

TOP TEN PITFALLS ENCOUNTERED IN INTERNAL INVESTIGATIONS

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Representation of corporations in corporate internal investigations is riddled with potential areas of danger. Every step of the representation and investigation present numerous opportunities for counsel to make mistakes with serious consequences for the company, its officers and employees, and the attorney him or herself.

The material herein is primarily based upon the seminal and invaluable authority in this area, Dan K. Webb, Robert W. Tarun & Steven F. Molo, *Corporate Internal Investigations* (1993) (“Webb”).

1. Securing the Representation

Securing competent representation as soon as a problem or issue is discovered which warrants investigation is often vital to prevent or mitigate possible legal consequences, civil or criminal, for a corporation down the road. In some cases, a company will cause in-house counsel to conduct an internal corporate investigation or—even less desirably—its officers or employees. Given the importance of internal investigations, retention of outside counsel by the company represents a better course since outside counsel is more likely to analyze the issues facing the company objectively than in-house counsel or corporate personnel. Outside counsel is further more likely to ask tough questions of the company and its personnel. Unfortunately, in many cases,

counsel often finds that he or she is being retained after the company has already conducted an investigation on its own or, frequently with unfortunate consequences for the company, has decided to disclose information to government agencies, thus causing itself “self-inflicted wounds.”

An attorney’s representation in an investigation may face challenges from shareholders or even the government. Accordingly, if possible, outside counsel should be engaged by a committee of the company, or by officers or directors who are not subjects or targets of the investigation and who have no appearance of a conflict of interest. *Webb*, at § 3.04[3][f].

In order to safeguard privilege and confidentiality, the corporation should issue a resolution or memorandum that an investigation is to be conducted and that the services of an outside attorney are being retained for the purposes of rendering legal advice. Any agreement regarding representation should clearly identify the client and the scope of the representation. *Id.*, at § 6.09[2].

2. Determining the Client or Clients

Corporate investigations frequently involve multiple parties or subjects, often with interests which may become antagonistic sooner or later. A corporation may be held criminally liable for the acts of its officers or employees. A corporation desiring to distance itself from an officer or employee, or an officer or employee who elects to cooperate with the government and offer evidence against his or her employer create

direct, actual conflicts of interest. Where different parties are targets of a government investigation, it will often be more prudent for each party to have separate representation.

However, multiple representation of both a corporation and officers or employees of the corporation is not prohibited. *Webb*, at § 3.04[3][f] (citing *Cuylar v. Sullivan*, 446 U.S. 335 (1980); *Holloway v. Arkansas*, 435 U.S. 475 (1978)). Yet, counsel should be very thorough in assessing the potential conflicts in such representation, should fully consult with each client regarding all possible potential conflicts, the sharing of confidential information, the consequences of plea-bargaining, immunity, conflicting defenses or a clients withdrawal of consent to the multiple representation, and the client's right to conflict-free representation, in strict compliance with local ethical or professional rules. *Id.*, at § 5.02[4] (quoting Wolfram, *Modern Legal Ethics*, 419 (1986)). Each client should be urged to consult with an independent attorney regarding the multiple representation. *Id.* Counsel should address the multiple representation in the agreement with each client and obtain the express consent of each client to the multiple representation in the agreement, setting forth in detail the consultation with the client regarding the multiple representation, the potential conflicts and consequences. *Id.*, at § 5.06[1]. If an actual conflict of interest exists, each client's knowing and intelligent waiver of the conflict should be obtained. *Id.*, at § 5.02[6]. However, such a waiver will not necessarily prevent disqualification.

3. Contacts with Officers, Employees and Witnesses

An essential part of internal investigations is communicating with and interviewing officers or employees with relevant knowledge. In the case of corporate personnel, this can lead to confusion as to whether counsel represents the individual or the corporation. At the outset of any communications with officers or employees, counsel should clearly advise them of the purpose of the communication and the fact that counsel represents the corporation, and not the officer or employee, pursuant to *Upjohn Co. v. United States*, 449 U.S. 383 (1981). *Webb*, at § 9.06[1]. Counsel should further memorialize his or her oral warnings in any notes or memoranda of the communications, and such notes or memorandum should further note that they are attorney work product. Counsel should inform all employees as to the nature of the attorney client privilege. *Id.*, at § 9.10. When obtaining information corporate employees, counsel should further guard against automatically giving employees the benefit of the doubt simply because they are “white collar” individuals.

