

REPORT

I. BACKGROUND

In early 2004, the U.S. Sentencing Commission amended the Commentary to the Federal Sentencing Guidelines to state that an organization's willingness to waive the attorney-client privilege or work-product doctrine could be relevant to a determination that the entity was cooperating with the government and therefore eligible for a reduced penalty. In August of 2004, the ABA House of Delegates adopted a resolution opposing that amendment ("Recommendation 303").¹ Two months later, then-ABA President Robert Grey created a new Presidential Task Force on Attorney-Client Privilege.

The Task Force has reviewed scholarly articles and applicable law, conducted meetings, held public hearings, and received oral and written testimony from interested persons.² After gathering and analyzing this information, the Task Force submitted a proposed resolution last year to the ABA House of Delegates that expressed support for the privilege and opposition to governmental policies that erode it ("Recommendation 111").³ The ABA House of Delegates approved the recommendation in August 2005 without dissent. In addition to Recommendation 111, the Task Force also provided the ABA House of Delegates with a detailed Report discussing and analyzing the importance of the

¹ Recommendation 303 supported five specific changes to the then-proposed amendments to the Federal Sentencing Guidelines for Organizations, including amending the Commentary to Section 8C2.5 to state affirmatively that waiver of attorney-client and work product protections "should not be a factor in determining whether a sentencing reduction is warranted for cooperation with the government." Recommendation 303 and the related Report are available at <http://www.abanet.org/poladv/report303.pdf>.

² These and other useful materials on the topic of privilege waiver are posted on the Task Force's website, which is located at <http://www.abanet.org/buslaw/attorneyclient/>.

³ Recommendation 111 states as follows:

RESOLVED, that the American Bar Association strongly supports the preservation of the attorney-client privilege and work product doctrine as essential to maintaining the confidential relationship between client and attorney required to encourage clients to discuss their legal matters fully and candidly with their counsel so as to (1) promote compliance with law through effective counseling, (2) ensure effective advocacy for the client, (3) ensure access to justice and (4) promote the proper and efficient functioning of the American adversary system of justice; and

FURTHER RESOLVED, that the American Bar Association opposes policies, practices and procedures of governmental bodies that have the effect of eroding the attorney-client privilege and work product doctrine and favors policies, practices and procedures that recognize the value of those protections.

FURTHER RESOLVED, that the American Bar Association opposes the routine practice by government officials of seeking to obtain a waiver of the attorney-client privilege or work product doctrine through the granting or denial of any benefit or advantage.

attorney-client privilege and the work product doctrine, as well as the various ways in which these protections have been eroded in recent years.⁴

In order to carry out the policy positions outlined in Recommendations 303 and 111, the ABA has worked closely with a broad coalition of legal and business groups in an effort to persuade the U.S. Sentencing Commission to amend its organizational Sentencing Guidelines in a manner consistent with those resolutions.⁵ After receiving extensive written comments and testimony from the ABA, the coalition, and numerous former senior Justice Department officials, the Sentencing Commission voted unanimously on April 5, 2006, to reverse the 2004 privilege waiver amendment to the Sentencing Guidelines. Unless Congress acts to modify or reverse the change, it will become effective on November 1, 2006.

Since the approval of Recommendation 111, the ABA also has engaged the Department of Justice in an effort to persuade it to modify its “Thompson Memorandum,”⁶ which makes an organization’s willingness to waive its attorney-client privilege and work product protections a key factor in determining whether the organization has been “cooperative.” The Task Force has developed a proposed amendment to the Thompson Memorandum to prohibit this practice, and on May 2, 2006, ABA President Michael Greco submitted this proposed amendment to Attorney General Alberto Gonzales.⁷

In implementing its charge, the Task Force also has focused its attention on other aspects of the Thompson Memorandum and its implementation. Of particular concern is a provision that provides:

[W]hile 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

⁴ Recommendation 111 and the related Report are available on the Task Force’s website at <http://www.abanet.org/buslaw/attorneyclient/>. The Recommendation, but not the Report, constitutes official ABA policy.

⁵ The members of the coalition include the American Chemistry Council, the American Civil Liberties Union, the Association of Corporate Counsel, Business Civil Liberties, Inc., the Business Roundtable, the Financial Services Roundtable, Frontiers of Freedom, the National Association of Criminal Defense Lawyers, the National Association of Manufacturers, the National Defense Industrial Association, the Retail Industry Leaders Association, the U.S. Chamber of Commerce and the Washington Legal Foundation. The ABA is not formally a part of the coalition but has worked closely with the coalition to achieve the common goals outlined in Recommendations 303 and 111. Other organizations that have taken steps to confront encroachment on the attorney-client relationship include the Securities Industry Association, the Bond Market Association, and a number of state and local bar associations.

⁶ Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys on *Principles of Federal Prosecution of Business Organizations* (Jan. 20, 2003), available at http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm.

⁷ Available at <http://www.abanet.org/poladv/acprivgonz5206.pdf>.

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.⁸

The Task Force has concluded that the implementation of this provision threatens to undermine fundamental values that have long been recognized by the ABA. In particular, the ABA has recognized the critical importance of access to competent representation in criminal cases (and, indeed, in all legal matters). Competent representation in a criminal case requires that counsel investigate and uncover relevant information,⁹ and that, subject to limited exceptions, lawyers should not interfere with an opposing party's access to such information.¹⁰ The ABA has further recognized the importance of protecting an individual's ability to assert his or her constitutional rights. The Task Force has concluded that practices instituted by federal and state prosecutors pursuant to the Thompson Memorandum and its principles, as well as similar practices instituted by civil enforcement authorities, have contributed to an erosion of these individual rights.

