PROTECTING DEFENSE EVIDENCE FROM PROSECUTORIAL DISCOVERY

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I. INTRODUCTION

In *Jencks v. United States*,[1] the Supreme Court ruled that a federal criminal defendant has a constitutional right to discovery of prior statements of a government witness if those statements are related to the testimony of the witness at trial. The Court based its ruling on the crucial importance of such statements to the defendant's ability to impeach witnesses effectively on cross-examination and to prepare his defense adequately.[2] As courts continued to grant criminal defendants greater access to helpful evidence prior to trial,[3] however, the government began demanding equal treatment. Prosecutors argued that, aside from the fifth amendment privilege against self-incrimination, a defendant has no valid interest in denying the prosecution access to evidence that could throw light on the issues in a case—that the state has just as much right to discovery of defense evidence as the defense has to discovery of evidence in the hands of the state. Sensing a receptive attitude from the legislatures and the courts, prosecutors argued further that the general policy of wide-open discovery in civil cases should be equally applicable to criminal trials.

It is now clear that the fifth amendment is not an absolute bar to criminal discovery in favor of the prosecution.[4] For example, the Supreme

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1. 353 U.S. 657 (1957).

2. *Id.* at 667, 668-69.

3. *See, e.g.*, Wardius v. Oregon, 412 U.S. 470, 475 (1973) (insisting that discovery in a criminal trial must be a "two-way street").

4. Williams v. Florida, 399 U.S. 78, 85 (1970) ("Nothing in the Fifth Amendment privilege entitles a defendant as a matter of constitutional right to await the end of the State's case before announcing the nature of his defense.").

Court has upheld, in the face of constitutional attack, the requirement under Federal Rule of Criminal Procedure 12.1 that the defendant give notice of an alibi defense.[5] Likewise, Federal Rule of Criminal Procedure 16(b)[6] compels a defendant who has asked for all discovery available to him under Rule 16(a)[7] to produce to the government prior to trial certain documents, test results, and tangible objects within his possession and control that he plans to introduce as part of his evidence in chief.[8] On the other hand, the language of Rule 16(b)(2)[9] also "plainly evidences

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5. *Id.* at 83 ("Privilege against self-incrimination is not violated by a requirement that the defendant give notice of an alibi defense and disclose his alibi witnesses.").

6. Rule 16(b) of the Federal Rules of Criminal Procedure, "Disclosure of Evidence by the Defendant," reads as follows:

(1) Information Subject to Disclosure.

(A) Documents and Tangible Objects. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions thereof, which are within the possession, custody, or control of the defendant and which the defendant intends to introduce as evidence in chief at the trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(C) or (D) of this rule, upon compliance with such request by the government, the defendant, on request of the government, shall permit the government to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, within the possession or control of the defendant, which the defendant intends to introduce as evidence in chief at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to that witness' testimony.

(2) Information Not Subject To Disclosure. Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant, or the defendant's attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by government or defense witnesses, or by prospective government or defense witnesses, to the defendant, the defendant's agents or attorneys.

FED. R. CRIM. P. 16(b).

7. Rule 16(a) establishes what information the government must disclose upon the defendant's request. Such information includes: (1) statements of the defendant; (2) the defendant's prior record; (3) documents and tangible objects; and (4) reports of examinations and tests. *See* FED. R. CRIM. P. 16(a).

8. *See* United States v. Ryan, 448 F. Supp. 810, 811 (S.D.N.Y.) ("Since the defendant has availed himself of the strategy to obtain discovery of the government, he must comply with the requirement for reciprocal discovery."), *aff'd*, 594 F.2d 853 (2d Cir. 1978), *cert. denied*, 441 U.S. 944 (1979); United States v. Whiteside, 391 F. Supp. 1385, 1389 (D. Del. 1975) (The court conditioned the granting of discovery to the defense upon the defendant's permitting the government to inspect and copy all documents or other tangible evidence the defendant intends to introduce at trial, but also specified that "[t]he defendant need not comply with the government's request for production if he elects to forego . . . discovery.").