Furthermore, where government entities or a grand jury are conducting their own investigations and are likely to approach corporate officers or employees, it is often urgent for counsel to interview relevant officers or employees, while taking great care not to say or do anything which might be construed as obstructing justice or suborning perjury. *Id.*, at § 9.08. Where the government is involved, it is advisable to inform any governmental entities involved of any and all persons represented by counsel, in order to prevent government agents from approaching parties directly, rather than through

counsel. Furthermore, if government agents have already contacted a client, the attorney should debrief the client as soon as is possible. *Id.*, at § 13.10[1].

Otherwise, in any corporate investigation, counsel should get a clear understanding of any problems or issues as soon as possible. *Id.*, at § 4.06. Counsel should develop clearly defined objectives and plans for the investigation at the outset, and obtain management's consent to such objectives and plans. *Id.* He or she should set forth his or her views in a work product memorandum. *Id.* Additional memoranda on any additional problems or issues which arise should be prepared. *Id.* A chronology of any relevant events and the investigation should also be prepared and maintained. *Id.*

4. Joint Defenses

Where the interests of subjects, targets or defendants are not adverse, it will often be desirable for them to cooperate in a "joint defense." Although joint defense agreements permit beneficial sharing of information, development of common strategies and reduce costs, the hazards of joint defense agreements include the potential for a party to use privileged or confidential information against another party or provide it to the government, as well as creating a risk that counsel could be subject to disqualification if a party elects to cooperate with the government. *Webb*, at § 5.05[4].

In order to be able to assert the joint defense privilege, the parties must show that (1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived. There must be actual or threatened legal proceedings for the privilege to apply. *Id.*, at §

5.05[1] (citing *United States v. Bay State Ambulance and Hospital Rental Service, Inc.*, 874 F.2d 20, 28 (1st Cir. 1989); *In re Bevill, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 126 (3d Cir. 1986); *United States v. Sawyer*, 878 F.Supp. 295, 297 (D.Mass. 1989)). Although each attorney participating in a joint defense agreement does not represent each party, each attorney still owes each party a duty of confidentiality and the attorney-client privilege is not waived when information is shared with other parties to a valid joint defense agreement.

Counsel should fully inform their clients regarding the nature of a joint defense agreement and the benefits and risks of entering into such an agreement. Counsel for the parties should enter into a clear written joint defense agreement, with the date of the agreement clearly set forth, stating, among other things, that the parties have common interests and that the purpose of the agreement is to promote adequate representation; what information will be shared, that no party will reveal information subject to the agreement without the prior consent of all parties; that any party may withdraw from the agreement on the condition that he or she notify all other parties in writing and return any information received under the agreement; that no attorney who has entered the agreement shall be disqualified from examining any party to the agreement who testifies in any proceeding; that the parties may use any information provided by any party to the agreement who testifies in any proceeding in cross-examining the party; that any party who withdraws from the agreement waives any privilege, confidentiality or conflict claims; that the agreement covers all parties, their attorneys and agents; and that nothing

in the agreement creates an attorney-client relationship between an attorney and a party who not the attorney's client. *Id.*, at § 5.05[5]

All documents provided pursuant to a joint defense agreement should further be labeled as confidential, work product and joint defense privileged. *Id.*, at § 5.06[4]. At the outset of every meeting or communication pursuant to a joint defense agreement, counsel should reiterate that the meeting or communication is being conducted pursuant to joint defense legal principles, and should make a notation to this effect in any notes or memorandum made pursuant to such meeting or communication. *Id.* Disclosure to persons not a party to the agreement must be guarded against, as disclosure may waive the privilege. Counsel should consider whether clients should be present at joint defense meetings, since this can increase the risk that privileged information may be disclosed. *Id.*

5. Confidentiality of Information

Corporations are typically large entities with numerous personnel who communicate frequently between themselves. Given today's many modes of communication, especially electronic mail, there is a substantial risk that information can be disseminated to outside parties, the media or the government, unless strict precautions are taken.

