CHAPTER 4

CONSTITUTIONAL PERSPECTIVES
FEW RIGHTS AND EVEN FEWER PRIVILEGES

This chapter addresses the status of corporations and other business organizations under the Fourth, Fifth, and Sixth Amendments to the U.S. Constitution. Here, the legal definition of a corporation as a "person" shrinks back into its more fictional existence; meaning that business organizations may share equally with individual persons in terms of exposure to criminal liability but they do not share equally in the same constitutional protections.

The Supreme Court's decision in *Hale v. Henkel*, 201 U.S. 43 (1906), established both the logic and the basic ground rules for the development of corporate and organizational constitutional rights and it remains the law today. There, the Court held that a corporation could assert the constitutional protections of the Fourth Amendment to prevent the government from engaging in unreasonable searches and seizures of its records but that it could not assert the protections of the Fifth Amendment and refuse compelled production of the same records. No, to a Fifth Amendment privilege against compulsory self-incrimination and yes, to a Fourth Amendment privilege against unreasonable searches and seizures.

Arguably, the case makes some sense in economic terms. A corporate assertion of the privilege against self-incrimination could have the impact of frustrating the government's need to prosecute corporate unlawful economic activity. However, because the Fourth Amendment is aimed at unreasonable government intrusions, allowing a corporation a Fourth Amendment privilege would not necessarily insulate the company from prosecution. In any case, in those instances where the Fourth Amendment has provided too much protection, the courts have created exceptions, such as the administrative search doctrine and others, to dilute the scope of protection.

I. The Fifth Amendment

Corporations have no Fifth Amendment privilege against compulsory self-incrimination. But incorporation is not the only form of business organization. No matter; other forms of business organizations have no such constitutional protection either. In *United States v. White*, 322 U.S. 694, 700–01 (1944), the Supreme Court upheld a records subpoena demanding the production of union records. The Court held that "the power to compel the production of the records of any organization, whether it be incorporated or not, arises out of the inherent and necessary power of the federal and state governments to enforce their laws." Bottom line: The Fifth Amendment's protection applies only to natural individuals acting in their own private capacity and in some cases as a sole proprietor, but not to an organization.

A. Defining "Organization"

The Court did provide a definition for the term "organization": "The test . . . is whether one can fairly say under all circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only." Bottom line: If the organization satisfies this definition, organizational records must be produced even if they are personally incriminating to the membership.

The definition of organization has been used liberally in barring the assertion of the privilege against self-incrimination by other noncorporate forms of business organizations. In *Bellis v. United States*, 417 U.S. 85, 92–93 (1974), the Court upheld a subpoena issued to a three-person law firm. The Court concluded that "groups" cannot assert the privilege if they are "relatively well organized and structured, and not merely a loose, informal association of individuals. It must maintain a distinct set of organizational records, and recognize rights in its members of control and access to them." Bottom line: Size does not matter. If it looks like a duck and quacks like a duck. . . .

B. "John Doe" Act of Production Immunity

Based on the decision in *Fisher v. United States*, 425 U.S. 391 (1976), even in the case of a sole proprietorship, the contents of voluntarily prepared documents are not protected. However, in the case of a sole proprietor or other records custodian, an assertion of privilege might be permissible where the act of production may incriminate the sole proprietor or individual custodian. This is known as the Act of Production Doctrine. Under this doctrine, the Court recognized that compliance with a subpoena has communicative aspects of its own—acknowledgement of the existence of the documents; acknowledgement of possession and control; and potential authentication by identification. But in each case, the court remains obliged to determine whether that communication is both "testimonial" and "incriminating."

In *United States v. Doe*, 465 U.S. 605 (1984), involving a grand jury subpoena, the court found that the act of producing the records, in itself, would involve testimonial incrimination. The Court noted that immunizing the act of production could solve the problem. As a result, the government has fashioned an informal type of letter immunity referred to as "John Doe Immunity." A custodian will receive an informal letter from the government "immunizing" the act of production to facilitate production without a court battle. Notably, the immunity applies only to the act of production, not to the contents of the documents produced.

C. Foregone Conclusion Doctrine

The Court was quick to carve out an exception to the doctrine by creating the "foregone conclusion" standard. Where the existence and location of the documents are a "foregone conclusion" and the act of production adds little or nothing to the sum total of the government's information that the custodian has the records, "no constitutional rights are touched." Bottom line: The act of production doctrine does not apply where (1) the existence, possession, and authentication of the records are a foregone conclusion; or (2) the act of production, although testimonial in nature, does not present a realistic potential for incrimination.

Subsequently, in *Braswell v. United States*, 487 U.S. 99 (1988), involving a subpoena for records of a closely held corporation, the Court held that the records had to be produced. However, again recognizing that the act of production might tend to incriminate the individual custodian, the Court prohibited the government from making any evidentiary use of the individual custodian's act on behalf of the corporation against that individual in a subsequent prosecution. Bottom line: The government is entitled to the records but cannot introduce evidence related to the act of production against the individual custodian in a subsequent prosecution of that individual.

In conclusion, corporations and other business organizations do not possess a Fifth Amendment privilege against compulsory self-incrimination. A sole proprietor

or other records custodian may assert the privilege where the act of production would tend to incriminate that individual in a subsequent prosecution.

