TEXAS BAR JOURNAL
Volume 50, Number 9, Oct. 1987

What Corporate Counsel Needs To Know About Criminal Investigations and Prosecutions

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Your client, the president of X,Y,Z, Inc., receives a federal grand jury subpoena requesting records of corporate activity for the past five years. He contacts you as corporate counsel and asks: (1) What does this mean? (2) What can happen? (3) What do we do? (4) Could this have been prevented?

This article will assist you in answering these questions, dealing with the government during an investigation, responding to grand jury subpoenas, developing internal guidelines to minimize the risk of criminal exposure and to maximize the protection of corporate information, and conducting an internal investigation to assess the corporation's vulnerability to a criminal investigation and prosecution.

I. What Does This Mean?

A. Generally

A grand jury subpoena means that inquiries are being made regarding potential criminal liability, notwithstanding the assistant United States attorney's assurances that your client is not a target. Unlike a civil subpoena, this means that the very existence of the corporation and the liberty of its management are in jeopardy.

B. Reporting Responsibilities

A grand jury subpoena may also mean that you have a duty, if a public corporation to report the investigation to the Securities and Exchange Commission (SEC). The SEC regulations provide that the company must include any information as to proceedings "known to be contemplated by government authorities."[1] Whether this includes grand jury proceedings is an open question. Corporate counsel may find some room to argue for nondisclosure based upon the recent Second Circuit opinion in *United States v. Matthews*.[2] In that case, the government charged Matthews with failure to disclose in a proxy statement in which he sought election to the board of directors that he was the subject of a grand jury investigation. The regulations provided that a candidate for director must disclose whether he has been "convicted in a criminal proceeding or is a named subject of a pending criminal proceeding."[3] The court held that "uncharged criminal conduct" was not required to be disclosed.[4] The court's rejection of criminal liability for non-disclosure of uncharged criminal conduct was buttressed by concerns about self-incrimination implications of accepting the government's approach.[5]

II. What Can Happen?

A. Direct Consequences

Officers, directors, and employees, as well as the corporation, may be indicted for a broad range of criminal activity.[6] "He did it, not me" is no defense. Criminal liability may be imposed for acquiescence or tactic approval of another's criminal conduct,[7] or conspiring with others who actually commit the illegal act.[8] Even of your criminal exposure originally is tenuous at most, you enhance your chances of indictment if you assist others in destroying documents or otherwise obstructing an investigation.[9] In addition to incarceration for

individuals,[10] a corporation and its officers, directors and employees may be liable for huge fines[11] and restitution.[12]

B. Collateral Consequences

A criminal prosecution of a corporation may have ruinous repercussions beyond the monetary penalties associated with the criminal proceeding. Loss of government business, private shareholder suits, and third party suits are just a few examples. The Federal Acquisition Regulations provide that suspensions of government contracts should be imposed merely on the basis of adequate evidence of fraud, theft, or certain other crimes, pending the completion of any investigation or legal proceedings.[13] Because an indictment us adequate evidence for suspension,[14] business reasons may necessitate cooperation with the government. Although a conviction does not automatically justify debarment,[15] as a practical matter, the indictment will probably terminate your relationship with the government.

III. What Can We Do?

A. Internal Investigations

Before exploring the availability of any constitutional protection,[16] or determining whether to move to quash the subpoena for being unreasonable or oppressive, the corporation would be well advised to conduct an internal investigation. Before initiating this procedure, you should determine what individuals are best suited for this function, their roles, who they report to, and whether their report should be written or oral. In that regard it is advisable to reduce to writing any guidelines and procedures.

1. Attorney-Client Privilege

To protect the confidentiality of the results, an attorney should control the investigation. The Supreme Court in *Upjohn Company v, United States,*[17] considered the attorney-client privilege in a corporate context. Under *Upjohn*, any written protected from compelled disclosure by the attorney-client privilege. The privilege exists not only to protect communications made in confidence to a lawyer for the purpose of obtaining legal advise, but also communications from the lawyer to the client to enable him to make sound and informed decisions.[18]

In that regard, there are three areas that you must be concerned with: (1) The privilege only protects disclosure of communications (e.g., the client cannot be compelled to answer the question, "What did you say or write to the attorney?").[19] It does not protect disclosure of the underlying facts by those who communicated with the attorney (e.g. the client may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact in communication to his attorney);[20] (2)the burden of demonstrating the applicability of the privilege rests on the party who invokesit;[21] and (3) the attorney-client privilege belongs to the corporate client and an attorney cannot waive the privilege without the client's consent.[22] In that regard, the privilege is of little value as an incentive for corporate employees to speak to the corporate attorney.[23] A well-advised employee is not likely to be moved to disclose adverse information by the existence of a privilege whose assertion or waiver is in the hands of the very corporate officials from whom he or she fears betrayal.[24] Only if corporate counsel is acting in a dual capacity (e.g., rendering legal advice to both the corporation and individual employees, as explained *infra* at section (3) (b) (1)) may the employee claim a privilege.[25]