9. *See supra* note 6.

that its purpose is not unlimited pretrial discovery by the prosecution because it explicitly exempts from inspection by the prosecution 'reports, memoranda, or other internal defense documents made by the defendant, or [his] attorneys or agents in connection with the investigation or defense of the case.' "[10]

In recent years, prosecutors have gone to greater and greater lengths to obtain one particular type of information from criminal defendants and targets of criminal investigations: attorney work product. For example, as a condition to settling a criminal case against a corporation, prosecutors frequently ask the corporation to waive its attorney-client and work-product privileges. A waiver permits the government to obtain internal investigative reports and memoranda of employee interviews that prosecutors then can use to assist in the prosecution of corporate employees. Similarly, grand jury subpoenas to attorneys have become increasingly popular as prosecutors discover new ways of arguing that corporations have waived their attorney-client privileges or that information corporations previously viewed as confidential is not in fact protected.

Fortunately, defense attorneys can employ certain strategies to bring the attorney-client privilege, the work product doctrine, and the Jencks Act[11] limitations into play to protect the confidentiality of information and evidence gathered by the defense. The remainder of this article outlines these strategies and explains how defense attorneys can implement them most effectively.

II. PROTECTING AGAINST DISCLOSURE OF INFORMATION GENERATED BY INTERNAL CORPORATE INVESTIGATIONS

In December 1988, lawyers for Drexel Burnham Lambert, Inc. were locked in a heated battle with the Manhattan U.S. Attorney's Office over whether a grand jury should have access to investigative information compiled by Drexel's attorneys in preparation for Drexel's defense on criminal charges of insider trading. In a decision that shocked the legal community, Senior U.S. District Court Judge Edmund L. Palmieri allowed a subpoena to be issued seeking both testimony and documents

10. United States v. Fratello, 44 F.R.D. 444, 446-47 (S.D.N.Y. 1968).

11. With the passage of the Jencks Act, Pub. L. No. 85-269, 71 Stat. 595 (1957) (codified as amended at 18 U.S.C. § 3500 (1982)), Congress limited the government's disclosure obligations as defined in Jencks v. United States, 353 U.S. 657 (1957). *See* discussion of the Jencks Act, *infra*, at notes 30-34 and accompanying text.

from Drexel's attorneys.[12] Judge Palmieri ruled that the requested information was not protected by the attorney-client privilege because the lawyers had used the information to assist Drexel's auditors in preparing standard financial opinions regarding the company's potential liabilities.[13] Because the lawyers shared the results of their private investigation with the auditors, Judge Palmieri found that Drexel's lawyers had waived the right to keep the information confidential. Had Judge Palmieri's decision taken effect, the grand jury could have gained access not only to the attorneys' files on Drexel, but also to any memoranda or communications that Drexel's lawyers obtained from individual defendants associated with the case, including Michael Milken, the renowned former head of Drexel's high-risk, high-yield junk bond department. Drexel eventually entered into a plea agreement with the U.S. Attorney in which the government agreed to drop its demand for the information.[14] Although Drexel's lawyers ultimately managed to protect their files from discovery, this incident highlights how careful defense counsel must be to protect privileged information from disclosure to third parties. Internal investigations, such as the one Drexel's lawyers conducted, have become a standard response to allegations of corporate fraud or mismanagement. Typically, the corporation's in-house counsel or retained outside counsel conducts the internal investigation. The end result is usually a report of the investigation, which then is circulated within the corporate hierarchy. Frequently, the corporation also shares the report's conclusions with regulatory agencies or the corporation's auditors. Therein lies the danger. That release of information may waive any applicable privileges, including the attorney-client privilege, and create the risk that the information ultimately will be discoverable by the prosecution.[15] Should such

12. Wall St. J., Dec. 6, 1988, at B8, col. 3.

13. *Id.*; Wash. Post, Dec. 3, 1988, at A3, col. 5.

14. N.Y. Times, Jan. 26, 1989, at A1, col. 4.

15. The necessary requirements of the attorney-client privilege have long been recognized to include:

(1) that there be a communication to or from an attorney;
(2) that the communication constitute legal advice or be made for the purpose of assisting the attorney in formulating legal advice;
(3) that the confidentiality of the communication be maintained; and
(4) that the privilege not be waived in any manner.

See United States v. United States Shoe Mach. Corp., 89 F. Supp. 357, 358-59 (D. Mass. 1950). *Compare* Upjohn v. United States, 449 U.S. 383, 394-95 (1981) (questionnaires completed by corporate employees pursuant to an internal investigation were protected under the attorney-client privilege because they had been completed with the expectation of confidentiality and with the understanding that they were solely for the purpose of providing the corporation with legal advice)

reports indeed fall into a prosecutor's hands, the results can be truly devastating because many reports are a virtual blueprint of the corporation's potentially criminal conduct.