The application of the *Fisher* foregone conclusion doctrine was rejected in *United States v. Hubbell*, 530 U.S. 27 (2000), where the government had issued a subpoena requesting 11 categories of business records that ultimately generated the production of over 13,000 pages of documents. The Court reasoned that given the breadth of the 11 categories, the nature of the demanded business information, and the number of records, the foregone conclusion doctrine did not apply to negate the protection under the act of production doctrine. Bottom line: Certain accounting and financial records, such as tax returns and accountant's workpapers, will probably fit under the foregone conclusion doctrine, whereas general demands for business records dealing with business operations and transactions, unless required by law to be kept, will not.

D. Other Exceptions

In *Shapiro v. United States*, 335 U.S. 1 (1948), the Supreme Court held that the Fifth Amendment provides no protection where individuals engage in a regulated business and are required to make and keep records available for inspection by public officials. This is known as the required records exception.

Transferring documents to an independent professional to avoid the reach of a subpoena also does not work. *Couch v. United States*, 409 U.S. 322 (1973). In *Couch*, the taxpayer delivered the records to her accountants to prepare her tax returns and the IRS subsequently issued a subpoena for the records to her accountants. In *Fisher*, the IRS directed a summons to a lawyer in possession of the records from a client seeking legal advice. In both cases, the clients asserted the protection of the privilege and in both cases, the Supreme Court rejected the argument because the persons compelled to produce the documents were not the clients but the professionals in possession of the documents.

What about the other rights under the Fifth Amendment? The Supreme Court has assumed, without actually deciding, that the Double Jeopardy Clause does apply to corporations. The Indictment Clause's applicability to corporations has yet to be decided by the Supreme Court. However, the two lower court decisions on the issue concluded that a corporation does not have to be charged by indictment and that the Fifth Amendment does not apply. *United States v. Yellow Freight Sys., Inc.*, 637 F.2d 1248 (9th Cir.), *cert. denied*, 454 U.S. 815 (1981); *United States v. Armored Transp., Inc.*, 629 F.2d 1313 (9th Cir.), *cert. denied*, 450 U.S. 965 (1981). *In dicta, United States v. Fitapelli*, 786 F.2d 1461 (11th Cir. 1986).

II. The Fourth Amendment

Corporations have Fourth Amendment protection against unreasonable searches and seizures. However, the Supreme Court has made it clear that corporate rights

are not coextensive with individual rights under the Fourth Amendment. In *United States v. Morton Salt*, 338 U.S. 632, 652 (1950), the Court stated: "[C]orporations can claim no equality with individuals in the enjoyment of a right to privacy."

Here, we consider two aspects of Fourth Amendment protection: the warrant requirement to search commercial premises and the legitimacy of government-issued subpoenas for the production of corporate books and records, most commonly in connection with a grand jury proceeding. In terms of criminal investigations, the government has two choices for collecting evidence from a commercial entity: It can do so through the execution of a search warrant at the commercial premises, usually done to avoid destruction of records and/or other incriminating evidence, or by grand jury subpoena, where production is typically voluminous and the element of surprise is not an issue.

A. The Warrant Requirement: Regulatory and Administrative Search Exception

In *See v. City of Seattle*, 387 U.S. 541 (1967), the Court held that the warrant requirement of the Fourth Amendment applied to government searches of business property. That declaration, however, was followed by a series of cases creating exceptions to the warrant requirement in the business context.

The Court reiterated that the Fourth Amendment applies to regulatory searches of business premises in *Camara v. Municipal Court*, 387 U.S. 523 (1967). However, unlike a search conducted as part of a criminal investigation, regulatory searches require a different and lesser standard of probable cause. Instead, *Camara* formulates a balancing test to determine whether a particular inspection is reasonable, that is, weighing the "need to search against the invasion which the search entails . . . in meeting the reasonable goals of code enforcement." *Id.* at 535. Probable cause may still be found to exist without a "particularized showing" of reason to believe that an instrumentality of a crime or other evidence is at the place to be searched. As long as the agency follows an administrative scheme that provides search criteria to protect against arbitrariness in selection and procedure for the search, the Fourth Amendment is satisfied. This legal precedent has firmly survived the test of time. *See, e.g., Nasca v. Town of Brookhaven*, 2008 WL 4426906 (E.D.N.Y. 2008).

In some instances, the courts have exempted regulatory searches from the warrant requirement altogether. For example, a warrant may be required for routine fire department and Occupational Safety and Health Administration (OSHA) inspections (*Marshall v. Barlow*, 436 U.S. 307 (1978)), but not for inspections of liquor licensees (*Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970)), licensed firearms dealers (*United States v. Biswell*, 406 U.S. 311 (1972)), and mining operations (*Donovan v. Dewey*, 452 U.S. 594 (1981)). The logic behind the warrant exception was stated in *Donovan*: "[I]t is the pervasiveness and regularity of federal regulation that

ultimately determines whether a warrant is necessary to render an inspection program reasonable under the Fourth Amendment."

Finally, in *New York v. Berger*, 482 U.S. 691 (1987), the Court upheld the warrantless search of an automobile junkyard's books and records because the operation was deemed a "pervasively regulated business." *Id.* at 704–05. The Court mandated three criteria for a statutory scheme permitting warrantless inspections of commercial property to pass constitutional muster: (1) there is a substantial governmental interest; (2) warrantless entry is required to avoid alerting business owners or managers; and (3) the inspection program is reasonable as to time, place, and scope.

Note that the failure of a regulatory agency to follow its own internal rules in obtaining evidence may also be excused as a basis for suppressing evidence. In *United States v. Caceres*, 440 U.S. 741, 742 (1979),[1] the Supreme Court explained that "a court has a duty to enforce an agency regulation [only] when compliance with the regulation is mandated by the Constitution or federal law."

