The Thompson Memorandum: A Revised Solution or Just a Problem?

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I. INTRODUCTION

A glance at recent newspaper headlines indicates that corporate America is in a state of upheaval. Two executives at Tyco International face criminal charges as a result of the alleged $600 million in illegal stock trades, unauthorized compensation, and personal
expenditures that occurred during their tenure with the corporation. Likewise, the former chairman of HealthSouth Corporation faces charges of accounting fraud and “could be the first . . . chief executive of a major company [to be tried] under the Sarbanes-Oxley corporate-crime law enacted [in 2002].” Add to these recent troubles the Enron, Adelphia, and WorldCom scandals of the past few years, and it is no wonder that corporations are worried about corporate privilege and avoiding criminal liability. Unfortunately, corporate attorneys are not likely to feel at ease in this regard anytime soon.

In January of 2003, Deputy Attorney General Larry D. Thompson issued a memorandum titled “Principles of Federal Prosecution of Business Organizations,” that encourages corporations to waive their attorney-client and work-product privileges in return for a reduction in criminal charges (“Thompson Memorandum” or “Memorandum”). Though the Memorandum is, in reality, a compilation of old Department of Justice (DOJ) guidelines with a face-lift, the new Deputy Attorney General has made it clear that his department will “[v]igorously enforce[] . . . the criminal laws against corporate wrongdoers.” Depending on the extent of corporate counsel’s involvement in and/or awareness of the criminal activity, he might even find that label being applied to him.

This Note examines the Thompson Memorandum and its implications for parties involved in a corporate investigation. Part II discusses the origins of the Memorandum, details the provisions contained in its text, and explains the revisions made since the Holder Memorandum’s debut in 1999. Part III looks at whether the Memorandum, in practice, establishes discretionary guidelines or creates rules that must be followed by prosecutors and corporations alike. Part IV briefly examines the attorney-client privilege and work product doctrine in light of the Thompson Memorandum’s principles. In particular, Part IV focuses on waiver of the attorney-client privilege and work product doctrine as to third parties and discusses whether the current policy should change in light of these new guidelines. Part V addresses some of the other often overlooked concerns raised by the Memorandum. These include issues such as the effect of the Memorandum on corporate employees, conflicts of interest for corporate counsel, and ethical considerations for the prosecution. Finally, Part VI focuses on the impact of the Thompson Memorandum and provides some suggestions for prosecutors and corporate attorneys that find themselves party to an investigation of a corporation’s wrongdoing.

II. THE THOMPSON MEMORANDUM AND ITS ORIGINS

This section describes two memoranda issued by the Office of the Deputy Attorney

4. See Howard W. Goldstein, The Thompson Memorandum, 229 N.Y. L.J. 5 (2003) (stating that the Memorandum “is in large measure the same as the Holder Memorandum, . . . [but] makes a number of changes that are worth examining”).
5. Thompson, supra note 3, at I.A.
The Thompson Memorandum

General of the United States Department of Justice. The first of these, released by former Deputy Attorney General Eric Holder, was titled “Federal Prosecution of Corporations” and established guidelines for federal prosecutors to utilize in their investigation of corporate criminal conduct (“Holder Memorandum” or “Memo”). The Thompson Memorandum reiterates the guidelines that were set forth in the Holder Memorandum and adds a few new provisions directed at preventing corporate fraud of the type exemplified by the Enron and WorldCom scandals.

A. The Holder Memorandum

In 1999, the recognition that an increasing amount of “criminal conduct [was] committed by or on behalf of corporations” prompted the DOJ to issue the first guidelines for prosecutors investigating corporate criminal conduct. These guidelines, known as the Holder Memorandum, further outline a set of factors for prosecutors to use when deciding “whether to charge a corporation in a particular case.” The Memo explicitly states that the “factors are . . . not outcome-determinative” and prosecutors do not have to accord them any specific “weight” in deciding whether to charge the corporation, it also expresses the DOJ’s commitment “to prosecuting both the culpable individuals and . . . the corporation on whose behalf they acted.” A discussion of the principles set forth in the Memo’s text follows.

1. General Principles of Corporate Prosecution

According to the Holder Memorandum, since “[c]orporations are ‘legal persons,’ capable of suing and being sued,” they “should not be treated [more] leniently . . . nor should they be subject to harsher treatment” than natural persons. Furthermore, because there are certain crimes that “are by their nature mo[re] likely to be committed by businesses,” the only way to stop them is to charge the entity responsible for the conduct. According to the Holder Memorandum, holding corporate entities responsible for the actions of their agents would “result[] in great benefits for law enforcement and the public . . . .”

The Holder Memorandum further indicates that the benefits of charging corporations include: 1) the government’s ability to change the behavior of the particular corporation under investigation; and 2) the greater ease in “prevent[ing], discover[ing], and punish[ing] white collar crime.” The decision to charge may also have a deterrent effect on the entire business community. For instance, if certain conduct is deemed
Inappropriate or illegal during the course of an investigation, the surrounding corporate community is more likely to take immediate action to modify and correct that practice rather than continue with the illegal conduct and risk prosecution of the company.\textsuperscript{17}

In spite of the advantages set forth above, the Holder Memorandum explicitly discounts the notion that “[p]rosecution of a corporation [should be] . . . a substitute for the prosecution of criminally culpable individuals.”\textsuperscript{18} Instead, the Memo endorses the doctrine of respondeat superior, and indicates that “a corporation may be held criminally liable for the illegal acts of its . . . agents” if the “agent’s actions . . . were within the scope of his duties and . . . were intended . . . to benefit the corporation.”\textsuperscript{19} For the purpose of liability, it is this intent of the agent, not the corporation’s profit from the agent’s actions, that is important.\textsuperscript{20} The fact that a company has a policy against the illegal actions “does not absolve [it] of legal responsibility for [its agents’] acts.”\textsuperscript{21} Thus, a corporation will only escape liability when its agents have committed “acts that could not benefit the stockholders” and were instead committed solely for personal gain.\textsuperscript{22} Based on this reasoning, the Memo urges prosecutors to consider charging the corporation in addition to the individual targets “[i]n all cases involving wrongdoing by corporate agents.”\textsuperscript{23}