The particular policies and practices addressed by the Task Force in this Report, as in its previous Report, relate to actions that organizations have been expected to take or to refrain from taking as aspects of cooperation justifying leniency. As discussed below, it is inconsistent with ABA principles, good corporate governance, the role of lawyers in our adversarial system of justice and individual Constitutional rights, for government lawyers to consider any of the following factors in making a determination of whether an organization has been cooperative in the context of a government investigation : (1) that the organization provided counsel to an employee or agreed to pay an employee's legal fees and expenses; (2) that the organization entered into or continues to operate under a joint defense, information sharing and common interest agreement with an employee or other represented party with whom the organization believes it has a common interest in defending against the investigation; (3) that the organization shared its records or other historical information relating to the matter under investigation with an employee or other

⁸ Memorandum from Larry D. Thompson, *supra* note 6, at 7-8.

⁹ *See, e.g.*, ABA Standards Relating to the Administration of Criminal Justice, The Defense Function, Standard 4-4.1(a) (3d ed. 1992) ("Defense counsel should conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction.").

¹⁰ *See, e.g.*, ABA Standards Relating to the Administration of Criminal Justice, The Prosecution Function, Standard 3-3.1(d) (3d ed. 1992) ("A prosecutor should not discourage or obstruct communication between prospective witnesses and defense counsel. A prosecutor should not advise any person or cause any person to be advised to decline to give to the defense information which such person has a right to give."); *id.*, The Defense Function, Standard 4-4.3(d) ("Defense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor. It is unprofessional conduct to advise any person other than a client, or cause such person to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give."); ABA Model Rules of Professional Conduct, Rule 3.4(f) ("A lawyer shall not . . . request a person other than the client [or a relative or employee of the client] to refrain from voluntarily giving relevant information to another party. . .").

represented party; or (4) that the organization chose to retain or otherwise declined to sanction an employee who exercised his or her Fifth Amendment right against self-incrimination in response to a government request for an interview, testimony, or other information.

The Task Force believes the ABA should express its opposition to these government policies, practices and procedures, as they undermine access to effective representation and the preservation of constitutional rights.

II. CORPORATE COOPERATION IN CRIMINAL INVESTIGATIONS

Criminal prosecutors have traditionally used the threat of prosecution to secure cooperation by parties whom they believe to be criminally culpable. Many regard this practice as objectionable, because it results in providing leniency to parties who would otherwise deserve harsher treatment or because it creates incentives for parties to fabricate evidence to secure leniency. Nonetheless, the practice is by now well-established, particularly in the context of investigations and prosecutions of individuals.¹¹

The practice of securing cooperation is now employed not only by prosecutors but also by civil enforcement authorities in dealing with organizations. As this Task Force observed in its earlier Report: “Prosecutors have traditionally recognized that criminal charges ought to be pursued rarely against corporations, but prosecutors nevertheless employ the threat of criminal prosecution to secure corporations’ assistance in their criminal investigations and prosecutions of individuals.”¹² As a general matter, as the Task Force further observed, this is a legitimate practice: “At one time, this assistance primarily included providing relevant documents and information other than privileged communications and attorneys’ litigation work product. Demands for this level of corporate assistance do not, in particular, present concerns from the perspective of the public interest in an effective corporate client-lawyer relationship.” As it does when measuring and rewarding cooperation by culpable individuals, the government may fairly consider the extent to which a cooperating organization assists it by providing information in its possession that is not otherwise easily accessible to investigators. Further, the government may consider whether the organization has taken steps to remedy whatever wrongdoing may have occurred and to prevent its recurrence, including by sending a strong message to officers and employees that future wrongdoing will not be tolerated.

While acknowledging the legitimacy of government investigative practices generally, the Task Force’s earlier Report in support of Recommendation 111 identified one practice of particular concern: “the perceived prosecutorial expectation that in order to persuade the prosecution that the corporation has not engaged in conduct deserving of prosecution, or as an aspect of cooperation with the criminal investigation, corporations will provide material that is subject to the protection of the attorney-client privilege or

¹¹ See, e.g., *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (en banc).

¹² Report in Support of Recommendation 111, at 14. Unless otherwise indicated, all quotations from that Report are on that page.

work-product doctrine.” The Report noted that, “[a]s a practical matter, corporations rarely can resist prosecutorial requests for disclosure, because of the harsh consequences of having to defend against criminal charges, and because, in cases where criminal charges are brought and sustained, corporations depend on the leniency in sentencing that results from providing assistance satisfactory to the prosecution.”¹³ The Task Force proposed Resolutions, subsequently adopted without dissent by the ABA House of Delegates, directed at this practice.

As acknowledged in the Thompson Memorandum, the government’s job is made easier when it can obtain the results of company counsel’s investigation, including statements of the organization’s employees. As Resolution 111 and accompanying Report set forth, companies are entitled to the benefit of counsel without intrusion of the government into confidential communications and information gathered under the privilege and work product doctrine. Additionally, the Task Force has become concerned by evidence of government practices under cooperation policies that, in addition to intruding on the relationship between the organization and its counsel, also adversely affect the right and ability of the organization to assure that employees are given adequate protections of the client-attorney relationship. By first encouraging an organization to obtain statements of employees and then requiring or encouraging it to waive attorney-client privilege and work product protections that would ordinarily shield such statements from discovery, the government is benefited, since “[s]uch waivers permit the government to obtain statements of possible witnesses, subjects, and targets without having to negotiate individual cooperation or immunity agreements.”¹⁴ However, as discussed below, such practices are violative of the rights of employees and unfairly intrude on the rights of organizations to deal fairly with their employees.¹⁵

¹³ *Id.* at 15.

