RECOMMENDED PRACTICES FOR COMPANIES AND THEIR COUNSEL IN CONDUCTING INTERNAL INVESTIGATIONS

Approved by the Board of Regents
February 2008

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RECOMMENDED PRACTICES FOR COMPANIES AND THEIR COUNSEL IN CONDUCTING INTERNAL INVESTIGATIONS*

I. Purpose of the Paper

Since 2001, over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrong-doing by corporate executives and employees. These investigations have included inquiries into suspected violations of the Foreign Corrupt Practices Act; alleged options backdating activities; alleged violations of the antitrust, environmental, import/export, and other laws; and financial statement improprieties.[1] The Federal Criminal Procedure Committee of the American College of Trial Lawyers has observed counsel implementing a wide variety of procedures and protocols in conducting corporate internal investigations for issuers and public companies in particular. The result has been variances both in treatment of officers and employees and in outcomes of the investigations for such officers and employees and the corporations themselves. The Committee has sought to determine, and now recommends, what it believes to be the fairest and most effective practices for conducting internal investigations of possible corporate wrongdoing. Although the principles articulated in this paper are tailored to internal investigations by issuers and public companies where significant allegations of malfeasance are alleged or suspected, many of these principles may be applied in the context of other entities and smaller investigations.

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* The principal draftsman of this report was David M. Brodsky (New York, N.Y.). He was assisted by a subcommittee of the Federal Criminal Procedure Committee of the American College of Trial Lawyers consisting of its Chair Douglas R. Young (San Francisco, CA.), Fellows Nanci Clarence (San Francisco, CA.), James Brosnahan (San Francisco, CA.), John S. Siffert (New York, N.Y.), Robert G. Morvillo (New York, N.Y.), the Honorable Nancy Gertner (US District Court, District of Massachusetts), and Regent Liaison Robert W. Tarun (Chicago, IL.). Fellow Cristina Arguedas (Berkeley, CA.) also reviewed this report.

1 *See, e.g.,* the Wall Street Journal Options Scoreboard, where 143 public companies are listed as having conducted internal investigations into suspected options backdating, http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html.

A sample of the internal investigations conducted by different law firms reveals the diversity of the matters under internal investigation since 2001:

- representation of Fortune 100 Company in a Special Litigation Committee investigation involving derivative shareholder claims against directors and officers regarding false financial statements and conflicts of interest arising out of acquisitions;
- representation of the Audit Committee of leading lessor of shipping containers and chassis in an internal investigation arising from an accounting restatement;
- representation of the Corporate Governance Committee of a major transportation company in a review of its corporate governance structure;
- representation of the Audit Committee of a large semiconductor company in an internal investigation involving alleged accounting improprieties and self-dealing;
- representation of the Audit Committee of a major computer data storage company regarding an investigation involving revenue recognition issues at one of the companies subsidiaries;
- representation of a leading fiber optics company in an internal investigation;
- representation of an Audit Committee into allegations of insider trading by certain directors and those affiliated with them
- representation of a U.S. public company and its U.S. subsidiary corresponding to the Japanese subsidiary in an investigation involving improper labeling of the grade and quality of plastics being used in computer monitors and other electronics equipment being shipped around the world, including the U.S.; and
- representation of an Audit Committee of one of the world's largest industrial corporations into the activities of foreign subsidiaries relating to energy plant inspections.

II. Initial Organizational Issues

A. Factors to Consider When Evaluating Whether to Commence an Internal Investigation When Allegations Have Been Lodged of Significant Corporate Malfeasance Or Where an Outside Auditor Suspects Illegality

Internal investigations typically result from discovery -- by the Company, the media, an external auditor, or a whistleblower -- of circumstances that raise a serious concern of potential liability or financial misconduct. The investigations are thus meant to determine the validity and seriousness of the circumstances alleged or disclosed and what action, if any, the Company should take consistent with the best interests of the shareholders. Among the possible responsive actions are remediation, market disclosure, and preparation for, and defense of, potential prosecutorial and regulatory actions or civil lawsuits. Depending on whose conduct is the focus of the investigation, senior management, the Board of Directors, an audit committee or a special committee of disinterested directors may decide to commence an investigation. There are some respected corporate lawyers who counsel that Boards should resist the trend of having audit committees or special committees of independent directors routinely investigating whistleblower complaints and the like.[2]

Whether to commence an internal investigation may be a discretionary decision, supra, or in limited circumstances may be prescribed by statute. In the latter case, Section 10A of the Exchange Act requires external auditors, who detect or otherwise become aware that an illegal act has or may have occurred, to determine whether it is likely such an illegal act has occurred and the effect of any illegal act on the Company's financial statements. Auditors look to the Company to investigate and evaluate such possible illegalities and then assess whether the Company and the Board of Directors have taken "timely and appropriate remedial actions" regarding such possible illegalities. In this regard, the methodology used in "10A investigations" is not materially different from an internal investigation commenced on the company's own initiative, and therefore, for the purposes of this paper they will be treated collectively.

Outside of the 10A context, there are several circumstance that have traditionally triggered the initiation of internal investigations by senior management, a Board, audit committee or special committee:

a. Receipt of a whistleblower letter or communication that raises allegations of misconduct by senior or significant members of management;

b. Shareholder demand in the nature of an actual or threatened derivative action against directors and officers, possibly leading to formation of a Special Litigation Committee;

c. Allegations of misconduct raised by external auditor, internal auditor, or compliance;

d. Board member suspicion of misconduct by officers or employees;

e. Receipt of subpoena or informal request for information by a government or self-regulatory organization (SRO), or an announcement by a government agency or SRO of suspicions of misconduct by the Company or industry; or

f. Allegations of misconduct by the media, watchdog groups, or academics.

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2 Andrew Ross Sorkin, *Questioning an Adviser's Advice*, N.Y. Times, Jan. 8, 2008 (interview of Martin Lipton).

In addition, although there have been no reported enforcement actions under the section yet, the "reporting up" provisions of the Sarbanes-Oxley Act of 2002 require in-house counsel to ensure that the corporation takes appropriate steps in response to allegations of wrongdoing.

B. External Factors, Such as The Existence or Anticipated Existence of a Parallel Government Investigation or Shareholder Lawsuit, Should Be Considered When Making Decisions About How To Conduct and Document An Internal Investigation

There is a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to, an actual (or anticipated) external investigation by (one or more of): the Department of Justice, Securities and Exchange Commission, NYSE (or other self regulatory organization ("SRO")), a state attorney general or local district attorney, or other enforcement or regulatory authority. The Company and the Board may also be facing civil lawsuits, including shareholder class actions and derivative suits, pertaining to the alleged misconduct; and in certain instances, may be dealing with criminal investigations initiated by federal and, more recently, state prosecutors.[3]

The existence or threatened existence of any of these external events necessarily affects how the Company, Board, audit or independent committee, and outside counsel conduct and document an internal investigation. As discussed more fully below, counsel and the Company should anticipate that all documents created, facts uncovered, and witness statements made to them, may be disclosed to the government or regulator, and also may be discoverable by a private plaintiff. This assumption should be a factor in all major decisions about the procedure and protocol for any major internal investigation. In particular, the company, the Board or its independent committees, and counsel may want, or may be forced, to make an early determination about whether and how they will "cooperate" with government or regulatory investigations.

During approximately the last decade, driven by regulatory policies promulgated by the Department of Justice,[4] the Securities and Exchange Commission and other regulators,[5] and

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3 *See, e.g.*, Mark Gimein, *Eliot Spitzer: The Enforcer*, Fortune, Sept. 16, 2002, at 77; Charles Gasparino & Paul Beckett, *Quick Fix May Elude Citigroup and Weill*, Wall St. J., Sept. 10, 2002, at C1; Gregory Zuckerman & Mitchell Pacelle, *Now, Telecom Deals Face Scrutiny*, Wall St. J., June 28, 2002, at C1.

4 *See* text, *infra* at n. 7-10, 13-14.

5 *See* "Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions," issued on October 23, 2001 as Releases 44969 and 1470, available at http://www.sec.gov/litigation/investreport/34-44969.htm, and referred to as the "Seaboard Report." The Seaboard Report is the SEC's current policy regarding waiver of privilege and work product, and sets forth the criteria that it will consider in determining the extent to which organizations will be granted credit for cooperating with the agency's staff by discovering, self-reporting, and remedying illegal conduct, which cooperation, or lack thereof, in the eyes of the staff will be taken into consideration when the SEC decides what, if any, enforcement action to take. The Seaboard Report has been read by practitioners as encouraging companies not to assert, or to waive, their attorney-client privilege, work product, and other legal protections as a sign of full cooperation. *See* Seaboard Report at paragraph 8, criteria no. 11, and footnote 3.

Another example of a regulatory agency promulgating similar policies is the Commodity Futures Trading Commission ("CFTC"), the Enforcement Division of which issued an Enforcement Advisory on August 11, 2004, entitled "Cooperation Factors in Enforcement Division Sanction Recommendations," promoting the waiver of appropriate privileges. The CFTC issued a revised Enforcement Advisory eliminating the waiver language on March 1, 2007. *See* http://www.abanet.org/poladv/priorities/privilegewaiver/acprivilege.html.

the U.S. Sentencing Commission, the passage of federal legislation mandating certain activities by independent auditors and Audit Committees, and civil litigation, there has been a renewed emphasis on companies' expanding the scope of their cooperation with governmental investigations, and even initiating them, by conducting extensive internal investigations into perceived corporate misconduct in order to achieve longer-term benefits at the hands of such regulators and avoid what could be punitive reactions by regulators and auditors.