One possible solution is to counsel corporations not to conduct internal investigations; however, the pressure from shareholders, the media, and regulatory agencies, such as the SEC and the Department of Defense, can create an intolerable atmosphere for a corporation that refuses to investigate its own alleged improprieties. Another solution is never to disclose such reports outside the corporate ranks for any purpose whatsoever, even to agents acting on the corporation's behalf. Such advice is also rarely practical.[16] Furthermore, when corporations generate internal reports pursuant to a voluntary compliance program, or need an outside auditor's input to interpret the information, disclosure is inevitable. Accordingly, while counsel is conducting an internal investigation, she must utilize methods that will ensure the greatest possible protection for client communications and attorney work product.

A. Prior Steps to Ensure Protection for Internal Corporate Investigation Information

A defense attorney can take numerous steps to increase the probability that the evidence he gathers cannot later be discovered by the prosecution. The following suggestions are based on factors courts previously have cited in denying discovery of defense materials to the prosecution.

1. Undertaking the Internal Investigation Voluntarily

First, a corporation should make the decision to conduct an internal investigation voluntarily, not pursuant to any government directive such as a consent decree. When a corporation does not undertake an investigation voluntarily, some courts have refused to apply the attorney-client privilege to materials generated during the investigation, reasoning that the corporation had not retained counsel to provide legal advice, but

with In re John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982) (a corporation's voluntary disclosure of the results of an internal investigation to its independent auditors for the purpose of conducting an annual audit, and to its underwriters for the purpose of facilitating a public offering waived the attorney-client privilege as "the need for confidentiality served by the privilege is inconsistent with such disclosure").

16. *See* ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information, ¶ 1 (1976) ("A lawyer should respond to the auditor's requests for information concerning loss contingencies to the extent specified in the Statement of Policy.").

merely to direct the investigation.[17]

2. Specifying a Purpose of Obtaining Legal Advice

Before a corporation begins any internal investigation, its board of directors should pass a resolution clearly stating that the corporation has retained legal counsel for the specific and sole purpose of providing legal advice, and that counsel will conduct the investigation in furtherance of that goal.[18] The board's resolution also should direct counsel explicitly to hold any information obtained in the strictest confidence and should state that counsel will advise the employees that their comments will remain confidential. In this way, defense counsel can help ensure that the government cannot claim later that the employees' communications are not privileged because they were not made with the requisite expectation of confidentiality.[19]

If the corporation chooses to conduct a preliminary investigation before retaining outside counsel, in-house counsel, rather than other employees of the corporation who are not licensed attorneys, should conduct the preliminary investigation. This precaution is designed to support the argument in a later discovery fight that the investigation was conducted for the purpose of rendering legal advice.

3. Special Rules for the Use of Outside Experts

If the corporation plans to consult outside accountants, auditors, investigators or other experts, the board's resolution also should state plainly that these individuals will act under the attorney's direction and control. Additionally, a written retainer agreement with outside consultants should specify that they are being retained for the purpose of assisting counsel in rendering legal advice. It is also suggested that outside consultants be hired by the attorney instead of the corporation. This

17. *See* SEC v. Canadian Javelin Ltd., 451 F. Supp. 594, 596 (D.D.C. 1978); SEC v. Dresser Indus., 453 F. Supp. 573, 576 (D.D.C. 1978), *aff'd*, 628 F.2d 1368 (D.C. Cir.), *cert. denied*, 449 U.S. 993 (1980).

18. *See In re* Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.), 731 F.2d 1032, 1037 (2d Cir. 1984) (the attorney-client privilege is "triggered only by a client's request for legal, as contrasted with business, advice"); Resnick v. American Dental Ass'n, 95 F.R.D. 372, 375 (N.D. Ill. 1982) (the attorney-client privilege does not apply even though the corporation initiated the investigation at the advice of counsel and kept counsel informed of developments, because the investigation was essentially "management-oriented" for overall business purposes and the lawyer-client relationship was "merely tangential").