2. Factors To Be Considered When Charging Corporations

According to the Holder Memorandum, generally corporations should be treated in the same manner as natural persons during the course of a criminal investigation. Therefore, prosecutors should consider all of the factors that are outlined in the United States Attorney’s Manual and are “normally considered in the sound exercise of prosecutorial judgment . . . .”\textsuperscript{24} These include: “the sufficiency of the evidence, the likelihood of success at trial,” and the “deterrent, rehabilitative,” and retributive effect of a successful prosecution.\textsuperscript{25}

However, the Memo does not treat corporate prosecution exactly the same as the

\textsuperscript{17} Holder, supra note 6, at I.B.
\textsuperscript{18} Holder, supra note 6, at I.B.
\textsuperscript{19} Id. at I.B.; see also United States v. Cincotta, 689 F.2d 238, 241-42 (1st Cir. 1982) (stating that an agent is acting within the scope of his employment when “performing acts of the kind which he is authorized to perform” and the acts are “motivated—at least in part—by an intent to benefit the corporation”).
\textsuperscript{20} See United States v. Automated Med. Lab., Inc., 770 F.2d 399, 407 (4th Cir. 1985) (holding that the Government is required to prove only that the employee intended to benefit the company not that the corporation actually benefited); see also Old Monastery Co. v. United States, 147 F.2d 905, 908 (4th Cir. 1945) (discussing the applicability of a corporate agent’s “purposes, motives, and intent” to a judgment of corporate liability).
\textsuperscript{21} Automated Med. Lab, 770 F.2d at 407.
\textsuperscript{22} Cincotta, 689 F.2d at 242 (emphasis added) (explaining that officers who take bribes in return for their illegal actions are acting outside the scope of their employment and thus “the corporation may not be held strictly accountable”).
\textsuperscript{23} Holder, supra note 6, at I.B. (emphasis added).
\textsuperscript{24} Id. at II.A.; see also U.S. ATTORNEY’S MANUAL § 9-27.220 (1997). The Manual states that “no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.” Id. Furthermore, due to the insufficiency of “judicial resources,” prosecutorial efforts should be directed toward those offenses “that are most deserving of Federal attention and are most likely to be handled effectively at the Federal level.” U.S. ATTORNEY’S MANUAL § 9-27.230 (1997).
\textsuperscript{25} Holder, supra note 6, at II.A.
prosecution of natural persons. Instead, it sets forth eight additional factors to be considered when deciding whether to file charges against a “corporate target.”\textsuperscript{26} These factors are: 1) “[t]he nature and seriousness of the offense”; 2) “[t]he pervasiveness of wrongdoing within the corporation”; 3) “[t]he corporation’s history of similar conduct”; 4) “[t]he corporation’s . . . disclosure of wrongdoing . . . and willingness to cooperate”; 5) “[t]he existence and adequacy of [a corporate] compliance program”; 6) “[t]he corporation’s remedial actions”; 7) “[c]ollateral consequences”; and 8) “[t]he adequacy of non-criminal remedies.”\textsuperscript{27} Each factor is discussed below.\textsuperscript{28}

\textit{a. The Nature and Seriousness of the Crime}

This factor is one of the “primary factors in determining whether to charge a corporation.”\textsuperscript{29} It focuses on the “risk of harm to the public from the criminal conduct” which can be measured in several different ways.\textsuperscript{30} First, as outlined in the United States Attorney’s Manual, the prosecutor can look at the “economic harm done to community interests.”\textsuperscript{31} Second, the government might assess the “physical danger to the citizens or damage to public property.”\textsuperscript{32} Finally, the prosecutor can attempt to measure the affect of the crime on the citizens’ “peace of mind.”\textsuperscript{33}

Furthermore, in weighing these considerations, a prosecutor can factor in the “public attitude . . . toward prosecution under the circumstances of the case.”\textsuperscript{34} He or she may also take steps to determine if the “the violation is technical or relatively inconsequential in nature.”\textsuperscript{35} The greater the harm and the greater the number of people affected by the harm, the more likely it is that charges should be filed against the corporation.\textsuperscript{36}

\textit{b. Pervasiveness of Wrongdoing in the Corporation}

Since a corporation is “held responsible for the acts of such persons fairly attributable to it,” this factor centers on the amount of criminal conduct within the

\textsuperscript{26} A “corporate target” is a corporation, itself, as opposed to an individual. The term does not include agents of a corporation. \textit{Id.}

\textsuperscript{27} \textit{Id.} at II.A.

\textsuperscript{28} The Memo includes a caution that these factors are “illustrative” rather than “exhaustive” and indicates that they may not all be applicable in a given situation. However, sometimes, “one factor may override all others.” \textit{Holder, supra} note 6, at II.B.

\textsuperscript{29} \textit{Id.} at II.A.

\textsuperscript{30} \textit{Id.}

\textsuperscript{31} U.S. ATTORNEY’S MANUAL, § 9-27.230 (1997). Such harm might include financial losses sustained by individuals as a result of corporate misconduct.

\textsuperscript{32} \textit{Id.}

\textsuperscript{33} \textit{Id.} For instance, the effects of corporate crime may cause citizens to feel less secure in their corporate investments, forcing them to hang onto their money instead of investing it in bonds or in the stock market.

