Symposium
Environmental Criminal Law

RESPONDING TO A GOVERNMENT ENVIRONMENTAL INVESTIGATION: SHAPING THE DEFENSE*

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INTRODUCTION

As environmental consciousness increases, federal and state governments have intensified enforcement of criminal provisions in environmental statutes and regulations. Many statutes have always provided for criminal penalties. However, the Environmental Protection Agency (EPA) only began focusing on enforcement in the mid-nineteen eighties. This Article discusses the substantive and tactical considerations in shaping the initial response to a governmental investigation of an environmental release or discharge. After an overview of the environmental criminal provisions, it describes the practical considerations in conducting an internal investigation and summarizes the potential criminal sanctions for failing to properly report the release or discharge of hazardous substances, and for providing false information to government investigators. Finally, it addresses considerations in the formation of a defense team under the joint defense doctrine, as well as funding the defense through indemnification and insurance.

I. ENVIRONMENTAL CRIMES

Many federal and state environmental statutes provide for criminal sanctions upon violation. As with all regulatory schemes, these provisions must be carefully reviewed in order to determine the elements of a criminal violation, including any requisite state of mind. Part I contains an overview of some of the more significant criminal provisions in federal and Arizona environmental statutes.

A. Water Pollution Statutes

The Federal Water Pollution Control Act[1] established a comprehensive scheme for protecting the quality of the nation's waters, primarily through the regulation of point sources of pollution. The Act requires any person discharging pollutants into the nation's waters to obtain a National Pollutant Discharge Elimination System (NPDES) permit for the discharge. One can become criminally liable for failing to timely apply for a permit, failing to supply information reasonably required to process the application, discharging pollutants when a permit has been denied, or violating the conditions of an issued permit.

It is a misdemeanor for a person to negligently violate specified provisions of the Act, or to negligently introduce a pollutant or hazardous substance into a sewer system or publicly owned treatment works he/she knows or reasonably should know could cause personal injury or property damage.[2] It is a felony to "knowingly" commit such violations,[3] to commit a second offense under the Act, to knowingly make a false material statement in any document filed pursuant to the Act, or to knowingly falsify, tamper with, or render inaccurate a monitoring device or method required to be maintained under the Act.[4] A person found guilty of "knowing endangerment" faces sharply increased fines and jail sentences.[5] Knowing endangerment exists if a person knowingly violates the Act knowing that he or she has placed another in imminent danger of death or serious bodily injury.[6]

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1. 33 U.S.C. §§ 1251–1387 (1988 & Supp. II 1990).

2. 33 U.S.C. §§ 1319(c)(1)(A), (B)(1988 & Supp. II 1990). *See* United States v. Marathon Dev. Corp., 867 F.2d 96 (1st Cir. 1989) (court affirmed conviction of defendant for dredging in wetlands without a permit); United States v. Distler, 671 F.2d 954 (6th Cir. 1981), *cert. denied*, 454 U.S. 827 (1981) (court affirmed conviction of defendant for failure to follow guidelines established pursuant to CWA §§ 1311 and 1317); United States v. Hamel, 551 F.2d 107 (6th Cir. 1977) (court affirmed conviction of defendant for willfully discharging gasoline into a navigable waterway); United States v. Frezzo Bros., Inc., 546 F. Supp. 713 (E.D. Pa. 1982), *aff'd*, 703 F.2d 62 (3d Cir. 1983), *cert. denied*, 464 U.S. 829 (1983) (court denies petition to vacate convictions of defendants for discharging pollutants into navigable waters without a permit); United States v. Oxford Royal Mushroom Prod. Inc., 487 F. Supp. 852 (E.D. Pa. 1980) (court distinguishes a willful discharge from a negligent discharge).

3. 33 U.S.C. §§ 1319(c)(2)(A), (B) (Supp. II 1990). United States v. Rutana, 932 F.2d 1155 (5th Cir. 1991), *cert. denied*, 112 S. Ct. 300 (1991) (court reversed and remanded sentencing of defendant who pled guilty to 18 counts of knowing discharge into public sewer system because District Court had no bases for downward departure from sentencing guidelines).

4. *See supra* note 3.

5. 33 U.S.C. § 1319(c)(3)(A) (Supp. II 1990).

6. 33 U.S.C. §§ 1319(c)(3)(A) & (B) (Supp. II 1990).

Under the Arizona Water Quality Act,[7] it is a misdemeanor for a person to (1) discharge certain substances without a permit or appropriate authority under the Act; (2) fail to monitor, sample or report discharges as required by a permit issued under the Act; (3) violate a discharge limitation specified in a permit issued under the Act; or (4) violate a water quality standard.[8]

It is a felony if a person commits these acts knowingly or with criminal negligence, or knowingly or recklessly manifests an extreme indifference for human life.[9]

B. The Clean Air Act

The federal Clean Air Act[10] provides a comprehensive scheme for protecting air quality, including criminal sanctions. For example, it is a felony for a person to knowingly violate any requirement or prohibition of an implementation plan, or to knowingly violate orders relating to new source performance standards, inspections, solid waste combustion, pre-construction requirements, emergency orders permits, acid deposition control or stratospheric ozone control.[11] The penalties double for repeat offenders. It is also a felony for a person to falsify, tamper with, render inaccurate, or fail to install a required monitoring device or method,[12] or to knowingly release hazardous air pollutants or extremely hazardous substances into the ambient air with knowledge that the release creates an imminent danger of death or serious bodily injury.[13]

It is a misdemeanor under the Act for a person to knowingly fail to pay a required fee,[14] or to negligently release into the ambient air hazardous air pollutants or extremely hazardous substances, if the release negligently places another in imminent danger of death or serious bodily injury.[15] Repeat offenses are felonies.[16]

The Arizona Air Quality Act[17] provides fines for violation of the State Air Pollution Control provisions[18] and renders violations of the County Air Pollution Control provisions class one misdemeanors for each day of the violation.[19]

C. The Federal Toxic Substances Control Act

The Toxic Substances Control Act[20] (TSCA) empowers the EPA to require toxic substance testing by manufacturers, to prohibit or regulate

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7. ARIZ. REV. STAT. ANN. §§ 49–201 to –363 (1988 & West Supp. 1991).
8. ARIZ. REV. STAT. ANN. § 49–263 (1988) (formerly § 36–3563).
9. *Id.*
10. 42 U.S.C. §§ 7401–7671 (1988 & Supp. 1990).
11. 42 U.S.C. § 7413(c)(1). *See* Adamo Wrecking Co. v. United States, 434 U.S. 275 (1978), *vacated and remanded,* 571 F.2d 582 (1978).
12. 42 U.S.C. § 7413(c)(2).
13. 42 U.S.C. § 7413(c)(5)(A).
14. 42 U.S.C. § 7413(c)(3).
15. 42 U.S.C. § 7413(c)(4).
16. *Id.*
17. ARIZ. REV. STAT. ANN. §§ 49–401 to 571 (1988 & West Supp. 1991).
18. ARIZ. REV. STAT. ANN. § 49–451 (West Supp. 1991).
19. ARIZ. REV. STAT. ANN. § 49–502 (1988).
20. 15 U.S.C. §§ 2601–2671 (1988 & Supp. II 1990).

certain chemicals, and to require that warnings, monitoring and records be maintained.[21] It also requires manufacturers to give notice to the EPA ninety days before generating new chemicals or older chemicals for significantly new uses.[22] Under the TSCA, it is a misdemeanor for a person to knowingly or willfully violate regulations, orders or requirements regarding the testing of chemicals, or regarding the manufacture, distribution, use or disposal of new or existing chemicals. It is also a misdemeanor for a person to use for commercial purposes those substances which he or she knows were manufactured, processed or distributed in violation of any provision of the Act, or to fail to comply with the reporting and inspection requirements set forth therein.[23]

D. The Federal Comprehensive Environmental Response, Compensation and Liability Act (CERCLA)

The Comprehensive Environmental Response, Compensation and Liability Act[24](CERCLA) provides the EPA with the authority to identify and clean up hazardous waste sites, and establishes a scheme to identify and deal with uncontrolled releases of hazardous substances. It is a misdemeanor for a person to fail to notify the EPA of the existence of hazardous waste treatment, storage or disposal facilities which do not have a permit under the Federal Resource Conservation and Recovery Act (RCRA)[25] if that person is required to make such a notification.[26] It is a felony for a person to knowingly destroy, mutilate, erase, dispose of, conceal, falsify or render unavailable or unreadable any records required by law to be kept regarding the location, title or condition of a facility, or the identity, characteristics, quantity, origin or condition of hazardous substances contained or deposited in a facility.[27] Finally, it is a felony for a person to knowingly give or cause to be given any false information as part of a claim against the Superfund created by CERCLA.[28]

E. Hazardous Waste Legislation

Pursuant to the RCRA, which regulates solid and hazardous wastes, the EPA issues a list of hazardous substances based on toxicity, degradability in animals and the environment, and other criteria. The EPA then sets standards and requirements regarding generators and transporters of waste, and those who own or operate waste treatment, storage and disposal facilities. Practices such as manifest record-keeping systems and labeling requirements ensure that wastes are properly designated for treatment, transportation and disposal.

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21. 15 U.S.C. §§ 2603, 2604, 2607 (1988).
22. 15 U.S.C. § 2603(a) (1988).
23. 15 U.S.C. §§ 2614–15 (1988). *See* United States v. Pacific Hide & Fur Depot, Inc., 768 F.2d 1096 (9th Cir. 1985) (court reversed the convictions of defendants for violations of TSCA because government failed to prove that a juror could conclude that defendants were aware that the capacitors in the salvage yard contained more than 50 ppm PCBs); United States v. Ward, 676 F.2d 94 (4th Cir. 1982), *cert. denied*, 459 U.S. 835 (1982) (court affirmed conviction of defendant for unlawful disposal of toxic substances and aiding and abetting unlawful disposal of toxic substances).
24. 42 U.S.C. §§ 9601–9675 (1988, Supp. I 1989 & Supp. II 1990).
25 42 U.S.C. §§ 6901–6992 (1988).
26. 42 U.S.C. § 9603(c) (1988).
27. 42 U.S.C. § 9603(d) (1988).
28. 42 U.S.C. § 9612(b)(1) (1988).

The EPA also administers and promulgates standards for the design and operation of treatment and disposal facilities. All such facilities must obtain a permit to operate.

It is a felony for a person to knowingly: (1) transport hazardous waste to a facility that does not have a permit; (2) treat, store or dispose of hazardous wastes without a permit or in violation of material conditions of a permit or regulation; (3) generate, store, treat, transport, dispose of, export or otherwise handle hazardous waste or used oil, and knowingly destroy, alter, conceal or fail to file any record, application, manifest, report or other document required to be maintained or filed with the EPA; (4) transport hazardous waste or used oil without a manifest; (5) export hazardous waste without the consent of the receiving country or in violation of an international agreement between the United States and the receiving country; or (6) store, treat, transport, dispose of or otherwise handle any used oil in knowing violation of any applicable regulation under the RCRA.[29] It is also a felony to omit material information or make false material statements in applications, labels, manifests, records, reports, permits or other documents filed, maintained or used by the EPA for purposes of compliance with RCRA regulations. Fines and jail sentences sharply increase for persons who knowingly transport, treat, store, dispose of, or export hazardous waste in violation of the RCRA or related regulations, and who know at the time that they are placing other persons in imminent danger of death or serious bodily injury.[30]

Under Arizona law, it is a felony for a person to do any of the following acts recklessly, knowingly, or by recklessly manifesting an extreme indifference for human life: (1) transport hazardous waste to a facility not authorized to receive such waste under Arizona or federal law; (2) generate hazardous waste and cause or allow it to be transported to an unauthorized facility; or (3) treat, store, transport or dispose of hazardous waste without appropriate authority under Arizona or federal law.[31]

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29. 42 U.S.C. § 6928(d) (1988). *See* United States v. Dee, 912 F.2d 741 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 1307 (1991) (defendants convicted of knowing violations of 6928(d)(2)(A); United States v. Hoflin, 880 F.2d 1033 (9th Cir. 1989), *cert. denied*, 493 U.S. 1083 (1990) (director of public works department was convicted of aiding and abetting disposal of hazardous waste in violation of 6928(d)(2)(A); United States v. Greer, 850 F.2d 1447 (11th Cir. 1988) (court reversed district court's verdict of acquittal of defendant of illegal dumping of hazardous waste pursuant to § 6928(d)(2)(A) and failing to report); United States v. Hayes Int'l Corp., 786 F.2d 1499 (11th Cir. 1986) (court reversed district court's verdict of acquittal of defendants holding that evidence was sufficient to find that defendant knowingly transported hazardous waste and knew recycler did not have a permit under § 6928(d)(1)); United States v. Johnson & Towers, Inc., 741 F.2d 662 (3d Cir. 1984), *cert. denied*, 469 U.S. 1208 (1985) (court held that individual defendants were "persons" under the RCRA).

30. 42 U.S.C. § 6928(e) (1988). *See* United States v. Protex Indus., Inc., 874 F.2d 740 (10th Cir. 1989) (court affirmed conviction of defendant for "knowing endangerment" holding that Act is not unconstitutional as applied); United States v. Tumin, No. Cr. 87-488 (E.D.N.Y. October 11, 1988) (defendant will spend up to two years in jail for knowingly endangering others by disposing of hazardous wastes in a densely populated area of Long Island).

31. ARIZ. REV. STAT. ANN. § 49-925 (West Supp. 1991).

II. KNOWLEDGE AND THE RESPONSIBLE CORPORATE OFFICER

A. Knowledge Issues

As Part I demonstrates, many environmental statutes provide criminal penalties only for conduct that is engaged in "knowingly," or escalate the criminal classification of conduct done "knowingly" from a misdemeanor to a felony. Thus, the significance of the knowledge element is substantial.[32] An examination of the case law interpreting two separate provisions of the RCRA provides an example of some of the issues associated with the knowledge requirement in the environmental context.

The two provisions of the RCRA used by way of example provide for a $50,000 fine and/or five years' imprisonment if a person (1) knowingly transports hazardous waste to a facility which does not have a permit,[33] or (2) knowingly treats, stores or disposes of hazardous waste without a permit.[34] Courts have struggled, and sometimes disagreed, as to which elements in

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32. *See, e.g.*, Clean Air Act, 42 U.S.C. § 7413(c) (1983 & Supp. 1991); Clean Water Act, 33 U.S.C. §§ 1319(c)(2)(A), (B), and (c)(4) (Supp. 1990); Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. § 9603(c), (d) (1983 and Supp. 1990); Emergency Planning and Community Right-to-Know Act of 1986, 42 U.S.C. § 11045(b)(4) (Supp. 1990); Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 1379i (1988); Solid Waste Disposal Act (or the Resource Conservation and Recovery Act, "RCRA"), 42 U.S.C. § 6928(d) (Supp. 1990); Toxic Substances Control Act, 15 U.S.C. §§ 2614, 2615(b) (1982). The Clean Air Act, Clean Water Act and RCRA also contain "knowing endangerment" provisions. *See* 42 U.S.C. § 7413(c)(5)(A) (Supp. 1990); 33 U.S.C. § 1319(c)(3) (Supp. 1990); 42 U.S.C. § 6928(e) (Supp. 1990). Congress enacted the knowing endangerment provisions to reflect the Congressional mandate to pursue strong criminal sanctions for knowing life-threatening conduct that violates environmental statutory provisions. The Tenth Circuit upheld the first criminal conviction under the RCRA's "knowing endangerment provision." *Protex Indus., Inc.*, 874 F.2d 740. The court added one element to those required to establish a "knowing" violation by stating that "the gist of the 'knowing endangerment' provision of RCRA is that a party will be criminally liable if, in violating other provisions of RCRA, it places others in danger of great harm and it has knowledge of that danger." *Id.* at 744.

"Knowingly" applies to the elements of each statute in a different manner, except it appears that knowledge of the statute itself is not required in any circumstances. *See, e.g.*, United States v. International Minerals & Chem. Corp., 402 U.S. 558, 562–64 (1971).

