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# DEFERRED PROSECUTION AGREEMENTS AND LEGAL PROFESSIONAL PRIVILEGE/ATTORNEY-CLIENT PRIVILEGE: ENGLISH AND US EXPERIENCE COMPARED

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**Abstract:** The ability to assert legal professional privilege is recognised in English law as a fundamental human right. In the US attorney-client privilege is one of the most sacrosanct

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privileges. The use of deferred prosecution agreements (DPAs) in the US and England and the part that corporate cooperation plays raises the concern that if cooperation requires waiver of privilege, privilege is effectively otiose in this context. In the US, DPAs rekindle evidential and procedural issues of selective waiver and judicial oversight.

We contrast the role of the English courts in providing judicial oversight of DPAs with the more limited degree of judicial involvement in the US. We analyse the intersection of privilege and DPAs, evaluating the requirements for cooperation with the prosecutor and the impact on the entity's ability to assert privilege. We consider whether waiver of privilege forms an essential constituent of cooperation and the possibility and consequences of limited/selective waiver.

The optimum position is that waiver should not be perceived as a prerequisite to co-operation for the purpose of obtaining a DPA. The US approach to the relationship between co-operation and waiver of privilege comes closer to the optimum position than does the English approach. In contrast, active judicial oversight in England is preferable to the more limited exercise in the US, and the availability of limited waiver in England provides a degree of protection to the corporation that corporations lack when waiving privilege or considering whether to do so.

**Keywords**: *deferred prosecution agreements; legal professional privilege; attorney-client privilege; waiver of privilege; limited waiver; Upjohn warnings; judicial oversight*

## I. INTRODUCTION

Deferred prosecution agreements (DPAs) are a tool whereby, following negotiations with the prosecuting authority, an agreement can be reached such that a prosecution for economic crime (such as fraud, money laundering or bribery) will not take place provided that agreed conditions are satisfied. These conditions might include, for example, financial penalties and compensation to victims. A prosecution may still take place if the conditions of the DPA are not satisfied.

Legal professional privilege attaches to communications between legal adviser and client for the purposes of giving or receiving legal advice (legal advice privilege) or to communications between legal adviser and client for the purposes of adversarial litigation (litigation privilege). The US equivalents are attorney-client privilege and the work product protection. The significance of privilege in the context of DPA's is that cooperation with the

prosecuting authority is important in both jurisdictions, giving rise to the question whether privilege must be waived (i.e. relinquished) in order for negotiations for a DPA to be concluded successfully. A related issue is the extent to which this may be achieved by a limited waiver of privilege (i.e. where privileged material is disclosed to the prosecutor but the use to which it can be put is restricted by the terms of the waiver).

Deferred prosecution agreements have been in general use in the US since the early 1900's[1] but are a relatively recent phenomenon in English law. This explains the relative paucity of academic comment in the UK in comparison to the much wider range of commentary available in the US and is particularly so as regards the interface between waiver of privilege and cooperation. We fill this lacuna in the academic literature and provide a comparative perspective with law, guidance and practice in the US.

Although similar in a number of ways, the US and English DPA regimes differ in two key respects: the more limited judicial oversight of the terms of the DPA in the US and in England the ability of a company to waive privilege on a limited/ selective basis over material relevant to the investigation being conducted by the enforcement agency. In both jurisdictions, cooperation is an essential requirement for approval of a DPA. The desire of an enforcement agency to access material such as interviews with corporate employees has led some to conclude that cooperation equates with or at least requires waiver of privilege. In the US, the response to this conclusion has resulted in a rather different approach to cooperation and waiver to that in England.

This article examines the DPA regimes in England and the US in terms of cooperation, waiver of privilege and judicial oversight and provide recommendations based on our comparative analysis. Section II introduces the DPA regime in England. We begin by considering the role of the court in providing judicial oversight of DPAs. We then analyse the intersection between cooperation and legal professional privilege, with reference to the Deferred Prosecution Agreement Code of Practice, the Serious Fraud Office Operational Handbook and the approach of the courts in relation to this issue. We conclude Section II by examining the implications of waiver for the corporation and its employees and the nature and significance of limited waiver.

[1] Andrea Amulic, "Humanizing the Corporation While Dehumanizing the Individual: The Misuse of Deferred-Prosecution Agreements in the United States" (2017) 116 *Mich L Rev* 123, 127.

Section III adopts a broadly similar structure to Section II but concerns the DPA regime in the US. We commence by recognising how the role of the court in the US is much more limited than that in England. We again analyse the intersection between cooperation and privilege, but this time in the context of the approach taken in the Justice Manual. We conclude Section III by examining the implications of waiver of privileges for employees and the company in the US, including the limited scope for selective waiver.

In Section IV, we contrast the substantive and procedural positions in England with that in the US. In Section V we present our conclusions. Informed by our comparative analysis and identification of the strengths and weaknesses in the approaches adopted in the US and England, we significantly advance knowledge and debate in this area by offering solutions to the substantive and procedural problems encountered in the two jurisdictions, each learning from the other.

## II. DPAS IN ENGLAND

DPAs, which in England may be used by corporate bodies only, were introduced in English law by s 45 of the Crime and Courts Act 2013[2]. In the US, where DPAs and non- prosecution agreements (NPAs[3]) were originally developed as methods of dealing with individuals for the purpose of discouraging recidivism,[4] DPAs are extensively used in the corporate context—a practice that became much more common, if highly controversial, after the conviction of Arthur Andersen in the early 2000's led to its collapse and significant job losses. The subsequent, increased use of DPAs arguably reflects a desire on the part of all the players to avoid this sort of disastrous outcome for other corporates[5] as well as the collateral fall out for shareholders, employees, customers, and the general public.

The rationale for the introduction of DPAs in England is that they give prosecutors "an extra tool" in tackling economic crime with the objective of allowing organisations to be held "to account for their wrongdoing in a focused way without the uncertainty, expense, complexity

[2] Which came into force on 24 February 2014.

[3] In contrast to a DPA, where charges are filed but prosecution is deferred, in an NPA the prosecutor agrees not to file charges provided that the relevant agreement is complied with. NPAs are not considered further in this article.

[4] Amulic, "Humanizing the Corporation" (n. 1), 125.

[5] *Ibid*., 131-132.

or length of a criminal trial"[6]. DPAs reflect a pragmatic approach to the particular difficulties of prosecuting corporate entities, where a directing mind and will with the necessary mens rea must be shown[7]. To date, there have only been nine DPAs in England[8] compared to many hundreds in the US[9]. The Director of Public Prosecutions and the Director of the Serious Fraud Office are the designated prosecutors for the purposes of DPAs[10]. So far, only the Director of the Serious Fraud Office has entered into DPAs in England. A range of common law and statutory offences, although covering only financial crimes, can be disposed of through a DPA[11].

The Serious Fraud Office and the Crown Prosecution Service have produced a Deferred Prosecution Agreements Code of Practice (the Code).[12] The Code sets out a two-stage test which prosecutors must apply in considering whether a DPA is an appropriate way to dispose

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[6] Ministry of Justice, *Deferred Prosecution Agreements. Government response to the consultation on a new enforcement tool to deal with economic crime committed by commercial organisations* (Cm 8463 23 October 2012).

[7] Eoin O'Shea and Emma Shafton, "DPAs: time to extend the regime?" [2019] *NLJ* 7. The Government has asked the Law Commission to examine the issue of corporate criminal liability for economic crime and present reform options.

[8] The first, heard in 2015, being *Serious Fraud Office v Standard Bank* [2016] Lloyd's Rep FC 102 (CC) (*Standard Bank*).

[9] The Department of Justice has entered into around 400 NDA's or DPAs since 2002: Cindy A Schipani, "Trends in prosecutions for corporate crime in the US" (2018), 39(2) *Comp Law* 43, 44-45; and see "2019 Year-End Update on Corporate Non-Prosecution Agreements and Deferred Prosecution Agreements" (Gibson Dunn survey) (Gibson Dunn, 8 January 2020) <https://www.gibsondunn.com/2019-year-end-npa-dpa-update/> (visited 20 November 2020); between 2000 -2019 there have been over 500 corporate NPAs and DPAs in the US.

[10] Crime and Courts Act 2013, schedule 17, Part 1, para 3.

[11] *Ibid*., Part 2 paras 15 - 28.

[12] Deferred Prosecution Agreements Code of Practice, Crime and Courts Act 2013 V1 11.2.14 (The Code) <https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf> (visited 23 March 2021).

of the case, as an alternative to prosecution, comprising an evidential stage[13] and a public interest stage. The public interest stage requires the prosecutor to consider factors such as the seriousness of the offence and the risk of harm to stakeholders and the general public. The Code lists factors both in favour of and against prosecution that may be taken into account.[14] One factor is the level of cooperation shown by the company.[15] Despite the existence of the public interest test, disposal by way of DPA is clearly possible in even the most serious cases of criminal conduct. For example, in *Serious Fraud Office v Rolls-Royce Plc* [16](*Rolls-Royce*), the conduct involved was described as "the most serious breaches of the criminal law in the areas of bribery and corruption."[17] Similarly, in *Serious Fraud Office v Airbus SE*[18] (*Airbus*), the court acknowledged that "[t]he seriousness of the criminality in this case hardly needs to be spelled out. As is acknowledged on all sides, it was grave."[19] In both cases, the cooperation by the companies in question was described as, respectively, "extraordinary" [20] and "exemplary" [21]; and in both cases there was a limited waiver of privilege. In the case of *Airbus*, what was described as a cooperative position to privilege was taken (although some documents were withheld)[22] with privilege being waived on a limited basis over interviews with employees which took place as part of *Airbus*' internal investigation.[23] Similarly, with *Rolls Royce*, privilege was waived on a limited basis over all interviews with employees conducted as part of its internal investigation.[24]

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[13] The evidential stage is based in part on stage of the Full Code Test in the Code for Crown Prosecutors, CPS, (October 2018) <https://www.cps.gov.uk/sites/default/files/documents/publications/Code-for-Crown-Prosecutors-October-2018.pdf> (visited 23 March 2021).

[14] The Code (n. 12), section 2, 2.8.1 and 2.8.2.

