

*International Society*  
*of*  
**Barristers**

Volume 40

Number 4

PERSPECTIVES ON THE FALL OF COMMUNISM  
IN THE SOVIET UNION  
*James Bacik, Tom Murray,*  
*Boris Topornin, and Alexander Yakovlev*

DEFERRED PROSECUTIONS AND THE INDEPENDENT MONITOR  
*James K. Robinson, Philip E. Urofsky,*  
*and Christopher R. Pantel*

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FIVE-YEAR CUMULATIVE INDEX

*Quarterly*

# International Society of Barristers Quarterly

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## **PERSPECTIVES ON THE FALL OF COMMUNISM IN THE SOVIET UNION†**

**James Bacik,\* Tom Murray,\*\* Boris Topornin,\*\*\*  
and Alexander Yakovlev\*\*\*\***

INTRODUCTION BY EDWARD NEVIN, SECRETARY-TREASURER,  
INTERNATIONAL SOCIETY OF BARRISTERS

Although this seems surprising, the entire lifespan of communist rule in Russia first and then the Soviet Union—from the revolution in 1917 to the collapse of the Soviet empire in 1989 to 1991—was barely more than seventy years. It is a history of horror, a history of totalitarianism, but I would like to share with you the insight that so stunned me, and that is the distinction between communism and totalitarianism, between the evil of Lenin and Stalin (the Genghis Khans of the twentieth century) and socialism, which in many ways is a logical extension of the Judeo-Christian creed. Socialism has a goodness about it. The evil was the totalitarianism and the imposition of the system on so many people.

The Soviet Union consisted of fifteen republics, the largest of those being Russia of course. Russia contained half of the population of the entire Soviet Union and three-quarters of the land. Russia is the world's largest country, in area. The flight time from Karagin in eastern Siberia to Moscow is eleven hours; Karagin is much closer to Los Angeles than it is to Moscow. This massive land is home to people of 132 different ethnic origins and adherents of the major religions of the world. Because of its latitude and its short growing season, it also is a country that has faced huge challenges in agriculture and thus, century after century, had difficulty feeding its own people. That is what set the stage for the revolution in 1917, so brilliantly chronicled by the journalist John Reed in his book called *Ten Days That Shook the World*. (Tom Murray wants to call his book about the period from 1985 through 1991 *Six Years That Shook the World*.)

Perhaps the beginning of the thaw in the grip of totalitarianism occurred with the death of Stalin. This part is personal to me. As many of you know, my wife,

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† Addresses delivered at the Annual Convention of the International Society of Barristers, Four Seasons Hualalai, Kona, Hawaii, March 8, 2005.

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\*\*\* Attorney, Russian Academy of Sciences, Moscow, Russia.

\*\*\*\* Attorney, Russian Academy of Sciences, Moscow, Russia. For health reasons, Mr. Yakovlev was unable to attend the meeting in Hawaii and participated by means of a videotaped interview. Mr. Yakovlev died on October 18, 2005.

Christina, is from Hungary. Stalin died in 1953, and it was only because of his death that Christina's father and brother came home from prison. They were among the millions and millions of people who were imprisoned by the horror of Stalinism. Perhaps as many as sixty million died over the course of his reign of terror. Christina left Hungary after the failed revolution in October of 1956.

The Soviet Union had no succession procedure, but by 1956 Khrushchev had solidified his power. At the Twentieth Congress of the Communist Party, he made an impassioned speech that stunned the Party and the nation because he criticized the former leader; Khrushchev called Stalin a criminal. That proved to be a short-lived thaw (I guess the Russian winter is far too cruel for a small thaw to accomplish much), and no significant change happened for the next thirty years, until Gorbachev.

A little later, you will see a film that tells part of the wonderful story of the vital connection between Gorbachev and Alexander Yakovlev. Yakovlev's personal story is remarkable. At the age of eighteen, he was a lieutenant in the Baltic marines. He was trapped in the siege of Leningrad and was shot; Nazi machine gun fire raked his body and legs. He was so badly wounded that his comrades thought he was dead. He was saved by the Russian Army tradition of removing not only their wounded but also their dead from the battlefield. Five of the Russian troops, his buddies, went out to pull his body off the field. Four were shot and killed, but the fifth scooped him up and ran him to safety. He survived, although somewhat crippled; his legs are still a source of pain some sixty years later. Because he was a man of great intellectual gifts, he went on to study history and philosophy, and he became an apparatchik and a major player in the Communist Party. He was such an excellent writer that he was chosen to draft much of the propaganda of the fifties and sixties. He got in trouble, however, when he wrote a paper that began to challenge the tremendous suppression of intellectualism. Even though it did so within rather narrow lines, it was enough to concern Brezhnev and other key people, and Yakovlev thought he was at risk of being sent to Siberia. He decided that perhaps he would do better in the diplomatic corps, and he got himself exiled to Canada as an ambassador for ten years.

It was because of Yakovlev's time in Canada that he formed a close friendship and collaboration with Gorbachev. After Yakovlev had been in Canada for almost ten years, Gorbachev—by then a powerful member of the Politburo—made a visit to Canada. Gorbachev and Yakovlev traveled together around Canada and got to know each other well in the process. Gorbachev discovered that Yakovlev had been thinking about matters of great importance for a long time, and Gorbachev wanted Yakovlev to be his primary advisor. With his position of power in the Politburo, Gorbachev was able to bring Yakovlev home almost immediately. Within a month after that visit in Canada, Yakovlev was back home, initially as a scholar but ready to move with Gorbachev immediately upon Gorbachev's rise to power in March of 1985.

From the beginning, Yakovlev's goal was to expose the horrible history. Gorbachev was convinced that if you do not face your terrible past, you will not move into

the future with anything of value or benefit. Gorbachev was careful because he didn't want to destroy socialism, but he knew that he had to reform. My respect for Gorbachev has grown enormously as I have studied and prepared for this event. With my particular bias regarding Hungary and the other satellite countries of the Soviet Union, I was especially overwhelmed by the discovery of what Gorbachev did in relation to those countries. From 1989 on, the Soviet troops who had occupied Eastern Europe for so many years stayed in their barracks and allowed whatever happened to happen. Gorbachev had as much power as Stalin, as much power as Lenin ever had, but he refused to repeat history, refused in particular to repeat what the troops had done in Budapest in 1956. He would not impose the Soviet system upon an unwilling people. He took that position despite tremendous criticism from the conservatives of the Kremlin, of the Politburo—those who wanted to maintain Soviet power and influence throughout the world and were horrified that Gorbachev would reduce its position of power in the world by not keeping the boot of the Soviet Union on the people of Eastern Europe. As a result of Gorbachev's deliberate action (or inaction), the Eastern European countries quickly drifted away from the Soviet Union, one at a time over a matter of months, to freedom to chart their own paths. Finally, in December of 1991, Boris Yeltsin, the president of Russia, and the presidents of Belarus and Ukraine announced their formation of a new, loose confederation and declared that the Soviet Union had ceased to exist. Gorbachev resigned on December 25, and the Soviet Union was formally dissolved.

By the way, I should caution you to take what I have said with a grain of salt. Obviously, I did not directly observe the events I have described. Also, as my friend Boris Topornin, whom you will hear later, said to me on another occasion in Moscow: "Edward, I am a professor of law. You draw big, broad conclusions from minimal facts." I am sure he will correct me if I have gone too far.

I will mention two more little tidbits and then summarize some themes. First tidbit: Andrei Sakharov, the father of the hydrogen bomb in Russia who became concerned with its power (just as our own people did), became the most important dissident in the Soviet Union and suffered for it, exiled to Gorki in the 1980s. When Gorbachev came to power, one of the first things he did was to have a phone installed in Sakharov's apartment in Gorki. Then Gorbachev called Sakharov and said, "Come home and continue with your patriotic duties." Sakharov's ultimate statement of dissidence had become mainstream.

Second tidbit: Yakovlev pushed Gorbachev beyond what Gorbachev initially wanted to do. Gorbachev wanted to confine the criticism to the horrors of Stalin and felt that if he went any further than that, it might be too much to bear. Yakovlev refused to stop there; he wanted to be sure that Lenin was also condemned for the killer that he was. Lenin was the one who said it was necessary to kill more professors; Lenin said they had to kill one out of every ten. Stalin was just a continuation. Yakovlev wanted to be sure that the people knew those facts.

What I wanted to do in this introduction was give you a sense of what I discovered and felt as I went through this process. Key terms here are “glasnost,” which is the openness and transparency that society must have if it’s to progress and respect its people, and “perestroika” or reconstruction, which to Gorbachev meant reconstruction and reform, not dissolution and destruction. Another term that was important to Gorbachev was the Russian word for “acceleration”; they wanted to move with all deliberate speed. With Lenin and Stalin, the Soviets had a command polity, the politics of absolute command from a single source (the Communist Party and its chief) that dominated not only the Party but the entire governmental structure and activity. Under Gorbachev (advised by Yakovlev) they changed to political pluralism and a pluralistic society. The economy, too, changed from one conducted by command to efforts toward a market economy (with some success and some failures). Along the way, we experienced the ending of the Cold War and, of course, the breakup of the Soviet Union.

With that introduction in mind, I give you Tom Murray, our Barrister from Sandusky, Ohio. He will tell you the remarkable story of his connection with Russia.

#### TOM MURRAY: THE SOUL OF RUSSIA

Thank you, Ed, for that excellent overview; you’ve saved me a great deal of work. You might have wondered why anybody would ask a lawyer from Sandusky, Ohio, to speak on the fall of communism. One reason might be that I’m the only dues-paying, Russian-speaking, Irish-Catholic lawyer in the Society who happens to count Mikhail Gorbachev and Alexander Yakovlev and Boris Topornin among his friends. Indeed, President Gorbachev and his daughter recently visited Sandusky, which I will talk about in a little while.

Ed mentioned communism and socialism and pluralism. These “isms” are what get us in trouble throughout history. As I see it, history is about people, and it should be about taking long, careful, loving looks at each other as we are, where we are, what we believe, and what we feel. That’s what I discovered during my first trips to Russia. I discovered a warm and generous and kind people who took me in and gave me what I think is the greatest gift other human beings can give, which is that they accepted gratefully my offer of friendship to try to help them as they struggled through momentous changes in their lives. They were struggling to get out from under the deprivations of that terrible, repressive communism. They gave me the gift of accepting what little I could bring to them.

Mr. Gorbachev once asked me, “How did you become interested in Russia?” That certainly is a good question, and I want to tell you where it began. There was one moment that started me on this odyssey that has enriched my life in ways I cannot express in words. About thirty years ago Ann and I and the five of our seven children who had been born at that time were watching the evening news. Walter Cronkite was

the anchor. About ten minutes into that night's broadcast, Mr. Cronkite announced that earlier that day the Strategic Air Command in Omaha had received a signal that the United States of America was under attack from Russian bombers. Our Strategic Air Command put all of our planes in the air, armed with nuclear bombs, of course, and heading for Russia. Five minutes before our planes reached Russian airspace, SAC discovered it was *not* fleets of Russian bombers heading for the United States but Canadian geese flying south. Upon hearing that report, I looked at my children and I thought of all the gifts that we had been given in life, of the sheer beauty of it all. I said to myself then and I said to Ann later that night that no matter what it took, even if it was an impossible dream, I needed to do what I could, however little it might be, to improve relations between our countries. I had to try or I would not have been able to live with myself. That was the beginning of my journey.

I have too many memories, too many stories to tell about the twenty-five year path from the first time I went to the Soviet Union until now. I have traveled the highways and byways of Russia—everywhere, even places that members of the Politburo never visited—and the more I learned about Russia the more I fell in love with the soul of the people. One of our daughters likes to say that I have had an ongoing affair with a woman a thousand years older than I am—and I don't deny it.

I once asked a friend of President Gorbachev a question that was important to me. This friend is a lawyer, as is Gorbachev, by training. I said to his friend, "Tell me about the *soul* of Gorbachev." He replied, "You know, Tom, no one has ever asked me that question." So when Mikhail Sergeyevich Gorbachev and his daughter came to my office for lunch during their visit in Sandusky, I had three hours with him and took the opportunity to search for the soul of this man who, with Alexander Nicholaevich Yakovlev, changed the course of history by force of character, by force of ideas and conviction. I asked him, "President Gorbachev, where did you draw the information for the risks you took to your own life?" Do you know what he talked about in response? Thomas Jefferson, John Locke, John Adams, the Constitution of the United States of America, the Declaration of Independence—the very foundations of our life in the United States. It was those ideas, he said, the great moral truths on which we must live or die that moved him. It was not "isms," it was the human dimension of life that moved him.

In that same conversation, President Gorbachev graciously pointed out that without Alexander Nicholaevich Yakovlev, what happened could never have happened. Let me tell you a story that will help you understand who Yakovlev is, and then we'll show the videotape of Ed Nevin's interview with him. You are about to enter into the very heart and soul of one of the great figures of modern history, maybe of all history.

Some years ago Ann and I hosted Alexander Yakovlev. We had a marvelous time. We took him to our getaway place in Florida and spent hours with him, hearing the inside story of Gorbachev and the momentous day-by-day changes. From the start, they knew the system had to be replaced; it was beyond reform. But they had to find

a way to make it seem that they were really trying merely to modify the system. You should hear them talk about the cunning they had to use. All along they were bringing their people, step by step, to the point where it was too late for the hardliners to do anything to stop the process. The momentum of change was there. This was one of the greatest feats of imagination and moral courage in human history.

Back in Ohio, we invited Mr. Yakovlev to come to Sunday mass with us. One way I try to keep up with my Russian is by following the scripture readings in my Russian language *New Testament*, so I gave that to him. Our pastor said, “Do you think your friend would like to say a few words to us?” The sermon of the day was based on the story of the mustard seed, so Alexander Yakovlev was reading that story in my Russian *New Testament*, and I got up and introduced him and asked him to come forward. He delivered the most eloquent, powerful sermon using this idea of the mustard seed that I’ve ever heard. He said truth is the mustard seed that’s in every one of us, and from love of truth, he and Gorbachev and others had built their strategy to bring opportunity for a new way of life to the Russian people. When he was finished, the people in our parish rose to their feet, and for five minutes they tore the roof off the church as they applauded, so great was the power of that brief sermon. Now I’d like to have you come to a better understanding of the great soul that delivered those words that so inspired the people in our church. It is a deep honor to introduce to you Alexander Nicholaevich Yakovlev.

#### ALEXANDER YAKOVLEV: THE STORY BEHIND PERESTROIKA AND GLASNOST<sup>1</sup>

##### *The Formation of the “Architect of Perestroika”*

Now there are people who say to me, “Life was better before.” I find it tiresome and become sad. I *remember* how it was before. I recall that we didn’t know, we just fought. We didn’t know we were patriots. We fought for our land, for our relatives, so that the fascists wouldn’t take this land. You shouldn’t present war as some spectacle or show, especially this war [World War II], the most difficult of wars. We had thirty million people killed—and how many handicapped? Three times more than this. How many widows? How many homeless children were left without fathers? Therefore, this is an immense pain. Yes, with our joint efforts with the Americans and the British, we were able to overcome and defeat the fascists. This was a great accomplishment. But I don’t think fate was fair to Russia. Both America and England remained democratic, but we continued to live under the totalitarian regime of Stalin’s fascism. This was an historical injustice. But to blame someone else for this

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<sup>1</sup> The interview of Mr. Yakovlev, who expressed his regret at being unable to attend the meeting, occurred on February 22, 2005. The videotape, in Russian with simultaneous translation, is on file in the office of the International Society of Barristers. *Ed.*

would be pointless. We ourselves are guilty. We need to take this blame on ourselves. What we have done, we have done.

I'm asked this question, which is a routine question, no matter where I speak: "Alexander Nicholaevich, when did you realize, when did your new world view appear?" This question sounds strange to me. (By the way, you have the same questions.) And I would respond that for someone who *thinks*, who is able to think, this is a slow and very difficult process. If you are brought up in those schools, in the Komsomol, then in the Communist Party, it is difficult to come to the conclusion of the falseness of it all, the falseness of everything you believed in, what you were willing to give your life for at the front and worked for without counting the cost. Suddenly, it turns out that you've done all this in vain, because the society that was built is at a dead end. That society was unjust. It served the idea of some chimera of worldwide revolution, victory over capitalism, the construction of the most just society, which they called communist. In reality, it was as if the entire nation ran toward the horizon of this great and happy society, but the faster the people ran, the further away the happy society became.