19. *See* Upjohn v. United States, 449 U.S. 303, 394 (1981).

shift will diminish markedly the government's opportunity to argue that the consultants were hired to assist management, rather than to contribute to the provision of legal advice. However, the mere formality of being hired by an attorney does not guarantee that courts automatically will consider subsequent communications between counsel and outside experts privileged. In *Federal Trade Commission v. TRW, Inc.*,[20] for example, TRW's attorneys hired an outside firm to prepare a study in anticipation of a substantial request for information by the FTC. The firm's research proposal stated that it had been prepared for TRW's legal department, for the purpose of enabling that department to advise TRW on the status of its procedures under the Fair Credit Reporting Act. Despite these precautions, the court strictly adhered to the established test for privileged status—that the communication be made for the purpose of obtaining legal advice—and ordered discovery of the documents.[21]

B. Further Ways to Protect Against Future Discovery Once the Investigation Has Begun

Once the corporation has retained counsel and a formal investigation has begun, the defense attorney can take additional steps to protect the forthcoming evidence from later discovery. The first precaution is so obvious it is often overlooked. Counsel should mark clearly any documents pertaining to the investigation with the words "privileged and confidential." In addition, notes and subsequent memoranda concerning interviews with employees or other witnesses should indicate who was present during the interview and specify that the interview was conducted for the purpose of providing legal advice. Counsel should not allow the presence of other corporate personnel during the interview, as a court could find such presence destroys the expectation of confidentiality and constitutes a waiver of the attorney-client privilege.[22] Counsel also should stress to all persons involved in the fact-finding process that their input will be used to render legal advice and that their comments will be held in the

20. 628 F.2d 207 (D.C. Cir. 1980).

21. *Id.* at 212 (there must be "limitations on the protection accorded the work of third persons").

22. *See* United States v. Furst, 886 F.2d 558 (3d Cir. 1989) (The presence of a third party at a meeting between corporate management, employees and counsel destroyed any reasonable expectation in the employee that his communications were confidential); United States v. Melvin, 650 F.2d 641, 645 (5th Cir. 1981) ("Disclosures made in the presence of third parties may not be intended or reasonably expected to remain confidential.").

strictest confidence.[23]

Whenever practical, a defense attorney should conduct interviews in person. The use of questionnaires is discouraged because that format is devoid of any of the factors that courts favor in granting protection from discovery under the work product doctrine.[24] If, however, the number of individuals to be interviewed is so large as to necessitate the use of questionnaires, the least risky approach is to use written questions with boxes for yes or no answers. That format will provide the government with the least amount of information should it later obtain the questionnaires through discovery. If the recipient of the questionnaire wishes to provide additional explanation, the form should advise her to speak with the attorney directly.

Counsel should caution outside consultants and investigators that their notes, reports, and memoranda also could be subject to discovery by the prosecution, and thus should be drafted with the utmost care. Whenever possible, outside consultants should report back orally to the attorney before committing their comments to writing. After conferring with counsel regarding the proposed content of their reports, the outside consultants then should prepare an unsigned draft report. No final report should circulate until counsel has approved it. An even better alternative is for the lawyer to make his own notes based on the outside consultant's oral report. Courts are more likely to accord protection under the work product doctrine to the attorney's records than to an outside consultant's written report.

Defense counsel should maintain all materials generated from an investigation in his personal files. In any event, the corporation should never make such evidence part of its own files. Defense counsel should keep the number of copies available to a minimum, preventing inadvertent disclosure that might lead a court to find a waiver of the attorney-client privilege.[25]

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23. *See In re* International Sys. & Controls Corp. Sec. Litig., 91 F.R.D. 552, 556 (S.D. Tex. 1981) ("When the client is a corporation, the privilege extends to those communications to or from the attorney by any employee if the communication concern[s] matters within the scope of the employee's corporate duties, the employee was aware he was being questioned in order that the corporation may obtain legal advice, and the communication was considered highly confidential when made and has been kept confidential by the company.").

24. *See In re* Grand Jury Investigation, 599 F.2d 1224, 1231 (3d Cir. 1979) (questionnaires contain no mental processes of the attorney or other work product).

25. *See* United States v. Kelsey-Hayes Wheel Co., 15 F.R.D. 461, 464-65 (E.D. Mich. 1954) (inadvertent or indiscriminate disclosure waives the attorney-client privilege); Eutectic Corp. v.