Since the mid-1990s, the principal focus of law enforcement and regulatory authorities in the United States has been to develop policies and guidelines designed to induce corporations and other business entities to waive, or not assert, applicable attorney-client and work-product privileges and protections.[6] In 1999, after several years of informal policies at various United States Attorney's Offices (principally the Southern District of New York), the Department of Justice formally adopted what came to be known as the "Holder Memorandum," after Eric Holder, then Deputy Attorney General of the United States. The Holder Memorandum, although advisory, set forth standards by which a corporation would be judged cooperative in a federal criminal investigation.[7] One factor was whether the corporation waived or did not assert privileges protecting the confidentiality of communications.

In 2002, then Deputy Attorney General Larry Thompson promulgated a revision of the Holder Memorandum, this time making mandatory the use of the factors in judging whether a corporation was sufficiently cooperative, including whether applicable privileges were waived or not asserted.[8] Among the most controversial of the nine additional factors in the Thompson Memorandum were those addressed to indicia of corporate "cooperation," including a willingness to waive or not assert the attorney-client privilege and the attorney work-product doctrine[9] and a willingness to deny advancement of fees and expenses and indemnification coverage.[10]

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6 *See* United States Attorneys' Criminal Resource Manual, Art. 162, §VI.B; United States Sentencing Guidelines Manual §8C2.5(g)(2001); the SEC's Seaboard Report, http://www.sec.gov/litigation/investreport/34-44969.htm; *see also* the EPA Voluntary Disclosure Program, the HHS Provider Self-Disclosure Protocol, and the Department of Justice Antitrust Corporate Leniency Policy.

7 *See generally* Memorandum from Eric Holder, Jr., Deputy Attorney General, to All Heads of Department Components and U.S.Attorneys (June 16, 1999) (including attachment entitled "Federal Prosecution of Corporations"), *reprinted in* Criminal Resource Manual, arts. 161, 162, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00100.htm.

8 *See* US DOJ, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) (the "Thompson Memorandum"), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

9 Regarding the attorney-client privilege and work-product doctrine, the Thompson Memorandum stated, in relevant part, that "[o]ne factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications among specific officers, directors, and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects and targets, without having to negotiate individual cooperation or immunity agreements."

10 Regarding denial of advancement of fees and expenses, the Thompson Memorandum stated, in relevant part, that "a corporation's promise of support to culpable employees and agents…through the advancing of attorneys' fees…may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."

In 2004, following the general trend of policy reflected in the Thompson Memorandum, the United States Sentencing Commission adopted an amendment that a corporation's waiver of the attorney-client privilege and work product protections would be a prerequisite for obtaining a reduction by a corporation in its culpability score.

The adoption of these policies by the Department of Justice and other regulatory entities have made inroads into historic policies protecting privilege and work-product in favor of policies promoting cooperation with governmental agencies and maximizing the effectiveness and efficiency of governmental investigations.[11] Companies formerly expected that the work product of their counsel prepared as a result of an internal investigation (and advice given as a result of such investigation) would be protected. Instead, however, many have come to learn that, upon the initiation of a governmental inquiry (formal or informal, and whether the company is a target or not) such expectations of confidentiality have in many cases been illusory. Internal investigations, conducted by and at the direction of legal counsel, are a critical tool by which companies and their boards learn about violations of law, breaches of duty and other misconduct that may expose the company to liability and damages. They are also an essential predicate to enabling companies to take remedial action and to formulate defenses, where appropriate. But internal investigations no longer have clear and predictable protections of confidentiality in the current environment, viewed as a "culture of waiver."[12]

Following significant criticism by business organizations and bar associations, these principles were superseded in 2006 by the so-called McNulty Memorandum.[13] The McNulty Memorandum reaffirms many of the factors to be considered by federal prosecutors when conducting corporate investigations and deciding whether to indict corporations or considering corporate plea agreements, but places some procedural restrictions and additional procedural reviews on prosecutors regarding their ability to request waivers of corporate attorney-client privileges or work-product

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11 Joint Drafting Committee of the American College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations* (March 2002), *available at* http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=68.

12 "The Decline of the Attorney-Client Privilege in the Corporate Context," Survey Results, Presented to the United States Congress and the United States Sentencing Commission, March 2006, http://www.nacdl.org/public.nsf/whitecollar/wcnews024/$FILE/A-C_PrivSurvey.pdf, and http://www.acca.com/public/attyclntprvlg/coalitionussctestimony031506.pdf ("Survey Results").

13 *See* Principles of Federal Prosecution of Business Organizations (December 12, 2006) (the "McNulty Memorandum"), *available at* http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf

protections.[14] [15] Despite these additional restrictions and reviews, there is little practical difference between the McNulty Memorandum and its predecessors: all maintain the position that waivers of the privilege and work product protections will be bases for favorable treatment of corporations and thus will still provide significant motivation for defense attorneys zealously representing their corporate clients to offer waivers without prosecutors having to ask. Since the main focus of both DOJ Memoranda is an evaluation of how the DOJ evaluates the "authenticity of a corporation's cooperation with a government investigation," including waivers, the McNulty Memorandum will still provide significant motivation for defense attorneys zealously representing their corporate clients to offer waivers without prosecutors having to ask.

In 2001, the SEC announced its own cooperation policy when it decided to take no action against Seaboard Corporation despite evidence that its former controller had caused the company's books and records to be inaccurate and its financial reports misstated. The Commission outlined thirteen factors it would consider in determining cooperation.[16]

In 2006, the SEC updated its standards for imposing civil penalties on corporations.[17] As explained in the Commission's Statement,

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14 The McNulty Memorandum lists nine factors that "prosecutors must consider…in reaching a decision as to the proper treatment of a corporate target":
(1) the nature and seriousness of the offense including the risk of harm to the public and any policies and priorities relating to the particular categories of crime;
(2) the pervasiveness of wrongdoing within the business organization including complicity in or condonation of the wrongdoing by management;
(3) the history of similar conduct within the company including prior criminal, civil and regulatory enforcement actions against the company;
(4) the timely and voluntary disclosure of wrongdoing and the company's willingness to cooperate in the investigation of its own agents;
(5) the existence and adequacy of the company's pre-existing compliance program;
(6) the company's remedial actions, including efforts to implement an effective compliance program or improve an existing one, efforts to replace responsible management, efforts to discipline or terminate wrongdoers, efforts to pay restitution, and efforts to cooperate with government agencies;
(7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable, and impact on the public arising from the prosecution;
(8) the adequacy of the prosecution of individuals who are responsible for the corporation's malfeasance; and
(9) adequacy of civil, regulatory enforcement actions or other remedies. *Id*.

15 We note also that as this paper is being published, Congress is considering the "Attorney-Client Privilege Protection Act," which would impose a bar on federal investigations requesting companies to waive privilege or to refuse to advance fees (H. 3013, passed by the U.S. House of Representatives on November 13, 2007; S.186, now before the U.S. Senate Judiciary Committee).

16 *Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions*, Release No. 44969, Oct. 23, 2001, *available at* http://www.sec.gov/litigation/investreport/34-44969.htm.

17 Statement of the Securities and Exchange Commission Concerning Financial Penalties, January 4, 2006, *available at* http://www.sec.gov/news/press/2006-4.htm; *see also* Litigation Release No. 19520, January 4, 2006, *SEC v. McAfee, Inc.*, Civil Action No. 06-009 (PJH) (N.D. Cal. 2006); *see also* Baker and Holbrook, "SEC Statement Clarifies Corporate Penalties – A Bit," National Law Journal, March 13, 2006.

> "whether, and if so to what extent, to impose civil penalties against a corporation… turns principally on two considerations: The presence or absence of a direct benefit to the corporation as a result of the violation…[and] [t]he degree to which the penalty will recompense or further harm the injured shareholders."
>
> Several additional factors the Commission will take into account include:
>
> (1) The need to deter the particular type of offense;
> (2) The extent of injury to innocent parties;
> (3) Whether complicity in the violation is widespread throughout the corporation;
> (4) The level of intent on the part of the perpetrators;
> (5) The degree of difficulty in detecting the particular type of offense;
> (6 Presence or lack of remedial steps by the corporation;
> (7) Extent of cooperation with the Commission and other law enforcement agencies.

Despite the DOJ memoranda and SEC guidance discussed above, in most cases, the precise benefits of the Company's cooperation, if any, cannot be known at the outset of an investigation. Indeed, many companies that have cooperated with the government have received stiff financial penalties, albeit perhaps lower than if no cooperation had been proffered.[18] In the area of enforcement of the Foreign Corrupt Practices Act, Assistant Attorney General Alice Fischer has stated that, although not in the "best interests of law enforcement to make promises about lenient treatment in cases where the magnitude, duration, or high-level management involvement in the disclosed conduct may warrant a guilty plea and a significant penalty,…there is *always a benefit* to corporate cooperation, including voluntary disclosure, as contemplated by the Thompson memo. …*[I]f you are doing the things you should be doing* – whether it is self-policing, self-reporting, conducting proactive risk assessments, improving your controls and procedures, training on the FCPA, or *cooperating with an investigation* after it starts – *you will get a benefit*. It may not mean that you or your client will get a complete pass, but *you will get a real, tangible benefit*" (emphasis added).[19] While the number of DOJ-deferred prosecution or non-prosecution agreements has increased recently, many corporations and their counsel continue to believe that the benefits of cooperation have not been tangible and have, with certain DOJ divisions and sections or U.S. Attorney offices, been far too unclear. Some companies, after due consideration, have decided, in the face of a grand jury subpoena or allegation of wrongdoing, neither to conduct an internal investigation nor to cooperate with government authorities.