[15] *Ibid*., section 2.8.2 (i).

[16] [2017] Lloyd's Rep FC 249 (CC).

[17] *Rolls-Royce* (n 16) [4].

[18] [2020] 1 WLUK 435 (CC).

[19] *Airbus* (n. 18), [64].

[20] *Rolls-Royce* (n 16), [22].

[21] *Airbus* (n. 18), [73].

[22] *Ibid*., [74].

[23] *Ibid*., [36].

[24] *Rolls-Royce* (n. 16), [19] – [20].

### *A. The Role of the Court*

The Crime and Courts Act 2013, schedule 17 sets out the role of the court in the DPA process[25]. After DPA negotiations have begun, an application to the court must be made, in private, for a declaration that entering into a DPA is likely to be in the interests of justice and that the proposed terms are fair, reasonable and proportionate[26]. In due course, a second application to the court must be made for a declaration that the final, agreed terms of the DPA are in the interests of justice and are fair, reasonable, and proportionate[27]. This declaration, the terms of the DPA and the initial private declaration are made public although reporting restrictions may be imposed where a criminal trial of individuals involved with the company is to take place[28]. As Sir Brian Leveson has observed, "In contra-distinction to the United States…"[29] , a key feature of the DPA scheme in England is that the court is involved at two stages, first, to scrutinise the proposal and, secondly, to consider whether or not to approve the DPA.

### *B. Cooperation and Legal Professional Privilege – The Deferred Prosecution Agreement Code of Practice, the Serious Fraud Office Operational Handbook and the Approach of the Courts*

When considering whether prosecution is in the public interest, a key question is what corporate behaviour amounts to sufficient cooperation to weigh against prosecution and in favour of entering into a DPA. This is the critical point at which the assertion of privilege and the DPA regime intersect. The relationship between waiver of privilege and cooperation is an issue that has been significantly more high profile in the US because of various iterations of the Justice

[25] Crime and Courts Act 2013 s 7, 8.

[26] *Ibid*., schedule 17 s 7.

[27] Crime and Courts Act 2013 s 8.

[28] For example see *Serious Fraud Office* v *XYZ Ltd* [2016] Lloyd's Rep FC 517 (CC) (*Sarclad*), where the DPA was agreed in July 2016 but reporting restrictions were not lifted until July 2019, see "Sarclad Ltd" (Serious Fraud Office, 7 May 2019) <https://www.sfo.gov.uk/cases/sarclad-ltd/> (visited 16 November 2020).

[29] *Standard Bank* (n. 8), [2].

Manual[30] (the Manual) and memoranda released by the Department of Justice (DOJ). In the US, their combined effect resulted in a widespread perception that privilege must be waived for a company to be regarded as cooperating with the DOJ to be eligible for a DPA[31], the response to which is analysed in Section III.

The English Code does not explicitly make waiver of privilege a requirement for cooperation. It acknowledges that it cannot change the law on legal professional privilege[32]. The Code's guidance on cooperation does include reference to the "considerable weight" given to the corporation's "genuinely proactive approach" including disclosure of witness accounts and providing a report of any internal investigation with source documents[33]. Witness accounts may well be covered by an entirely legitimate claim for litigation privilege but the Code does not adequately clarify the nature of the relationship between asserting privilege and being sufficiently cooperative. In this respect it is unfortunate that provisions proposed in the Ministry of Justice consultation on DPAs[34] "for the protection of legal professional privilege…to deal with organisations' concerns about the treatment of internal investigations…" were not included. Alongside the Code sits published internal guidance from the Serious Fraud Office (SFO) in its operational handbook (the Handbook). As there is significant judicial scrutiny prior to approval of DPAs in English law, the approach taken by the courts to cooperation and waiver must also be analysed.

The Handbook's corporate cooperation guidance[35] (the Guidance) states that "legal advisers well understand the type of conduct that constitutes true co-operation" and that good

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[30] The United States Department of Justice, "Justice Manual" (The Justice Manual) <https://www.justice.gov/jm/justice-manual> (visited 23 November 2020).

[31] See for example comments in The Justice Manual (n. 30), 9-28.000 – Principles Of Federal Prosecution of Business Organisations -9-28.710 – Attorney-Client and Work Product Protections; and Wulf A Kaal and Timothy A Lacine, "Effect of Deferred and Non-Prosecution Agreements on Corporate Governance: Evidence from 1993-2013" (2014) 70 *Bus Law* 61, 73 - 78.

[32] The Code (n. 12), section 3.3.

[33] *Ibid*., section 2.8.2(i).

[34] Ministry of Justice, *Consultation on a new enforcement tool to deal with economic crime committed by commercial organisations: Deferred prosecution agreements* (Consultation Paper CP9/2012 May 2012) Para 95.

[35] SFO Operational Handbook, Corporate Co-operation Guidance, August 2019.

practice includes providing "relevant material gathered during an internal investigation"[36]. The Guidance states that a schedule of documents withheld on the basis of privilege should be provided[37] and that when privilege is claimed, it is expected that this claim will be supported by certification from independent counsel[38]. The Guidance refers to the Code provisions regarding cooperation and states that "an organisation that does not waive privilege and provide witness accounts does not attain the corresponding factor against prosecution that is found in the DPA Code .... but will not be penalised by the SFO". In addition, the section of the Handbook covering DPAs states that "waiving privilege over any LPP material…" is an indicator of cooperation in the Code.[39] As noted earlier, the Code does not mention waiver of privilege in the context of cooperation. What the Code does, though, is give examples of what cooperation includes, such as the disclosure of witness accounts. Such accounts may be covered by privilege but will not necessarily be privileged, depending on the purpose for which they were produced.[40] Consequently, treating disclosure of witness accounts as cooperation is not identical to saying that in order for a corporation to be seen as cooperating, the corporation must waive any privilege that could legitimately be claimed over witness accounts. It would be far better if the Code expressly stated that, whilst it may be necessary to reveal relevant factual information in order to cooperate, that revelation does not inherently require disclosure of privileged information, i.e., where relevant factual information can be revealed without recourse to privileged documents. Whilst the Code acknowledges that it cannot change the law of privilege and that there is no obligation on a corporation either to negotiate a DPA or to accept a specific term[41], the reality is that in some situations a corporation may have to choose between waiving privilege or providing inadequate cooperation. For instance, a corporation may face that choice where the only viable source of the requisite factual information is privileged communications.

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[36] *Ibid.,* Preserving and providing material, section 1 (v) (c).

[37] *Ibid*., section 1 (x).

[38] *Ibid*., Witness Accounts and Waiving Privilege.

[39] SFO Operational Handbook, Deferred Prosecution Agreements, October 2020, Co-operation.

[40] *The Director of the Serious Fraud Office v Eurasian Natural Resources Corporation Ltd* [2018] EWCA Civ 2006, [2019] 1 WLR 791 [123] (CA) (*Eurasian)*.

[41] The Code (n. 12), section 3.3.

The SFO's interpretation of the Code clearly equates waiver of privilege with cooperation. This is unsurprising given reported statements from various SFO personnel. In *R(AL) v Serious Fraud Office*[42] the court concluded that "there is evidence that the SFO [treats] waiver…as relevant to the duty of disclosure under a DPA...".[43] In 2019, the current Director acknowledged that privilege is a fundamental right but expressed the view that companies wishing to cooperate with the SFO could waive privilege and that waiving privilege over initial investigative material would be "a strong indicator of cooperation".[44]

So far there has been no clear guidance from the courts regarding whether waiver of privilege over first witness accounts is necessary to meet the cooperation component of public interest factors against prosecution (and therefore in favour of a DPA). However, as is shown below, in a number of cases waiver is referred to as an example of cooperation. In contrast, in the US context, Passmore refers to judicial criticism of previous DOJ memoranda in which waiver was equated with cooperation.[45] To date there have been nine DPAs in England. Six of the DPAs[46] have included limited waiver of privilege by the company, and there are differences in the scope and extent of the limited waiver where it has occurred. Based upon analysis of the first four DPA's approved, Laird suggests that a DPA is unlikely to be approved if the company neither self-reports its discovery of the relevant criminality to the SFO nor waives privilege.[47]

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[42] [2018] EWHC 856 (Admin), [2018] 1 WLR 4557 (*R(AL)*).

[43] *Ibid*., [121]. Note that this case did not concern the approval of a DPA.

[44] Speech by Lisa Osofsky, Director of the SFO at the Royal United Services Institute, 3 April 2019 <https://www.sfo.gov.uk/2019/04/03/fighting-fraud-and-corruption-in-a-shrinking-world/> (visited 16 November 2020).

[45] Colin Passmore, *Privilege* (4th edn, Sweet and Maxwell 2019) 1-084.

[46] Namely, *Rolls-Royce* (n. 16), *Serious Fraud Office* v *Tesco Stores Ltd* [2019] Lloyd's Rep FC 283 (CC) (*Tesco)*, *Serious Fraud Office v Serco Geografix Limited* [2019] Lloyd's Rep FC 518 (CC) (*Serco*), *Airbus* (n. 18), *Serious Fraud Office v G4S Care and Justice Services (UK) Limited* [2020] 7 WLUK 303 (G4S) and *Director of the Serious Fraud Office v Airline Services Limited* [2020] Lexis Citation 335 (CC) (*Airline*).

[47] Karl Laird, "Deferred prosecution agreements and the interests of justice: a consistency of approach?" [2019] *Crim LR* 6, 486, 492.

In *Standard Bank*[48] and *Sarclad* [49], DPA's were approved where the companies self-reported promptly even though neither waived privilege. Cheung notes that in *Sarclad* Leveson P regarded the "assertion of privilege as being consistent with its full and genuine cooperation"[50]. *Rolls-Royce* did not self-report but did make a limited waiver of privilege and a DPA was approved.[51] Whether Laird's view is correct has not yet been tested, since the one subsequent DPA where there was no limited waiver of privilege, *Serious Fraud Office v Guralp Systems Limited*[52] (*Guralp*), involved a self -report. What does seem clear is that since the first two DPAs, Standard Bank and Sarclad, there is a trend for limited waiver of privilege, as demonstrated in six of the subsequent seven cases.

