

**Corporate Counsel, Internal Investigation and the Government Investigation: A
Brief Primer in Making Your Way Through a Potential Minefield¹**

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A golden age for white collar criminal prosecutions has dawned. Since mid-2002, the Department of Justice [“DOJ”] has charged more than 900 individuals in more than 400 corporate-fraud cases and more than 500 of those defendants have been convicted.²

The Key Document in this area is the DOJ’s memorandum entitled “*Federal Prosecutions of Corporations.*” Apart from other usual factors in determining whether to charge a corporation, the following factor plays a prominent role in deciding the “proper treatment” of a corporate target:

*“the corporation’s timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents...”*³

Typically, for company counsel, the game begins when the company receives a grand jury subpoena or one of its officers or employees receive a subject letter. A grand jury subpoena means that *serious* inquiries are being made regarding potential criminal

¹ For an excellent discussion in this area, see Androphy, J., *White Collar Crime*, Chapter 3 (West Publication, Second Edition).

² D. Solomon and A.M. Squeo, Crackdown Puts Corporation, Executives in New Legal Peril, *Wall Street Journal* (June 20, 2005) at A1.

³ Since 1999, the Department of Justice’s decisions about whether to charge a corporation with a crime have been governed by either the “Holder Memorandum” — so named for former Deputy Attorney General Eric Holder — or the “Thompson Memorandum” — former Deputy Attorney General Larry Thompson’s eponymous memo issued in 2003. For an analysis of the Thompson Memorandum and its repercussions on white-collar crime investigation and prosecution, see Joshi, A., An End to “Backseat Driving”? The Thompson Memorandum and Government Tactics in White-Collar Crime Investigation and Prosecution. *The Michigan Business Law Journal*, Spring 2007. In December 2006, Deputy Attorney General Paul McNulty issued his own “McNulty Memorandum,” which, as the memo itself said, was an attempt to recognize the concern “that our practices may be discouraging full and candid communications between corporate employees and legal counsel.” The McNulty Memo has been widely criticized as, in essence, “rearranging the deck chairs on the Titanic.” See Martz, Stephanie, The Attorney-Client Privilege Protection Act of 2007, *The Champion*, May 2007. The Memorandums are available on the Department of Justice’s webpage: <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>.

liability (notwithstanding the Assistant United States Attorney's [AUSA] assurances) of the corporation and / or its senior management. For a public corporation, this may mean that it has a duty to report the investigation to the SEC – a duty to report any proceedings “known to be contemplated by government authorities.”⁴ Whether this includes grand jury proceedings is an open question.⁵

At this stage, the company generally decides to conduct (if it has not already commenced) an Internal Investigation.⁶ Senior management for the company, in consultation with the in-house counsel should decide: (1) which individuals are best suited for this function; (2) their roles; (3) who they report to; and (4) whether their report should be written or oral. It would be advisable for in-house counsel to establish formal guidelines and procedures for this type of investigation.

Generally, it is preferable to employ outside counsel to conduct this type of investigation - not only to avoid the appearance that the investigation is a sham, but mainly to maintain the confidentiality of the investigation and the investigative report under the attorney-client privilege and the work product doctrine. Governmental agencies have been known to argue that where an investigation is done by in-house counsel, it was merely a “fact finding venture” rather an inquiry for the sole purpose of giving legal advice.⁷ If for budgetary concerns, an in-house investigation is the only remedy, the senior management (e.g. a Board Committee for Internal Investigation) should prepare a

⁴ 17 C.F.R. § 229.103 (1990).

⁵ See *U.S. v. Matthews*, 787 F.2d 38 (2d Cir. 1986).

⁶ Pedowitz, L., Conducting and Protecting Internal Corporate Investigations, *Business Crimes Bulletin: Compliance & Litigation* (Mar. 1994); Lotchin, T., No Good Deed Goes Unpunished: Establishing a Self-Evaluating Privilege for Corporate Internal Investigations, 24 *Corporate Counsel Review* 81 (July 2005).

⁷ *Securities and Exchange Commission v. Gulf & Western Industries, Inc.* 518 F.Supp. 675, 681-83 (D.D.C. 1981)

request in writing designating one of the in-house *attorneys* as special counsel and outline the scope of the investigation as a *legal* inquiry.

Are The Investigation And Its Results Privileged? If So, To Whom Does The Privilege Belong?

