KEEPING YOUR NOSE CLEAN:

AVOIDING CRIMINAL LIABILITY AS IN-HOUSE COUNSEL

Presenter
ROSCOE C. HOWARD, JR.
Andrews Kurth LLP
1350 I Street, NW Suite 1100
Washington, DC 20005
P: 202.662.2750
roscoehoward@andrewskurth.com

Co-Author
PAUL L. MITCHELL
Andrews Kurth LLP
600 Travis St., Suite 4200
Houston, Texas 77002
(713) 220-3897
paulmitchell@andrewskurth.com

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ROScoe C. Howard, Jr.
Partner
1350 I Street, NW
Suite 1100
Washington, DC 20005
P: 202.662.2750
F: 202.974.9544
roscOehoward@andrewskurth.com

Roscoe is a partner in the firm’s Washington office. His practice focuses on white-collar criminal matters, corporate compliance and ethics issues, and complex litigation. He has extensive experience in handling investigative matters initiated by the Department of Justice, Securities and Exchange Commission and local state law enforcement agencies. He has assisted with corporate internal investigations, provides advice on corporate compliance and ethics issues and has handled a wide variety of criminal cases. He is a member of the Corporate Compliance, Investigations and Defense, and Antitrust practice groups. Roscoe has tried over 100 cases to trial as a federal prosecutor and has handled matters in both federal court and the District of Columbia Superior Court.

Prior to private practice, Roscoe was appointed by President George W. Bush to serve as the United States Attorney for the District of Columbia from 2001-2004. During his appointment as U.S. Attorney, he served on the Attorney General’s Advisory Committee. Roscoe was appointed as United States Attorney from a tenured, full professorship at the University of Kansas School of Law, where he taught from 1994 to 2001. He has twice served as an Associate Independent Counsel, and previously held positions as Assistant U.S. Attorney in the District of Columbia, the Eastern District of Virginia in Richmond, Virginia and in Alexandria, Virginia.

He has authored numerous articles on criminal law and procedure and frequently speaks at white-collar crime seminars and institutes. He is a member of the Virginia and District of Columbia Bars. Roscoe graduated from Culver Military Academy in 1970. He earned his AB in 1974 from Brown University and his JD in 1977 from the University of Virginia.
Paul has a broad litigation practice, with the primary focus of representing companies in the energy sector in commercial litigation, corporate investigations and related matters.

In the area of litigation, Paul has extensive experience in both state and federal courts, including commercial, oil and gas and real estate litigation. He has both prosecuted and defended cases involving claims of breach of contract, fraud, breach of fiduciary duty, tortious interference and numerous other matters.

His experience in corporate investigations has included representation of corporations and audit committees in investigations and disclosures to the SEC and DOJ of transactions implicating the Foreign Corrupt Practices Act, investigations of alleged internal wrongdoing implicating Sarbanes-Oxley, investigations implicating the antitrust laws, and investigations on behalf of special litigation committees in connection with shareholder derivative actions.
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Keeping Your Nose Clean: Compliance

- Look closely at compliance.
  - Law Enforcement will give you a break if you have an effective compliance program—but it has to be EFFECTIVE.
  - Enron had a compliance program; Arthur Andersen had a compliance program.
  - You’ve got to have one that works. ... Law Enforcement is looking for what you are doing to keep your house in order.
What You Should do Before the Government Knocks

- Establish an effective compliance and ethics program
- Establish standards and procedures to prevent and detect criminal conduct
- Designate a compliance officer
- Be a good corporate citizen
- Designate a point person for government investigations
- Prepare contact information for counsel and senior management
- Ensure employees understand their rights
- Prepare a list of pre-qualified attorneys
- Prepare handouts to employees regarding handling government interviews/requests
- Consider establishing corporate committees to review issues

Compliance Program Must be Meaningful

- Adequately funded and staffed
- Clearly communicated to employees
- Apply to all employees and all situations (no special exceptions)
- Enforced
- Periodic assessment to ensure still effective
- Make sure the executives and employees actually know the policies
- Review Chapter Eight of the U.S. Sentencing Guidelines

Maintain Corporate Governance Structure

- Effective board process
- Actual allocation of responsibility to committees
- Thorough committee process
- Thoughtful use of experts
- Board objectivity as to management
Think before you Act: Red Flags

- Washington Post Test
- Don’t discount the obvious – ethical rules and professional responsibilities
- When legal representation begins to become business advice, issues will arise – seek advice from an independent source
- Due diligence – don’t cut corners

Keeping Your Nose Clean: Divide the Duties

- Divide the duties.
  - For larger companies, try not to have the compliance officer be your in-house counsel.
  - If you ask me about my kids, I’m going to tell you they are beautiful and they are great people, but I’m invested in them.
  - If your in-house counsel is also your compliance officer, he may say, “Hell yeah, it’s an effective program. I’ve looked at it.”
  - You want somebody who isn’t invested “kicking the tires” of your compliance program.