The cases involving limited waiver demonstrate variation with regard to its scope and extent. In *Rolls-Royce* and *Tesco*, the agreements included SFO access to digital content and mailbox accounts unfiltered for potential privilege, with an understanding that privilege issues would be resolved using independent counsel.[53] Limited waiver in *Tesco* concerned material pre-dating a statement in which profits were overstated.[54] In *Rolls-Royce*, *Airbus*, *G4S* and *Airline*, limited waiver concerned records of employee interviews collected during internal investigations[55]. In *Serco,* the company waived privilege in respect of accounting material and granted unrestricted access to relevant email accounts[56].

The limited waivers concerning records of internal investigation interviews with employees are particularly significant.[57] The SFO regards this type of material as very valuable. For example, speaking in 2016, General Counsel of the SFO commented on the importance of witness first accounts and asserted that the SFO does not regard itself as "constrained from

[48] *Standard Bank* (n. 8).

[49] *Sarclad* (n. 28).

[50] Rita Cheung, "Deferred Prosecution Agreements: Cooperation and Confession" [2018] *The Cambridge Law Journal* 12, 14.

[51] *Rolls-Royce* (n. 16), [19] – [20].

[52] [2020] Lloyd's Rep FC 90 (CC).

[53] *Tesco* (n. 46), [38]; *Rolls-Royce* (n. 16) [19 (ii)].

[54] *Tesco* (n. 46), [38 (ii)].

[55] *Rolls Royce* (n. 16), [20 (ii)], *Airbus* (n. 18), [36], *G4S* (n. 46), [23], *Airline* (n. 46), [72]

[56] *Serco* (n. 46), [24].

[57] Such records are potentially protected by the litigation privilege limb of legal professional privilege, see *Eurasian* (n. 40).

asking for them even if they are privileged..." [58] He indicated that asserting privilege over them would not be held against the company though waiver of such a claim would be regarded as a "significant mark of co-operation"[59]. In what Passmore describes as the Court of Appeal having "…quietly approved this practice"[60] the court did observe that when examining the conduct and cooperation of a company to determine whether to approve a DPA, the willingness of the company to waive any privilege over documents produced during any internal investigation, in order to share this material with the SFO, will be considered [61]. However, the importance of companies feeling able to investigate allegations internally without the fear that they would be forced to disclose privileged information to a prosecuting authority was also recognised, as was the potential result of such fear being a reluctance to initiate an internal investigation in the first place.[62]

The Code does not mention waiver of privilege, either in its examples of cooperation or elsewhere. What causes uncertainty is the fact that the Code does explicitly identify the disclosure of accounts of relevant witnesses as an example of cooperation favouring a DPA (and cutting against prosecution). Since such accounts can be covered by privilege, the perception is that waiver of privilege is required for the company to be seen as cooperative.
In its practice note on legal professional privilege, the Law Society of England[63] (the Law Society) considers any pressure on clients to waive privilege as undermining the absolute nature of the privilege. Such pressure includes "suggesting that if the client does not waive LPP

[58] Speech to compliance professionals given by Alan Milford, General Counsel of the SFO (29 March 2016) <https://www.sfo.gov.uk/2016/03/29/speech-compliance-professionals/> (visited 16 November 2020). Alan Milford recognised in his speech that unlike the SFO the DOJ is so constrained.

[59] *Ibid*.

[60] Passmore, *Privilege* (n. 45), 1-102.

[61] *Eurasian* (n. 40), [117]. This observation is footnoted in the Guidance: "The Court of Appeal has not ruled out a court's consideration of the effect of an organisation's non-waiver over witness accounts as it determines whether a proposed DPA in in the interests of justice…" but must be considered obiter; *Eurasian* did not involve the approval of a DPA.

[62] *Ibid*., [116].

[63] The Law Society is the independent professional body for solicitors <https://www.lawsociety.org.uk/> (visited 16 November 2020).

they will not be regarded as cooperative."[64] The Law Society also considers as "equally improper" any pressure on a client to structure their internal affairs in such a way as not to attract privilege at all[65]. It is, however, evident from comments made by the SFO's General Counsel[66], that the SFO regards the latter as a sign of cooperation. In *Serco*, the SFO requested that the company not conduct witness first account interviews during the criminal investigation--a request with which the company fully complied and which was referred to in court as one of a number of examples of "very substantial co-operation".[67]

The ability to assert legal professional privilege is recognised as a fundamental right in English law. In the context of DPAs, this right appears to have been seriously eroded by the SFO's interpretation of what amounts to cooperation under the Code. Although not explicit on waiver, the provisions of the Code cite the furnishing of witness accounts as an example of cooperation; and the SFO has been clear about the importance of these accounts to them. To conclude, as the Guidance does, that failure to waive privilege over these accounts equates to a failure to meet this example of cooperation in the Code results in a detrimental inference being placed on a corporate's failure to waive what is a fundamental right. The trajectory of the recent cases suggests that limited waiver is becoming the norm[68]. A concern is that in future a court being asked to approve a proposed DPA in a case involving serious misconduct may rule that a refusal to waive privilege automatically precludes a finding of sufficient cooperation[69]. A refusal to waive a fundamental right should not be interpreted in this way[70]. Nor is that approach justified by the purpose of and rationale for a DPA. At times, waiving privilege may provide a corporation with a convenient and low stakes way of demonstrating

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[64] Legal Professional Privilege, "Law Society Practice Note" (November 2019), para 10.1 <https://www.lawsociety.org.uk/support-services/advice/practice-notes/legal-professional-privilege/> (visited 16 November 2020).

[65] *Ibid*. This would be the result if, for example, interviews were not conducted by in-house or external lawyers.

[66] Milford, "Speech to compliance professionals" (29 March 2016) (n. 58).

[67] *Serco* (n. 46), [24].

[68] Although the limited waiver did not relate to witness accounts in every case.

[69] Assuming that the SFO were prepared to offer a DPA in such circumstances, which may itself be unlikely.

[70] Laird, "Deferred prosecution agreements and the interests of justice: a consistency of approach?" (n. 47), 493.

cooperation, for example, where relevant factual information is available from other unprivileged sources and would be disclosable in legal proceedings in any event. But this does not mean that a corporation should be put in a position such that waiver of privilege is regarded by prosecuting authorities or the courts as an essential prerequisite to cooperation.

### *C. Waiver of Privilege Over First Witness Accounts – The Implications for Employees of the Company*

Employees of a corporate conducting an internal investigation into suspected criminal conduct are likely to be placed in an invidious position. Witness accounts frequently form an important part of such an investigation and are particularly attractive to the SFO. A corporate may waive privilege in them to gain credit for cooperation in the hope of achieving a DPA.

In England, legal professional privilege arising in the conduct of a company's internal investigation belongs to the company. Employees should be warned that this is the case and that the corporate may choose to waive privilege in first witness accounts—such warnings often called *Upjohn* warnings in the US[71]. The potential jeopardy for employees is that they could be charged with criminal offences related to the conduct uncovered by an internal investigation. To date in England, charges have been brought against individual employees (or former employees) in five out of the nine agreed DPAs. The SFO have not yet obtained a conviction in any of the cases that have gone to trial[72] but the risk remains. The Guidance requires potential witnesses to be identified and that the corporation make employees available for interview[73]. These requirements do not go so far as the US Manual provisions that, following the 2015

[71] See for example *R(AL)* (n. 42), [19].

[72] *Guralp (n. 52)*, *Tesco* (n. 46) and *Sarclad* (n. 28), all saw the relevant individuals acquitted of all charges: *Guralp* <https://www.sfo.gov.uk/2019/12/20/three-individuals-acquitted-as-sfo-confirms-dpa-with-guralp-systems-ltd/> (visited 16 November 2021); *Tesco* https://www.sfo.gov.uk/2018/12/06/no-case-to-answer-ruling-in-case-against-former-tesco-executives/> (visited 16 November 2021); *Sarclad* <https://www.sfo.gov.uk/cases/sarclad-ltd/> (visited 16 November 2021).

[73] SFO Operational Handbook (The Guidance) (n. 35), 6 (ii) and (iv).

Yates Memo[74], explicitly require a corporation to investigate, determine which individuals within the company were responsible for the relevant misconduct, and disclose "all relevant facts" relating to the misconduct in order to gain any credit for cooperation with the DOJ[75]. Many American commentators have characterized those provisions as an attempt by the DOJ to force waiver of attorney-client privilege[76].

The provisions of the Code and its interpretation by the SFO create a powerful incentive for the company to waive privilege over witness accounts. The end result is a potentially adverse effect on both the integrity of any investigation and the employees themselves. Assuming that an employee fully understands the ramifications of an *Upjohn* warning, a lower level employee will realize that they have no power over any decision regarding waiver of privilege over witness accounts. For that reason, they may justifiably feel cautious about being candid in interview. Hengemuhle suggests that this risks an internal investigation "that is not entirely accurate" [77], which undermines the rationale for legal professional privilege. Passmore suggests that employees may become less willing to consult corporate counsel and be less candid when doing so for fear of privilege in such communications being waived[78].

### *D. Limited Waiver of Privilege in a DPA – The Consequences for the Company.*

Limited waiver of privilege has become a feature of DPAs in English law. Limited waiver occurs when privilege is waived for a limited purpose rather than being waived generally.[79] Its basis is that there are circumstances in which it is in the interests of justice to permit limited

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[74] United States Department of Justice, Office of the Deputy Attorney General, "Individual Accountability for Corporate Wrongdoing" (9 September 2015) <https://www.justice.gov/archives/dag/file/769036/download> (visited 16 November 2020).

[75] The Justice Manual (n. 30), 9-28.000 – Principles Of Federal Prosecution of Business Organisations, 9-28.700 – The Value of Cooperation.

[76] Leah Hengemuhle, "Mea Culpa: Why Corporate Waivers of Attorney-Client Privilege Have Not Increased the Prosecution of Corporate Executives" (2019) 60 *BC L Rev* 1415, 1426.

[77] *Ibid*., 1415, 1447.

[78] Passmore, *Privilege* (n. 45), 1-107.