B. Overly Broad Document Subpoenas

Starting with the decision in *Haas v. Henkel*, 216 U.S. 462 (1910), the Court recognized that "an order for the production of books and papers" could constitute an unreasonable search and seizure. The key issue noted by the Court was whether the subpoena *duces tecum* was "far too sweeping in its terms to be regarded as reasonable." However, there was no requirement of probable cause in connection with the issuance of a subpoena.

Later, in *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the government unlawfully searched a corporation's offices and was ordered by the court to return the seized documents. Thereafter, the government issued a subpoena for the same records, and the Supreme Court sternly rejected the government's argument that the subpoena was lawful. It held that the "rights of a corporation against unlawful search and seizure are to be protected even if the same result might have been achieved in a lawful way." A string of similar cases followed. *Accord, Fed. Trade Comm'n v. Am. Tobacco Co.*, 264 U.S. 298 (1924); *Go-Bart Importing Co. v. United States*, 282 U.S. 344 (1931). These cases were not predicated on a constitutional overbreadth analysis because government misconduct was so blatant that the Court didn't waste much time talking about the law. However, as regulatory subpoena power expanded, the Supreme Court readjusted its approach and began to shrink the constitutional parameters of protection.

In *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946), the Supreme Court rejected a Fourth Amendment claim of overbreadth in connection with a subpoena *duces tecum* issued under the Federal Labor Standards Act for the production of

1. In *Caceres*, a taxpayer's conversations with the IRS were recorded without Department of Justice approval in violation of internal IRS regulation.

records from newspaper publishers to determine compliance with the Act. The Court concluded that when an order for production of documents was judicially authorized, the only issue was "reasonableness" of the subpoena. That standard is codified in Rule 17(c) of the Federal Rules of Criminal Procedure, which applies to the issuance of both trial and grand jury subpoenas in a criminal investigation.

1. Rule 17(c)

Rule 17(c) permits a subpoena to be quashed only "on motion" and if "compliance would be unreasonable." The Supreme Court observed that this standard is not self-explanatory and that what is reasonable depends on the context. *United States v. R. Enters., Inc.*, 498 U.S. 292 (1991).

2. Trial Subpoenas

As a general rule with respect to any trial subpoena, "[a] subpoena for documents may be quashed [under Rule 17(c)] if their production would be 'unreasonable or oppressive,' but not otherwise." *United States v. Nixon*, 418 U.S. 683 (1974).[2] Relevance is not determinative but certainly may be raised at the time admission is sought at trial.

3. Grand Jury Subpoenas

The *Nixon* standard does not apply to grand jury subpoenas and so the Court held in *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 299 (1991). There, the Court decided the standards to apply when a party seeks to avoid compliance with a subpoena *duces tecum* issued in connection with a grand jury investigation. Grand juries are not licensed to engage in fishing expeditions, nor may they select targets of investigation out of malice or out of an intent to harass. However, the grand jury "'can investigate merely on the suspicion that the law is being violated, or even just because it wants assurance that it is not.'" *Id.* at 297 (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642–43 (1950)). "[T]he law presumes, absent a strong showing to the contrary, that a grand jury acts within the legitimate scope of its authority. Consequently, a grand jury subpoena issued through normal channels is presumed to be reasonable, and the burden of showing unreasonableness must be on the recipient who seeks to avoid compliance." *Id.* at 300.

A challenge based on relevance "must be denied unless the district court determines that there is no reasonable possibility that the category of materials the Government seeks will produce information relevant to the general subject of the grand jury's investigation." *Id.* at 301. The Court concludes that it is basically impossible for a party to make that showing because the challenging party may not be privy to the secret deliberations of the grand jury and a grand jury is entitled to determine for itself whether a crime has been committed. Thus, a Fourth Amendment challenge

2. The topic of discovery for the defense is addressed in Chapter 5.

to a grand jury subpoena should be decided based upon reasonableness and overbreadth but not relevance. Several lower federal courts have attempted, with limited success (*see, e.g., United States v. Gurule*, 437 F.2d 239 (10th Cir. 1970)), to add to the reasonableness determination the issue of relevance to the investigation.

C. No Zone of Privacy

When considered against the backdrop of *Hale v. Henkel*, the Fourth Amendment decisions reflect the imperative that the need to permit effective enforcement of the criminal law against corporations outweighs the danger of the misuse of government power. In short, the Fourth Amendment does protect the corporation from the abuse of government power in evidence-gathering pursuits, but it does not create a zone of privacy that protects commercial enterprises from government scrutiny. In pervasively regulated industries, the protection of the Fourth Amendment is virtually absent.

