What You Don't Know Can't Hurt You, Right? Resolving the Inherent Tension between the Yates Memo *and the Collective Knowledge Doctrine in Environmental Criminal Enforcement Actions*

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I. **Basics of Traditional Environmental Enforcement.**

A. Civil vs. Criminal Enforcement.

1. Different Goals:

   a. The goal of civil litigation is to compensate an injured party for damages.

   b. The government uses criminal enforcement to punish the defendant for unlawful actions.

2. Different Government Burdens:

   a. Under the Clean Air Act ("CAA"), the Clean Water Act ("CWA"), and the Resource Conservation and Recovery Act ("RCRA"), civil liability is strict liability; it attaches to a party through the mere existence of a violation of the statute—no intent or knowledge on the part of the violating party is required.

      i. The RCRA provides that "[a]ny person who violates any requirement of this subchapter shall be liable to the United States for a civil penalty."[2]

      ii. The CWA holds liable "[a]ny person who violates [the act] or any permit condition or limitation."[3]

      iii. The CAA provides for assessment of civil penalty for any person that has "violated, or is in violation of, any requirement or prohibition" of the statute.[4]

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[2] 42 U.S.C. § 6928(g).

[3] 33 U.S.C. § 1319(d).

[4] 42 U.S.C. § 7413(b).

b. Criminal liability under the statutes require some level of intent for liability to attach, which usually is a "knowingly" standard.[5]

3. Different Penalties:

a. Civil liability under each statute is limited to a fine of up to $27,500 per day per violation and the right of the government to seek an injunction against the action.[6]

b. Criminal penalties in each statute provide for up to five years imprisonment and/or fines for knowingly violating the statutes.[7]

i. Each of the statutes allows for imprisonment of up to 15 years for the knowing endangerment of another person.[8]

B. A Brief History of Environmental Criminal Liability.

Though the original criminal provisions were misdemeanors, each of the statutes has been amended to include felony charges, which now constitute the majority of environmental prosecutions under the CAA, CWA, and RCRA.[9]

1. RCRA: The first of the statutes amended by Congress, creating felonies for knowingly storing, treating, or disposing of hazardous waste without the proper permit or knowingly transporting hazardous waste to a non-permitted facility.[10]

2. CWA: Provides for felonies for knowingly discharging pollutants into the waters of the United States without a permit, knowingly making

[5] Though the CAA and the CWA include misdemeanor provisions for some specific negligent acts, the majority of prosecutions under the CAA, CWA, and RCRA are felony cases and as such, this presentation will focus on the felony provisions. *See* 33 U.S.C. § 1319(c)(1) (providing for a misdemeanor under the CWA for the negligent discharge of pollutants into the water of the United States); 42 U.S.C. § 7413(c)(4) (providing for a misdemeanor under the CAA for negligent endangerment of another person).

[6] 42 U.S.C. § 6928(g); 33 U.S.C. § 1319(d); 42 U.S.C. § 7413(b). Each of the maximum penalties were increased by 10% to $27,500 by the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461.

[7] *See* 42 U.S.C. 7413(c)(1); 33 U.S.C. 1319(1); 42 U.S.C. 6928(d).

[8] 42 U.S.C. 7413(c)(5); 33 U.S.C. 1319(3); 42 U.S.C. 6928(e).

[9] *See* 42 U.S.C. § 7413(c); 33 U.S.C. § 1319(c)(2), (c)(4); 42 U.S.C. § 6928(d).

[10] 42 U.S.C. § 6928(d).

a false statement on a monitoring report, or for knowingly tampering with or rendering inaccurate any CWA monitoring method.[11]

3. CAA: The amendments added criminal provisions under § 113(c) of the CAA for the knowing violation of emission and pollution standards.[12]

    i. When Congress passed the CAA amendments, the stated intent behind the enhanced criminal enforcement was to "bring the criminal provisions of the [CAA] up to date with the criminal provisions in the [CWA] and [RCRA]."[13]

II. Negligent and Knowing Violations: What is Required to Prove Intent?

A. There are two different *mens rea* requirements in the environmental criminal enforcement regime: negligence for some misdemeanors and knowingly for most felonies.

1. Negligence in the environmental context can be understood to mean a "failure to use such care as a reasonably prudent and careful person would use under similar circumstances."[14]

2. "Knowingly" requires that a defendant have "knowledge of facts and attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal."[15]

B. Negligently.

1. A person could violate environmental statutes by negligently releasing hazardous substances into the air or water when the person knows that such release could cause harm to another person.[16]

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[11] 33 U.S.C. § 1319(c)(2), (c)(4).

[12] 42 U.S.C. § 7413(c).

[13] Chafee-Baucus Statement of Senate Managers, S. 1630, The Clean Air Act Amendments of 1990, *reprinted in* CONG. RESEARCH SERV., *Legislative History of the Clean Air Act Amendments of 1990*, at 941 (1998).

[14] *See, e.g.,* United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999) (citing *Black's Law Dictionary* 1032 (6th ed. 1990)).

[15] United States v. Weintraub, 273 F.3d 139, 147 (2d Cir. 2001).

[16] *See, e.g.,* 33 U.S.C. § 1319(c)(1); 41 U.S.C. § 7413(c)(4).

2. Courts have determined, at least in the context of the CWA, that in order to establish negligence, the government must show merely simple negligence, rather than gross negligence.[17]

    a. For example, in *United States v. Hanousek*, the Ninth Circuit explained that because Congress chose not to prescribe a heightened negligence standard by including the language of "gross negligence," the Court would not disregard this distinction, and concluded that Congress intended that a person who acts with ordinary negligence in violating 33 U.S.C. § 1321(b)(3) may be subject to criminal penalties.[18]

    b. The United States Court of Appeals for the Third Circuit also recognized that "simple, rather than gross, negligence is the appropriate *mens rea* for a misdemeanor violation of the CWA under § 1319(c)(1)."[19] The Third Circuit agreed with other circuits that have addressed the negligence issue, explaining, "each court concluded that negligence has an ordinary and well-accepted meaning, and that, where Congress intended to alter that meaning to demand a showing of 'gross negligence,' it did so explicitly."[20]

3. The circuit courts have explained that simple negligence interpretation is acceptable because the criminal provision of the CWA constitutes public welfare legislation.[21]

    a. The Ninth Circuit in *Hanousek* explained that public welfare legislation is "designed to protect the public from potentially harmful or injurious items . . . and may render criminal a type of conduct that a reasonable person should know is subject

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[17] *See, e.g.,* United States v. Hanousek, 176 F.3d 1116, 1120 (9th Cir. 1999).

[18] *Id.* at 1121.

[19] United States v. Maury, 695 F.3d 227, 257 (3d Cir. 2012).

[20] *Id.*; *see also* United States v. Ortiz, 427 F.3d 1278, 1283 (10th Cir. 2005) (Holding that "an individual violates the CWA by failing to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance, and, in so doing, discharges any pollutant into United States waters without an NPDES permit."); United States v. Pruett, 681 F.3d 232, 242 (5th Cir. 2012) (holding, based on the plain, unambiguous language of the CWA, that § 1319(c)(1)(A) requires only proof of ordinary negligence).