### *The Foundation of Totalitarianism Begins To Crack*

One day I found myself on the balcony at the closed meeting of the Twentieth Congress of the Communist Party, which, by the way, is still an underestimated meeting. An interesting historical moment of global significance arrived. The announcement came: "A report on the cult of personality and its consequences will be presented by Nikita Sergeyevich Khrushchev," and his position was announced as First Secretary. Immediately throughout the hall there was a noise like a wave that kept rolling until he reached the podium. When he reached the podium, he raised his head, and immediately there was silence. He spoke on and on about murders, executions, and lawlessness. In the hall it was silent, without even the creak of a chair. (There might have been an occasional cough.) It was a sort of dead silence, a tense silence. I understood later why this was happening; it was because the people sitting in that hall were participants in some way or other in the actions Khrushchev was charging to Stalin. He said Stalin committed crimes and was guilty of repressions, incorrect decisions about agriculture, industry, construction, and so on.

Khrushchev claimed that the reason for Stalin's errors was that he abandoned the principles set down by Lenin. This wasn't true. Stalin was a faithful student of Lenin; he didn't come up with anything original. Lenin began the repressions. Lenin organized the concentration camps. Lenin created the system of using children as hostages. Lenin was the first to introduce the idea of executing every tenth person. Lenin adopted the practice of using ordinary people as human shields for the Red Army.

In 1955 Khrushchev said this: "We have new leadership now. We're building a developed socialism. I was a shepherd boy in czarist times. There was no socialism, but there were potatoes. And now we have practically built developed socialism,

but there are no potatoes.” The First Secretary of the Communist Party was standing there with a surprised expression, saying “there are no potatoes.” Something was going on in his head. He knew something was not right and he knew something had to be done, but he never understood and was not able to do what needed to be done.

*Yakovlev and Gorbachev: The Friendship That Changed History*

I suggest that the Twentieth Congress was also a beginning, an impulse toward perestroika. We who began perestroika and were carrying it out knew that if it hadn't been for the Twentieth Congress, the spiritual atmosphere for this would not have been prepared. Even so, the change came with great difficulty—one step forward and two steps back. Only in these conditions was it possible to begin the conversation: Isn't it time for us to get on the road to democracy and to do something more innovative?

Concerning perestroika, although they call me the architect of perestroika, I can't agree with this. Perestroika was made by *time*, not by any one person—not by me or Gorbachev. Of course, we were directly involved in it, but it had already ripened. For glasnost, for freedom of speech, however, we had to fight, and very seriously. It cost me a lot. It got to the point that at the Twentieth-Eighth Congress I had to make two speeches, giving explanations. Things went so far that in my second speech, I stated, “You can end my life, but you'll never force me to be silent.”

I should explain how Gorbachev and I came to know each other. I met the young man Gorbachev when I was the Soviet ambassador to Canada. I've always cared about agriculture, since I have peasant roots, and I had an idea to take Gorbachev, who had become a member of the Politburo, and show him the agricultural system in Canada. Pierre Trudeau and I had a very good relationship, even a friendly one. Often, he would come to see me on Sunday, without warning, driving himself, and we would talk about philosophy, about Russian literature which he loved, about many subjects, but not about diplomatic affairs. We did talk about Gorbachev before his visit. I told Trudeau, “Your planned reception of Gorbachev's visit is on a level that's not so good.” He replied that Gorbachev was invited by the Minister of Agriculture, so the plans were appropriate. I said, “All right, but it doesn't matter who invited him. I looked at the schedule you've planned for him, and it doesn't look so good.” Trudeau asked, “Why are you insisting like this?” I said, “This is the future leader of our country.” I myself got scared when I said this. What if this reached Moscow? Fortunately, no one else was there. He asked, “Are you sure?” I said, “Yes, I am sure.”

At one point the Minister of Agriculture invited Gorbachev and me to his personal farm. We arrived on time, but there was some kind of demonstration or picketing, and he was three hours late. So we had three free hours at the farm and Mikhail Sergeyevich and I went for a walk in the fields. We found ourselves alone. The bodyguards were walking by the woods, and we were alone in the fields. No one could hear what we were saying. Gorbachev told me very openly about the horrible things

going on in all spheres of life at home—in agriculture, industry, human resources. I was so inspired by his openness that I began to say to him, “What are we doing with foreign policy? Why are we scaring everyone? Why have we become the bogeyman of the whole world?” When he was leaving Canada, he said to me, “Wait for news.” Soon, I was called home. The fact that he later invited me to work with him showed that he knew what I thought and was already thinking about his future plans during that visit to Canada.

The first one and a half to two years, what did we have to do? We had to be cunning. We are sometimes accused, “You didn’t have a plan.” I answer, “What kind of plan?” We came up with a plan, denounced the totalitarian regime, introduced throughout the entire country a democratic regime, then established freedom of speech. Where would we have been before 1985? Somewhere in the camps of Magadan.

### *Reagan and the End of the Cold War*

I remember my conversation with Reagan during an early meeting on disarmament. We wrapped up the meeting for lunch or a coffee break—I can’t remember exactly. He stayed behind, and I was there picking up some papers. I asked him, “Mr. President, why don’t you want to accept our proposal about nuclear disarmament? The offer we have made at this meeting is a serious one.” He looked at me sternly, not smiling, and said, “Because we don’t believe you.” I said, “I understand. I’m not from the Ministry of Foreign Affairs, I’m not from the government and don’t bear direct responsibility as you do. That’s why I ask you to believe what I’m going to say to you now: We also don’t believe you.” And do you know what sort of answer he gave? It surprised me. He raised his head and said, “That can’t be.” “It can, and it is,” I said, “because during the many years of the Cold War, both you and we educated our nations not to believe each other and our governments are set up not to believe each other. The Cold War began in 1917, when the world was divided into two systems. Since then a lot has changed.” He said, “Is it really true that people in the Soviet Union don’t believe us?” I said, “Of course.” And I rather liked his response: “I need to think about this.” Mr. Reagan was changing before my eyes, literally in front of my eyes.

It was clear during our last meetings that he was committed to the idea of disarmament and good relations with our country. He believed. Mr. Reagan believed, and he became a completely different person. We remained on very friendly terms, which is why we began to exchange cards wishing each other “Happy New Year.” And when they opened the Reagan Library, when he was already lying sick in bed—and I thank Nancy for this—they invited me to give a speech about Reagan from the Russian side. Mr. Schultz gave a speech from the American side. This was the official ceremony to open the library.

Now we must move to a dialogue between cultures, to a dialogue between civilizations.

## JAMES BACIK: THE SPIRITUALITY OF THE PEOPLE

That was a truly remarkable film. I've had the opportunity to talk with Mr. Yakovlev, and he is even more impressive in person. He is a powerful figure, and he has made such a difference. Also, I've had the chance to share the podium with Mikhail Gorbachev on occasion, and he too is a warm and engaging figure. He has a great sense of self-deprecating humor. I must share with you a story he himself told: Two men are in the line going to the meat market, and they're in line interminably. They don't seem to be getting anywhere, and they realize they probably won't get any meat when they finally do get to the market, and they're mad. It's all Gorbachev's fault. He has ruined *everything*! He has ruined the economy, he has ruined the country. One man suddenly says, "You know, I'm going to go kill Gorbachev. Hold my place in line." He's gone for a couple of hours. When he finally gets back, his friend asks, "What happened?" He replies, "I found out that the line to kill Gorbachev is longer than this one."

I approach this as a theologian and a Catholic priest who is interested in spirituality. When I use the word "spirituality," I can start by defining it or describing it in broad terms that should be able to draw in everybody. In this broad sense, spirituality is a search for meaning in the midst of all of the absurdity of life, a search for some purpose in a world that often seems aimless. It's an attempt to find integration at a time when we feel pulled and tugged in many different directions. We live in a superficial culture, and spirituality has to do with trying to find some depth. For me, this brings to mind an image of the poet Yeats looking for a center that holds, that can hold in the midst of all the pressures, the stresses, difficulties, tugs and pulls in life. Spirituality has to do with the depth dimension of life. It has to do with who we are, our identity and how we relate to people. So when I use the word "spirituality," it has, first of all, that broad connotation.

Furthermore, spiritualities are often embodied in specific symbol systems, such as religions. You can talk about Calvinistic spirituality, as Max Weber did. You can talk about Catholic spirituality, or Russian Orthodox spirituality. And when you use it in religious terms, then in Christian terms it takes on what I call a trinitarian framework. That is, it has to do with how we hear the call of God in our own conscience and heart. It has to do with putting on the mind of Christ and seeing the world through his eyes. It has to do with responding to the spirit within us, which we call the Holy Spirit. So you can view spirituality in a lot of different ways, and those are the kinds of categories that I use to try to understand something of what is going on.

In approaching our subject today, which I want to do concretely, I asked myself *why* this man, Tom Murray, has had this long affair with the Russian people. What was it about the Russian people that attracted him? Why did he fall in love with them? How was it that the Russian people touched his soul, touched his heart, and moved him in all of these directions?

Part of the answer lies in entering into dialogue. I'm reminded of Martin Buber's classic work *I and Thou*. He makes a distinction between two types of relationships. Some relationships are "I-It," where I treat another person as an object or a means to an end, or as somebody who can get me something that I want, as somebody I'm going to manipulate or control. It's easy to fall into those kinds of relationships, of course. Buber contrasts that type with "I-Thou" relationships, where we take the other seriously, where we are willing to see the goodness in other people, where we have respect for the other people, where we expect there to be reciprocity, where there is mutual exchange.

Many decades ago in Ann Arbor, Michigan, there was an interesting dialogue between Martin Buber and the psychotherapist Carl Rogers. Carl Rogers was making his usual remarks about the importance of accepting the other person. To him, that was the key: Accept them as they are. Martin Buber said, in effect, "I don't think that's the last word. What I want to do is *confirm* people. That is, I want to be able to see the goodness in them, I want to see the potential, I want to see what other people don't see about them. That's what the eyes of love are able to do. The lover is able to see something about the beloved that others can't see, perhaps even something that the beloved doesn't see, as well."

What I believe with respect to my friend Tom Murray is that he was able to live a life of dialogue with the Russian people. He actually treated them as "Thou" in the Buber terminology. He did it first of all by learning their language. Next, he did it by entering into these people's lives where they were; he went to the homes of ordinary people and talked to them, and engaged them, and partied with them. I think it was there, out of that kind of experience with real people, that he fell in love with them, because he was in dialogue with them.

When he got to know the leaders—Gorbachev, Yakovlev, and so on—there was an added element. I was with him on some occasions when we were talking to them, and it seemed to me that he allowed them (using spiritual terms again) their process of transformation. That is, he allowed them time to develop, to think it through, to see where they were.

We sat with the people in the think tank, the intelligentsia and so on, and I remember the leader sitting there. He said, "Of course, we must move to a market system, to a free market." That man was a true believer at one time, he believed that they could change the economy and everything would be different. Now, there is a history to that. There is a great line from Leon Trotsky while he was still in competition with Stalin for control. Trotsky said something like this: "When we get the economy right, everything else will fall into place. In fact, human nature will change. The body will be more rhythmic, and the voice will be more melodius, and the average person will attain the status of Aristotle, Goethe, and Marx." So there was a belief in a sort of utopian ideal, which had something to do with the Russian soul, too.

More specifically, what did Tom Murray see in the Russian people and what was its source? When I talk to Tom, he'll say things such as this: They are warm and friendly and even fun-loving. They like nature, and they have a special feel for nature and for the vastness. The vastness of the country somehow influences that Russian soul. They have a great feeling of community, and family is absolutely crucial to them; they have a sense of relationship, of how you find your meaning and fulfillment within a larger community. They were long-suffering. "Fate is an evildoer" is one of their sayings. In other words, they have the sense of hardship, the sense that life is difficult. They also have a sense of beauty, an appreciation of beauty. When you go into some of those Russian homes, you find an icon, maybe with a candle in front of it, and incense to burn before the icon. Part of what is in the Russian soul is carried by those family religious practices. This observation brings us back to the question of the source of all those characteristics that so attracted Tom, and I link it to the great Russian Orthodox tradition. I want to talk a little bit about that tradition and try to see how I think it might be still at work in a way that could help the situation in Russia.

Back in 988 Grand Prince Vladimir I of Kiev, who was quite a rogue and a bad person in many ways, decided that he needed a religion to stabilize his principality. He sent out emissaries to find a good religion. The emissaries went to a synagogue, they went to a mosque, they went to a Roman-rite church, and they went to Hagia Sophia, the great Orthodox church in Constantinople. They came back and reported to Prince Vladimir: "We found it. We found the right place in Hagia Sophia. We attended the liturgy and it was as if heaven was touching earth; heaven and earth were brought together." (That actually is the very point of the architecture of Hagia Sophia—bringing heaven and earth together.) Then, according to legend, Prince Vladimir was baptized in the river along with many other people, and he changed his life; he became a good guy and spent the rest of his reign helping others and being a benevolent leader.

Thus, the Russian Orthodox religion was a consciously chosen religious spiritual tradition, which had been in place for nearly a thousand years before the Bolsheviks came to power in Russia. And I believe you can't understand what happened to Tom in Russia without understanding that fact, without appreciating how the Orthodox spiritual tradition has touched and influenced the soul of those people. The homes that Tom visited were not touched by Leninism or Marxism; the people weren't true believers in communism or socialism; they weren't like those people in the think tanks. Ordinary people never bought any of that; it was just repression to them. What was in their soul was connected with the wonderful Eastern Orthodox or Russian Orthodox religious system.

What is it in the Orthodox tradition that I believe Tom encountered in these ordinary Russian people? They have a wonderful sense of the transcendence of God, of the majesty of God. This comes through in their liturgy; there is a soaring sense that God is above everything. At the same time, however, Orthodoxy insists that God is

present in the world. The Orthodox talk about the divine energies that come into our own souls, our own bodies; we are divinized. Saint Basil, one of the great architects of this Eastern spirituality, says at one place, without apology, “Through the Spirit . . . we become God.” Through these divine energies, we share in the divine nature. “God became man so that we might become God,” said Saint Athanasios of Alexandria.

The response to the tsunami disaster was illustrative. We heard all kinds of religious voices. Some evangelical voices said the tsunami was a warning from God or a punishment for sin. Orthodox theologians reacted vehemently against that view. They said, “That is not the way we think of our God. Our God is mysterious. God is beyond all imagining. God’s ways are not our ways. God is not the one who is responsible for the evil in the world; we can’t pin that on God. Our response needs to focus on how we deal with this. These are long-suffering people, and the real question is not why, but how.” That summarizes the typical response out of the Eastern Orthodox world to the tsunami disaster. God was not giving a warning or a punishment; rather, God is both beyond us and yet with us in the struggle.

For those Orthodox people, Christ is the great judge of all. We see that in their icons and their paintings. Christ, for them, is one who brings truth, and the Orthodox are fervent about keeping alive the tradition of truth that Jesus gave. Christ is the one who came to free us. I am reminded of the passage on the Grand Inquisitor in Dostoevsky’s *The Brothers Karamozov*. When Jesus comes back, the Inquisitor becomes upset and says something like this to Jesus: “You’re making the same mistake you made before—you want to free the people. You think people can be free. We, the church leaders, know that isn’t true. They are like sheep. We’ve got to watch over them and guard them and tell them what to do.”<sup>2</sup> Dostoevsky is often considered one of the great interpreters of Russian spirituality; in his novels you can see the Russian spirit.

When the Russians think about the church, they also think about the church as a community of people, people who were scattered and somehow gathered. This concept is so important that a Russian lay theologian in the nineteenth century coined a word to describe it. Unfortunately, there is no good translation of the Russian word, but it suggests a strongly communal sense of the people of God. They are not independent individuals looking out and deciding whether they are going to join the church or not; rather, there is an existing community of which they simply and necessarily are a part. They believe that we humans are social creatures, we are interdependent, we are able to grow and develop only because other people love us and allow us to love them. This view gives them a sense of solidarity, of being together in the difficulties of life.

In their moral code, suffering has importance because it is redemptive. They see Christ as the great example of that; his self-sacrifice allows people to grow and saves

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<sup>2</sup> F. DOSTOEVSKY, *THE BROTHERS KARAMAZOV* pt. 2, bk. 5, ch. 5.

the human family. Again, there is a line from *The Brothers Karamazov*. Father Zossima, who is the wise figure, the teacher, says love in dreams is one thing, but love in action is a harsh and dreadful thing. Active love is labor and fortitude.<sup>3</sup> This gets at the Russian soul. Love in reality, in the concrete particularity, is demanding and challenging, an arduous business. That is part of the Russian sense of life.