\textsuperscript{34} \textit{Id.}

\textsuperscript{35} \textit{Id.} While these factors are important, they are not determinative. “Public and professional responsibility sometimes will require the choosing of a particularly unpopular course.” U.S. ATTORNEY’S MANUAL, § 9-27.230 (1997).

\textsuperscript{36} \textit{Id.} The Holder Memorandum notes that, in applying these factors, prosecutors are required to keep in mind the law enforcement objectives of various DOJ departments, including the Antitrust Division and Tax Division, and “comply with those policies” when they are required to do so. Holder, \textit{supra} note 6, at III.A.
corporation and the number of people involved.\textsuperscript{37} According to the Holder Memorandum, “even minor misconduct” may result in criminal charges if it involved many of the corporation’s employees, even if those employees had no authority within the corporation.\textsuperscript{38} This is due to the fact that if a large number of employees are engaging in illegal conduct, it is unlikely that corporate management is completely unaware of the actions. At the same time, management has not taken steps to address the illegality. Because “management is responsible for a corporate culture in which criminal conduct is . . . tacitly encouraged,” the corporation will be deemed responsible for actions that management knew or should have known about.\textsuperscript{39}

On the other hand, sometimes only a few employees are involved in the alleged misconduct. If this small number of employees includes members of the corporation’s upper echelon, the wrongdoing may also be deemed “pervasive.”\textsuperscript{40} Here, “the role of management” is the overwhelming consideration.\textsuperscript{41} Thus, under the United States Sentencing Guidelines, if management participates in or condones criminal conduct, fewer people are needed “for a finding of pervasiveness.”\textsuperscript{42}

c. The Corporation’s History of Similar Conduct

When deciding whether to charge a corporation, the prosecutor should review the corporation’s history of misconduct. Of particular relevance is a history of “prior criminal, civil, [or] regulatory enforcement actions against [the corporation or its agents].”\textsuperscript{43} If a corporation has been given warnings or criminal sanctions in the past, and has not yet made “adequate” steps toward correcting the problem, the balance should tip in favor of criminal prosecution.\textsuperscript{44}

d. Voluntary Disclosure and Cooperation

The fourth, and most controversial, factor set forth in the Holder Memorandum, suggests that prosecution might be avoided if a corporation “cooperate[s]” with the government’s investigation.\textsuperscript{45} To that end, the Memo indicates that “the prosecutor may consider the corporation’s willingness to identify the culprits within the corporation.”\textsuperscript{46}

For identification purposes, the corporation would be required “to make witnesses available, to disclose the . . . results of its internal investigation, and to waive the attorney-client and work product privileges.”\textsuperscript{47}

\textsuperscript{37} Id. at IV.A.
\textsuperscript{38} Id.
\textsuperscript{39} Id. at IV.B.
\textsuperscript{40} Id. at IV.A.
\textsuperscript{41} Holder, supra note 6, at IV.B.
\textsuperscript{42} U.S. SENTENCING GUIDELINES MANUAL § 8C2.5, cmt. n.4 (2003) (indicating that “pervasiveness” is a fact specific determination and will be based on “the number[] and degree of responsibility, of individuals [with] substantial authority” that “participated in, condoned, or were willfully ignorant of” the illegal actions within the corporation).
\textsuperscript{43} Holder, supra note 6, at V.A.
\textsuperscript{44} Id. at V.B. (reasoning that a corporation “is expected to learn from its mistakes”).
\textsuperscript{45} Id. at VI.A.
\textsuperscript{46} Id.
\textsuperscript{47} Id. (emphasis added).
This factor was developed in response to the difficulty that normally attends an investigation of a corporation’s misconduct. As a result of the “artificial nature” of the corporation, “[i]t will often be difficult [for prosecutors] to determine which individual took which action on behalf of the corporation.”48 Likewise, over time, individuals with knowledge of the criminal activities may be fired, retire, transfer, or resign.49 As a result, those individuals are not available to assist in the investigation and, thus, “a corporation’s cooperation may be critical in identifying the culprits and locating relevant evidence.”50 Therefore, the Holder Memorandum argues, it is in the public interest to offer reduced sanctions in return for corporate cooperation.51

According to the Holder Memorandum, there are two important considerations concerning the level of cooperation advanced by the corporation. The first consideration is the extent to which the corporation is willing to waive “attorney-client and work product protections.”52 Second, prosecutors should evaluate any “attempts to shield corporate officers and employees from liability by [its] willingness . . . to plead guilty.”53 Regarding the first factor, the Memo indicates that privilege waivers make it easier for the government to get witness statements “without having to negotiate individual cooperation or immunity.”54 They also allow the prosecutor to make a more complete evaluation of the “completeness” of the corporation’s willingness to cooperate.55 In spite of these considerations, the Holder Memorandum clearly states that “waiver of a corporation’s privileges [is not] an absolute requirement . . . [but rather is] only one factor in evaluating the corporation’s cooperation.”56 However, the Memo also authorizes prosecutors to ask for a privilege waiver in “appropriate circumstances.”57 Nonetheless, should a corporation decide to waive its evidentiary protection in an effort to cooperate, under the Holder Memorandum, the waiver “does not automatically entitle it to immunity from prosecution.”58

Regarding the second factor, prosecutors should consider whether a corporation has attempted to protect its “culpable employees and agents.”59 If a company has not terminated known wrongdoers and has instead paid for their legal defense, those actions should weigh in favor of prosecution.60 On the other hand, the Memo indicates that a corporation should not be able to offer up its employees as sacrificial lambs in order to escape liability for the corporate entity.61