[21] *See* United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999); United States v. Maury, 695 F.3d 227, 257 (3d Cir. 2012).

to stringent public regulation and may seriously threaten the community's health or safety."[22]

b. The RCRA has also been classified as a public welfare statute, essentially lessening the *mens rea* requirement: "[T]he government need only prove the defendant's knowledge of the facts meeting each essential element of the substantive offense and not the fact that the defendant knew his conduct to be illegal."[23]

c. However, the designation of the CWA and RCRA as public welfare statutes has not been uniformly adopted.[24]

d. Even where these environmental regulatory statutes are considered to involve public welfare offenses, the public welfare doctrine does not eliminate the *mens rea* requirement altogether, but rather requires the Government to prove only that the defendant knew of the facts of the offense.[25]

4. While the public welfare offense doctrine effectively lessens the burden of proof from requiring knowledge of illegality to requiring knowledge of the facts of the offense, it does not preclude a mistake of fact defense.[26]

a. In *United States v. Ahmad*, the defendant presented evidence that he believed he was pumping water into the street from a tank in his backyard when the liquid was actually a gasoline and water mixture.[27] The United States

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[22] United States v. Hanousek, 176 F.3d 1116, 1121 (9th Cir. 1999) (citing Staples v. United States, 511 U.S. 600, 607 (1994); Liparota v. United States, 471 U.S. 419, 433 (1985) (internal quotations omitted)).

[23] *See* United States v. Wilson, 133 F.3d 251, 264 (4th Cir. 1997); *see also* United States v. Sinskey, 119 F.3d 712, 715–16 (8th Cir. 1997) (Holding that "the government was not required to prove that defendant knew that his acts violated either the CWA or the NPDES permit, but merely that he was aware of the conduct that resulted in the permit's violation."); United States v. Hopkins, 53 F.3d 533, 540 (2d Cir. 1995) (concluding that Congress intended not to require proof that the defendant knew his conduct violated the law or a regulatory permit).

[24] Hanousek v. United States, 528 U.S. 1102 (2000) (Thomas, J., dissenting from cert. denial); *see also* United States v. Ahmad*,* 101 F.3d 386, 391 (5th Cir.1996).

[25] *See* United States v. Johnson & Towers, Inc., 741 F.2d 662, 668 (3d. Cir. 1984).

[26] United States v. Ahmad*,* 101 F.3d 386, 391 (5th Cir.1996).

[27] *Id.* at 388.

Court of Appeals for the Fifth Circuit held it was improper to apply the public welfare offense to the CWA to dispense with the *mens rea* requirement, because "if knowledge is not required as to the nature of the substance discharged, one who honestly and reasonably believes he is discharging water may find himself guilty of a felony if the substance turns out to be something else."[28]

b. Justice Thomas of the U.S. Supreme Court has also articulated various arguments against the application of the public welfare offense doctrine to the CWA, explaining that even though parts of the CWA regulate certain dangerous substances, "this case illustrates that the CWA also imposes criminal liability for persons using standard equipment to engage in a broad range of ordinary industrial and commercial activities."[29] Because even dangerous items can be commonplace, Justice Thomas warned, "we should be hesitant to expose countless numbers of construction workers and contractors to heightened criminal liability for using ordinary devices to engage in normal industrial operations."[30]

C. Knowingly

1. Required for most felony violations, "knowingly" is a heightened standard compared to negligence.

2. To establish culpability for a "knowing" violation, the government has a greater burden and must prove that the defendant had knowledge of the facts that constituted the offense.[31]

a. Courts have consistently held that to be found guilty under the statutes, a person must be proven to have knowledge of the facts but that knowledge of the law is not required. In other words, a defendant must have "knowledge of facts and

[28] *Id.* at 391.

[29] Hanousek v. United States, 528 U.S. 1102, 861 (2000) (Thomas, J., dissenting from cert. denial).

[30] *Id.* (citing Staples v. United States, 511 U.S. 600, 607 (1994)).

[31] *See* United States. v. Alghazouli, 517 F.3d 1179, 1192 (9th Cir. 2008) (citing United States v. Ho, 311 F.3d 589, 605–06 (5th Cir. 2002) ("Knowingly" in § 7413(c)(1) "means knowledge of underlying facts, not law.")).

attendant circumstances that comprise a violation of the statute, not specific knowledge that one's conduct is illegal."[32]

3. When a criminal statute requires that a defendant "knowingly" act, the "knowingly" requirement must be applied to every subsequently listed element of the crime.[33] Stated another way, courts should "ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[34]

    a. For example, in *Flores-Figueroa v. United States*, a federal statute imposed a prison sentence on an individual that "knowingly transfers, possesses, or uses, without lawful authority, a means of identification of another person" and whether "knowingly" applied to each element of the crime.[35] The Court held that "knowingly" applied to all elements, and consequently, the government was required to prove that the defendant knew that the "means of identification" belonged to "another person."[36] The court specifically rejected the government's argument that "knowingly" should only apply to the verbs of the statute, "transfers, possess, or uses."[37]

4. It is critical to determine the underlying facts of which a defendant must have knowledge to be convicted under one of the environmental statutes.

    a. For example, *United States v. Atlantic States Cast Iron Pipe Co.*, a case involving air emissions in violation of the CAA, the "attendant circumstances that comprise the violation" or "facts that constitute the offense" require that the defendant knew that the quantity of air emissions emitted exceeded the

[32] United States v. Weintraub, 273 F.3d 139, 147 (2d Cir. 2001).

[33] Flores-Figueroa v. United States, 556 U.S. 646, 653 (2009).

[34] *Id*. at 653.

[35] *Id*. at 647.

[36] *Id.* at 657.

[37] *Id.* at 651 (noting the failure of the Government to provide an example of a sentence that would lead the listener to believe that "knowingly" modified only the verb).

permitted limits.[38] Specifically, the court ruled that the "knowing" element required that "the defendant must know not just the nature of the discharge, but also the fact that the discharge is in violation of the authorized limits of the permits."[39] This demonstrates that the "facts that constituted the offense" or the "facts and attendant circumstances that comprise a violation" require more than mere knowledge that an emission exists.[40]

b. The Supreme Court has also held that "[a] person thinking in good faith that he was shipping distilled water when in fact he was shipping some dangerous acid would not be covered" by the criminal provision that requires that the defendant "knowingly" acted.[41]

c. In the context of the CAA, the United States Court of Appeals for the Second Circuit recognized a distinction between the required scienter in an asbestos case, which has no level that can be legally emitted without a permit, and other types of emissions that must meet a *de minimis* threshold before requiring regulatory approval or permitting.[42]

    i. In *United States v. Weintraub*, the Second Circuit held that "the scienter component of a criminal violation of the asbestos work-practice standard is satisfied by knowledge of the presence of asbestos and not the particular type of asbestos to which the standard applies is limited to such violations," but "[t]he application of the scienter requirement to criminal violations involving other hazardous air pollutants or violations of other provisions of the CAA must await future cases."[43]

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[38] United States v. Atl. States Cast Iron Pipe Co., No. 03-852, 2007 WL 2282514 (D. N.J. Aug. 2, 2007).