After considering these aspects of the Russian Orthodox tradition, I end up thinking that what Tom Murray encountered and loved was the best of that tradition still in the minds and hearts of the people. That tradition was operative in Russia for a thousand years. In fact, in 1988, much to Gorbachev's credit, Russia had a massive celebration of the thousandth year anniversary. It started in Moscow, with public events and liturgies, and moved to Kiev, with more celebration. All the way through, the participants reflected on how orthodoxy has shaped the Russian people. It is the only thing that held them together through difficult times. It's what enabled them to survive the Soviet period. Despite repression and persecution, people continued to practice their religion; it is estimated that from 1970 to 1988 thirty million were baptized. Gorbachev himself was baptized; his mother is a practicing Orthodox Christian. Recently even President Putin said that it would be hard to imagine Russia without Christianity, without that Orthodox tradition. Even people trained in another system, even the Marxists, and even some of the hardliners were able to see there was something deeper that sustained the people, guided them, and gave them a world view.

In the post-Soviet era, problems between Catholics and Orthodox have become pressing. It's a long story, but the simple version is that the Catholics were especially persecuted under the Soviet regime, so much so that they had to leave their churches and go underground. In many cases the Orthodox Christians took over those churches. When the Catholics (Greek-rite Catholics, united with the Pope) came up from the underground, they wanted to take back those churches. At first, in the post-Soviet era, the two groups began a dialogue, but that broke down, and you read now that the Orthodox people are just not happy with the Catholic Church. They are angry at the Catholics for proselytizing, and they won't continue the dialogue until that problem gets solved.

The Orthodox also are concerned about Protestant groups. It is estimated that in the 1990s the Baptists, the Pentecostals, and the Seventh-Day Adventists grew at a rate of about twenty to twenty-five percent a year. Some people now believe that there are almost as many practicing Protestants in Russia as there are practicing Orthodox. Even though the Orthodox are not happy about this growth, it does provide further evidence that there's something in the Russian soul that seeks transcendence, that seeks the infinite.

The question becomes whether that spirituality, especially the still-dominant Orthodox spirituality, can help the country. Can Orthodox spirituality help with the

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<sup>3</sup> *Id.*, pt. 1, bk. 2, ch. 4.

economy? Can it remind people that the economy isn't the whole of life? There is the sense of the dark side of life. Can orthodoxy keep that in the mix? Can orthodoxy somehow help people to see the economy in some larger spiritual perspective? Can orthodoxy help with the political process? I think they all agree that the rule of law is essential. They have extended trial by jury, which surely is a wonderful development. Are they able to keep in mind the importance of community, the common good? Can they gather their traditions? These are the elements that can serve as the glue to hold them together and to get them through the difficult transitions.

For just a minute, I would like to shift attention from Russia to us, and I'd like to suggest that all the world's great religious traditions have something to offer us. In particular, I would like to invite all of us to cultivate an openness to this Russian Orthodox tradition—something that Tom was able to achieve—and I'll suggest some possible consequences if we were able to do that. First of all, the community or communal emphasis would be a great corrective to the extreme individualism in our own country. It would be a reminder to us that we are not just autonomous people who are trying to get as much for our individual selves as possible. In our essence we are social, interdependent members of a community. The founding fathers understood that you had to have virtue if you were going to be a good citizen, and being a good citizen was an important part of life. (This dates back at least to the early Greeks and Aristotle.) Today, we seem to have a lot of individualism, a lot of interest groups, and a lot of difficulty seeing how we can work for the common good. We could learn something from the Russian Orthodox tradition about the solidarity of working with others to make good things happen. Another discovery Tom made in dealing with the Russian people was the sense of challenge to our consumerism. We seem to believe that the more we have the better we are; we measure people by how much money they make. To what degree are we deceived about what is truly important in life?

Tom and I had a conversation last night about reason and the intellectual movement known as "The Enlightenment." We are products of the Enlightenment, which celebrated reason. Voltaire wanted to smash the "infamous thing," meaning the Catholic Church. The rationalists enthroned the statue of reason in the cathedral of Notre Dame. In our thinking, that reason has become what I call instrumental reason: What are the means to get a desired end? Very often, we don't stop to think about *why* are we doing what we are doing. Why do I need all this money? Why am I working this hard? Why am I neglecting my family to build my career? The "why" questions are the larger questions of spirituality. My perception is that the Russians can take us back to that kind of question, which we all need if we are going to grow spiritually and make our own contributions in life.

I want to conclude by turning or returning to the particularity issue, about which Tom and I have had a lot of conversations. (In one talk that I gave just before Gorbachev spoke, I discussed the intersection of the particular and the universal.) You might sit here and think about all of these weighty matters—the Russian Orthodox

tradition, spirituality, geopolitics—and then think, “What can *I* do about this?” My friend Tom Murray has taught me that we all can do *something*. He decided to help redo a hospital in Russia, as we are going to see in a few minutes. The invitation from any spirituality is how we might respond, what we could do, how we somehow apply this feeling of depth and meaning and purpose that we perceive as a gift of the spirit. When we experience that sense of integration of the “center that holds,” and when we feel blessed with the gifts, what do we *do* and how do we share the gifts? That is the spiritual question that always lurks in the background.

#### BORIS TOPORNIN: THE NEW SOCIETY

Dear colleagues and friends, first of all I should like to thank the International Society of Barristers, its President, and all my colleagues for the invitation to come here, to be with you, and to speak before you. It is really one of the greatest events in my life because now I understand that lawyers have in their careers three levels. The first level is to graduate from law school. The second level is to be a member of the International Society of Barristers. The third level, the highest, which is not for everybody, is to be with the Society in Hawaii.

I should like to ask you for permission to speak freely—and that means with mistakes and perhaps some misunderstandings. My only excuse is that now it is exactly midnight in Moscow, and the people who might think that it is my hobby to read papers at midnight might be wrong.

My first comment has to do with those who attempt to make distinctions between people based on who is a socialist and who is a capitalist and so on. It seems to me that in our times such distinctions have ceased to exist, because now all of us are living under new conditions, in new circumstances, in new societies. So I try to explain the new society with new words: post-industrial, communicative, information society, and others. This means that we are living in a new time, a time of globalization, which means that we owe everybody an end. Each country is part of the whole system, and now the only right approach, in my opinion, is to look at events from a system approach, to find the right place and function of every country in that system. We all should try to work out new ideas, new traditions, and new rules, which is very important also for Russia.

I am not empowered to represent my country, but I feel very comfortable and I am very pleased with you because of your interest in what has happened in Russia in the late decades. It seems to me that sometimes the story was shown a little bit in light terms, as an easy event. I believe it was more complicated, with more mistakes, zig-zags, and small misunderstandings. I also don't like to tell you something that is maybe unexpected, but the truth is that even the relations between two of the important persons, Gorbachev and Yakovlev, are a little bit strained now. It is not because they defended different ideas; it is because their approaches, their personal views of

how to reform the country had some diversities. Gorbachev once told me that of course it is much easier to give advice, to say how you would have done everything better than it was done, but it is more difficult to make the ideas reality, to make the right decisions all the time. You can understand that *now* it is very easy to say that some action was a mistake, it was not proportional, and so on, but it was much more difficult at the time. Nevertheless, I am sure that perestroika and the people such as Gorbachev and Yakovlev will find their places in the books of history, even after many newer events, two or three hundred years from now. I am not sure whether their story will be a special chapter, a few pages, or merely a small remark, but their place in the history of the world, not only of my country, in my opinion, is the right thing.

I am here not only to see Hawaii and to tell you about what has happened in my country, but also to understand what is your way of thinking and what are the results of the development of American legal practice and science. I think it is easier now to understand each other because we see the distinctions. What are the distinctions between the American and Russian legal soul? There are not so many now. For instance, the private ownership of property and fundamental rights are also our constitutional principles now. Yes, we have the rule of law, or, as it is cited in the Russian constitution, the state based on the law. Our constitution provides for human rights, of course, and separation of powers, and courts. The new part played by courts has not fully developed, not yet sufficiently, but if I compare the situation with the same situation ten years ago, we could speak about good results, improvements. Maybe the distinction is in our approach to the role played by the state, but we think that the last events in my country have given us some support that we are on the right path. We think that the state should be a social state more than it is now. The state should play a more active part in social functions. But I cannot see now any other differences in our approach, in our ideas. Of course, the practice is a little bit different because you have long traditions, and we don't have such long history in the application of our principles; but we are sure that we should reach the same level.

When I remember the days and the months of upheaval and the failure of communism and the collapse of the Soviet Union, I have two thoughts, as a scientist, as a professor of the law. I understand that the socialist system had no reasons to exist anymore. The only priority was the ability to mobilize the resources of the countries in the time of crisis. I supported the perestroika and other efforts of Gorbachev, and that's why I was in the time of Gorbachev among the people who tried to advise and to work out some proposals—not at the highest level, but I was involved. And I should like to say that the leaders, especially Gorbachev, were sincere when they tried to reach certain results. I remember that one night when we were working all night because we had to finish the draft of a new federative treaty by the next day, I had a moment alone with Gorbachev, and he said that maybe he wouldn't survive the collapse of the Soviet Union. Still, during this night-long meeting, I watched him trying to bring arguments and make compromises in order to achieve one thing:

keeping the Soviet Union together as a united country. He failed, but not because he didn't want it and didn't work for it. He failed because it was impossible; at that time the situation was very difficult, and nobody who tried to use democratic methods could have done better.

Now that I have been here with you, I am a little bit enriched in understanding some American thoughts and way of life. I cannot finish my words without saying that it was a real happiness in my life and the life of my family that I met Tom Murray. You have heard today something about the Russian soul, but I want you to understand that there exists the soul of Tom Murray, a great, great soul with many places for good things. He is an American citizen; in Russia, he is a visitor. But it is impossible for me to call him a foreigner. First of all, he is a wonderful friend, and he is also a man whose ideas and activities help many other people and even countries. Tom, I should like to thank you one more time.

#### FILM: THE BALASHIKHA PROJECT

##### *Introduction, on Film, by Tom Murray*

Today Russia is one of our most important allies in the world, but she is in a life-and-death struggle. You see, after communism fell and President Gorbachev brought these warm and generous people a new reason to hope, life still didn't change in many sectors of Russian society. They had a hard time under communism, but as they have struggled to change, things have gotten worse in some sectors, and one of the hardest hit areas has been health care for mothers and babies. The statistics are appalling. The average woman has three abortions. Only one of two children is born healthy, and many children suffer from preventable chronic illnesses their entire lives. Our friendship with Russia is an important part of our future and our security. When a Russian friend of mine asked, "Can't you help us help our children survive?," I began talking to my friends here in the United States, and that led to the Balashikha Project. Here's a little bit about what we have planned.

##### *The Balashikha Baby Hospital*

In Russia there's an old saying, "Every child is a miracle," but these Russian children have been born into a world that is far from miraculous. Located in Balashikha, a city of 163,000 about an hour's drive outside of Moscow, the Baby Hospital serves a region the size of Ohio. This is the only obstetric care available for thousands of women. Working to change that situation is the goal of the Future of Russia Foundation, an effort crossing national boundaries. On the Russian side, Dr. Boris Topornin, director of the prestigious Institute of State and Law and co-chairman of the Committee on Law and Medicine for the Russian Academy of Sciences, was particularly helpful in bringing together Russian doctors and in obtaining the coopera-

tion of leaders in the Russian government. Doctor Topornin: “We have done a good job. Now it’s time for doctors, for architects, for construction firms to do what they begin to do. And I think that our program has a future.”

On the American side, doctors, architects, and other professionals are helping to develop plans for Balashikha and shaping a long-term strategy. That can mean something as simple as creative use of space. But delivery suites are another matter. A new delivery suite will be built in connection with the existing facility, to give Russian babies and their mothers the care that we in the United States take for granted.

Early on, the Balashikha Project garnered prominent supporters. Following a meeting at the White House with President George W. Bush, former Soviet President Mikhail Gorbachev joined the Balashikha unveiling ceremony. On behalf of the Gorbachev Foundation, President Gorbachev presented the first official gift to help fund the project: “Our contribution will be \$20,000.” As a long-time advocate of closer ties to the West, President Gorbachev sees this project in a larger context: “I’d like to thank you once again, all of you. I hope that it is not in vain, that by meeting today the initiative will go forward, and that the initiative will be successful. This will be a very good, specific, concrete step in helping Russia on a very important matter relating to children and women. Thank you.”

Russian funding is also in place, to assure the project’s future. Governor Boris Gromov, governor of the Moscow region in which Balashikha is located, assured the fact-finding delegation that funds have been set aside to help educate Russian women about critical health needs and to help train doctors and other providers to use the new facility effectively.

The work that needs to be done here may seem to be impossible, the problem too great to solve; but if every child is a miracle, then these children deserve no less.

#### QUESTIONS AND ANSWERS

Q: This question is for Mr. Topornin. What do you think would have happened, with respect to change in the Soviet Union, if the United States in 1956 had kept what I considered to be our commitment to Hungary and had stepped in to support the revolts against the totalitarian state instead of taking the hands-off position that we took?

A: That is a very interesting question. (As you know the “interesting” questions are questions that are very difficult to answer.) You have to try to put yourself back in the situation of 1956. At that time, I don’t think that the active intervention of any other country would have been understood and appreciated, even in Hungary, by everybody. More important, you have to remember, as Yakovlev said, that the world was divided into two blocks, and the possibility of World War III was very strong. The most important thing at that time was to avoid a new world war. That’s why I believe that the American policy not to get involved was right.

Q: Tom, I was surprised when you said the congregation gave Mr. Yakovlev a standing ovation. The people in my church would never do that during a service.

A: It was remarkable; that was the only time I have known that to happen in my church. In fact, only once have I seen a reaction similar to it. That occurred when Father Bacik and I were in Russia to speak at a conference about the development of law. In the process of planning for this conference, we had realized that we had to start by explaining the Western ideas about what it is to be human. The Western conception is that the human person is the center of everything we do; we build from the dignity of the individual to our institutions—which is the inverse of the communist approach under Lenin and Stalin, in which the State was primary. Thus, we ended up in a big hall full of communists, and we had to try to get them to accept the idea that before we got into law, and law and economics, and the other subjects, they needed to understand the western conception of what it is to be a human being. That was Father Bacik's job on the panel, and he gave a talk similar to the marvelous talk he gave here in which he synthesized many currents and trends in the world. He explained what he called the cultural ethos based on the dignity of the individual to this assemblage of Russian dignitaries, the leaders of Mr. Gorbachev's perestroika movement at the time.

In the front row was a delegation from the Supreme Soviet whose leader was sitting right in front of the speaker. He looked like the stereotypical communist apparatchik, a burly man who might have been a former soccer player. He raised his hand and stood up and said, "I should like to speak." As the moderator, I said, "Of course. Please come to the podium." He came to the podium, *grabbed* the microphone, and said, "Comrades!" I thought he was going to tear us apart with Marxist-Leninism. He said, "We owe a special debt of gratitude to our friends from America to come and talk to us about their ideas of what it is to be a human being. But above all, we owe them our gratitude for thinking enough of us as fellow human beings to bring someone to talk about their deepest beliefs and their ideas of the spiritual part of all humanity. Comrades, isn't it time we began paying attention to the spiritual needs of the people of the Soviet Union?" I wept, as did every other American in that hall. To me, it was the end of the Cold War once and for all. I resolved that, no matter what, I would do all in my power to help the people who for so long had had this aspiration to be fully human in the spirit of Father Bacik's remarks and were just waiting for the opportunity to live that dream of freedom.

Q: First, I would like to thank you for such a wonderful presentation, for the many insights you have brought us, for the wonderful work you are doing which means so much to the security of the people in both of our nations and indeed the world, and also for showing us what a difference one person can make. I want to ask what any of you see as you look into the soul of Mr. Putin. Where do you see him leading Russia at this time? He seems to have pulled away from democratic reforms, but recently he commented that the movement toward democracy in Russia is irreversible.