48. Holder, supra note 6, at VI.B.
49. Id.
50. Id.
51. Id.; See also U.S. ATTORNEY’S MANUAL § 9-27.230 (1997) (arguing that although “a willingness to cooperate should not by itself relieve a [corporation] of criminal liability,” in some situations, “the value of [the] cooperation clearly outweighs the Federal interest in prosecuting [the corporation]”).
52. Holder, supra note 6, at VI.B.
53. Id.
54. Id.
55. Id.
56. Id.
57. Holder, supra note 6, at VI.B. These circumstances are not defined, leaving it up to the prosecutor to determine what constitutes an “appropriate circumstance[]” to require a waiver. Id.
58. Id.
59. Id.
60. Id.
61. Holder, supra note 6, at VI.B.
e. Corporate Compliance Programs

Under the Holder Memorandum, the existence of a voluntary compliance program that is designed “to prevent and to detect misconduct” is the fifth factor that prosecutors should consider when deciding whether to charge a corporation criminally. Since the DOJ encourages “voluntary disclosures” and “self-policing,” the establishment of a compliance program and subsequent reporting of any problems that the corporation discovers will weigh in the corporation’s favor. However, the existence of such a program alone will not be enough to avoid prosecution. Likewise, criminal misconduct contrary to the corporation’s compliance program “does not absolve the corporation” from responsibility for the actions of its agents. This is due to the fact that a corporation is responsible for enforcing compliance provisions and for delegating authority to its employees. If the corporation inadequately enforces its compliance programs or entrusts responsibility to irresponsible agents, then it is still at fault for the resulting misconduct.

When evaluating a corporation’s compliance program, the Memo indicates that there are no specific rules regarding the program’s contents. Instead, prosecutors may consider factors such as the prevalence, duration, and seriousness of the misconduct. They may also take account of any corrective measures taken by the corporation to address the misconduct. In addition, prosecutors should look at “whether the program is adequately designed for maximum effectiveness in preventing and detecting misconduct by employees and whether . . . management is enforcing the program.” If the implementation of a compliance program is just a facade and corporate management is instead “tacitly encouraging or pressuring employees to engage in misconduct,” the presence of the compliance program will not assist the corporation in avoiding prosecution.

f. The Corporation’s Remedial Actions

This sixth factor provides that a prosecutor may take into account a corporation’s attempt to make restitution and/or to take remedial action. Specific items to be considered

62. Id. at VII.A.
63. Id.
64. Id.
65. Id. at VII.B.; see also United States v. Automated Med. Lab, Inc., 770 F.2d 238, 401-07 (4th Cir. 1985) (noting that the fact that the employees’ “overbleeding of [blood] donors” and falsification of records took place in violation of company policy was not sufficient to allow Automated Medical Laboratories to avoid liability for the conduct).
66. Holder, supra note 6, at VII.A. A prosecutor must “determine whether a corporation’s compliance program is merely a ‘paper program’ or whether it was designed and implemented in an effective manner.” Id. at VII.B. This determination is based on several criteria including: 1) whether employees are “adequately informed” about the program; 2) whether the corporation has auditors that “document, analyze, and utilize the results of the corporation’s compliance efforts”; and 3) whether the “remedial” and “disciplinary action[s]” in place are adequate. Id. The establishment of a ‘paper program’ will weigh in favor of prosecution, while the existence and implementation of an effective compliance program will weigh against it. Id.
67. Id. at VII.B.
68. Holder, supra note 6, at VII.B.
69. Id.
70. Id.
The Thompson Memorandum include: 1) the corporation’s disciplinary policies; 2) its disclosure of information; 3) any attempts to establish or improve a compliance program; and 4) the corporation’s “efforts to pay restitution . . . in advance of any court order . . . .”\textsuperscript{71} When corporations take responsibility for their misconduct and attempt to correct the situation, the DOJ will look favorably on those actions and may refrain from charging the corporation.\textsuperscript{72} However, the Memo specifically provides that “neither a corporation nor an individual target may avoid prosecution merely by paying a sum of money.”\textsuperscript{73}

\textbf{g. Collateral Consequences}

This factor recognizes that any criminal sanction may accidentally harm “innocent third parties.”\textsuperscript{74} However, according to the Memo, this impact is not always an adequate reason to avoid prosecuting the corporation. If the misconduct is widespread or if the harm is particularly severe, the impact on these third parties may be outweighed by the greater harm to the public.\textsuperscript{75} In contrast, if the misconduct is confined to a few instances or has caused very little damage, the protection of innocent third parties may warrant a decision not to file criminal charges against the corporation.

\textbf{h. Adequacy of Non-Criminal Sanctions}

The criminal law goals of “deterrence, punishment, and rehabilitation” are emphasized with this last factor.\textsuperscript{76} Prosecutors have the discretion to proceed with non-criminal alternatives if such alternatives accomplish these goals. However, if the nature of the corporate misconduct is particularly severe or widespread, non-criminal sanctions may not be appropriate under the Holder Memorandum’s weighing approach.\textsuperscript{77}

\textbf{B. The Thompson Memorandum: A Few Changes}

On January 20, 2003, in response to the corporate fraud scandals referenced above, Deputy Attorney General Larry D. Thompson issued a revision of the DOJ’s guidelines on corporate prosecution.\textsuperscript{78} The majority of the text of the Thompson Memorandum “largely incorporate[s] verbatim many provisions” from the Holder Memorandum discussed above.\textsuperscript{79} However, there are a few changes. For instance, the Thompson Memorandum explicitly states that “the nature and seriousness of the offense may be such as to warrant prosecution regardless of the other factors.”\textsuperscript{80} Likewise, the

\begin{itemize}
\item \textsuperscript{71} Id. at VIII.B.
\item \textsuperscript{72} Id.
\item \textsuperscript{73} Holder, \textit{supra} note 6, at VIII.A.
\item \textsuperscript{74} Id. at IX.B. For example, “innocent” employees may lose their jobs if a corporation is found criminally liable for misconduct and is forced to close.
\item \textsuperscript{75} Id. at IX.B.
\item \textsuperscript{76} Id. at X.B.
\item \textsuperscript{77} Id.
\item \textsuperscript{79} EFREM M. GRAIL, REED SMITH CLIENT BULLETIN 03-30, FEDERAL GOVERNMENT ISSUES REVISED PRINCIPLES FOR PROSECUTING CORPORATIONS: THE WATCHWORD IS COMPLIANCE (May 2003); see also Thompson, \textit{supra} note 3.
\item \textsuperscript{80} Vinegrad, \textit{Federal Prosecution}, \textit{supra} note 78 (emphasis added) (quoting Thompson, \textit{supra} note 3, at
Memorandum closely scrutinizes corporate compliance programs.\textsuperscript{81}