Lessons from recent corporate scandals

- The consequences of noncompliance can be very harsh for companies and their executives.
- Internal investigations of alleged corporate misconduct must be solid.
- Don’t count on the attorney-client privilege.
- It’s important to pay strict attention to code of ethics and other corporate policy provisions (even for seemingly minor issues).
- A “head in the sand” approach to compliance is unacceptable.
A “Head In the Sand” Approach is Unacceptable

- “You may find a defendant had knowledge of a fact if you find that a defendant deliberately closed his eyes to what would otherwise have been obvious to him.”
  - From the judge's charge to the jury in the 2006 criminal trial of Ken Lay and Jeffrey Skilling (Enron).
- From June 2005 to April 2006, Hewlett-Packard’s General Counsel raised legal questions about pretesting practices at least six times – “But she never pushed for a definitive answer about whether the methods used were, in fact, lawful. Or, more importantly, whether they were unwise or dangerous to the company.”
  - From Corporate Counsel, December 19, 2006
- “Somebody is doing something today [in your company] that you and I would be unhappy about if we knew of it. That's inevitable . . . . But we can have a huge effect in minimizing such activities by jumping on anything immediately when there is the slightest odor of impropriety.”
  - From Warren Buffett memo to his senior management at Berkshire Hathaway, September 27, 2006.

Importance of Compliance with Code of Ethics

- “In the event the Chairman of the Board and Chief Executive Officer of Enron Corp. should desire to make . . . an investment [of personal funds in an enterprise which furnishes goods or services of a type utilized by Enron], he may do so only upon approval of . . . the Board of Directors.”
- “Rules are important but you should not be a slave to rules either.”
  - From Warren Buffett memo to his senior management at Berkshire Hathaway, September 27, 2006.
- “HP is committed to protecting the personal information of its customers, channel partners, suppliers, other business partners and employees.”

Keeping Your Nose Clean: Tone at the Top

- Watch the tone at the top.
  - People at the top of an organization send the message of what is important.
  - What are you telling people about what is important?
  - Make sure your employees are prepared.
  - Require continual management reassessment of controls (financial and disclosure) and regulatory compliance procedures
  - Best practices
Setting the Proper Tone at the Top

- "We cannot stress enough how important it is for senior executives to incorporate into their everyday planning and communications the unambiguous message that ethics integrity and compliance are at the core of . . . corporate culture."
  
  - From the 2003 report of an independent team that former U.S. Senator Warren Rudman commissioned to review Boeing Co.'s compliance program.

- Few corporate leaders actually get through to employees with the right tone because they aren't explicit enough.
- Tone at the top really does matter.
- Small, everyday actions can make all the difference.
- Leaders must lead by example. Walking the walk is more important than talking the talk.
- Organizations have many “tops.”

Source: Patricia Harned, President of Ethics Resource Center, writing in the 9/6/06 edition of Compliance Week

Ferreting out problems: Internal Investigations

- If you detect a problem, an internal investigation may help to “nip the problem in the bud.”
- Determine whether it should be done in-house or outsourced, depending on allegation and who is implicated.
- Solving the problem before going to the government is a “plus.”
Law Enforcement's View of Internal Investigations

- "The [U.S. Department of Justice] respects a company’s right to ferret out wrongdoing within its ranks — to do its own self-policing . . . [but there] must also be integrity in what the company does when investigating misconduct."
  - Deputy Attorney General
  - Paul J. McNulty
  - December 12, 2006

Considerations in Deciding on Conducting an Internal Investigation

- Which government agency would handle the investigation?
- What are the potential risks or claims against the company?
- What are the benefits of conducting a parallel internal investigation?
- What are the time constraints?
- What are the goals of the internal investigation?

Internal Investigation Constants

- The client is the company.
- Do not conduct solo interviews, the interviews should always consist of two or more people.
- Do not obstruct the investigation.
- Public disclosure concerns — when disclosing to one agency consider whether disclosure to another will impact the company.
Internal Investigation – Immediate Concerns

- Designate a responsible overseer
- Document the initiation of the investigation
- Determine who should conduct the investigation
- Establish the scope and the client
- Create document retention policy
- Designate a document custodian
- Notify employees of document retention policy
- Freeze IT systems
- Notify employees of their rights
- Instruct employees not to obstruct the investigation
- Keep documents in their country of origin until you have a good reason to bring them to the United States

Remember that the United States attorney-client privilege and the work product protections may not transfer to other countries.