[39] *Id.* at *16.

[40] *Id.*

[41] United States v. Int'l Mineral & Chems. Corp., 402 U.S. 558, 563–64 (1971).

[42] *See* United States v. Weintraub, 273 F.3d 139, 151 (2d Cir. 2001).

[43] *Id.* at 147.

D. Willful Blindness: An Alternative to Proving Actual Knowledge.

1. When prosecuting under environmental statutes, the Government may use the willful blindness standard as an alternative to actual knowledge where a crime requires the *mens rea* of "knowingly," "intentionally," or "willfully."[44]

2. Generally, the gist of a willful blindness or deliberate ignorance instruction is that "the element of knowledge may be satisfied by inferences from the proof that the defendant deliberately closed his eyes to what otherwise would have been obvious to him."[45]

3. The willful blindness instruction may be given where the charges require mental states of knowingly, intentionally, and willfully to prove the knowledge or awareness aspect.[46] The instruction is not inconsistent where the court also gives instructions on actual knowledge, because "if the jury does not find actual knowledge, it might still find willful blindness."[47]

4. Willful blindness instructions must avoid "the implication that a defendant may be convicted simply because he or she *should have known* facts of which he or she was unaware," so that willful blindness is not equated with negligence or lack of due care.[48] Unlike negligence, willful blindness is a subjective state of mind, so the instruction "must make clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability."[49]

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[44] *See* MOD. CRIM. JURY INSTR. 3D CIR. § 5.06, *Willful Blindness* (2016).

[45]United States v. Atl. States Cast Iron Pipe Co., No. 03-852, 2007 WL 2282514 (D. N.J. Aug. 2, 2007). The following Model Criminal Jury Instructions, Federal Jury Practice and Instructions, and jury instructions previously proposed in the Third Circuit also provide examples of willful blindness and deliberate ignorance instructions: MOD. CRIM. JURY INSTR. 3d Cir. § 5.06, *Willful Blindness* (2016); MOD. CRIM. JURY INSTR. 3d Cir. 6.18.1341-4, *Mail or Wire Fraud – "Intent to Defraud Defined"* (2016); FED. JURY PRAC. & INSTR. CRIM. § 17:09, *Deliberate ignorance – Explained* (6th ed. 2015); United States v. Sanchez-Mercedes, *et al.*, No. 06-115, 2006 WL 5508876 (Jury Instruction) (E.D. Pa. Sept. 27, 2006); United States v. Comite, No. 06-070, 2007 WL 6082355 (Jury Instruction) (E.D. Pa. Jan. 4, 2007) (*see* Request No. 33).

[46] MOD. CRIM JURY INSTR. 3d Cir. § 5.06.

[47] *Id.*

[48] United States v. One 1973 Rolls Royce, 43 F.3d 794, 807–08 (3d Cir. 1994) (emphasis added).

[49] *Id.* (citing United States v. Caminos, 770 F.2d 361, 365 (3d Cir. 1985)).

5. The willful blindness standard has been used to prove knowledge in a few CAA and CWA cases.[50]

   a. In *Atlantic States*, a case dealing with asbestos violations of the CAA, the defendants requested a jury instruction on recklessness to clarify that recklessness would not satisfy the definition of knowing or willful.[51] The United States District Court for the District of New Jersey refused to provide the instruction and explained the legal foundation for the reckless and willful blindness instructions.[52] Initially, the New Jersey District Court included willful blindness in a draft of the final jury instructions, but ultimately exercised its discretion not to include the instruction.[53]

   b. In *United States v. Buckley*, another asbestos case, the defendant argued that the jury instructions regarding the knowledge element of the crimes violated due process.[54] In *Buckley*, the district court explained the meaning of knowledge to the jurors, noting, "the government could establish Buckley's knowledge by showing that Buckley closed his eyes to obvious facts or failed to investigate when aware of facts which demanded investigation."[55] The United States Court of Appeals for the Sixth Circuit explained individuals dealing with hazardous substances such as asbestos are on notice that they may incur criminal liability for emissions-related actions, and held that the jury instruction accurately stated the law and did not offend due process.[56]

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[50] *See, e.g.,* United States v. Yi, 704 F.3d 800, 804 (9th Cir. 2013). *But see* United States v. Atl. States Cast Iron Pipe Co., No. 03-852, 2007 WL 2282514, at *41 (D. N.J. Aug. 2, 2007) (Excluding a willful blindness instruction and noting there can be confusion between defining "reckless" in the subjective sense and the concept of "willful blindness.").

[51] United States v. Atl. States Cast Iron Pipe Co., No. 03-852, 2007 WL 2282514, at *40 (D. N.J. Aug. 2, 2007).

[52] *Id.* at *47.

[53] *Id.* at *21.

[54] United States v. Buckley, 934 F.2d 84, 87 (6th Cir. 1991).

[55] *Id.* at 88.

[56] *Id.*

c. In *United States v. Fillers*, the defendants were charged with CAA violations related to work-practice standards.[57] Addressing defendants' claims that the evidence of their knowledge was insufficient, the United States District Court for the Eastern District of Tennessee stated the knowing elements included being willfully blind.[58] Based on considerable evidence of willful blindness such as testimony that defendants were notified that the asbestos had not been removed, testimony that an employee handled asbestos at defendant's direction, and defendants' employees' knowledge of the asbestos, the *Filler* court concluded a rational juror could find the defendants knew about the violation.[59]

d. In *United States v. Yi*, a condominium purchaser was charged with releasing asbestos in violation of the CAA.[60] The defendant objected to the deliberate ignorance instruction and argued that the facts shown at trial did not support a finding of deliberate ignorance.[61] In *Yi*, the Ninth Circuit explained deliberate ignorance contains two prongs: "(1) a subjective belief that there is a high probability that a fact exists; and (2) deliberate actions taken to avoid learning the truth."[62] Applying these elements, the Ninth Circuit held that the evidence regarding the defendant's real estate experience, and his pattern of failing to read documents common to real estate transactions supported the finding of deliberate ignorance.[63]

III. **Corporate Responsibility: Who Could be Subject to a Corporation's Criminal Liability?**

A. Although criminal liability is usually imposed on a corporation when the evidence shows an employee committed all elements of the violation,

[57] United States v. Fillers, No. 09-144, 2012 WL 715256, at *1 (E.D. Tenn. March 1, 2012).

[58] *Id.* at *5.

[59] *Id.*

[60] United States v. Yi, 704 F.3d 800, 803 (9th Cir. 2013).

[61] *Id.* at 804.

[62] *Id.*

[63] *Id.* at 805.

criminal liability may also be imputed to a corporate individual who may not have personally acted in violation of the law, but should have known that the corporation violated the statute.

B. Guilty Actor.

1. When investigating a corporation's potential criminal violations of environmental statutes, the Government primarily looks for a "guilty actor" within the company who had the requisite intent to violate the statute and whose acts violated the law.