[79] See Green LJ in *R(AL)* (n. 42) [114].

waiver by a party who would not be prepared to undertake a general waiver.[80] For example, it may be in the interests of justice that a party can disclose documents for criminal proceedings but can still assert privilege in civil proceedings[81] or can disclose privileged documents to a regulator without a general waiver of privilege.[82]

The degree of control that the disclosing party has over the use of the documents disclosed via a limited waiver depends on its terms. Thus, it is vital to identify the terms of the limited waiver. The limited purpose and scope of the waiver may be communicated expressly or by implication. The court, in determining whether waiver is limited and, if so, the ambit of the waiver, must take all relevant circumstances into account, including express and implied communications between the parties sending and receiving the documents and "what they must or ought reasonably have understood". [83] In *Citic Pacific Ltd v Secretary for Justice*[84], privileged documents were handed to the Securities and Futures Commission (SFC) without a contemporaneous written document specifying the terms of the waiver. The Hong Kong Court of Appeal, applying English authority[85], cautioned that waiver of what is in Hong Kong a right guaranteed by the Constitution should not be inferred lightly. The court found that:

> what reasonably ought to have been understood...when the...documents were given to the SFC for inspection was that Citic was prepared to waive its privilege in those documents for the only purpose then known to Citic, namely, the SFC investigation, but would inevitably have adopted a very different approach in respect of the issue of privilege if faced with a criminal investigation.[86]

The Court of Appeal held that there had been a limited waiver of privilege for the purposes of the SFC's investigation only.

Where privilege is waived on a limited basis, there remains the risk that the subsequent use of privileged documents under the terms of a limited waiver may result in a general loss of confidentiality, and thus a general loss of privilege, if the documents come into the public

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[80] See Lord Millett in *B v Auckland District Law Societ*y [2003] UKPC 38, [2003] 2 AC 736 (New Zealand) [68].

[81] See, for example, *British Coal Corporation v Dennis Rye* [1988] 1 WLR 1113 (CA).

[82] See, for example, *Auckland* (n. 80).

[83] *Berezovsky v Hine and others* [2011] EWCA Civ 1089 (CA), per Lord Neuberger MR [29].

[84] [2012] HKCA 153 (*Citic*).

[85] *Berezovsky* (n. 83).

[86] Hon Hartmann JA in *Citic* (n. 84) [73].

domain. This was the case in *PCP Capital Partners LLP v Barclays Bank Plc*.[87] In *PCP*, Barclays provided the SFO with privileged documents under a limited waiver, the terms of which were as follows:

> You have agreed to accept these documents on the basis that they are being provided to the SFO for the sole purpose of your criminal investigation and pursuant to a limited waiver of privilege for this limited purpose. The SFO will of course be able to use the documents for the purpose of its investigation, prosecution and SFO related criminal proceedings and to disclose them to a third party in accordance with its statutory functions, including under the Criminal Justice Act 1987.[88]

Under the terms of the limited waiver, the SFO deployed some of the documents in open court at trial, privilege in these documents being lost when they were deployed.[89]

When a company is considering waiving privilege, the crucial issues are as follows. First, will waiver be general or limited? Secondly, if limited, for what purposes will privilege be waived (and do the limited waiver terms entitle the recipient of the documents to use them in ways that could result in a general waiver). The company should specify the terms in writing and obtain the agreement to those terms by the party to whom disclosure is being made.[90] It may be that, to comply with its statutory duties, a regulator will insist on terms including "carve outs" entitling it to use the documents disclosed in compliance with those duties, though the mere existence of a carve out will not prevent the party disclosing the documents from asserting privilege under the terms of the limited waiver unless the documents are actually deployed under the carve out.[91]

## III. DPAS IN THE UNITED STATES

DPAs have become a high visibility topic in the US because of the risk that a prosecutor's decision to charge or a regulator's decision to file a formal enforcement proceeding against a

[87] [2020] EWHC 1393 (Comm), [2020] Lloyd's Rep FC 460 (*PCP*).

[88] See Waksman J in *PCP* (n. 92), [10].

[89] *Ibid*., [11].

[90] See Passmore, *Privilege* (n. 45), 7-067 and 7-068.

[91] *Property Alliance Group Ltd v Royal Bank of Scotland plc* [2015] EWHC 1557 (Ch), [2016] 1 WLR 361.

corporation can impose a "death sentence" on the company. The horror story of the Arthur Anderson prosecution in the US is the often-cited example. The federal government filed obstruction of justice charges against the corporation, once one of the world's largest accounting firms, in relation to its work for Enron.[92] Arthur Anderson was convicted in 2002. The corporation's stock plummeted, and it essentially ceased to exist.[93] Even the Supreme Court's 2005 reversal of the conviction could not resurrect the firm.[94] And Arthur Anderson's fate is not an isolated incident; as a result of federal charges, companies such as Drexel Burnham Lambert and Daiwa Bank have either ceased to exist or ceased operating within the US.[95] The perception grew that the filing of charges against a company could amount to a "death sentence."[96] Even DOJ representatives acknowledged that the government's decisions

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[92] David Z Seide & Jonathan J Walsh, "A New SEC Manual: A Welcome Addition" Nat'l LJ, Mar 9 2009; SEC Issues Manual for Enforcement Division Barring Waiver Requests, Setting Probe Rules, 77 USLW (BNA) 2292 (Nov 18, 2008).

[93] Earl J Silbert and Demme Doufekias Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (2006) 43 *Am Crim L Rev* 1125, 1229.

[94] *Ibid*.

[95] See generally Edward J Imwinkelried, *The New Wigmore: Evidentiary Privileges* §6.12.5.b (3rd edn, Wolters Kluwer 2016) 1128; note, Andrew Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (2008) 35 *Fordham UrbLJ* 1075. More recently, the Justice Department filed criminal charges against Purdue Pharma related to its aggressive marketing of the addictive painkiller OxyContin. Jan Hoffman and Katie Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales," (NY Times, 21 October 2020) <https://www.nytimes.com/2020/10/21/health/purdue-opioids-criminal-charges.html> (visited 30 November 2020). The Department and Purdue have entered into an $8 billion settlement, the largest penalty ever levied against a pharmaceutical manufacturer in the United States. The charges and parallel civil suits have forced Purdue into bankruptcy.

[96] Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1090. See Hoffman and Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales" (n. 95).

whether to charge a corporation or grant the corporation cooperation credit "will sometimes make the difference between life and death for a corporation."[97]

### *A. The Role of the Court*

A major difference between English and US law in relation to DPAs is procedural in nature. In English law, Schedule 17 of the Crime and Courts Act 2013 sets out the two-step process for judicial approval of a DPA. The US approach is fundamentally different. At one time, the McNulty Memorandum imposed general procedural requirements for approval of waiver requests by Main Justice officials in Washington.[98] In the case of DPAs involving money laundering prosecutions, the current Manual for US attorneys still requires approval of proposed DPAs by Criminal Division (Money Laundering and Asset Recovery Section) (MLARS) in Main Justice[99], although the approval agencies are administrative rather than judicial. There is no formal judicial oversight of the approval of DPAs. Further, the US Manual provisions are not legally enforceable.[100] The Manual does not constitute a true administrative code.[101] Thus, even if a local prosecutor blatantly violates a Manual provision, the corporation cannot cite the violation as a basis for dismissing charges.

### *B. Cooperation – The Manual*

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[97] Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1228-29, quoting Christopher A Wray, Assistant Attorney General, DOJ Criminal Division.

[98] See generally, Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1094-95. Note, Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95). Main Justice is the Criminal Division of the US Justice Department headquarters in Washington DC.

[99] The Justice Manual (n. 30), 9-105.300.

[100] See generally, Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1099; Darryl K Brown, "Judicial Power to Regulate Plea Bargaining" (2016) 57 *Wm & Mary L Rev* 1225, 1260.

[101] *Ibid*.

The intersection between the assertion of privilege and corporate cooperation for DPA purposes has been significantly more contentious in the US, perhaps due to the evolution of DOJ practice over a longer period, reflected in a series of changes in the Manual for prosecutors.[102] The practices of administrative regulators have also evolved. At one time the Sentencing Commission adopted a guideline that a privilege waiver could establish a corporate defendant's "thorough" cooperation warranting leniency.[103] In addition, the Securities and Exchange Commission (SEC) took the position that in deciding whether to initiate an enforcement action against a corporation, its regulators should consider whether the corporation was willing to waive its privileges.[104] A widespread belief emerged that the best way to avoid the death sentence associated with proceedings being filed against a company was to waive the attorney-client privilege and the work product protection for the material reflecting the corporation's internal investigation into the suspected misconduct. In numerous surveys of in-house and outside corporate counsel, by wide margins the respondents indicated that by routinely requesting or demanding that the corporation surrender such material to obtain cooperation credit, government prosecutors and regulators had created a culture of waiver.[105] In the words of one commentator, this widespread belief created "near-hysteria" among many corporate executives and their counsel[106] and resulted in complaints that the widespread use of DPAs was creating a "culture of waiver" inconsistent with the law's strong commitment to the attorney-client privilege and the work product protection.

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[102] The original provisions were vague—perhaps intentionally so to give prosecutors the maximum flexibility and discretion. DOJ began clarifying the provisions only after it began receiving criticism.

[103] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1306

[104] Securities and Exchange Act of 1934 Release No. 44969 (Oct 23, 2001) (the so-called Seaboard Release).

[105] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1307-10, citing surveys conducted by the Association of Corporate Counsel, the National Association of Criminal Defense Lawyers, the Coalition to Preserve the Attorney-Client Privilege, and Corpedia Inc; Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1080.

[106] Michael L Siegel, "Corporate America Fights Back Over Waiver of Attorney-Client Privilege" (2008) 49 *BCLRev* 1, 52-54.