Signally, the Antitrust Division has a very clear standard – that parties who cooperate fully receive amnesty and reduced civil penalties. The Antitrust Criminal Penalty Enhancement

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18 For a discussion of the Securities and Exchange Commission's response to cooperation through the end of 2004, *see* Tim Reason, *The Limits of Mercy: The Cost of Cooperation with the SEC is High. The Cost of Not Cooperating is Even Higher*, CFO Magazine, April 2005, *available at* http://www.cfo.com/article.cfm/3804652/c_3805512?f=magazine_featured.

19 Prepared Remarks of Alice S. Fisher at the ABA National Institute on the Foreign Corrupt Practices Act, October 16, 2006, *available at* http://www.usdoj.gov/criminal/fraud/docs/reports/speech/2006/10-16-06AAGFCPASpeech.pdf.

and Reform Act, adopted in 2004, increases the criminal penalties for violations, but also increases the incentives for self-reporting and cooperation in criminal antitrust matters. Corporations and individuals reporting their involvement in antitrust violations may receive immunity from the DOJ's Antitrust Division under its leniency program, insulating successful applicants from criminal fines and imprisonment. The legislation thus creates strong incentives for antitrust violators to be the first to self-report their violations and thus insulate themselves from criminal prosecution, though not from the likely civil litigation to follow.[20] In a statement issued after the bill was signed into law, Assistant Attorney General for Antitrust R. Hewitt Pate stated that the Act would make the DOJ's Corporate Leniency Program "even more effective."[21]

As emphasized in the College's 2002 report *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*,[22] the attorney-client privilege and work product doctrine play a central role in corporate governance and remain essential to the due administration of the American criminal justice system. A waiver of these protections should not be taken lightly. This paper assumes that while a company, board, or audit or independent committee will consider, first and foremost, whether and how to conduct an internal investigation so as to protect the interests of the company and its stakeholders, it will also be cognizant of the importance of the attorney-client privilege and work-product protections in our society. (See also footnote 15, preceding.)

C. The Role of the Board and Management in Conducting and Overseeing the Investigation

The relative participation of management and the Board in an internal investigation is a function principally of the nature of the allegations. Where the alleged or suspected conduct involves senior officers or serious employee misconduct, or where the corporate entity is the focal point of a government inquiry, it is important that management, including usually the General Counsel's office, not be, and not be perceived to be, in charge of the internal investigation. An investigation carried out by management, or a corporate department (such as an internal audit department), likely will not be afforded credibility. Furthermore, the continuing involvement in the conduct of the investigation by board members and officers whose conduct is at issue may taint the ability to preserve the privilege as well as the appearance of impartiality.[23]

Rather, the Board of Directors should delegate the task of overseeing the conduct of the internal investigation and retaining counsel to conduct the investigation to the Audit Committee of the Board, the independent members of the Audit Committee, or alternatively, some group of independent Board members forming a Special Committee (hereinafter, jointly referred to as the "Independent Committee").

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20 H.R. 1086, 108th Cong., Title II, §201-221(2004). The benefits to the second, third or fourth cooperating company in Antitrust Division investigations are significantly less.

21 Press Release, Department of Justice, Assistant Attorney General for Antitrust, R. Hewitt Pate, Issues Statement on Enactment of Antitrust Criminal Penalty Enhancement And Reform Act of 2004 (June 23, 2004), *available at* http://www.usdoj.gov/atr/public/press_releases/2004/204319.htm.

22 http://www.actl.com/AM/Template.cfm?Section=All_Publications&Template=/CM/ContentDisplay.cfm&ContentFileID=68

23 *See Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007) (*Ryan I*); *Ryan v. Gifford*, 2008 Del. Ch. LEXIS 2 (Del. Ch. Jan. 2, 2008) (*Ryan II*).

D. Independent Outside Counsel Should Be Retained To Conduct Significant Internal Investigations

At least since the era of Enron, WorldCom, Adelphia, and other corporate scandals, government prosecutors, regulators,[24] and, increasingly, the Company's independent auditors, have looked askance at the choice of regular outside corporate counsel to conduct a sensitive inquiry. This skepticism is based on the fear that regular corporate counsel may have a motive to avoid criticizing, and thus alienating, senior management, the source of perhaps sizeable past and future law firm revenues. Regular counsel may also have given advice on matters related to the subject of the investigation and members of the firm may become witnesses in the internal, or subsequent external, investigation. Similarly, the government and outside auditors will likely be concerned that the Company's regular outside counsel's business and social familiarity with the Company's management or implicated directors will cause counsel to pull punches to avoid alienating friends. However, there may be select circumstances where regular outside counsel's knowledge of a corporation's business, special expertise, and distance from the core investigation issues and subjects permit it to conduct an objective investigation. In some cases, in fact, the government agency most interested in the investigation may agree in advance that regular counsel is the most viable choice to conduct the investigation so long as the objectivity of the effort is assured.

The Company is best served to portray itself to the government, its independent auditors, the investment community, and the media as having complete integrity and a commitment to uncovering the facts. Thus, choosing independent counsel with few if any prior ties to the Company ("Special Counsel")[25] has become commonplace and is generally regarded as the first step in convincing governmental authorities of the "authenticity" of its cooperation.[26] Such Special Counsel are perceived as not beholden to the Company and able to view facts in an objective manner, neither biased in favor of the Company or its management, nor, indeed, the governmental authorities.[27]

There are several consequences to the bias in favor of Special Counsel:

First, placing a higher value on the perception of independence than on the experience of existing counsel comes at a price: existing counsel's familiarity with the people and practices of the corporate client is lost, and the absence of such, while it might satisfy the perceptions

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24 *See* speech by SEC Commissioner Campos, "How to be an Effective Board Member," August 15, 2006, at http://www.sec.gov/news/speech/2006/spch081506rcc.htm ("…when circumstances indicate possible wrongdoing, the audit committee and the board should have their own independent advisors, investigators, and lawyers. As guided by Sarbanes-Oxley, the board and its committees should 'engage independent counsel and other advisors, as it determines necessary to carry out its duties' and should not rely exclusively on the corporation's advisors and lawyers").

25 The term "Special Counsel" is used in the same sense as the term "independent counsel" is generally used by other authors and papers. In our view, counsel that have been used occasionally by companies for individual matters should not be precluded from being selected as Special Counsel; rather, we recommend that whatever counsel is chosen, such firm not have had a substantial prior relationship with the Company.

26 Bennett, Kriegel, Rauh, and Walker, "Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era," 62 Bus.Law.55, 57 (Nov. 2006)(hereinafter, "Bennett").

27 Indeed, some firms have specialized in the conduct of internal investigations, at the possible risk that such consistent conducting of internal investigations may tend to align the Special Counsel regularly with the interests of the regulators, rather than the Company and its shareholders.

of the regulators and independent auditors, could well cause a consequential cost increase to the public company and its shareholders.[28]

Second, the bias sometimes results in the self-perception that Special Counsel are hired in order to find wrongdoing and thus to justify the Special Committee's judgment that wrongdoing may have occurred. In this regard, it is incumbent on the Independent Committee, as well as the Special Counsel, to ensure that the Special Counsel mandate is to investigate the validity of the allegations and not to ferret out some perceived concerns for the sake of justifying what inevitably is the significant cost of the investigation.

It should be the goal of the Independent Committee, in seeking to determine the truth of the underlying allegations, to safeguard and act in the best interests of the shareholders, as well as to prevent the internal investigation from impairing the reputations of employees, officers, and directors of the Company not found to have engaged in wrongdoing. To those ends, Special Counsel should be instructed to engage in investigative tactics designed to get at the truth, including using their investigative, technological, and professional capabilities.

The Independent Committee should be aware that Special Counsel, left unchecked, could succumb to the abuses that are an occupational hazard of special prosecutors as described by then-Attorney General Robert Jackson, and cited by Justice Scalia:

> If the prosecutor is obliged to choose his case, it follows that he can choose his defendants. Therein is the most dangerous power of the prosecutor: that he will pick people that he thinks he should get, rather than cases that need to be prosecuted. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In [such cases], it is not a question of discovering the commission of a crime and then looking for the man who has committed it, it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him.[29]

Third, in the current and foreseeable regulatory environment, the findings of Special Counsel are more likely to be credited by prosecutors, regulators, or private counsel (*e.g.*, when justifying settlement of a class or derivative lawsuit) if the Special Counsel is independent – *i.e.*, without a substantial prior relationship with the company or its senior management.

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28 *See* announcement by Dell Corporation of the cost of $135 million to it in retaining Special Counsel and forensic accountants to investigate issues resulting in a restatement of net income for 2003 through 2005 of between $50 and $150 million on total net income of $12 billion for that period. According to the Form 8-K, the investigation was done by 125 lawyers from Special Counsel and 250 accountants who conducted 233 interviews of 146 Dell employees and reviewed 5 million documents. *See* http://www.sec.gov/Archives/edgar/data/826083/000095013407018421/d49260e8vk.htm.

29 R. Jackson, The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys, April 1, 1940, quoted in *Morrison, Independent Counsel v. Olson, et al.*, 487 U.S. 654 (1988) (Scalia, J., dissenting).