III. The Sixth Amendment

A. The Right to Counsel

Most judicial decisions interpreting the right to counsel involve individual defendants, but the Sixth Amendment also affords corporations the right to counsel, and so the courts have held. *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 743 (3d Cir. 1979); *see also United States v. Unimex, Inc.*, 991 F.2d 546, 549 (9th Cir. 1993) (holding that "a corporation has a Sixth Amendment right to be represented by counsel" at trial); *United States v. Thevis*, 665 F.2d 616, 645 n.35 (5th Cir.) (accused corporation can avail itself of guarantees provided to "an 'accused'" by Sixth Amendment), *cert. denied*, 459 U.S. 825 (1982). However, once the corporation is indicted, it is not clear if law enforcement questioning of executive level corporate employees must terminate, as is constitutionally required with an individual defendant (*Massiah v. United States*, 377 U.S. 201 (1966)). Because a corporation "'is an artificial entity that can only act through agents,'" *Am. Airways Charters, Inc. v. Regan*, 746 F.2d 865, 873 n.14 (D.C. Cir. 1984), the prohibition against interrogation in the absence of counsel after the commencement of adversary judicial proceedings has created some confusion. The Department of Justice (DOJ) policy regarding this issue is also included in the following discussion.[3]

1. Criminal Proceedings Involving Corporations

Once the government files criminal charges against a corporation, the Sixth Amendment forecloses interrogation of the corporation outside the presence of corporate

3. Sixth Amendment Implications of Law Enforcement Contact with Corporate Executives, Memorandum for Merrick B. Garland, Principal Assoc. Deputy Attorney General (Apr. 15, 1994) [hereinafter Sixth Amendment Implications], http://www.usdoj.gov/olc/garland.htm.

counsel. *United States v. Kilpatrick*, 594 F. Supp. 1324, 1350 (D. Colo. 1984), *rev'd on other grounds*, 821 F.2d 1456 (10th Cir. 1987), *aff'd sub nom. Bank of Nova Scotia v. United States*, 487 U.S. 250 (1988).[4] The issue is whether interrogation of high-level corporate executives amounts to contact with the corporation itself.

DOJ acknowledges that it does for several reasons. First, corporate executives possess the power to invoke a corporation's right to counsel. *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1119 & n.12 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980). Second, statements made by high-level corporate executives can be imputed to the corporation itself as admissions. *Miano v. AC & R Advertising, Inc.*, 148 F.R.D. 68, 76–77 (S.D.N.Y.) (Katz, Magistrate J.), *adopted*, 834 F. Supp. 632 (S.D.N.Y. 1993). Thus, a corporation can invoke constitutional rights and make binding inculpatory statements through its high-ranking executives, and interrogation of corporate executives is deemed to be interrogation of the corporation itself. According to DOJ policy,[5] when law enforcement officials question high-ranking corporate executives after the initiation of formal criminal proceedings, the Sixth Amendment dictates that, absent a valid waiver of the right to counsel, all statements made by corporate executives are inadmissible against the corporation at a criminal trial.[6]

2. Civil Penalty Actions Against Corporations

Courts traditionally have rejected assertions of the Sixth Amendment right to counsel in civil penalty proceedings on the assumption that the Sixth Amendment applies only after the filing of criminal charges. *See, e.g., Williams v. United States Dep't of Transp.*, 781 F.2d 1573, 1578 n.6 (11th Cir. 1986); *Collins v. Commodity Futures Trading Comm'n*, 737 F. Supp. 1467, 1482–83 (N.D. Ill. 1990). One commentator has suggested, however, that the Supreme Court's ruling in *United States v. Halper*, 490 U.S. 435 (1989), may have future implications on the application of the rule.[7]

4. Although the district court opinion in *Kilpatrick* provides the only direct affirmation of this proposition, Sixth Amendment precedent bolsters the conclusion reached in *Kilpatrick*. The Supreme Court has emphasized that the Sixth Amendment Counsel Clause "provides the right to counsel at postarraignment interrogations." Michigan v. Jackson, 475 U.S. 625, 629 (1986). Because the Sixth Amendment right to counsel applies to corporations as well as individuals, *Unimex*, 991 F.2d at 549; *Rad-O-Lite*, 612 F.2d at 743, corporations—like individuals—cannot be subjected to interrogation outside the presence of counsel after the initiation of criminal proceedings. *See* Maine v. Moulton, 474 U.S. 159, 170 (1985); *Ethical Restraints of the ABA Code of Professional Responsibility on Federal Criminal Investigations*, 4B Op. O.L.C. 576, 580 (1980) ("Once the right to counsel has attached, the government may not elicit incriminating statements from the [defendant] unless it has obtained a waiver of his Sixth Amendment right.").

5. *Id.*

6. DOJ warns, however, that if those executives have not been formally charged, the statement they make can be introduced in a subsequent criminal proceeding against them, citing Maine v. Moulton, 474 U.S. 159, 180 (1985).

7. Linda S. Eads, *Separating Crime from Punishment: The Constitutional Implications of United States v. Halper*, 68 WASH. U. L.Q. 929, 971–72 (1990).

B. The Right to Appointed Counsel

Neither the Constitution nor the Criminal Justice Act[8] provides corporations a right of court-appointed counsel. The Criminal Justice Act does provide for the appointment of counsel for an indigent "person," but it does not clarify whether a corporation is a "person" for purposes of appointment of counsel. The word "person" in a federal statute includes corporations "unless the context indicates otherwise."[9] Arguably, the statute providing for appointment of counsel does provide the appropriate context to "indicate otherwise" and satisfy the rule.

In any case, the statutory text includes a list of classes of persons eligible, with catch-all clauses for a financially eligible person who "is entitled to appointment of counsel under the sixth amendment to the constitution" or "faces loss of liberty."[10] Although there is not much authority on the point, the Criminal Justice Act does not expressly include corporations.

The few cases to have considered the issue conclude that corporations have a right to counsel, but no right to appointed counsel in the event of insolvency or other financial hardship. *United States v. Unimex*, 991 F.2d 546, 549–50 (11th Cir. 1993); *United States v. Hartsell*, 127 F.3d 343, 350 (4th Cir. 1997) ("We [find] no suggestion anywhere in 18 U.S.C. § 3006A that corporations are entitled to publicly appointed counsel."); *United States v. Rivera*, 912 F. Supp. 634, 638 (D.P.R. 1996) ("[We] find that neither under Puerto Rico Local Rule 402 . . . § 3006A, or the Sixth Amendment of the United States Constitution are corporate defendants, even if financially unable, entitled to the appointment of counsel" under the Criminal Justice Act.).

