



Legal Ethics: Internal Investigations and the Attorney Client Privilege in Fraud Investigations

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Principles of Federal Prosecution of Business Organizations *JM Section 9-28.300*



- Factors to be considered:
 - Nature and seriousness of the offense
 - Pervasiveness of wrongdoing within corporation
 - Corporation's history of similar misconduct
 - Corporation's willingness to cooperate, including as to potential wrongdoing by its agent
 - Existence and effectiveness of corporation's pre-existing compliance program
 - Corporation's timely and voluntary disclosure of wrongdoing
 - Corporation's remedial actions
 - Collateral consequences arising from potential prosecution
 - Adequacy of alternative remedies
 - Adequacy of prosecution of individuals responsible for corporation's malfeasance

Corporate Cooperation – Potential Solution to Prosecution Challenge



- Prosecution Challenge with Corporate Wrongdoing - *JM Section 9-28.700*
 - *In investigating wrongdoing by or within a corporation, a prosecutor may encounter several obstacles resulting from the nature of the corporation itself. It may be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. 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 be critical in identifying potentially relevant actors and locating relevant evidence, among other things, and in doing so expeditiously.*
- Prosecution Solution/Practical Front-end Benefits of Cooperation:
 - Internal investigation v. full grand jury investigation
 - Requests for documents v. search warrants
 - Witness interviews/proffers v. grand jury subpoenas
 - Opportunity for dialogue

Corporate Cooperation – “Credit” for Corporation



- Why Cooperate? *JM Section 9-28.700*
 - *Cooperation is a mitigating factor, by which a corporation—just like any other subject of a criminal investigation—can gain credit in a case that otherwise is appropriate for indictment and prosecution.*
- What Merits Credit for Cooperation- *JM Section 9-28.700*
 - *In order for a company to receive any consideration for cooperation under this section, the company must identify all individuals substantially involved in or responsible for the misconduct at issue, regardless of their position, status or seniority, and provide to the Department all relevant facts relating to that misconduct. If a company seeking cooperation credit declines to learn of such facts or to provide the Department with complete factual information about the individuals substantially involved in or responsible for the misconduct, its cooperation will not be considered a mitigating factor under this section.*

Disclosure of the relevant *facts*

- What happened?
- When did it happen?
- Where did it happen?
- How did it happen?
- What documents exist?
- Who was involved?
- What business units were involved?
- What bank accounts were used?
- Who were the supervisors?
- What inquiries were received from the auditors?

Principles of Federal Prosecution of Business Organizations *JM Section 9-28.720*



- “Disclosure of the relevant facts”
 - DOJ will not ask for a waiver of the attorney-client privilege or work product doctrine
 - DOJ will not consider disclosure /non-disclosure of material covered by attorney-client privilege or work product doctrine in evaluating whether organization has been cooperative

Key Ethical Issues For Interviews



- Who Conducts Interviews of Employees?
 - Lawyer or Non-Lawyer?
 - If Lawyer, Under Privilege?
- Who Does Corporate Counsel Represent?
- What Warnings Should Be Given To Employees Being Interviewed?
- How To Handle Reluctant Witnesses?
- Who Owns The Privilege?

Ethical Issues and Internal Investigations



- Importance of Upjohn Warning In Interviewing **Every** Employee: U.S. v. Ruehle
- 9th Cir. Opinion - “the treacherous path which corporate counsel must tread when conducting an internal investigation”
- State Bar of Georgia – Rules of Professional Conduct
 - Rule 1.13 – Organization as Client
 - Rule 1.13 (d) – Disclosure Option Not Available to Lawyer Conducting Internal Investigation
 - Rule 4.3 – Dealing with Unrepresented Person
 - In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:*
 - (a) state or imply that the lawyer is disinterested; when the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and*
 - (b) give advice other than the advice to secure counsel, if a lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of a client.*

US v. Ruehle



- Internal investigation into Stock Option Backdating
- Contemporaneous with civil securities fraud cases in which CFO was represented by same law firm
- Outside counsel interviews CFO – disputed fact on Upjohn Warning
- Company discloses interview content to FBI – CFO indicted
- CFO Defense – Exclude interview because of attorney-client communication, same lawyers defending civil lawsuit
- District Court grants motion, refers corporate counsel to state bar
- 9th Cir – Reverses District Court because statements not confidential, does not address referral to state bar, corporate counsel can testify for Gov't

Upjohn Warning – Corporate Miranda



- Represent Only Corporation, Not Witness
- Conversation protected by Attorney-Client Privilege/Work Product Doctrine
- Corporation May Decide to Waive Privileges and Disclose Confidential Communications, Including to Government
- Request that Witness Keep Facts Discussed in Interview Confidential

- Real Time Questions/Issues
 - Dynamic Between Inside Counsel, Outside Counsel, and Business Person.
 - Consequences of Not Cooperating ?
 - Do I need a Lawyer?
 - Offer to Provide Separate Counsel ? When?
 - How Is Upjohn Warning Documented ?
 - Joint Defense Arrangement?