¹⁴ Memorandum from Larry D. Thompson, *supra* note 6, at 7.

¹⁵ Since the Thompson Memorandum encourages the organization to disclose privileged and confidential memoranda of interviews conducted by the organization’s lawyers as part of an internal investigation, the organization is oftentimes placed in the position of either waiving the confidentiality inherent in attorney-client privilege and work product protections, thereby undermining the rights of its employees, or facing punishment for not having done so. The Task Force believes this harms effective corporate governance while both undermining the role of attorneys as counselors and advocates for their clients, and damaging the relationship of trust and confidence between an organization and its employees.

Moreover, the government has taken the position that false statements by employees to the private lawyers conducting the organization’s internal investigation into alleged wrongdoing can be prosecuted under 18 U.S.C. § 1512(c)(2) for impeding an “official proceeding.” See *United States v. Singleton*, Criminal No. H-04-514-SS (S.D. Tex. superseding indictment of March 8, 2006). A similar theory was applied in the recent prosecutions involving Computer Associates. In that case three former executives of the company pleaded guilty to charges of federal obstruction of justice for lying to outside counsel retained by the company to investigate possible improprieties. The guilty pleas were based on the same theory, namely, that by lying to the outside law firm, the employees had sought to obstruct the government’s investigation and mislead federal officials. See Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. Times, May 17, 2004, at C1.

Other government policies and practices relating to cooperation by organizations have come under criticism¹⁶ and have been called to the Task Force's attention in the course of its work. Among other things, concerns have been raised that, in seeking complete cooperation from corporations that are subject to criminal prosecution or civil enforcement actions, the government has unintentionally undermined corporate compliance with the law by "giv[ing] company personnel an incentive not to speak to internal counsel, the person from whom they would normally seek advice in helping the company obey the law."¹⁷ The Task Force has identified several government policies, procedures and practices relating to cooperation by organizations that it considers to be contrary to the public interest, not only because they are inconsistent with good corporate governance, but also because they erode individuals' fundamental rights.¹⁸

III. GOVERNMENT POLICY AND PRACTICES REGARDING INDEMNIFICATION OR ADVANCEMENT OF ATTORNEYS' FEES

When confronted by a government investigation, organizations routinely face the question of providing lawyers for individual directors, officers, employees and agents (collectively "Employees"). Actual or potential conflicts of interest prevent the organization's lawyers from representing all affected Employees. If the investigation focuses on actions taken by the affected Employees in the course and scope of their duties, it is not uncommon for these Employees to retain separate counsel to protect their individual interests. Often the employer will pay the legal fees for Employees up to the point where they are determined to be innocent or are found guilty of wrongdoing. These steps are taken pursuant to well established corporate governance practices. Typically, articles of incorporation or corporate by-laws authorize companies to enter into such

¹⁶ See, e.g., John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310 (2004); John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579 (2005); Peter J. Henning, *Targeting Legal Advice*, 54 AM. U.L. REV. 669 (2005). For contrasting views, see, e.g., Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587 (2004); Barry W. Rashkover, *Reforming Corporations Through Prosecution: Perspectives From an SEC Enforcement Lawyer*, 89 CORNELL L. REV. 535 (2004).

¹⁷ George Ellard, Essay, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 993 (2005) (discussing Computer Associates prosecution, in which corporate officers were charged with obstruction of justice for allegedly making false statements to corporate counsel knowing that corporate counsel would convey them to government investigators); see also Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1 (quoting white-collar defense attorney Stanley Arkin: "the discretionary tools by which the government has come to define cooperation diminish the sense of professional trust in the workplace and degrade the basic relationship between lawyers and employees of a firm.").

¹⁸ See also "The Decline of the Attorney-Client Privilege in the Corporate Context, March 2006 Survey Results," presented to Congress and the Sentencing Commission by the coalition referred to in note 5, *supra*. This detailed survey, containing responses from over 1,200 in-house and outside corporate counsel, documents the manner in which the government has frequently pressured organizations under investigation to waive the attorney-client privilege and work product protections, and the impact these practices have had, *inter alia*, on the ability of organizations to conduct effective self-governance programs. It is available online at <http://www.acca.com/Surveys/attyclient2.pdf>.

agreements pursuant to authority to do so provided by state laws. This system is designed to insure that the best interests of the organization are advanced and protected, and that the rights of Employees are maintained, by providing the board of directors with standards to guide its decisions. This system has worked well and it is inappropriate for the enforcement community to interfere with the decision-making of organizations through pressures exerted under cooperation policies.

Under the Thompson Memorandum, however, in assessing the extent of an organization's cooperation with the government, prosecutors are instructed to consider whether an organization is supporting "culpable employees and agents . . . through the advancing of attorney's fees."¹⁹ In addition, in carrying out these dictates, prosecutors on occasion encourage the organization to make these determinations at an early stage of the investigation, often before the organization has completed its own internal investigation into the matters at hand. This may cause the organization to make these determinations prematurely and without a proper factual basis, in order to be seen as fully cooperating with the government. Such decisions not only harm the organization, they deprive Employees of the support and resources they need to defend themselves, even though they have neither admitted nor been convicted of wrongdoing. This in turn damages the rights of these individuals to effective representation and undermines the relationship of trust and confidence that should exist between an organization and its Employees.