A: (Mr. Topornin) This is another interesting question. Gorbachev and Yeltsin both were political persons from the old times. They were born, educated, and involved in politics in a time when the Soviet system was still in its full size and status. Putin is a person of the new generation, a political leader who was born in the old times, but got his education and his understanding of life in the modern times. His first priority is to restore the importance of Russia, the role we all thought Russia could play in the world. Next, he is trying to eliminate the mistakes that were made by his predecessor. Yeltsin was a reformer, and he was (and still is) a big man. My own view is that if Yeltsin had been the leader at the time of perestroika, the Soviet Union might have survived. But he also made many grave mistakes. For instance, it is impossible to understand why, in a federative state, the leader would say to the governors, "Please take as much sovereignty, as much power as you want," but that was Yeltsin's policy. When the leaders of the constituent parts of the Russian Federation began to grasp the power, it was Putin who realized that this nearly caused the collapse of the Russian Federation, and his federative reform was necessary. If we now criticize the way governors will be selected, we need to take into account the simple fact that it was necessary to strengthen the unity of the Russian federative state.

The second area in which Putin has been criticized for moving backward is the economy. Here, again, we have grave mistakes in the important reform that we call privatization. Privatization was necessary, but it was done in a hurry. Haste was perhaps the main component of the reform, and many mistakes were made. The Russian people could not release themselves into the free market overnight. It was necessary for Putin to improve the privatization by establishing some limits and making some changes, but I never thought and I don't think now that Putin's intent was to undo privatization, to "deprivatize" the economy. The market economy is his firm belief.

Third, the Chechen war is also a very complicated problem in Russia. It is a result of hundreds of years of difficult relations, but if we allow the establishment of a nationalistic and fundamentalist region in the Caucasus, there will be a new Caucasus war like the one that lasted a hundred years in the eighteenth and nineteenth centuries. Of course, I cannot say that the policy is faultless, and I am critical of the mistakes. In general, though, and in principle, I belong with the people who support Putin, his general ideas, and his policy.

Q: With some trepidation, I decided to take the microphone to ask a much more trivial question. Tom, you said that you became involved in this in the first instance because about ten minutes into the news broadcast one evening, Mr. Cronkite reported that Russian planes had been on the way to bomb America and our planes had been armed with nuclear weapons and sent flying toward Russia. My question is what in the world was more important that it took up the first nine minutes of that news broadcast? Did Mr. Cronkite say, "We'll get to the business about the world nearly coming to an end in a few minutes. But first let me tell you about this."?

A: Thank you for raising this. I had intended to comment that what amazed me most was not that the technical failure had occurred at SAC but that the American news establishment thought it didn't merit more prominent coverage than the seventh or eighth story. The next day I happened to be traveling, and I started checking various newspapers I came across because I was so astonished by the low level of attention. I found that the story was always back page news until I got a copy of the *London Times*. The *London Times* headline on the front page, if I remember correctly, was something like this: "Six Minutes Before Armageddon." They got it. My sense was that our national psyche had become benumbed to the moral dimension of the insanity that we were calling "mutual assured destruction."

I would like to add one more thing. After I told President Gorbachev the story of why I had gotten interested in Russia, he said this to me (and I'm paraphrasing): "You know, Tom, we should always try as hard as we can to change things so that never again in the future, for our children and grandchildren, will we have a world in which one man with a black box can make a decision as to whether all of us live or die." That was so simple yet profound, and I think that was the impulse behind the friendship that developed between Mr. Reagan and Mr. Gorbachev.

In closing, I want to say that I am grateful to you for giving me an opportunity to share some of these experiences. None of them would have been possible without the support of my saint Ann. I can't tell you how often I was away for a month or more in Russia, and Ann always carried on with great serenity. Let me illustrate with a little Irish story: Casey got dressed up one day to go to the soccer match. He was gone for seven years. When he came back, his wife said to him, "What happened?" He said, "We lost." She said, "Sit down now, and don't blame me if your dinner is cold."

## DEFERRED PROSECUTIONS AND THE INDEPENDENT MONITOR<sup>†</sup>

James K. Robinson,\* Philip E. Urofsky,\*\* and Christopher R. Pantel\*\*\*

*In response to today's wave of corporate investigations and prosecutions, prosecutors have sought to require significant changes in corporate culture, compliance, and controls, and, as importantly, to monitor those changes for a reasonable time. The result is the corporate deferred prosecution agreement and its adjunct, the Independent Monitor. This paper first will review the development of deferred prosecution agreements and the factors that may determine which companies receive such treatment; secondly, it will analyze the Independent Monitor's role, both the common terms of reference and certain unique terms relevant to specific cases; and thirdly, it will suggest the outlines of an Independent Monitor's workplan.*

### INTRODUCTION

“That which hath been is that which shall be, and that which hath been done is that which shall be done; and there is nothing new under the sun.”<sup>1</sup> Applying that lesson to today's climate of corporate wrongdoing, it is probably fair to say as long as there have been governments, investors, and lenders who are keenly interested in a business's books, certain businesses have been willing to cook them. Further, periodically or even cyclically, one or more businesses get caught at it, engaging in such outrageous and unambiguously dishonest behavior that the public demands corrective action, whether it be in the form of new regulation or, as now, criminal investigation and prosecution of the wrongdoing businesses and their executives.

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<sup>1</sup> *Ecclesiastes* 1:9.

Today's wave of corporate investigations and prosecutions is usually dated to the breaking of the Enron scandal in the autumn of 2001, since which time the Department of Justice has indicted over 900 defendants for corporate fraud-related offenses, including 60 chief executive officers, and obtained 500 convictions and pleas.<sup>2</sup> Similarly, the Securities and Exchange Commission (SEC) brought 679 enforcement actions in 2003 alone, approximately a third of which involved financial reporting and issuer disclosure violations.<sup>3</sup> Granted, not all of these defendants' alleged frauds rise to the level of the Enrons and WorldComs of this world, but it is nevertheless an impressive record.<sup>4</sup>

What, then, of the corporations, in whose names or on whose behalf these crimes were committed? Until recently, a prosecutor's choices, when faced with corporate wrongdoing, were essentially binary: he or she could either bring charges or decline prosecution, with no middle ground allowing for continued supervision or enforced remediation. Although the Organizational Sentencing Guidelines provided for a period of corporate probation,<sup>5</sup> neither the courts nor the probation office had jurisdiction unless the company was charged and convicted. For public and other regulated companies, prosecutors could, and often did, defer to the SEC or other federal and state regulatory agencies to bring administrative and civil enforcement actions, with sanctions ranging from injunctions to fines. Companies, however, may have viewed such actions, in which they did not have to admit to wrongdoing when settling, as merely a cost of doing business. Prosecutors, therefore, sought a third way—a way that would enable them to exercise their discretion not to charge a corporation in appropriate circumstances but that would, at the same time, give them sufficient leverage to require significant changes

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<sup>2</sup> These numbers include convictions and guilty pleas during the period from the inception of the President's Corporate Task Force on July 9, 2002, through May 31, 2004. CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT § 3.2 (July 2004), available at [http://www.usdoj.gov/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf).

<sup>3</sup> 2003 U.S. SEC. EXCH. COMM'N ANN. REP. 103, available at <http://www.sec.gov/about/annrep03.shtml>.

<sup>4</sup> Indeed, the intent behind the statistics is clear. Former Deputy Attorney General Thompson explained the goal of the President's Corporate Fraud Task Force, and noted that "[a]s we establish with ever increasing certainty the prospect that corporate criminals will lose both their fortunes and their liberty, we will have gone a long way to restoring the integrity of the market and the confidence of the nation." Thompson, Remarks at Corporate Fraud Task Force Conference (Sept. 26, 2002), quoted at <http://www.usdoj.gov/dag/cftf/>.

<sup>5</sup> The *Guidelines Manual* promulgated by the U.S. Sentencing Commission notes that corporate probation "is an appropriate sentence for an organizational defendant when needed to ensure that another sanction will be fully implemented, or to ensure that steps will be taken within the organization to reduce the likelihood of future criminal conduct." U.S. SENTENCING GUIDELINES MANUAL ch. 8 introductory cmt. (2004), available at <http://www/ussc.gov/guidelin.htm>. See also *id.* § 8D1.4, application note 1 ("To assess the efficacy of a compliance and ethics program submitted by an organization, the court may employ appropriate experts who shall be afforded access to all material possessed by the organization that is necessary for a comprehensive assessment of the proposed program.").

in corporate culture, compliance, and controls and, as importantly, allow them to *monitor* those changes for a reasonable period of time. Thus was born the corporate deferred prosecution agreement (DPA) and its adjunct, the Independent Monitor.

This paper will review the development of the DPA and the factors that appear to determine which companies receive such treatment. It will then describe the role of the Independent Monitor, both the common terms of reference and certain unique terms relevant to the facts and circumstances of particular cases. Finally, it will suggest the outlines of an Independent Monitor's workplan.

#### DEFERRED PROSECUTION AGREEMENTS

Generally, a DPA requires the potential defendant to agree to comply with certain conditions for a set period of time. In return, the U.S. government agrees not to charge or to dismiss any charges at the end of the period if the defendant has fulfilled his or her side of the bargain.<sup>6</sup> To enable the prosecutor to enforce this agreement, not to mention avoiding the risk of having postponed the trial only to lose witnesses and evidence, these agreements usually also require the potential defendant to admit to sufficient facts to ensure a conviction should he, or it, breach the agreement.<sup>7</sup>

#### *Historical Application of DPAs in the Noncorporate Context*

The DPA, or pretrial diversion, is a "longstanding alternative to incarceration ... in which criminal charges are dropped or postponed on the condition that the offender fulfill certain requirements over an extended period of time."<sup>8</sup> Pioneered in the juvenile courts, ostensibly to deal with first-time offenders, diversion from prosecution was extended to adult defendants in light of the

<sup>6</sup> See L. Rosenblum, *Mandating Effective Treatment for Drug Offenders*, 53 HASTINGS L.J. 1217, 1233 (2002); see also A. Armstrong, *Drug Courts and the De Facto Legalization of Drug Use for Participants in Residential Treatment Facilities*, 94 J. CRIM. L. & CRIMINOLOGY 133, 146 (2003).

<sup>7</sup> Typically, this is accomplished by appending a lengthy and inculpatory "Statement of Facts" to the DPA, which facts the infringing company must agree not to contest in the event that a trial becomes necessary due to noncompliance with the agreement. See, e.g., *Deferred Prosecution Agreement* para. 3, *United States v. Monsanto Co.* (D.D.C. 2004) ("Should the Fraud Section ... initiate the prosecution that is deferred by this Agreement, MONSANTO COMPANY will neither contest the admissibility of, nor contradict, the Statement of Facts in any such proceeding."); accord *Deferred Prosecution Agreement* para. 3, *United States v. America Online, Inc.*, Crim. No. 1:04 M 1133 (E.D. Va. 2004) (noting that AOL agrees not to contradict the factual statements set forth in Appendix A to the agreement). As James Comey, U.S. Deputy Attorney General, stated in announcing the AOL DPA, "If AOL fails to comply with the agreement, the deal is off, and they are in a world of trouble." Available at <http://www.dailystar.com/dailystar/related/articles/55945.php>.

Most of the deferred prosecution agreements, press releases, and other Department of Justice materials referenced in this article are available on the Department's website at <http://www.usdoj.gov/dag/cftf/>. Ed.

<sup>8</sup> *Developments in the Law-Alternatives to Incarceration*, 111 HARV. L. REV. 1863, 1902 (1998).

1962 Supreme Court decision in *Robinson v California*.<sup>9</sup> *Robinson* found, inter alia, that states could create, as an alternative to prosecution and incarceration, programs for compulsory treatment of drug offenders with the possibility of penal sanctions for treatment failure.<sup>10</sup> In 1967, two pilot pretrial intervention programs began in Washington, D.C., and New York City.<sup>11</sup> These pilot programs targeted juveniles, first-time offenders, and misdemeanor defendants—groups, it was hoped, who would be more amenable to rehabilitation programs and for whom prosecution might be “unnecessary, ineffective, or counter-productive.”<sup>12</sup> In exchange for a DPA, the individual took part in a rehabilitation program that included counseling, training, and job placement.<sup>13</sup>

Variations of these programs have spread throughout the country, generally targeting the same groups of low-level offenders, first-time offenders, and juveniles.<sup>14</sup> Under the protocols of these programs, prosecutors consider a defendant’s entrance into a DPA based more on the offender’s characteristics—i.e., whether he or she is likely to be rehabilitated—than on the offense, provided, of course, that the offense is not so serious as to disqualify the defendant from participation.<sup>15</sup> In most programs, the prosecutor has discretion to offer a particular defendant a DPA, although some jurisdictions have given this responsibility to the courts.<sup>16</sup>

### *The New Trend of Applying DPAs in the Corporate Context*

In the world of corporate crime, prosecutors did not experiment with DPAs until the 1990s. In many ways, the same factors that support and oppose deferred prosecutions in drug cases apply to corporate deferred prosecutions. Although criminal charges may be justified, prosecuting a corporation may carry significant collateral consequences and harm innocent shareholders, employees, and customers, as the *Arthur Andersen* case demonstrated.<sup>17</sup> In

<sup>9</sup> 370 U.S. 660 (1962).

<sup>10</sup> See *Developments in the Law*, *supra* note 8, at 1902 (citations omitted).

<sup>11</sup> *State v. Leonardis*, 71 N.J. 85, 94 (1976).

<sup>12</sup> *Id.* at 94–95.

<sup>13</sup> *Id.* at 95.

<sup>14</sup> See *id.*; S. Belenko, *The Challenges of Integrating Drug Treatment into the Criminal Justice Process*, 63 ALB. L. REV. 833, 846 (2000); L.M. Brennan, *Drug Courts: A New Beginning for Non-Violent Drug Addicted Offenders—An End to Cruel and Unusual Punishment*, 22 HAMLIN L. REV. 355, 378 (1998); C. McCaskill, *COMBAT Drug Court: An Innovative Approach to Dealing with Drug Abusing First Time Offenders*, 66 U. MO. KANSAS CITY L. REV. 493, 494 (1998). See also L. Rosenblum, *supra* note 6, at 1236; A. Armstrong, *supra* note 6, at 144.

<sup>15</sup> See *State v. Leonardis*, *supra* note 11, at 102.

<sup>16</sup> *Id.* at 95. See also 21A AM. JUR. 2d *Criminal Law* § 936 (1998).

<sup>17</sup> See, e.g., R. M. Cooper, *Deferred Prosecution: A Primer*, NAT’L L.J., July 25, 2005, at 12 (“The clearest example of collateral damage from prosecution of an institution is Arthur Andersen, which was not a public company or even a corporation. The prosecution destroyed the firm, put out of work thousands of Andersen employees who had no involvement in the conduct that led to the prosecution, and significantly reduced the number of large accounting firms available to meet the needs of large corporations.”).

contrast, the resolution of the *KPMG* case demonstrates that many of the collateral consequences associated with corporate prosecution may be avoided by the use of a DPA.<sup>18</sup>

In 2002, the press reported that the Department of Justice had offered Arthur Andersen a deferred prosecution agreement, which was not accepted, possibly due to the collateral consequences of admitting to wrongdoing (such as liability in civil lawsuits and issues with state regulators and public companies).<sup>19</sup> KPMG, on the other hand, although initially combative, set the stage for a settlement by issuing a statement in which it took “full responsibility for the unlawful conduct by former KPMG partners” and, indeed, fired or forced the resignation of approximately thirty partners allegedly involved in that conduct.<sup>20</sup> The divergent results of the respective tactical decisions of Andersen and KPMG provide an interesting case study in the evolving field of deferred corporate prosecution. Andersen, having failed to agree to deferred prosecution, is nearly defunct.<sup>21</sup> KPMG, conversely, having agreed to deferred prosecution, will, if it can avoid criminal prosecution by other

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<sup>18</sup> KPMG admitted criminal wrongdoing pertaining to tax fraud conspiracy related to the design, marketing, and implementation of fraudulent tax shelters, and agreed to pay a substantial fine and penalty as well as to implement a number of remedial compliance steps. Press Release, Department of Justice, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case, Aug. 29, 2005, available at [http://www.usdoj.gov/opa/pr/2005/August/05\\_ag\\_433.htm](http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.htm). See also Deferred Prosecution Agreement para. 2, KPMG (S.D.N.Y. 2005).

