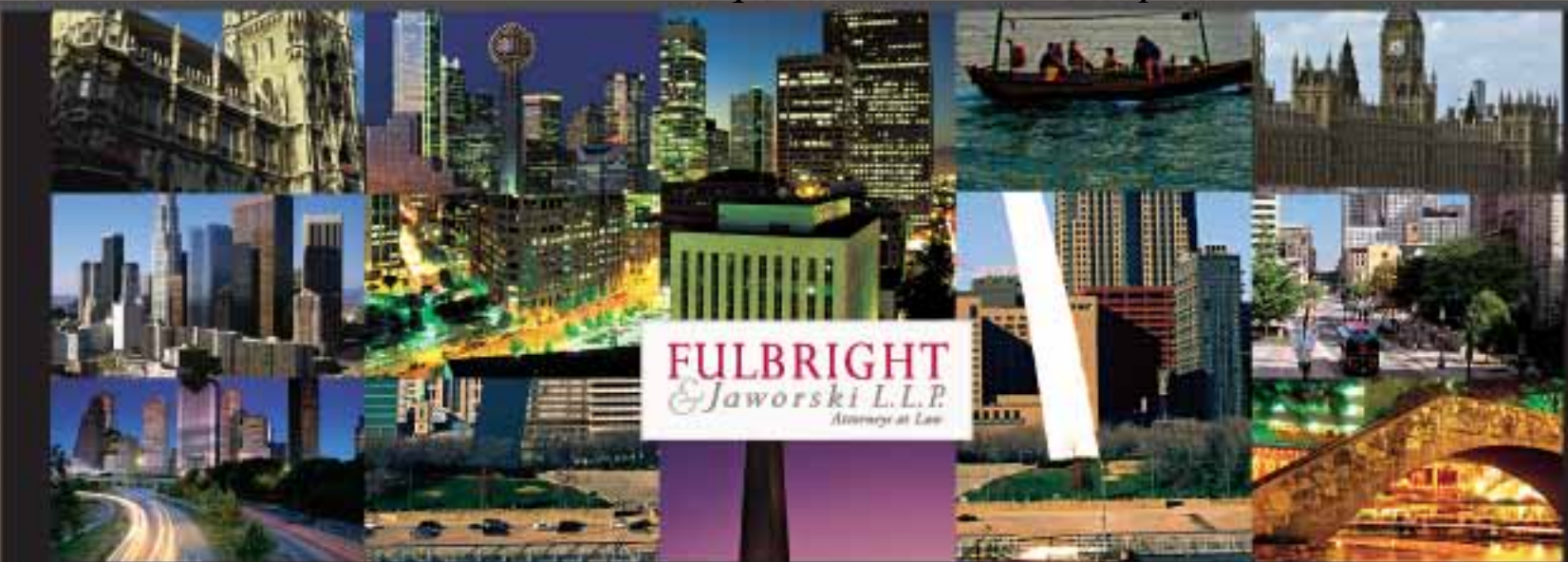




MNACCA: Lunch and Learn
**What to Do When the Government Comes Knocking:
Avoiding Pitfalls, Roadblocks, and Landmines**

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GOVERNMENTAL INVESTIGATIONS

- In complex white collar criminal cases, the government typically begins its investigation in one of five simple, but intimidating ways:
 - *Grand Jury Subpoena*
 - *Search Warrants*
 - *National Security Letters*
 - *Congressional Investigations*
 - *Covert Operations*

Scope and Impact of the Grand Jury Process

- Grand Jury's power is broad.
- Your Arms Are Too Short To Box with God: Resting the Grand Jury.

What to do when the subpoena hits your desk?

- Early contact with the prosecutor may ultimately determine your status as:
 - *Witness.*
 - *Subject.*
 - *Target.*
- What is the scope of the subpoena?
- What is the time period to respond?
- What documents are sought by the government?

Search Warrant

- Basic Assumption:
 - *The government has a substantial advantage in executing a search warrant.*

GAME PLAN

- Preparing for the Blitz:
 - *Designation of response team*
 - *Written Protocol*
 - List of key contacts within the company
 - List of key contacts outside the company
 - Employee do's and don'ts

DUTIES OF RESPONSE TEAM

- Counsel Notification
- Initiate immediate contact with government officials
- Review Warrant
- Designation of Monitors
 - *Do not obstruct the search*
 - *No interviews*
 - *Document agents' activities*

National Security Letters

- A NSL is a demand letter to an entity or organization to provide various records and data pertaining to individuals.
- Used primarily by the FBI.
- No probable cause required.