In response to this criticism, in a short period of time the DOJ released several memoranda providing federal prosecutors with varying guidance on the use of DPAs and the solicitation of waivers and also revised its guidelines.[107] Under the 2003 Thompson Memorandum, federal prosecutors could request waivers and consider a corporation's willingness to waive in deciding whether to defer prosecution.[108] In 2006, however, the McNulty Memorandum not only required prosecutors to establish a "legitimate" need for protected material but also sometimes required the local prosecutor to obtain approval from Main Justice before requesting the waiver.[109] These changes did not satisfy the government's critics. Many organizations of businesses and attorneys vehemently objected to the procedures outlined in the McNulty Memorandum and lobbied Congress in 2006-08 to prescribe restrictions on DPAs and waiver requests.[110] To prevent the enactment of such legislation[111] and perhaps also out of a growing realization that the explicit stress on waiver was making it more difficult to conduct internal corporate investigations that would be of use to the DOJ, in the 2008 Filip Memorandum[112] and the more recent 2015 Yates Memorandum[113], the DOJ changed the tone of its guidance to prosecutors.

The new guidance is set out in § 9-28.710 of the Manual. With two exceptions, the Manual now forbids prosecutors from demanding or even seeking privilege waivers. The two exceptions are situations in which the defendant raises an "advice of counsel" defense[114]and those in which the communications fall within the crime/fraud exception to the attorney-client

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[107] See generally Imwinkelried *The New Wigmore: Evidentiary Privileges* (n. 95), and Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95).

[108] Memorandum from Deputy Attorney General Larry D Thompson to United States Attorneys, Subject: Principles of Federal Prosecution of Business Organizations, §VI (Jan 20, 2003).

[109] DOJ Revises Thompson Memorandum to Limit Consideration of Privilege Waivers, 75 USLW (BNA) 2355 (Dec 19, 2006).

[110] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1099-1103

[111] N Richard Jamies, "The Filip Memo: DOJ's Latest Gambit" *Nat'l LJ*, Sept 29, 2008, 3.

[112] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1314.

[113] *Ibid*., § 6.12.5.b (2019 Cum Supp).

[114] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), § 6.12.4.b(2).

privilege.[115] In the former situation the prosecutor has a special need to review the allegedly privileged material. When the client pleads an "advice of counsel" defense, the client argues that he or she lacked mens rea because they innocently relied on the attorney's advice. If the client elects to use a privilege waiver as a sword, it would be unfair to permit the client to simultaneously assert the privilege as a shield to deny the prosecution access to the attorney's advice. In the latter situation the material is unprotected. The privilege does not attach because the client illegitimately sought the attorney's advice to help the client further a crime or fraud. In all other cases, prosecutors may accept voluntary waivers by corporate defendants, but they may neither insist on nor request them. Section 9-28.710 elaborates that in deciding whether to award cooperation credit, the prosecutor must inquire only whether the corporation has provided "the facts known to the corporation about the putative criminal misconduct under review." Section 9-28.720 states that "a corporation should receive the same [cooperation] credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in material that are so protected".

Of course, if the corporation provides the government with an employee witness statement reflecting an interview conducted by in-house or outside counsel, the corporation would implicitly waive any privilege covering the statement. However, § 9-28.720 plainly states that a corporation disclosing facts collected by counsel in an investigation covered by privilege receives exactly the same credit as a corporation disclosing facts that were not collected in a manner that would trigger the attorney-client privilege or the work product protection.[116] The government's evident hope was that this new guidance would simultaneously encourage corporations to provide relevant factual information while reducing

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[115] The Justice Manual (n. 30), § 9-28.720. The Manual cites cases such as *Pitt v District of Columbia*, 491 F3d 494 (DC Cir 2007) (District of Columbia CA) and *United States v Wenger*, 427 F3d 840 (10th Cir 2005) (US CA) as cases involving the advice of counsel defense. The Manual also references *United States v Zolin*, 491 US 554 (1989) (US SC), the leading Supreme Court precedent on the crime/fraud exception.

[116] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1098, 1123 (both corporations receive the identical "equal cooperation credit"; the author describes this result as "perverse" because the corporation surrendering privileged material has arguably surrendered more but receives no additional *quid pro quo*).

the emphasis on waiver that had been making corporate employees fearful of cooperating in internal investigations.

The government not only made changes in the Manual provisions regarding waiver for prosecutors. For its part, the Sentencing Commission voted in 2006 to delete the prior language referring to privilege waiver.[117] In 2008 the SEC revised its enforcement manual and directed its staff not to seek privilege waivers.[118] Despite these changes, Hengemuhle argues that the language in the Yates Memorandum linking cooperation credit with the requirement to "disclose all facts related to the individuals responsible or involved in the corporate misconduct" in effect forces companies to waive attorney-client privilege. [119]

The DOJ has countered with data indicating that the concern is overblown. Although the McNulty Memorandum was not as restrictive as the Filip Memorandum, the McNulty Memorandum appeared to make federal prosecutors less eager to seek DPAs and waivers.[120] For example, in 2007 the DOJ reported only 29 DPAs; and of those 29, only three contained waiver provisions.[121] One 2007 article reported that "since the so-called McNulty memo went into effect in December 2006, DOJ has not approved any requests by prosecutors to ask companies for privileged attorney-client communications and has approved only four requests for privileged documents."[122] According to the Gibson Dunn survey cited earlier[123], in 2016

[117] Vote by US Sentencing Commission Said to Stem Erosion of Attorney-Client Privilege, 74 USLW (BNA) 2598 (Apr 11, 2006).

[118] Seide & Walsh, "A New SEC Manual: A Welcome Addition" (n. 92); SEC Issues Manual for Enforcement Division Barring Waiver Requests, Setting Probe Rules, (n. 92).

[119] Hengemuhle, "Mea Culpa: Why Corporate Waivers of Attorney-Client Privilege Have Not Increased the Prosecution of Corporate Executives" (n. 76).

[120] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), 1313.

[121] *Ibid*.

[122] Justice Department Tells Judiciary Panel No Need to Overturn Corporate Waiver Policy, 76 USLW (BNA) 2164 (Sept 25, 2007).

[123] Gibson Dunn survey (n. 9).

the DOJ entered into 40 DPAs, 17 in 2017, 24 in 2018, and 31 in 2019[124]--compared to 170,487 federal prosecutions in 2019.[125]

In this light, it is untenable to claim that federal prosecutors "routinely" request privilege waivers or seek DPAs with corporate defendants. Yet, the experience with Arthur Anderson, Drexel Burnham Lambert, and Daiwa Bank is cautionary. In a rare case, the allegations of corporate misconduct can be so significant that a corporation resisting the government's overtures for cooperation runs a grave risk that its reputation will be destroyed, its stock value will drop, it will be debarred from certain types of business, it will incur massive legal expenses, and it will lose its most valued employees.[126] In such cases, the corporation must engage in a careful cost/benefit analysis: Does the potential short-term benefit of receiving cooperation credit (e.g., perhaps avoiding prosecution) outweigh the potential long-term costs, including the incurral of legal expenses and the subsequent use of the privileged information by private third parties filing civil lawsuits against the corporation? Despite the possible costs, if in an extreme case the corporation concludes that the consequence of non-cooperation might well be suffering "the death sentence," the corporation may feel compelled to waive.[127]

### *C. Waiver of Privilege – The Implications for Employees of the Company*

Like the corporate employer and employee, the government must conduct a cost/benefit analysis. In the best of all possible worlds, if under the governing law both the corporation and the natural person employees have committed crimes, the government would obtain

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[124] Gibson Dunn survey (n. 9). Note, Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), at 1112 ("the low number").

[125] Stephen Gandel, "White-collar crime prosecutions hit lowest level in 33 years" (CBS News, 26 September 2019) <https://www.cbsnews.com/news/white-collar-crime-prosecutions-have-hit-lowest-level-in-33-years/?intcid=CNM-00-10abd1h> (visited 20 November 2020).

[126] Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1229. See also Hoffman and Benner, "Purdue Pharma Pleads Guilty to Criminal Charges for Opioid Sales," (n. 95).

[127] Despite the current Manual provisions, the pressure exists so long as the key evidence of essential "facts" takes the form of privileged material.

convictions of all offenders. But in the real world, the government has limited funding for investigations; and its prosecutors can often save considerable expense by "piggy backing" onto the corporate's internal investigation.[128] Moreover, as § 9.28.210 of the Manual explains, the government's priority is conviction and deterrence of the natural person offenders.

In many respects it is a useful legal fiction to treat the entity as a person; but any realistic prosecutor realizes that the entity acts only through human beings. In the words of the Manual, "imposition of individual criminal liability may provide the strongest deterrent against future corporate wrongdoing."[129] Given that priority, it makes sense for the government to trade concessions to the entity for an increased ability to identify and prosecute the natural person criminals. A sophisticated prosecutor ought to appreciate the point that if it becomes a popular belief among corporate employees that their employer will almost automatically transfer the results of any internal investigation to government investigators, the quality and thoroughness of such investigations will decline; and, in turn, even if a waiver permits the government to "piggy back," the internal investigation will be of less value to the government. In short, the government faces the challenging task of obtaining corporate cooperation without causing the typical corporate employee to assume that the corporate counsel questioning him or her is in reality a deputized government investigator.[130] The natural person employees of corporations under investigation find themselves in a similar situation in England and the US.

As in England, in the US the privilege belongs to the corporation. More specifically, there is general consensus on the propositions that: corporate counsel represent the entity rather than its employees; in certain circumstances both the attorney-client privilege and the work product protection can apply to the corporation's internal investigations into alleged misconduct; and the holder of both the privilege and the protection is the corporation itself, not its employees. All those propositions follow as logical consequences of the Supreme Court's 1981 decision in *Upjohn Co v United States.*[131] *Upjohn* can place corporate employees in a difficult position. If they divulge misconduct during an internal investigation conducted by corporate counsel, the privilege and protection may attach to those revelations; but they do not

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[128] Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1228.

[129] The Justice Manual (n. 30), § 9.28.210.

[130] Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1240

[131] 449 US 383 (1981) (*Upjohn*).

hold the privilege or protection. Consequently, after conducting its own cost-benefit analysis, to avoid prosecution, the corporation can decide to waive its privilege and protection by providing the government with its internal investigation, including the written memorials of the employees' statements. An employee who does not understand that risk is at special peril; he or she may reveal misconduct during the internal investigation on the mistaken assumption that like his or her employer, the corporate employee can invoke the privilege or protection. That element of unfairness explains why many US jurisdictions now require corporate investigators to administer an "*Upjohn* warning" to the employees being questioned.[132] The warning informs the employee that the employer holds any privilege applicable to the interview and that over the employee's objection, the employer may later decide to reveal the divulged information to third parties such as government prosecutors and regulators.