<sup>19</sup> See, e.g., J. Johnsson, *Where's Aldo? Andersen's Leadership Void: Needed: Truck Unit Jump-Start, Balance Sheet Tune-Up*, CRAIN'S CHI. BUS., Apr. 22, 2002, available at <http://www.kellogg.northwestern.edu/news/hits/020422ccb.htm> (“Andersen's legal problems were amplified last week when talks collapsed with the Justice Department to settle an indictment against the firm for destroying Enron-related documents. Andersen now faces a criminal trial, due to begin May 6, unless it can revive the talks. Prosecutors had offered a ‘deferred prosecution’ that would place the embattled accountancy on probation in exchange for the firm admitting criminal wrongdoing.”).

<sup>20</sup> KPMG LLP Statement Regarding Department of Justice Matter, June 16, 2005, available at <http://www.us.kpmg.com/about/press.asp?cid=1872>. See also C. Johnson, *Challenges Just Starting at KPMG*, WASH. POST, Aug. 30, 2005, at D1 (“In the past, KPMG had been famous for pushing back on regulatory initiatives and shareholder lawsuits. . . . One of KPMG's most important signals about a new tone came June 16, when the firm issued a statement taking ‘full responsibility for the unlawful conduct by former KPMG partners.’”); F. Norris, *News Analysis: Onceproud KPMG Finds Itself Humbled*, INT'L HERALD TRIB., Aug. 31, 2005, available at <http://www.iht.com> (“KPMG had already been forced to grovel as it realized that its continued existence might be in question if the Justice Department chose to file criminal charges against it. Even before the settlement was issued, it had said it took ‘full responsibility for the unlawful conduct by former KPMG partners.’”).

<sup>21</sup> The Supreme Court's recent unanimous decision to overturn the Andersen conviction (*Arthur Andersen, LLP v. United States*, 125 S. Ct. 2129 (2005) (No. 04-368)), while providing a symbolic (even though Pyrrhic) victory for the company, is not likely to make white collar prosecutions any more difficult. Robert Mintz, a former federal prosecutor, and Columbia Law School Professor John Coffee, an expert on securities law, have noted that “since the Andersen prosecution, Congress has changed the law about obstruction, making it a simpler case for prosecutors to make.” See *Andersen Conviction Overturned*, CNN MONEY, May 31, 2005, available at [http://money.cnn.com/2005/05/31/news/midcaps/scandal\\_andersen\\_scotus/index.htm](http://money.cnn.com/2005/05/31/news/midcaps/scandal_andersen_scotus/index.htm). Even this vindication for Andersen, therefore, may prove little incentive for other corporate entities to reject an offered DPA.

jurisdictions,<sup>22</sup> suffer the long-term loss of only certain practice areas directly related to the fraud.<sup>23</sup>

It is arguable, therefore, that in some cases, deferring prosecution and creating incentives for rehabilitation and quick restitution in the corporate context may benefit society more than bringing charges.<sup>24</sup> Indeed, Professor John Coffee of Columbia University has noted that, given the sanctions and remedial requirements included in corporate DPAs, “As a practical matter ... you are getting about what you would get at sentencing. You are getting it quicker. The corporation is forced to enter into this plea bargain and admit its guilt at the outset, rather than contest the charges for a year or more.”<sup>25</sup> On the other hand, prosecutors have to be wary of appearing to be soft on corporate crime or opening themselves to accusations that they allowed a corporation to buy itself out of a prosecution.<sup>26</sup>

The earliest known deferred prosecution in the corporate context is the *Prudential Securities* case in 1994.<sup>27</sup> In that case, the U.S. Attorney for the Southern District of New York charged Prudential Securities with securities fraud related to the sale of certain oil and gas partnerships. Because Prudential had made restitution payments to investors, enhanced its compliance procedures, cooperated with federal authorities, and acknowledged wrongdoing, the U.S. Attorney’s Office agreed to defer prosecution for

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<sup>22</sup> See C. Johnson, *supra* note 20 (KPMG “must try to stave off Mississippi’s attorney general, who according to news reports may file similar criminal charges against KPMG.”).

<sup>23</sup> “The agreement requires permanent restrictions on KPMG’s tax practice, including the termination of two practice areas, one of which provides tax advice to wealthy individuals; and permanent adherence to higher tax practice standards regarding the issuance of certain tax opinions and the preparation of tax returns. In addition, the agreement bans KPMG’s involvement with any pre-packaged tax products and restricts KPMG’s acceptance of fees not based on hourly rates.” Press Release, Department of Justice, *supra* note 18.

<sup>24</sup> See F.J. Warin & J.C. Schwartz, *Deferred Prosecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 IOWA J. CORP. L. 121, 121–22 (1997).

<sup>25</sup> *Professor Coffee: Andersen Committed Suicide, Not Murdered by Prosecutors*, CORP. CRIME REP., Aug. 29, 2005, at 1.

<sup>26</sup> See J. Novack, *Club Fed, Deferred*, Forbes.com, Aug. 24, 2005 (noting that some critics believe deferred prosecution as a method for dealing with big-name corporations accused of everything from accounting fraud to violations of the Foreign Corrupt Practices Act is “too soft”), available at [http://www.forbes.com/services/2005/08/24/kpmg-taxes-deferredcz\\_jn\\_0824beltway.html](http://www.forbes.com/services/2005/08/24/kpmg-taxes-deferredcz_jn_0824beltway.html). The balancing act between a fear of disproportionate or otherwise unfair collateral consequences and the appearance of being “too soft” is evident in the comments of Attorney General Alberto R. Gonzales concerning the recent DPA with KPMG LLP: “Today’s agreement requires KPMG to accept responsibility and make amends for its criminal conduct while protecting innocent workers and others from the consequences of a conviction. The stiff financial penalty announced today means that the firm is paying for its conduct, while the guarantees of cooperation, oversight, and meaningful reform will help to ensure that its future business is conducted with honesty and integrity.” Press Release, Department of Justice, *supra* note 18.

<sup>27</sup> See *United States v. Prudential Sec. Inc.*, Mag. # 94-2189 (S.D.N.Y. filed Oct. 27, 1994). See also F.J. Warin & J.C. Schwartz, *supra* note 24, at 126.

three years.<sup>28</sup> In exchange, Prudential agreed to pay an additional \$330 million to a restitution fund, install an independent director to receive complaints, and retain an independent law firm to review regulatory and compliance controls.<sup>29</sup> In 1996, Coopers & Lybrand entered into a similarly constructed agreement that deferred prosecution for two years for similar reasons.<sup>30</sup>

Corporate criminal liability is not a new concept; the underlying principles are blackletter: A corporation is liable for the acts of its employees and agents that were within the scope of their employment and, at least in part, for the benefit of the corporation.<sup>31</sup> Nevertheless, although the principle may have been clear, it was much less obvious why particular corporations were charged and others were not (or, as in the cases of Coopers & Lybrand and Prudential, given deferred prosecutions). The absence of clear guiding principles to channel prosecutorial discretion made many corporate lawyers, not to mention their clients, nervous. In 1999, the Department of Justice responded by issuing the *Principles of Federal Prosecution of Corporations*,<sup>32</sup> a list of nondeterminative factors that were intended to address the facts and circumstances that might, or might not, lead to a corporate indict-

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<sup>28</sup> The Prudential Securities DPA is a one page document attached to the criminal complaint. It was accompanied by a letter agreement that spelled out the company's obligations. In pertinent part, the Prudential DPA states "after a thorough investigation it has been determined that the interest of the United States and your own interest will best be served by deferring prosecution in this district." The term of the agreement was three years, whereupon, after successful compliance by Prudential, the United States would institute "no further prosecution." See *United States v. Prudential Sec. Inc.*, *supra* note 27 [hereinafter *Prudential Securities Letter*].

<sup>29</sup> Letter from Mary Jo White, U.S. Attorney, U.S. Department of Justice, to Scott Muller and Carey Dunne, Counsel for Prudential (Oct. 27, 1994).

<sup>30</sup> See Settlement Agreement, Coopers & Lybrand LLP (C&L) (C.D. Cal. 1996) [hereinafter *Coopers & Lybrand Agreement*]. C&L obtained confidential information, including the amounts of competitors' bids, pertaining to an Arizona government contract. One of C&L's former partners aided and abetted the concealment of prior violations of federal criminal law, including the deliberate nonproduction of documents responsive to federal grand jury subpoenas. C&L agreed to (1) pay a \$3 million fine, (2) implement a formal ethics and integrity program, and (3) perform 3,000 hours of community service. C&L's compliance with the agreement would be monitored by independent legal counsel. These reforms were deemed sufficient to minimize the likelihood of future misconduct.

<sup>31</sup> See, e.g., *United States v. Jorgensen*, 144 F.3d 550, 560 (8th Cir. 1998) ("A corporation is criminally responsible for the acts of its officers, agents, and employees committed within the scope of their employment and for the benefit of the corporation.") (internal quotation marks and citations omitted); *Mylan Lab. Inc. v. Akzo, N.V.*, 2 F.3d 56, 63 (4th Cir. 1993) ("[I]t is undoubtedly true that a corporation is liable for the criminal acts of its employees and agents done within the scope of their employment with the intent to benefit the corporation."); *United States v. Sun Diamond Growers of California*, 964 F. Supp. 486, 490 (D.D.C. 1997) ("[I]t has long been established that corporations are criminally liable for the crimes of their senior officers, particularly when the corporation benefits from the officers' offensive conduct.") (internal quotation marks and citations omitted).

<sup>32</sup> Memorandum, Deputy Attorney General Eric Holder, Department of Justice, Bringing Criminal Charges Against Corporations (June 16, 1999), available at <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

ment and thereby provide a structure within which prosecutors would exercise their discretion.<sup>33</sup>

The 1999 *Principles*, which were slightly revised and reissued in 2003,<sup>34</sup> form the backdrop for the current investigations and prosecutions of corporate financial fraud and other corporate malfeasance. The *Principles* made it clear that the Department viewed prosecutions of corporations as a valuable tool for changing corporate culture and deterring future misconduct, both within the defendant corporations and more broadly within the business community.<sup>35</sup> Despite the large number of individuals charged since the Enron debacle, however, very few corporations have been criminally prosecuted. Thus, perhaps inadvertently, the *Principles*, by drawing prosecutors' attention to a number of factors, such as cooperation, remediation, compliance programs, collateral consequences, and alternatives to prosecution,<sup>36</sup> and recognizing that those factors might justify not charging the corporation, had

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<sup>33</sup> *Id.* ("The attached document, *Federal Prosecution of Corporations*, provides guidance as to what factors should generally inform a prosecutor in making the decision whether to charge a corporation in a particular case. I believe these factors provide a useful framework in which prosecutors can analyze their cases and provide a common vocabulary for them to discuss their decision with fellow prosecutors, supervisors, and defense counsel. These factors are, however, not outcome-determinative and are only guidelines. Federal prosecutors are not required to reference these factors in a particular case, nor are they required to document the weight they accorded specific factors in reaching their decision.") In remarks before the National Press Club, then Assistant Attorney General for the Criminal Division James K. Robinson noted, "We are stepping up white collar crime enforcement while, at the same time, examining the issues of fairness and proportionality in investigating and prosecuting these cases." See J.K. Robinson, *Corporate Crime in America*, CORP. CRIME REP., Feb. 17, 1999.

<sup>34</sup> Memorandum, Deputy Attorney General Larry D. Thompson, Department of Justice, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm).

<sup>35</sup> The following passage appeared as paragraph I.A. in the 1999 version of the "Federal Prosecution of Corporations" attached to the Holder Memorandum, and remained unchanged in the 2003 version, "Federal Prosecution of Business Organizations," promulgated with the Thompson Memorandum: "Corporations should not be treated leniently because of their artificial nature nor should they be subject to harsher treatment. Vigorous enforcement of the criminal laws against corporate wrongdoers, where appropriate, results in great benefits for law enforcement and the public, particularly in the area of white collar crime. Indicting corporations for wrongdoing enables the government to address and be a force for positive change of corporate culture, alter corporate behavior, and prevent, discover, and punish white collar crime."

<sup>36</sup> Federal Prosecution of Business Organizations in Thompson Memorandum, *supra* note 34, at para. II.A (listing the relevant factors as (1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime; (2) the pervasiveness of wrongdoing within the corporation, including the complicity in, or coordination of, the wrongdoing by corporate management; (3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it; (4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation including, if necessary, the waiver of attorney-client and work-product protection; (5) the existence and adequacy of the corporation's compliance program; (6) the corporation's remedial actions; (7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and the impact on the public; (8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; (9) the adequacy of remedies such as civil or regulatory enforcement actions).

the effect of encouraging prosecutors to consider alternatives to criminal prosecution, including DPA.<sup>37</sup>

This is not to say that corporations have not been charged in the recent past. Over the past year alone, the U.S. government has charged corporations with environmental crimes,<sup>38</sup> price fixing,<sup>39</sup> fraud in federal grant programs<sup>40</sup> and violations of the Foreign Corrupt Practices Act (FCPA).<sup>41</sup> DPAs, however, have been used with more frequency recently to resolve a wide variety of criminal investigations, ranging from accounting fraud to tax fraud to violations of the FCPA. For example, the Enron Task Force entered into separate agreements with the Canadian Imperial Bank of Commerce (CIBC)

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<sup>37</sup> *Id.* at para. VI.B (“Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation’s cooperation may become critical in identifying the culprits and locating relevant evidence. In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government’s investigation.”); *see also* UNITED STATES ATTORNEYS MANUAL § 9-27.600-650 (permitting non-prosecution agreements in exchange for cooperation when a corporation’s “timely cooperation appears to be necessary to the public interest and other means of obtaining the desired cooperation are unavailable or would not be effective”). The Thompson Memorandum cited this text from the USAM § 9-27.600-650.

<sup>38</sup> Press Release, Department of Justice, Evergreen To Pay Largest-Ever Penalty for Concealing Vessel Pollution, Apr. 4, 2005, *available at* [http://www.usdoj.gov/opa/pr/2005/April/05\\_enrd\\_159.htm](http://www.usdoj.gov/opa/pr/2005/April/05_enrd_159.htm); Press Release, Department of Justice, Phosphorus Manufacturer Sentenced to Pay \$18 Million in Criminal Fine and Restitution and Clean Up Site, Apr. 29, 2004, *available at* [http://www.usdoj.gov/opa/pr/2004/April/04\\_enrd\\_282.htm](http://www.usdoj.gov/opa/pr/2004/April/04_enrd_282.htm); Press Release, Department of Justice, W.R. Grace and Executives Charged with Fraud, Obstruction of Justice, and Endangering Libby, Montana Community, Feb. 7, 2005, *available at* [http://www.usdoj.gov/opa/pr/2005/February/05\\_enrd\\_048.htm](http://www.usdoj.gov/opa/pr/2005/February/05_enrd_048.htm).

<sup>39</sup> Press Release, Department of Justice, Korean Company—Hynix—Agrees To Plead Guilty to Price Fixing and Agrees To Pay \$185 Million Fine for Role in DRAM Conspiracy, Apr. 21, 2005, *available at* [http://www.usdoj.gov/opa/pr/2005/April/05\\_at\\_207.htm](http://www.usdoj.gov/opa/pr/2005/April/05_at_207.htm); Press Release, Department of Justice, Indiana Ready Mixed Concrete Producer [Lee’s Ready Mix & Trucking Inc.] Indicted on Price Fixing Charge, May 19, 2005, *available at* [http://www.usdoj.gov/opa/pr/2005/May/05\\_at\\_279.htm](http://www.usdoj.gov/opa/pr/2005/May/05_at_279.htm). The Department of Justice has also pursued price fixing charges in the polychloroprene rubber industry. *See* Press Release, Department of Justice, Italian Company [Syndial S.p.A.] To Plead Guilty and Pay \$9 Million Fine for Participating in Polychloroprene Rubber Cartel, May 2, 2005 (also noting that DuPont Dow Elastomers L.L.C. participated in the same international conspiracy, pleaded guilty on March 29, 2005, and was sentenced to pay an \$84 million criminal fine), *available at* [http://www.usdoj.gov/opa/pr/2005/May/05\\_at\\_232.htm](http://www.usdoj.gov/opa/pr/2005/May/05_at_232.htm).

<sup>40</sup> Press Release, Department of Justice, Six Corporations and Five Individuals Indicted in Connection with Schemes To Defraud the Federal E-Rate Program, Apr. 7, 2005 (“A federal grand jury in San Francisco today returned a 22-count indictment against six companies and five individuals on charges of fraud, collusion, aiding and abetting, and conspiracy in connection with E-Rate projects at schools in seven states”), *available at* [http://www.usdoj.gov/opa/pr/2005/April/05\\_at\\_169.htm](http://www.usdoj.gov/opa/pr/2005/April/05_at_169.htm).