The attorney-client privilege in a corporate context has many interesting contours.⁸ Under *Upjohn*⁹, any written reports prepared concerning interviews with officers and employees are protected from compelled disclosure by the attorney-client privilege. However, company counsel should remember that:

- (a) the privilege only protects disclosure of communications and not of the underlying *facts*;
- (b) presence of a third person while such communications are made or the disclosure of an otherwise privileged communication to a third person, eliminates the intent for confidentiality on which the privilege rests;
- (c) the burden of demonstrating the privilege is on the party who invokes it; and
- (d) the privilege belongs to the company, and an attorney or an employee cannot waive it without the company's consent.

As a practical matter the corporation's attorney-client privilege is of little value as an incentive to convince employees to speak to the corporate attorney. This is especially the case when the government has no duty to inform a corporation that it is contacting one of its employees as part of its investigation of the corporation. Only if corporate counsel is acting in a dual capacity as an attorney for the corporation and the employee,

⁸ See *Upjohn Co. v. U.S.*, 449 U.S. 383, 101 S. Ct. 677 (1981)

⁹ *Id.*

may the employee claim a privilege.¹⁰ Functioning in a dual capacity is a dangerous strategy. It poses huge risks and offers few benefits.¹¹

Further, the work product doctrine protects from discovery, materials prepared or collected by an attorney “in the course of or preparing for possible litigation” – *except* upon the showing of substantial need and undue hardship.¹²

Interviewing Corporate Employees¹³

Before interviewing corporate employees, counsel in charge of internal investigation should advise the employees of their rights and also warn the employees of any potential conflicts. The typical *Upjohn* Advisements consist of:

- We are company counsel
- What you say may be privileged...and that’s the company’s privilege
- The company could choose to waive this privilege, but *you* can’t.
- Now ... tell me everything

However, some courts have held the *Upjohn* advisements to be too “watered down” and have required the investigating attorneys to move beyond the basic advisements¹⁴:

¹⁰ See *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 611 n.5 (8th Cir. 1977)

¹¹ Multiple representation – e.g. of the corporation and its employee – may result in criminal charges of obstruction of justice if company counsel advises an employee, for example, to assert the Fifth Amendment solely to protect an officer of the corporation. See *U.S. v. Cintolo*, 818 F.2d 980 (1st Cir. 1987). A solution to this problem could be the formation of a joint defense committee. Such a committee is made up of the lawyers representing the clients who are under joint investigation or have been jointly indicted. Any meetings of and communications between the attorneys on the committee are protected by the attorney-client privilege, even if the interests of the clients become adverse. However, a properly worded mutual defense agreement should be executed.

¹² See *Hickman v. Taylor*, 329 U.S. 495 (1947); Fed. R. Civ. P. Rule 26(b)(3).

¹³ See R. Fitzpatrick, “Ex Parte Communications with Current and Former Employees,” CA01 ALI-ABA 377 (1996) – the author cites 40 states (and the District of Columbia) which have addressed the propriety of contacting former employees of an adverse corporate party.

Counsel may want to:

- advise of the possibility of punishment by the company;
- explain that the company may disclose what employee said to the government;
- explain that untruthful statements later repeated to the government by investigating / company counsel may lead to the employee's prosecution for perjury ...

Where it appears that the interests of the company are or may become adverse to those of the employee being interviewed (this *will* happen with some of the employees), clarity as to the nature of the lawyer's role is critical.¹⁵ During the introductory remarks, company counsel should make it painstakingly clear (in a non-threatening and a non-intimidating way) to the employee that he or she is an attorney for the corporation and then should state the advisements as listed above.¹⁶ After the conclusion of the interview, company counsel should memorialize the substance of the conversation with each witness. This memorandum should reflect counsel's standard introductory and closing remarks concerning the *Upjohn* advisements, employee's communication to counsel, counsel's response to any questions posed by the employee¹⁷ and counsel's impressions with respect to the witness. The memorandum should also identify any documents that may have been discussed during the interview. Finally, the memorandum should be

¹⁴ See *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333 (4th Cir. 2005), cert denied, 126 S.Ct. 1114 (2006) (noting that "watered-down *Upjohn* warnings" given by the investigating attorneys – who represented to the employees that they could represent the employees too as long as no conflict arose – represented a "potential legal and ethical minefield.")

¹⁵ Rule 1.13 of the ABA Model Rules of Professional Conduct and its Comment

¹⁶ Corporate counsel differ in their approach towards providing the *Upjohn* advisements to an employee before the interview. Some adopt a sly approach of wording these advisements in a manner as to deliberately confuse an employee and not putting the employee on proper notice. In the author's opinion, this strategy has considerable pitfalls and almost always comes back to haunt corporate counsel.