2. When proving the requisite criminal scienter as to a corporation, "the most straightforward way to raise such an inference for a corporate defendant will be to plead it for an individual defendant."[64]

3. The guilty actor could range from a high-level manager to a low-level employee, as long as it can be proven that the individual committed the elements of the crime: the act plus the appropriate *mens rea*.

a. For example, in formulating its precedent regarding corporate scienter, the Sixth Circuit explained that a corporation could be held criminally liable if the "lower-level employee[], contributing to the misstatement, knowingly provide[s] false information to their superiors with the intent to defraud the public."[65]

C. Responsible Corporate Officer.

1. The Responsible Corporate Officer Doctrine (the "RCO Doctrine") allows the Government to hold a corporate officer criminally liable for the company's violations.[66]

2. The RCO Doctrine is based on the principle that "a corporate agent, through whose act, default, or omission the corporation committed a crime, was himself guilty individually of that crime."[67]

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[64] Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008).

[65] *See In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455, 477 (6th Cir. 2014).

[66] *See* United States v. Ming Hong, 242 F.3d 528, 531 (4th Cir. 2001) (citing United States v. Dotterweich, 320 U.S. 277 (1943)).

[67] United States v. Park, 421 U.S. 658, 670 (1975).

3. The RCO Doctrine has been applied broadly "whether or not the crime required 'consciousness of wrongdoing'" and "not only to those corporate agents who themselves committed the criminal act, but also to those who by virtue of their managerial positions or other similar relation to the actor could be deemed responsible for its commission."[68] The rationale behind such broad application is to hold "criminally accountable the persons whose failure to exercise the authority and supervisory responsibility reposed in them by the business organization resulted in the violation complained of."[69]

4. In order to prove the corporate officer had a "responsible share" in violating the law, "the Government establishes a prima facie case when it introduces evidence sufficient to warrant a finding by the trier of the facts that the defendant had, by reason of his position in the corporation, responsibility and authority either to prevent in the first instance, or promptly to correct, the violation complained of, and that he failed to do so."[70]

5. The RCO Doctrine has been applied in various RCRA and CWA cases involving both "knowingly" and "negligently" standards.[71]

    a. For instance, the Ninth Circuit has held that any corporate officer who is "answerable" or "accountable" for an unlawful discharge of hazardous substances is liable under the CWA.[72] Further, under the CWA a person is a responsible corporate officer "if the person has authority to exercise control over the corporation's activity that is causing the discharges," although "[t]here is no requirement that the officer in fact exercise such authority or that the corporation expressly vest a duty in the officer to oversee the activity.[73] In other words, in proving a defendant is a responsible

[68] *Id.*

[69] *Id.*

[70] *Id.* at 673–74.

[71] *See, e.g.,* United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998) ("knowingly" case); United States v. Ming Hong, 242 F.3d 528, 531–32 (4th Cir. 2001) ("negligently" case); *see also* United States v. Hansen, 262 F.3d 1217, 1251 (11th Cir. 2001); United States v. Osborne, No. 11-1029, 2012 WL 1096087, at *3 (N.D. Ohio Mar. 30, 2012) (holding the RCO Doctrine applies to public welfare statutes, including the CWA).

[72] United States v. Iverson, 162 F.3d 1015, 1023 (9th Cir. 1998).

[73] *Id.* at 1025.

corporate officer who violated the CWA, the Government is not required to prove that defendant was a formally designated corporate officer of the company, but rather "the pertinent question is whether the defendant bore such a relationship to the corporation that it is appropriate to hold him criminally liable for failing to prevent the charged violations of the CWA."[74]

6. Significantly, where an underlying statute requires actual knowledge of wrongdoing, the government must still prove such actual knowledge, and the mere status as an RCO does not dispense with the statutory mens rea requirement, particularly in cases involving a felony.[75]

   a. The Ninth Circuit clarified in *United States v. Iverson* that "the 'responsible corporate officer' instruction relieved the government only of having to prove that defendant personally discharged or caused the discharge of a pollutant, and that the government still had to prove that the discharges violated the law and that defendant knew that the discharges were pollutants."[76]

   b. In *United States v. MacDonald & Watson Waste Oil Co.*, the First Circuit vacated a conviction under the RCRA because the jury instructions improperly allowed the jury to find defendant guilty as a responsible corporate officer without finding he had actual knowledge of the alleged transportation of hazardous waste, despite the RCRA's "knowingly" requirement.[77] The However, the First Circuit explained there is no case "where a jury was instructed that the defendant could be convicted of a federal crime expressly requiring knowledge as an element, solely by reason of a conclusive,

[74] United States v. Ming Hong, 242 F.3d 528, 531–32 (4th Cir. 2001) (Holding that evidence that defendant was involved in the purchase of the company's insufficient filtration system, that defendant was in control of the company's finances and refused to authorize payment for further filtration media, and that defendant was regularly present at the company site where discharges occurred openly was sufficient to prove guilt.).

[75] United States v. Iverson, 162 F.3d 1015, 1022–23 (9th Cir. 1998).

[76] *Id.* at 1026.

[77] United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 52–53 (1st Cir. 1991) (Stating "while *Dotterweich* and *Park* thus reflect what is now clear and well-established law in respect to public welfare statutes and regulations lacking an express knowledge or other scienter requirement, we know of no precedent for failing to give effect to a knowledge requirement that Congress has expressly included in a criminal statute.").

or 'mandatory' presumption of knowledge of the facts constituting the offense."[78]

7. However, the RCO Doctrine could be used as circumstantial evidence to infer a corporate defendant's knowledge based in their corporate position.

    a. In *MacDonald*, the First Circuit acknowledged that the Government may prove a responsible corporate officer's knowledge using circumstantial evidence, such as the position and responsibility of defendants, as well as information provided to those defendants on prior occasions.[79]

    b. In *United States v. Weitzenhoff*, the Ninth Circuit upheld a conviction of managers of a waste treatment plant for knowingly violating a statute prohibiting the discharge of pollutants without a permit. The trial court did not require the jury to find that the defendants knew they were violating the terms of a statute or permit.[80] The court, citing *United States v. International Minerals & Chemical Corp.*, held that in statutes like the Clean Water Act that are designed to protect the public at large from potentially dire consequences of pollution, the government need not prove that the defendants knew their actions violated a permit or statute.[81]

8. The "impossibility defense" may apply to the RCO Doctrine where the defendant RCO exercised extraordinary care but still failed to prevent the violation.

    a. The District Court of Massachusetts explained, "[T]he impossibility defense allows the corporate officer to introduce evidence to establish an affirmative defense that he exercised extraordinary care and still could not prevent violations of the Act. The defense is raised when the defendant introduces a sufficient quantum of

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[78] *Id.*

[79] *Id.* at 52-53; *see also* United States v. Johnson & Towers, Inc., 741 F.2d 662, 670 (3d. Cir. 1984) (Stating "knowledge" in a RCRA criminal prosecution "may be inferred by the jury as to those individuals who hold the requisite responsible positions with the corporate defendant."), *cert. denied*, 469 U.S. 1208 (1985); *see also* United States v. Self, 2 F.3d 1071, 1087–88 (10th Cir. 1993) (Explaining that while a responsible corporate officer's "knowledge of prior illegal activity is not conclusive as to whether a defendant possessed the requisite knowledge of later illegal activity, it most certainly provides circumstantial evidence of the defendant's later knowledge from which the jury may draw the necessary inference.").