Besides the distinction between corporate “paper programs” and effective compliance programs,\textsuperscript{82} the new guidelines include a paragraph on a prosecutor’s evaluation of the “corporate governance mechanisms” that are included in the compliance programs and the board of directors’ involvement in enforcing those mechanisms.\textsuperscript{83} For example, prosecutors must determine whether the corporation has taken steps to “effectively detect and prevent misconduct.”\textsuperscript{84} Some of these steps include: 1) demonstrating that “directors exercise independent review over proposed corporate actions”; 2) establishing independent and accurate internal audit functions; 3) adequately informing employees “about the compliance program”; and 4) establishing “an information and reporting system . . . [so that the board of directors can] reach an informed decision regarding the organization’s compliance with the law.”\textsuperscript{85}

A third change is incorporated into the corporation’s “disclosure” and “cooperation” factor.\textsuperscript{86} The new guidelines instruct prosecutors to assess “whether the corporation, while purporting to cooperate, has engaged in conduct that impedes the investigation.”\textsuperscript{87} The memo further lists examples of conduct that might “impede” an investigation.\textsuperscript{88}

Finally, the Thompson Memorandum added a ninth factor to those previously outlined in the Holder Memorandum. This factor is designed to address the “adequacy of the prosecution of individuals responsible for the corporation’s malfeasance.”\textsuperscript{89} Though this factor is not explained further in the text of the Memorandum, the revised guidelines indicate that “[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas,” suggesting that sacrificing the corporation to save its “individual directors, officers, employees, or shareholders” is not a strategy that is likely to prove effective.\textsuperscript{90}

\begin{itemize}
  \item \textsuperscript{81} Thompson, supra note 3, at VII (listing a series of factors for evaluating a program’s “adequacy” and “effectiveness”).
  \item \textsuperscript{82} Id. at VII. (suggesting that the provision of “staff sufficient to audit, document, analyze, and utilize” the data provided by the compliance program might be sufficient to avoid the program’s classification as a “paper program”).
  \item \textsuperscript{83} Id.
  \item \textsuperscript{84} Id.
  \item \textsuperscript{85} Id.; see also In re Caremark, 698 A.2d 959, 970 (Del. Ch. 1996), cited in Thompson, supra note 3 (stating that “relevant and timely information is an essential predicate for satisfaction of the board’s supervisory and monitoring role”).
  \item \textsuperscript{86} Thompson, supra note 3, at VI.
  \item \textsuperscript{87} Id.
  \item \textsuperscript{88} The Thompson Memorandum states:

\begin{quote}
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.
\end{quote}

\textsuperscript{Id.; see also Vinegrad, Federal Prosecution, supra note 78 (discussing the implications of this paragraph on corporate counsel).}
  \item \textsuperscript{89} Thompson, supra note 3, at VI; Vinegrad, Federal Prosecution, supra note 78 (quoting Thompson, supra note 3, at I.B.).
  \item \textsuperscript{90} Id.
III. THE THOMPSON MEMORANDUM: GUIDELINES OR RULES?

Following on the heels of several highly publicized corporate fraud scandals, the timing of the Thompson Memorandum makes it clear that the DOJ intends to take a firm hand with corporate criminal investigations. Furthermore, the fact that the Thompson Memorandum incorporated the Holder Memorandum’s “all but explicit requirement that corporations must waive the protections of the corporate attorney-client privilege and attorney work product doctrine in order to avoid a prosecution of the corporation itself,” suggests that these principles are more than just “guidelines.”91 Likewise, the Memorandum has made things worse for corporations by limiting the “corporation’s representation of its employees.” 92 While the Memorandum specifically states that waiver of the attorney-client privilege and work-product doctrine is not an “absolute requirement,”93 in practice, the government is looking for a “blanket waiver of the [protections] before the company has completed its internal probe.”94 Should they not receive that blanket waiver, the government is willing to go forward with a criminal prosecution against the corporation.

In fact, even if corporations do disclose the results of their investigation to the government, they still have to “fear that a less-than-complete disclosure will not count as ‘thorough’ cooperation and may [still] increase the chance of an indictment and the severity of any penalty.”95 Unfortunately, the Memorandum seems to license “short cut[s]” to obtaining information and allows the government to take a direct path to evidence that it previously had to obtain “through the traditional means of grand jury subpoenas and the conferral of immunity.”96 In the end, it “effectively forces companies to do the government’s job for them by investigating themselves and surrendering their findings to the authorities.”97

Though the Memorandum refrains from stating that prosecutors must consider a corporation’s cooperation as a determinative factor in deciding whether to bring criminal charges against the corporation, prosecutors do have the power to request privilege waivers “if necessary.”98 In their article, On the Brink of a Brave New World: The Death of Privilege in Criminal Investigations, David M. Zornow and Keith D. Krakaur argue that this clause is not a limitation, but rather is an invitation. They state that “it is the rare prosecutor who would find that any available evidence-gathering tool is not ‘necessary’ to further his criminal investigation.”99

92. Id.
93. Thompson, supra note 3.
94. Ben-Veniste & Rubin, supra note 91.
96. Id. at 156.
98. Thompson, supra note 3.
99. Zornow & Krakaur, supra note 95, at 155; see also Gibeaut, supra note 97, at 51 (asserting that although the Holder and Thompson Memoranda do not “expressly order[] prosecutors to seek waivers, defense lawyers say that practice has become so ingrained that there’s really no option left”).
Furthermore, though it is “officially dubbed voluntary,” a corporation’s decision to waive its attorney-client privilege and work product protection is “almost universally regarded as mandatory.”\(^{100}\) In fact, the DOJ’s Enron task force director recently stated, “[y]ou don’t have to waive the attorney-client privilege, but we want you to.”\(^{101}\) In light of these considerations, it is more appropriate for corporations to consider the provisions set forth in the Thompson Memorandum as government “rules” rather than discretionary “guidelines” and prepare for an investigation accordingly.