Although the administration of such warnings reduces the risk of unfairness to the employee, such warnings simultaneously threaten the internal investigation. Knowing the risk of a subsequent waiver by his or her corporate employer, the employee may be tempted to be less cooperative during the investigation. The employee may either lie during the interview or be less candid and withhold relevant information.[133] Like the Government and the corporate employer, the employee must engage in a cost/benefit analysis before deciding whether to cooperate in the internal investigation. The employee must balance the benefits of cooperation (perhaps avoiding termination by the employer)[134] against the potential costs, including their subsequent prosecution by the government or civil liability to third parties injured by the corporate conduct. If the employee realizes that he or she has personally engaged in serious misconduct, the employee may well strike the balance in favour of refusing to cooperate in the

[132] Note Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1086; Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1231.

[133] Silbert and Jannou, "Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System" (n. 93), 1231.

[134] *Ibid*.

investigation and invoke the privilege against self-incrimination during any government interrogation.[135]

### *D. Waiver of Privilege in a DPA – The Consequences for the Company*

In theory an American corporation's decision-making about the advisability of entry into a DPA can be a much more complicated calculus than that facing an English company. The DPA rules must be considered in the context of other relevant American privilege doctrines. As noted earlier, when a corporation contemplating a DPA engages in its cost/benefit analysis, it must weigh the short-term benefits against the long-term potential costs, including the risk that private third parties will later use the disclosed material in litigation against the corporation. In England, if the corporation enters into a sufficiently explicit DPA, the corporation can be protected against the risk because a long line of English precedents recognizes the concept of limited/selective waiver. The terms of the limited waiver can effectively provide that the corporation waives its privilege only for a specific purpose. After entering into such an agreement with English prosecutors, the corporation could be relatively confident that it may still assert the privilege against private third parties suing the corporation, though as was seen above this is subject to the possibility that subsequent deployment of privileged materials in the course of legal proceedings could result in loss of privilege. Thus, the distinction between the position in the two jurisdictions may be less significant than would appear to be the case at face value. In England, much will depend on the terms of the limited waiver.

In most US jurisdictions, no matter how explicit the terms of the DPA, the corporation cannot have the same assurance as a limited, selective, waiver might, at least in theory, provide

[135] In English law, the privilege against self-incrimination is subject to a variety of statutory exceptions. In various contexts, statute has abrogated the privilege both expressly and by necessary implication. Some statutory provisions that abrogate the privilege against self-incrimination in the context of civil proceedings expressly give the person who is obliged to answer the incriminating question an alternative statutory protection, preventing his answers from being used against him in subsequent criminal proceedings. Examples are provided by s 31(1) of the Theft Act 1968 and s 13 of the Fraud Act 2006.

in England. In the US, only a distinct minority of jurisdictions endorse the concept of selective waiver. In federal court, only the Court of Appeals for the Eighth Circuit and a few district courts in other circuits recognize the concept.[136] An early version of Federal Rule of Evidence 502 included a provision authorizing selective waiver, but that authorization was deleted before Congress enacted the rule.[137] In the United States, the prevailing view is that the privilege

[136] Note Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1088. *Diversified Industries, Inc v Meredith,* 572 F3d 596 (8th Cir 1977) is the leading precedent recognizing selective waiver, but it is a distinct minority view. Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), § 6.12.4.a(2).

[137] Note Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1089; Adv Comm Note, Fed R Evid. 502(d) ("this subdivision does not provide a basis for a court to enable parties to agree to a selective waiver of the privilege, such as to a federal agency conducting an investigation, while preserving the privilege as against other parties seeking the information"). Despite this note, some have argued that in limited circumstances, there can be a valid selective waiver order under Rule 502(D). Edward J Imwinkelried, "The Debate Over The Permissibility of Selective Waiver Orders Under Federal Rule of Evidence 502(D): The Crucial Scope Issues" *SMU LREV* (Forthcoming 2021). The key is understanding that Rule 502 protects against only waivers effected by disclosure; the rule does not extend to other acts that can result in waiver such as advancing an "advice of counsel" defense: – assume that the court approves of a DPA agreement with a narrow scope providing only that disclosure to the government will not effect a waiver. Here the scope of the agreement and order coincide with the scope of Rule 502. Assume further that after the disclosure, the parties settle and that the holder performs no other acts that would otherwise effect a waiver. In that situation, under the terms of 502(d) the holder can certainly argue that it can still assert the privilege in subsequent litigation against third parties—in effect a valid selective waiver. – Alternatively, assume that the court approves a DPA agreement with a broader scope, in which the holder agrees not only to disclosure but also that the other party may use the disclosed material as evidence in the pending proceeding. Here the scope of the order and agreement exceed the scope of Rule 502. The holder's failure to object to the use of the material as evidence would

holder may not "pick and choose"; once the holder has disclosed to any third party outside the original circle of confidence, the privilege terminates as against all third parties. When faced with the decision whether to cooperate and waive, an American corporation must weigh the possible civil liability exposure in later actions filed against the corporation. Unless the fact situation is a rare case in which the corporation is facing "the death penalty," the civil exposure (caused by the lack of selective waiver) could easily prompt the corporation to decide against entry into a DPA.

## IV. EVIDENTIAL AND PROCEDURAL ISSUES: THE POSITION IN ENGLAND AND THE UNITED STATES CONTRASTED

### *A. Limited Waiver and Cooperation*

At first blush, the US approach appears more protective of the corporation's interests in relation to privilege than English law. In England, based on public statements by several of its officers, the SFO clearly equates waiver of privilege with cooperation. Moreover, the Code cites as an example of cooperation the disclosure of witness accounts. Such accounts can clearly be covered by a legitimate claim to litigation privilege. In addition, the trend in recent English cases indicates that limited waiver is becoming the norm. The reality seems to be that without careful thought, the terms of a limited waiver may not always prevent the deployment of material in legal proceedings and the subsequent loss of privilege. If a corporation feels pressured to make a limited waiver, deployment in ensuing criminal litigation in line with the terms of the limited waiver may have the practical consequence that privilege will be lost.

In contrast, in most instances the DOJ Manual now forbids federal prosecutors from demanding or requesting a waiver. The Manual also announces that a prosecutor must award the same cooperation credit to a company providing factual material unprotected by any privilege as he or she would accord a corporation furnishing material covered by the attorney-client privilege or work product protection. Thus, the Manual purports to announce clear

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effect a waiver. Since Rule 502 applies only to waivers resulting from disclosure, the order's provision purporting to prevent that failure from effecting a waiver is nugatory.

guidance that can make it a straightforward matter for a corporation to conduct its cost/benefit analysis.

Appearances can be deceiving, however. Again, the provisions of the Manual are not legally enforceable.[138] They are in the nature of internal "housekeeping" guidance[139] enforced at the discretion of the Attorney General.[140] In addition, to qualify for any cooperation credit the corporation must provide the DOJ with "all relevant facts relating to the individuals responsible for the misconduct"[141]. Although the Manual stresses that eligibility for cooperation credit does not require waiver of attorney-client privilege, a company that "does not disclose such facts…will not be entitled to receive any credit for cooperation"[142]. These Manual provisions may result in a company disclosing materials that could be protected by attorney-client privilege or conducting its internal investigation in such a way that privilege does not arise – a pressure that has been decried as "improper" in England. Moreover, even if the provisions were enforceable, while English courts uphold limited waivers, most US courts reject selective waiver.

The controversy over DPAs gives US courts an opportunity to take a new look at the issue.[143] There is nothing inherent in the logic of waiver that precludes recognizing the concept of selective waiver, a waiver effective against one party but not effective as against third parties. In some respects, US courts already recognize several species of "selective" waiver. Suppose, for example, that a patient is involved in personal injury litigation. The patient has separately consulted multiple medical professionals; the professionals do not jointly consult on the patient's condition. There is substantial authority that even if the patient discloses his or her communications with one professional, the patient retains the medical privilege protecting

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[138] Note, Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1099; Brown, "Judicial Power to Regulate Plea Bargaining" (n. 100).

[139] Brown, "Judicial Power to Regulate Plea Bargaining" (n. 100), 1260.

[140] *Ibid*.

[141] US Department of Justice, Office of the Deputy Attorney General, Individual Accountability for Corporate Wrongdoing, 9.9.2015 and The Justice Manual (n. 30) 9-28.700.

[142] The Justice Manual (n. 30) 9-28.720.

[143] Note, Gilman, "The Attorney-Client Privilege Protection Act: The Prospect of Congressional Intervention into the Department of Justice's Corporate Charging Policy" (n. 95), 1131.

their communications with the other professional.[144] The courts have extended this reasoning to the attorney-client privilege.[145] Likewise, there is precedent that a holder may waive a privilege in one proceeding but assert the privilege in a later, separate proceeding.[146] There is no insuperable logical barrier to recognizing selective waiver. The notion of a selective waiver is not self-contradictory. Moreover, while only a minority of federal courts have approved of the concept, it enjoys respectable support. For instance, in 2006 Congress amended the Federal Deposit Insurance and Federal Credit Union Act to permit selective waiver under specified circumstances.[147] In 2012 the Consumer Financial Protection Bureau finalized a rule that purported to allow selective waiver with respect to documents submitted to the CFPB.[148] Some states such as Oklahoma have enacted legislation codifying a general selective waiver principle.[149] In all these settings, the principle has proved to be workable.

Most importantly, there is a strong policy argument for recognizing the principle in the DPA setting. In this setting, selective waiver can be "a valuable palliative."[150] In the words of one commentator, without the benefit of a selective waiver doctrine

> "corporate counsel [confront] the [harsh] choice of refusing to cooperate [with the government] and thereby involve the corporate client in a formal investigative or enforcement action—or cooperating and risking the loss of the privilege. Agency budgets are limited, so cooperative regulation through corporate self-policing

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[144] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), § 6.12.7.b.

[145] *United States v Gasparik*, 141 FSupp2d 361, 371 (SDNY 2001).

