorneys, such considerations of convenience do not overcome the policies served by the attorney-client privilege."[31]

The Filip revisions alter the Department's approach to the question of internal investigations by redefining the issue while leaving business organizations with the same dilemma. Rather than phrasing the question of producing information and materials from the inquiry as one of possible waiver, as in the past, the Filip revisions recast the issue as one of choice for the company:

> A corporation is an artificial construct that cannot, by definition, have personal knowledge of the facts . . . 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.[32]

Accordingly, the company can choose to either use lawyers or not use lawyers. What was an issue of waiver by the company is now a question of choice—waiver is eliminated by redefining the question.

Redefining the issue as one of choice rather than waiver fails, however, to recognize the fundamental issues at stake. Protests regarding waiver and stripping corporations of fundamental rights are not about abstract theoretical rights but the ability of the company to assess what happened, take the necessary steps to correct the situation and ensure future compliance with the law. Stated differently, eliminating the culture of waiver is about ensuring that corporations can implement the key law enforcement goals of rooting out and correcting any malfeasance and ensuring that the organization will be a good corporate citizen in the future. The "culture of waiver" has undercut the ability of business organizations to meet this goal.

In the end, redefining the issue from one of waiver to choice leaves the company with the same dilemma it has always had under DOJ cooperation principles—produce the results of the internal investigation or fail to obtain cooperation credit. Since many would argue that the company has no choice except to try and obtain cooperation credit,[33] under the new

policy the company still has no choice but to strip itself of key rights whether through waiver or simply forgoing the use of lawyers. Unfortunately, what is sacrificed are the rights of the organization and its employees and ultimately its ability to meet key law enforcement goals.[34]

The other points in the new policy suffer from similar flaws. At first glance, the passages that proscribe prosecutors from considering the payment of legal fees, entering into joint defense or cooperation agreements and personnel actions all seem to fully answer the critics. Each statement, however, has the same limitation: the point cannot be considered in assessing "cooperation." Each can be considered in other ways. Thus, while the payment of attorneys' fees cannot be considered in evaluating cooperation, prosecutors can inquire about indemnification agreements and payments. In *Stein*, prosecutors testified that the only thing they did was ask about the advancement of legal fees, not direct their curtailment.[35] That question, sanctioned by the Filip revisions, is as *Stein* demonstrates, frequently more than enough to cause any business organization to limit or terminate the payments, as KPMG did in a desperate attempt to compile enough cooperation credits to avoid being charged.

Similarly, while prosecutors may not consider joint defense agreements in evaluating cooperation, the revisions note that the company should be aware that these undertakings can preclude the production of certain facts. If the company cannot produce all the facts, it would not earn cooperation credit.[36] Given the prospect of this result, many companies in the crucible of a government charging decision will clearly avoid this potential difficulty—they will avoid entering into these agreements thereby depriving their employees of often critical information for their personal testimony and defense.

Finally, the limitations on considering corporate personnel actions are equally ineffective. While those actions may not be considered in evaluating cooperation, they can be fully assessed in determining whether the organization has remedied the situation and taken sufficient steps to ensure compliance with the law in the future.[37] Indeed, the DOJ has repeatedly stressed the importance of full remediation and assurances of future compliance. Yet following the non-lawyer suggestions of the Filip revisions will undercut the ability of the organization to comply with these goals. That, of course, would undercut the ability of the organization to obtain cooperation credit, the very point of the actions. Thus, like the other points in the new policy, it is a good first step, but it does not resolve the situation.

In sum, while the Filip revisions take a good first step, they do little to eliminate the culture of waiver the Department has created through its cooperation policies. Business organizations are still left with the same choices, whether it is called waiver or avoidance, and Department policies continue to undermine their ability to be good corporate citizens. Under the Filip revisions, the choice offered business organizations is the same as before: No choice at all.

Thomas O. Gorman is a Partner resident in the Washington, D.C. office of Porter Wright; Chair, Porter Wright SEC and Securities Litigation Group; Co-chair, ABA Criminal Justice, White Collar Securities Subcommittee; and former senior counsel, Division of Enforcement and Special Trial Counsel, Office of the General Counsel, Securities and Exchange Commission. For current information on securities litigation, please visit Mr. Gorman's blog at http://www.secactions.com/.