<sup>41</sup> On March 1, 2005, in federal district court in San Diego, Titan Corporation pleaded guilty to a three-count criminal information charge of violating the Foreign Corrupt Practices Act’s anti-bribery and books-and-records provisions, as well as aiding and abetting the filing of a false tax return. *See* United States v. Titan Corp., No. 05-0314 (S.D. Cal. 2005); *see also* Press Release, Department of Justice, DPC (Tianjin) Ltd. Charged with Violating the Foreign Corrupt Practices Act, May 20, 2005 (alleging payment of approximately \$1.6 million in bribes in the form of commissions to physicians and laboratory personnel employed by government-owned hospitals in China), *available at* [http://www.usdoj.gov/opa/pr/2005/May/05\\_crm\\_282.htm](http://www.usdoj.gov/opa/pr/2005/May/05_crm_282.htm); Press Release, Department of Justice, ABB Vetco Gray, Inc. and ABB Vetco Gray UK Ltd. Plead Guilty to Foreign Bribery Charges, July 6, 2004, *available at* [http://www.usdoj.gov/opa/pr/2004/July/04\\_crm\\_465.htm](http://www.usdoj.gov/opa/pr/2004/July/04_crm_465.htm).

and Merrill Lynch & Co. after concluding that both had aided and abetted Enron's manipulation of separate financial reports.<sup>42</sup> Similarly, the Justice Department agreed to defer prosecution against America Online, Inc. (AOL) and Bristol-Myers Squibb, both of which were alleged to have engaged in improper accounting to meet market expectations.<sup>43</sup> In one matter, both sides of a conspiracy to commit securities fraud, PNC ICLC Corp. (PNC) and American Insurance Group (AIG), were given DPAs.<sup>44</sup> As noted above, KPMG LLP recently entered into a DPA involving its participation in designing and marketing fraudulent tax shelters.<sup>45</sup> Finally, in the FCPA context, since December 2004, the Department has entered into DPAs with InVision Technologies, Monsanto Company and Micrus S.A., all of which are alleged to have paid bribes to foreign officials to obtain business.<sup>46</sup> Even state prosecutors have joined in, with the Attorney General of Oklahoma entering into a deferred prosecution agreement with MCI, WorldCom's successor, to settle charges of fraudulent accounting.<sup>47</sup>

Apart from the *Principles of Federal Prosecution of Corporations*, which largely address the binary decision whether to charge or not to charge, the Department has not provided any official guidance as to when a prosecutor should agree to *defer* prosecution. Indeed, the only reference to DPAs in the

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<sup>42</sup> The Enron Task Force determined that CIBC and its personnel violated federal criminal law in connection with the sale of financial assets by Enron to a Special Purpose Entity and also that CIBC aided and abetted Enron's violation of federal criminal law in connection with the same transactions. Letter from the Enron Task Force to Gary Naftalis, Counsel for Canadian Imperial Bank of Commerce (Dec. 22, 2003) [hereinafter *CIBC Letter*]. The Enron Task Force, additionally, found violations in transactions initiated at year-end 1999 relating to Merrill Lynch & Co.'s temporary "purchase" from Enron of Nigeria power barges and the subsequent sale of the barges and offsetting energy trades involving back-to-back options. Letter from the Enron Task Force to Robert Morvillo and Charles Stillman, Counsel for Merrill Lynch & Co., Inc. (Sept. 17, 2003) [hereinafter *Merrill Lynch Letter*].

<sup>43</sup> See Deferred Prosecution Agreement, United States v. America Online, Inc., Crim. No. 1:04 M 1133 (E.D. Va. 2004) [hereinafter *AOL Agreement*]; Deferred Prosecution Agreement, United States v. Bristol-Myers Squibb Co. (D.N.J. 2005) [hereinafter *Bristol-Myers Agreement*].

<sup>44</sup> See Deferred Prosecution Agreement, PNC ICLC Corp. (W.D. Pa. 2003); see also Press Release, Department of Justice, American International Group, Inc. Enters into Agreements with the United States, Nov. 30, 2004 ("With today's joint agreements totaling \$126,366,000, coupled with an agreement reached last year between the Department and [PNC], in which PNC agreed to pay \$115 million in penalties and restitution, the Department of Justice and the SEC have obtained \$241,366,000 in restitution, disgorgement, penalties and prejudgment interest in connection with off-balance-sheet transactions ..."), available at [http://www.usdoj.gov/opa/pr/2004/November/04\\_crm\\_764.htm](http://www.usdoj.gov/opa/pr/2004/November/04_crm_764.htm).

<sup>45</sup> See letter agreement between David N. Kelley, U.S. Attorney for the Southern District of New York, and Robert S. Bennett, counsel for KPMG LLP (Aug. 26, 2005) [hereinafter *KPMP Agreement*], available at <http://www.usdoj.gov/usao/nys/pressrelease2005.html>.

<sup>46</sup> See Nonprosecution Agreement between the Department of Justice and InVision Technologies Corp. (Dec. 2004) [hereinafter *InVision Agreement*] (the InVision matter also included a civil settlement with the SEC); Agreement between the Department of Justice, Criminal Division, Fraud Section, and Micrus Corporation and its Swiss Subsidiary Micrus S.A. (Feb. 28, 2005) [hereinafter *Micrus Agreement*]; Deferred Prosecution Agreement, United States v. Monsanto Co. (D.D.C. 2004) [hereinafter *Monsanto Agreement*].

<sup>47</sup> News Release, Oklahoma Attorney General, State To Gain 1,600 Jobs from WorldCom Agreement, Mar. 12, 2004, available at [www.oag.state.ok.us](http://www.oag.state.ok.us).

*Principles* is in the context of encouraging or rewarding cooperation.<sup>48</sup> Readers are, therefore, left to review the explanations, such as they are, that are contained in the DPAs themselves or in the Department's press releases announcing them.

In the earliest corporate deferred prosecution, *Prudential Securities*, the U.S. Attorney for the Southern District of New York provided one of the most detailed explanations, stating:

[T]he decision to enter into a deferred prosecution agreement with PSI was based on a variety of factors, including: PSI's payment of an additional \$330 million to compensate innocent investors and its prior settlement with the SEC in October 1993, which included its paying an initial \$330 million into a fund established to compensate victims and its agreeing to enhanced compliance procedures; PSI's cooperation with the United States Attorney's Office during the investigation, including its acknowledgement of its own wrongdoing; the concern that an indictment would cause crippling collateral consequences to thousands of innocent employees and investors; and the fact that the core of the criminal conduct occurred in the 1980's and the departure from PSI of the individuals believed to be responsible for the wrongful acts.

... The public interest is well served by this agreement. Upon conviction, a corporation cannot be sentenced to jail but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect future wrongdoing. This agreement imposes such sanctions. ... If PSI fulfills all of its obligations under the agreement, further prosecution will be unnecessary.<sup>49</sup>

Similarly, in the *Coopers & Lybrand* matter, the U.S. Attorney for the Central District of California noted several factors as supporting the decision to defer prosecution:

Coopers & Lybrand's conduct following notification of possible wrongdoing ... coupled with its public acceptance of responsibility, its ongoing cooperation in the government's investigation, its payment of a multi-million dollar sum, its agreement to perform significant community service, and its agreement to institute ethics training nationwide exemplify a commitment to ethical corporate behavior and minimize the likelihood of future misconduct.<sup>50</sup>

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<sup>48</sup> See Federal Prosecution of Business Organizations in Thompson Memorandum, *supra* note 34, at para. VI.B (“[A] corporation's cooperation may be critical in identifying the culprits and locating relevant evidence. In some circumstances, therefore, granting a corporation immunity or amnesty or pretrial diversion may be considered in the course of the government's investigation.”).

<sup>49</sup> Press Release, U.S. Attorney's Office for the Southern District of New York, Oct. 27, 1994, at 3–4.

<sup>50</sup> News Release, U.S. Attorney for the Central District of California, Sept. 19, 1996, at 2.

The public acceptance of responsibility referred to in the U.S. Attorney's statement consisted of a detailed seven-page "public statement" setting out the improper conduct and condemning it.<sup>51</sup> Of course, the facts that the former Coopers & Lybrand partner who was allegedly involved in the conduct had died shortly after his indictment and that the U.S. Attorney was continuing to investigate Coopers & Lybrand's client, a high-profile local politician, might also have been relevant factors.<sup>52</sup>

In more recent times, the Justice Department has generally not provided such detailed apologia but has instead listed a fairly uniform set of factors. For example, in *Micrus*, the Department stated that it had "determined that entry into the Agreement, as opposed to institution of a criminal prosecution, is appropriate under the circumstances," which included the company's voluntary disclosure, its prompt disciplinary action of officers and employees "primarily responsible for the conduct," its ongoing cooperation, and the absence of any prior criminal history.<sup>53</sup> Similarly, in *Monsanto*, the Department stated that its agreement to defer prosecution "reflects Monsanto Company's previous actions in investigating misconduct in its Asia-Pacific operations, voluntarily reporting its findings, and cooperating in the government's subsequent investigation; its adoption of the remedial measures set forth herein; its commitment to maintain and independently review such measures; and its willingness to continue to cooperate with the Fraud Section in its investigation."<sup>54</sup>

The government's most detailed recent explanation for deferring a prosecution can be found in the Bristol-Myers Squibb agreement, which recites in detail what the government obviously viewed as extraordinary remedial acts by the company. These included retaining a former federal judge as an "Independent Advisor" to conduct a comprehensive review of its "internal controls, financial reporting, disclosure, planning, budget and projection processes and related compliance functions of the Company"; settling an enforcement action with the SEC which entailed payment of a substantial penalty and restitution as well as continued retention of the Independent Advisor; making an additional substantial restitution payment in connection with a shareholders' securities litigation; making significant personnel changes including replacing several senior officers and creating new senior positions devoted to compliance and controls; making changes to various controls; and establishing an effective compliance program.<sup>55</sup> In addition,

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<sup>51</sup> Public Statement, Coopers & Lybrand LLP, Sept. 20, 1996.

<sup>52</sup> *Id.*

<sup>53</sup> *Micrus* Agreement, para. 3.

<sup>54</sup> *Monsanto* Agreement, para. 2.

<sup>55</sup> *Bristol-Myers* Agreement, para. 5.

the company agreed to make changes to its corporate governance structure, including the appointment of a nonexecutive chairman of the board and the appointment of a nonexecutive director “acceptable to the [U.S. Attorney]”; retaining a Monitor; endowing a chair for teaching business ethics and corporate governance at a local university; making additional restitution payments; and disclosing specific categories of information in its quarterly and annual public filings with the SEC.<sup>56</sup>

Similarly, although KPMG had engaged in a pattern of deception and even obstruction with respect to IRS and congressional inquiries,<sup>57</sup> it apparently took a more cooperative approach once the Department of Justice opened a criminal investigation. For example, in June 2005, *before* it reached any settlement with the Department, the firm issued a statement acknowledging responsibility for the “unlawful conduct of former KPMG partners,” stating that it was taking steps to “insure that those responsible for wrongdoing have been separated from the firm,” and announcing that it had undertaken various “firm-wide structural, cultural and governance reforms to ensure the highest ethical standards.”<sup>58</sup> Although the KPMG agreement merely recites the usual factors involving acceptance of responsibility and ongoing cooperation,<sup>59</sup> the Statement of Facts provides additional details concerning KPMG’s cooperation and remediation, including, *inter alia*, conditioning employment and payment of legal fees for current *and* former partners on cooperation with the government (and, in fact, terminating employees who refused to cooperate), declining to enter into any joint defense agreements, waiving privileges, and refraining from conducting certain internal inquiries that the government feared might interfere with its investigation.<sup>60</sup>

The scope of Bristol-Myers Squibb’s remedial actions and KPMG’s cooperation is breathtaking and is probably well beyond what most companies would be willing or need to do. The factors noted in other agreements such as *Monsanto* and *Micrus*, however, are not particularly enlightening when it comes to predicting whether the government will agree to a DPA. Voluntary disclosure, cooperation, employee discipline, and remedial compliance steps

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<sup>56</sup> *Id.*, paras. 7-11, 18, 20-21, 25.

<sup>57</sup> Information, *United States v. KPMG LLP*, Civ. No. 05-Cr-903 (S.D.N.Y. 2005); *KPMG Agreement* paras. 27, 31 *et seq.*, available at <http://www.usdoj.gov/usao/nys/pressrelease2005.html>. See also *KPMG Agreement*, Exhibit C—Statement of Facts, para. 23 *et seq.* This pattern of behavior contrasts sharply with that of two other firms implicated in the tax shelter scandal, PricewaterhouseCoopers LLP and Ernst & Young LLP, both of which reached civil settlements with the IRS and were apparently not the subject of a criminal investigation. See C. Johnson, *supra* note 20.

<sup>58</sup> See *KPMG LLP Statement*, *supra* note 20; see also C. Johnson, *supra* note 20 (KPMG’s new management team had taken “aggressive steps . . . to clean house,” including firing or inducing the resignation of thirty partners.).

<sup>59</sup> *KPMG Agreement*, para. 10.

<sup>60</sup> *KPMG Agreement*, Exhibit C—Statement of Facts, paras. 35-36.

are almost de rigueur in the post-Enron, post-Sarbanes-Oxley atmosphere, and they closely track the factors identified both in the *Principles* as favoring nonprosecution and in the Sentencing Guidelines for reducing a corporation's sentence.<sup>61</sup> Therefore, it appears that the decision whether to prosecute, decline prosecution, or defer prosecution remains, as it always has, in the hands of the individual prosecutor and is dependent upon his view not only of the factors in the *Principles*, including such aggravating factors as the involvement of senior management and the extent and duration of the unlawful conduct, but also of intangibles such as the prosecutor's view of the genuineness of the corporation's cooperation, compliance, and remediation. Further, it is likely that particular divisions at "Main Justice" or particular U.S. Attorneys' Offices may be more or less likely to entertain requests for deferred prosecutions, based on policy concerns or the front office's political or philosophical predilections.

A further complicating factor is that corporate DPAs may take one of two forms. In one, the corporation is actually charged, with a complaint or criminal information being filed in the appropriate federal district court. The government then requests that the court continue any proceedings for the period of the DPA, at the end of which period the government will move to dismiss the charges. Although the court might require the company to appear for a status conference or to adopt the agreement on the record, the company is not required to enter any formal plea. In the other form, no charges are filed, and the agreement takes the form of a letter containing the usual conditions as well as a waiver of the statute of limitations to permit the government to file charges at a later date if the company breaches the agreement. In both forms, the company may be required to pay the equivalent of a criminal fine (usually denominated a nonrefundable "penalty"), adopt a statement of facts in which it admits to all the elements of the offense, agree to implement various remedial steps, and, as discussed below, retain an Independent Monitor.

Again, the Justice Department, unfortunately, has not provided any public guidance as to which factors will determine whether a particular company will be able to obtain a letter agreement or will have to suffer the further stigma of being charged in a filed pleading. The facts in *InVision* and *Mon-santo* provide some clues but they are by no means determinative. In *InVision*, the bribes in question were few in number and small in amount, and, in fact, the company's management had identified a suspicious payment request from an intermediary in Thailand and refused to make the payment.<sup>62</sup>

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<sup>61</sup> U.S. SENTENCING GUIDELINES MANUAL, *supra* note 5, § 8C2.5—Culpability Score (and factors relevant thereto); *see also* Federal Prosecution of Business Organizations in Thompson Memorandum, *supra* note 34, at para. II.A(1)-(9)—Factors to be Considered.

<sup>62</sup> *InVision* Agreement, para. 3.

In contrast, although the criminal information in *Monsanto* charged only one bribe, the parallel SEC complaint alleges that the company's Indonesian subsidiary paid an additional \$700,000 of questionable payments to 140 Indonesian government officials and family members over an extended period of time, during which time the company apparently conducted no internal audits of its subsidiary.<sup>63</sup> Thus, although both companies voluntarily disclosed the conduct, agreed to cooperate, and implemented remedial measures, the Department apparently viewed the amount and duration of the corrupt conduct in Monsanto's case as justifying the more public denunciation of a filed pleading.