E. The Independent Committee and Special Counsel Should Determine The Appropriate Scope of the Inquiry and the Rules of the Road

The Board should pass a resolution broadly authorizing the Independent Committee to retain counsel and their agents (e.g., auditors or other experts), conduct an investigation, and report its ultimate findings to the Board. The Independent Committee should retain the Special Counsel in writing. Special Counsel's retention letter should state the allegations under review and the scope of the inquiry, and make clear that Counsel is to advise the Independent Committee of its legal rights and obligations, as well as potential liabilities. Absent a conflict, the general counsel or regular outside counsel will advise the Company of its related rights and obligations and liabilities. The scope of the Special Counsel's engagement can be expanded in appropriate circumstances, and that expansion should also be confirmed in writing by the Independent Committee.

The scope of Special Counsel's mandate as set forth in the retention letter should be determined by the Independent Committee, in consultation with the Board, and state whether the Committee shall act for the Board or investigate and report to the Board for action. In defining the scope of the investigation, the Independent Committee must decide whether to provide Special Counsel at the outset with a broad mandate to find any and all suspected corporate wrongdoing, or a narrower mandate, at least at the outset, to examine only specific allegations or suspicions. In the latter case, Special Counsel should reassess with the Independent Committee whether additional suspicions should form the basis for a separate investigation by this or other Special Counsel or by regular counsel.

The Independent Committee and Special Counsel should also agree upon specific reporting procedures and protocols for documenting the investigation (such as the designation of all communications with legends such as "ATTORNEY-CLIENT PRIVILEGED" and, where applicable, "ATTORNEY WORK PRODUCT"). The goal at the outset should be frequent updating by oral reporting. Careful consideration should be given to the extent to which written reports should be rendered, if at all, during or at the conclusion of the inquiry. There is typically limited utility and great risk in creating interim written reports of investigation. Such interim reports run the risk of creating confusion and credibility issues, as well as potential unfairness to officers or employees who are the subjects of the investigations, if facts discovered in the latter part of the investigation are inconsistent with preliminary factual determinations or interim substantive findings.

The Board of Directors, in consultation with the Independent Committee, should also determine whether and to what extent Special Counsel may waive the Company's attorney-client privilege or its own work product protections in its dealings with regulators or other third

parties.[30] We question whether there are any circumstances where Special Counsel, either on its own or with the authority of the Independent Committee, but without specific authority from the Board of Directors, should waive the Company's attorney-client privilege. We recommend that the Special Counsel not be given the authority to make such waiver decisions without prior full deliberation by the Independent Committee and the full Board, with the latter being encouraged to take advice from regular or other counsel on this decision.[31]

Nor should Special Counsel be allowed to condition its retention by the Independent Committee upon a pre-retention decision by the Independent Committee to waive all privileges. Furthermore, the engagement letter for Special Counsel should make clear that Special Counsel's work product, data, and document collection and analysis belong to the Independent Committee and the Company, not to Special Counsel, and should be returned to the Independent Committee and Company upon completion of the investigation, for possible use by the Company in its defense of possible third party or government claims.

There are times when it is far more efficient in terms of both cost and time for an outside expert to assist Special Counsel in the course of its investigations. Under Sarbanes-Oxley, the Audit Committee (which may well be functioning as the Independent Committee) has the authority to retain expert assistance in the course of an investigation.[32] The Independent Committee should exercise that authority by permitting Special Counsel to retain additional professionals, including forensic auditors, investigators, and public relations advisers, where necessary and with appropriate consultation with the Committee.

The choice of a particular expert and the manner in which it is retained are critical junctures in an investigation. In order to protect the attorney-client privilege and general confidentiality of communications between Special Counsel and its additional professionals, it is not advisable to choose professionals who also regularly or generally are employed by the Company to perform similar services, unless a very convincing case can be made that the Special Counsel's professionals are different and separated from the Company's regular professionals. In some situations, Special Counsel have conferred with prosecutors and regulators and obtained the prior approval of experts well-known to the company.

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30 *See In re Qwest Communications International Inc. Securities Litigation*, 450 F.3d 1179 (10 Cir. 2006), in which the Court held that a company's turning over to the SEC and DOJ of internal investigative documents, pursuant to a confidentiality agreement, constituted a waiver of the attorney-client and work product privileges, and rejected the doctrine of "selective waiver" or "limited waiver." See also *U.S. v. Reyes,* 2006 U.S. Dist. Lexis 94456 (N.D. Cal. Dec. 22, 2006), holding that investigating counsel's oral report to DOJ and SEC summarizing otherwise privileged internal investigation interviews created a waiver, and rejecting the concept of "selective waiver." In connection therewith, the Judicial Conference of the United .States proposed and the U.S. Senate Judiciary has reported favorably to the Senate for a floor vote S. 2450, which would enact new Rule 502 of the Federal Rules of Evidence, placing, *inter alia*, new restrictions on waivers of the attorney-client privilege, such as limitations on the scope of a waiver and inadvertent disclosure and new procedures on the effectiveness of confidentiality orders. See http://www.uscourts.gov/rules/index2.html#sen502. Notably, however, the Judicial Conference did not recommend and the Senate Judiciary Committee did not adopt any version of the "selective waiver" doctrine.

31 We note the possibility that Special Counsel may unintentionally induce an inadvertent waiver of the corporate attorney-client privilege if there are communications by Company's officers or Board members directly with Special Counsel, rather than through the Independent Committee. See *Ryan v. Gifford*, 2007 WL 4259557 (Del. Ch. Nov. 30, 2007) (*Ryan I*); see generally, Gregory P. Joseph, "Privilege Developments I," The National Law Journal, February 11, 2008. However, the confines of this paper do not allow for analysis and recommendations with respect to this circumstance.

32 15 U.S.C. 78f(m)(5) ("AUTHORITY TO ENGAGE ADVISERS- Each audit committee shall have the authority to engage independent counsel and other advisers, as it determines necessary to carry out its duties.")

Experts should sign retention agreements that make clear their engagement is in contemplation of providing assistance for legal advice. Conclusions of independent experts also improve the appearance to outsiders (*i.e.*, government agencies and auditors) that the investigation is in fact independent.

F. Communications to, and Indemnification of, Company Employees

Numerous management and employee morale issues will likely arise during the course of an internal investigation, especially where long-standing practices or the conduct of senior employees are under investigation. These issues should be addressed promptly by the Independent Committee, usually by a memorandum to all affected employees to keep employees abreast of general information about the purpose and expected length of the inquiry, the expectation of the Audit Committee that all employees will cooperate with the inquiry and with Special Counsel, and the need to preserve all data related to the investigation.

Importantly, the Independent Committee should explicitly communicate what constitutes "cooperation" of an employee during an internal investigation, and that an employee's refusal to cooperate in this regard may result in dismissal. In most circumstances, the cooperation of employees should include: (1) the provision, upon request, of all documents related to company business whether kept in the employee's office, home, or personal computer; (2) strict compliance with all document hold and retention notices; and (3) submission to interviews by Special Counsel.[33]

The Independent Committee should make an early determination of the extent to which employees of the Company will be authorized to retain separate representation by counsel whose fees will be advanced or indemnified, either through existing indemnification policies or new policies designed for the scope of the internal investigation (a decision that is largely governed by state law and the entity's bylaws). The Company should give consideration to distributing a memorandum to employees notifying them of the nature of any prospective investigation, the possible need for witness interviews, the Company's ability to recommend counsel for individual employees, the possibility that the Company will be responsible for advancing fees and expenses for the employee's representation, and the absolute requirement that any employee being interviewed tell the truth to Special Counsel.[34]

Whether to indemnify or advance legal fees (and the scope of any such indemnification or advancement) to employees has become a significant area of controversy under the

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33 We distinguish the situation where an employee must cooperate fully with an internal investigation, including making himself available for an interview , or be subject to employment sanctions including possible discharge, from the situation where an employee invokes constitutional protections under the Fifth Amendment not to testify before a governmental body. In the latter situation, we do not think it appropriate for a Company to sanction the employee's invocation of constitutional rights by penalty or discharge. Nor, importantly, do we think it appropriate for governmental bodies to consider a corporation non-cooperative if it does not discharge or sanction an employee who invokes such protections, see *infra* at 22. We note the observation of the U.S. Supreme Court in *Slochower v. Board of Higher Education*, 350 US 551, 557-58 (1956) that ". . . a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who might otherwise be ensnared by ambiguous circumstances..." and do not think a Company should be in any way penalized for respecting an employee's invocation of such constitutional right.

34 *See Bennett*, at 65.