¹⁷ Again, making it clear that counsel was not providing any legal advice to the employee,

marked as being attorney-client privileged and as being subject to the work product doctrine.¹⁸

Getting Your Message To The Employees Before The Government Agents Get Theirs

It is a well known maxim of the law in the area of white collar defense that a witness is the property of neither the government nor the company.¹⁹ More often than not, government investigators will contact the target corporation's employees at the employee's home, in the evening, when the employee is relaxed and away from the workplace environment. Government investigators will also suggest to these employees that they do not need to seek counsel or consult with company representatives prior to being interviewed. In these circumstances, the employees are not usually aware that:

- (a) they have *no* obligation to talk to the government investigators;
- (b) they have a right to consult with counsel prior to agreeing to any interview;
and, most importantly,
- (c) the company may be obligated or willing to advance the costs of such representation.

In the predatory circumstances of government investigations, it would be advisable for company counsel (in-house or outside counsel) to distribute a memorandum to employees that contains the following information:

- (a) that the government is conducting an investigation of certain matters;

¹⁸ See *Upjohn v. U.S.*, supra at 399; Bennett, R., Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era, 62(1) *The Business Lawyer* 55, 72 (November 2006)

¹⁹ *U.S. v. Medina*, 992 F.2d 573, 579 (6th Cir. 1993).

- (b) that government investigators may wish to interview employees in connection with the investigation;
- (c) that the company has retained outside counsel to represent it in connection with the investigation;
- (d) that the company also has arranged for an attorney to be available to provide advice to those employees who wish to consult with counsel;
- (e) that the role of separate counsel would be to advise employees as to whether it is in the employee's interest to be interviewed, and the appropriate conditions for such interview;
- (f) that as the matters at issue occurred during the employee's tenure as an employee, the company has agreed to be responsible for advancing fees and related expenses for the employee's legal representation in connection with the investigation;
- (g) that while the company recommends that the employee consult with counsel prior to consenting to any interview, it is the employee's prerogative to decide whether to do so;
- (h) that should the employee consent to an interview, it is essential that the employee be truthful in responding to questions at any interview; and
- (i) that the company requests that the employee promptly advise it of any contacts or communications with government investigators whether or not the employee elects to speak with separate counsel.

By using such a memorandum, company counsel can document the propriety of the advice given to the employees, minimize the confusion on their part and preserve the advice to avoid any allegation that the company and / or its counsel attempted to tamper

with or improperly influence a potential witness or to otherwise obstruct the government's inquiry.

Separate Counsel for an Employee: Always a Sound Strategy

More often than not, where a company is the subject or target of a criminal investigation, there is a serious conflict between it and its personnel. An employee may have taken the impugned action based upon information or direction received from an officer of the corporation. Even if contrary to company policy, the action may very well be attributed to the company, and the company could be held liable for the acts of its employees. In such circumstances, the interests of the company, the officer and the employee may vary, and counsel for the company should refrain from providing legal advice to the individuals involved.²⁰

Also, there are important *strategic* advantages for company counsel to recommend that the company retain separate counsel for the employees, to wit:

- (a) separate counsel generally have greater credibility regarding representations made on behalf of individuals;
- (b) the government investigators may be more forthcoming with separate counsel for the individual, than with company counsel;
- (c) separate counsel can prepare the individual to be interviewed or to testify or advise the individual not to be interviewed or assert a privilege not to testify –

²⁰ Further, the potential for conflict is exacerbated by the Sentencing Guidelines as the Guidelines create significant incentives for corporations to cooperate with governmental authorities in the prosecution of individuals within the company responsible for illegal conduct. *See e.g. U.S. v. McVay*, 447 F.3d 1348, 1350 (11th Cir. 2006).

without any risk of an allegation that the company or company counsel was improperly attempting to influence the witness's testimony;

- (d) in appropriate circumstances, separate counsel may provide corporate counsel with a briefing regarding any informal interviews.²¹

Corporate counsel generally are reticent in retaining a separate counsel for individual employees because they believe that separate counsel will be more likely to protect the attorney-client privilege than to waive it to win points for “cooperation” with the government. The solution to this conundrum could be entering into a “joint defense agreement” – an arrangement where the parties have separate attorney-client relationships and their own attorney-client privileges, yet wish, for strategic reasons, to share information with the other participants. A communication made under a joint defense arrangement does not waive the underlying attorney-client privilege.²² Even if a party withdraws from this arrangement, withdrawal is prospective; the withdrawing party may not disclose communications made during the course of the joint defense efforts.²³

Further, company counsel and separate counsel for an employee have several incentives to share information between them. To enumerate a couple:

- (a) First, the employee's counsel needs information from the corporation. Key documents are likely to be corporate property. Also, other employees may be reluctant to give interviews directly to an individual's counsel but may be willing

²¹ See Bennett, R., Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era, 62(1) *The Business Lawyer* 55, 75-76 (November 2006)

²² See Mathewson, L., Joint Defense Agreements in the Corporate Context: No Guarantees, *Champion*, September / October 2005.