[146] Imwinkelried, *The New Wigmore: Evidentiary Privileges* (n. 95), § 6.12.7.c.

[147] 12 USC §§ 1785(j) and 1828(x)(1); Audrey Strauss, "White Collar Crime" NYLJ, Mar 1, 2007.

[148] Note, Jacob M Gerber, "Silence Isn't Golden: The CFPB's Privilege Rule and the Risk of Failure under *Chevron* Step One" (2013) 17 *NC Banking Inst* 275, 276; Confidential Treatment of Privileged Information, 77 Fed Reg 39,617 (July 5, 2012).

[149] Robert A Brown, "The Amended Attorney-Client Privilege in Oklahoma: A Misstep in the Right Direction" (2011) 63 *OklaL Rev* 279, 301.

[150] Liesa Richter, "Corporation Salvation or Damnation? Proposed New Federal Legislation on Selective Waiver" (2007) 76 Fordham LRev 129 .

> should be encouraged in the interest of economy and efficiency. The strict waiver cases discourage this corporate policing activity . . .”[151]

Unless the fact situation is the rare case in which the corporation faces “the death penalty,” the lack of a selective waiver doctrine may induce the corporation to refuse to cooperate with the government investigators. Especially if the maximum fine authorized by the relevant penal statute is modest, the fine may be dwarfed by the corporation’s potential exposure in a subsequent civil suit filed by private third parties. In many cases the lack of a selective waiver doctrine can pose a serious obstacle to the successful implementation of the DPA program. The controversy over selective waiver both precedes the current debate over DPAs and transcends the DPA context, but the DPA debate may bring that controversy to a head in the US.

### *B. Judicial Oversight*

Another aspect of English practice from which the US system could learn is that of judicial oversight. While English law interposes the courts to review the propriety of DPAs, in the US the only oversight is internal administration by the DOJ; and even the purported administrative constraints are not enforceable in court.

Like the controversy over selective waiver in the DPA setting, the controversy over judicial oversight of DPAs is a microcosm of a larger dispute. The “Take Care Clause” of the United States Constitution assigns the executive the duty to “take Care that the Laws be faithfully executed.”[152] That clause has led some federal courts to sweepingly declare that decisions as to charges and pleas are the “special province of the Executive branch,”[153] including the DOJ. The Supreme Court has asserted that the national Constitution gives “the Executive Branch . . . exclusive authority and absolute discretion to decide whether to prosecute

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[151] John W Gergacz, *The Attorney-Corporate Client Privilege* 5-48 (2d ed, Garland Law Pub 1990).

[152] US Constit, Art II, § 3.

[153] *Greenlaw v United States*, 554 US 237, 246 (2008) (SC).

a case."[154] Those decisions have been described as "quintessentially executive" in nature.[155] On that assumption, it would arguably be inappropriate—perhaps even unconstitutional—to permit courts to second guess DOJ decisions as to DPAs.

On closer examination, that language is hyperbolic. There is no constitutional or practical impediment to permitting judicial oversight of DPAs in the US. In fact, there are solid policy reasons for allowing such oversight. There is no constitutional barrier. Federal Rule of Criminal Procedure 11 gives the courts extensive authority over plea bargains. Rule 11(a)(1) requires the court's consent to the entry of a nolo contendere plea, 11(a)(2) similarly requires the court's consent to a conditional plea preserving the defendant's right to appeal a reserved issue, and 11(c) allows the courts to review plea agreements between the prosecution and the defendant. Rule 11(a)(2) grants the courts absolute discretion to decide whether to approve a conditional plea,[156] under 11(a)(1) the court has broad discretion over nolo pleas,[157] and the court similarly enjoys a measure of discretion in deciding whether to approve a plea agreement negotiated between the parties.[158] Although this discretion constrains prosecutors' authority, the courts have uniformly concluded that Rule 11 does not violate separation of powers.[159] For its part, Rule 48 is a break from the traditional common-law rule that a prosecutor has sole discretion whether to enter a *nolle prosequi.*[160] Rule 48 provides that the

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[154] *Ibid*. See also *People v Alaybue,* 51 CalApp5th 207, 264 CalRptr 3d 876, 887 (2020) (California CA).

[155] *Morrison v Olson*, 487 US 654, 706 (1988) (US SC) (Scalia J, dissenting). See also *In re Wild*, 955 F3d 1196, 1216 (11th Cir 2020) (US CA) ("the Executive branch has exclusive authority and absolute discretion to decide whether to prosecute a case." *United States v Nixon*, 418 US 683, 693… (1974) (US SC) (citing Confiscation Cases, 74 US (7 Wall) 454… (1869)"); Brown, "Judicial Power to Regulate Plea Bargaining" (n. 119), 1273 ("unregulated prosecutorial discretion").

[156] *United States v Davis,* 900 F2d 1524 (10th Cir) (for any reason or no reason), *cert denied,* 498 US 856 (1990) (US CA).

[157] *United States v Dorman,* 496 F2d 438 (4th Cir), *cert denied,* 419 US 945 (1974); *United States v Soltow,* 444 F2d 59 (10th Cir 1971) (US CA) (sole discretion).

[158] *United States v Pimentel,* 932 F2d 1029 (2d Cir 1991) (US CA); *United States v Adams,* 634 F2d 830 (5th Cir 1981) (US CA).

[159] *United States v Kuchinski,* 469 F3d 853 (9th Cir 2006) (US CA).

[160] Adv Comm Note, Fed R Crim P 48.

government may dismiss a charge only "with leave of court." On the one hand, the cases recognize that the prosecutor has a more complete command of the facts and is usually in a superior position to decide whether dismissal serves the interests of justice.[161] The courts have, however, construed Rule 48 as forbidding the judge from merely rubber stamping the prosecutor's assessment of the public interest.[162] Like Rule 11, Rule 48 limits the authority of prosecutors in the executive branch; and like Rule 11, Rule 48 has withstood a constitutional, separation of powers challenge.[163] Subject to Congressional veto, the Supreme Court proposes amendments to the Federal Rules of Criminal Procedure pursuant to statutory authority, namely, the Rules Enabling Act;[164] and Congress has authority to authorize the courts to oversee the charging and plea practices of prosecutors in the Executive branch.[165]

Just as constitutional considerations do not preclude assigning courts a role overseeing DPAs, practical workload considerations would not foreclose doing so. In the outlier year of 2015, federal prosecutors entered into 102 DPAs with corporations.[166] But in the typical year there are only a few tens of such agreements—for instance, 17 in 2017, 24 in 2018, and 31 in 2019.[167] In 2019, nationwide the federal courts handled over 170,000 prosecutions.[168] Giving the courts oversight over DPAs would hardly overburden them.

Nor is it plausible to contend that the courts are incompetent to make the sorts of judgments entailed in oversight role. In the past, it has sometimes been generalized that courts are "ill suited" to make decisions relating to charging and plea practices.[169] But the experience

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[161] *United States v Salinas,* 693 F2d 348 (5th Cir 1982) (US CA); *United States v Cowan,* 524 F2d 504 (5th Cir 1975), *cert denied,* 425 US 971 (1976) (US CA).

[162] *United States v Ammidown,* 497 F2d 615 (DC Cir 1973) (US CA); *United States v N V Nederlandsche Combinatiae Voor Chemische Industrie,* 428 FSupp 114 (SDNY), *reconsid Denied,* 75 FRD 473 (SDNY 1977); *United States v Bettinger Corp,* 54 FRD 40 (D Mass 1971).

[163] *United States v Cowan* (n. 161).

[164] 28 USC § 723.

[165] Brown, "Judicial Power to Regulate Plea Bargaining" (n. 100) 1254, 1264-66.

[166] Gibson Dunn survey (n. 9).

[167] *Ibid*.

[168] Gandel, "White-collar crime prosecutions hit lowest level in 33 years" (n. 125) (170,487 prosecutions).

[169] Brown, "Judicial Power to Regulate Plea Bargaining" (n. 100), 1236, quoting a passage from *Wayte v United States*, 470 US 598, 607 (1985) (US SC).

under Rules 11 and 48 is to the contrary. Under those rules, the courts have grappled with such questions as the relative culpability of potential defendants,[170] the difficulty of gathering evidence without a potential defendant's cooperation,[171] the extent to which a natural person employee has deceived the corporate employer,[172] the effectiveness of a punishment in providing sufficient deterrence,[173] and whether in the long term a dismissal exposed a defendant to a substantial risk of unfair harassment.[174] This case law demonstrates that the courts are capable of making the sorts of evaluative decisions needed to oversee DPAs.

Finally and perhaps most importantly, especially at this juncture in American legal history, there is a strong policy argument that assigning the courts an oversight role will decrease the danger that political considerations will influence prosecutors' decisions with respect to DPAs.

As previously stated, Criminal Procedure Rule 48(a) requires the "leave of court" for a prosecutor to dismiss charges. The original 1944 Advisory Committee Note to Rule 48 cites *United States v Wood*[175] as an example of the evils that the imposition of the leave requirement was intended to eliminate. In that case, the defendant, a federal tax collector in Montana, was charged with embezzling federal funds. Wood was well connected politically; his grandfather had been Missoula's first major and a judge, and his father was a close friend of the governor and had served as the state's assistant attorney general.[176] The federal prosecutor's stated reason for dismissal was that the defendant "is of a prominent . . . family, . . . young, [and] . . .

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[170] *United States v Brighton Bldg & Maintenance Co,* 431 F Supp 1118 (ND Ill 1977).

[171] *United States v BP Products,* 610 F Supp 2d 655 (SD Tex 2009).

[172] *United States v Florida West Int'l Airways, Inc,* 282 FRD 695 (SD Fla 2012).

[173] *United States v Viren,* 828 F3d 535 (7th Cir 2016), cert denied, 137 S Ct 702, 196 L Ed 2d 576 (2017) (US CA); *United States v Bean,* 564 F2d 700 (5th Cir. 1977 (US CA)); *United States v Munroe,* 493 F Supp 134 (ED Tenn 1980).