Thompson Memorandum and will likely continue to be under the McNulty Memorandum.[35] Under the Thompson Memorandum, in making charging decisions with respect to entities, prosecutors were required to consider whether the entity was supporting "culpable employees and agents . . . through the advancing of attorney's fees."[36] In June 2006, just months before the Department of Justice issued revised guidelines through the McNulty Memorandum, a district court in the Southern District of New York held this provision of the Thompson Memorandum unconstitutional in connection with the government's prosecution of several former KPMG employees for participation in the creation of allegedly fraudulent tax shelters.[37] In that case, the court held that the government's exertion of pressure on KPMG to refuse to advance legal fees for certain of its former employees violated those employees' Fifth and Sixth Amendment rights.[38]

In response, the McNulty Memorandum softened the DOJ's guidance. Under the McNulty Memorandum, federal prosecutors "*generally* should not take into account whether a corporation is advancing attorneys' fees to employees or agents under investigation and indictment;" but may take indemnification of employees into account in "extremely rare cases" in which "the totality of the circumstances show[s] that [the advancement of fees] was intended to impede a government investigation."[39] It is yet unclear whether a federal prosecutor's invocation of this aspect of the McNulty Memorandum in "extremely rare" circumstances would survive constitutional challenge. (Judge Kaplan's initial holdings with respect to the broader provisions of the Thompson Memorandum are currently before the Second Circuit.) It is also not clear the extent to which provisions of the McNulty Memorandum dealing with corporations' waiving the applicable privileges or not denying indemnity to employees under investigation are actually being followed by the line Assistant U.S. Attorneys, by whom most investigations are being conducted.[40]

As a general matter, the SEC for its part has generally not considered, and in our view should not consider, whether an entity has chosen to indemnify or advance legal fees

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35 *See generally*, *United States v. Stein*, 435 F.Supp.2d 330 (SDNY 2006); *see also United States v. Stein* 452 F. Supp. 2d 230 (S.D.N.Y. 2006), *vacated by Stein v. KPMG* LLP) 486 F.3d 753 (2d Cir. 2007); *United States v. Stein*, 488 F.Supp.2d 350 (S.D.N.Y. 2007); *see also SEC v. Lucent Technologies*, Litigation Release No. 18715 / May 17, 2004, *available at* http://www.sec.gov/litigation/litreleases/lr18715.htm (Lucent fined $25 million for non-cooperation in that, *inter alia*, after reaching an agreement in principle with the staff to settle the case, and without being required to do so by state law or its corporate charter, Lucent expanded the scope of employees who could be indemnified against the consequences of the SEC enforcement action and failed over a period of time to provide timely and full disclosure to the staff on a key issue concerning indemnification of employees.)

36 *Thompson Memorandum, supra* n. 8, at 7-8.

37 435 F. Supp. 2d at 365-69.

38 *Id.* at 356-360.

39 *Id*. at 360-365.

40 In a survey conducted in 2007 by the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers, corporate members were contacted via email and invited to participate confidentially in a survey to determine whether there had been or continued to be instances of prosecutorial abuse in the coercion of the waiver of their clients' attorney-client privilege or work product protection or denial of the rights to counsel or job security protections for their employees in the corporate investigation process. In a report to the U.S. Senate Judiciary Committee by the former Chief Justice of the Delaware Supreme Court, E. Norman Veasey, numerous instances of such coerced waivers and other abuses were cited, including several where Assistant U.S. Attorneys either did not know of the McNulty Memorandum, or were unfamiliar with its modifications of prior Department of Justice Practices. *See* Letter to Senate Judiciary Committee, dated September 13, 2007, *available at* http://www.abanet.org/poladv/abaday07/acpresources.html

for its employees or former employees, in determining whether the entity has been sufficiently "cooperative." (However, in 2004, the SEC took action against Lucent in part because the company "expanded the scope of employees that could be indemnified against the consequences of this SEC enforcement action," after it had reached "an agreement in principle with the staff to settle the case, and without being required to do so by state law or its corporate charter."[41]) The SEC has explicitly barred settling parties from recovering penalty payments through indemnification agreements. This policy, adopted in 2004 to purportedly "enhance deterrence and accountability," "require[s] settling parties to forgo any rights they may have to indemnification, reimbursement by insurers, or favorable tax treatment of penalties."[42] We question whether such a policy is fair to employees who may have engaged in what the SEC perceives as wrongdoing but did not do so as so-called "rogue" employees, but rather in furtherance of what they may have mistakenly believed was corporate policy. We also question what legitimate interest the SEC or, for that matter, any agency of the government has in interfering in any way with a corporation's legal right to pay the legal fees and expenses of past and present employees in defense of an investigation, trial, or appeal; with the exception of making payments for the purpose of the employee's committing acts of obstruction of justice by, for example, destroying documents, threatening witnesses, or suborning perjury.

Based upon the treatment by the SEC and the courts of indemnification and advancement of fees issues, we recommend that Independent Committees adopt a written policy at the outset of an internal investigation regarding the scope of indemnity and advancement that will be followed, presumably in adherence to its by-laws, applicable state laws, and other corporate and regulatory governance policies. The policy should include the possibility that, at the outset, the Independent Committee could desire to expand the scope of indemnity to include employees who might not be covered by the by-laws but are likely witnesses, subjects or targets of the inquiry, as well as independent contractors or acting officers of companies or their subsidiaries who perform important executive functions but are not literally within the company's standard indemnity policies. It is not recommended that, to curry favor with the regulators or governmental authorities, those individuals performing such functions be excluded from indemnification or advancement.

III. Creating an Accurate Factual Record: Document Review & Witness Interviews

Given the attention being given by prosecutors and regulators to document preservation and production, the expedient collection and review of relevant documents, and interviewing of relevant witnesses, are principal steps in ensuring an accurate factual record.

A. Mechanics of a Litigation Hold

At the outset of an investigation, counsel (likely Special Counsel in collaboration with regular or internal counsel) should identify the universe of documents that must be *preserved*,

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41 *"Lucent Settles SEC Enforcement Action Charging the Company with $1.1 Billion Accounting Fraud,"* http://www.sec.gov/news/press/2004-67.htm. ("Companies whose actions delay, hinder or undermine SEC investigations will not succeed," said Paul Berger, Associate Director of Enforcement. "Stiff sanctions and exposure of their conduct will serve as a reminder to companies that only genuine cooperation serves the best interests of investors.")

42 Speech by Stephen Cutler, Director of Division of Enforcement, 24th Annual Ray Garrett Jr. Corporate & Securities Law Institute, April 29, 2004, http://www.sec.gov/news/speech/spch042904smc.htm.

as opposed to the universe of documents that must be *collected*. Counsel should not send a blanket email request that all relevant documents be forwarded to a central source.

The first step should be the identification of all relevant employees who are the likely sources of documents; preliminary interviews should be conducted by regular outside counsel and internal counsel to determine such relevant employees. Then, internal counsel should send an email direction to relevant employees stating, in essence, that no documents, including electronic documents and attachments, may be destroyed without explicit approval of counsel, see *infra*.

Third, regular counsel should engage in an analysis of relevant documents to determine if others should be included in the "litigation hold." This is especially important when the organization affected by the internal inquiry is in many disparate locations. For electronic documents, this may include communicating with the "key players" to learn how they stored information. Because of the amendments to the Federal Rules of Civil Procedure pertaining to e-discovery that went into effect on December 1, 2006, internal counsel should already have prepared and have available guides to all sources of "electronically stored information" in the Company, *see* Rule 16(f), and should be prepared to institute a litigation hold on all such materials.[43]

External counsel should oversee compliance with a litigation hold, using reasonable efforts to continually monitor the party's retention and production of relevant documents.[44] Once the relevant documents are obtained, all documents should be logged in the same way that one would during traditional litigation. A revised document storage and retention policy should be established as early as possible following the collection of relevant documents. This should involve the segregation of relevant backup electronic media, which in some cases may necessitate counsel's taking physical possession of backup tapes.[45]

As with traditional litigation, care should be taken to avoid over- or under-production during discovery. Over-producing data, especially in light of the volume of electronic media, can greatly drive up fees without yielding additional relevant data. An even greater risk of over-production or uncontrolled production is the waiver of privilege, which can result when documents are produced in their native application formats without care being taken to reveal metadata or

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43 Among the varieties of electronically stored information, or "ESI," is one particular type called "metadata," defined by one Federal Magistrate Judge, as "(i) information embedded in a ESI in Native File [the electronic format of the application in which such ESI is normally created, viewed and/or modified] that is not ordinarily viewable or printable from the application that generated, edited, or modified such Native File; and (ii) information generated automatically by the operation of a computer or other information technology system when a Native File is created, modified, transmitted, deleted or otherwise manipulated by a user of such system." Suggested Protocol for Discovery of Electronically Stored Information, *In re Electronically Stored Information*, U.S.D.C., D.Md (Magistrate Judge Paul Grimm)(2007), *available at* http://www.mdd.uscourts.gov/news/news/ESIProtocol.pdf at pgs. 2-3. Metadata has provided Special Counsel with the ability to view drafts of documents and emails, including electronic information concerning the creation, formation, editing of such document, as well as the author or viewer of such edits and the dates of creation and viewing.

44 *See Zubulake v. UBS Warburg*, 2004 WL 1620866 (S.D.N.Y. July 20, 2004) ("Zubulake V"). *See also Telecom International Am. Ltd. V. AT&T Corp.*, 189 F.R.D. 76, 81 (S.D.N.Y. 1999) ("Once on notice [that evidence is relevant], the obligation to preserve evidence runs first to counsel, who then has a duty to advise and explain to the client its obligations to retain pertinent documents that may be relevant to the litigation") (citing *Kansas-Nebraska Natural Gas Co. v. Marathon Oil Co.*, 109 F.R.D. 12, 18 (D.Neb. 1983)).

45 *In re Electronically Stored Information*, *supra* n. 41, at 10.

maintain relationships between attachments and emails. Under-production and spoliation during the discovery process may result in sanctions ranging from adverse inference instructions[46] to default judgments because of counsel's insufficient actions[47] to monetary fines.[48]

B. Document Collection & Review

Document collection is usually accomplished by the Company's regular outside and internal counsel, and then review of the documents and interviewing of witnesses by Special Counsel. The relevant universe of hard-copy and electronic documents must be identified and collected as early as possible in the investigative process, even before Special Counsel is retained, so that all available information will be preserved and there will be a sufficient factual background to identify relevant witnesses and conduct efficient interviews by asking the appropriate questions and being able to refresh witnesses' recollections.

