New Jersey Law Journal

VOL. CLXXXVI– NO. 10 – INDEX 924 DECEMBER 4, 2006 ESTABLISHED 1878

Environmental Law

A Nontoxic Ounce of Prevention

Notes on handling Enron-era environmental investigations

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Legal practice in the zone between businesses and government investigators has changed drastically since the dawning of the Enron era in 2001. Judge Kaplan succinctly described the birth of this period of corporate criminal prosecutions in *U.S. v Stein*, 435 F. Supp.2d 330, 337 (SDNY 2006) (*Stein I*). These changes have profoundly affected white collar litigation in general and environmental practice in particular. Most importantly, these changes have placed a premium on preventive lawyering and aggressive efforts to educate clients. Lawyers and clients must now focus, before investigations have begun, on the lowered bar for obstruction of justice prosecutions under "Sarbanes-Oxley," as well as on government investigators' insistence that full cooperation requires a waiver of a corporation's applicable privileges. (This latter requirement impacts both corporate strategies and the fate of individual officers and employers.)

Stepped-up criminal enforcement of environmental, health and safety laws has been widely heralded by the federal government. Staffing changes at the U.S. Environmental Protection Agency (EPA), Office of Enforcement and Compliance (OECA), new initiatives and additional funding for the OECA criminal program all suggest that this will be a growing trend. See "The State of Environmental Crime Enforcement: An Annual Survey," By Steven P. Solow, *BNA Environment Reporter*, Vol. 37, No. 9, 3/3/2006, pp. 465.

The now infamous Thompson Memorandum urges federal prosecutors to work hand in hand with representatives from inter alia, the EPA and the Environmental Crimes Section of the Environment and Natural Resources Division, in order to benefit from knowledge "outside the normal experience of criminal prosecutors." See Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Department Components United States Att'y, Principals of Federal Prosecution of Business Organizations (Jan. 20, 2003) (available at www.usdoj.gov/dag/cftf/corporate_ guidelines.htm). In addition to the Thompson Memorandum, a close study of the subject requires examination of the Holder Memorandum which preceded it (Memorandum from Eric H. Holder Jr., Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999), available at www.usdoj.gov/criminal/fraud/ policy/Chargingcorps.html) and the McCallum Memorandum which succeeded it (Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys (Oct. 21, 2005), available at www.us doj.gov/usao/eousa/foia_reading_ room/usam/title9/crm00163.htm.)

This enhanced use of investigative personnel on the state and federal levels has been complemented by an emphasis on business compliance with government regulations. Consequently, effective counseling of heavily regulated businesses requires a keen sense for when a purely regulatory matter may take on criminal hues. The Thompson Memorandum is a critical guideline for those interested in developing early awareness of approaching criminal inquiries. The memorandum sets forth nine factors to be considered by prosecutors when choosing between civil and criminal remedies or between indictments, deferred prosecutions and nolle pros decisions. Although all nine of the factors are significant, two are essential to the current discussion: Factor 4, "timely and voluntary disclosure of the wrongdoing and willingness to cooperate" and Factor 5, "the exis-

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tence and adequacy of a corporate compliance program."

This focus on "compliance" and "cooperation" reflected in the Thompson Memorandum, along with other important executive and legislative pronouncements during the Enron era, such as the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, demands lawyer facility with the following issues: (1) the need for companies to be aware of the opportunities and dangers inherent in early cooperation with the government, (2) the need for business leaders and managers to understand the nuances surrounding attorney-client and work product privileges, (3) the need for all participants, lawyers and nonlawyers alike, to heed the perils created by the lowered culpable mental states for federal obstruction of justice charges, and (4) early recognition of the dangers inherent in parallel civil and criminal proceedings. David M. Ulhmann, Chief of the Department of Justice's Environmental Crimes Unit, has noted that these broadly recognized white-collar "hot-button" issues are "critical issues for the environmental crimes program."