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[1] Previously, cooperation principles were included as part of a memorandum by then Deputy Attorney General Paul J. McNulty. *See infra* note 3. The new revisions are a chapter in the U.S. Attorneys' Manual. *See Principles of Federal Prosecution of Business Organizations*, U.S. Department of Justice, Executive Office for U.S. Attorneys, U.S. Attorneys' Manual, Title 9, Chapter 28 (Aug. 28, 2008) [hereinafter Filip revisions].

[2] A diverse group of organizations and individuals have protested the Department's policies regarding cooperation by business organizations. Those policies have fostered what has come to be called the "culture of waiver," according to critics, because a waiver of the attorney-client privilege and work product protections is believed to be required to earn cooperation credit to try and avoid or mitigate liability. A survey by a group of business and bar organizations concluded that most practitioners believe that waiver of privilege is necessary to cooperate. *See The Decline Of the Attorney-Client Privilege in the Corporate Context—Survey Results* (2006). The groups include the American Bar Association, American Chemistry Council, Association of Corporate Counsel, Business Civil Liberties, Inc., Business Roundtable, The Financial Services Roundtable, Frontiers of Freedom, National Association of Criminal Defense Lawyers, National Association of Manufacturers, National Defense Industrial Association, Retail Industry Leaders Association, U.S. Chamber of Commerce, and Washington Legal Foundation. Congress has held hearings on this question, during which many former justice department officials and former attorneys general testified about the ill effects of DOJ cooperation policies. *See The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations; Hearing Before the Senate Committee on the Judiciary*, 109th Cong. (2006); *White Collar Enforcement: Attorney-Client Privilege and Corporate Waivers; Hearing Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary*, 109th Cong. (2006).

[3] *See* Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Dec. 12, 2006) [hereinafter McNulty memo]. In 1999, the Department issued the first of a series of memoranda discussing organizational charging principles. *See* Memorandum from Eric Holder, Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999) [hereinafter Holder memo]; Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components, United States Attorneys (Jan. 20, 2003) [hereinafter Thompson memo].

[4] *See* Letter, E. Norman Veasey, former Chief Justice, Delaware Supreme Court, to the Honorable Patrick Leahy and the Honorable Arlen Specter, Judiciary Committee Hearings on S. 186 (Sept. 13, 2007).

[5] No. 07-3042, 2008 BL 196269 (2d Cir. Aug. 28, 2008).

[6] *See* Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007). This bill passed the House of Representatives and is currently being considered by the Senate. On July 9, 2008, Attorney

General Michael Mukasey testified before the Senate Judiciary Committee, noting that the McNulty memo was being revised. *See Oversight of the U.S. Department of Justice; Hearing Before the Senate Committee on the Judiciary*, 110th Cong. (2008) (testimony of Michael Mukasey). A letter from Deputy Attorney General Filip to Senator Specter dated the same day outlined the proposed revisions [hereinafter Filip Letter]. The revisions were intended to forestall congressional action on the bill. The draft legislation would essentially prohibit prosecutors from requesting waivers of privilege.

[7] *See Stein*, 2008 BL 196269, at 5.

[8] *See* Filip revisions, *supra* note 1, at 9-§28.720 n.3.

[9] *See* Filip revisions, *supra* note 1, at § 9-28.750 (stating that "the Department encourages corporations, as part of their compliance programs, to conduct internal investigations and to disclose the relevant facts to the appropriate authorities"); Thompson memo, *supra* note 3, at 2 ("In conducting an investigation . . . prosecutors should consider . . . the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including . . . the waiver of corporate attorney-client and work product protection."); *see also* Holder memo, *supra* note 3, at § VI (same); McNulty memo, *supra* note 3, at 6 (same).

[10] *See* Filip revisions, *supra* note 1, at § 9-28.700.