Inside counsel and internal technology experts can be particularly helpful in identifying processes and sources of documents, and in coordinating the document collection process; each should play a major role in supervising the gathering, production, and preservation of documents, including electronic documents. However, once the Independent Committee has been appointed and Special Counsel retained, we recommend that the function of document analysis should be that of the Special Counsel and retained technology professionals to retrieve, host, and analyze electronic and hard documents. Internal technology professionals should be used only in those circumstances in which the Company has a sufficiently sophisticated staff that is trained in issues that may become critical in a subsequent litigation (*i.e.*, chain of custody) or in a government investigation (*i.e.*, the preservation of metadata).

C. Witness Interviews

After relevant documents are reviewed (assuming time permits), Special Counsel should identify the relevant witnesses and begin conducting the interviews. Investigating lawyers should be aware that they could become witnesses in a criminal or civil procedure where an issue arises as to what statements a witness made to them during the investigation. In certain cases, such as when the scope of the issues are unclear, it may make sense for Special Counsel to begin the interview process before all relevant documents can be digested. Careful consideration should be given as to who should attend each interview both for reasons of obtaining objective responses and for ensuring the appearance of obtaining objective responses. Whether inside counsel should be present during the employee interviews is an issue that should receive special attention. The risks of having internal counsel present at the interview include inadvertently chilling the employee's ability to be forthcoming and having the employee incorrectly perceive that she is represented personally

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46 *See In Re Seroquel Products Liability Litigation,* 244 F.R.D. 650 (M.D.Fla., Aug. 21, 2007) (granting in part a motion for sanctions against the defendant for failure to produce the discovery in usable format).

47 *See Metropolitan Opera Assoc., Inc. v. Local 100, Hotel Employees & Restaurant Employees International Union*, 212 F.R.D. 178, 222 (S.D.N.Y. 2003).

48 *See In the Matter of Banc of America Securities LLC*, Admin. Proc. File No. 3-11425, Mar. 10, 2004, *available at* http:// www.sec.gov/litigation/admin/34-49386.htm (fining Banc of America $10,000,000 for violating sections 17(a) and 17(b) of the Exchange Act for failure to produce documents during a Commission investigation).

by the internal counsel. It may also inadvertently trigger concerns by external auditors or regulators that inside counsel may herself be a potential wrongdoer, and thus inappropriately present when interviews are being conducted. At the very least, the issue should be thoroughly vetted with the Independent Committee before inside counsel takes a seat at the investigating table.

In some instances, it may be necessary for the Company to hire separate legal counsel for employees who are being interviewed that may have — or may appear to have — interests adverse to the Company. However, depending upon the Company's by-laws, it should not be necessary to retain such counsel until such adversity becomes sufficiently clear, or until an employee makes a reasonable request for separate counsel. An employee may on her own choose to seek the advice of counsel and ask that counsel be present for the interview. Absent exigent circumstances, *e.g.*, the need to immediately conduct interviews in order to qualify for corporate amnesty under Antitrust Division Corporate Leniency Program, a company should not refuse to grant such a request for counsel. However, as indicated earlier, an employee should be advised that his failure timely to cooperate – which includes fully submitting to interviews by Special Counsel – may result in adverse employment consequences including dismissal.

Special Counsel should be especially wary of the situation that arises frequently in the course of an internal investigation, when an employee who is otherwise without counsel is about to be interviewed and, before or as an interview is being conducted, asks whether she needs to consult counsel, or if she retains counsel, would the Company pay for such counsel. Special Counsel is best advised under these circumstances to remind the witness that he does not represent her and that if she wishes to speak to counsel, the Special Counsel would be willing to adjourn the interview for a reasonable time to allow such consultation, and, assuming that the Company's by-laws so allow, to consider the Company's indemnification of the employee's costs of counsel and advancement of fees and expenses.

As discussed above, advance preparation for such contingencies should include consultation with the Independent Committee at the outset of the engagement regarding the scope of the Company's obligations to indemnify and advance fees to categories of directors, officers, and employees.

The Independent Committee should also decide whether Special Counsel will agree with counsel for employees to make documents available to them for review before conducting interviews. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, other evidence of attempts to disrupt the integrity of the internal investigation, or an inability to retrieve and review voluminous documentation, Special Counsel generally should not interview witnesses before the witnesses have had a chance to review relevant documents. We specifically disapprove of Special Counsel's attempting to interview a witness who has not been given an adequate opportunity to refresh his recollection as to prior events by reviewing key hard or electronic documents, or Special Counsel's succumbing to pressure from prosecutors or regulators to attempt to do so, in an effort to trap a witness into a misstatement, which would otherwise not occur if the witness were properly refreshed with all relevant documents and electronic communications. This is particularly true since the government has indicted several executives in obstruction of justice cases

in recent years based on alleged misstatements to outside counsel during the course of an investigation.[49] Accordingly, before interviews of officers and employees, and whenever practical, Special Counsel should make available to counsel for employees the topics and documents that will be covered in the interview, and allow employees to obtain copies of their documentary files, including calendars and electronic data.

At the outset of the interview, in addition to providing an overview of the investigation and the purpose of the interview, Special Counsel should make very clear that (1) Special Counsel represents the Company (or the Independent Committee, as the case may be); (2) Special Counsel is not the employee's lawyer and does not represent the employee's interests separate from those of its own client; (3) the conversation is protected by the attorney-client privilege, but the privilege belongs to the Company; and therefore (4) the Company can choose to waive its privilege and disclose all or part of what the employee has told Special Counsel during the interview to external auditors, the government, regulators, or others. Employees also should be apprised of their rights and responsibilities if they are contacted by regulators or prosecutors and asked to subject themselves to an interview, including the ability, without employment sanction, to invoke constitutional rights.

In light of the position taken by the DOJ, as indicated above, that an employee can be indicted for obstruction of justice under 18 U.S.C. 1512, if she lies to private counsel conducting an internal investigation, where she knows that her statements may be shared with a government agency such as the SEC or DOJ conducting its own investigation, we recommend that Special Counsel advise employees at the outset of the interview whether the Company has made a decision to waive the attorney-client privilege and work product protections, or is likely to do so, and to disclose the memorandum of interview to governmental authorities. In recent years, the government has brought several such cases.[50] It should be anticipated that an employee, being so advised, would seek individual counsel and Special Counsel should be prepared to accommodate the request for an adjournment to seek such counsel.

The interviews should be memorialized in a manner consistent with the attorney work-product doctrine and the ultimate purpose of the investigation. A memorandum should be prepared by Special Counsel of the substance of each witness's interview as close in time to the interview as possible. Ultimate decisions on the contents of the memorandum of a witness's interview should be Special Counsel's. However, fairness, and the possible use of such memoranda in follow-up inquiries by Special Counsel, regulators, or prosecutors, causes us to recommend that counsel for witnesses be given reasonable opportunity to review the memoranda for substance and to recommend possible modifications (which Special Counsel may, but is not compelled to, adopt, especially where the recommended modifications are, in Special Counsel's opinion, contrary to what was stated at the interview) so as to avoid misstating or mischaracterizing a witness's statements and

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49 *See* text, *infra*, at n. 50.

50 *Id*.

to address adverse inferences that may be submitted in company proffers.[51] Special Counsel should consider reading, explaining the substance of, or showing a draft of the memorandum of interview of the witness to counsel for interviewed witnesses to review for accuracy but not to keep a copy thereof.[52]

In addition, if a final written report is to be prepared, we recommend that tentative conclusions as to witnesses' conduct should, as a matter of fairness and completeness, be shared with counsel for present or former employees whose conduct is under examination for possible correction, modification or explanation. Again, we do not suggest that Special Counsel is obligated to adopt any modification suggested, but rather only to give any suggestion whatever weight is in Special Counsel's opinion warranted under the circumstances.

The question of the extent to which, if at all, privileged and work-product protected material should be made available to the company's independent auditors, if, as would be expected, they so request, is highly complex.[53] There is little, if any, authority to support the view that dissemination of privileged information to an independent auditor does not create a waiver of the privilege. With respect to the production to external auditors of Special Counsel's work product prepared in anticipation of litigation, the decisions are inconsistent regarding whether doing so constitutes a waiver.[54] In the latter circumstance, we believe that entry into a written agreement with the independent auditor, acknowledging the confidentiality of the information shared and assuring that it will be held in confidence *might* be effective in some jurisdictions despite *Medinol*. However, under current case law, it is doubtful that any written confidentiality agreement with the independent auditor with respect to privileged material could prevent a waiver from being found. Notwithstanding

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51 *See U.S. v. Kumar, E.D.N.Y., DOJ News Release, September 22, 2004 ("*Former Computer Associates executives indicted on securities fraud, obstruction charges"), *available at* http://www.usdoj.gov/opa/pr/2004/September/04_crm_642.htm ("Shortly after being retained, the company's law firm met with [executives] in order to inquire into their knowledge of the practices that were the subject of the government investigations. During these meetings, the defendants … allegedly presented to the law firm an assortment of false justifications to explain away evidence of the 35-day month practice. The indictment alleges that [the defendants] … intended … that the company's law firm would present these false justifications to the U.S. Attorney's Office, the SEC and the FBI in an attempt to persuade the government that the 35-day month practice never existed").

52 We note the possible argument that disclosure to a witness or her counsel of the substance of a draft memorandum of interview or of tentative conclusions as to a witness's conduct may be deemed a waiver of the corporate privilege and perhaps Special Counsel's work product. We believe that risk of the success of such argument may be able to be mitigated by conditioning such limited disclosure upon the execution of a narrow "common interest" agreement between Special Counsel and counsel for the witness, premised upon the common interest that exists to prevent inadvertent factual errors and conclusions based thereon from being made by Special Counsel and the Independent Committee. See *Ryan v. Gifford I*, *supra* ("Under [the common interest] exception [to the attorney-client privilege],… for the communication to remain privileged even after its disclosure to others, the "others [must] have interests that are 'so parallel and non-adverse that, at least with respect to the transaction involved, they may be regarded as acting as joint venturers.'" *Saito v. McKesson HBOC, Inc.*, No. 18553, 2002 WL 31657622, at *4 (Del. Ch. Nov. 13, 2002) (citing *Jedwab v. MGM Grand Hotels, Inc.,* No. 8077, 1986 WL 3426, at *2 (Del. Ch. Mar. 20, 1986))."