2. Work Product Doctrine

To the extent that material is not protected by the attorney-client privilege as disclosing communications between an employee and counsel, the work product doctrine may prevent compelled disclosure. The work product doctrine, recognized initially in *Hickman v, Taylor*,[26] protects from discovery, except upon the showing of substantial need[27] and undue hardship,[28] materials prepared or collected by an attorney "in the course or preparing for

possible litigation."[29] A lawyer may assert the work product privilege, and to the extent that a client's interest may be affected, the client may also assert the privilege.[30]

3. Special Counsel (in-house versus outside)

The investigation may be conducted by in-house or outside counsel. Outside counsel, however, should be employed to avoid the appearance that the investigation is a mere sham or cover-up. This is especially true if there is a possibility that you may want to discuss or publish the results, if exculpatory, to the investigating agency to avoid prosecution. Otherwise, be prepared to reassure the agency that in-house counsel was entirely impartial and unconnected with the alleged wrongdoing, and unassociated with any management personnel the subject of the investigation.

Except in uncomplicated cases, there are other distinct advantages of outside counsel. In most instances, counsel will prepare a written investigative report of the problem. Especially if incriminating, this should remain confidential under the attorney-client privilege and work product doctrine and all attempts should be exerted to avoid disclosure. As a general rule in-house counsel with respect to activities engaged in for purposes of determining the applicability of the attorney-client privilege.[31] Even so, an adversary in litigation or the attorney for an investigating agency may argue that an in-house investigation was merely a fact-finding venture rather than in inquiry for the sole purpose of giving legal advise. If you must use an in-house counsel because of the staff as a legal inquiry for the sole purpose of giving legal advise. If you must use an in-house counsel because of budgetary concerns, prepare a request in writing designating one of the staff as special counsel and outlining the scope of the investigation as a legal inquiry rather than an inquiry for the purpose of seeking business advice.[32] Although it could be construed as self-serving, it may ultimately be the determining factor in a court's finding that a privilege exists.

4. Waiver of Privileges

a. Attorney-Client

The attorney-client privilege is not an eternal protection. Special counsel should be selective and careful in disclosing information to third parties. Because the attorney-client privilege protects only confidential communications, the 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.[33] The attorney-client privilege is not generally considered waived if a privileged communication is produced under compulsion or court order,[34] or shared with a third person who has a common legal interest with respect to the subject matter of the communication.[35]

The issue is particularly important if bankruptcy is contemplated. In *Commodity Future's Trading Commission v. Weintraub,*[36] the United States Supreme Court held that the trustee of a corporation in bankruptcy has the power to waive the corporation's attorney-client privilege with respect to pre-bankruptcy communications.[37]

b. Work Product

The work product privilege also is not waived by disclosures between attorneys for parties having a mutual or common interest in litigation. In applying the standard, courts have held that the work product privilege is not waived by disclosures between attorneys for parties having a "mutual interest" in litigation, or between attorneys representing parties "sharing a common interest in litigation, actual or prospective," or between parties" one of whose interests in prospective litigation may turn on the success of the other party in a separate litigation."[38] The purpose of the work product doctrine is to protect the rest of

the world generally.[39] Disclosure to a third party does not waive the privilege "unless such disclosure is inconsistent with the maintenance of secrecy from the disclosing party's adversary."[40] In contrast to attorney-client privilege, which exists to protect a confidential relationship, even a mere showing of a voluntary disclosure to a third person will not suffice to show waiver of the work product privilege.[41]

C. Special Problems

There is a split of authority as to whether a corporation waives the attorney-client[42] and work product[43] privileges as to third parties in civil litigation by negotiating a consent decree with or turning over documents to a government agency.[44] Since there is a division of authority on the issue, one would be well advised to obtain a tightly-worded protective order in the proceedings with the government agency, and if possible, obtain the consent of your civil adversary.

B. Ancillary Problems During Investigation

1. Multiple Representation

Another problem confronted by special counsel is determining whether representing both the corporation and officers and employees would undermine the integrity of the investigation and risk waiver of any applicable privilege. As a general principle, corporate counsel may initially represent both the company and its employees[45] provided the corporate and