Congressional Investigations

- Since 1821, the Supreme Court has recognized the Congress's power to investigate.
- Originally, the Court limited investigations to those related to “valid legislation.”
- Later, the Court recognized the power to investigate “for any legislative purpose,” including:
 - *Oversight of government operations;*
 - *Proposed legislation; and*
 - *Defects in the political system.*

Congressional Investigations (cont.)

- Likely targets:
 - *Current and former Administrations;*
 - *Financial services industry;*
 - *Energy companies;*
 - *Drug manufacturers; and*
 - *Government contractors*

WHETHER TO CONDUCT AN INTERNAL INVESTIGATION

- As a general matter, as soon as the company has reason to believe a problem may exist, an internal investigation should be initiated
- Time is of the essence

Basis for Internal Investigation

- Government inquiry, including grand jury or Inspector General subpoenas, search warrants, National Security Letters (NSL), Congressional investigations, and/or covert operations.
 - *The government may be willing to “deputize” a third-party to conduct the investigation.*
 - *Is this an offer you can’t refuse?*
- Whistleblower allegations or internal “red flags.”
 - *Proactive investigation conducted by outside counsel.*

Internal Investigation Steps

1. Select Investigators
2. Stop the Conduct
3. Preserve the Evidence
4. Determine the Identity of the Client
5. Initial Visit to Scope Out Problem
6. Consider Voluntary Disclosure
7. Consider Securities Laws Disclosure Obligations
8. Formulate an Investigative Plan, Including the Scope of the Investigation
9. Consider Improvements to the Company's Compliance Program
10. Document All Investigative Steps

Protecting the Privilege

- Frequently asserted privileges:
 - *Attorney-Client (Absolute)*.
 - A rule of evidence that says the communications between an attorney and his or her client are confidential and may not be disclosed unless the client agrees to the disclosure or fails to take proper measures to protect the privilege.
 - *Work Product (Qualified)*.
 - Generally protects information prepared by an attorney “in anticipation of litigation or trial.”
 - Includes opinion and fact work product.
 - *Fifth Amendment*.
- Voluntary disclosure will likely waive privilege.

Practical Advice on Protecting the Privilege

1. Stamp each document.
2. Formally request authorization for the internal investigation.
3. Formal authorization by corporate management.
4. Formal authorization of outside counsel.
5. Attorney must coordinate the investigation.
6. Maintain a separate investigation file.
7. Management should direct employee cooperation.
8. Witness statement should make opinion work product.
9. Summary reports must reference privileges.
10. Create confidential relationship with consultants.
11. Advise employees that counsel speak for the corporation.

Cooperation with Government Investigation

- When determining whether to charge a corporation in a criminal investigation, prosecutors consider whether the corporation:
 - *Voluntarily disclosed the wrongdoing; and*
 - *Cooperated with the government's investigation.*
- Through cooperation, the corporation may have the ability to shape the government's inquiry and work in partnership with prosecutors.

Risks Associated with Full Cooperation

- No assurance that corporation will not be prosecuted.
- Information provided can be used against the corporation in a criminal or civil enforcement action.
- Potential high costs associated with conducting an investigation.
- Even full cooperation can result in a criminal indictment, deferred prosecution agreement (“DPA”), non-prosecution agreement (“NPA”) or civil enforcement action.
- DPAs and NPAs can have collateral consequences.
 - *Further admission of criminal conduct.*
 - *Possible payment of substantial “penalties.”*
 - *Possible suspension and debarment from federal programs.*
 - *Appointment of a monitor.*

Prevalence of Corporate Monitors

- A number of DPAs and NPAs arise from violations of healthcare fraud statutes.
- The DOJ appoints a corporate monitor to evaluate a company's internal controls and compliance policies as part of either a DPA or NPA.
- DPAs and NPAs are “the settlements of choice for prosecutors and corporate defense attorneys.”
- Situations that prompt the government to impose a monitor are:
 - *Serious violations.*
 - *Pattern of disregard for the law.*
 - *Intentional or reckless behavior.*
- Reflects a serious flaw in the company's compliance program.