[174] *Salinas* (n. 161); *United States v Cox,* 311 F2d 417 (8th Cir), *cert denied*, 373 US 913 (1963) (US CA) ; *United States v Rossoff,* 806 F Supp 200 (CD Ill 1992); *United States v Fields,* 475 F Supp 903 (DDC 1979); *N V Nederlandsche Combinatie Voor Chemische Industrie* (n. 162).

[175] Adv Comm Note, Fed R Crim P 48, citing *United States v Woody,* 2 F2d 262 (D.Mont. 1924).

[176] Thomas Ward Frampton, "Why Do Rules 48(a) Dismissals Require 'Leave of Court'" (2020) 73 *Stan L Rev Online* 2, 11.

studying law in a California university."[177] The district court judge protested that the government's "reasons . . . savour altogether too much of some variety of prestige and influence (family, friends, or money) that too often enables their possessors to violate the laws with impunity; whereas persons lacking them must suffer all penalties."[178] Yet, the judge felt compelled to follow the common-law rule that the prosecutor "has absolute discretion over criminal prosecutions and can dismiss or refuse to prosecute, any of them at his discretion . . ." On the record the judge stated that the dismissal was "abhorrent to justice," but the judge thought that he had no choice but to grant the prosecutor's dismissal motion "albeit reluctantly."[179]

It would be naïve to think that giving courts an oversight role in the DPA process will completely eliminate any possibility of political influence compromising legitimate law enforcement interests. Creating an oversight system would reduce that risk. While judges in many states are elected, federal judges are appointed. Moreover, unless in an exceptional case the hearing was closed to the public, an oversight hearing would be a more public forum than a DOJ decision whether to enter into a DPA with a corporate defendant. In the US DPA cases do not involve run-of-the-mill prosecutions; rather, they tend to involve high-visibility allegations of major misconduct by large corporations—situations in which the monetary and reputation stakes could tempt the defendants to seek political favours. Just as *Wood* made the case for requiring "leave of court" for government dismissals under Criminal Rule 48(a), the recent allegations by both sides of political influence in cases such as the prosecution of Michael Flynn, President Trump's former National Security Advisor, [180] cut in favour of judicial oversight in DPA cases.

## V. CONCLUSION

[177] *Ibid*.

[178] *Woody* (n. 175), 262.

[179] *Ibid*., 263.

[180] Critics claimed that the prosecution of Flynn for making false statements to the FBI about relations between the Trump administration and the Russian government was politically inspired. Byron Tau, Government Misconduct Asserted In Flynn Case, Wall St J, June 11, 2020, A3.

Based on the analysis we have undertaken concerning the intersection of legal professional privilege and DPAs in England and the US, it is clear that the approaches in each jurisdiction have advantages and disadvantages. In the US, the DOJ's approach to cooperation and waiver is preferable to that of England. The US experience illustrates a troublesome journey, ending with the more satisfactory solution of the current Manual. This journey could be truncated in England through a judicial approach to waiver aligned to the actual requirements of the Code. In England, the availability of limited waiver and judicial oversight are positive aspects of DPAs from which the US system could benefit.

### *A. Substantive Aspects*

In both jurisdictions there is or has been either an expectation or a perception that waiver of privilege is required in order to gain credit for cooperating in the context of a DPA. In England, the SFO clearly regards limited waiver over first witness accounts as very important and therefore interprets the Code accordingly. As illustrated, the provisions of the Code are opaque, giving the SFO latitude in its interpretation of waiver and cooperation. In addition, judicial oversight of DPAs, where the courts include and comment on waiver when listing examples of cooperation, has been unhelpful. Whatever the SFO's interpretation of the Code, the Code itself does not explicitly require waiver of privilege. Furthermore, the Code is clear that it does not and cannot change the law on privilege. It is therefore arguable that when considering cooperation for the purposes of approving a DPA, the court should not take waiver into account at all – it should be irrelevant, since a company is undeniably entitled to assert privilege where the facts support a privilege claim. This does not mean that it will always be possible to cooperate in the absence of waiver—but the key should be whether a corporation has cooperated by revealing enough relevant factual information to the SFO, not whether in the course of this process there has or has not been a waiver of privilege.

In the US, the Manual is much closer to this sensible position; the Manual both negatively prohibits prosecutors from demanding or seeking privilege waivers and affirmatively focuses on the corporation's revelation of the pertinent facts. The combination of the lack of enforceability of the Manual provisions, the backdrop of past DOJ practice, and the lack of judicial oversight continues to perpetuate, in some quarters, the popular perception that waiver is required in the US. The bottom line is that the Manual makes it clear that cooperation neither equates with nor always requires a privilege waiver to qualify for cooperation credit. There will often be a variety of ways to establish facts other than by the

disclosure of privileged material. If the corporation can meet the government's need for reliable evidence of the relevant facts in other ways, there should not be an invariable requirement for privilege waiver. At times, a corporation may find it necessary to waive privilege to make an adequate disclosure of relevant factual information. However, it exceeds the government's legitimate needs and can chill employees' cooperation in useful internal investigations to announce that corporations must always waive privilege to be deemed cooperative. A corporation may feel that a privilege waiver is an easy way of demonstrating cooperation; but neither the corporation nor its employees should be told that waiver is a sine qua non for cooperation.

Where the corporation needs to disclose privileged information to satisfy the Government's factual needs or the corporation simply deems waiver a convenient way for the corporate to obtain cooperation credit, the scope of the waiver can be restricted in a manner that protects the company's legitimate interests. In the US, the majority view rejecting limited/selective waiver puts a company in potential jeopardy where possible third-party civil suits are concerned. Unless the case is a rare one in which the corporation faces a realistic prospect of suffering "the death penalty," the lack of a selective waiver option in most US jurisdictions could prompt a corporation to reject a prosecutor's overture for a DPA and refuse to cooperate with the prosecutor. The notion of limited waiver seems especially apt for the DPA setting, since the interests of federal law enforcement authorities are readily distinguishable from those of private parties interested in filing civil lawsuits against the corporation. Adopting selective waiver at least in this limited context would allow the courts to accumulate additional experience with such waivers and put them in a better position to decide the larger question whether they should extend the selective waiver practice to other settings. Even if the US courts change their stance on selective waivers, as seen in the English context, in any DPA agreement a corporation must take care to explicitly limit the scope of the limited waiver.

### *B. Procedural Aspects*

Whilst this is not current practice in the US, neither constitutional nor practical caseload considerations preclude assigning federal courts a meaningful role in overseeing the formation and administration of DPAs. Past experience establishes that the courts are fully competent to make the sort of judgments entailed in such oversight, and the institution of judicial oversight would reduce the troubling spectre of political influence in charging and disposition practices

that can lead to entrenched perceptions regarding waiving privilege. There is, however, a risk that the requirement for judicial oversight could become a mere rubber-stamping exercise. For example, to date in England the courts have approved the terms of DPAs even where serious criminal conduct has occurred. The treatment by the English courts of limited waiver as a cogent example of cooperation gives rise to the danger that even where very serious criminal conduct has occurred, a court might treat the mere fact that privilege has been waived as a major factor warranting judicial approval of a DPA. The better approach is to have judicial oversight of the terms of the DPA but with the nuanced understanding that waiver of privilege does not equate to the cooperation necessary for a DPA and, standing alone, waiver is insufficient to justify approval of a DPA.

### *C. Best Practice*

The ongoing controversy over DPAs in the US has renewed interest in two longstanding issues in American evidence and procedural law. Those issues are selective waiver and judicial oversight. On both fronts the US should seriously consider moving in the direction of English practice. Doing so could improve the administration of DPAs in the US and would give US legislatures and courts additional experience to evaluate the broader issues of the wisdom of limited waiver and more extensive judicial involvement in criminal justice administration. Decades ago one of the pioneers of American administrative law, the late Professor Kenneth Culp Davis, argued that American prosecutors and police wielded excessive discretion in the justice system.[181] In advancing his argument, Professor Davis appealed to the experience of other nations' legal systems that have structured meaningful constraints to control that discretion. In contrast, on another front England ought to consider moving in the direction of American practice. The DOJ'S approach to factual disclosure and waiver is to be admired and achieves a more appropriate balance between the fundamental rights of the company and the needs of prosecutors than is achieved in England. Whether the assessment of the level of cooperation is made by a prosecuting authority or a court, in the assessment the question of waiver of privilege should be entirely disaggregated from the issue of the requisite level of cooperation. The dispositive question should be whether the information provided by the

[181] Brown, "Judicial Power to Regulate Plea Bargaining" (n. 100), 1255; citing Kenneth Culp Davis, "Discretionary Justice: A Preliminary Inquiry" 188, 207-08 (1969).

corporation satisfies the Government's factual needs, not whether the corporation has made a waiver.

Unlike the position in England, the DOJ Manual makes explicit that eligibility for cooperation credit does not require waiver of attorney-client privilege. In addition, the Manual forbids prosecutors from demanding or seeking privilege waivers whereas the SFO does not regard itself as so constrained. The DOJ clearly—and quite correctly--believes that it can often get the information it needs without requiring the disclosure of privileged communications. Of course, It is an entirely distinct issue whether the corporate's assertion of privilege is valid or "dubious". It is thus defensible for the Manual to allow prosecutors to seek information that was either unprivileged to begin with by virtue of the crime/fraud exception or is now unprivileged because of the corporation's assertion of an "advice of counsel" defense.

De-coupling waiver and cooperation (which the current version of the Manual seems to achieve in the US) is in the interests of employees. If employees in both jurisdictions no longer feared that their statements to corporate counsel would always come into the possession of prosecutors investigating corporate misconduct, their statements would tend to be more truthful. That would improve the veracity and utility of any internal investigation conducted by the company. In the final analysis, the privilege will still belong to the company. But if appropriate *Upjohn* warnings are given to employees interviewed as part of an internal investigation and the employees come to realize that waiver is not an invariable requirement in the DPA process, employees will feel more comfortable participating in any internal investigation. The end result would be internal investigation reports that are more useful both to the corporation and, if subsequently disclosed, to Government investigators.

A comparative law analysis of the DPA regimes in the two systems is revealing. In some respects, the US system has developed superior substantive standards for approving DPAs. In contrast, the procedural approach to DPAs in England of judicial oversight and selective waiver seems preferable.