Implementing the Internal Investigation

- Collect and Preserve All Relevant Documents
  - Prioritize and collect documents, including electronic data
  - Create a plan for review of documents
  - Maintain and organize documents
  - Protect documents that were not subpoenaed or requested
  - Protect proprietary information and attorney-client privileged or work product protected materials

- Other Investigational Tools
  - Forensic experts
  - Auditors

Implementing the Internal Investigation: Witness Interviews

- Prioritize witnesses and conduct interviews
  - Provide "Upjohn" warnings
    - The interviewer represents the company only
    - The interviewer is assisting a company investigation
    - The interview is privileged information of the company
    - The company may decide to waive the privilege and share the information with third parties

- Remind the employee
  - Interview is a condition of employment
  - Do not give advice on retention of counsel
  - Have a list of counsel to provide if they want advice
  - Keep the interview confidential

- Document the interview
  - Attorney Notes
Keeping Your Nose Clean: Know the Rules

- Know the rules before you need to use them
  - Understand the U.S. Department of Justice and S.E.C. policies
    - policy memoranda explain the government’s practices and principles in business prosecutions.
  - No government agency will call and tell you they are coming.
  - Law Enforcement wants to catch you off guard.
    - If you’re trying to get your act together during the investigation, it is too late.

Methods Used by the Government to Get Things Started

- Search warrants
- Grand jury subpoenas
- Civil, administrative or investigative demands
- Requests for informal interviews

Law Enforcement is Taking a Harder Look at Corporate Crime

SEC Promises to Make War on Securities Fraud

- “One of the first things I’ll do would be to try to take the handcuffs off the enforcement division.”
- “The Commission will make war without quarter on any who sell securities by fraud or misrepresentation.”
  - Chairman Mary Shapiro

- “As head of the SEC’s Division of Enforcement, the staff and I will relentlessly pursue and bring to justice those whose misconduct infects our markets, corrodes investor confidence and has caused so much financial suffering.”
  - Enforcement Director Robert Khuzami
Government Focus on Corporations

Filip Memorandum (August 2008) – in determining whether to charge a corporation, the government looks for:

- Disclosure of “relevant facts,” whether privileged or not
- No request of waiver of “core” attorney-client communications or work product or from crediting corporations that do waive privilege
- Corporate counsel should raise attorney-client privilege protections issues with the appropriate U.S. Attorney or Assistant Attorney General
- Remediation efforts by the company after discovery of problem
- Participation in joint defense agreements, to the extent it prevents a company from disclosing relevant facts
- Prosecutors can no longer take into consideration promises to indemnify employees and agents

SEC Now Makes It Easy For Whistleblowers

SEC Makes Whistleblowing Easier
Corporate/Securities Enforcers “Ramping Up”

- President Obama’s creation of an Interagency Financial Fraud Enforcement Task Force
  - More than 20 federal agencies involved including SEC and DOJ
- SEC’s budget request of $1.2 billion for next year
  - 12% increase over 2010
  - Enable agency to hire 130 new full-time enforcement employees, open 75 more inquiries and 130 more formal investigations, and bring 70+ more cases than 2010
- DOJ’s funding request includes a request for 118 new positions to combat financial fraud

SEC Principles of Cooperation for Companies

- **Self-policing** prior to discovery of misconduct
  - Effective compliance procedures
  - Appropriate “tone at the top”
- **Self-reporting** misconduct upon discovery
  - Thorough review of nature, extent, origins and consequences
  - Disclosure to public regulators
- **Remediation**
  - Dismissing or appropriately disciplining wrongdoers
  - Internal controls and procedures to prevent recurrence
  - Compensating those adversely affected
- **Cooperation with law enforcement authorities**

SEC Principles of Cooperation for Individuals

- The assistance provided by the cooperating individual in connection with the SEC’s investigation or related enforcement action
- The importance of the underlying matter in which the individual cooperated
- The societal interest in ensuring that the cooperating individual is held accountable for his or her misconduct
- The appropriateness of cooperation credit based upon the profile of the cooperating individual
Government Investigations

- The Government does not need any level of proof to justify "looking at a company."
- A business organization may only act through its employees. The objective of the organization in a government investigation is to overcome the presumption that the company is responsible for the "bad acts" of its employees that brought government scrutiny.
- Two questions loom to respond to a government investigation:
  - Were the employees acting within the scope of their authority?
  - Is there an effective compliance system in place and was it deliberately avoided by the employees in question?

Factors Influencing Decisions to Investigate or Prosecute

The Government will focus on a business entity because of information brought to its attention by an individual, the media or through another investigation.