IV. PROTECTIONS AFFECTED BY THE THOMPSON MEMORANDUM

A. Attorney-Client Privilege

The attorney-client privilege protects confidential communications between a lawyer and his client if the communications are made for the purpose of obtaining legal advice,\(^{102}\) and if they were “intended to be confidential.”\(^{103}\) It applies to both natural persons and corporations\(^{104}\) and extends to communication between the attorney and client “even if the . . . relationship never progresses beyond an initial consultation.”\(^{105}\) Likewise, the attorney-client privilege protects the “agent or representative” of the client or the attorney.\(^{106}\) This may include paralegals, office employees, non-testifying hired experts, and messengers with access to the information passing between the client and his attorney.\(^{107}\)

The attorney-client privilege was developed to foster communication between a client and his attorney and to encourage disclosure of facts relevant to the representation of the client.\(^{108}\) Without the privilege, it is assumed that a client might hide information that is “necessary for him to receive fair and effective representation” because of a fear that such information might be disclosed to third parties.\(^{109}\) The following statement reviews the principles discussed above and provides a comprehensive summary of the elements of the attorney-client protections:

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 . . . 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 the client (b) without the presence of strangers (c) for the purpose of . . . [obtaining legal

\(^{100}\) Zornow & Krakaur, supra note 95, at 149.


services] . . . and (d) not for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.110

This privilege can be waived in two ways.111 First, it is waived when the client voluntarily discloses information to third parties that do “not fall into the privileged person category.”112 Second, the privilege is waived if an attorney discloses information to others “with the client’s consent.”113 In the corporate context, it is this type of consensual waiver of the privilege that is most impacted by the Thompson Memorandum’s rules for corporate cooperation.

B. Work-Product Doctrine

The work-product doctrine stems from the Supreme Court’s decision in Hickman v. Taylor114 and protects materials “obtained or prepared by an adversary’s counsel with an eye toward litigation.”115 In Hickman, a group of tugboat owners employed an attorney to defend them against the family members of four crew members who drowned when the owner’s tug boat sank.116 In preparation for trial, four surviving crew members were interviewed regarding the accident.117 Plaintiff’s counsel requested discovery relating to the interviews and specifically requested the content of the survivors’ statements.118

The Supreme Court held that without “adequate reasons to justify production,” an attorney is not required to provide documents containing the “[w]ork product of the lawyer.”119 This is especially true when the “materials contain the opinion of the preparing attorney.”120 Such “[o]pinion work product consists of the attorney’s ‘mental impressions, conclusions, opinions or legal theories’ . . . and is ‘virtually undiscoverable.’”121 This is to prevent lawyers from feeling as though they cannot write any of their thoughts down on paper.122

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112. Kane & Bucci, supra note 110, at 18.

113. Minkoff, supra note 111 (emphasis added).


115. Id. at 511.

116. Id. at 498.

117. Id.

118. Id. at 499.

119. Hickman, 329 U.S. at 511-12.

120. Koch, supra note 109, at 351.

121. Zornow & Krakaur, supra note 95, at 150.

122. Id. Federal Rule of Civil Procedure 26(b)(3) is the codification of the work-product doctrine as set forth in Hickman v. Taylor. The rule states:

[A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party’s representative (including the other party’s attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has
In terms of scope, the work product doctrine is very different from the attorney-client privilege. For instance, the work-product doctrine only protects “materials that are not based on confidential communications with a client” and apply to “materials prepared by nonlawyers acting on behalf of the lawyer or client.”123 Furthermore, work-product protections, unlike the attorney-client privilege, are not absolute and can “be obtained upon a showing of ‘substantial’ or ‘extraordinary’ need for the material.”124 In addition, the doctrine only applies to “materials prepared in anticipation of litigation, [while] the attorney-client privilege applies to confidential communications regarding any legal service.”125

C. Waiver of Corporate Protections

As mentioned above, the Thompson Memorandum indicates that waiver of the attorney-client privilege and the work-product doctrine will weigh against prosecution of a corporation. However, the Memorandum also indicates that even if a corporation chooses to waive its protections and disclose all relevant information to the government, it is not guaranteed immunity from prosecution.126 With this in mind, it becomes difficult for a corporation to determine whether the benefits of disclosure will outweigh the harms caused by disclosure. This dilemma is due in part to the concept of waiver and third party disclosures. As indicated previously, when a client discloses information to unprotected third parties or gives its attorney permission to do so, the client is, in most cases, deemed to have waived the privilege. In fact, courts have held that voluntary disclosure of any “part of a communication will [constitute an implied waiver and will] waive the attorney-client privilege not just for that matter, but for all related communications on the same subject matter.”127 Likewise, the work-product protection will be waived if the disclosure makes it easier for the opposing party to secure the information.128