C. The Right to Confrontation

Another right guaranteed by the Sixth Amendment is the right to confront witnesses against the defendant. The right applies to corporations. In *United States v. Nippon Paper Industries Co., Ltd.*, 17 F. Supp. 2d 38 (D. Mass. 1998), a Japanese corporation was charged with a conspiracy to fix prices for the export of thermal fax paper to the United States. The government was unable to compel the attendance of a key witness from Japan. However, the witness had given a pretrial videotaped deposition that the government was seeking to introduce at the criminal trial. In denying the government's motion, the court relied on the corporation's right under the Sixth Amendment to confront witnesses against it. The court held that a foreign corporation being prosecuted in a U.S. court under U.S. law had the same rights as a domestic corporation under the Sixth Amendment.

That's not the real problem. The problem is an evidentiary one grounded in the doctrine of *respondeat superior.* Typically, the evidence introduced against the corporation to establish guilt is the product of out-of-court statements made by corporate agents and/or documents generated by the organization, all of which the law attributes to the corporation. Out-of-court statements made by employees are admissible against the corporation as admissions of a party-opponent,[11] and the testimony recounting employees' statements may come from third parties with whom they spoke, including government agents. The same employee who made the incriminating statements, which are imputed to the corporation, may now refuse to testify at the company's trial, asserting a Fifth Amendment privilege against self-incrimination. The admissions are still not hearsay, yet the corporation is now precluded from cross-examining the witness.

The courts have uniformly held that the corporation's right to confrontation does not trump a witness's privilege against self-incrimination and the evidence remains admissible at trial. *See United States v. Follin*, 979 F.2d 369, 374 (5th Cir. 1992); *United States v. King*, 134 F.3d 1173 (2d Cir. 1998). The bottom line is that the corporation will have little success in seeking to prevent admission of the most incriminating evidence against it based on the assertion of its constitutional right to confront witnesses.

D. Other Sixth Amendment Rights

Corporations have Double Jeopardy protection. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977). They also have a right to a jury trial. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989); *United Mine Workers v. Bagwell*, 114 S. Ct. 2552 (1994) (establishing the right of organizations to a jury trial in criminal contempt proceedings).

IV. Privileges

The protections afforded by the attorney-client privilege and the work product privilege are critical in the defense of white-collar criminal proceedings, particularly where internal corporate investigations have been initiated by the target company.

A. Attorney-Client Privilege

1. Scope

The attorney-client privilege is an evidentiary privilege, recognized under Federal Rule of Evidence 501, that protects confidential communications between a client and an attorney where legal advice, as opposed to business advice,[12] is being sought by the client. As explained by the Supreme Court in the seminal case establishing the parameters of the attorney-client privilege for corporations, *Upjohn v. United States*,

8. 18 U.S.C. § 3006A(a).
9. 1 U.S.C. § 1.
10. 18 U.S.C. § 3006A(a)(1)(H), (I).
11. FED. R. EVID. 801(d)(2)(A).
12. The privilege does not apply when the attorney is being asked for business advice. United States v. Rowe, 96 F.3d 1294, 1297 (9th Cir. 1996).

449 U.S. 383 (1981), the privilege protects only the disclosure of communications; it does not protect disclosure of underlying facts by those who communicated with the attorney.

In formulating the contours of the privilege, the Supreme Court rejected the "control group" test as being too narrow and as frustrating the purpose of the privilege, which is to afford full and frank disclosure to the company's attorney. The restriction of the privilege to only those employees included in upper management or the control group ignores the fact that "it will frequently be employees beyond the control group ... who will possess the information needed by the corporation's lawyers. Middle-level—and indeed lower-level—employees can, by actions within the scope of their employment, embroil the corporation in serious legal difficulties, and it is only natural that these employees would have the relevant information needed by corporate counsel if he is adequately to advise the client with respect to such actual or potential difficulties." *Id.* at 391.

The Court refused to develop any hard and fast rules regarding who is covered by the privilege. The application is decided on a case-by-case basis, which does inject some uncertainty into the process.

The party invoking the privilege has the burden of proving that an attorney-client relationship existed and that the particular communications were confidential; meaning that the communication was made confidentially, outside the presence of any third parties, in the attorney's professional capacity for the purpose of securing legal advice or assistance. The key issue is whether the client reasonably understood that the consultation was confidential. *United States v. Schaltenbrand*, 930 F.2d 1554, 1562 (11th Cir.), *cert. denied*, 502 U.S. 1005 (1991). However, third parties *retained by the lawyer* to assist in providing legal services, such as an accountant, may be present during client communications and the privilege is still preserved. The workpapers of the attorney's agent are similarly covered by the protection of the privilege. *United States v. Kovel*, 296 F.2d 918 (2d Cir. 1961); *United States v. Ackert*, 169 F.3d 136 (2d Cir. 1999) (elaborating on the *Kovel* standard). Tax advice, however, does not qualify for protection. *United States v. Adlman*, 68 F.3d 1495, 1500 (2d Cir. 1995).