53 See Brodsky, Palmer, and Malionek, "The Auditor's Need For Its Client's Detailed Information vs. The Client's Need to Preserve the Attorney-Client Privilege and Work Product Protection: The Debate, The Problems, and Proposed Solutions," http://www.abanet.org/buslaw/attorneyclient/publichearing20050211/schedule.shtml

54 *See Medinol, Ltd. v. Boston Scientific Corp.*, 214 F.R.D. 113 (S.D.N.Y. 2002) (holding that the disclosure of an internal investigation report to outside auditors waives both the attorney-client and work-product privileges, because the auditor's interests are not necessarily aligned with the corporation's interests). *But see Merrill Lynch & Co., Inc. v. Allegheny Energy, Inc.*, 2004 WL 2389822 (S.D.N.Y. 2004) (holding that the disclosure of internal investigation reports to outside auditors, while waiving the attorney-client privilege, does not waive the work product privilege because under the facts of the case the auditor and the corporation is not the equivalent of the type of tangible adversarial relationship contemplated by the work product doctrine).

the resulting dilemma to the Independent Committee and the Board of Directors, we believe there may well be circumstances where the independent auditor will insist that presentation of privileged material is a *sine qua non* for the certification of financial statements. Under those circumstances, a Board may have no choice but to authorize the delivery of such materials. However, we recommend that all other alternative courses of action be first explored with the independent auditors before such an outcome. We further recommend that Special Counsel be advised by the Board and Independent Committee at the outset of the engagement not to share information with the Company's external auditors without the written, fully informed consent of both the Independent Committee and the Company's Board. We recommend that the Board formally consider and decide the production and waiver issue before any steps leading to waiver are taken.

IV. Developing a Record of the Investigation

During the course of the investigation, we recommend that Special Counsel keep and continuously update a record of witnesses and documents examined, documents shown to witnesses, and issues being raised. We also recommend that the Independent Committee be regularly updated on the course of the investigation. Under certain circumstances, these updates, especially those being done in the early stages of an inquiry, should be made orally, because the possibility exists that preliminary information gathered or early conclusions formed may well prove to be inaccurate or incomplete; premature recording of such information or conclusions could well be prejudicial to the company as well as implicated employees. In particular, once the Special Counsel has conveyed early impressions to the Independent Committee (based on preliminary reviews of documents and early interviews), those impressions may, as a practical matter, prove embarrassing to modify or be impossible to eradicate from the minds of the Independent Committee.

Once the investigation has been completed, Special Counsel must report its findings, conclusions, and bases to the Board, the Audit Committee, or the Independent Committee, as the case may be. Careful and early consideration must be given to whether the ultimate form of the report will be written or oral, and the effect of preparing a report on issues concerning the corporate attorney-client privilege and work product protections. The form of the report and the nature of its preliminary dissemination should be analyzed because of the likelihood that some version of the report will likely make it into the hands of government authorities or plaintiffs' attorneys, resulting in the substantial risk of enhanced civil litigation against the Company, and the officers and directors. If the report is

to be written, careful consideration must be given to whether it will be posted on a website[55], and whether it will be turned over to prosecutors, regulators, and the independent auditor. [56]

Special Counsel should be careful to remind the governing body that the report's conclusions are ultimately that of the Independent Committee, not just Special Counsel, and that the Board members have fiduciary responsibilities to draw their own conclusions as to the evidence presented, and should not simply accept the conclusions as drawn by Special Counsel without a full understanding of the bases for such conclusions.

V. The External Investigation

A. Role of Special Counsel in Follow-on Investigations and Civil Litigation.

The Company may be tempted to use the services or work product of its Special Counsel in connection with its defense of external investigations and civil litigation. However, many experienced General Counsel and practitioners believe that Special Counsel should not be used as Company defense counsel, lest the independence of the Special Counsel be brought into question, and the legitimacy of the inquiry be compromised. We recommend that such follow-up inquiries be handled by counsel other than Special Counsel; otherwise, the view of Special Counsel as being independent of management will likely be dissipated, and external auditors, as well as regulators or prosecutors, are likely to disregard the work of such Special Counsel as being the product of bias.

B. Use of Work Product of Special Counsel

As to whether the documents and database accumulated by the Special Counsel may be utilized by Company or employee counsel to minimize expenses to the Company and maximize the speed of preparation, we recommend that, absent genuine regulatory concerns regarding possible obstruction of justice, such documents and databases should be available for that use, once stripped of the evidence of the internal thought processes of Special Counsel.

Among the more difficult issues facing Company counsel that has inherited such document depositary and work product is the extent to which such should be made available to counsel for present or former employees, who are likely also facing civil litigation and regulatory

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55 Posting a copy of an internal investigative report to the Independent Committee on a website or otherwise making it available to the public runs the risk of waiving both the protections of the work product doctrine and the corporate attorney-client privilege. *In re Kidder Peabody Securities Litigation*, 168 F.R.D. 459, 467, 469-70 (SDNY 1996) ("The decision to release the report appears, in retrospect, to have been virtually a foregone conclusion from the outset since this was a crucial aspect of Kidder's public relations strategy… In practical terms this means that Kidder's waiver by publication requires disclosure of those portions of the interview documents that are specifically alluded to in the [Special Counsel] report.")

56 *See Ryan v. Gifford,* 2007 WL 4259557 (Del. Ch. Nov. 30, 2007) (*Ryan I*), where it was held that delivery of a report by a special investigative committee, set up following the filing of a derivative action, to a Board of Directors consisting of several directors who were also named as defendants in the derivative action, constituted a full waiver of the privilege as to all communications between the committee and its counsel, including all correspondence between the special committee and its counsel, the investigation report, and all correspondence between the company and counsel to the special committee. Several unusual factors contributed to the finding of waiver. For example, because the directors were present at the committee's report in their personal, not fiduciary, capacities, the Court found the privilege had been waived, particularly as their personal attorneys were present and they used the committee's findings in their individual defenses. Furthermore, the special committee lacked sufficient authority to take action independent of the other board members.

investigations. Although outside the strict boundaries of this paper, we again believe that, absent genuine concerns about obstruction of justice, fairness dictates that such materials be made available on an individualized basis to such present or former employees, especially since it is likely that they have also been made available already to the Department of Justice, SEC, or other regulators.[57] Accordingly, we also recommend that the presumption be that the work product of Special Counsel such as witness interviews conducted by Special Counsel should be made available, on an individualized basis, to counsel for present or former employees, again, absent genuine concerns of obstruction of justice.

VI. Recommendations

1. An organization should take steps to consider an internal investigation when allegations have been lodged of significant corporate malfeasance or where an outside auditor gives notice that it suspects the possibility of illegal corporate activity. A Board of Directors, an audit, or a special committee may in select circumstances conclude that it is not in the best interests of the Company to investigate, disclose to, or cooperate with the government. In reaching the decision as to what is in the best interests of the shareholders, the Board, audit committee, or special committee may weigh and consider published prosecutorial and regulatory policies, related cases and dispositions, DOJ and/or SEC statements and the impact and costs of actual or anticipated litigation on the Company.

2. Where the alleged or suspected conduct involves senior officers or serious employee misconduct, or where the corporate entity is the focal point of a government inquiry, management, including usually the general counsel's office, should not be, and should not be perceived to be, in charge of the internal investigation.

3. A committee of the Board of Directors consisting of the independent members of the Board (the "Independent Committee") should be delegated the task by the Board of Directors of overseeing the conduct of the internal investigation when allegations have been lodged of significant corporate malfeasance or where an outside auditor gives notice that it suspects the possibility of illegal corporate activity and retaining counsel to conduct the investigation.

4. The goal of the Independent Committee should be to seek to determine the truth of the underlying allegations, to safeguard and act in the best interests of the shareholders, and to prevent the internal investigation from impairing the reputations of employees, officers, and directors of the Company not found to have engaged in wrongdoing.

5. The Board should pass a resolution broadly authorizing the Independent Committee to retain counsel and their agents, conduct an investigation, and report its ultimate findings to the Board. In order to preserve communications between the Committee and the Board as privileged, the Committee should have authority to take action independent of the Board.

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57 It should be noted that the Department of Justice is on record in at least one option backdating case that disclosure of witness interview memoranda of Special Counsel to counsel for derivative plaintiffs, and other parties, would constitute premature disclosure of the substance of testimony from potential Government witnesses and would facilitate efforts by subjects and potential criminal defendants to manufacture evidence and tailor their testimony and defenses to conform to the Government's proof. *In re UnitedHealth Group Shareholder Derivative Litigation*, USDC, D.Minn., Civil No. 06-1216JMR/FLN.

6. Outside counsel which has not had a substantial prior relationship with the Company and its senior management ("Special Counsel") should be retained to conduct significant internal investigations.

7. The Independent Committee should retain the Special Counsel in writing. Special Counsel's engagement letter should state the allegations under review, the scope of the inquiry, and make clear that Special Counsel is to advise the Company of its legal rights and obligations, as well as its potential liabilities.