33. The relevant statutory provision states:

> (d) Criminal penalties
>
> Any person who—
>
> (1) knowingly transports or causes to be transported any hazardous waste identified or listed under this subchapter to a facility which does not have a permit under this subchapter or pursuant to title I of the Marine Protection, Research, and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 *et seq.*].

42 U.S.C.A. § 6928(d)(1).

34. The relevant statutory provision states:

> (2) knowingly treats, stores or disposes of any hazardous waste identified or listed under this subchapter—
>
> (A) without a permit under this subchapter or pursuant to title I of the Marine Protection, Research and Sanctuaries Act (86 Stat. 1052) [33 U.S.C.A. § 1411 *et seq.*]; or
>
> (B) in knowing violation of any material condition or requirement of such permit;
>
> (C) in knowing violation of any material condition or requirement of any applicable interim status regulations or standards...

42 U.S.C.A. § 6928(d)(2)(A)–(C) (Supp. 1992).

these provisions require proof of knowledge: (1) knowledge of the statute; (2) knowledge that the substance is hazardous; (3) knowledge that the company is transporting, treating, storing or disposing of waste; or (4) knowledge of the permit requirement and the facility's permit status. Each of these elements is discussed below.

1. Knowledge of the Statute

The courts have repeatedly held that the knowledge requirement is satisfied if a person acts voluntarily with knowledge of his actions; knowledge of the law or a specific intent to break the law is not required.[35] Thus, the term "knowingly" applies to mistakes of fact, not mistakes of law, such as a person believing in good faith that he was shipping distilled water while actually shipping dangerous acid.[36] Moreover, because it is highly probable that hazardous waste will be regulated, there is a presumption that one possessing or handling hazardous waste is aware of the regulation, especially where a corporate officer is "in control" of the materials.[37]

2. Knowledge That the Material Is Hazardous

The courts have held that where the violations require the involvement of a hazardous substance, the defendants must have knowledge that they were dealing with something dangerous as opposed to something harmless.[38] While the government need not prove that the defendants had specific knowledge that regulations define a particular material as "hazardous,"[39] it must establish that they knew that the chemical wastes had the potential to be harmful to others or to the environment.[40] The use of the word "hazardous," however, may confuse the jury about whether a substance must be hazardous as defined by regulation or by common usage.[41]

3. Knowledge That the Corporation Is Transporting, Treating, Storing or Disposing of Waste

Section 6928(a)(2)(A) applies to any person who knowingly treats, stores, or disposes of any hazardous waste.[42] Section 6928(d)(1) applies to any person who knowingly transports waste to a facility without a permit.[43]

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35. *See, e.g., International Minerals & Chem. Corp.*, 402 U.S. at 562–64; United States v. Sellers, 926 F.2d 410, 415–16 (5th Cir. 1991); *Dee*, 912 F.2d at 745; *Hayes Int'l Corp.*, 786 F.2d at 1501–02.

36. *Sellers*, 926 F.2d at 415 (citing *International Minerals & Chem. Corp.*, 402 U.S. at 563).

37. *Id.* at 416; *Dee*, 912 F.2d at 745 (citing *International Minerals & Chem. Corp.*, 402 U.S. at 563).

38. *Dee*, 912 F.2d at 745; *Hoflin*, 880 F.2d at 1039.

39. United States v. Baytank, Inc., 934 F.2d 599, 613 (5th Cir. 1991); *Sellers*, 926 F.2d at 415–16; *Dee*, 912 F.2d at 745 (citing *International Minerals & Chem. Corp.*, 402 U.S. at 563).

40. *Hoflin*, 880 F.2d at 1039. *See also Dee*, 912 F.2d at 745.

41. *See* Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After* United States v. Dee, 59 CHEM. W. LIT R. 1061 (1991).

42. 42 U.S.C. § 6928(d)(2)(A).

43. 42 U.S.C. § 6928(d)(1).

Several courts have held that the term "knowingly" modifies "transports,[44] treats, stores and disposes of."[45] Therefore, the government must prove that the defendant "knowingly" transports, treats, stores or disposes of hazardous waste.

4. Knowledge of the Permit Requirement and a Facility's Permit Status

The courts vary as to whether the government must prove that a defendant had knowledge (1) that a permit was required for treatment, disposal and storage facilities, or (2) that the facility in question had no permit.[46]

In *Johnson & Towers*, the Third Circuit Court of Appeals held that Section 6928(d)(2)(A) required the government to prove that the defendant had knowledge a permit was required, because "knowingly" applied to all elements of the described offense.[47] In so holding, the court concluded that Congress inadvertently omitted the word "knowing" in subsection (A), and that the "knowingly" language which introduces subsection (2) also applies to subsection (A).[48]

In *Hoflin*,[49] the Ninth Circuit Court of Appeals rejected the reasoning of *Johnson & Towers*. The court held that proof that a defendant knew the disposal facility had no permit is not an element of the offense set forth in Section 6928(d)(2)(A) because if Congress had intended to insert a knowledge requirement, it could easily have done so.[50] However, in *United States v. Speach*,[51] the Ninth Circuit held that proof of knowledge was required for a violation of Section 6928(d)(1). The court distinguished *Hoflin* on the grounds that it involved Section 6928(d)(2)(A), which addresses the crime of knowingly treating, storing, or disposing of waste at one's *own* facility, while Section 6928(d)(1) requires transporters to ensure that *other parties* have storage permits.

Finally, in *Hayes International Corp.*, a case concerning Section 6928(d)(1), the Eleventh Circuit found that knowledge that it is illegal to transport hazardous waste to an unpermitted facility is not required, but knowledge that the facility did not have a permit is required.[52] The court reasoned that Section 6928(d)(1) was not drafted to make knowledge of illegality an element of the offense. If construed otherwise, the statute would criminalize innocent conduct. The court, however, held that a defendant acts knowingly if he willfully fails to determine the permit status of a facility.[53]

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44 United States v. MacDonald & Watson, Waste Oil Co., 933 F.2d 35, 51 (1st Cir. 1991).

45. United States v. White, 766 F. Supp. 873, 895 (E.D. Wash. 1991).

46. *Hoflin*, 880 F.2d at 1038–39; *Hayes Int'l Corp.*, 786 F.2d at 1503–05; *Johnson & Towers*, 741 F.2d at 668–69.

47. *Johnson & Towers*, 741 F.2d at 668–69.

48. *Id.* at 668.

49. *Hoflin*, 880 F.2d at 1039.

50. *Id.*

51. 968 F.2d 795 (9th Cir. 1992).

52. *Hayes Int'l Corp.*, 786 F.2d at 1503–05.

53. *Id.*

B. The Responsible Corporate Officer Doctrine.

Most environmental statutes define a "person" to include corporate officers and employees[54] based on a legislative philosophy that penalizing individuals is a more effective deterrent than imposing fines on corporations which might treat those fines as a cost of doing business. Thus, the scope of liability for environmental crimes can extend not only to the corporation, partnership, joint venture or other entity involved, but also to the directors, supervisory personnel, line employees responsible for discharges of wastes and the reporting of discharges to environmental agencies, and outsiders who advise or are otherwise associated with the entity's environmental matters.

Because an individual defendant's knowledge is sometimes difficult to prove, the government has recently attempted to invoke the "responsible corporate officer" doctrine as an alternative to proving actual knowledge. The doctrine developed in other areas of law to prosecute corporate officers for violating regulatory laws. The seminal cases in the area, *United States v. Dotterweich*[55] and *United States v. Park*,[56] involved misdemeanor charges under the Federal Food, Drug and Cosmetic Act (FDCA), which did not require scienter or knowledge. In *Dotterweich*, a pharmaceutical company and its president were convicted of shipping misbranded and adulterated drugs under the FDCA.[57] The president challenged the conviction claiming he was personally unaware of any wrongdoing. The Court held that the hardship of such a conviction should rest on the person that has the opportunity to prevent the harm rather than on the innocent public.[58]

In *Park*, the corporation and its president/chief executive officer were charged with allowing food received in interstate commerce and held for sale to be stored in a building accessible to and contaminated by rodents.[59] The Food and Drug Administration (FDA) notified the individual of the unsanitary conditions. Months later, the FDA again investigated and found that the condition had not been rectified.[60] At trial, the president admitted that he was responsible for all of the operations of the company but claimed he had delegated authority over the situation to others.[61] The Court held that "responsible corporate officers" have a duty to seek out and remedy violations, and that corporate officers are legally accountable because of their responsibilities and authority, not merely because of their position.[62] Thus, the Court clarified what it had stated indirectly in *Dotterweich*—that corporate officers could be liable for violations of strict liability public welfare statutes.

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54. *See Dee*, 912 F.2d at 744 (federal employees are "persons" under RCRA); *Johnson & Towers, Inc.*, 741 F.2d at 665 (corporate agents are "persons" under RCRA). In several statutes, such as the Clean Water Act and the Clean Air Act, the statutes specifically include "responsible corporate officer" within the definition of a "person." *See* 42 U.S.C. § 7413(c)(6); 33 U.S.C. § 1319(c)(6). In United States v. Brittain, 931 F.2d 1413, 1419 (10th Cir. 1991), the court held that the addition of "responsible corporate officer" was an expansion of liability under the Clean Water Act.

55. 320 U.S. 277 (1943).

56. 421 U.S. 658 (1975).

57. *Dotterweich*, 320 U.S. at 278.

58. *Id.*

59. 421 U.S. at 662.

60. *Id.* at 663.

61. *Id.* at 664–65.

Because environmental statutes also deal with public welfare crimes, several courts have relied upon the rationale of *Dotterweich* and *Park* in relaxing the "knowledge" requirement in various environmental criminal provisions.[63] In some instances, courts have permitted juries to infer that the responsible corporate officers had knowledge of the particular facts in issue because it was their business to know.[64]

Recently, several courts have distinguished *Dotterweich* and *Park* on the grounds that they addressed a statute without a knowledge requirement. These courts have reasoned that since many federal environmental statutes require proof of "knowledge," the government must prove that an individual defendant had actual knowledge.[65] However, in the case of a responsible corporate officer, several courts have held that knowledge may be proven by direct or circumstantial evidence.[66] Criminal liability may be established where the official, by reason of his position, "knew" of illegal activities; and the jury may be allowed to infer this knowledge from circumstantial evidence.[67]

For example, in *Hayes International Corp.*,[68] the government prosecuted a corporate employee for violating Section 6928(d)(1) of the RCRA. The employee was responsible for the disposal of jet fuel drained from airplanes and a paint waste and solvent mixture. The employee arranged to dispose of these wastes with a vendor for a small fee. As it turned out, the vendor did not have a permit and disposed of the wastes at illegal dump sites.

In deciding whether the employee had knowledge, the court allowed the jury to rely on circumstantial evidence.[69] Indeed, the court stated that "it is common knowledge that properly disposing of wastes is an expensive task, and if someone is willing to take away wastes at an unusual price or under unusual circumstances, then a juror can infer that the transporter knows the wastes are not being taken to a permit facility."[70] The court ultimately held that the employee did not take sufficient precautions to ensure that the vendor had a permit.

Application of the responsible corporate officer doctrine does not mean, however, that the government may convict a defendant solely because he is a responsible corporate officer. In *MacDonald & Watson Waste Oil Co.*,[71] the court reversed the conviction of the president of a company whose business it was to transport and dispose of waste oil.[72] The First Circuit found that one of the jury instructions was improper because it suggested that the president could be convicted of a "knowing" violation solely because of his status as

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62. *Id.* at 675.
63. *Johnson & Towers*, 741 F.2d at 666 (citing *Dotterweich*, 320 U.S. at 280–81).
64. *Johnson & Towers*, 741 F.2d at 669 (citing *International Minerals & Chem. Corp.*, 402 U.S. at 569).
65. *See MacDonald & Watson Waste Oil*, 933 F.2d 35; *White*, 766 F. Supp. 873.
66. *MacDonald & Watson Waste Oil*, 933 F.2d at 55; *Hayes Int'l Corp.*, 786 F.2d at 1504.
67. *MacDonald & Watson Waste Oil*, 933 F.2d at 55.
68. 786 F.2d
69. *Id.* at 1504.
70. *Id.*
71. *MacDonald & Watson Waste Oil*, 933 F.2d at 35.
72. *Id.* at 50–55, 61.

president of the company.[73] The court held that the government was not required to prove that the president had *actual* knowledge of the illegal shipments.[74] However, it noted that the conviction could have been upheld if the jury had been instructed that it could infer the president knew of the illegal shipments based on circumstantial evidence, such as evidence that the president knew of prior violations and chose to ignore the facts behind the RCRA violations.[75]

In the two most recent cases concerning Section 6928(d)(2)(A) of the RCRA, the courts have again held that a responsible corporate officer may not be convicted solely because of his position; rather, a conviction must be based on his knowledge of the violations.[76] In *White*, the government alleged that the defendant was liable for the acts of other employees because he was the responsible corporate officer for environmental safety and had direct responsibility for supervising the handling of hazardous waste.[77] In striking the government's allegations, the court stated that "[t]he 'responsible corporate officer' doctrine would allow a conviction without showing the requisite specific intent," a result contrary to the knowledge requirement of the statute.[78]

In *Baytank*, the court found sufficient evidence to convict both the executive vice president and the operations manager.[79] Specifically, the court determined that the jury could have reasonably concluded that these defendants knew that hazardous wastes were stored on-site and without a permit in violation of the regulations.[80] The operations manager had direct responsibility for the day-to-day operations, including the filing of environmental compliance forms. The executive vice president was also involved in operations and had submitted an application for an NPDES permit under the Clean Water Act. The court found that the testimony was sufficient to establish that these defendants knew of the violation.[81]

These recent cases suggest that courts will not permit the responsible corporate officer doctrine to be applied in a wholesale fashion to environmental statutes with knowledge requirements. Rather, some limitations will be placed on that doctrine in an effort to give effect to the express language of the statutes themselves. It is likely, however, that the use of circumstantial evidence and factual inferences related to an employee's corporate duties and responsibilities will enable a limited form of this doctrine to exist in the environmental arena.

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73. *Id.* at 51.
74. *Id.* at 55.
75. *Id.* at 50–55.
76. *Baytank*, 934 F.2d at 616–17; *White*, 766 F. Supp. at 895.
77. *White*, 766 F. Supp. at 894–95.
78. *Id.*
79. *Baytank*, 934 F.2d at 616–17.
80. *Id.* at 616.
81. *Id.*

III. PRACTICAL CONSIDERATIONS IN CONDUCTING INTERNAL INVESTIGATIONS

A. Introduction

When a company receives notice, whether by government investigation or otherwise, that an environmental violation may have occurred, it should conduct an internal investigation as soon as possible. When confronting such an investigation, accurately determining the facts is critical because a company cannot formulate an effective response to allegations unless and until such facts are ascertained. Indeed, the failure to obtain an accurate and complete set of facts could cause the company to respond in an inappropriate or damaging manner. Such responses could negatively impact future defenses and the credibility of the company in the eyes of third parties. Thus, the company must plan and implement its internal investigation carefully.

Although an internal investigation clearly impacts the legal affairs of a company, management should also consider the impact it may have on the company's internal health and well being. For example, an investigation necessarily affects employer-employee relations, disrupts internal systems, affects employee morale, and can even impact competition and productivity. If mishandled, internal investigations can worsen existing problems.

When a company is faced with the need to conduct an internal investigation, several fundamental tasks must be accomplished. *First*, identify the objective of the investigation. Once the objective is defined, the investigation can be tailored in substance and scope to realize that objective. *Second*, name the person(s) who will conduct the investigation. Options include in-house or outside counsel, specially retained counsel, an internal audit committee or board, outside technical consultants, or management personnel. *Third*, retrieve, review and organize relevant documents. *Fourth*, interview persons having relevant knowledge. In connection with such interviews, give consideration to the potential for future discovery of the company's work product, *Miranda*-type rights, the appropriateness and availability of separate counsel, and the potential existence of government informers. *Fifth*, collate the results of the investigation.

B. The Application of Privilege.

The attorney-client privilege and the work product doctrine must be given considerable attention during every phase of an internal investigation. In order to protect the confidentiality of the internal investigation, it is wise to conduct the investigation in a manner that will maximize the work product doctrine and the attorney-client privilege. The client can always waive the privilege at a later date, if appropriate.