Morford Memo

- Issued on March 10, 2008 by Acting Deputy Attorney General of the DOJ, Craig Morford, in an attempt to address criticism by Congress and the media of the government's selection of monitors.
- Promotes consistency within the DOJ regarding its use and selection of monitors.
- Does not provide guidance on when it is appropriate for the government to appoint a monitor.
- The Morford Memo addresses the following:
 - *Monitors must be approved by the government.*
 - *The monitor must be an independent third party, neither an agent of the government nor an agent of the company*
 - *The monitor's role should be no broader than necessary.*
 - *The monitor must immediately report misconduct it discovers directly to the government.*
 - *The company must justify why it chooses to reject the monitor's recommendations.*
 - *Although not specified in detail, the typical length of time of the monitorship is usually 3 years.*

Consequence of Failing to Cooperate

- Prosecutors will seek a plea to the most serious, readily available provable offense charged.
- If convicted the corporation could face:
 - *Payment of substantial fines and penalties;*
 - *Suspension and debarment from federal program;*
 - *Corporate compliance program with an independent monitor (huge cost); and*
 - *Possible shareholder lawsuits.*

How Does a Corporation Cooperate?

- Conduct a thorough, independent investigation using credible outside counsel.
- Voluntarily disclose facts to the government.
- Make it easy for the government to investigate.
 - *Identify and produce key witnesses for interviews.*
 - *Provide organized “hot” documents.*
 - *Discipline wrongdoers.*

How Does a Corporation Cooperate?

(continued)

- Take remedial and corrective action.
- Make full restitution.
- Communication must be candid and honest with the government at all times.
- Possibly waive attorney-client and work product privileges.
 - *Most controversial can include the following:*
 - Provide the detailed results of your investigation; and
 - Perform additional analysis as requested, i.e., emails and accounting records.

History of DOJ's Policies

- 1999 Holder Memo
- 2003 Thompson Memo
- 2006 McNulty Memo
 - *Each memo concerned guidelines for investigating corporate conduct.*

The DOJ's Response: Filip Memo

- On August 28, 2008, the DOJ issued revised Principles of Federal Prosecution of Business Organizations, in response to:
 - United States v. Stein *decision*.
 - *Renewal of proposed legislation – Attorney Client Privilege Protection Act of 2008.*
 - *Criticism of prior DOJ policy, specifically that the DOJ coerced corporations to waive attorney-client privilege and work product protection.*

Five Key Changes of the Filip Memo

1. Cooperation credit is no longer dependant on the waiver of attorney-client privilege or work product protection, but is dependant on disclosure of relevant facts.
 - *Same credit for disclosing facts contained in unprivileged materials as for facts contained in privileged materials.*
 - *No need to produce protected notes or memoranda generated by lawyers' interviews, but prosecutors may request relevant facts acquired from interviews.*

Five Key Changes of the Filip Memo

2. Prosecutors are forbidden from requesting the disclosure of non-factual attorney-client privileged communications and work product such as:
 - *Legal advice.*
 - *An attorney's mental impression.*
 - *An attorney's legal theories.*
- Two long-standing exceptions allow prosecutors to request waiver.
 - *Communications in furtherance of a crime or fraud.*
 - *Assertion of an advice of counsel defense.*

Five Key Changes of the Filip Memo

3. Participation in a joint defense agreement does not mean a corporation ineligible for cooperation credit.
 - *Prosecutors may not request that a corporation refrain from entering into such agreements.*

Five Key Changes of the Filip Memo

4. Prosecutors are instructed not to consider a corporation's advancement of attorney's fees to employees when evaluating cooperation.
 - *Prosecutors may not request that a corporation refrain from taking such action.*
 - *Payment of attorney's fees is only relevant when the advancement of attorney's fees, combined with other circumstances, would rise to the level of criminal obstruction of justice.*

Five Key Changes of the Filip Memo

5. Prosecutors may not consider whether a corporation has sanctioned or retained culpable employees in evaluating cooperation credit.
 - *Prosecutors may only consider whether a corporation has disciplined culpable employees when evaluating the corporation's remedial measures or compliance program.*