Communications between an organizational client and its outside counsel are "presumed" to be made for the purpose of obtaining legal advice. *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996). Because in-house counsel may operate in a purely or primarily business capacity in connection with corporate matters, the same presumption that applies to communications with outside counsel does not apply to inside counsel. *United States v. Chevron Corp.*, 1996 WL 264769 (N.D. Cal. 1996). In *United States v. ChevronTexaco Corp.*, 241 F. Supp.2d 1065, 1077 (N.D. Cal. 2002), the trial court held that materials transmitted between nonlawyer employees of the company that reflect matters about which the corporate client intends to seek legal advice are protected in the same way that an individual client's notes would be protected.

The privilege is the client's, not the attorney's, to assert and waive. However, if the client may invoke the privilege, then the client's attorney may also do so on the client's behalf. *See Fisher v. United States*, 425 U.S. 391, 402 n.8 (1976). Corporate officers do not have the authority to waive corporate privilege; it must be done by formal action approved by corporate management and is normally exercised by its officers and board of directors. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348–49 (1985). As a practice note, counsel must carefully prepare organizational employees testifying before the grand jury or at trial to exercise great caution in answering questions where those answers might result in an unauthorized waiver of the corporate privilege that could subject the employee to liability. It is not the employee's privilege to waive.

When the control of a corporation passes to new management, the authority to assert and waive the corporation's attorney-client privilege passes as well. New managers put in place as part of a takeover, merger, or normal succession may also assert or waive. *Id.* at 349.

A subsidiary does not have an automatic right to assert the parent corporation's privilege, even where the parent is now defunct. *In re Grand Jury Subpoena No. 06-1*, 274 Fed. Appx. 306 (4th Cir. 2008). The court recognized that close corporate affiliation, including that shared by a parent and a subsidiary, suffices to render those entities "joint-clients" or "co-clients" such that they may assert joint privilege in communications with an attorney pertaining to matters of common interest. However, the scope of the joint-client or co-client privilege is circumscribed by the "limited congruence of the clients' interests" (citing *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345, 362–63 (3d Cir. 2007)).

2. Bankruptcy Trustee Waiver

The Supreme Court also held in *Commodity Futures Trading Commission v. Weintraub*, 471 U.S. 343, 439–58 (1985), that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege in bankruptcy with respect to prebankruptcy communications. The trustee plays the role "most closely analogous to that of solvent corporation's management." If the corporate debtor remains in possession and a trustee is not appointed, the debtor's directors assume the same fiduciary duties as those of a trustee.

As a practice note, it is apparent that where an insolvent corporation and/or its officers, directors, and employees are the targets or subjects of a criminal investigation, the decision to file for bankruptcy protection opens up the files of the company not only to the bankruptcy trustee but also to the government should the trustee determine that waiving the privilege is in the best interests of the creditors and shareholders to whom the trustee owes a fiduciary duty. Trustees frequently cooperate with the government, which increases the risk of civil and criminal liability for the company and prior management.

3. *Crime-Fraud Exception*

Client communications made for the purpose of furthering an ongoing or future crime are not protected by the privilege. The party asserting the exception, usually the government, has the burden of presenting a threshold "showing of a factual basis adequate to support a good faith belief by a reasonable person" that the hearing would reveal evidence of a crime or fraud. *United States v. Zolin*, 491 U.S. 554 (1989).

Once that threshold showing is made, a trial court can determine whether the crime-fraud exception applies in one of two ways. A judge can make an *in camera* inspection of the allegedly confidential documents to assist the court in determining if the crime-fraud exception should apply given the government's prima facie showing, rejecting the "independent evidence rule." Alternatively, the court can examine only the government's proof *ex parte* and *in camera* without examining the allegedly privileged documents, which would excuse the need to make a prima facie showing before the submission.

Communications between a corporation, through its agents, and corporate counsel that are made in furtherance of a crime or fraud are outside of the scope and protection of the privilege. *United States v. BDO Seidman, LLP*, 492 F.3d 806, 818 (7th Cir. 2007).

4. *Joint Defense Agreements*

The common interest doctrine, also referred to as the joint defense privilege, protects communications between parties who share a common interest in litigation. *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 341 (4th Cir. 2005). The purpose is to allow persons with a common interest to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. *Id.* The common interest doctrine "presupposes the existence of an otherwise valid privilege," and, therefore, is an extension of the attorney-client privilege and the attorney work product doctrine. *Hunton & Williams, LLP, v. U.S. Dep't of Justice*, 2008 WL 906783 (E.D. Va. 2008) (citing *In re Grand Jury Subpoenas*, 902 F.2d 244, 249 (4th Cir. 1990)). The party asserting the privilege has the burden to show both that there was a common interest and that the parties intended to engage in a cooperative effort in obtaining legal advice.

Two points of caution. First, the privilege applies only when clients are represented by separate counsel. Second, the clients must share a common interest in the litigation. *In re Teleglobe Commc'ns Corp.*, 493 F.3d 345 (3d Cir. 2007). Given the sometimes indeterminate length of an investigation, it is unnecessary that there be actual litigation in progress. *United States v. Aramony*, 88 F.3d 1369 (4th Cir. 1996).

The more serious problem with entering into a joint defense agreement arises when a member abandons the agreement and decides to cooperate with the government. The courts have held that a defendant may cross-examine the cooperator using the cooperator's statements made to the defendant's attorney during the course of the joint defense agreement, on the theory that the cooperating defendant waived his right to the attorney-client privilege when he pled guilty. *United States v. Alameida*, 341 F.3d 1318, 1323 (11th Cir. 2003). However, in *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000), the privilege was held to have created a "disqualifying" conflict of interest at trial when it prevented defense attorneys from adequately cross-examining the cooperating defendant at trial. The defendants' convictions were reversed.