8. The scope of the Special Counsel's engagement can be expanded in appropriate circumstances, and that expansion should also be confirmed in writing by the Independent Committee.

9. The Special Counsel should be instructed to engage in investigative tactics designed to get at the truth of the underlying allegations of wrongdoing, including using such investigative, technological, and professional techniques of which they are capable.

10. It should not be the goal of the Special Counsel, absent specific mandate from the Independent Committee, to investigate any perceived wrongdoing by corporate officers or employees wherever it may occur.

11. The Independent Committee and Special Counsel should also agree upon specific reporting procedures and protocols for documenting the investigation.

12. The Independent Committee should also determine whether and to what extent Special Counsel may waive the Company's attorney-client privilege or its own work product protections in its dealings with regulators or other third parties. The waiver of these protections is a major corporate decision that requires full and frank discussion of the benefits of these privileges and the impact of a waiver on prosecutorial, regulatory or parallel proceedings. In few, if any, cases, should Special Counsel be given the authority to make such waiver decisions on its own without prior full deliberation by the Independent Committee and the full Board, with the latter being encouraged to take advice from regular or other counsel on this decision.

13. Special Counsel should not be allowed to condition its retention by the Independent Committee upon a pre-retention decision by the Independent Committee to waive all privileges.

14. The engagement letter for Special Counsel should make clear that Special Counsel's work product, data, and document collection and analysis belongs to the Independent Committee and their Special Counsel, and upon completion of the investigation, may, in appropriate circumstances, be shared under the common interest privilege with the Company for possible use in its defense of third party or government claims. Any sharing of the materials with any director-defendants should be done only if it is clear those directors are acting in their fiduciary, not individual, capacities; to this end, their individual counsel should not be present and the directors should not use those materials in their individual defenses, or else the common interest privilege could be waived.

15. The Independent Committee should authorize the Special Counsel in writing to retain additional professionals, including forensic auditors, investigators, and public relations advisers, where necessary.

16. Experts should sign retention agreements that make clear their engagement is in contemplation of providing assistance for legal advice.

17. The Independent Committee should consider promptly addressing management and employee morale issues by a memorandum to all affected employees to keep employees abreast of general information about the purpose and expected length of the inquiry, and the expectation that all employees will cooperate with the inquiry and with Special Counsel.

18. The Independent Committee should explicitly communicate what constitutes "cooperation" of an employee during an internal investigation, and that an employee's refusal timely to cooperate in this regard may result in dismissal. In most circumstances, the cooperation of employees should include: (1) the provision upon request of all documents related to company business whether kept in the employee's office, home, or personal computer; (2) strict compliance with all document hold and retention notices; and (3) submission to interviews by Special Counsel.

19. At the outset of an investigation, the Independent Committee should adopt a written policy regarding the scope of indemnity and advancement to directors, officers and employees, or others affiliated with the Company, in adherence to its by-laws, other corporate governance policies or new policies designed for the scope of the internal investigation.

20. The Independent Committee should also consider, at the outset of an internal investigation, adopting a written policy expanding the scope of indemnity to include employees otherwise not covered by normal indemnification policies, and independent contractors or acting officers of companies or their subsidiaries who perform important executive functions but are not literally within the company's standard indemnity policies. The adoption of any expanded indemnification or advancement policy should be adhered to, once adopted, and not thereafter expanded to include those originally excluded, unless the scope of the investigation is altered.

21. The Independent Committee should give careful consideration to distributing a memorandum to affected employees notifying them of the nature of any prospective investigation, the possible need for witness interviews, the ability of the Company to recommend counsel for individual employees, the possibility that the Company will be responsible for advancing fees and expenses for the employee's representation, and the requirement that any employee asked to give an interview cooperate and tell the truth to Special Counsel.

22. External counsel should oversee compliance with a litigation hold, using reasonable efforts to continually monitor the party's retention and production of relevant hard-copy and electronic documents.

23. The relevant universe of hard-copy and electronic documents must be identified and collected as early as possible in the investigative process, even before Special Counsel is retained.

24. Special Counsel and retained forensic professionals should conduct document review and analysis of electronic and hard documents.

25. Assuming time permits, after review and analysis of documents, Special Counsel should identify the relevant witnesses and begin conducting the interviews.

26. At the outset of the interview, Special Counsel should advise each witness that (1) the Special Counsel represents the Independent Committee, (2) Special Counsel is not the employee's lawyer and does not represent the employee's interests; (3) statements made to the Special Counsel should be truthful; (4) the interview is protected by the attorney-client privilege, but the privilege belongs to the Company; and (5) the Independent Committee can unilaterally choose to waive its privilege and disclose all or part of what the employee has told Special Counsel during the interview to external auditors, the government, regulators, or others.

27. The Independent Committee and Special Counsel should give careful consideration as to whether inside counsel should attend witness interviews, with an eye to maximizing the possibility of obtaining objective responses and to ensuring the appearance of obtaining objective responses.

28. Special Counsel should advise employees at the outset of the interview whether the Company has made a decision to waive the attorney-client privilege and work product protections, or is likely to do so, and to disclose the memorandum of interview to governmental agencies such as the SEC or DOJ that is conducting its own investigation.

29. Special Counsel should tell witnesses at the outset of the interview that the Department of Justice has taken the position that an employee can be indicted for obstruction of justice under 18 U.S.C. § 1512, if he or she lies to private counsel conducting an internal investigation, where he or she knows that his or her statements may be shared with a government agency such as the SEC or DOJ that is conducting its own investigation.

30. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, other evidence of attempts to disrupt the integrity of the internal investigation or the unavailability of hard-copy or electronic documents, Special Counsel should make available to witnesses or their counsel the topics and documents that will be covered in the interview, and allow employees to obtain copies of their documentary files, including calendars and electronic data.

31. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, or other evidence of attempts to disrupt the integrity of the internal investigation, Special Counsel should not generally interview witnesses before they have had a reasonable opportunity to review relevant documents.

32. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, or other evidence of attempts to disrupt the integrity of an investigation, Special Counsel should resist attempts by prosecutors or regulators to seek the Special Counsel's interview of a witness who has not been given an opportunity to refresh his recollection as to prior events.

33. Special Counsel should not advise an employee whether he or she should seek the advice of individual counsel, lest the employee misunderstand the role of Special Counsel as being the exclusive representative of the Independent Committee. Under these circumstances Special Counsel should remind the witness that the Special Counsel does not represent the witness and that if he or she wishes to speak to counsel, the Special Counsel will adjourn the interview for a short time to allow such consultation, and, if previously authorized by the Independent Committee, to provide recommendations of counsel.

34. Special Counsel should memorialize the substance of each witness interview as close in time to the interview as possible and in a manner consistent with the attorney work-product doctrine and the ultimate purpose of the investigation.

35. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, or other evidence of attempts to disrupt the integrity of an investigation, Special Counsel should give counsel for witnesses an opportunity to suggest modifications to the memoranda so as to avoid misstating or mischaracterizing a witness's statements. Special Counsel should consider reading, explaining the substance of, or showing a draft of the memorandum of the interview of the witness to counsel for interviewed witnesses to review for accuracy, but not to keep a copy thereof.

36. Absent special circumstances such as valid concerns of possible witness tampering, obstruction of justice, or other evidence of attempts to disrupt the integrity of an investigation, if a final written report is to be prepared, Special Counsel should share tentative conclusions as to witnesses' conduct with counsel for present or former employees whose conduct is under examination for possible correction or modification.

37. If the company's independent auditors request access to privileged information or the Special Counsel's work product, the Independent Committee should first explore all other alternative courses of action, but should not have the power or authority to decide the issue on its own. The Independent Committee should give careful consideration to such request and make a recommendation to the Board. The Special Counsel should be advised by the Board and Independent Committee at the outset of the engagement <u>not to share</u> information with the Company's external auditors without the written, fully informed consent of both the Independent Committee and the Company's Board.

38. We recommend that the Board formally consider and decide the issue of production to the independent auditors before any steps leading to waiver are taken. In light of inconsistent decisions regarding whether production of Special Counsel's work product to external auditors constitutes a waiver of the work product protections, it is important to enter into a written confidentiality and common interest agreement with external auditors that allows for work product information to be provided without a waiver issue arising.

39. During the course of the investigation, Special Counsel should keep and continuously update a record of witnesses and documents examined, documents shown to witnesses, and issues raised.

40. Special Counsel should regularly update the Independent Committee on the course of the investigation. In the early stages of an inquiry, updates should generally be made orally, because of the possibility that preliminary information gathered or early conclusions formed might prove to be inaccurate or incomplete, and prejudicial to the company as well as employees implicated by them.

41. Upon the completion of the investigation, Special Counsel should report its findings and the conclusions, and the bases therefor, to the Board, the Audit Committee, or the Independent Committee, as the case may be. Special Counsel should be careful to remind the governing body that the report's conclusions are ultimately that of the Independent Committee, not just Special Counsel, and that the Board members have fiduciary responsibilities to draw their own conclusions as to the evidence presented.

42. Before presentation of the final report, the Independent Committee and Special Counsel should again give careful consideration to whether the ultimate form of the report will be written, oral or PowerPoint, to whom it will be provided, and how it will be published.

43. Special Counsel should not be used as Company defense counsel in civil or criminal litigation or investigations that follow the internal investigation.

44. Absent genuine regulatory concerns regarding possible obstruction of justice, the database of documents and selected work product, once stripped of the evidence the internal thought processes of Special Counsel, should be made available for use by any Special Litigation Committee, counsel to the Company, and on an individualized basis, to counsel for present or former employees.

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