- Political themes – TARP funds, healthcare fraud, mortgage fraud.
- News Articles
- Whistleblowers
- Anonymous and Non-Anonymous “Tips”
- Competitors
- Former Employees

The U.S. is not the only place that can cause you problems:

UK Bribery Act 2010

- The 2010 Bribery Act overhauled criminal bribery law in the United Kingdom.
- Main provisions in the act include:
  - Bribery of a foreign public official is criminal offence.
  - An offence for failure to prevent bribery by a commercial organisation.
  - Maximum imprisonment of 10 years for individuals and unlimited fines for commercial organisations.
- Covers any company doing business in the UK:
  - “Relevant commercial organisation” means—any other body corporate (wherever incorporated) which carries on a business, or part of a business, in any part of the United Kingdom.
- The alleged violation need not occur in the United Kingdom for a non-UK company to be investigated and charged by UK law enforcement authorities.
How to Advise Clients in Parallel Investigations

- When responding to regulatory or law enforcement demands for materials and information, assume that the information will be provided to other government agencies, including prosecutors.
- Consider contacting prosecutors early and often.
  - ask questions
  - make a record of all contact with DOJ
  - advise prosecutors that the company and/or its employees are represented by counsel, and offer to discuss issues
  - ensure that all subsequent contacts are through counsel

Examples of Initial Questions to Ask Government

- What is the status of my client in this investigation (i.e., target, subject, witness)?
- What are the possible charges against my client?
- What other agencies are involved in this investigation?
- What charges are other agencies pursuing?
- Are the agencies cooperating with one another?
- How long has this investigation been going on?
- What are the names of other targets in this investigation?
- Who have you talked to as part of your investigation?
- Consider “Queen for a Day” Letter for initial interviews

Advice to GCs on Government Probes: Don’t Panic

- “When they knock, don’t panic.”
  - It’s all about pressure.
  - Investigators will send in uniformed law enforcement officers just for effect.
  - None of us think as well when we are under pressure.
  - One of the ways to handle the pressure is to prepare for it now.
What to do When the Government Knocks – Search Warrants

- Don’t panic
- Call attorneys
- Get identification – agents and government attorney
- Review the warrant and affidavit
- Dismiss non-essential employees for the day
- Do not consent to search
- Do not consent to interviews
- Do not agree to expand the scope of the search
- Cooperate with the agents during the search but don’t make the government’s case for it
- Ask to obtain copies of documents that are seized
- Obtain agents’ inventory of records seized
- Create a detailed list of items seized

What to do When the Government Knocks – Investigative Demands

- Don’t panic
- Call your lawyer
- Review document request carefully
- Identify primary point of contact
- Negotiate reasonable scope
- Do not obstruct investigation
- Consider conducting internal investigation
- Preserve privilege
- Request and plan for communications with investigators
- Cooperate but don’t make government’s case for it
- Request and plan for exit conference with investigators
- Determine which government agencies are involved

What to do When the Government Knocks – Unannounced Interviews

- Don’t panic
- Get identification
- Be polite
- Determine reason for interview
- Express willingness to cooperate
- Refer investigators to counsel
- Do not be persuaded to answer questions
- Do not be intimidated by persistent investigators, threats of subpoenas and grand jury visits
- Ask if there is a subpoena or warrant to be served
- Miranda – “Am I free to go?”
Investigations: International Concerns

- Keep documents in their country of origin until you have a good reason to bring them to the United States.
- Remember that the United States attorney-client privilege and the work product protections may not transfer to other countries.

Steps to Take After the Government Knocks

- Contact counsel
- Prepare narrative of what transpired
- Instruct employees on document retention
- Conduct debriefings
- Identify employees with relevant information
- Distribute information to employees regarding handling government interviews/requests
- Contact government attorneys
- Determine which government agencies are involved
- Collect, copy and identify all relevant materials, including e-mails, computer files and other documents
- Determine whether to conduct parallel internal investigation
- Set up a response team for the government investigation
- Set up plan for communications with the public
- Consider setting up a committee to oversee internal investigation

How to Advise Clients in Parallel Investigations

- When responding to regulatory or law enforcement demands for materials and information, assume that the information will be shared with other government agencies, including prosecutors. Civil, criminal, and administrative tools may be employed.
- Contact prosecutors early and often to ask questions and make a record.
- Advise prosecutors that client is represented by counsel to ensure that all subsequent contacts are with counsel and to open a dialogue on the issues.
Dealing with the Press

- Press can be a useful tool
- Be wary of trying cases in press
- Ethical limits on statements to press
- Audience is too broad
- Press acts only in sound bites
- Words easily taken out of context
- Nurture relations with press

Roscoe C. Howard, Jr.

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