The attorney-client privilege applies when the following circumstances are met:

> (1) [T]he asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client

(b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.[82]

In the landmark case *Upjohn Co. v. United States*,[83] the United States Supreme Court considered the scope of the attorney-client privilege in the context of an internal investigation conducted by in-house counsel. The Court held that the privilege must be determined on a case-by-case basis, and, in that case, considered the following facts to be significant to its decision to apply the privilege: (1) the employees communicated with corporate counsel to secure legal advice for the corporation; (2) the employees cooperated with corporate counsel pursuant to the instruction of corporate superiors; (3) the communications involved matters within the scope of the employees' employment; and (4) the information was not available from upper level management.[84] The *Upjohn* Court refused to limit the privilege to communications between corporate counsel and managerial or policy-making employees and, instead, applied the privilege to mid- and lower-level employees.[85] In *Diversified Industries, Inc. v. Meredith*,[86] the final report of an internal investigation by counsel was held to fall within the attorney-client privilege and employee interviews were held to be confidential communications by the corporate client.[87]

In *Samaritan Foundation v. Superior Court*,[88] the Arizona Court of Appeals recently rejected the logic employed by the *Upjohn* court.[89] In *Samaritan*, the court considered whether employee interview summaries made by a paralegal employed within a hospital's legal department fell within the attorney-client privilege. The court had no difficulty deciding that the privilege applied to communications with paralegals.[90] However, the question of whether the employees interviewed were "clients" was more troublesome. The court ultimately held that, in a corporate setting, the attorney-client privilege is limited to "control-group" employees, including top managerial decision-makers and persons who have advisory responsibility to those decision-makers.[91] In so ruling, the court reasoned that the work-product doctrine generally affords adequate protection to corporations conducting investigations, with one reservation: those instances wherein corporations

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82. United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950). In state courts and federal court actions predicated on state claims, the attorney-client privilege is governed by state case law. *But see* American Std. v. Pfizer Inc., 828 F.2d 734 (Fed. Cir. 1987).

83. 449 U.S. 383 (1981).

84. *Id.* at 394–95.

85. *Id.* at 391.

86. 572 F.2d 596 (8th Cir. 1977).

87. *Id.* at 610–11. *But cf.* Spectrum Sys. Int'l Corp. v. Chemical Bank, 558 N.Y.S.2d 486 (N.Y. App. Div. 1990) (where role of counsel was that of an investigator retained to develop facts to develop corruption prevention measures, rather than to render legal opinions, neither the attorney-client nor the work-product doctrine applies).

88. 114 Ariz. Adv. Rep. 8 (Ct. App. 1992).

89. *Id.*

90. *Id.* at 12.

91. *Id.* at 15.

seek advice on matters in which litigation is remote.[92] In an effort to provide full protection, the court adopted a "qualified attorney-client privilege" for communication with non-control group employees. The court described this qualified privilege as follows:

> a. The qualified privilege applies when management, in order to secure legal advice or assistance for the corporation, directs a corporate employee outside the control group to communicate in confidence with the corporation's legal staff about ... employment.
>
> b. Unlike work product immunity, the privilege does not require a showing that the communication was undertaken in anticipation of or preparation for litigation.
>
> c. Like work product immunity, however, the qualified privilege may be overcome "upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means."
>
> d. Additionally, to overcome the privilege, the party seeking discovery must demonstrate that its substantial need outweighs the corporation's interest in maintaining confidentiality.[93]

Given this new qualified privilege, interviews of mid- and lower-level employees will have to be approached with caution and thoughtfulness. The practice of creating an express attorney-client relationship with such employees may not protect communications any longer. Indeed, the *Samaritan* court specifically rejected the hospital's attempt to transform its interviewees into "clients" through the execution of retention agreements.[94] The court noted that these employees did not seek, need or receive personal legal advice.[95] Thus, the work product doctrine may be the only means of preserving information obtained from non-control group employees in Arizona.

The work product doctrine, codified in Rule 26(b)(3) of the Arizona and Federal Rules of Civil Procedure, Rule 16(b)(2) of the Federal Rules of Criminal Procedure, and Rule 15.4(b) of the Arizona Rules of Criminal Procedure,[96] provides that (1) documents or tangible things, (2) prepared in anticipation of litigation or for trial, (3) by or for another party, or by or for that party's representative, (4) are protected against discovery, unless the party seeking disclosure can demonstrate substantial need, and that undue hardship would result without discovery. Most courts have held that documents prepared during an internal investigation are protected against disclosure by the work product doctrine.[97]

In order to preserve the protection of the attorney-client privilege and the work-product doctrine, it is advisable to draft an engagement letter specifying the purpose, objective and role of the attorney in the investigation.

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92. *Id.* at 16.
93. *Id.* (citations omitted).
94. *Id.* at 12.
95. *Id.*
96. *See also* Hickman v. Taylor, 329 U.S. 495 (1947).
97. *In re* Grand Jury Subpoena (John Doe, Inc.), 599 F.2d 504, 511–12 (2d Cir. 1979); *In re* Grand Jury Investigation (Sun Co.), 599 F.2d 1224, 1229 (3d Cir. 1979); *Upjohn*, 449 U.S. at 399.

Such a letter should be drafted with due regard for the elements set forth in *Upjohn*, *Samaritan* and the federal and state work product rules.[98] It is a good idea to have an appropriate board of directors resolution that authorizes the retention of counsel, again reiterating that it is for the purpose of securing legal advice, and, if applicable, in anticipation of litigation. In order to preserve the attorney-client privilege, confidentiality should be scrupulously maintained for the duration of the investigation.

In addition to ordinary rules of waiver, the attorney-client privilege and work-product doctrine may be endangered by the crime-fraud exception which allows discovery of materials if those materials involve the furtherance of criminal or fraudulent activity.[99] The risk that this exception will be triggered is very real in an investigation setting, especially if wrongful conduct is ongoing.

C. Conducting the Investigation

1. The Scope of the Investigation

In defining the scope of an investigation, a company must consider the specific objectives it seeks to achieve and then tailor the investigation accordingly. For example, is the investigation being conducted because there is a possibility that civil or criminal regulations have been violated? Is the investigation being conducted because there is a risk of injury to the public? Or, is the investigation aimed at an isolated incident or an overall corporate practice?

Once the company identifies these objectives, the investigation should be structured and conducted in a manner that will not later be viewed as part of an effort to obstruct any outside investigation or improperly influence potential witnesses.[100] In this regard, the company must decide whether to announce the governmental and internal investigations to company employees. It is often wise to disclose the existence of such investigations by written memorandum. Such a memorandum ensures that uniform and accurate information is conveyed to company employees, thereby curtailing damaging gossip and speculation. A memorandum also lends credibility to the company's intent to discover the true facts in an objective manner, thereby dispelling notions of a "cover-up."

If a memorandum is distributed, it should state that the government is conducting an investigation and identify the agency conducting the investigation, if known. The memorandum should advise the employees that

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98. *See supra* text accompanying notes 67–78.

99. United States v. Zolin, 491 U.S. 554, 562–63 (1989); Garner v. Wolfinbarger, 430 F.2d 1093 (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971); *In re* Antitrust Grand Jury (Advance Publications), 805 F.2d 155, 162–64 (6th Cir. 1986); *In re* Grand Jury Subpoenas Duces Tecum (Marc Rich & Co. A.G.), 731 F.2d 1032, 1038 (2d Cir. 1984); *In re* Grand Jury Subpoenas Duces Tecum, 773 F.2d 204, 206 (8th Cir. 1985); United States v. Horvath, 731 F.2d 557, 562 (8th Cir. 1984); *In re* Sealed Case, 754 F.2d 395, 399 (D.C. Cir. 1985); *In re* Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982); *In re* John Doe Corp., 675 F.2d 482, 492 (2d Cir. 1982).

100. Counsel must exercise extreme caution, however, not to mislead a witness in any way. Otherwise, the attorney may be subject to criminal prosecution. The obstruction of justice and witness tampering statutes are discussed *infra* part IV.B.

the firm has retained counsel to represent it, and that counsel will be conducting an internal investigation. The memorandum should advise employees that they may be approached by government agents, at home or work, for interview purposes. Although it should be made clear that it lies within the employee's sole discretion whether or not to agree to an interview, the memorandum should encourage all employees to be truthful if an interview is granted.

A memorandum should also be sent to all employees the company intends to interview. This memorandum should emphasize the importance of the interview, stress its confidentiality and the need for full cooperation, and state that the purpose of the investigation is to provide legal advice to the corporation in anticipation of possible litigation. The memorandum should inform the employee of which documents or records will be needed for the interview, and advise them of their right to separate counsel.[101]

2. Identifying Who Will Conduct the Investigation

Internal investigations are most often conducted by outside counsel assisted by technical consultants, and least often by corporate management. The advantage of having an attorney conduct the investigation lies in the availability of legal privileges. The decision as to whether in-house or outside counsel should conduct the investigation is less clear, so long as inside counsel is acting only in a legal capacity.[102] In-house counsel likely has more familiarity with the business practices of the company, the systems in place, the sources of documentation and the identity of key employees. Outside counsel, on the other hand, brings a more objective and disinterested perspective to the fact-finding process. Moreover, outside counsel can always tap the resources of in-house counsel during the course of the investigation.

The selection of internal management personnel to conduct the investigation may negatively impact the credibility and accuracy of the investigation. Corporate employees at almost every level carry with them preconceptions of loyalty, conflict, personal gain and other motives which may impair an objective fact-finding endeavor. Even if such motives can be controlled, the credibility of the results as seen through the eyes of third parties may nonetheless be affected adversely.

The skills of technical consultants will probably be necessary to the investigation. Environmental matters often require the retention of civil engineers, soil engineers, hydrologists, chemists and other environmental experts to assist counsel in determining the facts. Indeed, counsel may not understand the significance or nuances of certain documents or facts absent expert assistance. If a technical consultant conducts the investigation himself, however, significant legal privileges will be lost. Thus, counsel should be retained together with an appropriate consultant in order to preserve these privileges. Both outside and inside consultants should report directly to the counsel directing the internal investigation. Any consultant's report should be drafted to maximize the attorney-client and work product privileges.

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101. *See infra* part III.C.4.

102. *In re* Sealed Case, 737 F.2d 94, 99 (D.C. Cir. 1984); *In re* Grand Jury Subpoena Duces Tecum, 731 F.2d at 1037; Teltron, Inc. v. Alexander, 132 F.R.D. 394, 396 (E.D. Pa. 1990); Henson v. Wyeth Labs., Inc., 118 F.R.D. 584, 587 (W.D. Va. 1987).

Communications to and from outside agents, other than counsel, may also be protected by the attorney-client privilege.[103] In such instances, the communications must relate to the rendering of legal advice by the attorney. Thus, one must be careful not to rely on the privilege when using outside agents to formulate business decisions, as opposed to advice of a legal nature. Under appropriate circumstances, communications to outside agents retained by counsel will also be covered by the work-product doctrine.[104] The consultant's work should be covered by an engagement letter which clearly states that all communications and information are confidential, and that the report is for the purpose of giving legal advice, or in anticipation of litigation, if appropriate. Any board of directors resolution authorizing retention of counsel, and the retention of counsel letter itself, should expressly authorize counsel to retain non-legal experts to assist in providing legal advice and in preparations made in anticipation of litigation.

3. The Retrieval of Relevant Documents and Physical Evidence

Although the volume of documents may dictate a different result, a review of pertinent documents is usually advisable before conducting employee interviews. It may also be necessary to review physical evidence and test results. These documents and test results will provide a good working framework of the facts in question, may raise questions as to other facts, will help identify persons having knowledge and may reveal the existence of any "smoking guns" early on.

Employees or an independent agent can organize documents, physical evidence, and test results. If an independent agent is employed, the agent must be educated about the company's systems so that critical materials are not left undiscovered. Indeed, the search should be conducted with a broad net, directed at most if not all departments within the company because pertinent materials often end up in odd locations.

During this process, be mindful of the future use of the materials. From the start, documents should be organized and indexed by subject matter, date, type or other appropriate category, so that they can be accurately and efficiently retrieved. A chronology of events is often more easily created as materials are being collected. Cross-index documents, physical evidence, and test results with specific personnel for use in future employee interviews, thereby creating witness files as facts are gathered.

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103. *E.g.*, United States v. Judson, 322 F.2d 460, 462 (9th Cir. 1963) (statements prepared by accountant at request of counsel); United States v. Cote, 456 F.2d 142, 144–45 (8th Cir. 1972) (privilege could attach to information in an accountant's workpapers); United States v. McPartlin, 595 F.2d 1321, 1335–37 (7th Cir. 1979), *cert. denied*, 444 U.S. 833 (1979) (privilege covered communication to investigator). *But see* United States v. Brown, 478 F.2d 1038, 1039–40 (7th Cir. 1973) (no privilege where accountant attended meeting between a client and his attorney but had been retained by the client and directed by the client to attend the meeting).

104. United States v. Nobles, 422 U.S. 225, 238–39 (1975); *In re* Grand Jury Subpoena, 599 F.2d at 513. *Cf.* State *ex rel.* Corbin v. Ybarra & Excel Indus. Inc., 161 Ariz. 188, 192–95, 777 P.2d 686, 690–93 (1989). *But see In re* International Sys.& Controls Corp. Sec. Lit., 91 F.R.D.552, 557 (S.D. Tex. 1981), *vacated by* 693 F.2d 1235 (5th Cir. 1982) (no work product where accountant was retained by a special committee of the corporate client's board of directors).

Finally, it should be noted that many governmental agencies have subpoena power and are often quick to subpoena pertinent documents and tangible evidence during an investigation. This practice increases the importance of gathering, organizing, and reviewing such materials early in the investigation.

4. Interviewing Employees

Conduct employee interviews with two persons, if possible. The use of two interviewers increases the likelihood of accuracy and makes it more difficult for the employee to later recant his recitation of the facts. It is wise to begin employee interviews by reading a uniform and standardized introductory statement. Such a statement will minimize miscommunication and will help avoid subsequent allegations of undue influence. This statement should state that an investigation is being conducted, identify the subject matter of the investigation, explain the purpose of the interview, inform the employee of his or her right to retain separate counsel, and advise the employee to be truthful.

If counsel represents only the company, that fact should be clearly stated to the employees. ABA Model Rule 1.13(d) states that:

> In dealing with an organization's directors, officers and employees ... a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

The comment to the Model Rule states that:

> Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the corporation cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged. Whether such a warning should be given may turn on the facts of each case.

It is also wise to advise employees that the company may choose to reveal the contents of the interview to governmental agencies if it is in the company's best interest.[105] If this advice is not given, and employees believe that the company lawyer is acting as their lawyer, under certain circumstances the lawyer may be obligated to keep the information confidential and may be disqualified from representing the corporation.[106]

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105. In United States v. Keplinger, 776 F.2d 678, 700–01 (7th Cir. 1985), *cert. denied*, 476 U.S. 1183 (1986), the court ruled that information provided by employees to company counsel could be revealed to the government. The court ruled that the employees had neither sought nor asked about individual representation and the company lawyers neither believed nor represented that they were representing the employees. *See also* United States v. Layton, 855 F.2d 1388, 1406 (9th Cir. 1988), *cert. denied*, 489 U.S. 1046 (1989); *In re* Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d 120, 125 (3d Cir. 1986); *In re Grand Jury Investigation*, 599 F.2d at 1235–36; *In re* Grand Jury Subpoena Duces Tecum, 391 F. Supp. 1029, 1034 (S.D.N.Y. 1975).

106. *See* E.F. Hutton & Co. v. Brown, 305 F. Supp. 371, 396–98 (S.D. Tex. 1969) (where corporate counsel was disqualified because of a corporate officer's lack of understanding of the lawyer's role). *See also In re* Grand Jury Proceedings, Detroit Michigan, August, 1977, 434 F. Supp. 648, 650 (E.D. Mich. 1977), *aff'd*, 570 F.2d 562 (6th Cir. 1978). In *In re* Grand Jury Investigation No. 83–30557, 575 F. Supp. 777, 780 (N.D. Ga. 1983), the court set forth the parameters of what employees must prove under such circumstances.