For counsel who believe that criminal problems are unlikely to affect their clients, let us consider the following hypothetical case, which contains issues likely to lurk just beneath the surface of initial contacts with senior management in business organizations facing inquiries or investigations. An old client, the Clean Image Corporation, has just hired your law firm to conduct an investigation. The EPA has opened a multimedia inspection at one of your client's manufacturing facilities. The agency has questioned the completeness and accuracy of information submitted to it as required by law and has suggested there may be "serious consequences" if satisfactory explanations are not forthcoming. Because you are aware that Clean Image is a good corporate citizen with a good compliance history, you assure the government that the company will cooperate thoroughly in unearthing the cause of any deficiencies in its reports.

Specifically, EPA has questions about certain reports and test data submitted under applicable regulatory programs. You begin your inquiry by interviewing a senior vice president you have known for many years. The vice president is in charge of overseeing the preparation and certification of reports to government agencies. As is typical in these situations, the vice president relies heavily on the information he receives from in-house environmental, health and safety managers.

As soon as you are seated with the vice president, he informs you that he recalls a briefing from a prior corporate counsel about "the Upjohn case." He asks, "Is our conversation confidential?" He explains that he is asking because he wants to be totally candid with you about certain "issues" with "incomplete" records and questionable test reporting "protocols" in connection with the inquiries from EPA's inspectors.

This simple question raises legal, ethical and strategic challenges. Your obligation to diligently represent Clean Image's interests and to search out the path that will be "in the best interests of the corporation" is clear. RPC 1; 3, 1.13(b). Your charge is to show that Clean Image has been in compliance, or if there has been a lack of compliance, that any lapses are not chargeable to the corporation. You may be motivated by your client's concerns to "cooperate" with the government by unearthing any wrong doing. You are considering a recommendation that your client waive applicable privileges and authorize you to share all of your findings with the government.

However, your duty to deal candidly with unrepresented persons prevents you from falsely assuring the vice president that you will or can protect him from the disclosure of any confessions of his own wrongful conduct he may offer. RPC 4.3.

If the vice president is about to inform you that he may bear some responsibility for the "incomplete" documents, he may be affected by the fact that Sarbanes-Oxley reforms have considerably lowered the bar for obstruction of justice prosecutions. Gone is the requirement of "consciousness of wrongdoing" considered by the Supreme Court in *Andersen v United States*, 544 U.S. 696, 706 (2005), as the essential mental element of 18 U.S.C. 1512(b). Now it may suffice for the government to demonstrate under 18 U.S.C. 1512(b) or 18 U.S.C. 1519 that an actor had the intention to "impair," "mutilate" or "falsify" a document destined for EPA without proving that the actor knew the conduct was illegal. For a succinct analysis of the effect of Sarbanes-Oxley on the mens rea requirement for Federal obstruction prosecutions, see Howell & Weissman, "Ostruction for Data Destruction after 'Andersen'," *N.Y. Law Journal*, June 8, 2006.

If you tell the apprehensive and possibly culpable vice president that the "confidences" you must preserve are Clean Image's and not his, he will face difficult choices. A decision to be less than candid, for example, may engender unforeseen consequences. If the government relies on the principles of the Thompson Memorandum, and demands that Clean Image waive its work product and attorney-client privileges, then the contents of your interview with the vice president will ultimately be disclosed to investigators. Currently, the federal government takes the position that false statements made to private attorneys conducting internal investigations, while companies are cooperating with the government, may constitute obstruction of justice under 18 U.S.C. § 1512(c)(2). See Judge Kaplan's observations in *U.S. v Stein*, 2006 WL 2060430 (S.D.N.Y.2006) *(Stein II)* FN 114. This view is contrary to the well-settled position, articulated in Justice William Rehnquist's 1995 opinion in *U.S. v Aguilar*, 515 U.S. 593, 599 (1995), and reiterated as recently as *Andersen*, that criminal prosecution required a "nexus" in "time causation or logic" between an act of obstruction and a "judicial proceeding."

Telling the vice president that your talk is not confidential may cause him to remain silent. This may hurt Clean Image's ability to satisfy the government that Clean Image is fully cooperating to the extent necessary to avoid prosecution, and obtain a deferred prosecution agreement.