[80] United States v. Weitzenhoff, 35 F.3d 1275, 1285–86 (9th Cir. 1993).

[81] *Id.*

evidence as to his exercise of 'extraordinary care' so as to justify placing an additional burden on the government. At this point, the government must prove beyond a reasonable doubt that the defendant, by the use of extraordinary care, was not without the power or capacity to correct or prevent the violations of the Act."[82]

b. In *United States v. Park*, the Supreme Court clarified that the RCO Doctrine "does not require that which is objectively impossible. The theory upon which responsible corporate agents are held criminally accountable for 'causing' violations of the Act permits a claim that a defendant was 'powerless' to prevent or correct the violation to 'be raised defensively at a trial on the merits.'"[83]

D. Collective Knowledge Doctrine.

1. In the absence of proof of individual knowledge, the "knowing" element of criminal statutes may be proven in some jurisdictions using the Collective Corporate Knowledge Doctrine, although it has not yet been applied specifically in CAA, CWA, or RCRA cases.

2. This doctrine, which is grounded in traditional agency principles, allows a prosecutor to establish a corporation's scienter through the collective knowledge of the corporation's employees, without requiring proof of culpable intent of an individual corporate official.[84]

3. In contrast to the RCO doctrine, the Collective Knowledge Doctrine has been utilized to impute multiple employees' knowledge to the corporation to establish the corporation's scienter, but not to impute other employees' knowledge to a second employee to establish the second employee's requisite mens rea.[85]

[82] United States v. New England Grocers Supply Co., 488 F.Supp 230, 236 (D. Mass. 1980).

[83] United States v. Park, 412 U.S. 658, 671 (1975).

[84] *See* City of Roseville Emps.' Ret. Sys. v. Horizon Lines, Inc., 442 Fed. App'x 672, 676 (3d Cir. 2011).

[85] *See* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987) (explaining the knowledge obtained by corporate employees acting within the scope of their employment is imputed to the corporation); United States v. Pac. Gas & Elec. Co., No. 14-175, 2015 WL 9460313, at *4-5 (N.D. Cal. Dec. 23, 2015) (Permitting the prosecutor to "invite[] the grand jury to consider whether PG&E's employees' individual knowledge and disregarding of the company's Section 192 duties rendered the company liable for 'knowingly and willfully' violating those duties.").

4. Currently, the Courts of Appeal are split on the issue of whether collective knowledge is an appropriate mechanism for demonstrating a corporation's specific intent.[86]

5. The Collective Corporate Knowledge Doctrine Circuit Split

   a. In 1987, the First Circuit was first addressed the collective intent issue.[87] In *United States v. Bank of New England*, the trial judge had instructed the jurors that the bank's knowledge was "the sum of the knowledge of all of the employees," or "a totality of what all of the employees knew within the scope of their employment."[88] The First Circuit explained that this collective knowledge instruction was appropriate in the context of corporate criminal liability, because the "acts of a corporation are, after all, simply the acts of all of its employees operating within the scope of their employment."[89]

      i. The collective knowledge obtained by corporate employees is then imputed to the corporation, regardless of "whether employees administering one component of an operation know the specific activities of employees administering another aspect of the operation."[90] As such, the First Circuit upheld the trial court's instruction on collective corporate knowledge as not only proper, but necessary.[91]

   b. Subsequent to the *Bank of New England* decision, three circuits have allowed plaintiffs to plead collective scienter.[92]

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[86] *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010).

[87] *See* United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

[88] *Id.* at 855.

[89] *Id.* at 856.

[90] *Id.* (quoting *United States v. T.I.M.E. – D.C., Inc.*, 381 F.Supp. 730, 738 (W.D. W. Va. 1974) ("[A] corporation cannot plead innocence by asserting that the information obtained by several employees was not acquired by any one individual who then would have comprehended its full import. Rather the corporation is considered to have acquired the collective knowledge of its employees and is held responsible for their failure to act accordingly.")).

[91] United States v. Bank of New England, 821 F.2d 844, 856 (1st Cir. 1987).

[92] *See* Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195 (2d Cir. 2008); Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 710 (7th Cir. 2008); Glazer Capital

i. The Seventh Circuit permitted an inference of corporate scienter based on the collective knowledge of corporate-level employees, explaining, "it is possible to draw a strong inference of corporate scienter without being able to name the individuals who concocted and disseminated the fraud."[93]

ii. The Second Circuit has held that where a defendant is a corporation, "it is possible to plead corporate scienter by pleading facts sufficient to create a strong inference either (1) that 'someone whose intent could be imputed to the corporation acted with the requisite scienter' or (2) that the statements 'would have been approved by corporate officials sufficiently knowledgeable about the company to know' that those statements were misleading."[94]

iii. The Ninth Circuit stated that its precedent did not foreclose the possibility that, in certain circumstances, some form of collective scienter pleading might be appropriate, citing to the Seventh Circuit's example.[95]

iv. In addition, the United States District Court for the Northern District of California recently held that the collective corporate knowledge might establish not only that a defendant acted knowingly, but that it acted willfully as well.[96]

c. However, four circuits have held collective corporate knowledge cannot be used to prove scienter.[97]

Mgmt., LP v. Magistri, 549 F.3d 736, 744 (9th Cir. 2008). The Third, Eighth, and Tenth Circuits are undecided.

[93] Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 710–11 (7th Cir. 2008).

[94] Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 177 (2d Cir. 2015) (quoting Teamsters Local 445 Freight Div. Pension Fund v. Dynex Capital Inc., 531 F.3d 190, 195–96 (2d Cir. 2008)).

[95] Glazer Capital Mgmt., LP v. Magistri, 549 F.3d 736, 744 (9th Cir. 2008).

[96] United States v. Pac. Gas & Elec. Co., No. 14-175, 2015 WL 9460313, at *3 (N.D. Cal. Dec. 23, 2015).

[97] *See* United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010); United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 918 n.9 (4th Cir. 2003); *S*outhland Sec. Corp. v. INSpire Ins. Sol., Inc., 365 F.3d 353, 366 (5th Cir. 2004); Phillips v. Scientific-Atlanta, Inc.,

i. The United States Court of Appeals for the D.C. Circuit noted its skepticism regarding corporate intent theories that rely on aggregating the states of mind of multiple individuals, because although "negligent acts of employees can be fairly imputed to the corporation[,] [i]ndividual acts of negligence on the part of employees cannot be combined to create a wrongful corporate intent."[98] The D.C. Circuit expressed the concern that the collective knowledge instruction could allow a jury to find criminal scienter of a corporation where no wrongful intent is found by permitting a plaintiff to piece together "scraps of 'innocent' knowledge held by various corporate officials, even if those officials never had contact with each other or knew what others were doing. . . ."[99] Therefore, the D.C. Circuit vacated the judgment below, because the collective knowledge instruction may have caused the jury to apply a lower standard of knowledge for corporate defendants.[100]

ii. The Fifth Circuit has emphasized that, when determining scienter, it is "appropriate to look to the state of mind of the individual corporate officer or officials who make or issue the statement . . . rather than generally to the collective knowledge of all the corporation's officers and employees acquired in the course of their employment."[101] Relying on the general rule that a subjective state of mind may not be imputed on general principles of agency, the Fifth Circuit considered only the state of mind of the individual, named defendants, rather than the

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374, F.3d 1015, 1018 (11th Cir. 2004). The Sixth Circuit adopted a "middle ground" between the two camps of the circuit split; however, that "middle ground" appears to still require proof of the requisite intent of an employee before that intent may be imputed to the corporation. *In re* Omnicare, Inc. Sec. Litig., 769 F.3d 455, 476 (6th Cir. 2014).