If applicable, instruct the employee that the interviews are subject to the corporation's attorney-client privilege or work-product doctrine, and that information provided during the interviews should not be revealed to third parties. Indeed, to avoid waiver caused by inadvertent disclosure, advise the employee that he or she does not have the right to waive the attorney-client privilege on behalf of the company, as that right belongs only to the board of directors or corporate management acting collectively.[107]

Counsel should decide early on if and when to interview former employees. If former employees have critical knowledge and information, they should be identified and interviewed as soon as possible since government investigators will undoubtedly try to interview them. Corporate counsel's interviews with former employees should be subject to the attorney-client privilege and work-product doctrines.[108] The law varies among jurisdictions regarding whether one's adversary is permitted *ex parte* contact with current or former corporate employees.[109]

Give advance thought to the exchange of information during the interview. For example, should documents and other information be shared with the interviewee? Care must be taken not to disclose privileged matters if such disclosure would waive the privilege. The government may be able to later discover documents protected by the attorney-client privilege and the work-product doctrine if they are used to refresh the recollection of a witness in connection with testimony.[110] Although some give and take may be required, it is best not to reveal strategies and legal positions which the company is considering. Additionally, while the interview is being conducted, counsel should avoid making any statements that could be misconstrued as efforts to influence the employee's testimony.

The interviewer should keep in mind that employees have many motivations for being less than candid, including the belief that certain information could jeopardize their employment with the company or be

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107. *See* C.F.T.C. v. Weintraub, 471 U.S. 343, 348–49 (1985); *In re* O.P.M. Leasing Servs., Inc., 670 F.2d 383, 386 (2d Cir. 1982); Citibank, N.A. v. Andros, 666 F.2d 1192, 1195 (8th Cir. 1981); FED. & ARIZ. R. EVID. 612.

108. *E.g., In re* Coordinated Pretrial Proceedings In Petroleum Products Antitrust Lit., 658 F.2d 1355, 1361 n.7 (9th Cir. 1981), *cert. denied*, 455 U.S. 990 (1982); Admiral Ins. Co. v. U.S. Dist. Court for Dist. of Ariz., 881 F.2d 1486, 1493 n.6 (9th Cir. 1989); Lang v. Superior Court, 107 Ariz. Adv. Rep. 11 (App. Feb. 27, 1992).

109. *See, e.g., Lang*, 107 Ariz. Adv. Rep. at 15 (*ex parte* contact with former employee of opposing party permitted unless employee's actions or omissions gave rise to underlying litigation or former employee has ongoing relationship with former employer in connection with the litigation); Niesig v. Team I, 558 N.E.2d 1030, 1035 (N.Y. 1990) (prohibition also includes corporate employees responsible for actually effectuating the advice of counsel in the matter); Wright v. Group Health Hosp., 691 P.2d 564, 569 (Wash. 1984) (no contact with those who have legal authority to bind the corporation). *See also* Mompoint v. Lotus Dev. Corp., 110 F.R.D. 414 (D. Mass. 1986).

110. *See* FED. R. EVID. 612 and comparable state rules; R.J. Hereley & Son Co. v. Stotler & Co., 87 F.R.D. 358, 359 (N.D. Ill. 1980); James Julian, Inc. v. Raytheon Co., 93 F.R.D. 138, 146 (D. Del. 1982); Wheeling Pittsburgh Steel Corp. v. Underwriters Labs., Inc., 81 F.R.D. 8, 9 (N.D. Ill. 1978). *But see* Leucadia, Inc. v. Reliance Ins. Co., 101 F.R.D. 674, 679 (S.D.N.Y. 1983) (mere fact that deposition witness looked at a document protected by attorney-client privilege is inadequate reason to conclude privilege was destroyed); Sporck v. Peil, 759 F.2d 312, 317–18 (3d Cir. 1985), *cert. denied*, 474 U.S. 903 (1985); Aguinaga v. John Morrell & Co., 112 F.R.D. 671 (D. Kan. 1986).

harmful to their fellow employees. Thus, as with most interviews, some skill is required to make the employee feel at ease while still impressing the seriousness of the inquiry.[111] At the end of the interview, instruct the employee to contact counsel if he or she later receives or recalls information which is pertinent to the subject matter.

Memorialize the information obtained during the interview as soon after the interview as possible. Draft such a memorandum in a manner which will provide the greatest degree of protection under the attorney-client privilege and work product doctrine. Opinion work product—an attorney's legal strategy, his intended lines of proof, evaluations of the strengths and weaknesses of his case, and inferences drawn from interviews of witnesses—is very difficult for an adversary to secure.[112] In deciding whether to take sworn statements or recorded interviews, remember that these materials could be the subject of future discovery requests and protracted battles over the application of the work product and privilege protections.

5. The Results of the Investigation

When the investigation is completed, the facts must be analyzed and collected in some meaningful manner. It is natural, of course, to prepare a report enabling decisions regarding future action to be taken. The danger with preparing a written report lies in its availability to third parties through formal discovery or other means. Thus, in order to maximize protection of the report under privilege and work-product principles, write the report with due consideration to the factors considered by the courts in applying these privileges. In other words, the report should not simply recite facts collated—it should contain legal opinions, advice, analyses, and recommendations. Moreover, after the report is completed, rigorously maintain its confidentiality.

D. Conflicts in Multiple Party Representations—Should Individuals Have Separate Counsel?

The question of whom the corporate counsel represents must be resolved at the outset and is addressed in ER 4.2. The Comment to the Rule explains:

> In the case of an organization, this rule prohibits communications by a lawyer for one party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by his or her own counsel,

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111. The question of whether employees should have communications with third parties, including governmental agencies, without first consulting either corporate officials or counsel should also be considered. Government investigators often attempt to contact such employees at home. Advising the employee on this issue can be a delicate matter.

112. *Sporck*, 759 F.2d at 316; *In re* Sealed Case, 676 F.2d 793, 809–10 (D.C. Cir. 1982); *In re* Murphy, 560 F.2d 326, 336 (8th Cir. 1977); *In re* Doe, 662 F.2d 1073, 1076–77 n.2 (4th Cir. 1981), *cert. denied*, 455 U.S. 1000 (1982); *In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979).

> the consent by that counsel to a communication will be sufficient for purposes of this rule.

It may be incumbent upon the company to seek outside counsel for the corporation separate from counsel for individual corporate officers, due to potential or actual conflicts of interest. If outside counsel is retained, the company must decide whether that counsel should represent more than one individual. Typically, economic considerations come into play in these decisions. However, because of conflicts issues which inevitably arise in any multiple-client representation situation, counsel must be alert, even at the preliminary stage of the attorney-client relationship, for possible conflicts down the road.[113]

Any discussion of potential conflicts in the representation of more than one client or the decision of whether to become involved in a joint defense effort should begin with a defendant's Sixth Amendment constitutional right to "the assistance of an attorney unhindered by a conflict of interests,"[114] and the applicable ethical rules on conflicts.[115] ER 1.6(a) provides, in relevant part, that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation ...."

Before undertaking representation of the client, thoroughly discuss the pros and cons of joint representation of the corporation and its officers and employees. If an individual's testimony is sought merely as a witness, and that person is not a subject or target of the investigation, corporate counsel may also represent individual witnesses. As an alternative, separate counsel may be brought in to represent groups of witnesses. Courts have generally not been willing to disqualify counsel for multiple defendants in grand jury investigations unless the government can show an actual conflict of interest, *i.e.*, that one of the clients will provide incriminating testimony about the other clients.[116]

ER 1.7 generally provides that (a) "a lawyer shall not represent a client if the representation of that client will be directly adverse to another client ... or (b) ... if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person ..., unless" the lawyer reasonably believes the representation will not be adversely affected

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113. *Cf.* Bridge Products, Inc. v. Quantum Chemical Corp, 20 Envtl. L. R. 10940 (N.D. Ill. 1990) (available on WESTLAW at 1990 WL 19968) (law firm hired as counsel for defendant in hazardous waste case disqualified after previously learning privileged information during "beauty contest" interview with plaintiff as its potential replacement counsel).

114. Cuyler v. Sullivan, 446 U.S. 335, 355 (1980) (Marshall, J., concurring in part, dissenting in part) (quoting Holloway v. Arkansas, 435 U.S. 475, 483 n.5 (1978)). *Accord* United States v. Crespo de Llano, 838 F.2d 1006, 1012 (9th Cir. 1987); United States v. Wheat, 813 F.2d 1399, 1402 (9th Cir. 1987), *aff'd*, 486 U.S. 153 (1988).

115. The ABA MODEL RULES OF PROFESSIONAL CONDUCT were adopted as amended by the Arizona Supreme Court in 1983. The ethical rules (ER) governing conflicts of interest are ARIZONA RULES OF PROFESSIONAL CONDUCT Rules 1.7, 1.8 and 1.9.

116. *In re* Grand Jury Proceedings, 859 F.2d 1021, 1024–25 (1st Cir. 1988); *In re* Special February, 1977 Grand Jury, 581 F.2d 1262, 1264–65 (7th Cir. 1978); *In re* Special Grand Jury, 480 F. Supp. 174, 179 (E.D. Wis. 1979).

and each client consents after consultation.[117] If the clients consent, several courts have recognized the clients' right to their choice of retained counsel.[118] Federal Rule 44(c) requires that a hearing be held to advise the clients of the potential conflicts in such a representation.[119] Even with each client's consent, however, the court may disqualify counsel if it determines *sua sponte* that an actual conflict exists.[120]

ER 1.13 governs an attorney's conduct in representing a corporation or other organizational client. The comment to the Rule cautions that when the lawyer finds that the organization's interests are adverse to that of one of its constituents, the lawyer should advise the constituent to obtain independent representation[121] and "that discussions between the lawyer for the organization and the individual may not be privileged."[122]

If corporate counsel concludes that an individual officer, director, or employee faces a substantial risk of criminal liability, then the multiple representation becomes far more problematic. If a joint defense strategy will not be in the best interests of the corporation and its agents, or if it would benefit a defendant to make a proffer to the government or plea bargain, then the individual should be separately represented. The conflict problem is even more acute if one client is being courted by the government as a mere witness while others are potential targets,[123] for example, an employee who has information about corporate wrongdoing by others.[124] If one client becomes a witness against the other client, counsel will probably be forced to withdraw, because he cannot cross-examine one client for the benefit of another client and cannot cross-examine a former client on the basis of information received in confidence.[125]

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117. ER 1.7(b) further provides that "[w]hen representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved."

118. United States v. Cunningham, 672 F.2d 1064, 1070 (2d Cir. 1982), *cert. denied*, 466 U.S. 951 (1984); United States v. Curcio, 680 F.2d 881 (2d Cir. 1982) (Curcio I), *appeal after remand*, 694 F.2d 14 (2d Cir. 1982) (Curcio II); *In re* Grand Jury Empaneled January 21, 1975, 536 F.2d 1009 (3d Cir. 1976).

119. United States v. Hughes, 817 F.2d 268, 271 (5th Cir. 1987), *cert. denied*, 484 U.S. 858 (1987); Duncan v. Alabama, 881 F.2d 1013, 1017 (11th Cir. 1989); United States v. Garcia, 517 F.2d 272 (5th Cir. 1975) (preceding the enactment of FED. R. CRIM. P. 44(c)).

120. *See, e.g.*, Wheat v. United States, 486 U.S. 153, 162 (1988) ("where a court justifiably finds an actual conflict of interest, there can be no doubt that it may decline a proffer of waiver, and insist that defendants be separately represented."); United States v. Allen, 831 F.2d 1487, 1494 (9th Cir. 1987), *cert. denied*, 487 U.S. 1237 (1988); United States v. Kenney, 911 F.2d 315, 322 (9th Cir. 1990); United States v. Rewald, 889 F.2d 836, 857–58 (9th Cir. 1989), *cert. denied*, 111 S. Ct. 64 (1990).

121. *See, e.g., In re* Folding Carton Antitrust Lit. 76 F.R.D. 417, 419 (N.D. Ill. 1977); United States v. RMI Co., 467 F. Supp. 915, 921 (W.D. Pa. 1979).

122. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 cmt. (1992).

123. *In re* Investigative Grand Jury Proceedings on April 10, 1979, 480 F. Supp. 162, 167–68 (N.D. Ohio 1979) (representation of target and non-target clients constitutes irreconcilable conflict), *appeal dismissed*, 621 F.2d 813 (6th Cir. 1980), *cert. denied sub nom.* Wittenberg v. United States, 449 U.S. 1124 (1980).

124. *See* David M. Zornow & Thomas M. Obermaier, *Representation of the Corporation and Its Employees in Environmental Criminal Cases*, C617 A.L.I.–A.B.A. 73 (1991).

125. *See, e.g.*, United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978); *RMI*, 467 F. Supp. at 919; Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221, 228 (7th Cir. 1978). *See also* Lightbourne v. Dugger, 829 F.2d 1012, 1023 (11th Cir. 1987), *cert. denied*, 488 U.S.

In summary, conducting an internal investigation requires the company and its counsel to carefully identify and analyze a multitude of legal, ethical and practical issues. Each investigation prompts a new and unique set of issues that may require counsel to deviate, in whole or in part, from some of the practical advice provided in Part III. Moreover, one of the ramifications of an internal investigation may be the discovery of new facts that fall within the mandatory reporting requirements of federal and state laws. These reporting requirements are addressed in Part IV.

IV. THE SECOND TIER OF CRIMINAL VIOLATIONS

A. The Need to Report the Event or to Amend Federal and State Filings

Many federal and state environmental laws require prompt reports of environmental emissions or discharges. The failure to report is often a crime. In addition to the reporting requirement, companies are often required by law to maintain records of the event. The following overview reflects the statutes as they currently read.

Under the Clean Air Act (CAA), the EPA requires that records be maintained and reports be filed concerning the emission of air pollutants.[126] It is a criminal violation of the CAA for a person to knowingly fail to notify the appropriate authority or report the emission.[127] In addition, a person may not knowingly make any false material statement in, omit material information from, or alter, conceal or fail to file any records or reports required under the CAA.[128] The penalty for the first criminal violation of the CAA is a fine pursuant to Title 18 and/or imprisonment of up to two years. For a subsequent violation, the penalties double.[129]

The Clean Water Act (CWA) allows the EPA and certain state agencies to require records and reports to determine if effluent limitations or other standards are being violated.[130] In addition, anyone in charge of a vessel or facility must immediately notify the appropriate agency of the United States Government if he knows of a discharge of oil or hazardous substances from his vessel or facility into navigable waters.[131] Failure to provide the required

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934 (1988); United States v. Soudan, 812 F.2d 920, 927 (5th Cir. 1986), *cert. denied*, 481 U.S. 1052 (1987).

126. 42 U.S.C. § 7413(c)(2). *See* United States v. Hugo Key & Son, Inc., 731 F. Supp. 1135 (D.R.I. 1989); United States v. Harford Sands, Inc., 575 F. Supp. 733 (D. Md. 1983).

127. 42 U.S.C. § 7413(c)(2).

128. *Id.*

129. *Id.*

130. A violation is punishable under 33 U.S.C. § 1319(c) (1988).

131. 33 U.S.C. § 1321(b)(5) (1988); 33 C.F.R. § 153.203 (1991). *See* United States v. Ashland Oil & Transp. Co., 504 F.2d 1317 (6th Cir. 1974) (court held that defendant did not provide notice immediately).

