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New Developments in Parallel Criminal and Civil Proceedings: Special Considerations for In-House Counsel

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As businesses face evolving standards of corporate governance and industry regulation, parallel criminal and civil proceedings are becoming more common. Corporate employees are often subpoenaed as witnesses before the grand jury - without corporate counsel knowing whether the individual or Company is merely a nonparty witness or the target of the criminal investigation. Corporate officers and directors, faced with potential criminal and civil liability for their official acts, are often counseled to assert their Fifth Amendment rights by refusing to answer questions in discovery, even though the fact finder in a civil proceeding may draw an adverse inference from their silence. In-house counsel frequently has to make complex strategic decisions, while having only limited knowledge about the scope of a government investigation.

Parallel proceedings may arise from a wide variety of situations, such as: business disputes alleging corporate malfeasance, "routine" inquiries by administrative agencies that could result in a referral to the United States Department of Justice ("Justice Dept."), class action lawsuits, or bankruptcy proceedings. Prudent counsel will have a ready strategy for responding to the warning signs of a potential government investigation. Such strategies should incorporate an immediate "litigation hold" procedure (i.e., the suspension of regular document destruction policies), commencing of internal investigation procedures to respond to the requests for information, and an early assessment of whether the Company will request a stay of any civil proceedings, enter into joint defense agreements, or advance costs of independent defense counsel for affected officers, directors, and employees.

Should the Company ask for a stay? Usually, the answer is yes to: (i) avoid adverse inferences from corporate witnesses taking the Fifth Amendment in civil depositions,[1] (ii) avoid what amounts to double jeopardy,[2] and (iii) devote resources to responding to the criminal investigation. Because stays have been characterized as "extraordinary remedy,"[3] counsel should also consider whether protective order is feasible. F.R.C.P. 26.

Given the Justice Dept.'s mandate for greater cooperation between federal criminal and civil prosecutors, counsel should assume inter-agency cooperation and collaboration.[4] This trend has led to concomitant discovery opportunities for the defense. Earlier this year, the Justice Dept. issued guidelines for disclosures in criminal discovery, requiring the prosecutor to consider whether other agencies are part of the "prosecution team," thereby subjecting those files to review for exculpatory information, including information derived from a confidential informant[5] Justice Dept. press releases may now give rise to Brady obligations requiring disclosures of information from cooperating agencies in criminal discovery.[6] Should the Company enter into a Joint Defense Agreement (JDA)? Prevailing wisdom is that the Company and its individual officers and employees should retain separate counsel, and consider a JDA. However, JDAs are sometimes seen as leaving a defendant exposed to the actions of a former co-defendant who cut(s) an independent deal with the government. Even the existence of a JDA or the advancement of legal fees for individual employees can be adversely interpreted by the Justice Dept., impairing the Company's ability to receive cooperation credit.[7]

Best practices dictate that businesses facing criminal investigation should retain counsel experienced in both civil and criminal litigation so that a coordinated strategy is devised early. New developments in California law, regarding the discoverability of witness statements, impact how witness interviews are conducted.[8] Because businesses often elect to make voluntary disclosures thereby waiving attorney-client privileges and work product protections, seasoned

counsel and their investigators conducting interviews frequently omit inculpatory information or statements from their written notes, and make no recordings of their interviews.[9] In-house counsel should consider regular internal reviews of a Company's criminal defense action plan to incorporate new developments in this rapidly changing legal landscape.

Originally published in the California Minority Counsel Program eNewsletter - May/June 2010 Issue

Sources

[1] Although corporate entities have no Fifth Amendment privilege, individual witnesses testifying before the grand jury may assert the privilege against self-incrimination. Kastigar v. United States, 406 U.S. 441, 444 (1972); In re Gault, 387 U.S. 1, 49 (1967); Pacers, Inc. v. Superior Court, 162 Cal.App.3d 686, 688 (1984). Fact finders in civil litigation may draw adverse inferences from a witness asserting their Fifth Amendment privilege, including attributing those adverse inferences to the corporate entity. Baxter v. Palmigiano, 425 U.S. 306 (1976).

[2] United States v. Halper, 490 U.S. 435 (1989) (government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks punitive rather than remedial sanction).

[3] See e.g., In re Mid-Atl. Toyota Antitrust Litig., 92 F.R.D. 358, 360 (D. Md. 1981); Weil v. Markowitz, 829 F.2d 166 (D.D.C. 1987).

[4] Memorandum from Attorney General (Janet Reno) to Federal Attorneys (July 28, 1997).

[5] Memorandum of then Deputy Attorney General David W. Ogden dated January 4, 2010, "Guidance for Prosecutors Regarding Criminal Discovery" and codified in the U.S. Attorneys' Manual, Section 165. These procedures were to be implemented by March 31, 2010.

[6] F. R. Crim. Pro. 16 and 26.2; Brady v. Maryland, 373 U.S. 83 (1963); United States v. Reyes, 577 F.3d 1069, 1078 (9th Cir. 2009); United States v. Cerna, 633 F. Supp. 2d 1053, 1059 (N.D. Cal. 2009)(Brady obligations extended to four agencies named in official government press release).

[7] U.S. Attorneys' Manual, tit. 9, Criminal Resource Manual, art. 162, Federal Prosecutions of Corporations (August 2008 rev.), section 9-28.730. http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm

[8] Coito v. Superior Court, ____ Cal. App. 5th ____ (Cal. App. 5th Dist. March 4, 2010) (holding witness statements are not per se protected by the work product doctrine). Coito is directly at odds with the oft-cited Nacht & Lewis Architects, Inc. v. Superior Court, 47 Cal. App. 4th 214, 217 (Cal. App. 3d Dist. 1996). The California Supreme Court granted review of the Coito case on June 10, 2010. Coito only addresses third party witness statements; therefore, employers may still claim that witness statements made by their own employees or former employees fall under attorney client privilege under Upjohn Co. v. United States, 449 U.S. 383, 397 (1981).

[9] Inculpatory statements are still discoverable when counsel and investigators who conduct witness interview are subpoenaed regarding the substance of the interviews, even when not reflected in their notes or recordings of those interviews.

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