The bottom line is that the joint defense privilege cannot be waived without the consent of all parties to the defense, except in the situation where one of the joint defendants becomes an adverse party in the litigation. *Matter of Grand Jury Subpoena*, 406 F. Supp. 381, 393–94 (S.D.N.Y. 1975).

As a practice pointer, a written agreement is not necessary, but it can be very helpful to the court in later determining whether a joint defense agreement exists *United States v. Dose*, 2005 WL 106493 (N.D. Iowa 2005), who is a party to the agreement, when it was entered into, and what the "common interest" was between the parties at the time of the communication. *See, e.g., Beneficial Franchise Co., Inc. v. Bank One, N.A.*, 205 F.R.D. 212 (N.D. Ill. 2001); *Block Drug Co., Inc. v. Sedona Labs., Inc.*, 2007 WL 1183828 (D. Del. 2007).

The DOJ has changed its position on joint defense agreements. In August 2008, in a statement issued by Deputy Attorney General Mark Filip ("Filip memo"),[13] the DOJ announced revisions to its Corporate Charging Guidelines.[14] Under the new policy, federal prosecutors may not consider whether the corporation has entered into a joint defense agreement in evaluating whether to give the corporation credit for cooperating.

5. *Conflict of Interest in Representation*

The Sixth Amendment right to have effective assistance of counsel encompasses the right to have counsel untainted by conflicts of interest. *Holloway v. Arkansas*, 435 U.S. 475 (1978). The rules of professional conduct allow an attorney to serve multiple clients on the same matter so long as all clients consent and there is no substantial risk of the lawyer being unable to fulfill the attorney's duties to them.[15]

There is a great temptation by corporate defense lawyers to take the position with the government that they represent all of the existing corporate employees and the corporation. However, in the event that a conflict between the employees and the corporation or between employees arises, counsel may find itself disqualified

13. Remarks Prepared for Delivery by Deputy Attorney Gen. Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008), http://federalevidence.com/pdf/2008/FRE502/DOJFilip_Remarks_8-28-08.pdf.

14. U.S. Attorneys' Manual Tit. 9, Ch. 9-28.000 *et seq.*, Principles of Federal Prosecution of Business Organizations, http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf and attached as Appendix C.

15. Restatement (Third) of the Law Governing Lawyers §§ 128–131.

from representing all parties and without any client. In *Wheat v. United States*, 486 U.S. 153, 159 (1988), the Supreme Court observed that joint representation of criminal defendants "engenders special dangers of which a court must be aware."

Client waivers do not automatically resolve the problem. In fact, Rule 44 of the Federal Rules of Criminal Procedure directs trial judges to conduct an investigation and personally advise each defendant of their right to effective assistance of counsel. If the court determines that a conflict exists, it must act to protect each defendant's constitutional rights. This means that a court can reject the waiver and assign separate counsel. Under *Wheat*, the court is given substantial latitude.

An attorney in a conflict of interest situation, such as where one of the multiple defendants decides to plead guilty or otherwise cooperate, must be disqualified from all representation where it creates an inability to adequately represent the interests of the remaining defendants. The better practice is to retain separate counsel for the corporation and each of its employees who may be the subject or target of an investigation. Defense counsel should refrain from advising corporate employees not to cooperate in the government's investigation to avoid a possible later accusation that the attorney engaged in obstructing justice. Employees may be advised, however, that they do not have a legal obligation to cooperate.

In a joint defense agreement situation where one defendant later cooperates and abandons the agreement, the remaining defense counsel are not automatically disqualified but the area is very uncertain in application. "The mere inability to utilize the privileged communications is not itself a manifestation of a conflict of interest, because no lawyer in the world could utilize those communications. Rather, the potential conflict of interest stems from the fact that [the defendant's] lawyer might be so tongue-tied (due to his fear of revealing the confidential communications made by [the cooperating defendant]) that his representation of [the defendant] suffers." *United States v. Alameida*, 341 F.3d 1318, 1323–24 (11th Cir. 2003). As noted above, in *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000), the privilege was held to have created such a "disqualifying" conflict of interest at trial, resulting in the reversal of the defendants' convictions on appeal.

B. Work Product Privilege

At the core of the doctrine, the work product privilege shelters the mental processes of the attorney, providing an area of privilege within which the attorney can analyze and prepare the client's case. *United States v. Nobles*, 422 U.S. 225, 238 (1975). First formulated in the seminal case *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947), the doctrine was designed to create a "zone of privacy" in which an attorney is encouraged to write down litigation theories and strategies without fear that the opponent will capitalize on that attorney's work product. The work product doctrine is separate from the attorney-client privilege and broader in scope. *Nobles* at 238. As provided in Federal Rule of Criminal Procedure 26, the rule extends not only

to work by the attorney but also to litigation preparation work by the party or its representatives.

The party asserting the protection of the work product doctrine bears the evidentiary burden to establish that the documents are prepared "in anticipation of litigation." *Resolution Trust Corp. v. Dabney*, 73 F.3d 262, 266 (10th Cir. 1995); Fed. R. Civ. P. 26. The opposing party can overcome the privilege if it can demonstrate that it has a "substantial need" for the documents and that it is unable to otherwise obtain the "substantial equivalent" of the withheld documents without "undue hardship."[16] Even in this circumstance, the court must protect against the disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney.[17]

A voluntary disclosure of materials to a third party may constitute waiver. Work product disclosed to a third party, not an adversary, and with a "common interest" is typically not a waiver because that third party also seeks to prevent disclosure to the adversary. Courts do not treat inadvertent disclosure, even to an adversary, as an automatic waiver.