To help preserve confidentiality and privilege of information, it may be advisable for counsel or management to prepare a memorandum to all corporate personnel instructing that communications regarding certain matters be kept confidential and confined to designated persons, and that circulation of privileged or confidential material

be limited and confined to designated persons. *Webb*, at § 6.09[2]. Counsel should be especially vigilant in ensuring that e-mails regarding the investigation or its subject are only copied to necessary parties. It is vital to clearly and continually warn employees against dissemination of information relating to the investigation.

A memorandum, known as an “*Upjohn* memorandum,” should also be copied to relevant corporate personnel and individuals assisting counsel in the investigation, stating the purpose of the investigation, that the investigation is done in anticipation of litigation, that any materials generated in the investigation will receive work product protection and that all personnel are to cooperate in the investigation. *Id.*, at § 6.08[1] (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)).

Any and all attorney-client privileged, work product protected or other privileged documents should be clearly marked as work product or with the appropriate privileges. Counsel should segregate and index privileged or protected documents and should maintain a list of privileged or protected documents. *Id.*, at § 6.09[2]. A designated “privilege lawyer” may be assigned to review documents in order to guard against inadvertent waiver of privilege.

In order to ensure the applicability of the attorney-client privilege, communications or materials made by counsel should take care to distinguish whether they are for the purpose of legal or business advice. *Id.*, at § 6.04[5]. Furthermore, counsel or his or her associates or agents should conduct the investigation, not corporate officers or employees.

In many cases, expert witnesses, auditors, investigators or other agents will need to be retained. Counsel should be responsible the retention and direction of such experts, auditors, investigators or agents so that work product and other privileges protect their work. *Id.*, at § 10.07. All such persons should sign written agreements expressly providing that they are being hired to assist counsel in rendering legal advice to the client. *Id.* Any materials produced by such persons should be marked as prepared for counsel. *Id.* It should further be determined early on whether an expert is being retained as a consultant or to testify at trial. *Id.*

Individuals who are, or may become, subjects or targets of an investigation, or who are witnesses, should have no responsibility in conducting the investigation, if possible. *Id.*, at § 10.07.

6. Gathering, Maintaining and Disclosing Information

Corporate investigations often implicate voluminous documents and information. It is imperative for counsel to identify and review relevant documents and information for the purposes of the investigation. To this end, it is a good practice for counsel to arrange contacts within the corporation who can apprise counsel as to all relevant documents or information and assist counsel in obtaining all such documents or information. *Webb*, at § 8.11. Persons unaffiliated with the company should be involved in the retrieval of documents or information. *Id.*

Where large amounts of documents or information are in issue, counsel should carefully select how the documents and information will be organized or indexed. *Id.*

Counsel should further prepare files for “hot documents,” witnesses and other important subjects. *Id.*

Destruction of documents or information gives rise to a risk of charges for obstruction of justice. Therefore, it is imperative for counsel prepare a memorandum to all corporate personnel instructing that certain categories of documents or information be preserved and not be destroyed. *Id.* Counsel should ensure that all relevant documents and information are securely stored. *Id.*

In all too many cases, a government entity or a grand jury will conduct its own investigation and will request information from the company or serve it with a subpoena. If the government is amenable to the idea, it may be advisable to produce documents or information subject to a confidentiality agreement which provides that the corporation does not waive any privilege or work product protection, and prevents the information from being disclosed to outside parties. *Id.* Moreover, it is extremely important to keep careful track of any and all documents and information provided to the government, including through use of Bates-labeling and inventories or summaries of the production. *Id.*

If documents or information are produced to the government or a grand jury, counsel should carefully review any documents produced, and should obtain a receipt for the production. *Id.*

Conversely, a company may be subject to a search warrant. Government searches are frequently heavy-handed and disruptive. The corporation should designate a senior

manager to deal with the government in handling the company's compliance with warrants or subpoenas. *Id.*, at § 13.10[2][b]i]. A record of the file sources of any privileged, protected or confidential documents or information should be kept in the event any documents or information is seized.