²³ However, to learn about the pitfalls of Joint Defense Agreements, see *U.S. v. LeCroy*, 348 F.Supp.2d 375 (E.D.Pa. 2004).

to talk to the in-house or corporation's outside counsel conducting an internal investigation. An individual's attorney should be eager to learn the results.

- (b) Second, the corporation will want information from the employee. With separate counsel for an employee, the employee would feel more confident to provide information (and any communication that may have been forthcoming from the government agents).

White collar criminal defense is all about information control. A party who controls the discovery, interpretation and flow of information has an upper hand.

Responding To A Search Warrant

For strategic reasons the AUSA may choose to obtain documents through the use of a search warrant rather than through a grand jury subpoena.²⁴ FBI agents could arrive at your client's corporate headquarters with a two-page search warrant that appears to permit the agents to search everything in sight. Your client would then call you. The following are some suggestions as to how to respond to a group of government agents armed with a search warrant:

- (a) Review the warrant for the correct name of the company, address, and the scope of the search. Though this may seem obvious, it is remarkable how frequently government agents have the details wrong. Also, this is important to avoid the agents' later claims of good faith if the warrant is defective.
- (b) Offer to cooperate in order to limit the disruption caused by a search (this will also have a calming effect on the employees who may be shocked on seeing uniformed government agents going through the company's private materials).

²⁴ On how to respond to a subpoena for e-mail and other things, *see* Sanchez, A., How Best to Respond to Subpoenas for E-mail, *National Law Journal* (July 25th, 2005), at S5.

- (c) Ask if there are any warrants for persons, which must be very specific as to time and place. In this circumstance, in-house counsel or company counsel has no obligation to help the agents find the employees because the warrant is personal and not corporate.
- (d) Attempt to limit conversations between the agents and employees to avoid any damaging admissions (be *very very* careful about this – do NOT tell any of the employees to not talk to the government agents or you may be facing - an “obstruction of justice” charge,
- (e) Monitor the search to ensure it does not exceed the parameters of the warrant.
- (f) Try to make a list of items seized. Do not rely on the list provided by the government. Also, the list will give you clues as to what the government is investigating.
- (g) Ensure that attorney-client privileged materials are not seized. If they are seized, then a record should be made for a motion to seal the records. A letter documenting seizure of the privileged materials should be sent to the lead investigator on the day of the search and then, the motion should be filed as soon as possible.
- (h) Debrief the employees present during the search as soon as possible afterward to determine (a) what exactly took place, (b) who talked to whom, (c) what was seized, (d) were any comments made by the government agents to any of the employees, (e) whether the scope of the warrant was exceeded and last but not least, (f) whether or not certain employees may be cooperating with the government in its investigation.

How To Obtain the Return Of Records That Are Seized During A Search

In some circumstances, it may be difficult for a corporation to operate without the records that are seized during a search. It is not uncommon for the FBI or other federal agents, armed with a search warrant, to seize records, correspondence, logs, business files, computers, floppy disks, internal company memoranda, sales records, etc. In this scenario, the company's activities come to a screeching halt – the company cannot operate without its computers and other business records, orders cannot be filled, receivables cannot be accounted for...the list goes on and on. To make matters worse, the local T.V. network is almost always tipped off to the search and the company has to deal not only with the wholesale seizure of its records, but negative publicity as well.

Rule 41 of the Fed. Rules of Criminal Procedure is the primary statutory authority for the federal search and seizure warrants. If the subject of the search has been formally charged by indictment or criminal information, then the validity of the search warrant can be litigated with the filing of a suppression motion pursuant to Rule 12(b)(3), Fed. R. Crim. P. However, Rule 12 is of little use to the uncharged client. Such clients may not be indicted for many months, if at all. There is nothing for these aggrieved, uncharged clients to suppress since the clients do not have a criminal case pending in federal court. In the meantime, the government has possession of the client's property, which may be crucial to the operation of the client's business. Left unaddressed, the situation may become inimical to the interests of the client (including its officers, directors, and employees). In these circumstances, Rule 41(e) offers a solution.