C. Internal Corporate Investigations and Privilege Protection

Internal investigative reports are treated as work product. Even so, some aspects of the investigation will not be protected by the work product doctrine. For example, the identity of persons interviewed by counsel is not protected. Preexisting documents left in possession of counsel are not protected. The results of internal examinations may not be protected from disclosure to the government in a subsequent grand jury investigation.

The DOJ has recently changed its policy regarding the need for corporations to disclose the results of internal corporate investigations. This is discussed in greater detail in Chapter 6 but bears repeating here because of its critical importance to defense lawyers and companies engaged in internal investigations to pinpoint the source of criminal wrongdoing. The Filip Memo, issued on August 28, 2008,[18] provides that credit for cooperation will not depend on whether a corporation has waived attorney-client privilege or work product protections. Corporations that provide timely disclosure may receive due credit for cooperation; those who choose not to, receive no credit. Refusal by a corporation to cooperate is not treated as evidence of guilt.

16. Fed. R. Civ. P. 26 (b)(3).
17. *Id.*
18. Remarks Prepared for Delivery by Deputy Attorney Gen. Mark R. Filip at Press Conference Announcing Revisions to Corporate Charging Guidelines (Aug. 28, 2008), http://federalevidence.com/pdf/2008/FRE502/DOJFilip_Remarks_8-28-08.pdf.

D. Rule 502(FRE) Limitations on Waiver of Privilege

In 2008, Rule 502 was added to the Federal Rules of Evidence[19] to resolve court disputes involving waiver by disclosure of certain communications otherwise protected by the attorney-client or work product privileges. It does not apply to waiver under any other common law privilege and does not determine if either privilege applies in the first instance. Subsection (a) of the rule addresses scope of the waiver and subsection (b) addresses inadvertent disclosure. Under subsection (a), if privileged material is disclosed to the government, any waiver that occurs only extends to additional, undisclosed material if, in the case of an intentional waiver, the disclosed and undisclosed materials concern the same subject matter and "ought in fairness to be considered together." As the Advisory Notes to Rule 502(a) make clear, a finding of waiver in such circumstances should be "reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." [20] With respect to inadvertent disclosure, there is no waiver if the privilege holder took reasonable steps to prevent disclosure and also promptly took reasonable steps to rectify the waiver.[21]

Under subsection (d) of the rule, disclosure of materials in a litigation or other federal proceeding may be protected from waiver of attorney-client privilege or work product protection by a court order. These are referred to as "confidentiality orders." The rule provides that when a confidentiality order governing the consequences of disclosure is entered in a federal proceeding, its terms are enforceable against nonparties in any federal or state proceeding. State confidentiality orders have been upheld in federal proceedings under the rules of comity pursuant to Title 28 U.S.C. § 1738.

Under subsection (e), the parties can still enter into an agreement to limit waiver through disclosure on their own but it is only binding on the parties to the agreement. It will not be binding on nonparties to the agreement unless it is made part of a court order under subsection (d).

19. Rule 502(FRE): (a) Scope of waiver. When the disclosure is made in a Federal proceeding or to a Federal office or agency and waives the attorney-client privilege or work-product protection, the waiver extends to an undisclosed communication or information in a Federal or State proceeding only if: (1) the waiver is intentional; (2) the disclosed and undisclosed communications or information concern the same subject matter; and (3) they ought in fairness to be considered together. (b) Inadvertent disclosure. When made in a Federal proceeding or to a Federal office or agency, the disclosure does not operate as a waiver in a Federal or State proceeding if: (1) the disclosure is inadvertent; (2) the holder of the privilege or protection took reasonable steps to prevent disclosure; and (3) the holder promptly took reasonable steps to rectify the error, including (if applicable) following Federal Rule of Civil Procedure 26(b)(5)(B). Disclosure Made in a State Proceeding—When the disclosure is made in a State proceeding and is not the subject of a State-court order concerning waiver, the disclosure does not operate as a waiver in a Federal proceeding if the disclosure: (1) would not be a waiver under this rule if it had been made in a Federal proceeding; or (2) is not a waiver under the law of the State where the disclosure occurred. (d) Controlling Effect of a Court Order—A Federal court may order that the privilege or protection is not waived by disclosure connected with the litigation pending before the court—in which event the disclosure is also not a waiver in any other Federal or State proceeding. (e) Controlling Effect of a Party Agreement—An agreement on the effect of disclosure in a Federal proceeding is binding only on the parties to the agreement, unless it is incorporated into a court order. (f) Controlling Effect of This Rule—Notwithstanding Rules 101 and 1101, this rule applies to State proceedings and to Federal court-annexed and Federal court-mandated arbitration proceedings, in the circumstances set out in the rule. And notwithstanding Rule 501, this rule applies even if State law provides the rule of decision. (g) Definitions—In this rule: (1) "attorney-client privilege" means the protection that applicable law provides for confidential attorney-client communications; and (2) "work-product protection" means the protection that applicable law provides for tangible material (or its intangible equivalent) prepared in anticipation of litigation or for trial.

20. *See* United States v. Treacy, 2009 Wl 812033 (2009), not published in F.Supp.

21. Advisory Committee Notes, subdivision (b) (2007).