The practical impact of this language in the Thompson Memorandum can be enormous. In one current example, allegedly in response to pressure from the government, KPMG refused to pay the legal fees of thirty-two of its partners and employees unless they talked to prosecutors.²⁰ KPMG evidently perceived that it *had to* impose this condition to convince the government it was cooperating fully with the investigation and thereby enabling it to avoid indictment by entering into a deferred prosecution agreement with the government.²¹

The former KPMG defendants moved to dismiss their indictments, and District Judge Lewis A. Kaplan ordered limited discovery and held a hearing on whether "the Thompson memorandum, insofar as it deals with advancement of defense costs as a factor relevant to whether a prospective corporate defendant will be prosecuted, is an improper interference with [individual employee] defendants' rights to obtain counsel of their choice and to mount a defense consistent with their means."²² Based on that record, on June 26 of this year the court issued an extensive opinion holding that the Thompson Memorandum,

¹⁹ Memorandum from Larry D. Thompson, *supra* note 6, at 7-8. The Thompson Memorandum does not provide any measure by which an organization is expected to determine whether an Employee is "culpable" for purposes of the government's assessment of cooperation and, in part as a consequence, an organization may feel compelled either to defer to the government investigators' initial judgment or to err on the side of caution.

²⁰ See Cohen; *supra* note 17, at A1.

²¹ *Id.*

²² *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (April 12, 2006), slip op. at 1-2.

and the government's implementation of it in the KPMG case, violated both the Fifth and Sixth Amendments to the Constitution.²³

The court found that KPMG would have paid the individuals' legal expenses had the government not "held the proverbial gun to its head."²⁴ It concluded that the Thompson Memorandum, by its reference to "the advancing of attorneys fees" as a factor to assess cooperation, violated the individuals' substantive due process rights under the Fifth Amendment to be free from government interference with their ability to defend themselves.²⁵ In particular, the court declared that "it simply cannot be said that the payment of legal fees for the benefit of employees and former employees necessarily or even usually is indicative of an unwillingness to cooperate fully."²⁶

As to the Sixth Amendment, the court first concluded that, while the Amendment's protections typically attach at the time of indictment, the government cannot take actions pre-indictment that it intends or knows will likely have an unconstitutional effect on those rights.²⁷ The court then held that the Thompson Memorandum unconstitutionally interfered with the defendants' right to counsel of their choice because it "discourages and, as a practical matter, often prevents companies from providing employees and former employees with the financial means to exercise their constitutional rights to defend themselves."²⁸

The Court also conducted a hearing on whether proffer statements made to government attorneys by certain KPMG employees were improperly coerced in violation of the privilege against self-incrimination, as a result of KPMG's insistence that the employees cooperate with the government as a condition of continued employment and payment of legal fees. The Court concluded that the government was responsible for the pressure KPMG put on the employees to waive their constitutional rights, and it suppressed certain of the statements and the fruits of those statements. After noting that companies facing allegations of wrongdoing are under intense pressure to avoid indictment, the Court stated:

²³ *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (June 26, 2006).

²⁴ *Id.*, slip op. at 2.

²⁵ *Id.* at 48-54.

²⁶ *Id.* at 52.

²⁷ *Id.* at 56.

²⁸ *Id.* at 59. The court declined to dismiss the defendants' indictments based on the foregoing. Instead, it opened a new civil docket under which the defendants could sue KPMG for provision of their legal fees, *id.* at 77-78, and it noted that, if any statements they made to the government as a result of KPMG's insistence that the employees submit to government interviews as a condition of continued employment or payment of any legal fees were therefore improperly coerced, those statements could potentially be suppressed, *id.* at 67-68.

The DOJ and other federal agencies have capitalized on this, in part by altering the manner in which suspected corporate crime has been investigated, prosecuted, and, when proven, punished. The Thompson Memorandum is a part of this change. In cases involving vulnerable companies, the pressure exerted by it and by the prosecutors who apply it inevitably sets in motion precisely what occurred here – the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights.²⁹

For those Employees who cannot afford to hire their own defense counsel,³⁰ the government's policy of discouraging organizations from advancing their Employees' legal fees may have the effect of depriving these individuals of counsel altogether during the critical stages prior to indictment. Even for those Employees who can afford a lawyer, it will often be difficult if not impossible to afford a lawyer with special expertise in white-collar criminal investigations and prosecutions and to finance the extensive legal work typically demanded to receive fully informed advice or to wage an effective defense to white-collar criminal allegations. This policy thus effectively denies individuals the benefits of representation to which, in many cases, they typically would otherwise be entitled under their employment contracts, under state law, under the corporation's articles of incorporation or by-laws, or under the doctrine of implied contract.