Under the CWA, as it has been construed by the courts, the term "navigable waters of the United States" is defined very broadly. *See Ashland Oil & Transp. Co.*, 504 F.2d at 1325 (stating that the provision of the CWA applies to the tributaries of a navigable river); United States v. Velsicol Chem. Corp., 438 F. Supp. 945, 947 (W.D. Tenn. 1976) (stating that discharges into a city sewer system that, in turn, empties into a navigable stream are regulated under the CWA). The applicability of the term "navigable waters of the United States," however, does have limits. *See, e.g.*, Kelly, People of the State of Mich. v. United States, 618 F. Supp.

notification can result in a penalty of up to $10,000 and one year's imprisonment.[132]

The RCRA governs generators and transporters of hazardous waste as well as owners or operators of facilities that treat, store, or dispose of hazardous waste. Under the reporting requirements of the RCRA, any of the above parties must notify the EPA by submitting various reports and records regarding the location and general description of any of the parties' activities that may be associated with the generation, transportation, treatment, storage or disposal of hazardous wastes.[133] The knowing omission of material information from the reports and records violates the criminal provision of the RCRA and subjects the violator to a fine of not more than $50,000 for each day of violation and/or up to two years of imprisonment.[134] For a subsequent violation, the penalties double.[135]

Under CERCLA, one must immediately notify the federal government when a hazardous substance is released in a quantity greater than specified "reportable quantities."[136] Any person in charge of a vessel or facility from which a hazardous substance is released in reportable quantities who fails to notify the authorities, or who submits in such notification any information which he knows to be false or misleading, is subject to criminal penalties.[137] There are several exceptions to this rule: (1) federally permitted releases do not have to be reported and are defined as those allowable under defined federal and state statutes. For example, NPDES-permitted releases under the CWA or releases in compliance with a Subtitle C hazardous waste management permit under the RCRA; (2) notification of continuous releases need only be made annually to the appropriate on-scene coordinator, though any statistically significant increase in those releases must be reported to the National Response Center; and (3) releases of oil or any fraction of oil such as gasoline need not be reported as a result of CERCLA's "petroleum exclusion" provision.[138] Failure to make the required report or notification or the making of a false or misleading report or notification may result in both civil and criminal penalties and up to three years' imprisonment for a first offense.[139] Anyone who knowingly destroys or falsifies required records also violates the statute.[140]

1103, 1107 (W.D. Mich. 1985) (holding that "Congress did not intend the [CWA] to extend federal regulatory authority over groundwater contamination").

132. 33 U.S.C. § 1321(b)(5) (1988).

133. 42 U.S.C. § 6930(a) (1988).

134. 42 U.S.C. §§ 6928(d)(3)–(5), (7).

135. 42 U.S.C. § 6928(d)(7).

136. The failure to give this notice is a violation of 42 U.S.C. § 9603(b)(3) (1988). *See* United States v. Carr, 880 F.2d 1550 (2d Cir. 1989) (court affirmed conviction of defendant for failing to report release of prohibited amount of hazardous substances in violation of CERCLA). However, if the notice is provided, it cannot be used in a criminal prosecution other than for perjury. 42 U.S.C. § 9603(b)(3).

137. 42 U.S.C. § 9603(b)(3) and (c). *See Carr*, 880 F.2d; United States v. Greer, 850 F.2d 1447 (11th Cir. 1988).

138. 42 U.S.C. § 9603(f) (1988) (exemptions). *See also* 40 C.F.R. § 302.1 (1991) and 42 U.S.C. § 9601(14) (1988) for CERCLA's petroleum exclusion provision.

139. 42 U.S.C. §§ 9603(b) and 9609 (1988).

140. 42 U.S.C. § 9603(d)(2).

Under TSCA, the owner of a facility must report any release of polychlorinated biphenyls (PCBs) in excess of fifty parts per million.[141] This report must be made within twenty-four hours to an EPA regional office. TSCA imposes a variety of other reporting requirements concerning chemical substances inventory, preliminary assessment information and pre-manufacture notifications.[142] It is a criminal violation for a person to knowingly or willfully fail or refuse to (1) establish or maintain records, (2) submit reports, notices or other information, or (3) permit access to or copying of records as required pursuant to TSCA.[143] The penalty for a criminal violation of TSCA is a fine of up to $25,000 per day of violation and/or imprisonment of up to a year.[144]

These reporting requirements pose a dilemma for corporations and their employees. On the one hand, corporations are in violation of the law if they fail to report a release. On the other hand, notification subjects the corporation to liability for cleanup and increased scrutiny by the regulatory authorities, and may subject corporate officers to personal liability. Further, such notification and resulting scrutiny by regulatory authorities may lead to a conflict between the corporation and its officers or representatives. Counsel for corporations must be aware of this dilemma and any resulting conflicts.

B. False Statements, Obstruction, Witness Tampering and Perjury

When a discharge occurs or is discovered that appears to violate an environmental statute, it is important not to worsen the situation by engaging in conduct that might be construed to be the product of a guilty mind. Investigating agencies and prosecutors often make decisions as to whether to prosecute based upon their subjective evaluation of the quality of the response and whether it appears that the persons involved are acting like good citizens. The government will be more likely to prosecute if the persons involved irresponsibly fail to remedy the situation, conceal or destroy documents, lie to government agents or encourage others not to be forthcoming. Parts IV.B.1–4, *infra,* discuss some of the more common criminal violations committed during the course of a government investigation.

1. False statements

Federal and Arizona statutes prohibit the making of false statements to government agencies.[145] These statutes apply to statements in a wide range of materials including applications, labels, manifests, records, permits or any other document under the jurisdiction of the EPA, ADEQ or any other federal or state agency.

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141. 40 C.F.R. §§ 761.123, 761.125 (1991).
142. 15 U.S.C. §§ 2606(f), 2607(a), and 2602(a) (1988).
143. 15 U.S.C. §§ 2614, 2615(b).
144. 15 U.S.C. § 2615(b).
145. 18 U.S.C. § 1001; ARIZ. REV. STAT. ANN. § 13–2311 (1989). *See* State v. Sommer, 155 Ariz. 145, 745 P.2d 203 (App. 1987) (numerous false sworn statements regarding collection of unemployment benefits when defendant was working was held to be scheme or artifice to defraud); Franzi v. Koedyker, 157 Ariz. 401, 758 P.2d 1303 (App. 1985) (cause of action pursuant to § 13–2311 upheld where defendants conspired to give false testimony in investigation into election campaign funding).

The statutes define three separate offenses: (1) falsifying, concealing or covering up a material fact by any trick, scheme or device; (2) making false, fictitious or fraudulent statements or representations; and (3) making or using any false documents or writings.[146] The elements of the offenses are: (1) a statement, (2) that is false, (3) material, (4) made knowingly and willfully, and (5) made in a matter within the jurisdiction of a department or agency. The statutes apply to the investigatory or enforcement process and have often been utilized to prosecute persons who make false statements or provide false documents to investigators. The concealment or destruction of relevant records also constitutes a violation.

In addition to the general false statements statutes, three other Arizona statutes are relevant. It is a felony for a person to acknowledge, certify, notarize, procure or offer to be filed, registered or recorded in a public office, an instrument known to be false or forged.[147] Similarly, it is a felony to make an unsworn statement believed to be false regarding a material issue to a public servant in connection with an official proceeding.[148] Finally, it is a misdemeanor for a person to knowingly make a false, fraudulent, or unfounded report or statement to a law enforcement agency, or to knowingly misrepresent a fact for the purpose of interfering with the orderly operation of a law enforcement agency.[149]

2. Obstruction of Justice

The federal obstruction of justice statute is written in broad terms and covers a wide range of conduct, including corruptly influencing, obstructing, or impeding "the due administration of justice."[150] The statute has been flexibly applied to deal with a wide range of obstructive behavior, including the

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146. *See, e.g., Rutana*, 932 F.2d at 1155 (court reversed and remanded for a heavier sentence to be imposed where defendant pled guilty to knowing discharge of pollution into public sewer system; convictions for defendant's false statements made to authorities about having contracted to clean up discharges were dismissed); *Brittain*, 931 F.2d at 1413 (court affirmed conviction of defendant of falsely reporting a material fact to a government agency as contained in monthly discharge monitoring reports from treatment plant); United States v. Gardner, 894 F.2d 708 (5th Cir. 1990) (court affirmed conviction of defendant for concealing material facts from agency of United States regarding cars that did not comply with air pollution emission standards); *Protex*, 874 F.2d at 741 n.1 (court affirmed conviction of Protex on four counts of making false statements to federal and state environmental and health agencies); United States v. Carolan, 1990 Haz. Waste Lit. R. 18,988 (W.D. Mo. April 16, 1988) (former president of Rose Chemical Co. sentenced to two years in prison and fined $10,000.00 for conspiring to defraud the U.S. EPA and for making false statements in a report regarding the concentrations of PCBs in water discharged from the Rose Chemical plant); United States v. W.R. Grace & Co., No. CV 87–27–T (D. Mass. May 31, 1988) (company was fined $10,000.00 after pleading guilty to a felony charge of filing a false statement on the amount of a toxic chemical used at one of the company's plants in response to a Request for Information under the RCRA); United States v. Olin Corp., 465 F. Supp. 1120 (W.D.N.Y. 1979) (court denied defendant's motion to dismiss counts 1–12 regarding false statements in reports to be submitted to the Federal Water Quality Administration).

147. ARIZ. REV. STAT. ANN. § 39–161 (1985). *See* State v. Edgar, 124 Ariz. 472, 605 P.2d 450 (1980) (realty mortgage filled out by minor was a false instrument pursuant to § 39–161).

148. ARIZ. REV. STAT. ANN. § 13–2704 (1989).

149. ARIZ. REV. STAT. ANN. § 13–2907.01 (1989). *See* State v. Terrell, 168 Ariz. 112, 811 P.2d 364 (App. 1991) (statute is not unconstitutionally broad or vague and state has a legitimate interest).

150. 18 U.S.C. § 1503 (1988).

destruction of documents,[151] the giving of false testimony,[152] the concealment[153] or destruction[154] of memoranda under subpoena, the falsification of documents[155] and the corrupt intimidation of witnesses to cause them to invoke their Fifth Amendment privilege.[156] Another federal statute prohibits willful endeavors to obstruct, delay or prevent the communication of information relating to the violation of any federal criminal statute by any person (for example, a whistleblower or informant) to a criminal investigator.[157]

A similar Arizona statute makes it a felony to knowingly attempt by means of bribery, misrepresentation, intimidation or threats to obstruct, delay or prevent the communication of information or testimony relating to a violation of a criminal statute to a peace officer, magistrate, prosecutor or grand jury.[158]

3. Witness Tampering

The Federal Victim and Witness Protection Act of 1982[159] revised and broadened criminal liability for witness tampering. The statute prohibits influencing a witness by threats, force or misleading conduct with an intent to (1) influence testimony; (2) induce the withholding of testimony or documents, destruction of documents, evasion of process or absenting oneself from an official proceeding; or (3) hinder, delay or prevent the communication of information regarding the possible commission of an offense to a federal law enforcement officer. Misleading conduct includes (1) knowingly making false statements; (2) intentionally omitting information from a statement and thereby making it misleading; (3) knowingly inducing reliance upon false or misleading

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151. *See, e.g.*, United States v. McKnight, 799 F.2d 443 (8th Cir. 1986); United States v. Walasek, 527 F.2d 676, 681 (3d Cir. 1975); United States v. Siegel, 152 F. Supp. 370, 376 (S.D.N.Y. 1957), *aff'd*, 263 F.2d 530 (2d Cir.), *cert. denied*, 359 U.S. 1012 (1959).

152. *See, e.g.*, United States v. Cohn, 452 F.2d 881 (2d Cir. 1971), *cert. denied*, 405 U.S. 975 (1972) (false testimony). *But cf.* United States v. Thomas, 916 F.2d 647, 652 (11th Cir. 1990) (proof of perjury alone insufficient for violation of § 1503; Government must establish nexus between false statements and obstruction of justice).

153. *See, e.g.*, United States v. Lench, 806 F.2d 1443, 1445 (9th Cir. 1986) (defendants endeavored to conceal documents under subpoena); United States v. Rasheed, 663 F.2d 843, 853 (9th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982) (concealment).

154. *See, e.g., Siegel*, 152 F. Supp. at 376 (destruction of memoranda under subpoena). *But see* United States v. Gravely, 840 F.2d 1156, 1160 (4th Cir. 1988) (documents destroyed need not be under subpoena if defendant is aware grand jury is likely to seek documents in its investigation); United States v. Ruggiero, 934 F.2d 440, 450 (2d Cir. 1991) (destruction of documents in anticipation of subpoena).

155. *See, e.g.*, United States v. Cohen, 202 F. Supp. 587, 589 (D. Conn. 1962) (falsification of documents).

156. *See, e.g.*, United States v. Cintolo, 818 F.2d 980, 992–93 (1st Cir. 1987), *cert. denied*, 484 U.S. 913 (1987); United States v. Cioffi, 493 F.2d 1111, 1118–19 (2d Cir. 1974), *cert. denied*, 419 U.S. 917 (1974) (corruptly advising a witness to take the Fifth Amendment).

157. 18 U.S.C. § 1510 (1988). *See, e.g.*, United States v. Leisure, 844 F.2d 1347, 1364 (8th Cir.), *cert. denied*, 488 U.S. 932 (1988) (for conviction under statute, defendant need only believe that witness might give information to federal officials and prevent communication).

158. ARIZ. REV. STAT. ANN. § 13-2409 (1989). *See* State v. Coddington, 135 Ariz. 480, 662 P.2d 155 (App. 1983) (defendant violated this section by stating that a person had falsely reported a burglary; defendant failed to mention other burglaries, murder that the person committed).

159. 18 U.S.C. §§ 1512–15 (1988).

documents; and (4) knowingly using any trick, scheme or device with an intent to mislead.

Under Arizona law, it is a felony to influence a witness by threatening the witness, or offering, conferring or agreeing to offer any benefit upon a witness, with intent to influence his testimony, induce him to avoid legal process, or induce him to absent himself from any official proceeding to which he has been legally summoned.[160] It is also a felony to tamper with a witness by knowingly inducing the witness to unlawfully withhold any testimony or testify falsely.[161]

4. Perjury

It is a felony under federal and Arizona statutes to make false statements under oath. Under federal law, a perjury or false declaration prosecution requires (1) an oath to testify truthfully; (2) a willful or knowing false statement by the declarant contrary to the oath; (3) a belief by the declarant that the statement is untrue; and (4) a relationship between the statement and a material fact.[162] In Arizona, a person commits perjury by making a false sworn statement in regard to a material issue, believing it to be false.[163] A person commits false swearing by making a false sworn statement while believing it to be false.[164]

Because environmental investigations and regulatory schemes involve communications and other contacts between the government and private companies, the above statutes often provide additional ammunition for governmental agencies investigating environmental crimes. The violation of these statutes may also intensify pending investigations or re-direct attention to corporate officers and employees. Thus, truthfulness and care must be given primary consideration during the course of such investigations.

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160. ARIZ. REV. STAT. ANN. § 13-2802 (1989). *See* State v. Ferraro, 67 Ariz. 397, 198 P.2d 120 (1948).

161. ARIZ. REV. STAT. ANN. § 13-2804 (1989).

162. 18 U.S.C. §§ 1621, 1623 (1989). *See, e.g.,* United States v. Novod, 923 F.2d 970 (2d Cir. 1991), *cert. denied,* 111 S.Ct. 2018 (1991) (court affirmed conviction of attorney for perjury before grand jury where attorney denied knowledge of client's ties to company that purchased 19 acre dump site and obtained permit surreptitiously); United States v. Barone, 913 F.2d 46 (2d Cir. 1990) (upward departure from sentencing guidelines improper where defendant convicted of perjury related to amount of rent received for property used as a dump); United States v. Pandozzi, 878 F.2d 1526 (1st Cir. 1989) (court affirmed conviction of defendant for perjury where defendant made a false statement to a grand jury about pouring polluting liquids down a storm drain).

163. ARIZ. REV. STAT. ANN. § 13-2702 (1989). *See* Franzi v. Superior Court of Arizona, 139 Ariz. 556, 679 P.2d 1043 (1984) (section does not violate First Amendment free speech nor is it unconstitutionally vague); State v. Self, 135 Ariz. 374, 661 P.2d 224 (Ct. App. 1983) (evidence that defendant had testified under oath that he paid $1200 in attorneys' fees but never submitted tangible evidence was sufficient to convict for perjury).