[11] *See id.* (Factors including "the difficulty of determining what happened, where the evidence is, and which individuals took or promoted putatively illegal corporate actions" may create a situation where "cooperation can be a favorable course for both the government and the corporation.").

[12] *See id.* at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts.").

[13] *See* McNulty memo, *supra* note 3, at 7; Thompson memo, *supra* note 3, at 4.

[14] *See* McNulty memo, *supra* note 3, at 8-10; Thompson memo, *supra* note 3, at 5.

[15] *See* Filip Revisions, *supra* note 1, at § 9-28.710 ("Attorney-Client and Work Product Protections.").

[16] *See id.* at § 9-28.720(b) ("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.").

[17] This provision essentially mirrors a provision in the McNulty memo. *Compare id.* at § 9-28.730 *with* McNulty memo, *supra* note 3, at 11. While both the Filip revisions and the McNulty memo suggest that there may be circumstances under which the DOJ needs to make these inquiries, it is difficult to understand the reason the government needs to know if the organization is honoring what is usually a state law obligation frequently covered by an insurance contract. The suggestion in the Filip revisions that the information may be necessary to evaluate conflicts is less than convincing and would clearly not justify routine questions on the point. *See* Filip revisions, *supra* note 1, at § 9-28.730, n. 6. In any event, the payment of legal fees is an issue for the employee, company and carrier, not the government. *But see, United States v. Bennett*, No. 05-1192 (S.D.N.Y. June 12, 2008) (in its sentencing memorandum, the DOJ argued that defendant Phillip Bennett, who pled guilty to charges based on the collapse of Refco, should not be given cooperation credit for working with plaintiffs in class actions based on the Refco debacle because his legal fees were being paid under an indemnification agreement with the company).

[18] *See United States v. Stein*, 435 F. Supp. 2d 330, 369 (S.D.N.Y. 2006), *reaff'd.*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007) (holding that "the fact that advancement of legal fees occasionally might be part of an obstruction scheme or indicate a lack of full cooperation by a prospective defendant is insufficient to justify the government's interference with the right of individual criminal defendants to obtain resources lawfully available to them in order to defend themselves, regardless of the legal standard of scrutiny applied.").

[19] *See* Filip revisions, *supra* note 1, at § 9-28.730 ("[T]he 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.").

[20] *See Stein*, 435 F. Supp. 2d at 337 ("'Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents . . . 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.'") (quoting Holder memo, *supra* note 3, at § VI, ¶ 4); *Cf. United States v. Weissman* (S.D.N.Y. Apr. 26, 1995) (granting defendant's motion to compel two law firms to produce documents for his defense of the government's charges of obstruction and perjury, where defendant argued that he had made statements to the law firms while they were acting as outside counsel for a corporation in a joint defense effort; the court held that defendant's demonstrated need to determine whether statements revealed facts concerning the existence of any joint defense agreement overruled the law firms' assertion of privilege).

[21] *See* Filip revisions, *supra* note 1, at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts."); Remarks Prepared for Delivery by Deputy Attorney General Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008); Filip Letter, *supra* note 6, at 3. On this issue, the McNulty memo contained a specific directive, absent from the Filip revisions, that in assessing the extent and value of a corporation's cooperation, "[a]nother factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents . . . [for example,] through retaining the employees without sanction for their misconduct . . . ." *See* McNulty memo, *supra* note 3, at 11.

[22] The SEC's organizational charging and cooperation principles are contained in a Report of Investigation and Commission Statement, commonly known as the Seaboard Report, issued in 2001. *See* Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release No. 34-44969 (Oct. 23, 2001). While the Seaboard Report also stresses self-reporting, the production of all facts, and suggests that a waiver of privilege may be required in some instances, in practice, waiver is routine for corporations trying to maximize cooperation credit. *See* Speech by SEC Staff: Remarks Before the Mutual Fund Directors Forum 7th Annual Policy Conference (Apr. 12, 2007) (Linda Chatman Thomsen, Director, SEC Division of Enforcement, citing two examples where cooperation credit was given—the company that waived privilege was not prosecuted; the company that did not waive privilege got cooperation credit but was prosecuted).