As a matter of good corporate governance, organizations may contract with Employees or otherwise decide to make legal representation available in matters relating to the Employee's responsibilities, including in criminal investigations and prosecutions. Organizations legitimately may conclude that such agreements enable them to attract and retain highly qualified officers and Employees. Indeed, individuals employed by the organization may justifiably expect their employer to support them in connection with lawful actions they have taken on the organization's behalf, rather than abandoning them at

²⁹ *United States v. Stein*, No. S1 05 Crim. 0888 (LAK) (July 25, 2006), slip op. at 36-37. The Court went on to say:

In this case, the pressure that was exerted on the Moving Defendants was a product of intentional government action. The government brandished a big stick – it threatened to indict KPMG. And it held out a very large carrot. It offered KPMG the hope of avoiding the fate of Arthur Andersen if KPMG could deliver to the [United States Attorney's Office] employees who would talk, notwithstanding their constitutional right to remain silent, and strip those employees of economic means of defending themselves. In two instances, that pressure resulted in statements that otherwise would not have been made.... The coerced statements and their fruits must be suppressed.

It is no answer for the government to say that these aspects of the Thompson Memorandum are needed to fight corporate crime. Those responsible should be prosecuted and, if convicted, punished. But the end does not justify the means. *Id.* at 37.

³⁰ The costs associated with defending a government investigation involving complex corporate and financial transactions can often run into the hundreds of thousands of dollars. Therefore, if the government succeeds in pressuring a company not to pay for the Employee's legal defense, the Employee typically may be unable to afford effective legal representation.

the first suspicion of wrongdoing. As a general rule, criminal prosecutors have no legitimate interest in pressuring organizations to refuse to carry out such agreements. Further, the effect of abrogating such agreements is to impede or prevent these individuals from retaining qualified lawyers to render a competent defense in highly complex white-collar criminal investigations and prosecutions. This strikes at the core of our adversarial system of justice. It has long been recognized that our system functions best when persons with legal needs are represented by competent counsel.³¹

IV. GOVERNMENT POLICY AND PRACTICES REGARDING JOINT DEFENSE, INFORMATION SHARING AND COMMON INTEREST AGREEMENTS

The Thompson Memorandum provides that, in deciding whether to reward an organization for its cooperation with a criminal investigation, the Department will view with disfavor an organization's decision to "provide[e] information to [its] employees about the government's investigation pursuant to a joint defense agreement."³² In practice, some government prosecutors and civil enforcement authorities have interpreted this language broadly, with the result that organizations have been discouraged from entering into agreements of this sort, which are commonly referred to as "joint defense and information-sharing agreements" or "common interest agreements" (referred to hereafter as "common interest agreements"). An organization would typically seek to enter into such an agreement with Employees and other represented parties with whom it shares a common interest in defending against the investigation. Implementing the Thompson Memorandum in this manner undermines the legitimate interests of both the organization and the Employee in access to information necessary to effective representation.

The issues raised by the implementation of the Thompson Memorandum in this manner can only be understood if the effects are discussed in a real world context. Upon learning of alleged wrongdoing by its personnel, an organization typically retains counsel to conduct an internal investigation and advise the organization how to respond. At this preliminary stage, the organization has a legitimate interest in obtaining access to all relevant information available to it. In some cases, to facilitate its own investigation, the organization may want to exchange information and act cooperatively with lawyers for individual Employees or other parties involved in the matter and with whom it has a common interest in defending against the investigation. In such cases, to maintain the confidentiality of attorney-client privileged information and work product protected materials, the lawyers and their clients may consider entering into a common interest agreement pursuant to which each party will preserve the confidentiality of information obtained from the other. Indeed, in the absence of such an agreement, the organization may not have access to such information.

³¹ Not only does this policy interfere with the establishment of an effective attorney-client relationship, but it also runs counter to the Department of Justice's own internal regulations, which permit the Department to pay for a prosecutor's outside counsel if the prosecutor is a subject of a federal criminal investigation. 28 C.F.R. §§ 50.15(a) (7), 50.16.

³² Memorandum from Larry D. Thompson, *supra* note 6, at 7-8.

The law has long recognized that, because the interest in access to effective representation may be promoted by the sharing of pertinent information, including privileged information, among parties to a legal matter who are allied in interest, the privilege is not waived when otherwise privileged information is shared pursuant to such an agreement: “The joint defense agreement, or common interest rule, is an extension of the attorney-client privilege which ‘serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.’”³³ An organization may well choose to be involved in such an agreement with current and former Employees, and other represented parties, including other organizations under investigation in the same matter.

At some point in the investigation, the organization may determine -- whether or not it believes wrongdoing has occurred -- that it wishes to cooperate with the government. At that point, as a result of the implementation of the Thompson Memorandum in many cases, the organization faces impediments resulting from three different approaches by the government. First, the government may take the position that the organization has already demonstrated a lack of cooperation by previously entering into a common interest agreement with some of its Employees during the course of its internal investigation or the government’s investigation. Second, the government may take the position that no meaningful cooperation can be demonstrated, if the organization continues to operate under such an agreement with those the government alleges are wrongdoers. Third, the government may require or encourage the organization to make determinations of wrongdoing prematurely, even at the outset of the organization’s own internal investigation or the government’s investigation.

The difficulty presented by the first approach is that it has a chilling effect on an organization pursuing what is otherwise a perfectly legitimate, even necessary, practice in pursuing an effective internal investigation. The government should not be able to measure cooperation based on the fact that an organization entered into a common interest agreement at the beginning or during the course of its internal investigation.

The difficulty presented by the second approach is that, at the time the organization determines it wants to cooperate, many legitimate reasons may still exist as to why the organization would want to maintain common interest arrangements with some, if not all, of its Employees and others. This may be because the organization, in attempting to discharge its obligations in good faith, has not yet determined the extent or significance of these parties’ conduct; because the organization disagrees with the government over the nature, extent or seriousness of the allegations; or for a myriad of other legitimate reasons. A desire to cooperate does not mean that the organization is prepared to agree with the government’s position in the matter in any, let alone all, respects.