[98] United States v. Sci. Applications Int'l Corp., 626 F.3d 1257, 1274 (D.C. Cir. 2010) (quoting Saba v. Campagnie Nationale Air France, 78 F.3d 664, 670 n.6 (D.C. Cir. 1996)).

[99] *Id.* at 1275 (quoting United States *ex rel.* Harrison v. Westinghouse Savannah River Co., 352 F.3d 908, 918 n.9 (4th Cir. 2003)).

[100] *Id.* at 1276.

[101] Southland Sec. Corp. v. INSpire Ins. Sol., Inc., 365 F.3d 353, 366 (5th Cir. 2004).

corporation as a whole.[102] Thus, the courts disapproving the use of collective knowledge to prove scienter emphasize that piecemeal, innocent knowledge of individual employees cannot replace a required wrongful, subjective state of mind.[103]

iii. In *Teachers' Retirement System of Louisiana v. Hunter*, the Fourth Circuit explained that to allege securities fraud against a corporation, "the plaintiff must allege facts that support a strong inference of scienter with respect to at least one authorized agent of the corporation, since corporate liability derives from the actions of its agents."[104] However, the Fourth Circuit later included nuances of the collective knowledge doctrine in its reasoning, stating that to adequately plead corporate scienter, the complaint must allege facts giving rise to a strong inference that at least one corporate agent acted with the required state of mind satisfies the PSLRA "even if the complaint does not name the corporate agent as an individual defendant or otherwise identify the agent."[105]

iv. The Sixth Circuit decided that the states of mind of any of the following corporate agents are probative for purposes of determining "whether a misrepresentation made by a corporation was made by it with the requisite scienter:"

(a) The individual agent who uttered or issued the misrepresentation;

[102] *Id.* at 366-67 (citing RES. (SECOND) OF AGENCY § 275 cmt. b, § 268 cmt. d).

[103] *See* First Equity Corp. v. Standard & Poor's Corp., 690 F.Supp. 256, 260 (S.D.N.Y. 1988) *aff'd* 869 F.2d 175 (2d. Cir. 1989) (Although "a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual.").

[104] Teachers' Ret. Sys. of La. v. Hunter, 477 F.3d 162, 184 (4th Cir. 2007) (citing Makor Issues & Rights, Ltd. v. Tellabs Inc., 513 F.3d 702, 702, 710 (7th Cir. 2008); Southland Sec. Corp. v. INSpire Ins. Sol., Inc., 365 F.3d 353, 363–67 (5th Cir. 2004)).

[105] Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc., 576 F.3d 172, 189 (4th Cir. 2009).

(b) Any individual agent who authorized, requested, commanded, furnished information for, prepared (including suggesting or contributing language for inclusion therein or omission therefrom), reviewed, or approved the statement in which the misrepresentation was made before its utterance or issuance; or

(c) Any high managerial agent or member of the board of directors who ratified, recklessly disregarded, or tolerated the misrepresentation after its utterance or issuance.[106]

d. The Third, Eighth, and Tenth Circuits have not adopted or rejected the corporate collective knowledge doctrine

IV. **The *Yates Memo*.**

A. On September 9, 2015, Deputy Attorney General Sally Q. Yates issued a memorandum titled "Individual Accountability for Corporate Wrongdoing" (the "*Yates Memo*"), detailing a renewed approach within the Department of Justice ("DOJ") to identify and hold individuals accountable for their role in corporate misconduct.[107]

1. The *Yates Memo* signaled the agency's increased focus on the idea that "[f]ighting corporate fraud and other misconduct is a top priority of the Department of Justice" and "[o]ne of the most effective ways to combat corporate misconduct is by *seeking accountability from the individuals who perpetrated the wrongdoing*"[108]

2. In a speech announcing the memo, Yates described the policy changes as "a substantial shift from our prior practice."[109] The goal

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[106] *Id.*

[107] Sally Quillian Yates, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015) (the "*Yates Memo*").

[108] *Yates Memo* at 1 (emphasis added).

[109] Justice News, *Deputy Attorney General Sally Quillian Yates Delivers Remarks at New York University School of Law Announcing New Policy on Individual Liability in Matters of Corporate Wrongdoing*, DEP'T OF JUSTICE (Sept. 10, 2015) (the "*Yates NYU Speech*").

of the *Yates Memo* was not only accountability but deterrence as well.[110]

B. The *Yates Memo* outlines six key steps that "should be taken in any investigation of corporate misconduct" and are aimed at strengthening the DOJ's pursuit of "individual corporate wrongdoing."[111] They are:

1. In order to qualify for any cooperation credit, corporations must provide to the DOJ all relevant facts relating to the individuals responsible for the misconduct;

2. Criminal and civil corporate investigations should focus on individuals from the inception of the investigation;

3. Criminal and civil attorneys handling corporate investigations should be in routine communication with one another;

4. Absent extraordinary circumstances or approved departmental policy, the DOJ will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation;

5. Department attorneys should not resolve matters with a corporation without a clear plan to resolve related individual cases, and should memorialize any declinations as to individuals in such cases; and

6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on considerations beyond that individual's ability to pay.[112]

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[110] Speaking at a 2016 conference on white-collar crime, Yates stated:

> The bad acts of individuals have grave consequences, from the loss of jobs to the corruption of government officials, from the foreclosure of homes to the destruction of financial security and economic confidence. So holding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system. We cannot have a different system of justice-or the perception of a different system of justice-for corporate executives than we do for everyone else.

Justice News, *Deputy Attorney General Sally Q. Yates Delivers Remarks at the New York City Bar Association White Collar Crime Conference*, U.S. DEP'T OF JUSTICE (May 10, 2016).

[111] *Yates Memo* at 2.

[112] *Id.* at 2–3.

C. It is important to highlight the requirement that "[i]n order for a company to receive any consideration for cooperation . . . the company must completely disclose to the Department all relevant facts about individual misconduct."[113]

1. Complete disclosure means that the company must identify “all individuals involved in or responsible for the misconduct” and provide the government with “all facts relating to that misconduct.”[114]

2. Critically, a company is under the impetus to take proactive steps towards its own internal investigation because when a company “declines to learn of such facts” its cooperation “will not be considered a mitigating factor.”[115]

3. Consequently, in order to obtain cooperation credit, a company will not only be expected to conduct its own internal investigation but also to provide the results of the investigation, including potentially culpable individuals, over to the government.[116]

4. Practically speaking, the company will investigate and prove the *mens rea* element for the government against the company’s own employees.