Rule 41(e) provides that an aggrieved person may seek return of property that has been unlawfully seized, and a person whose property has been lawfully seized may seek return of property when aggrieved by the government's continued possession of it. The court can impose conditions upon the return of the property to protect access and use of the property in subsequent proceedings.²⁵

As a counsel for the corporate client whose records and tangibles have been seized by government agents, it would be advisable to:

- (a) obtain a copy of the search warrant inventory prepared by the federal agent (you should already have a copy of the actual search warrant, as that document was either left on the premises or was given to the person whose premises were searched.)
- (b) confer with the seizing agent or the AUSA and request that privileged and sensitive items be either returned or protected (remember that the search inventory may not be very specific. For e.g. the compact disks may only be referred to as "CDs", files seized from a file cabinet may simply be listed as "files" Review the inventory with your corporate client and in-house counsel and determine what, if any, privileged or sensitive items were seized.)
- (c) request copies of all seized documents (the costs of photocopying are usually borne by the party requesting the copies. Uncle Sam does not provide copies at its expense unless your client is indigent.)
- (d) attempt to obtain a copy of the search warrant affidavit. The affidavit may provide a wealth of information and a window into the government's case (e.g. it may

²⁵ See *Richey v. Smith*, 515 F.2d 1239, 1243-44 (5th Cir. 1975) and *J.B. Manning Corp. v. U.S.*, 86 F.3d 926 (9th Cir. 1996) for various factors that come into play before the property is returned under Rule 41(e).

indicate that “probable cause” was developed by unnamed confidential informants who do business with the client or who work for the client or by witnesses who testified in the grand jury.)²⁶

Responding To The Prosecutor’s Invitation: “Let’s Talk”

An AUSA may tell you that he or she has spoken to and made deals with a number of your corporate client’s employees and they would like to talk to your top level executives, i.e. the Board members, Chief Executive Officer, Chief Financial Officer, etc? At this stage, it may become clear that the interests of the company and its management are adverse and company counsel, if representing the targeted individual, should not represent him or her any longer.²⁷

Typically, AUSAs forward “Queen for a Day” proffer letters to the defense attorneys in order to talk to the potential defendants.²⁸ The “Queen for a Day” proffer letters vary by districts and are not the best available option as the government may later use anything that the individual says to impeach him, should he testify. Instead, it would be advisable for the individual’s counsel to:

- (a) attempt to get “use immunity” under 18 U.S.C. §6002 (prosecutors generally balk at giving such immunity partly because it requires approval from the DOJ); if not,
- (b) attempt to get “use and fruits immunity”; or

²⁶ Affidavits are often under seal because at least some of the probable cause emanated from confidential sources. In this scenario, you may have to persuade a judge to unseal the affidavit.

²⁷ This is the time when the individual employees (including the officers of the corporation) kick themselves for not having separate counsel representing them all along.

²⁸ See May, J., Queen for a Day From Hell: How to Handle a Troubling Proffer Letter, *Champion*, September / October 2006.

(c) attempt to have your client speak to the prosecutors pursuant to Rule 11 of the Federal Rules of Criminal Procedure (Rule 11 governs pleas, and pursuant to Rule 410(4) of the Federal Rules of Evidence, any statements made in course of plea discussions which do not result in a plea of guilty or which results in a plea of guilty later withdrawn is not admissible against the defendant).

At this stage, depending on the facts of your case, an aggressive defense attorney who has mastered the facts of the case may be able to convince the AUSA to either drop the case against his client or after securing immunity (or a lenient plea) morph the client into a State's witness. Of course, there is always another option: go to trial. If your client decides to plea bargain or agree to accept some responsibility and testify as a State witness, company counsel should be careful to maintain the integrity of the attorney-client and the work-product privileges as to third parties in *civil litigation*. Federal circuits are split as to whether there can be a limited waiver of the privilege with respect to follow on civil litigation.²⁹

To sum up: internal investigations are a potential minefield. The minefield, however, may be safely navigated by exercising care and controlling and mastering the flow of information from the beginning of the investigation. The most successful defense of a white-collar criminal investigation is the case that the public never hears about – the one that company counsel along with outside counsel have convinced the AUSA to dismiss partly based upon the thoroughness of their internal investigation.

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²⁹ *In re Weiss*, 596 F.2d 1185, 1186 (4th Cir. 1979); *Diversified Industries, Inc. v. Meredith*, 572 F.2d 596, 606 (8th Cir. 1977); *U.S. v. Billmyer*, 57 F.3d 31, 36 (1st Cir. 1995).

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