³³ *United States v. Schwimmer*, 892 F.2d 237, 243 (2d. Cir. 1989); *see also In re: Grand Jury Subpoenas, 89-3 and 89-4*, 902 F.2d 244 (4th Cir. 1990); *see generally* Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 *FORDHAM L. REV.* 871 (1996).

The difficulty presented by the third approach is that the Thompson Memorandum has at times been implemented in a manner that encourages organizations to make a determination of wrongdoing by Employees far in advance of the matter being adjudicated, sometimes at the outset of the organization's internal investigation into what happened and who did it. As a result, the organization may feel compelled to make a premature determination as to the "culpability"³⁴ of its Employees, so as not to displease government attorneys by appearing to be uncooperative. This in turn may lead the organization to decline to enter into common interest agreements with affected Employees, and to cut off the affected Employees from access to the organization's records and other historical information concerning the matter under investigation, as well as to deprive these Employees of financial support and a capable legal defense. These decisions are often made at a time when the Employees have neither been accused nor convicted of any wrongdoing. Such practices inhibit the organization's ability to conduct a thorough internal investigation and do serious damage to the relationship of trust and confidence that must exist between an organization and its Employees.³⁵

Culpability can only be determined with certainty once an admission is made or a verdict is returned. It is the prerogative of the organization to reach the proper balance in providing fairness to its Employees while also evaluating their conduct in a timely fashion. The organization's thorough investigation of the facts may lead to a determination as to whether the Employees and others have acted in a manner that would prevent the organization from having a common interest with them. The organization's determination of culpability should not be done prematurely or in haste, or for reasons other than those based on an evaluation of the conduct of the individual in question. Indeed, the Constitution and statutory law impose heavy procedural and substantive burdens on the government if it seeks to prove culpability, including in criminal cases the need to overcome the presumption of innocence by proof beyond a reasonable doubt.

Since the Thompson Memorandum also empowers federal prosecutors to grant to or withhold benefits from the organization seeking cooperation credit as a result of these critical determinations, the organization is placed in an unenviable position. Given the potentially severe consequences to the "uncooperative" organization and the potential harm to individuals prematurely designated "culpable," the final decision in this regard must reside with the organization. It is inappropriate for the government to pressure the

³⁴ As that term is used in the Thompson Memorandum, *supra* note 6, at 7-8.

³⁵ The Thompson Memorandum does not provide guidance by which the organization is expected to determine if an employee is "culpable" for purposes of the government's cooperation guidelines. Nor does the Thompson Memorandum define what constitutes "support." As a consequence, an organization may feel compelled either to defer to government investigators' initial judgments or to err on the side of caution by broadly designating involved employees as culpable. The organization may thus make a premature decision to regard an employee as "culpable" when it might have reached a different conclusion after a thorough internal investigation. Besides depriving otherwise eligible Employees of legal representation and pertinent information, this response to the Thompson Memorandum may have the unintended consequence of impeding the organization's internal investigation by requiring the organization to adopt an unnecessarily adversarial relationship with certain of its Employees who may or may not have engaged in misconduct.

timing or merits of such a critical decision.³⁶ The Task Force believes that the sole judge of when to terminate a common interest agreement should be the organization itself. That decision should be made by the organization on the basis of what the organization, in its sole discretion, determines to be lawful, appropriate and consistent with good corporate governance.

On the other hand, the government will undoubtedly insist that an organization seeking leniency for cooperation assist the government in its investigation and prosecution, not thwart or impede it. Under these circumstances, the government may look unfavorably on the organization's continued sharing of information concerning the government's investigation with other parties whose interests in defending against the investigations are inconsistent with those of the organization³⁷ Under these limited circumstances, the government should be entitled to consider as a factor in determining the extent of an organization's cooperation its continued participation in a common interest agreement with parties the organization no longer believes share a common interest in defending against the investigation.

When an organization that is seeking credit for cooperation reaches the conclusion that it no longer has a common interest in defending against the investigation with a fellow member of a common interest agreement, it may well withdraw from that agreement. Prior to reaching such a conclusion, however, counsel for the organization, Employees and other represented parties must be able to effectively represent their respective clients by having the ability to share information and strategy liberally and without prejudicing a determination by the government as to whether the organization is deemed cooperative

³⁶ The U.S. Securities and Exchange Commission has seemingly taken a similar approach. In 2004, for instance, the Commission added a \$25 million penalty to its settlement with Lucent Technologies for failing to "cooperate" with the Commission's investigation of its accounting measures. Phyllis Diamond, *SEC Demand for 'Cooperation' Seen Raising Due Process Concerns*, 36 SEC REGULATION & LAW REPORT 1070 (No. 24; June 14, 2004), available at <http://corplawcenter.bna.com/pic2/clb.nsf/id/BNAP-5ZUQH2>. One component of Lucent's failure to cooperate included the company's decision to expand "the scope of employees that could be indemnified against the consequences of the enforcement action after an agreement in principle had been reached with the SEC staff." *Id.* At the time, Paul Berger, the Associate Director of the Commission's Enforcement Division, stated that "[a]nyone who settles with us is going to agree not to be indemnified." He also said the Commission "may well ask [a company] not to indemnify an individual employee who has incurred costs and penalties." *Id.* The SEC has no apparent statutory authority to impose penalties for non-cooperation with its investigations. The Staff of the SEC has taken a similar view toward indemnification of attorneys' fees.