Filip Memo: Remaining Questions

- Will disclosure of relevant facts contained in attorney-client privileged documents waive the privilege for the entire document?
- Does the Filip Memo go far enough?
 - *Not as expansive as the proposed legislation – Attorney Client Privilege Protection Act of 2008.*
 - *National Association of Criminal Defense Lawyers criticized the memo as “only a policy – not binding on the Department or U.S. Attorneys in the field, and subject to revision or recession by the attorney general at any time, for any reason, or for no reason at all.”*

A Word About the Employment Arena

- Whistleblowing complaints may result in referral by the DOL/OSHA to other parts of the government
- Notice may arise in employee complaints, even in unrelated areas (*e.g.*, sexual harassment investigation)
- Government investigations may affect employment considerations

Top Ten Mistakes Companies Make During Investigations: Number 10

- Thinking it's going to be fast.



Top Ten Mistakes Companies Make During Investigations: Number 9

- Thinking it's going to be fair.



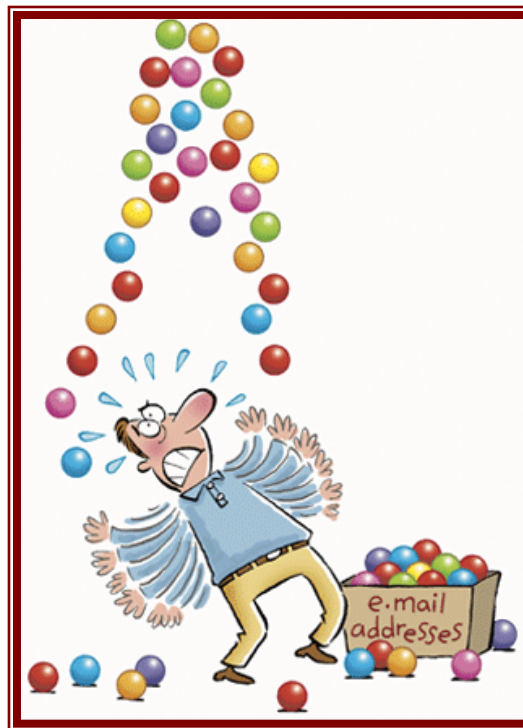
Top Ten Mistakes Companies Make During Investigations: Number 8

- Thinking it's going to be cheap.



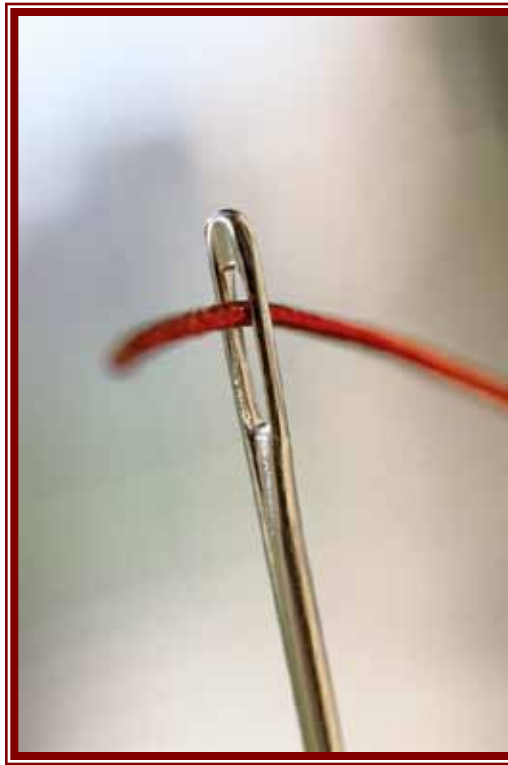
Top Ten Mistakes Companies Make During Investigations: Number 7

- Thinking one lawyer can represent everybody.



Top Ten Mistakes Companies Make During Investigations: Number 6

- Thinking a voluntary disclosure can be limited.



Top Ten Mistakes Companies Make During Investigations: Number 5

- Thinking political influence can help.



Top Ten Mistakes Companies Make During Investigations: Number 4

- Failing to anticipate that they will be investigated.



Top Ten Mistakes Companies Make During Investigations: Number 3

- Failing to notify defense counsel before they fire key employee-witnesses.



Top Ten Mistakes Companies Make During Investigations: Number 2

- Failing to coordinate public statements with defense counsel.



Top Ten Mistakes Companies Make During Investigations: Number 1

- Failing to preserve records and electronic information.



Thank you.

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