Counsel have numerous duties where a warrant is executed for the corporation and a search conducted. Counsel should carefully review the warrant and ensure that the government agents are informed of the names of all in-house or outside attorneys and law firms who represent the corporation to place the agents on notice as to who will be observing the search and the names which will likely appear on any privileged documents, and are informed of any areas or files which contain privileged information. *Id.*, at §§ 13.10[2][b]i] & [ii]. He or she should also find out as much as possible from the agents or the supervising United States Attorney or other government official about the reasons for the search, and ask for identification from and identify all agents engaging in the search, as well as the governmental entity each is affiliated with. *Id.*, at § 13.10[2][b]ii]. It is recommended that that company and management be instructed not to consent to any proposed search, or search outside the scope of any search warrant. *Id.*, at § 13.10[2][b]i]. If the agents attempt to search areas or items outside the scope of the warrant, counsel should deny the agents access or request that the agents cease searching such areas or items. *Id.*, at § 13.10[2][b]ii]. Corporate counsel should keep a video camera ready to capture any wrongful or improper conduct by government agents. *Id.*, at § 13.10[2][b]i]. In the event that any problem arises, counsel should be prepared to

contact the court or agency issuing the subpoena immediately, while being careful not to “forcibly resist, oppose, prevent, impede or interfere with persons executing the search warrant.” *Id.*, at § 13.10[2][b]ii] (quoting 18 U.S.C. § 2231). Counsel should take notes on the agents’ actions and areas and items searched and seized, and management should further be instructed to make a list of any items seized which are essential to the operation of the company, so that counsel can move for the return of these items. *Id.* Following the search, counsel should promptly debrief any corporate personnel who were interviewed by government agents before, during or after the search. *Id.*, at § 13.10[c]

Historically, a corporation had no affirmative duty to report any wrongdoing to the government. However, the Sarbanes-Oxley Act requires a corporation which issues securities to file along with each periodic financial statement a written statement by the Chief Executive Officer and the Chief Financial Officer which confirms that the information contained in the report “fairly presents, in all material respects, the financial condition and results of operations of the issuer.” *Webb*, at § 3.30 (citing 18 U.S.C. § 1350). 18 U.S.C. § 1350(c) also provides for criminal penalties for knowingly or willfully certifying any statement which does not comply with the requirements of the section. *Id.*, Moreover, 15 U.S.C. § 7241(a)(5)(B) requires disclosure of “any fraud, whether or not material, that involves management or other employees who have a significant role in the issuer’s internal controls.” Other federal securities laws also require disclosure of facts which are “material.” *Id.*, There is also the federal misprision of a felony statute, 15 U.S.C. § 7241, which prohibits affirmative steps to conceal a crime. *Id.*

7. Reporting the Findings and Recommendations of the Investigation

Once the internal investigation is complete, counsel will be faced with the decision of how to present the findings and recommendations of the investigation to the client. In many cases, this will entail a written report for management containing findings, factual and legal issues and recommendations. Any written report should expressly state that it was prepared for the purpose of rendering legal advice to the corporation and that it is attorney-client privileged and attorney work-product. *Webb*, at § 11.10. Such report should include only such information as is absolutely necessary. *Id.* Counsel should keep in mind that any report may eventually be disclosed to the government and/or the corporation's shareholders, customers, lenders or vendors.

Counsel should also ensure that the corporation follows through on any recommendations of an internal investigation, as the company's actions may be significant in any decision by the government to take action against the company.

8. Testifying Before a Grand Jury

Where an officer or employee of a corporation has received a grand jury subpoena, he or she should be advised to consult with counsel.

If the witness intends to assert his or her Fifth Amendment privilege against self-incrimination, counsel for the witness should send the prosecutor a letter advising the prosecutor of the witness' intent to assert the privilege and seeking waiver of his or her client's appearance. *Webb*, at § 12.06[1].

If the witness does testify before the grand jury, counsel should advise the witness to answer all questions truthfully, and to answer questions without speculation and based on the facts known to him or her. *Id.* Counsel should debrief the witness immediately after their testimony, and prepare a debriefing memorandum. *Id.* Counsel should further request a copy of the witness' grand jury testimony. *Id.* If possible, counsel should have the witness prepare a statement to read to the grand jury, which will help confine and guide the witness' testimony. *Id.*

If there is a possibility for the client to receive a grant of immunity, counsel should obtain the broadest grant of immunity possible. *Id.*, at § 12.06[2].

9. Dealings with the Government

In cases where there is a contemporaneous government investigation or inquiry, a corporation will often find itself in a dilemma over whether to make contact with government representatives and provide them with information in an effort to dissuade or mitigate any perceived future action, at the risk of waiving any privilege or confidentiality.