Corporations are probably grateful that the government is willing to entertain the possibility of deferred prosecutions rather than automatically reaching for the indictment trigger. The *Principles* initially suggested, however, that a prosecutor faced with a corporation that had violated the law had three choices: prosecution, alternatives to prosecution, and nonprosecution. Although there are exceptions,<sup>64</sup> deferred prosecution appears to have largely replaced nonprosecution as an option. Like a deferred prosecution against a low-level, first-time offender, there are good policy reasons for deferring prosecutions against corporations. It is possible, however, that the burdens of deferred prosecution—significant monetary penalties, the looming threat of prosecution for the term of the agreement, mandatory cooperation, remedial compliance measures, and the potential nuisance of a Monitor—may cause corporations to question the benefits of such agreements.

#### INDEPENDENT MONITORS

An Independent Monitor was included in the first-known corporate DPA—the *Prudential Securities* case—and it has been a regular condition of almost every DPA since. Indeed, prosecutors have become so enamored of the idea that they have begun to include Independent Monitors in outright

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<sup>63</sup> See Complaint, Sec. & Exch. Comm'n v. Monsanto Co., Case No. 1:05CV00014, at paras. 2-3, 21, 23, 24 (D.D.C. filed Jan. 6, 2005); see also SEC Litigation Release No. 19023, *Monsanto Settles Action and Agrees to Pay a \$500,000 Penalty*, Jan. 6, 2005, available at <http://www.sec.gov/litigation/litreleases/lr19023.htm>.

<sup>64</sup> During the summer of 2005, just prior to the transition from one U.S. Attorney to another in the Southern District of New York, the U.S. Attorney's Office announced a spate of nonprosecution agreements, including ones with Tommy Hilfiger, U.S.A., with respect to an investigation into foreign and domestic tax fraud, Royal Dutch Petroleum Company (Shell) in connection with overstating oil and gas reserves in its filings with the SEC, and MCI, in connection with the WorldCom accounting fraud debacle. See News Releases at [www.usdoj.gov/usao/nys/pressrelease2005.html](http://www.usdoj.gov/usao/nys/pressrelease2005.html). In its News Releases announcing the Shell and MCI agreements, the U.S. Attorney's Office specifically referred to the Thompson Memorandum and noted each company's cooperation, its remedial actions, and its settlement with other agencies, including the SEC.

prosecutions—matters in which charges are brought and the corporation sentenced.<sup>65</sup> Further, the SEC has also adopted the mechanism and included either prospective monitors or retrospective examiners in several recent agreements.<sup>66</sup>

Independent Monitors have been used in a variety of recent enforcement actions. In the five most recent enforcement actions involving the Foreign Corrupt Practices Act, against Titan Corp., InVision Tech, DPC Tianjin, Monsanto Co., and Micrus Corp., the Department of Justice and the SEC have each required the corporation to retain an Independent Monitor.<sup>67</sup> Independent Monitors have also figured in several recent accounting fraud matters,<sup>68</sup> as well as the KPMG fraudulent tax shelter investigation.<sup>69</sup> Similarly, the SEC has recently used Independent Monitors as parts of settlement agreements with both WorldCom and Credit Suisse First Boston (CSFB).<sup>70</sup>

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<sup>65</sup> Plea Agreement paras. 26-30, United States v. DPC Tianjin Ltd., No. CR 05-482 (C.D. Cal. 2005) [hereinafter *DPC Tianjin Agreement*].

<sup>66</sup> See, e.g., Sec. & Exch. Comm'n v. Monsanto Co., *supra* note 63 (monitor); Sec. & Exch. Comm'n v. Time Warner Inc., Civ. No. 1:05CV00578-GK (D.D.C. 2005) (forensic examiner); Sec. & Exch. Comm'n v. The Titan Corp., Civ. No. 05-0411 (JR) (D.D.C. 2005) (independent consultant).

<sup>67</sup> In the *Titan* matter, the SEC required retention of an independent consultant to review the company's FCPA compliance procedures. See *Titan*, *supra* note 66. "DOJ also required Titan to retain an independent consultant to assist in instituting a strict compliance program and internal controls to prevent future FCPA violations—an increasingly common settlement requirement." F. Shaheen & N. Green, *Penalties Get Tougher for FCPA Violations*, Nat'l Def., Sept. 2005, available at [http://www.nationaldefensemagazine.org/issues/2005/sep/ethics\\_corner.htm](http://www.nationaldefensemagazine.org/issues/2005/sep/ethics_corner.htm). InVision was required by the Justice Department to retain an FCPA Compliance Monitor (*InVision Agreement*, paras. 10-13) and also an "Independent Consultant" by the SEC to ensure that its corporate compliance program was designed to detect and prevent violations of the FCPA (SEC Litigation Release No. 19078, SEC Settles Charges Against InVision Technologies for \$1.1 Million for Violations of the Foreign Corrupt Practices Act, Feb. 14, 2005, available at <http://www.sec.gov/litigation/litreleases/lr19078.htm>). DPC Tianjin's plea agreement and the SEC order require DPC itself to implement an effective FCPA compliance program and requires the retention of an Independent Monitor (or, for the SEC, independent consultant), who is charged with monitoring the implementation of the FCPA compliance program and reporting back to the agencies. See Cadwalader, FCPA Advisor, June 2005, at 3. The DOJ required that Monsanto retain an independent expert for a period of three years to review its compliance program (*Monsanto Agreement*, para. 9), and the SEC mandated that Monsanto retain an independent consultant to review and make recommendations concerning the company's FCPA compliance policies and procedures (SEC Litigation Release No. 19023, SEC Sues Monsanto Company for Paying a Bribe, Jan. 6, 2005, available at <http://www.sec.gov/litigation/litreleases/lr19023.htm>). Micrus, however, received only an FCPA Compliance Monitor. See *Micrus Agreement* paras. 10-13.

<sup>68</sup> See *AOL Agreement* (investigation into various business transactions between AOL and numerous AOL business partners); letter from the Enron Task Force to Merrill Lynch & Co., *supra* note 42.

<sup>69</sup> *KPMG Agreement* para. 18 *et seq.*

<sup>70</sup> The SEC sought, and, on July 3, 2002, received approval for the appointment of a corporate monitor as part of the settlement with WorldCom. See SEC Litigation Release No. 18147, In WorldCom Case, SEC Files Proposed Settlement of Claim for Civil Penalty, May 19, 2003, available at <http://www.sec.gov/litigation/litreleases/lr18147.htm>. The SEC filed charges against CSFB for abusive practices relating to the allocation of stock in "hot" initial public offerings. CSFB undertook, among other remedial measures, to retain an independent consultant to review its new policies concerning the allocation of IPO stock, and also to adopt the recommendations of the independent consultant. SEC Release 2002-14, SEC Charges CSFB with Abusive IPO Allocation Practices, Jan. 22, 2002, available at <http://www.sec.gov/news/headlines/csfbipo.htm>.

Independent Monitors are not, however, necessarily required by every DPA with the Department of Justice. The agreements with AEP Energy Services, PNC, BDO Seidman, Sears, and Banco Popular did not require Independent Monitors. In those cases, however, the prosecutors may well have relied on monitors appointed by other regulatory agencies or on the fact that the company was already a highly regulated entity subject, particularly after its deferred prosecution, to strict oversight. For example, the AEP Energy Services DPA was part of a multiagency package that included settlements with the Federal Energy Regulatory Commission (FERC) and the U.S. Commodity Futures Trading Commission. As part of the FERC settlement, the company agreed to monitoring by the FERC staff of its “compliance with Standards of Conduct, Market Behavior rules, and the Commission’s NGPA regulations.”<sup>71</sup>

In most cases, the Independent Monitor is not selected until the DPA has been executed and, where necessary, accepted by the court. The Department of Justice or the SEC obviously has a great deal of input into the selection process, whether going so far as to select the Monitor, as in *CIBC* and other agreements drafted by the Enron Task Force,<sup>72</sup> or merely requiring that any Independent Monitor selected by the company be “acceptable” to the government, as in *Monsanto* and *Micrus*.<sup>73</sup> In some cases, however, such as *Bristol-Myers Squibb*, where the company had already retained a retired federal judge as an “Independent Advisor,” the agreement will contemplate that the company’s previously retained consultant be retained as the Monitor.<sup>74</sup> In other cases, the Department and the company may agree on an acceptable Monitor during the settlement negotiations.<sup>75</sup>

The terms of reference, of course, vary depending on the nature of the underlying offense. In *AOL*, which had already restated its financial statements, revamped its controls, and was in the process of negotiating a settlement of remaining accounting issues with the SEC, the focus of the Monitor’s terms of reference was on “AOL’s internal control measures related to its accounting for advertising and related transactions; the training related to these internal control measures; AOL’s deal sign-off and approval procedures; and AOL’s corporate code of conduct.”<sup>76</sup> In contrast, in *InVision*,

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<sup>71</sup> See Press Release, Federal Energy Regulatory Commission, Commission Accepts \$21 Million Civil Penalty To Settle Investigation of AEP’s Natural Gas Activities, Jan. 26, 2005, available at <http://www.ferc.gov/press-room/press-releases/2005/2005-1/01-26-05-aep.asp>.

<sup>72</sup> See, e.g., *CIBC* Letter para. 10; *Merrill Lynch* Letter para. 9.

<sup>73</sup> *Monsanto* Agreement para. 9; *Micrus* Agreement para. 11.

<sup>74</sup> *Bristol-Myers* Agreement para. 11.

<sup>75</sup> See, e.g., Press Release, Department of Justice, *supra* note 18 (“Richard Breeden, former Securities and Exchange Commission Chairman, has been appointed to serve as the independent monitor.”).

<sup>76</sup> *AOL* Agreement para. 13.

*Monsanto*, *Micrus*, *Titan*, and *DPC Tianjin*, all of which were FCPA matters, the focus was on evaluating the effectiveness of the companies' FCPA compliance programs and its controls related to preventing corrupt payments.<sup>77</sup> On the other hand, in *KPMG*, which involved the design and marketing of fraudulent tax shelters, the Monitor was charged not only with monitoring compliance with the agreement and implementation of a compliance program, but also with monitoring personnel decisions involving culpable employees, certain restrictions on KPMG's tax practice, and the operations of certain practice areas.<sup>78</sup>

Nevertheless, there are certain common elements. First, all of the agreements include some requirement that the Monitor be "independent" of the company. For the most part, this term is not defined, but other provisions provide some guidance. For example, the *DPC Tianjin* plea agreement provides: "It shall be a condition of the Monitor's retention that the Monitor is independent of DPC Tianjin and that no attorney-client relationship shall be formed between them."<sup>79</sup> Further, to the degree that there is any privilege pertaining to communications between the Monitor and the company, most agreements require the company to waive the privilege and state that any revocation of the waiver is a breach of the agreement, thereby ensuring that the Monitor is able to communicate with the government without restriction.<sup>80</sup> Further, in some cases, the Monitor is given tasks beyond mere monitoring and is charged with acting as a conduit and intermediary between the government and the company, gathering information at the government's request.<sup>81</sup>

Secondly, most agreements involving Independent Monitors include some sort of reporting requirement. For example, the *AOL DPA* requires the Monitor to prepare a report "on the effectiveness of AOL's internal control

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<sup>77</sup> See, e.g., *Monsanto* Agreement para. 9.

<sup>78</sup> *KPMG* Agreement para. 18(a).

<sup>79</sup> *DPC Tianjin* Agreement para. 27. See also *Micrus* Agreement, para. 11.

<sup>80</sup> See, e.g., *Monsanto* Agreement para. 9 ("To the extent that Monsanto Company structures the retention of the independent compliance expert such that the attorney-client privilege could conceivably be applicable, it shall be a condition of that retention that Monsanto Company shall waive as to the Fraud Section and the U.S. Securities and Exchange Commission the attorney-client privilege and any other protections accorded to communications and client confidences with respect to communications between the independent compliance expert and Monsanto Company and the independent compliance expert's work product."); *DPC Tianjin* Agreement para. 27 ("If DPC Tianjin, the Monitor, or any other party or tribunal asserts or determines that communications between the Monitor and DPC Tianjin are protected by the attorney-client privilege or that documents created or reviewed by DPC Tianjin or the Monitor in connection with the Monitor's work are protected by the work product doctrine, then DPC Tianjin shall waive ... any protections afforded to such communications and documents concerning the Monitor's work."); *CIBC* Letter para. 10.

<sup>81</sup> See, e.g., *CIBC* Letter para. 10 ("The Monitor shall ... coordinate with the SEC, Federal Reserve, and OSFI and provide information about CIBC as requested by those agencies."); *Micrus* Agreement para. 12 ("The Monitor shall: ... (e) coordinate with the SEC and provide information about Micrus as requested by that agency."); *InVision* Agreement para. 12(e) (same).

measures,”<sup>82</sup> while the *CIBC* agreement provides simply that the Monitor shall “report to the Department ... on an [sic] least a semi-annual basis, as to CIBC’s compliance with this Agreement.”<sup>83</sup> The Department appears to have envisioned that the *Monsanto* and *KPMG* Monitors, on the other hand, would have more immediate reporting obligations. The *Monsanto* Monitor, for example, was to report any corrupt payments he might detect to the company’s general counsel first and then, if not satisfied with the company’s response, to the Department directly.<sup>84</sup> Similarly, the *KPMG* Monitor was specifically empowered to “at his or her option, conduct an investigation [into potentially illegal or unethical conduct], and/or refer the matter to KPMG’s compliance office, the [U.S. Attorney’s] Office, the IRS, or a Designated Agency.”<sup>85</sup> Some agreements are structured so that the Monitor files his reports with the company’s audit committee,<sup>86</sup> general counsel,<sup>87</sup> or compliance officer,<sup>88</sup> albeit usually with copies to the Department.<sup>89</sup> Finally, particularly in agreements involving FCPA violations, the Monitor’s reporting responsibilities may be extended to include reporting to or sharing its reports with “any ... foreign law enforcement or regulatory agency” investigating payments to foreign officials by the company.<sup>90</sup>

Thirdly, most agreements spell out the broad terms of a compliance program that addresses the specific underlying conduct, such as accounting fraud or the FCPA noncompliance, and then tie the Monitor’s responsibilities directly to this program. For example, the *Micrus* and *InVision* agreements noted that the companies had *no* effective FCPA compliance programs and accordingly instructed the respective Monitors to monitor each company’s implementation of a FCPA compliance program and to “ensure that the Policies and Procedures are appropriately designed to accomplish their goals.”<sup>91</sup> In the *CIBC* agreement, the Monitor was charged with evaluating the bank’s compliance with its agreement not to “engage in certain structured

<sup>82</sup> *AOL* Agreement para. 13(c).

<sup>83</sup> *CIBC* Letter para. 10.

<sup>84</sup> *Monsanto* Agreement para. 9.

<sup>85</sup> *KPMG* Agreement para. 18(e)(IV). The agreement also requires the Monitor to report “not less often than every four months” regarding KPMG’s compliance with the agreement and on any changes “necessary to foster KPMG’s compliance with any applicable laws and standards.” *Id.*

<sup>86</sup> *AOL* Agreement para. 13(c). The *AOL* agreement requires the Monitor to provide its report to Time Warner’s Audit and Finance Committee, with copies to the Department of Justice. However, it also requires the Monitor to provide periodic reports to the Department “as to AOL’s cooperation with the Monitor.” *See id.* para. 13(e).

<sup>87</sup> *Merrill Lynch* Letter para. 9(c).

<sup>88</sup> *Monsanto* Agreement para. 9(c).

<sup>89</sup> *See* note 86 *supra* (noting that under *AOL* Agreement para. 13(e), the Monitor is to provide periodic reports to the Department of Justice).

<sup>90</sup> *See DPC Tianjin* Agreement para. 29; *Micrus* Agreement para. 13; *InVision* Agreement para. 13. This provision is not included in the *Monsanto* agreement.