D. Reconciling the Inherent Tension Between the *Yates Memo* and the Collective Knowledge Doctrine.

1. While a corporation, as an entity, may be imputed with the knowledge of its employees, can the same approach be applied to corporate officers to create individual culpability?

2. Deputy Attorney General Yates acknowledged that responsibility within corporations is “diffuse” thus making it “extremely difficult to identify the single person or group of people who possessed the knowledge or criminal intent necessary,” and that “high-level

[113] *Id.* at 3.

[114] *Id.*

[115] *Id.*

[116] The focus on encouraging company cooperation and disclosure clearly presents ethical concerns regarding waiver of attorney-client privilege and representation of employees when the company is obligated to identify individuals and provide all facts relevant to the misconduct, an issue that is discussed more fully below, *infra* Section V.

executives" are often especially difficult to prosecute as they are "often insulated from the day-to-day activity in which the misconduct occurs."[117]

3. Commentators have also noted that the new policy may not lead to an increase of individual charges because "the harmful conduct is often caused by the acts of multiple agents who lack criminal intent and are unaware of each other's acts."[119]

4. The policy change may even decrease individual charges as upper level managers are incentivized to diffuse their responsibilities to subordinates, thus insulating those at higher levels from the requisite *mens rea* and resulting in the scapegoating of subordinates as the corporate officers work for full cooperation.[120]

5. Note, however, that the government may pursue individuals through the collective knowledge doctrine during its initial investigation as motivation to compel a company to cooperate more fully or agree to greater civil penalties as part of a consent decree to avoid criminal prosecution.

V. **Ethical Considerations Going Forward in Defending Criminal Environmental Enforcement Actions**

A. The corporation's ability to control the attorney-client privilege is key to cooperation under the *Yates Memo*.

B. The Corporation as a Client: Model Rule 1.13.

1. Rule 1.13(a): "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."

2. Rule 1.13(f): "In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably

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[117] *Yates NYU Speech*.

[119] Elizabeth E. Job & Thomas W. Joo, *The Corporation As Snitch: The New DOJ Guidelines on Prosecuting White Collar Crime*, 101 VA. L. REV. 51 (2015) (noting that U.S. Attorney Bharara "specifically blamed . . . the diffusions of responsibility . . . for the lack of individual charges").

[120] *See* Joseph W. Yockey, *Beyond Yates: From Engagement to Accountability in Corporate Crime*, 12 N.Y.U. J.L. & BUS. 407, 422 (2016)

should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."

C. Overview of the *Upjohn* Warning.

1. Elements of the corporate attorney-client privilege:

a. The corporation that sought or received the legal advice was a client;

b. The interview was with corporate counsel, acting as such;

c. The communication involved matters within the scope of the interviewee's official duties;

d. The communication related to securing or rendering legal advice to the corporation; and

e. The communication was made with an expectation of confidentiality.[121]

2. Key components of an effective *Upjohn* warning:

a. Identifying that the corporation is corporate counsel's only client and that the constituent is not a client;

b. Corporate counsel is collecting facts for the purpose of providing legal advice to the corporation;

c. The communication is protected by the attorney-client privilege, which belongs to the corporation, not the constituent;

d. The corporation may choose to waive the privilege and disclose the communication to a third party, including the government; and

e. The communication must be kept confidential, meaning that it cannot be disclosed to any third party other than interviewee's counsel.[122]

[121] Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

[122] American Bar Association White Collar Crime Working Group, *Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts With Corporate Employees* 3 (July 17, 2009).

3. Robust *Upjohn* warnings maximize the corporation's chances of controlling the attorney-client privilege and fulfill corporate counsel's ethical duty to interviewees.

D. The Pitfalls of Improper or Nonexistent *Upjohn* Warnings.

1. The District Court in *United States v. Nicholas*: focus on corporate counsel's behavior.[123]

2. The Ninth Circuit in *United States v. Reuhle*: focus on the interviewee's subjective belief and whether the belief was objectively reasonable.[124]

E. Proving Joint Representation: It is (Likely) On the Constituent.

1. The Third Circuit's *Bevill* Test (adopted by the Second and Sixth Circuits):

a. The constituent approached corporate counsel to seek legal advice;

b. When the constituent approached corporate counsel, the constituent made it clear that they were seeking legal advice in their individual rather than their representative capacity;

c. Corporate counsel saw fit to communicate with the constituent in their individual capacity, knowing that a possible conflict could arise;

d. The constituent's conversations with corporate counsel were confidential; and

e. The substance of the constituent's conversations with corporate counsel did not concern matters within the corporation or the general affairs of the corporation.[125]

2. The Fourth Circuit's subjective belief test and evaluation of the objective reasonableness of that subjective belief.[126]

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[123] United States v. Nicholas, 606 F. Supp.2d 1109 (C.D. Cal. 2009), (holding that corporate constituent could prevent the corporation from disclosing communications where constituent was also represented by corporate counsel), *rev'd on appeal*, United States v. Ruehle, 583 F.3d 600 (9th Cir. 2009).

[124] United States v. Ruehle, 583 F.3d 600, 609–12 (9th Cir. 2009).

[125] *In re* Bevill, Bresler & Schulman Asset Mgmt. Corp., 805 F.2d 120, 123 (3d Cir. 1986).

[126] *In re* Grand Jury Subpoena Under Seal, 415 F.3d 333, 340 (4th Cir. 2005).

F. Does the *Yates Memo* Require an Amended *Upjohn* Warning?

1. Post-*Yates Memo*, must an amended *Upjohn* Warning indicate that cooperating with the government will occur, rather than it may occur?[127]

a. Risk of privilege never attaching in the first place for not being conducted to provide legal advice and for lack of confidentiality.[128]

b. Mitigating this risk:

i. Specifically identify the scope and legal purpose of the investigation in the engagement letter and repeat the scope and legal purpose wherever appropriate, including during interviews, and in any written summaries of interviews with constituents. At the same time, an investigation should not be so narrowly described as to undermine legitimate offshoot inquiries that may serve the purpose of the investigation. As investigations are by their nature initiated at an early stage of a client's knowledge, it may be necessary to re-evaluate the scope of an investigation as the investigation progresses.

ii. Corporations should consider ensuring that there is a written corporate policy clearly stating that all internal investigations and related interviews are for the purpose of obtaining and rendering legal advice to the corporation.

iii. All constituents involved should be strictly warned about the importance of confidentiality and the need to avoid any disclosure about the nature of the investigation.

iv. *Upjohn* warnings should be memorialized in writing to prepare for a potential dispute over whether the warnings were given.

v. To help preserve the attorney-client privilege and the work product doctrine, interview memos should be prominently marked "Attorney-Client Privilege" and "Attorney Work Product." In addition, an introduction to any interview summary should indicate that the interview was undertaken to render legal advice, specify that appropriate

[127] *See* Waithera Junghae, *Lawyers should amend Upjohn warning in light of Yates Memo*, GLOB. INVES. REVIEW (Oct. 13, 2015).