³⁷ By way of example, after an organization seeking leniency has concluded that certain Employees acted unlawfully in connection with the matter under investigation, the government may properly conclude that it is inconsistent with the organization's pledge of cooperation with the government for the organization to provide those Employees with information concerning the government's investigation. This information might include insights into the way in which the government's investigation is being conducted, information about individuals targeted for prosecution and disclosure of the organization's internal work product from its own investigation. Presumably, as it sought lenient treatment through cooperation, the organization itself would have concluded that, under those circumstances, it no longer had a common interest with those Employees in the context of the government's investigation and thus would have terminated or withdrawn from such a common interest agreement with those employees.

under applicable policies. Common interest agreements are not invariably against public policy – on the contrary, the evidence law reflects just the opposite – and therefore the government has no legitimate interest in categorically discouraging organizations from participating in them.³⁸

V. GOVERNMENT POLICY AND PRACTICES REGARDING THE SHARING OF INFORMATION WITH PARTIES OUTSIDE THE CONTEXT OF COMMON INTEREST AND INFORMATION SHARING AGREEMENTS

Wholly apart from whether an organization shared information with others pursuant to a common interest agreement, some federal prosecutors implementing the Thompson Memorandum have taken the position that, in order to receive credit for cooperation, an organization should not provide any information – even the organization’s own records relating to the purported wrongdoing and other historical information – to counsel for current or former Employees who are possible subjects or targets of the criminal or enforcement investigation, or who are under indictment. However, a categorical restriction on the sharing of information interferes with the individual’s ability to gather the facts necessary for an attorney to prepare an adequate defense and may adversely impact the organization’s ability to conduct a thorough internal investigation.³⁹

For the government to influence organizations to adopt such a restriction is contrary to the public interest because, as noted, effective representation is essential to the just resolution of disputes in criminal cases no less than in civil cases. Indeed, the ABA is on record as being against lawyers’ interference with witnesses’ providing information to the opposing party’s counsel. Rule 3.4(g) of the ABA Model Rules of Professional Conduct makes it improper for a lawyer to “request a person other than the client [or a relative or employee of the client] to refrain from voluntarily giving relevant information to another party.”⁴⁰ In criminal cases in particular, courts have sometimes found it to be improper for the prosecution to pressure witnesses not to give information to defendants and their counsel.⁴¹

³⁸ To be sure, the government in criminal or civil enforcement proceedings may measure the value of an organization’s cooperation as it measures that of individuals, by the amount of information provided to the government and the usefulness of the information. But the fact of having entered into a joint defense agreement should not in itself be viewed as a factor diminishing the value or sincerity of the organization’s assistance.

³⁹ Insofar as it impedes reciprocal exchanges of information between the organization and certain of its Employees, this policy also undermines the organization’s ability thoroughly to investigate matters of concern to both the organization and the government. *See* note 13, *supra*.

⁴⁰ *See also* note 10, *supra*.

⁴¹ *See, e.g., United States v. Morrison*, 535 F.2d 223 (3d Cir. 1976); *United States v. Leung*, 351 F. Supp. 2d 992 (C.D. Ca. 2005); *see also United States v. Narciso*, 446 F. Supp. 252, 316 (E.D. Mich. 1977) (concluding that letter implying that prospective witnesses should not speak with defense counsel and explicitly requesting that witnesses contact the government attorneys before consenting to any such interview was “improper and ill-advised”; and observing: “Witnesses do not belong to any party to a lawsuit and this is

While an organization may decide for its own purposes to deny information to parties adverse to the government, it should not be pressured by the government to do so. Therefore, the organization should not be deemed "uncooperative" by government attorneys if it provides its own pertinent records and other historical information relating to the matter under investigation to Employees and other represented parties who are attempting to defend themselves. Unlike material that may be shared under a common interest agreement, some of which may be protected by privilege or the work product doctrine, or which may involve information about the government's ongoing investigation, an organization's records created at or about the time of the suspected wrongdoing and its other historical information relating to the matter under investigation are evidentiary in nature. With some limitations, such records are ordinarily subject to subpoena and will undoubtedly be sought by prosecutors, investigators and other enforcement authorities. Providing such materials to Employees and other represented parties, even those suspected or accused of wrongdoing, simply enables these parties and their attorneys to prepare an adequate defense.

The decision about whether or not to provide such records and historical information to Employees and other represented parties should be made by the organization based upon the best interests of the organization and that of the individuals in question.⁴² Government attorneys and investigators should not require or encourage organizations to withhold such material, nor should they grant or deny benefits to organizations based on the sharing of such materials. Whatever interest the government may claim in preventing the organization from sharing such information is outweighed by the need to allow organizations to exercise their prerogatives in evaluating Employee conduct while ensuring that represented parties receive adequate representation and have access to relevant evidence.

VI. GOVERNMENT POLICY AND PRACTICES REGARDING TERMINATION OR SANCTIONING OF OFFICERS AND EMPLOYEES FOR ASSERTING CONSTITUTIONAL RIGHTS

In assessing the extent of an organization's cooperation with the government, the Thompson Memorandum encourages prosecutors to consider whether an organization is supporting "culpable employees and agents . . . through retaining the employees without sanction for their misconduct."⁴³ In implementing this provision, prosecutors and civil enforcement authorities have sometimes made it known that, as a condition of complete

particularly so in a criminal case where a defendant is forced to compete with the vast resources of federal investigatory agencies and must necessarily overcome a natural reluctance of a witness to speak to the defense after an indictment has issued charging a criminal offense.").