C. *Protecting Against Discovery After the Investigation Is Complete*

Once the investigation is concluded, the single most important thing a defense attorney can do to prevent eventual discovery of the investigation's findings is to ensure that the corporation refrains from disclosing the information to any outside party for any purpose. Courts have consistently held that such disclosure waives the attorney-client privilege because disclosure is inconsistent with the highly confidential relationship protected by the privilege.[26]

Maintaining strict confidentiality is doubly necessary because any disclosure will waive the privilege not only for the final report of an investigation, but also for the underlying information relied on in preparing the report. For example, in *In re John Doe Corp.*,[27] the Second Circuit allowed production of all prior drafts of a voluntarily disclosed internal corporate report, including those that mentioned criminal conduct.[28] In so ruling, the court rejected the corporation's argument that there had been merely a limited waiver of the privilege through disclosure of only the final draft, which did not include findings of misconduct. At least one circuit, however, has applied a limited waiver in the belief that this more liberal approach to the privilege will have the desirable effect of encouraging corporations to police themselves and institute any necessary reforms.[29] Nevertheless, given the conflicting decisions regarding the limited waiver theory, a defense attorney cannot afford to take the risk that his client will successfully retain any attorney-client privilege

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Metco, Inc., 61 F.R.D. 35, 39 (E.D.N.Y. 1973) (despite the fact that the original document was sent to the attorney, the courtesy copy to the corporation's president was not privileged) (citing United States v. Aluminum Co. of Am., 193 F. Supp. 251, 253 (N.D.N.Y. 1960)).

26. *See In re* Subpoenas Duces Tecum (Fulbright & Jaworski), 738 F.2d 1367, 1370 (D.C. Cir. 1984) (litigants who fail to maintain absolute confidentiality are precluded from relying on the attorney-client privilege); Permian Corp. v. United States, 665 F.2d 1214, 1221 (D.C. Cir. 1981) (any voluntary disclosure by the holder of the attorney-client privilege is inconsistent with the confidential relationship the privilege is designed to protect and thus waives the privilege); *In re* Weiss, 596 F.2d 1185, 1186 (4th Cir. 1979) (documents and testimony previously provided to the SEC constituted a waiver of the attorney-client privilege in subsequent grand jury testimony); *In re* Grand Jury Investigation of Ocean Transp., 604 F.2d 672, 674-75 (D.C. Cir.) (inadvertent disclosure waives privilege), *cert. denied*, 444 U.S. 915 (1979); United States v. Aronoff, 466 F. Supp. 855 (S.D.N.Y. 1979) (disclosure of attorney-client information in preindictment negotiations waives privilege).

27. 675 F.2d 482 (2d Cir. 1982).

28. *Id.* at 489.

29. *See* Diversified Indus. v. Meredith, 572 F.2d 596, 611 (8th Cir. 1978) (voluntary disclosure of privileged material in a nonpublic SEC investigation constituted only a limited waiver of the attorney-client privilege); Pritchard-Keang Nam Corp. v. Jaworski, 751 F.2d 277, 284 (8th Cir. 1984) (reaffirming application of the limited waiver theory), *cert. dismissed*, 472 U.S. 1022 (1985).

following even the slightest prior disclosure of an internal investigation. Therefore, counsel should take care to ensure that no disclosure occurs.

III. PREVENTING DISCLOSURE OF INFORMATION OBTAINED FROM EMPLOYEES OR OTHER WITNESSES

We now turn to the broader topic of how to prevent disclosure of statements made by witnesses in interviews with a defense attorney during the course of the attorney's investigation. While these suggestions will be helpful to counsel seeking to prevent a prosecutor from gaining access to employee statements given in the course of an internal corporate investigation, they will prove equally valuable in denying the government discovery under the Jencks Act of prior statements made by any type of witness. Additionally, these suggestions will ensure that notes or memoranda prepared by defense counsel regarding those statements also remain privileged.

A. The Jencks Act Governs Disclosure of Prior Statements of Witnesses Who Testify at Trial

Pursuant to the Jencks Act (the Act), defendants can discover prior statements of witnesses testifying in a federal criminal trial.[30] Congress enacted the Act following the Supreme Court's decision in *Jencks v. United States*[31] that a federal criminal defendant is entitled to discovery of prior statements of a government witness if those statements relate to the witness' testimony at trial. The purpose behind the Court's ruling was to enable the defendant effectively to impeach the witness on cross-examination. In passing the Jencks Act, however, Congress moved swiftly to limit the government's disclosure obligation to only those statements that relate directly to a witness' actual testimony, and to preclude defendants from obtaining those statements until after the witness has testified on direct examination.

While some courts have concluded that a criminal defendant has no reciprocal disclosure obligations under the Act,[32] others have applied the Act's disclosure obligation to the defense under a theory of reciprocal

30. 18 U.S.C. § 3500 (1982). *See supra* note 11. The Jencks Act is implemented by rule 26.2 of the Federal Rules of Criminal Procedure. *See* FED. R. CRIM. P. 26.2.