Therefore, disclosure to the government under the Thompson Memorandum opens corporations up to a host of liability concerns. If they disclose the materials that they have collected during the course of any internal investigation, they may “invite civil lawsuits...
in which... the company’s lawyers already will have conducted the plaintiffs’ investigation for them.” 129 Likewise, if the company names individuals that might be responsible for illegal actions, the company can be sued for libel if that preliminary information turns out to be untrue. 130 Finally, if a corporation incurs these risks in the name of “cooperation,” it may provide the evidence necessary for a finding of criminal liability on its part. 131

These problems were all brought to the forefront in the recent case, United States v. Bergonzi, 132 decided by the United States District Court for the Northern District of California in August of 2003. Bergonzi involved a situation in which the auditors of McKesson Corporation (“McKesson”), a non-party, announced a finding of “auditing irregularities” prompting a host of suits against McKesson for securities fraud. 133 McKesson then hired a law firm and an accounting firm to assist in reviewing the irregularities and to assist in reviewing the irregularities and to provide legal advice concerning their import. 134 Upon completion of the investigation, McKesson entered into an agreement with the Securities and Exchange Commission (SEC) by which it would provide a copy of the investigative report to the SEC. The agreement specifically stated that McKesson was not waiving its attorney-client privilege or work product protection and the SEC agreed that it would not argue that it had done so. 135 A similar agreement was made with the United States Attorney’s Office (USAO). 136

At some point, the USAO inadvertently sent some materials regarding McKesson’s internal investigation to the defendants, Albert Bergonzi and Jay Gilbertson, in response to a discovery request. 137 When McKesson asserted that the documents were protected under the attorney-client privilege and work product doctrine, the district court held that “[b]ecause they had shared the materials with the government, they were compelled to share them equally with their opponent.” 138 Thus by disclosing the materials to a third party, McKesson’s work product and attorney-client protections were eliminated.

V. OTHER CONCERNS

A. Conflicts of Interest for Corporate Counsel

The guidelines set forth in the Thompson Memorandum also place corporate counsel in an awkward position because while he or she has been retained to represent the corporation’s interests, those interests are often in conflict with the attorney’s own

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129. Id.
130. Id.
131. Id.
133. Id.
134. Id.
135. Id.
136. Id.
interests. For example, in advising a corporation to avoid disclosing anything to the government on the theory that the disclosure will subject the corporation to additional civil liability in the form of suits brought by third parties, the lawyer can be deemed to have “engaged in conduct that impedes the investigation” which may possibly result in criminal charges for obstruction. Likewise, if the attorney agrees to represent the corporation and its employees, he or she may also face reprisal from the government. In fact, the Memorandum lists several actions that might indicate that the corporation (or corporate counsel) is “purporting to cooperate” but is in fact subverting the investigation. Because each of these actions are ultimately dependent on the government’s interpretation of their meaning, corporate attorneys risk criminal liability for themselves or the corporation with each decision they make.

B. Effect on Corporate Employees

1. Indemnification of Legal Fees for Employees

In addition to the concerns mentioned above, the Thompson Memorandum poses difficulties for employees who contracted for the company’s payment of their legal fees in the event of a lawsuit. Though it is not unethical or an obstruction of justice for a company to arrange or pay for legal representation for its employees in addition to itself, corporate attorneys who engage in this dual representation may face special scrutiny from the DOJ. Because the Memorandum discourages “joint defense” arrangements that allow the company and its employees to be represented by the same attorney, corporations that continue with these arrangements are likely to be viewed as “hindering” the prosecution’s investigation by attempting to clothe its employees with the attorney-client privilege. Once the company is forced to withdraw its support, its employees are left to fend for themselves in any ensuing legal battles that may develop.

139. Thompson, supra note 3, at VI.B.; see also Gibeaut, supra note 97, at 51 (observing that “experienced internal investigators already agree that ordering employees not to talk with the government amounts to obstruction”).

140. Thompson, supra note 3, at VI.B. These actions 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.

Id. (emphasis added).


142. Goldstein, supra note 4.

143. Barber, supra note 141; Gibeaut, supra note 97, at 51 (“Justice frowns deeply on companies that advance legal fees to employees . . . and enter into joint defense agreements that allow senior management to share investigative information with employees.”).

144. Id.
2. Increased Disclosure Obligations

On a related note, corporate counsel may be saddled with an additional obligation to warn every employee that anything that is communicated to the company attorney is not protected by the attorney-client privilege. Corporate attorneys may also have to inform employees that “the attorneys represent the company, and do not represent the [employee].”145 As a result, employees may not only refuse to cooperate with the government in any investigation but they may also be unwilling to share information with the corporation’s in-house counsel. In fact, members of the defense bar report that these disclosures have already had a “chilling effect” and, as a result, “corporate executives and employees are getting more and more reluctant to talk to their lawyers.”146 If this is true, the government will soon be unable to obtain any information about corporate crime. Likewise, the corporation itself will be unable to conduct a proper internal investigation and make changes where necessary147 and the government’s attempt to shift the burden of investigation to the corporation will be unsuccessful.148

C. Prosecutorial Misconduct?149

For corporations caught in the position of having to waive their evidentiary protections and risk civil liability to third parties or criminal sanctions from the government, the threat of prosecution seems to be an abuse of the charging power.150 However, prosecutors have traditionally been given broad discretion when it comes to charging decisions and most scholars agree that “prosecutorial discretion is necessary.”151 In addition, past judicial decisions demonstrate that courts show “extraordinary deference to the prosecutor’s decision making function” resulting in the lack of any meaningful remedy for an abusive charging decision.152

Still, one could make a “vindictive prosecution” argument based on the claim that the DOJ is charging corporations that it might not have charged had the corporation waived its evidentiary privileges. However, this argument is not automatically applicable