In dealing with the government prior to an indictment, it is important to keep in mind the principles considered by the government in determining whether to prosecute:

The United States Attorney's Manual, beginning at Section 9-27, entitled "Principles of Federal Prosecution," sets forth guidelines for prosecutors considering a federal prosecution. These guidelines are an attempt by the government to establish a uniform approach to federal prosecutions, with the aim of providing fair and equal treatment, while maintaining a degree of flexibility in assessing factors which influence the decision to prosecute or not. In general, if a prosecutor believes a federal crime has been committed and there is sufficient evidence to support a conviction, a

prosecution should be pursued unless “no substantial federal interest” would be served by pursuing a prosecution, the person is subject to effective prosecution in another jurisdiction, or an adequate non-criminal alternative to prosecution exists. The factors to be considered in determining whether a potential prosecution should be pursued or declined include:

- Federal law enforcement priorities
- The nature and seriousness of the offense
- The deterrent effect of prosecution
- The person’s culpability
- The person’s criminal history
- The person’s willingness to cooperate
- The person’s personal circumstances
- The probable sentence or punishment
- Other considerations

The above Principles of Federal Prosecution are primarily focused upon an individual target as opposed to a putative corporate defendant. On December 12, 2006, Deputy Attorney General Paul J. McNulty issued a Department of Justice (“DOJ”) memorandum entitled “Principles of Federal Prosecution of Business Organizations” (the “McNulty Memo”) as a supplement to those principles of federal prosecution set forth in the U.S. Attorney’s Manual. The McNulty Memo supersedes two prior memorandums addressing the subject of corporate prosecutions. Deputy Attorney General Larry D. Thompson’s memorandum, dated January 20, 2003, was also entitled “Principles of Federal Prosecution of Business Organizations” (the “Thompson Memo”). Associate Attorney General Robert D. McCallum, Jr.’s memorandum, dated October 21, 2005, was entitled “Waiver of Corporate Attorney-Client and Work Product Protections” (the McCallum Memo”).

The McNulty Memo generally provides that prosecutors should apply the same factors in determining whether to charge a corporation as they do with respect to individuals, and should weigh all of the factors normally considered in the sound exercise of prosecutorial judgment regarding the same. However, because of the nature of the corporate “person,” additional factors should be considered when conducting an investigation, determining whether to bring charges, and negotiating plea agreements. The McNulty Memo provides that prosecutors should consider the following factors in reaching a decision as to the proper treatment of a corporate target:

- the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities,

if any, governing the prosecution of corporations for particular categories of crime;

- the pervasiveness of wrongdoing within the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
- the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
- the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents;
- the existence and adequacy of the corporation's pre-existing compliance program;
- the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
- collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;
- the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and,
- the adequacy of remedies such as civil or regulatory enforcement actions.

DOJ policy shifts announced in the McNulty Memo were significant in two respects. First, federal prosecutors must now obtain written approval before seeking a waiver of the attorney-client privilege and work product protection. Prosecutors must first establish a legitimate need for privileged information, and then must seek approval before they can request it. When federal prosecutors seek privileged attorney-client communications or legal advice from a company, the U.S. Attorney must obtain written approval from the Deputy Attorney General. When prosecutors seek privileged factual information from a company, such as facts uncovered in a company's internal investigation of corporate misconduct, prosecutors must seek the approval of their U.S. Attorney. The U.S. Attorney must then consult with the Assistant Attorney General of the Criminal Division before approving these requests. Attorney-client communications should be sought by prosecutors only in rare circumstances, and if a corporation chooses not to provide attorney-client communications after the government makes the request, prosecutors have been directed not to

consider that declination against the corporation in their charging decisions. Second, prosecutors generally may not consider a corporation's payment of legal fees to employees in determining a company's cooperation, except in rare circumstances when it can be shown that such fees, combined with other significant facts, were part of a deliberate design to impede the government's investigation.

(courtesy of Joseph P. Griffith, Jr., Esq., Joe Griffith Law Firm, LLC, <http://www.joegriffith.com/health-care-fraud-crimes.html>).

10. Parallel Proceedings

In some cases, the corporation will be involved in parallel civil or administrative proceedings while an investigation is being conducted. *Webb*, at § 14.13. If there is a pending criminal proceeding, counsel should seek a stay of any pending civil proceedings. In any event, counsel should seek a confidentially agreement or protective order preventing dissemination of materials produced in parallel proceedings. *Id.*