164. ARIZ. REV. STAT. ANN § 13-2703 (1989). *See Franzi,* 139 Ariz. at 556, 679 P.2d at 1043 (defendant charged with crime of false swearing in front of grand jury may not raise defense of grand jury's lack of jurisdiction at trial).

V. THE JOINT DEFENSE DOCTRINE: WHEN HANGING TOGETHER CAN DECREASE THE RISK OF HANGING AT ALL[165]

A. Introduction

As discussed in Part III, strategy and ethical conflicts will often dictate that separate counsel be involved to represent the company and various employees, officers, directors and third parties. In shaping the defense strategy, where multiple defendants or targets of a grand jury investigation are represented by different counsel, counsel for each should consider forming a joint defense alliance to present a united front against all the governmental forces being brought to bear against the defendants.[166] A joint defense offers several advantages, including conserving legal and investigative resources, utilizing common technical experts, dividing the labor, limiting formal discovery, and sharing and centralizing of information.

A joint defense strategy may be particularly effective where both the corporation and its employees are the subjects of a government investigation and, because of potential or actual conflicts of interest, separate counsel may need to be retained. Also, in the environmental context, a common defense effort may be the appropriate course for potentially responsible parties (PRPs) facing liability for cleanup responsibility under CERCLA.

A joint defense provides the opportunity for clients and their counsel to develop and implement a unified strategy against a common attack without jeopardizing the confidentiality of the shared communications. In addition to sharing information, a consolidated defense facilitates collaboration among separately represented clients on common legal concerns as well as tactical decisions. Indeed, in criminal cases, a joint strategy can be necessary to a fair opportunity to defend.[167]

Among the myriad of reasons for forming a joint defense, perhaps staying apprised of a pending or ongoing grand jury investigation is the most valuable. Because of the inherent secrecy of a grand jury investigation, monitoring the information obtained by the government during these proceedings can become less problematic if multiple defendants work together.[168]

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165. Paraphrased from United States v. Donahue, 560 F.2d 1039, 1044 (1st Cir. 1977).

166. "Joint defense," as discussed herein, is distinguished from joint or multiple representation, where various clients or a corporation and its employees are represented by the same counsel. The concept of a joint defense is applicable in both civil and criminal settings. *See, e.g.*, Wilson P. Abraham Constr. Corp. v. Armco Steel Corp., 559 F.2d 250 (5th Cir. 1977). For purposes of this article, however, the focus will be on the parameters of a joint defense in the criminal defense context.

167. *McPartlin*, 595 F.2d at 1337.

168. The degree of secrecy required under Arizona's grand jury secrecy statutes appears to be more stringent than under the Federal Rules of Criminal Procedure. *Compare* ARIZ. REV. STAT. ANN. § 13-2812(A) (1989) ("A person commits unlawful grand jury disclosure if such person knowingly discloses to another the nature or substance of any grand jury testimony ... or other matter attending a grand jury proceeding which is required by law to be kept secret") *with* FED. R. CRIM. P. 6(e)(2) ("No obligation of secrecy may be imposed on any person" except those persons specifically delineated in the Rule.); *In re* Investigation Before April 1975 Grand Jury, 531 F.2d 600, 607 n.11 (D.C. Cir. 1976); *In re* Grand Jury Investigation, 610 F.2d 202,

B. The Joint Defense Privilege

Generally, the attorney-client privilege is deemed waived when confidential communications are voluntarily disclosed to a third party outside the attorney-client relationship.[169] However, many courts have recognized the concept of a joint defense privilege or "common interest" rule[170] as an extension of the attorney-client privilege,[171] where parties and their counsel share confidential information for the express purpose of presenting a common defense.

1. Development of the Privilege in the Ninth Circuit and Arizona

The joint defense privilege was forged through judicial creativity to strike a balance between the need to obtain and share confidential information among separately represented clients with a common interest, and the traditional rule that confidential communications shared with parties outside the attorney-client relationship are considered waived. With the creation of the joint defense privilege, clients have an incentive to divulge information, on a quid pro quo basis, to others in the joint defense effort without the fear of losing the mantle of protection provided by the attorney-client privilege.

In this country, the recognized wellspring of the joint defense doctrine is *Chahoon v. Commonwealth*.[172] Since *Chahoon*, the notion of a joint defense privilege has been refined and widely accepted in virtually every federal circuit,[173] and also in many states. In *Chahoon*, three defendants were jointly

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217 (5th Cir. 1980); *In re* Grand Jury Investigation (90–3–2), 748 F. Supp. 1188, 1195 n.7 (E.D. Mich. 1990).

Although the outer limits of the Arizona grand jury secrecy statutes have not been defined, in *Ybarra & Excel Industries, Inc.*, 161 Ariz. at 190 n.2, 777 P.2d at 688 n.2 (dicta), the Supreme Court made a cryptic reference that the statutes did not "explicitly support" the interpretation by the Attorney General's office that a consultant's report (prepared at the behest of a joint defense team of lawyers) which had been subpoenaed by the grand jury could not be disclosed to the defendants' lawyers.

169. *See, e.g.*, Clady v. County of Los Angeles, 770 F.2d 1421, 1433 (9th Cir. 1985), *cert. denied*, 475 U.S. 1109 (1986).

170. *See generally*, Lawrence D. Stone et al., *The Common Interest or Pooled Information Privilege*, 20 COLO. LAW. 225 (Feb. 1991); Daniel J. Capra, *The Attorney-Client Privilege In Common Representations*, 20 TRIAL LAW. Q. 20 (Summer 1989).

171. *See, e.g.*, Waller v. Finance Corp. of America, 828 F.2d 579, 583 n.7 (9th Cir. 1987). *But cf.* Susan K. Rushing, *Separating the Joint-Defense Doctrine From the Attorney-Client Privilege*, 68 TEX. L. REV. 1273 (1990) (advocating that the joint defense privilege should be treated not as an extension of the attorney-client privilege but as a distinct privilege, thereby resulting in a more uniform application by the courts).

172. 62 Va. (21 Gratt.) 822 (1871).

173. *See, e.g.*, United States v. Bay State Ambulance & Hosp. Rental Serv., Inc., 874 F.2d 20, 28–29 (1st Cir. 1989); United States v. Schwimmer, 892 F.2d 237, 243–44 (2d Cir. 1989); Eisenberg v. Gagnon, 766 F.2d 770, 787–88 (3d Cir.1985), *cert. denied*, 474 U.S. 946 (1985); *In re* Grand Jury Subpoenas, 89–3 and 89–4, 902 F.2d 244 (4th Cir. 1990); *Wilson P. Abraham*, 559 F.2d at 253; *McPartlin*, 595 F.2d at 1336; John Morrell & Co. v. United Food & Commercial Workers, Local Union 304A, 913 F.2d 544 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1683 (1991); United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987), *vacated in part on other grounds*, 842 F.2d 1135 (9th Cir. 1988) (en banc), *aff'd in part and vacated in part on other grounds*, 491 U.S. 554 (1989); *Waller*, 828 F.2d at 583 n.7 (9th Cir. 1987); United States v. Blasco, 702 F.2d 1315, 1329 (11th Cir. 1983), *cert. denied*, 464 U.S. 914 (1983). *See also* United States v. Lopez, 777 F.2d 543, 552–53 (10th Cir. 1985) (in the absence of his lawyer or a joint defense agreement, statements made by co-defendant in the presence of another

indicted for conspiracy to defraud. Each party was separately represented by his own lawyer. Recognizing that the co-defendants had a natural interest in working together towards a common goal of acquittal, the court stated:

> Under such circumstances, it was natural and reasonable, if not necessary, that these parties, thus charged with the same crimes, should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know and to make all necessary arrangement for the defen[s]e.[174]

Among the federal circuits, the Ninth Circuit first recognized the joint defense exception to the attorney-client privilege.[175] In *Continental Oil Co. v. United States*,[176] employees and executives of two oil companies were subpoenaed to testify before a federal grand jury. Before and after this testimony, the employees were interviewed by their respective attorneys, who prepared and exchanged in confidence memoranda of the interviews in order to keep each other apprised of the grand jury proceedings.

The Ninth Circuit held that the memoranda were protected by the attorney-client privilege as extended by the joint defense doctrine set forth in *Chahoon*. The court declined to rigidly apply the joint defense privilege only in those circumstances where a true "defense" was being mounted after indictment. Rather, the court recognized that the privilege was "a valuable and ... important right for the protection of any client at any stage of his dealings with counsel,"[177] including prior to the onset of a criminal prosecution.[178] Significantly, the court's rationale for finding no waiver of the attorney-client privilege centered on its determination that the other attorneys receiving the confidential information were functioning as an arm or agent of the communicating party's attorney.[179]

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co-defendant and his counsel were admissible). *But cf.* United States v. Goland, 897 F.2d 405, 412–13 (9th Cir. 1990) (doctrine does not extend to a right to a "joint defense"; "[a] defendant must be prepared to present all evidence in his defense in his own case in chief and cannot count on co-defendants [to present favorable evidence for him]."), *appeal after remand,* 959 F.2d 1449 (9th Cir. 1992).

174. 62 Va. at 839. *But cf.* proposed FED. R. EVID. 503(b)(3). The Advisory Comments to the proposed rule criticize the result in *Chahoon*, noting that the "frequent reason" for retaining separate attorneys is because of actual or potential conflicts in addition to the common interests.

175. Hunydee v. United States, 355 F.2d 183 (9th Cir. 1965); Continental Oil Co. v. United States, 330 F.2d 347 (9th Cir. 1964). *See also In re* American Continental Corp., 741 F. Supp. 1368, 1372 (D. Ariz. 1990).

176. *Continental Oil,* 330 F.2d. at 347.

177. *Id.* at 350 (emphasis supplied). Since the court's decision rested on its finding that the memoranda were protected under the attorney-client privilege, it declined to consider the merits of the argument that the documents were also protected by the work-product doctrine articulated in *Hickman,* 329 U.S. at 495, and subsequently codified at FED. R. CRIM. P. 16(a)(2), (b)(2), and various State rules of criminal procedure, *see, e.g.*, ARIZ. R. CRIM. P. 15.4.b(1).

178. *See also* JACK B. WEINSTEIN & MARGARET A. BERGER, 2 WEINSTEIN'S EVIDENCE, ¶ 503(b)[06], at 503–99 (1991) ("Standard 503(b)(3) should apply not only if litigation is current or imminent but, ... whenever the communication was made in order to facilitate the rendition of legal services to each of the clients involved in the conference.") (footnote omitted).

179. *Continental Oil,* 330 F.2d at 350. Arguably, the work-product doctrine also would have prevented disclosure of the memoranda. However, the court's decision was based on the application of the joint defense privilege.

Following *Continental*, in *Hunydee v. United States*,[180] the Ninth Circuit applied the joint defense privilege to a communication made by a husband to his attorney in the presence of his wife and her attorney. The court stated the rule fashioned in *Continental*:

> Where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, those statements, even though they are exchanged between attorneys, should be privileged to the extent that they concern common issues and are intended to facilitate representation in possible subsequent proceedings.[181]

In Arizona, the contours of the joint defense doctrine have yet to be defined. One recent Arizona Supreme Court case, however, has at least implicitly recognized the concept of a joint defense. In *State ex rel. Corbin v. Ybarra & Excel Industries, Inc.*,[182] Excel and certain of its officers and managers were indicted for violation of the Arizona Hazardous Waste Management Act.[183] Prior to the indictment, Excel's corporate counsel learned of a pending criminal investigation by the Attorney General's office and referred Excel and its corporate officers and managers to different criminal defense lawyers.

In anticipation of criminal prosecution, the lawyers held several joint defense meetings, during the course of which Excel hired an outside technical consultant to conduct an independent soil test of the soil in question. At the request of the defense lawyers, Western conducted its soil test and submitted the report to Excel.

The consultant was later served with a subpoena to produce the written report to the Grand Jury. The consultant complied with the subpoena and explained his handwritten notes on the report, which reflected his conversations with the defense attorneys, to a special agent of the Attorney General's office. The special agent testified extensively before the Grand Jury on the contents of the soil test and the notes. Shortly thereafter, an indictment of Excel and its officers and managers followed. After the indictment, a motion for a new determination for probable cause was filed on the ground that the Attorney General had violated the attorney-client and work-product privileges.

The trial court found that the report had been prepared at the direction of the defense lawyers and "in anticipation of criminal litigation."[184] The court of appeals ruled that the report was not protected by either the attorney-client privilege or work-product doctrine.[185] On review, the Arizona Supreme Court held that the report and the notes were protected under the work-product doctrine and Arizona Rules of Criminal Procedure Rule 15.4.b(1).[186]

Although the court's decision in *Excel* rested solely on the application of the work-product doctrine, the logical extension of the holding would be to recognize the joint defense doctrine *in toto* in this jurisdiction. Indeed, the soil

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180. 355 F.2d 183 (9th Cir. 1965).
181. *Id.* at 183.
182. 161 Ariz. at 188, 777 P.2d at 686.
183. ARIZ. REV. STAT. ANN. §§ 49–921 to –928.
184. 161 Ariz. at 191, 777 P.2d at 689.
185. State *ex rel.* Corbin v. Superior Court & Excel Indust., Inc., 161 Ariz. 181, 777 P.2d 679 (App. 1988), *vacated in relevant part by Excel*, 161 Ariz. 188, 777 P.2d 686.
186. *Excel*, 161 Ariz. at 192–95, 777 P.2d at 690–93.

test was requested by the joint defense team of lawyers, and the court's decision implicitly recognized the joint defense doctrine as it applies to attorneys' work-product.[187]

2. Elements of Privilege

As with all privileges, the party asserting the joint defense privilege has the burden of proving its applicability.[188] To establish the privilege, one must prove that the communications were (1) confidential,[189] (2) made in the course of a joint defense effort,[190] (3) designed to further the effort, and (4) that the privilege has not been waived.[191]

The common interest which binds the defendants may be limited to only one issue,[192] and at least one court has held that the privilege applies even in the absence of a "technical attorney-client relationship."[193]

> [A] formal retainer is [not] the *sine qua non* of the privilege and its protection. To the contrary, where one communicates in confidence with an attorney for the purpose of promoting one's own defense interests, those communications should not be placed beyond the pale of the privilege for want of any technical attorney-client relationship. This, I am convinced, is a logical and even necessary extension of the policy that underlies the privilege.
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> This conclusion rests beside, if not upon the established principle that pre-retainer consultations may be subject to the privilege. *See* 8 J. Wigmore, Evidence § 2304 (McNaughton rev. ed. 1961). Moreover, it

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187. *See In re* Grand Jury Subpoenas 89–3 and 89–4, 902 F.2d 244, 249 (4th Cir. 1990) (joint defense or common interest rule presupposes the existence of an otherwise valid privilege, and the rule applies not only to communications subject to the attorney-client privilege, but also communications protected by the work-product doctrine). *Accord In re* Grand Jury Subpoena (85–W–71–5), 784 F.2d 857 (8th Cir. 1986), *cert. dismissed*, 479 U.S. 1048 (1987); *In re* Sunrise Sec. Lit. 130 F.R.D. 560, 583 (E.D. Pa. 1989); Western Fuels Assoc. v. Burlington Northern R.R. Co., 102 F.R.D. 201, 203 (D. Wyo. 1984); Exxon Corp. v. F.T.C., 466 F. Supp. 1088, 1099 (D.D.C. 1978); Transmirra Products Corp. v. Monsanto Chem. Co., 26 F.R.D. 572, 578 (S.D.N.Y. 1960).

188. *E.g., In re* Grand Jury Subpoenas, 803 F.2d 493, 496 (9th Cir. 1986), *corrected by* 817 F.2d 64 (9th Cir. 1987); Weil v. Investment/Indicators, Research & Management, Inc., 647 F.2d. 18, 25 (9th Cir. 1981); United States v. Landof, 591 F.2d 36, 38 (9th Cir. 1978). *Accord In re* Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d at 126; *In re* Grand Jury Empaneled February 14, 1978, 603 F.2d 469, 474 (3d Cir. 1979); Dome Petroleum Ltd. v. Employers Mut. Liab. Ins. Co., 131 F.R.D. 63 (D.N.J. 1990).