These scenarios are not designed to suggest that there are no sound approaches in this new era, but rather to caution that those who wait until investigations have begun considerably narrow their options and increase their risks. Some key considerations for addressing this dilemma follow.

The first keys are prophylaxis, prophylaxis and prophylaxis.

Employees should be trained to utilize an environmental management system with sound record keeping and document retention policies and to understand the relative ease with which "obstruction" charges can be brought even if they lack criminal intent. Sound polices and sound auditing protocols, implemented at least periodically by independent third parties, might enable Clean Image to ferret out the issues concerning its vice president before an investigation commences.

If the company's intention is to maintain the kind of rigorous, transparent compliance programs that are viewed positively by government investigators, then key employees should understand the nature of the attorney-client privilege in the corporate context and the likelihood that any applicable privileges could be waived in the event of an investigation. The middle of an investigation is not the optimum time to explain the nuances of the privilege. This is especially true if the listener, like the vice president, is being told that the lawyer explaining the law to him is likely to be disclosing his incriminatory statements to the authorities.

There should be a well thought out, carefully constructed policy addressing the issue of paying legal fees for executives and employees whose legal problems arise from their work. Having funds to hire separate counsel might help alleviate the challenge of talking to the vice president in our hypothetical. Note, however, that this is an area of evolving jurisprudence. Judge Kaplan, in *Stein I* and *II*, addressed the questions of whether the government tactic of employing the cooperation guidelines of the Thompson Memorandum amounts to an unconstitutional effort to coerce companies seeking deferred prosecution to deny payment of legal fees to their employees. The practice of compelling waivers has drawn criticisms from many sources. Former Republican and Democratic Attorneys General and Solicitors General have argued that it creates a "culture of waiver." The ABA has decried the "chilling effect" of the practices, and groups as diverse as the U.S. Chamber of Commerce, the ACLU, the Association of Corporate Counsel and the National Association of Criminal Defense Lawyers have responded to invitations to criticize the practice before the Senate Judiciary Committee.

Matters as complex and nuanced as these are not best discussed with business leaders who are under the pressure of investigation. They should be initially broached when there is still time to develop compliance policies, and when the fate of the company, which may be sensitive to regulation and the market, is not at stake, and when leadership is not immediately fearful of being designated as a target. This is especially true when there is the need to rationally assess the logical but risky possibility of not cooperating with the government.

You must consider that any inquiry into a regulatory violation has the potential to spawn an investigation or criminal case that has broader implications for the entire enterprise. Also, while the government often purports to target only "the most egregious offenders," the chances that criminal charges, high fines and restitution may stem from routine civil compliance inspections are not insignificant. Due to increased communication among government programs, charges potentially could stem from the inspection of the initially targeted facility or program, a follow-up inspection at the same facility by a different program, or an inspection of a different facility conducted to evaluate whether there is a pattern of noncompliance throughout the larger organization.

Beware of parallel investigations. See Edward R. Bonanno, "Parallel Proceedings Issues for Criminal and Civil Enforcement," *New Jersey Lawyer*, February 2005. The government has many advantages in civil proceedings and investigations, ranging from enhanced discovery opportunities, to the fact that clients may be reluctant to assert their rights for fear of angering the government or "looking guilty." While the government may simultaneously conduct civil and criminal investigations into alleged wrongful conduct, it may not use these processes to savage individual constitutional rights.

In this new era, an "ounce of prevention," although impossible to objectively calculate or measure, may be worth far more than the proverbial pound of cure. Experienced counsel have appreciated the trends and nuances in environmental, health and safety compliance requirements and government enforcement initiatives for some time. Like the government, these advisors need more than ever to employ comprehensive training and interdisciplinary techniques to protect their clients from the multifaceted financial burdens, strains on personnel and negative publicity that come along with a criminal investigation. Special attention should be given to developing record-keeping and document retention protocols and practices that can stand up to the scrutiny of a government prosecutor. Independent third parties should be engaged periodically to test the system or "audit the auditors." Such parties should not have long-standing relationships with the organization and should be engaged separately by, and report directly to top management, apart from the traditional EHS function ■