31. 353 U.S. 657 (1957).

32. United States v. Wright, 489 F.2d 1181, 1189 (D.C. Cir. 1973) (the Act by its express terms "has no application whatever to defense witnesses and statements in the possession of the defense").

discovery.[33] Courts have not found the fifth amendment privilege against self-incrimination to be implicated by these reciprocal obligations, known as reverse Jencks Act disclosures, because that privilege "applies only to evidence of a testimonial or communicative nature obtained from the defendant himself."[34]

B. Types of Documents Discoverable by the Government Under Reverse Jencks

The key to determining which documents the government can discover under the Jencks Act lies in the statute's narrow and specific definition of the term "statement."[35] Under the Act, a "statement" can be either a writing made by the witness and signed or otherwise adopted or approved by him,[36] or a recording or transcription of a substantially verbatim recital of the witness' oral statement recorded contemporaneously with the witness' declaration.[37] The entire declaration of the witness must be included, not simply relevant excerpts,[38] and the document must not contain any conscious or inadvertent opinions or impressions of the person conducting the interview.[39] Furthermore, "nothing in [the Act] or in the cases construing its application . . . justifies the conclusion that [a party] can be forced to produce its entire files for inspection . . . in

33. United States v. Cruz, 478 F.2d 408, 411 (5th Cir.) (the purpose of the Jencks Act is to "undergird the truth finding process" of criminal trials by making existing prior witness statements equally available to both sides), *cert. denied*, 414 U.S. 910 (1973); United States v. Pulvirenti, 408 F. Supp. 12, 14 (N.D. Ill. 1976) ("The obligation placed on the defendant should be the reciprocal of that placed upon the government.").

34. People v. Damon, 24 N.Y.2d 256, 261, 247 N.E.2d 651, 654, 299 N.Y.S.2d 830, 834 (1969) (because the prosecution would be requesting statements of a witness offered by the defendant, rather than the statements of the defendant himself, the privilege does not attach) (citing Schmerber v. California, 384 U.S. 757 (1966)).

35. The term "statement" is defined by the statute to include:

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical or other recording or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

18 U.S.C. § 3500(e) (1982).

36. *Id.* § 3500(e)(1).

37. *Id.* § 3500(e)(2).

38. United States v. Harris, 542 F.2d 1283, 1292 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977).

39. Menendez v. United States, 393 F.2d 312, 316 (5th Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969).

order to determine if it contains some pertinent matter which might be of assistance to the [other party]."[40] Unless a statement clearly falls within the stringent guidelines of the Act, the defendant need not produce it.

C. *Using the Requirements of the Jencks Act to Prevent Discovery of Notes of Witness Statements*

1. *Written Statements Must Be Signed or Otherwise Adopted or Approved by the Witness*

If the witness has not signed, adopted, or approved the statement, it does not constitute a written statement within the meaning of the Act.[41] The witness' adoption or approval must be formal in nature. The requirement is not met if the witness is unfamiliar with what the lawyer has written down.[42] Nor is it sufficient for the attorney in the course of the interview merely to inquire of the witness whether the attorney has understood the witness correctly and for the witness to respond in the affirmative.[43] Witness sheets prepared by counsel and containing anticipated testimony that the witness has not signed or adopted also are not producible under the Act.[44]

2. *Recorded Oral Statements Must Be Substantially Verbatim Recitals*

If the notes taken during the course of a witness interview are a "substantially verbatim recital" of what the witness has said, they constitute a statement under the Act, and the defense must produce them upon demand, providing they relate to the subject matter of the witness' testimony.[45] Because the Jencks Act was designed "to eliminate the danger of distortion and misrepresentation inherent in a report which merely selects portions . . . from a lengthy oral recital," courts strictly construe

40. Foster v. United States, 308 F.2d 751, 755-56 (8th Cir. 1962).

41. United States v. Gantt, 617 F.2d 831, 841 (D.C. Cir. 1980).

42. Goldberg v. United States, 425 U.S. 94, 110 n.19 (1976).

43. *Id.*

44. United States v. Myerson, 368 F.2d 393, 395 (2d Cir. 1966), *cert. denied*, 386 U.S. 991 (1967); United States v. Franzese, 321 F. Supp. 993, 995 (E.D.N.Y. 1970), *cert. denied*, 402 U.S. 995 (1971). Once a writing has been signed or otherwise adopted or approved by the witness, however, it makes no difference that the lawyer and not the witness actually wrote the statement. *Goldberg*, 425 U.S. at 98.

45. Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1963). Whether or not the reports are a substantially verbatim recital is a question of fact. United States v. Graves, 428 F.2d 196, 200 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

the verbatim requirement.[46] "Courts will not allow production of only short excerpts of an interview."[47] Instead, to be discoverable, the notes must cover the entire interview.[48] If the notes are a "truncated version," or if they constitute "merely a memorandum giving names, places and hours," the court will deny production.[49] The inclusion of selected verbatim phrases in an investigator's notes does not elevate the notes to a Jencks Act statement.[50] If the notes are anything less than a substantially verbatim recital of the witness' remarks, they need not be produced under the Act.

3. *Rough Notes Are Not Subject to Production Under the Jencks Act*

To be producible as a substantially verbatim statement, notes cannot be in rough or incomplete form.[51] For example, the Supreme Court has held that jotting down a couple of "rough pencil notes" giving "names, places and hours" is not equivalent to recording the witness' words verbatim and is not sufficient to constitute a recorded statement.[52] More recently, the Ninth Circuit refused to order production of rough, handwritten notes used to prepare a formal interview report because such notes were "too cryptic and incomplete to constitute the full statement envisioned by the Jencks Act."[53]

Rough notes also will seldom qualify as Jencks Act statements because an investigator rarely will read rough notes back to an interviewee. This lack of feedback denies the witness the opportunity to adopt and approve the statement. Unless the witness testifies that his interview was transcribed verbatim into the investigator's or attorney's rough notes, or that the notes were read back to him and approved, a court will not compel discovery of the notes.[54]

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46. *See, e.g.*, Palermo v. United States, 360 U.S. 343, 352 (1959).

47. United States v. Harris, 542 F.2d 1283, 1292 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977).

48. United States v. Augenblick, 393 U.S. 348, 355 (1969).

49. *See id.*

50. United States v. Cruz, 478 F.2d 408, 413 (5th Cir.), *cert. denied*, 414 U.S. 910 (1973).

51. *Augenblick*, 393 U.S. at 355.

52. *Id.* at 354-55.

53. United States v. Griffin, 659 F.2d 932, 937 (9th Cir. 1981), *cert. denied*, 456 U.S. 949 (1982).

54. *See id.*

4. *Protecting Reports by Outside Consultants from Discovery Under the Jencks Act*

Investigative reports usually are not discoverable under the Act because they do not fall within the Act's definition of a statement. For example, in *Menendez v. United States*,[55] the Fifth Circuit held that a report written from an FBI agent's notes of witness interviews did not constitute a statement because the witnesses did not approve or adopt either the report or the notes from which it was written.[56]

Courts also have denied production of an investigative report when the report does not include the prior statement of any witness who testified,[57] or is insufficiently connected with the subject matter of the witness' direct examination.[58] Additionally, courts may deny production when only half of the report consists of information elicited from the testifying witness and the other half is made up of information gleaned from other sources.[59] Because this merging is common in report preparation, documents that convey considerable information beyond the witness' actual comments are rarely producible under the Act.[60]

D. *Summary of How To Protect Notes and Memoranda of Witness Interviews from Discovery Under the Jencks Act*

The legislative history of the Act makes clear that "one evil Congress sought to remedy in passing the Jencks Act was the possible production of notes made by . . . attorneys in preparing their case."[61] Consequently,

55. 393 F.2d 312 (5th Cir. 1968), *cert. denied*, 393 U.S. 1029 (1969).

56. *Id.* at 316. *See also* Hanks v. United States, 388 F.2d 171, 173 (10th Cir.) (the verbatim requirement barred production of an investigator's report because the report contained only a description of the crime, the arrest, the personal and criminal history of the accused, a list of witnesses, and a brief statement of the witnesses' expected testimony), *cert. denied*, 393 U.S. 863 (1968).

57. *See* United States v. Orzechowski, 547 F.2d 978, 985 (7th Cir.), *cert. denied*, 431 U.S. 906 (1977). *See also* United States v. Pope, 415 F.2d 685, 689 (8th Cir. 1969) (reports of a postal inspector participating in a mail fraud investigation did not have to be produced because the postal inspector did not testify at trial and he had not adopted or approved the documents).

58. *See, e.g.*, United States v. Graves, 428 F.2d 196, 200 (5th Cir.), *cert. denied*, 400 U.S. 960 (1970).