Employee's Perspective



- Will Company's Lawyer Be A Witness Against Me In Criminal Case?
- "Lawyer Up"/Invoke 5th Amendment
- Bring Own Counsel to Interview
- Blow the Whistle? Go to the Government?

Internal Investigation – Employee Risks



Title 18, United States Code, Section 1512:

“Whoever knowingly uses intimidation, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . .

Hinder, delay, or prevent the communication to a law enforcement officer . . . of information relating to the commission or possible commission of a Federal offense . . .

Shall be fined under this title or imprisoned not more than 20 years, or both.”

18 U.S.C. § 1512(b)(3)

Internal Investigation – Employee Risks



19. Between on or about March 2, 2004, and on or about August 13, 2004, in the District of Columbia, the defendant,

KEVIN A. RING,

did knowingly engage in misleading conduct toward outside legal counsel for Firm B by making materially false statements, intentionally omitting material information, and intentionally concealing material facts, with the intent to hinder, delay, and prevent the communication of information to the Federal Bureau of Investigation, relating to the commission or possible commission of a federal offense, namely conspiracy, mail fraud, wire fraud, and payment of a gratuity.

All in violation of 18 U.S.C. §§ 1512(b)(3) and 2.



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Thank you



Effective and Ethical Witness Preparation

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The Importance of Witness Preparation



I've never seen a bad witness ...

But I've seen a lot of lazy lawyers

Effective Witness Preparation

Corporate Counsel Concerns



- Nature of the matter
 - Bet the Company
 - Significant reputational risk
 - Bellwether claim
 - Criminal matter
- Nature of the company
 - Multi-national
 - Multi-faceted national company
 - Single office company
- Nature of the witness
 - Senior management
 - Problem witness
 - Corporate representative (30(b)(6))

Effective Witness Preparation

Does the Witness Need Separate Counsel?



- Preference for no separate counsel
 - Ensures consistent strategy
- Does conflict exist?
 - Company finds wrongdoing
 - Middle ground: “shadow counsel”
- Former employees
 - Establish attorney/client relationship to control contact
 - To pay or not to pay
- Must Company Pay?
 - CA Labor Code § 2802

Effective Witness Preparation

The Upjohn Dilemma



- “The Upjohn warning”:
 - Lawyers represent company, not employee
 - Attorney client privilege belongs to company, not employee
 - Company may disclose information at its sole discretion
- What if lawyer represents witness and company
 - Potential for ethical dilemma
- Middle ground: representation letter with waiver

Effective Witness Preparation

30(b)(6): When the Company gets to choose



- “Persons most knowledgeable” ≠ persons with personal knowledge
- Substantive knowledge v. Presentability?
 - Consider several options

Effective Witness Preparation



- Refresh recollection
 - Outside counsel
 - Inside counsel
- Build confidence
 - Outside counsel
 - Inside counsel
 - Consultant
- Build skills
 - Outside counsel
 - Consultant

Effective Witness Preparation



What you can do for me:

- Know the trial themes
- Share the political pitfalls
- Be the liaison to the witness
- Work the back channels
- Don't be a potted plant

Ethics of Witness Preparation



Appropriate preparation vs. improperly altering/influencing testimony

- A lawyer's duty is:
 - "to extract the facts from the witness, not pour them into him"
 - "to learn what the witness knows, not to teach him what he ought to know"
- ABA Model Rules of Prof'l Conduct – general rules but few specifics
 - 1.1: Duty of competent representation includes adequate preparation
 - 1.2(d): Lawyer may discuss with client the consequences of client's conduct
 - 3.4(b): Lawyer shall not assist a witness to testify falsely

Ethics of Witness Preparation



Restatement (Third) of the Law Governing Lawyers

- Appropriate witness prep includes:
 - Discussing witness' role, recollection, and probable testimony
 - Discussing factual context - revealing other relevant testimony/evidence and asking witness to reconsider recollection in that light
 - Reviewing documents
 - Discussing applicability of law to the facts
 - Discussing probable cross-examination
 - Rehearing testimony
- Example: "The Verdict"
 - Defendant doctor's witness prep
 - Proper preparation or improper coaching?

Preserving Protection: the Law



- For Attorney/Client Privilege
 - Confidential
 - Between attorney and client
 - Made for purpose of obtaining or providing legal advice
- Attorney Work Product
 - Materials prepared by party or representative
 - Motivated by or in anticipation of litigation

Preserving Protection in Practice



- Have procedures in place “as directed by legal department”
- Limit access as much as possible
- Avoid the reporting chain
- Confidential and protected
- Don’t give business advice
- Keep legal department/corporate investigations separate

Thank you



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