⁴² An organization should be free to make whatever decision it deems appropriate, lawful and consistent with good corporate governance, free from government pressure. Some organizations may well decide that such materials will not be shared with parties determined by the organization to have engaged in wrongful conduct. As in the case of participation in common interest agreements discussed in the Section IV of this Report, the timing and substance of this determination are up to the organization.

⁴³ Memorandum from Larry D. Thompson, *supra* note 6, at 7-8.

cooperation, an organization will be expected to discharge Employees who assert their right against self-incrimination when requested to provide interviews or other information by the government's criminal or civil enforcement investigators.⁴⁴

The organization is, of course, free to take whatever personnel actions it deems appropriate, lawful and consistent with good corporate governance. Nonetheless, the Task Force believes that government prosecutors and enforcement authorities should not require or encourage organizations to threaten their Employees with loss of employment or with other sanctions, in order to pressure them to waive their Fifth Amendment right to remain silent in response to government questioning. This practice may in some circumstances be viewed as coercive and may lead Employees to provide statements to government attorneys and investigators against their will. This practice can also result in the organization's Employees being unfairly deprived of their Constitutional rights to decline to be interviewed by government investigators and to seek the assistance of counsel before speaking with the government. As such, this practice undermines our adversary system of justice. The government could not properly discharge its own public employees merely for asserting a constitutionally protected right not to testify.⁴⁵

Policies setting standards for evaluating cooperation in the context of government investigations should not require or encourage organizations to conclude that Employees who assert the right against self-incrimination when questioned by the government are per se uncooperative or have culpability for malfeasance. As noted, this may cause an organization to make a premature assessment of wrongdoing by individual Employees.⁴⁶ Because an organization's cooperation often begins before anyone has been tried or even charged, and sometimes even before all the facts are known, the manner in which the Thompson Memorandum has at times been implemented conflicts with the most basic American legal principle that defendants (and potential defendants) are innocent until proven guilty. The mere assertion of the privilege in response to a government inquiry should not be taken by the government as evidence of non-cooperation, much less proof of guilt.⁴⁷ Nor should government lawyers be permitted to consider as a factor indicating lack

⁴⁴ As previously noted *supra* at page 7, the Task Force believes it is both unfair and inconsistent with the rights of Employees for Department of Justice prosecutors to require or encourage an organization, often at the outset of an investigation, to make a determination as to which of its Employees are "culpable" before all of the facts are known to the organization. It is likewise inappropriate for the government to encourage an organization to make a premature determination as to what actions constitute "misconduct."

⁴⁵ See *Gardner v. Broderick*, 392 U.S. 273 (1968) (finding that state may not discharge its employee solely for refusing to waive constitutional right against self-incrimination); see also *Garrity v. New Jersey*, 385 U.S. 493 (1967). See note 31, *supra*, regarding Department of Justice policy permitting payment of legal fees for outside counsel for prosecutors accused of criminal conduct.

⁴⁶ Of course, an organization will often have a legitimate interest in disciplining or discharging Employees based on its independent conclusion that they have engaged in wrongdoing or, for that matter, based on their unwillingness to cooperate with the organization's own investigation of alleged wrongdoing.

⁴⁷ Moreover, as the Supreme Court has recognized, individuals assert the right against self-incrimination for many reasons other than because they are in fact guilty of a crime. *Griffin v. California*, 380 U.S. 609, 613

of cooperation the fact that an organization chose not to impose sanctions on Employees who asserted their Constitutional rights in response to government requests for information.

VII. CONCLUSION

The government is entitled to conduct thorough investigations of possible wrongdoing and to grant leniency to those organizations that provide genuine cooperation. However, the government's investigative and prosecutorial interests must be balanced against the public interest in ensuring that organizations have the ability to conduct thorough internal investigations of possible wrongdoing, and that individuals receive effective representation and are able to assert their Constitutional rights without fear of punishment.

In the context of responding to government inquiries into possible wrongdoing on the part of its personnel, it is legitimate and in the public interest for an organization seeking leniency as a result of its cooperation with the government's investigation to choose to do any or all of the following: (1) provide counsel to an Employee or agree to pay an Employee's legal fees and expenses; (2) enter into or continue to operate under a joint defense, information sharing and common interest agreement with an Employee or other represented party with whom the organization believes it has a common interest in defending against the investigation; (3) share its records or other historical information relating to the matter under investigation with an Employee; or (4) choose to retain or otherwise decline to sanction an Employee who exercised his or her Fifth Amendment right against self-incrimination in response to a government request for an interview, testimony, or other information. Policies and practices of prosecutorial and civil enforcement agencies that discourage organizations from taking these steps erode individuals' constitutional and other legal rights, undermine the role of lawyers in our adversary system of justice, damage relations between individual Employees and their organizations, and impede the ability of organizations to conduct thorough investigations of suspected wrongdoing.

Respectfully submitted,

R. William Ide, III, Chair

ABA Task Force on Attorney-Client Privilege

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(1965). Oftentimes, defense counsel advise some clients whom they believe to be innocent to do so, recognizing that their testimony may be used against them, even unfairly, to draw unwarranted inferences.