189. *See Keplinger*, 776 F.2d at 701 (communications made in the presence of strangers are not privileged); *Bay State Ambulance*, 874 F.2d at 28; United States v. Friedman, 445 F.2d 1076, 1085 n.4 (9th Cir. 1989), *cert. denied*, 404 U.S. 958 (1971).

190. *Compare Eisenberg*, 766 F.2d at 787–88 (communications to an attorney to establish common defense strategy are privileged even though the attorney represents another client with some adverse interests) *with* Gov't of Virgin Islands v. Joseph, 685 F.2d 857, 862 (3d Cir. 1982) (no privilege for communications with another defendant's attorney whose interests are completely antagonistic).

191. *In re* Bevill, Bresler & Schulman Asset Management Corp., 805 F.2d at 126 (citing *In re* Grand Jury Subpoena Duces Tecum Dated November 16, 1974 [hereinafter *Grand Jury Subpoena, 11/16/74*], 406 F. Supp. 381, 385 (S.D.N.Y. 1975)).

192. *See, e.g., Hunydee*, 355 F.2d at 185; *McPartlin*, 595 F.2d.at 1321 (co-defendants joined in common effort to discredit a witness justified application of joint defense privilege). As demonstrated in *Continental Oil*, the "joint defense effort" is construed broadly.

193. *Grand Jury Subpoena, 11/16/74*, 406 F. Supp. at 396.

> would hardly be reasonable to decree that a potential or an actual codefendant cannot "without penalty" sow some of the seeds and reap some of the fruits of a joint defense effort without first enlisting the aid and accompaniment of independent counsel.[194]

Finally, the privilege can only be waived by the communicating party, or by the consent of all parties to the defense.[195] Otherwise, a joint defendant may attempt to barter information gained through the joint defense effort in exchange for his own exoneration.[196] In subsequent litigation between the parties of the original joint defense agreement, however, the privilege is destroyed.[197] The rationale for this rule is that the element of confidentiality never existed between the parties to the joint defense, but only to the outside world.[198]

C. Joint Defense Agreements

A carefully structured, written joint defense agreement is imperative, even among allies joined in a common cause. Though not required to invoke the protection of the joint defense privilege, a formal written document provides enhanced security, beyond the joint defense privilege, for the parties to the agreement as well as the information shared under it. Although multiple defendants may be jointly indicted or face the probability of indictment, at some later point it may be in the best interests of one defendant to cooperate with the government, or a defendant may be compelled to testify by a grant of immunity[199] in exchange for his or her testimony. With this ever-present potential for today's ally to become tomorrow's adversary, a formal agreement standing as a clear expression of the cooperative parties' intent and understandings[200] should be seriously considered before any information is shared.

No magical formula exists for a joint defense agreement. Each will vary depending on the circumstances, the quantum of interests in common, and the degree of protection sought. At minimum, however, the formal consent agreement should unambiguously state that its purpose is to provide a framework within which the clients and lawyers can share privileged materials and information, without losing the umbrella of confidentiality, for the purpose of presenting a common defense. Some other suggested points to include are that confidential matters and information shared with counsel for

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194. *Id.*

195. *See, e.g.*, Ohio-Sealy Mattress Mfg. Co. v. Kaplan, 90 F.R.D. 21, 29 (N.D. Ill. 1980).

196. *See, e.g., Grand Jury Subpoena, 11/16/74*, 406 F. Supp. at 394.

197. *See, e.g., In re* LTV Sec. Lit. 89 F.R.D. 595, 605 (N.D. Tex. 1981). As explained by one court:

> To be sure, what is divulged by and to the clients present at [a joint defense] meeting cannot be deemed to be confidential *inter sese*; in any later controversy between or among those clients, the privilege could not stand as a bar to full disclosure at the instance of any one of them.

Grand Jury Subpoena, 11/16/74, 406 F. Supp. at 386.

198. *Cf.* Nichols v. Elkins, 2 Ariz. App. 272, 277, 408 P.2d 34, 39 (1965).

199. *See* 18 U.S.C. § 6002 (1988); ARIZ. REV. STAT. ANN. § 13-4064 (1989).

200. *See, e.g.*, United States v. Melvin, 650 F.2d 641 (5th Cir. 1981) (absent a joint defense agreement, case remanded for determination of whether shared communications were confidential and entitled to protection under joint defense doctrine).

the other defendants will remain confidential; the parties to the agreement manifest their belief that their disclosures under the agreement are covered by the joint defense privilege; co-defendants may not disclose information obtained from other parties to the agreement; parties who subsequently withdraw from the agreement will maintain the confidentiality of all materials and information obtained under the agreement; each lawyer intends to pursue the separate but common interests of his respective clients; and each document or any correspondence imparting confidential information under the agreement be clearly marked:

"CONFIDENTIAL—ATTORNEY-CLIENT [WORK-PRODUCT] PRIVILEGED UNDER JOINT DEFENSE AGREEMENT"[201]

All affected parties, including clients, attorneys, and any experts or investigative staff of the attorneys, should sign the agreement. Even with the measured amount of security brought by a joint defense agreement, information should be shared through formal lawyer-to-lawyer communications rather than through informal discussions among clients. In the event one of the defendants withdraws from the agreement and is either compelled to testify against a former co-defendant or voluntarily decides to cooperate with the government, the client-to-client communication may not be protected.[202]

The decision to participate in a joint defense agreement is, of course, dependent on the circumstances of each case and the particular company's (or individual's) role in the case. If such an agreement would be strategically beneficial to a company, however, care must be taken to establish and maintain the cooperative effort so as not to waive valuable privileges or defenses. Because the economic benefits alone are often substantial, the possibility of a joint defense agreement is almost always worthy of consideration.

VI. INDEMNIFICATION AND INSURANCE ISSUES RELATING TO THE DEFENSE EFFORT

A. Corporate Indemnification

If the company determines that corporate officers and directors need separate counsel, the issue then arises as to how they will be paid. Corporate authority to pay for such expenses is usually found in state corporation law or the corporation's articles of incorporation and bylaws.

In analyzing state corporation law, the first issue is whether the indemnification of the officer or director is mandatory or permissive. Generally, an officer or director must be indemnified if he or she has been

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201. *See* Paul L. Perito et. al., *Joint Defense Agreements: Protecting the Privilege, Protecting the Future*, 4 CRIM. JUST. 6 (Winter 1990) (providing examples of the structure and content of joint defense agreements); Zornow & Obermaier, *supra* note 106. *See also Waller*, 828 F.2d at 581.

202. *See, e.g., Lopez*, 777 F.2d at 552–53. *Contra Schwimmer*, 892 F.2d at 244 (unnecessary for communicating party's attorney to be present when communication is made to other party's attorney) (citing *Grand Jury Subpoena, 11/16/74*, 406 F. Supp. at 396).

successful in defense of an action.[203] Some statutes require that the person be "wholly successful," while others allow indemnification "to the extent" that the person is successful, thereby allowing indemnification where the indemnified person has been partially successful.[204] Certain state codes, such as that in California, require the person to be successful on the merits, while most allow indemnification if the person has been successful "on the merits or otherwise," which allows indemnification upon a dismissal on procedural grounds or pursuant to a settlement in which the person admits no liability and makes no payment.[205] Most mandatory indemnification statutes provide that the only amounts recoverable are expenses, including attorneys' fees, actually and reasonably incurred in defense of the action or proceeding.[206]

Most state corporation laws also allow permissive indemnification if the indemnified party acted in good faith, in a manner reasonably believed to be in the best interests of the indemnifying corporation and, in the case of a criminal proceeding, the indemnified person had no reasonable cause to believe his or her conduct was unlawful.[207] Delaware allows indemnification if the indemnified person acted in a manner "not opposed to" the best interest of the corporation. Many of these statutes provide that the termination of an action by a judgment, order, settlement, conviction or plea of *nolo contendere* does not in and of itself create a presumption that the indemnified person did not meet the applicable standard of conduct.[208] Under permissive indemnification statutes, the types of costs which are typically recoverable are judgments, fines, amounts paid in settlement and reasonable expenses including attorneys' fees.

Most states, including Arizona, authorize corporations to advance expenses to indemnified persons before it is determined that the person is entitled to indemnification, provided there is a written undertaking to reimburse the corporation, unless it is ultimately determined that the person is entitled to

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203. *See, e.g.*, 8 DEL. CODE ANN. § 145(c) (1991); CAL. CORP. CODE § 317(d) (West 1990); N.Y. BUS. CORP. LAW § 723(a) (1992); ARIZ. REV. STAT. ANN. § 10–005(C) (1990). Two courts, Lussier v. Mau–Van Dev., Inc., 667 P.2d 830, 833–34 (Haw. 1983) and Haenel v. Epstein, 450 N.Y.S.2d 536, 537 (N.Y. App. Div. 1982), required the result to be final—no indemnification until the entry of a final and favorable appellate ruling.

204. *See* Merritt–Chapman & Scott Corp. v. Wolfson, 321 A.2d 138, 141 (Del. Super. 1974) (In a criminal case, the court stated "any result other than conviction must be considered success."); MCI Telecommunications Corp. v. Wanzer, C.A. Nos. 89c–MR–216, 89C–SE–26. 1990 WL 91100, (Del. Super. June 19, 1990) (Director "successful" in three of four counts of suit against him by corporation entitled to indemnification with respect to those three counts). However, in Galdi v. Berg, 359 F. Supp. 698, 701-02 (D. Del. 1973), the court held that dismissal of a claim without prejudice was not "success" because the same claim was pending in another forum.

205. CAL. CORP. CODE § 317(d) (West 1990). *See* Wisener v. Air Express Intl. Corp., 583 F.2d 579, 583 (2d Cir. 1978); B & B Invest. Club v. Kleinert's, Inc., 472 F. Supp. 787, 789–91 (E.D. Pa. 1979).

206. *See MCI Telecommunications Corp.*, 1990 WL 91100.

207. *See, e.g.*, DEL. CODE ANN. § 145(a) (1991); CAL. CORP. CODE § 317(b) (West 1990); N.Y. BUS. CORP. LAW § 722(a) (1992); ARIZ. REV. STAT. ANN. § 10–005(A) (1990); Plate v. Sun–Diamond Growers, 275 Cal. Rptr. 667, 673 (Ct. App. 1990) (intentional wrongdoing on the part of the officers precluded a finding that they acted in good faith, even though the wrongdoing did not harm the corporation and was not against the corporation's best interests).

208. *See, e.g.*, DEL. CODE ANN. § 145(a) (1991); CAL. CORP. CODE § 317(b) (West 1990); NY BUS. CORP. LAW § 722(b) (1992); ARIZ. REV. STAT. ANN. § 10–005(A) (1990).

indemnification.[209] Delaware, California and New York have amended their laws to provide that the repayment obligation will only be binding if it is determined that the indemnified person is not entitled to indemnification. Many states require the corporation's board to make a specific determination while others allow blanket authorizations.[210]

Most state laws require a corporation to authorize indemnification, usually by a majority vote of a quorum of directors consisting of directors who are not parties to the proceeding. If such a quorum is not obtainable or a quorum of disinterested directors so directs, a written opinion of independent legal counsel may be required. Some states allow a vote of shareholders to support an indemnification, as long as shares held by the person seeking indemnification are excluded from such vote.[211]

Many state laws recognize that the indemnification rights granted by statute are not exclusive, thereby allowing broader rights to be granted in articles of incorporation, bylaws, by contract or by resolution.[212] It is very common to have bylaw provisions which broaden indemnification rights by allowing for broader mandatory indemnification, expanding the list of proceedings for which indemnification is available and the list of persons entitled to indemnity, simplifying procedures by which indemnification can be obtained, or deeming the bylaws to be a contract between the indemnified person and the corporation. Another common form of non-statutory indemnification is a contract between the corporation and the indemnified person.

Many state laws limit a corporation's ability to provide non-statutory indemnification if the person has engaged in willful misconduct, reckless behavior or other specified exceptions. Many such statutes provide that where there was intentional illegal conduct, or where the indemnified person had reasonable cause to believe his or her conduct was unlawful, indemnification is not allowed.[213]

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209. *See, e.g.*, DEL. CODE ANN. § 145(e) (1991); CAL. CORP. CODE § 317(f)(West 1990); N.Y. BUS. CORP. LAW § 725(a), 723(c) (1992); ARIZ. REV. STAT. ANN. § 10-005(E) (1990).

210. Johnson v. Gene's Supermarket, Inc., 453 N.E.2d 83, 87-89 (1983); Security Am. Corp. v. Walsh, Case, Coale, Brown & Burke, at 1985 WL 225 (N.D. Ill. Jan. 11, 1985).

211. *See, e.g.*, DEL. CODE ANN. § 145(d) (1991); CAL. CORP. CODE § 317(e) (West 1990); N.Y. BUS CORP. LAW § 723(b) (1992); ARIZ. REV. STAT. ANN. § 10-005(D) (1990). *See, e.g.*, Hydro-Dynamics, Inc. v. Pope, 146 Ariz. 586, 708 P.2d 70 (1985) (court ordered indemnification must relate to expenses incurred in connection with defense or settlement of suit as required in subsections 10-005(B) and (E)).

212. *See, e.g.*, DEL. CODE ANN. § 145(f) (1991); CAL. CORP. CODE § 317(g) (West 1990); N.Y. BUS CORP. Law § 721 (1992); ARIZ. REV. STAT. ANN. § 10-005(F) (1990).

213. *See, e.g.*, CAL. CORP. CODE § 317(g) (West 1990); N.Y. BUS. CORP. LAW § 721 (1992); ARIZ. REV. STAT. ANN. § 10-005(I) (1990); Altman v. Stevens Fashion Fabrics, 441 F. Supp. 1318, 1321 n.2 (N.D. Cal. 1977). But see PepsiCo., Inc. v. Continental Casualty Co., 640 F. Supp. 656, 660 (S.D.N.Y. 1986), which rejected the argument that public policy would bar indemnification pursuant to a non-exclusivity clause of a settlement of claims alleging violations of § 10(b) of the Securities Exchange Act of 1934.

B. Insurance Coverage for Defense Costs in Environmental Investigations and Proceedings

In determining how to pay for counsel, investigators and consultants, counsel should review the company's insurance policies, and, if appropriate, send a claim letter to the appropriate insurance carriers. The most likely sources of coverage are the company's directors and officers' insurance and comprehensive general liability policies. However, securing coverage is often difficult because of a number of exclusions.

Directors and officers of corporations may seek coverage for the defense of environmental proceedings under directors' and officers' insurance policies.[214] However, these policies typically define a covered loss as "damages, judgments, settlements and defense costs ... incurred in the defense of actions, suits or proceedings and appeals therefrom, ... [l]osses shall not include civil or criminal fines or penalties imposed by law."[215] Thus, penalties such as fines or judgments flowing from environmental investigations are specifically excluded from the definition of a covered loss under these policies.

In addition, in recent years most directors' and officers' policies contain a "pollution exclusion" that provides:

> [This policy excludes payment for loss connected with claims] for seepage, pollution or contamination and based upon or attributable to the violation or alleged violation of any federal, state, municipal or other governmental statute, regulation or ordinance prohibiting or providing for the control or regulation of emissions or effluents of any kind into the atmosphere or any body of land, water, waterway or watercourse or arising from any action or proceeding brought for enforcement purposes by any public official, agency, commission, board or pollution control administration pursuant to any such statutes, regulations, or ordinances or arising from any claims alleging seepage, pollution or contamination based upon common law nuisance or trespass.[216]

Thus, even if criminal penalties were a covered loss under these policies, penalties imposed pursuant to environmental statutes would be excluded under this provision.[217]

Most often, coverage for environmental claims is sought under Comprehensive General Liability Policies (Comprehensive Liability

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214. *See* William Biel, *Whistling Past the Waste Site: Directors' and Officers' Personal Liability for Environmental Decisions and the Role of Liability Coverage*, 140 U. PA. L. REV. 241, 269 (1990).