<sup>91</sup> *Micrus* Agreement para. 11; *InVision* Agreement para. 12 & app. A, para. 1.

finance transactions with United States public companies” and “to implement specific new policies and procedures relating to the integrity of client and counterparty financial statements and quarter-end and year-end transactions.”<sup>92</sup> A significant part of the implementation of such programs is, of course, training, and the Monitor in *Coopers & Lybrand* was specifically charged with monitoring and reporting on the company’s ethics training.<sup>93</sup>

In addition, many of the agreements permit the company latitude to amend any policies implemented as a result of the agreement, provided that such amendments do not “diminish” the new policies.<sup>94</sup> In some cases, however, the Monitor is given final authority over the program. For example, the *Micrus* DPA provides, “During the Monitor’s term, no amendments or changes will be made to the Policies and Procedures without the prior approval of the Monitor.”<sup>95</sup>

Fourthly, in most cases the agreements envision a lawyer or a law firm acting as the Monitor,<sup>96</sup> although some agreements, such as those in the *Monsanto* and *DPC Tianjin* matters, refer more generally to “an outside, independent compliance expert ... (who may be an individual, partnership or other entity, including outside counsel).”<sup>97</sup> In some cases, the Monitor is specifically authorized to hire accounting experts<sup>98</sup> or to coordinate with experts appointed by other agencies.<sup>99</sup> In the *Merrill Lynch* case, the Department required the company to hire *two* Monitors—an auditing firm “to undertake a special review” of the company’s new policies and procedures concerning “the integrity of client and counterparty financial statements and year-end transactions” and “an individual attorney ... to review work of the auditing firm.”<sup>100</sup> Similarly, in *AOL*, the Department required AOL to hire an Independent Monitor to focus on prospective compliance, while the SEC, in a separate agreement with AOL’s parent, Time Warner, required it to hire a forensic examiner to review the accounting for certain historical transactions.<sup>101</sup>

<sup>92</sup> *CIBC* Letter paras. 3, 9, 10.

<sup>93</sup> *Coopers & Lybrand* Agreement para. 13.

<sup>94</sup> See, e.g., *CIBC* Letter para. 9; *Monsanto* Agreement para. 8.

<sup>95</sup> *Micrus* Agreement para. 13. See also *DPC Tianjin* Agreement para. 29; *Monsanto* Agreement para. 8.

<sup>96</sup> See, e.g., *Prudential Securities* Letter at 3 (“retain a mutually acceptable outside counsel”); *CIBC* Letter para. 10 (*CIBC* “will retain and pay for an outside, independent law firm”); *InVision* Agreement para. 11 (same).

<sup>97</sup> *Monsanto* Agreement para. 9; *DPC Tianjin* Agreement para. 27.

<sup>98</sup> *AOL* Agreement para. 13(f); *DPC Tianjin* Agreement para. 31.

<sup>99</sup> *CIBC* Letter para. 10 (Monitor may rely “as appropriate in the judgment of the Monitor on the outside monitor named under the agreement between *CIBC* and *OSFI* and the Federal Reserve”).

<sup>100</sup> *Merrill Lynch* Letter para. 9.

<sup>101</sup> SEC Release 2005-38, SEC Charges Time Warner with Fraud, Aiding and Abetting Frauds by Others, and Violating a Prior Cease-and-Desist Order; CFO, Controller, and Deputy Controller Charged with Causing Reporting Violations, Mar. 21, 2005 (“The company also agreed to engage an independent examiner to determine whether the company’s historical accounting for certain transactions was in conformity with [GAAP].”), available at <http://www.sec.gov/news/press/2005-38.htm>.

Lastly, several agreements have included clauses addressing the consequences of future mergers, sales, or acquisitions. As early as the *Prudential Securities* agreement, the government required the company, as well as its parent corporation, to agree that it would “not directly or indirectly transfer ownership or assets of [Prudential Securities] in such a way that would frustrate the purposes of this Agreement.”<sup>102</sup> Several recent agreements specifically emphasize that the appointment of a Monitor continues even in the event of a sale, transfer, or merger. For example, at the time the *InVision* agreement was executed, the company had already signed a merger agreement with General Electric (GE). The agreement, therefore, obligated the company to retain a Monitor *only* if the merger did not close; if it did, the agreement provided that “the obligations of InVision respecting an FCPA compliance program shall be governed by the separate agreement entered between the Department and GE.”<sup>103</sup> That agreement obligated GE to retain an Independent Consultant for the more limited purpose of “evaluat[ing] the efficacy of the integration by GE of InVision into GE’s existing FCPA compliance program” and reporting to the Department on this integration.<sup>104</sup>

A similar structure was established in the *DPC Tianjin* plea agreement, even though that company was not, at the time, involved in any known merger discussions. In that agreement, the government required the company to include in any future sales or merger agreement a provision “binding the purchaser or successor fully to the obligations described in this Agreement ... including the provisions set forth in the FCPA Compliance Program and Monitor Section.”<sup>105</sup> The government also recognized, however, that a new owner, who had not been involved in the corrupt conduct, might not need the supervision and oversight of a Monitor. Thus, it provided that, in the event of a merger, the Monitor would review “the effectiveness of the purchaser’s or successor’s program for compliance” and, if that program is satisfactory to the government, determine the “efficacy of the integration” of the company into the purchaser’s program.<sup>106</sup> If the government is satisfied that “the purchaser or successor has effectively integrated [the company] into its existing ... compliance program, the purchaser or successor will no longer be bound by the ... Compliance and Monitor provisions of this Agreement.”<sup>107</sup> On the other hand, if the government is *not* satisfied with the purchaser’s program or the company’s integration into the purchaser’s program, then the pur-

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<sup>102</sup> *Prudential Securities* Letter at 3.

<sup>103</sup> *InVision* Agreement para. 11.

<sup>104</sup> *GE* Agreement para. 5.

<sup>105</sup> *DPC Tianjin* Agreement para. 31. *See also Monsanto* Agreement para. 17; *AOL* Agreement para. 21.

<sup>106</sup> *DPC Tianjin* Agreement para. 31(a), (b).

<sup>107</sup> *Id.* para. 31(b).

chaser or successor remains subject to the Monitor provision of the agreement, “solely with respect to the business operations of [DPC Tianjin].”<sup>108</sup>

To sum up, then, almost all deferred prosecution or plea agreements calling for an Independent Monitor will include the following elements: (1) some guarantee of the independence of the Monitor; (2) some form of reporting requirement; (3) some responsibility for monitoring a newly implemented compliance program, in addition, perhaps, to other responsibilities; (4) some description of the Monitor’s necessary qualifications or expertise; and (5) some provision for future changes in the corporate structure or ownership. Where they differ is largely on the margins and will depend, in large part, upon the facts and circumstances of the offense and, in some cases, the corporate structure of the company.

#### A MODEL INDEPENDENT MONITOR WORKPLAN

Independent Monitors operate pursuant to the terms of reference in a carefully negotiated agreement. The scope of their review may be narrow or broad, their reporting requirements may be periodic or singular, and their reporting obligations may be to the government alone or also to the company’s management, to its audit committee, or, as in *AOL*, to its parent corporation’s audit committee.<sup>109</sup> Obviously, any workplan must be custom-designed to satisfy these requirements. The following basic elements, however, are likely to be present in any Independent Monitor’s workplan.

##### *Retention*

Selection is only the beginning of the process. The first step is obviously to negotiate a retention agreement. This is a three-party negotiation, involving the Monitor, the government, and the company. The retention letter must fill out or clarify any vague or ambiguous terms of reference in the deferred prosecution or plea agreement; establish fees and expenses, as well as any limits thereon; state whether the Monitor is authorized to hire experts to assist him; etc.

Further, as most Monitors are lawyers who are members of law firms, it must establish the relationship between the Monitor and his law firm, including whether the Monitor may use (and bill for) lawyers at the firm, address the issue of any current or future conflicts between the company and the firm, and set the limits for future recusal by the Monitor from work involving the company or its affiliates.

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<sup>108</sup> *Id.* para. 31(c).

<sup>109</sup> *AOL* Agreement para. 13(d).

### *Familiarization*

Once selected and retained, the Monitor needs to “get up to speed” on what brought the company to its current unfortunate situation. The first step in this process is, of course, to read the basic pleadings or other documents related to the DPA. These would include the agreement itself; the complaint, criminal information, or statement of facts; any related pleadings, such as charges or complaints against the company’s current or former officers or employees or third parties alleged to have conspired with them; and any written submissions by the company to the government, such as any submission to the Department relating to the *Principles* or a Wells submission to the SEC.

Secondly, the Monitor should meet with the prosecutors or the SEC enforcement attorneys and, if appropriate, the investigating agents or accountants. This conversation should include both a debriefing concerning the scope of the government’s investigation, including allegations that were not included in the pleadings, as well as a discussion as to the government’s expectations of the Monitor’s work.

Thirdly, the Monitor should seek and review public source information, such as articles or books about the company or about any trials involving the alleged misconduct.

### *Workplan: Initial Stages*

The workplan obviously needs to reflect the terms of reference. The workplan should include both a list of documents that the Monitor wants the company to provide and a list of employees that the Monitor wants to interview.

The Monitor should plan on an initial period of “getting the lights up,” in which he familiarizes himself with the company’s organization, meets with the senior management, identifies the key compliance and control processes, interviews the employees responsible for them, and begins to identify relevant periodic reports and other documents in which he is interested.

Interviews may raise several issues that the Monitor will need to address at this early stage. Generally, the company, having just signed an agreement with the government, has sufficient incentive to be cooperative and will likely make any employee available to the Monitor. The employees, on the other hand, to the extent they were even tangentially involved in any of the conduct that was under investigation, may be understandably nervous and, furthermore, may still be represented by counsel. In some cases, therefore, it may be necessary to discuss with counsel the scope of the requested interview and to agree to focus on the employee’s current duties and the current practices at the company and to avoid questions about historical facts and procedures. Further, if this employee is a potential government witness in a forthcoming trial, the Department or the SEC may also prefer that the Moni-

tor not generate additional written statements that could, conceivably, be discoverable by the defense.

In addition, the Monitor should determine what form of *Miranda*-style warnings should be given prior to beginning the interview. As discussed above, although retained by the company, the Monitor's reporting obligation is often to the government, and the DPA or retention agreement usually provides the government with unfettered access to the Monitor. The company's communications with the Monitor, therefore, will likely not be deemed privileged, regardless of the terms of the agreement, nor will the Monitor's interviews with the company's employees.<sup>110</sup> Thus, to dispel any misconception that the Monitor is representing the company, the Monitor should, prior to any interview, explain that any information provided to him may be shared with the government.

During this initial period, the Monitor will also want to familiarize himself with the company's controls. While doing so, of course, the Monitor should begin to focus on the specific controls, if any, that relate to his terms of reference. For instance, if, as in *Monsanto*, the Monitor is tasked with reviewing and monitoring the FCPA compliance program,<sup>111</sup> the Monitor will want to identify the procedures in place for retaining agents, making payments overseas, lobbying foreign governments, etc. On the other hand, if, as in *AOL*, the Monitor is tasked with a broader mandate to review and monitor a compliance culture as it relates to business practices and revenue recognition,<sup>112</sup> then the Monitor will need to focus on the company's gen-

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<sup>110</sup> The government has been willing to include language in its agreements that provides the company with a basis for preserving the privilege. See, e.g., *CIBC* Letter para. 10 (requiring CIBC to waive privilege "as to the Department, the SEC, the Federal Reserve, and OSFI" but stating that the "sharing of such communications ... is not intended to constitute a waiver of any privilege under any federal or state law that would shield from disclosure to any other third party any such communications"); *DPC Tianjin* Agreement para. 27 (providing that waiver is "only as to" the Department of Justice, the U.S. Attorney's Office, and the SEC and stating "The sharing of such communications by the Monitor with the DOJ and the SEC is not intended to constitute a waiver of any privilege under any federal or state law that would shield from disclosure to any other third party any such communications."); *Micrus* Agreement para. 11 (same); *KPMG* Agreement para. 8(e)(II) (same). In the absence, however, of a congressionally enacted federal rule or law recognizing a privilege for such communications to the government, the traditional rule against selective waivers will probably prevail. See T. Loomis, *DOJ Encourages Waiving Attorney-Client Privilege*, N.Y.L.J., Feb. 23, 2003 ("Corporate defense lawyers also point out that once a company waives the privilege, anyone can gain access to the unprotected documents, including class action plaintiffs' lawyers."); see also *Interview with United States Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, U.S. ATT'YS' BULL., Nov. 2003, at 1, 4 ("While there is varying case law in this area, it is true that courts have held that waiver to the Government during a criminal investigation can result in a waiver with respect to civil litigants. There is pending litigation about the enforceability of Government agreements to keep privileged information confidential and there have also been legislative proposals to protect information disclosed via waivers to the SEC. So the landscape in this area may be changing."), available at [http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usab5106.pdf](http://www.usdoj.gov/usao/eousa/foia_reading_room/usab5106.pdf).

<sup>111</sup> See *Monsanto* Agreement para. 9(c).

<sup>112</sup> See *AOL* Agreement para. 13.

eral compliance and ethics program, its accounting controls, and its Sarbanes-Oxley cycles and certification procedures.

Once the Monitor is satisfied that he has a basic understanding of how the company is organized, which procedures and controls are relevant to his task, and which employees are responsible for those procedures and controls, he should schedule meetings with the government and company management. With respect to the government, the Monitor needs to confirm that he is doing what the government expects from him and understand what the government will want to see and hear at the end of the process. In addition, the Monitor may want to provide the government with his preliminary views and report on the company's cooperation.<sup>113</sup> With respect to the company, the Monitor will want to ensure that the company understands what he will be doing for the rest of the term of his appointment and what the Monitor is going to expect in terms of reports and access. In addition, the Monitor may want to provide the company with any preliminary suggestions for improvement or discuss any issues that have arisen during the initial period.

*Workplan: Secondary Stages*

Having identified key controls and procedures, the Monitor can now move on to the task of *monitoring*. This will, of course, involve both reviewing documents and conducting more interviews.

There is simply no way the Monitor can, or should, review all transactions in which the company is involved. Thus, the Monitor must identify some way of viewing the "big picture" and then focus on specific transactions that are, or may be, of interest. For example, in the *AOL* matter, which involved advertising sales and revenue recognition, the Monitor may review periodic reports on advertising sales and only request the underlying documentation for transactions over a threshold amount or that meet other criteria. He can then follow up on specific transactions by asking for additional detail or interviewing the employees involved in the transactions. He may also want to attempt to follow the transactions through the company's procedures from inception to final accounting. In contrast, in an FCPA matter, such as *Mon-santo* or *InVision*, the Monitor may request regular reports on due diligence involving foreign agents, consultants, and joint venture partners as well as perform in-depth reviews of all the documents relating to a particular foreign contract.

Further, in addition to monitoring specific transactions or types of transactions, the Monitor should plan on conducting regular periodic interviews or meetings with the key personnel responsible for the relevant controls and

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<sup>113</sup> See *id.* (requiring periodic reports to the government on the company's cooperation with the Monitor).

procedures. For example, in an accounting case, it may make sense to schedule these meetings after the close of each quarter and review any issues that came up in preparing the quarterly reports and certifications.

### *Reports*

At a minimum, the Monitor is likely to want to create a record of what he did during the term of his appointment, provide some description of the relevant controls and procedures that he monitored, and identify any flaws or problems he encountered. How detailed this report should be and whether it should include supporting documentation will likely be the subject of discussions with the government and management, particularly as it may become public at some point.

### CONCLUSION

The Independent Monitor is still largely a new creature in corporate criminal prosecutions. Thus far, no Monitor's report has been released, and it is not possible to evaluate the efficacy of the Monitor mechanism. In theory, however, the Monitor should serve as a sort of private Pretrial Services Officer (or, in the case of a company that is charged and convicted, a private Probation Officer), ensuring that the company, which has been allowed essentially to "remain out on bond" for the length of the DPA, remains on good behavior and fulfills its part of the bargain. At the very least, the presence of the Monitor may provide sufficient incentive for the company to maintain a heightened level of controls after the initial scare of the government investigation has worn off and perhaps long enough for a culture of compliance and controls to become ingrained in the company.

The value of the DPA is also yet to be determined. The fact that the government has not announced even informal policies that would provide guidance on what would make a company eligible for a deferred prosecution, what the limits are on the sanctions that can be imposed through a deferred prosecution, and what remains of the promise of nonprosecution offered by the *Principles of Federal Prosecution of Corporations* is disturbing. Although companies may feel relieved to have escaped a full-blown prosecution and conviction, with the attendant collateral consequences, the prospect of living for several years with the threat of a prosecution hanging over them may turn out to be more limiting than a quick conviction might have been. Further, companies that examine the level of monetary "penalties" and punitive remedial requirements exacted by the government in return for deferred prosecution, not to mention the costs associated with retaining Independent Monitors, may well wonder whether the game is worth the candle.

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