[23] Filip revisions, *supra* note 1, at § 9-28.720(b).
[24] *See* McNulty memo, *supra* note 3, at 10.
[25] *See* Thompson memo, *supra* note 3, at 9 ("This [attorney-client] 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."); *see also* Holder memo, *supra* note 3 ("The Department does not, however, consider waiver of a corporation's privileges an absolute requirement, and prosecutors should consider the willingness of a corporation to waive the privileges when necessary to provide timely and complete information as only one factor in evaluating the corporation's cooperation."); McNulty memo, *supra* note 3, at 12 ("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 be critical in enabling the government to evaluate the accuracy and completeness of the company's voluntary disclosure.").
[26] Since business organizations cannot assert the Fifth Amendment, the privileges are their only effective protection from disclosure. *See* Julie R. O'Sullivan, *The Last Straw: The Department of Justice Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigation of Corporations*, 57 DePaul L. Rev. 29, 340 (2008).
[27] *See Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, American College of Trial Lawyers, at 5 (Feb. 2008) ("Internal investigations, conducted by and at the direction of legal counsel, are a critical tool by which companies and their boards learn about violations of law, breaches of duty and other misconduct that may expose the company to liability and damages.").
[28] 449 U.S. 383, 389 (1981).
[29] *Supra* note 27, at 14.
[30] In *Stein*, prosecutors pressured witnesses, through KPMG, to waive their Fifth Amendment rights. This led to the ruling that the Thompson memo was in part unconstitutional. 495 F. Supp. 2d at 390. Under current practice, the company as the holder of the privilege can waive privilege after the conclusion of the investigation. Witnesses in an investigation should be advised of this fact. This possibility can of course result in some witnesses deciding not to cooperate. The situation becomes even more difficult if a company decides to waive privilege at the outset. Under those circumstances, it may have difficulty fully assessing the situation. This is part of the difficulty created by the culture of waiver. Decisions such as *United States v. Stringer*, 521 F.3d 1189 (9th Cir. 2008), which permit agencies such as the SEC to essentially "front" for criminal investigators, aggravate this situation as does the trend toward deputization. *See* N. Richard Jannis, *Taking the Stand: Deputizing Corporate Counsel As Agents of the Federal Government*, Washington Lawyer n.19 (March 2005) (discussing criminally charging witnesses for obstruction of justice for not telling the truth to internal investigators where the witness knew the information would be transmitted to the government). This is particularly true when the organization limits its cooperation with its employees.
[31] 449 U.S. at 396.
[32] Filip revisions, *supra* note 1, at §9-28.720(a).
[33] *See* Thomas O. Gorman and Heather Stewart, *Is There a New Sheriff in Corporateville? The Obligations of Directors, Officer, Accountants, and Lawyers after Sarbanes-Oxley 2002*, 45 Admin. L. Rev. 135 (2004); Frank C. Razzano, *To Cooperate With the Securities Exchange Commission or Not to Cooperate – That's the Question – Part II*, 31 Sec. Reg. L.J. 410 (2003).
[34] *See United States v. Zolin*, 491 U.S. 554 (1989), *Upjohn*, 449 U.S. at 383; *Commodity Futures Trading Com. v. Weintraub*, 471 U.S. 343 (1985); *Hickman v. Taylor*, 329 U.S. 495 (1947).
[35] *See Stein*, 435 F. Supp. 2d at 342–43.
[36] *See* Filip revisions, *supra* note 1, at § 9-28.720 ("Cooperation: Disclosing the Relevant Facts.").
[37] *See id.* at § 9-28.900 ("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, corporations that fully recognize the seriousness of their misconduct and accept responsibility for it should be taking steps to implement the personnel . . . changes necessary to establish an awareness among employees that criminal conduct will not be tolerated."); Thompson memo, *supra* note 3, at 7 ("In determining whether or not a corporation should be prosecuted, a prosecutor may consider whether meaningful remedial measures have been taken, including employee discipline . . . 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."); *McNulty* memo, *supra* note 3, at 16 (same).