215. For examples of current directors' and officers' policies provided by the two leading carriers, see Chubb Group of Ins. Cos. Executive Liab. & Indem. Policy, Chubb Form 14–02–0386 (1984), & Nat'l Union Fire Ins. Co. of Pittsburgh, Pa., Directors Officers Ins. and Co. Reimbursement Policy, Nat'l Union Form 47352 (hereinafter National Union Policy) (1988).

216. National Union Policy, *supra* note 215 at 2.

217. Directors' and officers' policies also generally contain a "regulatory agency exclusion" which excludes coverage for any fines or penalties imposed by government agencies. These clauses have, however, been held void as contrary to public policy and as violating the reasonable expectations of the insured. Branning v. CNA Ins. Cos., 721 F. Supp. 1180, 1184 (W.D. Wash. 1989); American Casualty Co. v. Federal Sav. & Loan Ins. Corp., 704 F. Supp. 898, 903 (E.D. Ark. 1989).

Policies).[218] The insuring clause of a "standard form" Comprehensive Liability Policy states:

> The company will pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of ... property damage to which this policy applies, caused by an occurrence.[219]

There are many problems with securing coverage under such a clause. First, some courts have stated that the indemnification of defense costs incurred in a criminal proceeding violates public policy.[220] Second, because the insuring clause limits coverage to "sums which the insured shall become legally obligated to pay *as damages*," many courts have determined that criminal penalties are not "damages" for the purpose of assessing the coverage of a liability policy.[221] These courts conclude that an insurer has no duty to defend its insured in a legal proceeding where there is no possibility of a covered loss arising pursuant to that proceeding.[222]

This analysis was recently used by the United States District Court for the District of Columbia in *Potomac Electric Power Co. v. California Union Insurance Co.*,[223] wherein the court stated:

> Any fees incurred solely for the purpose of representing the company and/or its employees before state and federal grand juries are not reimbursable under the policy. This is because fees expended in defending against possible criminal charges are not recoverable under a liability policy. There are two reasons for this. First, criminal punishments—fines and incarceration—are not "damages" caused to the property of another. Further, it has been suggested that allowing fees spent on a criminal defense to be recovered under a liability policy would violate public policy. [224]

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218. *See* Carl A. Salisbury, *Pollution Liability Insurance Coverage, The Standard Form Pollution Exclusion and the Insurance Industry: A Case Study in Collective Amnesia*, 21 ENVTL. H.L. 357 (1991); Nicholas J. Wallwork et. al., *Liability Insurance in Environmental Litigation: An Overview of Selected Issues in Developing Arizona Law*, 22 ARIZ. ST. L. REV. 367 (1990).

219. *See, e.g.*, SUSAN J. MILLER & PHILIP LEFEBVRE, 1 STANDARD INSURANCE POLICIES ANNOTATED 411 (1986) (emphasis omitted).

220. *See, e.g.*, Potomac Elec. Power Co. v. California Union Ins. Co., 777 F. Supp. 980, 983–84 (D.D.C. 1991) (liability insurer held not responsible for reimbursement of fees incurred in defense of grand jury investigation relating to violation of environmental regulations); Horace Mann Ins. Co. v. Barbara B., 4 Cal. Rptr. 351, 354 (Ct. App. 1992) (insurer held to have no duty under educator's liability policy to defend its insured for criminal acts); Perzik v. St. Paul Fire & Marine Ins. Co., 279 Cal. Rptr. 498, 500 (Ct. App. 1991) (insurer held to have no obligation under professional liability policy to defend its insured in federal criminal grand jury investigation). *See, e.g., Potomac*, 777 F. Supp. at 984; Blair v. Anik Liquors, 510 A.2d 314 (N.J. 1986).

221. *Potomac*, 777 F. Supp.at 983; Shelter Mut. Ins. Co. v. Bailey, 513 N.E.2d 490, 497 (Ill. App. 5 Dist. 1987); Stein v. Int'l Ins. Co., 266 Cal. Rptr. 72, 75 (Ct. App. 1990) ("[i]t is well-established that an insurer is not required to provide a criminal defense to an insured under a liability policy obligating the insurer to pay 'damages' ...."); Jaffe v. Cranford Ins. Co., 214 Cal. Rptr. 567, 570 (Ct. App. 1985).

222. *See* Donnelly v. Trans. Ins. Co., 589 F.2d 761 (4th Cir. 1978); *Horace Mann Ins.*, 4 Cal. Rptr. 2d at 354; Gibralter Casualty Co. v. Sargent & Lundy, 574 N.E.2d 664, 673 (Ill. Ct. App. 1990); *Perzik*, 279 Cal. Rptr. at 500.

223. *Potomac*, 777 F. Supp. at 980.

224. *Id.* at 983–84 (citations omitted).

Thus, under *Potomac,* an insurer is not obligated to defend its insured in criminal proceedings initiated under federal and state environmental laws.

While an insurance company need not defend its insured in purely criminal proceedings, it may be required to defend its insured in a proceeding where there is a risk that both criminal sanctions and civil damages may be assessed.[225] As a general rule, an insurance company has a duty to defend its insured in any proceeding which could possibly result in a covered loss under the policy.[226] Therefore, where a proceeding may result in civil damages covered under the policy, as well as criminal penalties not covered, an insurer will have a duty to provide defense.

The *Potomac* court held that where there are separate criminal and civil proceedings taking place concerning the same operative facts, the expenses incurred by the insured in the criminal proceeding may be recoverable if those expenses would have been necessary in civil proceedings taking place at the time. The court held that fees incurred in defense of a federal criminal grand jury investigation would be recoverable if they were "reasonably related" to civil proceedings which were based on the same set of facts. Thus, a liability insurer may ultimately become liable for indemnifying its insured for some of the expenses incurred in the defense of a criminal proceeding if the insured can establish that these expenses were "reasonably related" to a pending civil claim.

These exceptions should be particularly important in the context of criminal proceedings relating to environmental statutes. Generally, criminal proceedings are merely one aspect of the enforcement of such statutes and are ancillary to the civil enforcement efforts.[227] Therefore, it is likely that an insured defendant may have a claim for defense costs incurred in connection with a criminal investigation or proceedings because (1) those proceedings may result in the assessment of civil damages which would be covered under the relevant insurance policy, or (2) the criminal proceedings are "reasonably related" to pending civil proceedings which are within policy coverage.[228]

A second reason that criminal penalties may not be covered under the insuring clause of a Comprehensive Liability Policy is that any such penalties may not constitute a loss "caused by an occurrence" as required by the clause. An occurrence is defined in the standard Comprehensive Liability

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225. *See, e.g., Donnelly,* 589 F.2d 761; *Gibraltar,* 574 N.E.2d at 670–74; State Farm Fire & Cas. Co. v. Superior Court, 236 Cal. Rptr. 216 (Cal. App. 1987).

226. *See Gibraltar,* 574 N.E.2d at 673 (insurer has a duty to defend if any allegation indicates potential coverage).

227. *See* Charles Lord & Robert W. Adler, *Environmental Crimes, Raising the Stakes,* 59 GEO. WASH. L. REV. 781 (1991).

228. The issue of whether clean-up costs are "damages" within the meaning of a CGL policy has been the subject of much litigation. *Compare* Maryland Casualty Co. v. Armco, Inc., 822 F.2d 1348 (4th Cir. 1987) *with* Continental Ins. Co. v. Northeastern Pharmaceutical & Chem. Co., 842 F.2d 977 (8th Cir. 1988) *and* Hazen Paper Co. v. U.S. Fidelity & Guaranty Co., 555 N.E.2d 576, 586 (Mass. 1990); C.D. Spangler Constr. Co. v. Indus. Crankshaft and Eng'g Co., 388 S.E.2d 557, 563 (N.C. 1990); Compass Ins. Co. v. Cravens, Dargan & Co., 748 P.2d 724, 727–28 (Wyo. 1988); Outboard Marine Corp. v. Liberty Mut. Ins. Co., 570 N.E.2d 1154, 1162 (Ill. App. 3d 1991); Broadwell Realty Services, Inc. v. Fidelity & Casualty Co., 528 A.2d 76, 77–79 (N.J. 1987); Kipin Industries, Inc. v. American Universal Ins. Co., 535 N.E.2d 334, 337 (Ohio App. 3d 1987).

Policy as "an accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage and which is neither expected nor intended from the standpoint of the insured."[229] The purpose of the "occurrence" requirement is to bar coverage for intentionally caused damage.[230]

For the most part, the criminal enforcement provisions of federal and state statutes require that a violator's action be "knowing or willful."[231] Therefore, although no court has specifically addressed this issue, a court may hold that an act giving rise to criminal penalties would not constitute an "act or occurrence" under a Comprehensive Liability Policy.

Finally, even if criminal penalties are included as a covered loss under the insuring clause of a Comprehensive Liability Policy, such penalties may be excluded under the so-called "pollution exclusion" included in these policies. The standard form Comprehensive Liability Policy contains an exclusion, which states that:

> [this policy shall not apply to]—bodily injury or property damage arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; but this exclusion does not apply if such discharge, disposal, release or escape is sudden and accidental.[232]

By its terms, the pollution exclusion does not exclude coverage for damages which occur as a result of a discharge of pollutants or contaminants where the discharge or release is "sudden and accidental." Therefore, this clause does not exclude coverage for damages relating to an environmental "accident."[233] On the other hand, this clause does exclude coverage for the discharge or release of pollutants where such release is intentional or reckless.[234] There is a deep split in the courts regarding whether the word "sudden" means "instantaneous"[235] or whether it means "unexpected or unintended," allowing

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229. MILLER & LEFEBVRE, *supra* note 219 at 411.

230. *See* Payne v. United States Fidelity & Guaranty Co., 625 F. Supp. 1189, 1191 (S.D. Fla. 1985).

231. *See* Jane F. Barrett & Veronica M. Clarke, *Perspectives on the Knowledge Requirement of Section 6928(d) of RCRA After United States v. Dee*, 59 GEO. WASH. L. REV. 862 (1991); Christopher Harris et. al., *Criminal Liability for Violations of Federal Hazardous Waste Law: The "Knowledge" of Corporations and Their Executives*, 23 WAKE FOREST L. REV. 203 (1988). The exception to this rule is the Clean Water Act, 33 U.S.C. § 1319(c)(2) (1988), which provides that criminal sanctions may be imposed for negligent conduct.

232. MILLER & LEFEBVRE, *supra* note 219 at 411.

233. *See* Port of Portland v. Water Quality Ins. Syndicate, 796 F.2d 1188, 1194 n.2 (9th Cir. 1986); Evans v. Aetna Casualty & Surety Co., 435 N.Y.S.2d 933, 935–36 (App. Div. 1981); Lansco, Inc. v. Department of Envtl. Protection, 350 A.2d 520 (1975), *aff'd*, 368 A.2d 363 (1976), *cert. denied*, 372 A.2d 322 (1977).

234. Great Lakes Container Corp. v. National Union Fire Ins. Co., 727 F.2d 30, 31 (1st Cir. 1984); Ashland Oil, Inc. v. Miller Oil Purchasing Co., 678 F.2d 1293, 1315 (5th Cir. 1982); Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 340 S.E.2d 374, 379 (N.C. 1986); Transamerica Ins. Co. v. Sunnes, 711 P.2d 212 (Or. Ct. App. 1985).

235. Ogden Corp. v. Travelers Indem. Co., 924 F.2d 39, 41–42 (2d Cir. 1991); United States Fidelity & Guaranty Co. v. Morrison Grain Co., 734 F. Supp. 437, 441 (D. Kan. 1990); American Universal Ins. Co. v. Whitewood Custom Theaters, Inc., 707 F. Supp. 1140, 1148 (D.S.D. 1989); *Hazen Paper*, 555 N.E.2d at 587; Weber v. IMT Ins. Co., 462 N.W.2d 283,

coverage for discharges that are routine, repeated or otherwise occur over a longer period of time.[236]

Beginning in 1985, a number of insurers began including an "absolute pollution exclusion" in their Comprehensive Liability Policies, which states that coverage will not apply:

> (1) To bodily injury or property damage arising out of the actual, alleged or threatened discharge, dispersal, release or escape of pollutants:
>
> (A) At or from premises owned, rented or occupied by the named insured;
>
> (B) At or from any site or location used by or for the named insured or others for the handling, storage, disposal, processing or treatment waste;
>
> (C) Which are at any time transported, handled, sorted, treated, disposed of, or processed as waste by or for the named insured or any person or organization for whom the named insured may be legally responsible; or
>
> (D) At or from any site or location on which the named insured or any contractors or subcontractors working directly or indirectly on behalf of the named insured are performing operations.
>
> (i) if the pollutants are brought on or to the site or location in connection with such operations; or
>
> (ii) if the operations are to test for, monitor, clean up, remove, contain, treat, detoxify or neutralize the pollutants.
>
> (2) To any loss, cost or expense rising out of any governmental direction or request that the named insured test for, monitor, clean up, remove, contain, treat detoxify or neutralize pollutants.
>
> Pollutants means any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals and waste. Waste includes materials to be recycled, reconditioned or reclaimed.[237]

This exclusion has generally been upheld by the courts, at least so far.[238]

286–87 (Iowa 1990); *Outboard Marine,* 570 N.E.2d at 1162; Mays v. Transamerica Ins. Co., 799 P.2d 653, 657–58 (Or. App. 1990); Colonie Motors v. Hartford Accident & Indemn. Co., 538 N.Y.S.2d 630, 632 (App. 1989); Shapiro v. Public Service Mut. Ins. Co., 477 N.E.2d 146, 149 (Mass. 1985); Barmet of Indiana, Inc. v. Security Ins. Group, 425 N.E.2d 201, 202–03 (Ind. App. 1981).

236. Just v. Land Reclamation, Ltd., 456 N.W.2d 570, 573 (Wisc. 1990); Du-Wel Products, Inc. v. U.S. Fire Ins. Co., 565 A.2d 1113, 1117–19 (N.J. 1989); State v. Aetna Casualty & Surety Co., 547 N.Y.S.2d 452, 453 (App. Div. 1989); Jonesville Products, Inc. v. Transamerica Ins. Group, 402 N.W.2d 46, 47–48 (Mich. 1986); United Pacific Ins. Co. v. Van's Westlake Union, Inc., 664 P.2d 1262, 1266 (Wash. Ct. App. 1983).

237. *See* Insurance Services Office, Inc., Form IL 09 28.

238. *See, e.g.,* Titan Holdings Syndicate, Inc. v. Keene, 898 F.2d 265 (1st Cir. 1990); Guilford Industries, Inc. v. Liberty Mut. Ins. Co., 688 F. Supp. 792 (D. Me. 1988), *aff'd per curiam,* 879 F.2d 853 (1st Cir. 1989); Hydro Systems, Inc. v. Continental Ins. Co., 717 F. Supp. 700 (C.D. Cal. 1989); Alcolac, Inc. v. California Union Ins. Co., 716 F. Supp. 1546 (D. Md. 1989); League of Minn. Cities Ins. Trust v. City of Coon Rapids, 446 N.W.2d 419 (Minn. Ct. App. 1989).

In summary, the costs of defending and advising a company investigated for environmental violations can be substantial. It is important to examine contractual and statutory provisions to defray these costs, including indemnification agreements and insurance policies. Moreover, a prompt review of these materials will prevent a waiver of any potential coverage and may impact a company's ability to fully respond to investigative activities by governmental agencies.

CONCLUSION

Responding to an environmental release or discharge, counsel must be aware of and sensitive to the requirements of several disparate bodies of law. Counsel must be aware of the elements of the basic criminal environmental violations and must be sensitive to violations committed not only by the corporation, but also by its employees, officers, directors and outside consultants. An internal investigation should be conducted, with due consideration to privilege and work product protections. Counsel must be alert to the possible need for separate representation of some or all of the parties involved and must be cognizant of federal and state obstruction of justice and witness tampering provisions.

Upon completion of the investigation, federal and state reporting requirements must be reviewed and compliance effectuated. If separate counsel are selected, the company can usually pay for them, but may have a difficult time securing reimbursement from insurers. A joint defense agreement is advisable, both during the investigation and at trial.

If the initial response is handled effectively, the company and its employees may be able to head off indictments, negotiate a more favorable disposition, or at least be in a more favorable position to respond to any charges.