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147. Barber, supra note 141. Warning employees that their conversations may not be protected by the attorney-client privilege results in fewer employees who are willing to disclose wrongdoing. See Gibeaut, supra note 97, at 51 (arguing that the DOJ’s “approach could freeze over already chilly relationships by making employees claim”). As a result, corporations may actually learn less about misconduct than they would have under normal circumstances. If corporate management is not informed of wrongdoing when it occurs, there will be no opportunity for it to stop the illegal conduct or attempt to right the wrong before a criminal investigation begins. Barber, supra note 141.
148. Loomis, supra note 146.
149. BENNETT L. GERSHMAN, PROSECUTORIAL MISCONDUCT § 4:57 (2d ed. 2002) (discussing abuse of the charging function and vindictive prosecution).
150. Id.
151. Id. at § 4:3 (stating that prosecutorial discretion is necessary to provide “individualized justice” and to take into account aggravating or mitigating factors, thereby limiting the number of people subjected to the “stigma of prosecution”).
152. Id. at § 4:57.
in this context because the vindictiveness doctrine generally applies when a prosecutor
brings “increased charges after making an initial charging decision.” In those cases,
the vindictiveness standard states that “the mere appearance of vindictiveness give[s] rise
to a presumption of a vindictive motive.” The government is then required to rebut the
presumption.

Attempts to bring threats of prosecution and initial charging decisions within the
scope of the vindictiveness doctrine have been unsuccessful. In fact, according to one
treatise, most of these situations “are not vindictiveness cases at all, because the
prosecutor is not manipulating his charging power to chill a defendant’s exercise of rights
but, rather, [is] seeking to coerce behavior deemed advantageous to law enforcement.”
Therefore, as the argument goes, the DOJ is not charging a corporation because it has
exercised its Sixth Amendment right to counsel and the accompanying protections
associated with that right. Instead, the charge is based on the corporation’s interference
with the government’s investigation.

VI. RECOMMENDATION

As explained in this Note, the Thompson Memorandum’s goals of detecting,
punishing, and deterring future corporate criminal activities must be weighed against the
severe impact that they have on the legal protections afforded to corporations and their
employees. The Memorandum’s focus on one aspect of a corporation’s cooperation,
namely waiver of evidentiary privileges, serves only to impede the very goals that it
seeks to promote. By elevating the waiver of corporate protections to an “all or nothing”
status, prosecutions based on the Memorandum’s guidelines will not distinguish between
corporations who take drastic measures to delay and destroy a government investigation
and those corporations that have taken steps to investigate and assist the prosecution in its
effort, but do not want to waive their attorney-client privilege and work product
protection for reasons unrelated to the criminal investigation. Furthermore, rather than
promoting the free flow of information, the Thompson Memorandum serves to inhibit
employee honesty and corporate cooperation because employees will still be at risk for
prosecution in spite of their effort to assist the government.

The purpose and goals recited in the Thompson Memorandum would be better
served if the government would treat the principles set forth in its text as the guidelines
they are purported to be, rather than the battering ram that they are in practice. To this
end, the government should take into account the totality of a corporation’s cooperation,
not just its willingness to waive the only protections it can claim. Likewise, corporate
cooperation should not be the determinative factor in a decision to charge the corporation.
Instead, the prosecution should consider all of the factors enumerated in the
Memorandum and weigh them accordingly.

154. GERSHMAN, supra note 149, at § 4:57.
holding the alleged animus has no charging authority, there is no appearance of vindictiveness).
156. See id. at 634 (holding that although the filing of a charge may be sufficient to establish vindictive
prosecution, the defendant must demonstrate at least an appearance of vindictiveness on the part of the
prosecution).
157. GERSHMAN, supra note 149.
Furthermore, because the “main focus” of the changes in the Thompson Memorandum is “to address the efficacy of corporate governance mechanisms,” the DOJ should increase its use of deferred prosecution agreements. With these agreements, a charge is filed against a corporation. If the corporation admits to criminal wrongdoing, the prosecution is delayed for some period of time, during which, the corporation must comply with the terms set forth by the DOJ in the agreement. If the corporation does comply, the criminal charge is dismissed. Otherwise, the prosecution goes forward and the corporation’s admission of guilt can be used as evidence against it. This approach addresses the issue of corporate wrongdoing while providing a second chance for companies that truly want to remedy the misconduct.

In the meantime, corporate attorneys should review the guidelines set forth in the Thompson Memorandum and look for ways to maximize cooperation with prosecutors, while at the same time maintaining confidentiality under the attorney-client privilege and work product doctrine. Since effective corporate compliance programs and remedial steps taken by the corporation both weigh against a criminal prosecution, corporate attorneys would do well to focus their attention on these matters. To this end, in-house counsel should make sure that the corporation has an effective method for detecting wrongdoing and should advocate “[e]arly investigation” into such matters to “eliminate potentially cumulative liability.” Other steps might include advising the corporation to hire independent counsel, implement new policies, or obtain an injunction to stop the wrongful conduct.

If the DOJ continues on its current path, the judiciary will need to modify the present state of the waiver doctrine to reflect the “catch-22” position in which a corporation subject to criminal prosecution finds itself. If neither branch is willing to adjust, we should expect that corporate players will work harder to hide misconduct and will reduce efforts to discover and correct problems within their ranks. Such actions threaten the very goals that the Thompson Memorandum was intended to promote and, therefore, would not be an acceptable result.

VII. CONCLUSION

In response to the growing problem of corporate misconduct, the DOJ has twice attempted to formulate guidelines for prosecutors to follow when deciding whether to charge a corporation criminally. Like its predecessor, the Thompson Memorandum encourages the waiver of many of the protections that our legal system is based upon. It further gives prosecutors the discretion to determine when those protections should be waived and the consequences if a corporation refuses. For these reasons, the Thompson Memorandum is not a solution. Instead, it is merely an opportunity for new problems to occur.

159. Id.
160. Thompson, supra note 3.
162. Id.