[128] *See* Nathan Huff, *One Year Later: Yates Memo Remains a Threat to the Privileged Status of Internal Investigations*, AM. BAR ASS'N WHITE COLLAR CRIME COMM. NEWSLETTER (Winter/Spring 2017).

warnings were given to the interviewee, and that the summary contains the mental impressions of corporate counsel and does not represent a transcript of the interview.

vi. All privileged and work-product documents should further be clearly labeled "Confidential" to help demonstrate the intent to maintain the confidentiality of the document.

vii. Any disclosures, even to the government, should be subject to a non-disclosure agreement, restricting the right of the receiving party to share the information with third parties.

G. Conflicts of Interest & Model Rule 1.7.

1. Rule 1.13(g): "A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or its shareholders."

2. Rule 1.7(a): "(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

3. Rule 1.7(b): Notwithstanding the existence of a conflict of interest, a lawyer may represent both clients if "(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and (4) each affected client gives informed consent in writing."

4. Are joint defense agreements in jeopardy under the *Yates Memo*?

a. Given the *Yates Memo*'s position that corporations "cannot pick and choose what facts to disclose" to be eligible for any cooperation credit, a corporation seeking cooperation credit may have an incentive to blame a culpable constituent sufficient to

prevent a common interest from existing. Therefore, where a corporation has determined early in an investigation that it plans to cooperate with the government, but a constituent has not reached that same conclusion, any information disclosed between the corporation and constituent under the cloak of a joint defense agreement may be vulnerable to the government's argument that the privilege was waived due to a lack of common interests.[129]

H. Corporate Counsel's Other Ethical Obligations to Interviewees.

1. Rule 4.1: "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."

2. Rule 4.2: "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."

3. Rule 4.3: "In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client."

4. Rule 4.4(a): "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person."

I. Whistleblower Considerations.

1. To guard against whistleblower retaliation claims, establish an effective compliance program and cultivate a culture of compliance.

2. Features of effective compliance programs:

[129] *See* Patrick Linehan and William Drake, *BNA Insights: The Yates Memo and the Future of Joint Defense Agreements*, BLOOMBERG (June 21, 2016).

a. Established standards and procedures to prevent and detect criminal conduct;

b. Specified constituents with responsibility for the day-to-day operation of the compliance program;

c. A governing authority that is knowledgeable about the content and operation of the compliance program to provide oversight;

d. Conducting effective training programs and otherwise disseminating educational materials when appropriate to constituents;

e. Periodic auditing to ensure the compliance program is being followed and monitoring the effectiveness of the compliance program;

f. Establishing appropriate incentives to comply with the compliance program and appropriate disciplinary measures for failing to comply; and

g. Taking reasonable steps to respond appropriately to inappropriate conduct and preventing further similar conduct.[130]

3. Avoiding the misperception that an internal investigation is retaliatory:

a. Keeping whistleblower identities confidential when possible to avoid the misperception that the whistleblower was identified as an act of ostracism;[131]

b. Assuring interviewees that they will not be retaliated against for truthful and good faith participation in an investigation;

c. Reminding constituents that retaliation against persons for participating in interviews or making reports is strictly prohibited and providing instructions on who in the corporation to report perceived reprisals to;

d. Maintaining investigation documents in separate files, apart from personnel files and inaccessible to constituents;[132]

[130] United States Sentencing Commission Guidelines, *Guidelines Manual*, § 8B2.1.

[131] *See* Hailliburton v. Admin. Review Bd., 771 F.3d 254, 256 (5th Cir. 2014), *rehearing en banc denied by* 596 F. App'x 340 (5th Cir. 2015) (holding that identifying a whistleblower is actionable retaliation because "[i]t is inevitable" that "ostracism" in the workplace will result).

e. The scope of information provided to constituents, balancing the need for cooperation in connection with interviews and the preservation of evidence with limiting the dissemination of confidential information;

f. The possibility of a retaliation claim before disciplining, filing a lawsuit, or filing a counterclaim against an accuser.

J. Disciplining Non-Whistleblower Constituents during Investigations.

1. When actual or potential constituent wrongdoing is discovered, several considerations must be weighed in determining the appropriate course of action for the corporation. The effect on the corporation's other constituents, ongoing operations, the continuing investigation, and the corporation's relations with law enforcement should all be considered. In addition, there are varying degrees of discipline, from written reprimands to termination. How the corporation balances these considerations is a function of the timing and precipitating cause of the disciplinary action. Each will have an effect on the decision of whether, when, and how to discipline a constituent.

2. Disciplining Constituents for Refusing to Cooperate.

a. In certain instances, constituents may refuse to cooperate with the corporation's internal investigation. In the vast majority of circumstances, there is no Fifth Amendment right against self-incrimination in the context of an internal investigation by a private employer.[133] However, terminating a constituent who refuses to cooperate should not be done reflexively. Taking action against a constituent can have serious consequences for the corporation, from antagonizing other constituents to instigating a civil suit by the fired constituent. Prior to taking action, the corporation should take into account the seriousness of the investigation, the basis of the constituent's refusal to cooperate, the corporation's treatment of similarly situated constituents, and whether the information is available by alternative means.

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[132] Maintaining investigation files in a location inaccessible to constituents also protects against constituents participating in "self-help discovery," where a whistleblower uses his or her access to various employer databases and documents to collect material that may support a whistleblower retaliation claim. *See generally* JDS Uniphase Corp. v. Jennings, 473 F. Supp. 2d 697 (E.D. Va. 2007) (Holding that a whistleblower may not pilfer "an employer's proprietary documents in violation of their contract merely because it might help them blow the whistle on an employer's violation of law, real or imagined.").

[133] *See* Nuzo v. Northwest Airlines, Inc., 887 F. Supp. 28, 33 (D. Mass. 1995).

b. It should be recognized that regulators or prosecutors might not look favorably on a corporation that fails to discipline a constituent who refuses to cooperate with an internal investigation. If the corporation is perceived as encouraging, implicitly or explicitly, the obstinacy of its constituents, it may have a negative effect on the corporation's ability to receive cooperation credit—especially in light of the *Yates Memo*'s "all or nothing" approach. Therefore, the corporation should document its attempts to encourage constituent cooperation, including informing constituents of the obligation to cooperate and the potential consequences for not doing so.

3. Disciplining Constituents for Misconduct.

a. If facts become known during an investigation that indicate that there was misconduct, it is essential that this information be conveyed immediately to the appropriate personnel in the corporation. If the misconduct is ongoing, action should be taken to stop it. Taking immediate action to halt inappropriate behavior can serve as a signal to the government that the corporation is taking its obligations seriously, is operating in good faith, and is willing to take difficult actions if necessary.

b. Despite these advantages, there are also drawbacks to acting swiftly in such circumstances that should be considered. Disciplining constituents could have a chilling effect on other constituents' cooperation during the investigation. The corporation could also lose access to the terminated constituent and thereby short circuit an aspect of the investigation. Further, any disciplinary action in the midst of an investigation may alert law enforcement or potential third party litigants of possible wrongdoing. Therefore, the corporation must be prepared to face scrutiny at that time not only about the decision to discipline the constituent, but also about the underlying facts and circumstances that prompted the investigation in the first place.