59. *See, e.g.*, United States v. Aviles, 315 F.2d 186, 192 (2d Cir. 1963), *cert. denied*, 380 U.S. 906 (1965).

60. Of course, if the testifying witness was the author of the report, courts might be less likely to rule that the inclusion of information from other sources should bar production. The witness would still have to sign or otherwise adopt or approve the report, however, for it to be discoverable as a Jencks Act statement.

61. United States v. Crosby, 294 F.2d 928, 951 (2d Cir. 1961), *cert. denied*, 368 U.S. 984 (1962).

the Act encompasses only those statements that record verbatim what the witness has said, and requires that in order to be subject to production, the statement must relate directly to the witness' testimony on direct examination.[62] The inclusion of extraneous material, such as personal commentary by the attorney,[63] or information from other sources,[64] will prove fatal to production. In addition, a witness' written statement is not discoverable unless the witness has signed or otherwise adopted or approved it as his own.[65]

Therefore, in order to ensure that notes and memoranda relating to witness preparation are secure from discovery, counsel should record notes of the witness' statements in fragmentary form and intertwine them with the attorney's impressions of the facts to such an extent that the two cannot be separated. In addition, any attempt to have a witness verify the accuracy of the attorney's notes should be oral and informal so that a court cannot deem the exchange an adoption or approval of the notes by the witness. Counsel should take only rough notes, and fragments are preferable to complete sentences. Any subsequent interview memoranda should await preparation in order to fail the Act's contemporaneous recording requirement,[66] and further make it appear that the attorney is relying on his memory of what the witness said, rather than reconstructing the interview verbatim.[67] It also would be wise to rephrase the witness' actual words whenever it is possible to do so without losing the original meaning. This will weaken the prosecution's claim that the document contains a verbatim statement of the witness.[68]

Memoranda and reports are more secure from discovery than notes taken during the interview because the former inevitably will contain information from other sources, and thus cannot be said to be solely the verbatim statement of a witness. Memoranda also typically will contain trial strategy that will cause the document to be protected under the

62. Saunders v. United States, 316 F.2d 346, 349 (D.C. Cir. 1983).

63. Menendez v. United States, 393 F.2d 312, 316 (5th Cir. 1968), *cert. denied*, 430 U.S. 934 (1969).

64. United States v. Aviles, 315 F.2d 186, 192 (2d Cir. 1963), *cert. denied*, 380 U.S. 906 (1965).

65. United States v. Gantt, 617 F.2d 831, 841 (D.C. Cir. 1980).

66. 18 U.S.C. § 3500(e)(2) (1982).

67. Palermo v. United States, 360 U.S. 343, 352-53 (1959) ("summaries . . . which evidence substantial selection of material, or were prepared after the interview without the aid of complete notes, and hence rest on the memory of the agent are not to be produced").

68. United States v. Aviles, 315 F.2d 180, 192 (2d Cir. 1963) (discovery of an interview report was denied because the witness had spoken in such poor English that the lawyer was forced to put the witness' words "into a more recognizable form"), *cert. denied*, 380 U.S. 906 (1965).

work product doctrine. Finally, whether the attorney is taking notes or drafting memoranda, the less he writes about what a witness is specifically expected to say on direct examination, the less likely the document will later qualify as a discoverable statement under the Jencks Act.

IV. CONCLUSION

Internal corporate investigations, such as the one conducted by Drexel Burnham Lambert, Inc., have become a standard response to allegations of corporate fraud or mismanagement. Unfortunately, these commendable attempts by corporations to put their own houses in order are increasingly being turned against them in actions to impose both civil and criminal liability on the organizations and their individual employees. The innovative and aggressive tactics prosecutors now employ to obtain internal investigative reports, memoranda of employee interviews, and other forms of attorney work product, as well as to intrude upon the attorney-client privilege, pose serious problems for defense attorneys. As outlined in this Article, however, a defense lawyer can implement numerous offensive strategies at each stage of the investigative process to ensure that the attorney-client privilege, the work product doctrine, and the Jencks Act function as intended to protect the confidentiality of information and evidence gathered by the defense. These recommendations are well worth the time and effort they require, particularly when they succeed in preventing a virtual blueprint of possible corporate misconduct from falling into the prosecution's hands. When such disclosure does occur, the corporation in effect is forced to participate in proving its own guilt. These steps will help insure against that situation.

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