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The Pitfalls of Cooperating with Government Investigations: Privilege and *Brady* Considerations

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Potential Implications of Cooperating with Government Investigations

- Risk of privilege waiver over internal investigation interview materials.

- Fifth Amendment and *Brady* implications of "deputization" where a cooperating company is deemed an agent of the government.

Government Policies Motivating Cooperation - 2008 Filip Memo

- Memo revising Principles of Federal Prosecution of Business Organizations.
- Outlines what measures a corporation must undertake to qualify for cooperation credit.
- Includes a corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents.
- Revised prior DOJ guidance that considered as a factor the willingness of a corporation to waive privilege.

Government Policies Motivating Cooperation - 2015 Yates Memo

- Reinforced DOJ's focus on individual culpability.
- To qualify for ANY cooperation credit, corporations must provide the DOJ with ALL relevant facts relating to individuals responsible for the misconduct.
- Changed the consequences of not disclosing all facts about individuals:
  - Historically, cooperation credit was a "sliding scale."
  - Now, full disclosure of all facts about all individuals involved in wrongdoing is a "threshold hurdle."

Implications of Yates Memo

- **Privilege:** Tension between disclosing all relevant facts to be eligible for cooperation credit and maintaining privilege over internal investigation materials.

- **Focus on Individuals:** Pressure to conform internal investigation to needs of government, and risk being deemed an "agent" of the government.

Maintaining Privilege Over Internal Investigation Interview Material: Recent Case Law

- *S.E.C. v. Vitesse Semiconductor Corp., et al* (S.D.N.Y. 2011): "Very detailed, witness-specific" oral downloads provided to the SEC constituted waiver of work product protection.

- *In re General Motors LLC Ignition Switch Litigation* (S.D.N.Y. 2015): Disclosing company's investigation report to government – including numerous citations to witness interviews – did not waive work product protection over interview notes and memoranda.
    - Distinction between *facts* learned in interviews, and *record* of what was said in interviews.

Maintaining Privilege Over Internal Investigation Interview Material: Recent Case Law

- *U.S. v. Stewart* (S.D.N.Y. 2016): Disclosure of *contents* of privileged communications, as opposed to unprivileged *facts*, constituted waiver of privilege.
    - Court appears to have relied on language in letter stating, "Mr. Stewart *reported*…"

Maintaining Privilege Over Internal Investigation Interview Material: Recent Case Law

- *S.E.C. v. Herrera* (S.D. Fla. 2017): Addressed whether law firm conducting internal investigation waived work product protection when it voluntarily gave the SEC "oral downloads" of interview notes.
  - Held: Law firm waived work product protection, and was compelled to produce interview notes and memoranda to defendants.
  - Reading memorandum to government is the same as handing it over: "[N]o substantive distinction…between the… physical delivery of…notes and memoranda and reading or orally summarizing the same written materials…."

Maintaining Privilege Over Internal Investigation Interview Material: Key Takeaways and Practice Pointers

- Summary of facts v. what witnesses said.
- Avoid attributing specific facts to particular witnesses.
- "Based on our investigation to date, we understand that…"
- Suggest witnesses for government to interview.

Maintaining Privilege Over Internal Investigation Interview Material: Key Takeaways and Practice Pointers

- Create separate document with limited talking points for use in presentation to government.
- Keep detailed notes of what was conveyed during all government meetings.
- No decks or other handouts.
- If handouts must be used, mark them as Attorney Work Product.

The Danger of Corporate "Deputization"

- Pressure on cooperating companies to conform internal investigations to needs of government and in a way that furthers government's interest in pursuing individuals.
- Potential consequences where internal investigation becomes too closely entwined with government investigation.
- Criminal Defendants in two recent cases have invoked corporate "deputization" argument.

The Danger of Corporate "Deputization": *Brady* Implications

- *U.S. v. Blumberg* (D.N.J. 2014)
  - Following multi-year internal and government investigations, brokerage firm (ConvergEx) entered into DPA.
  - In criminal case against former subsidiary CEO, Defendant argued that government "effectively deputized ConvergEx as a member of its investigative team," and that government had obligation to search for and produce *Brady* materials within company's files.
  - Defendant relied on *U.S. v. Risha*, 445 F.3d 298 (3d Cir. 2006): Three-part test for determining whether evidence in another investigating agency's files is in government's "constructive possession" for *Brady* purposes.

The Danger of Corporate "Deputization": *Brady* Implications

- *U.S. v. Blumberg* (D.N.J. 2014)
  - Court held four-day evidentiary hearing.
  - Evidence presented by Defendant:
    - 8,000 pages of correspondence between government and counsel.
    - Counsel interviewed dozens of witnesses and read memoranda to government.
    - Counsel reported to government on its review of documents and audio.
    - Counsel analyzed trade data and created charts and spreadsheets for government.
    - Counsel created binders of key documents for government.
    - Counsel walked government through list of employees and gave impressions on culpability of each.
  - In response, government argued that nevertheless, it had conducted an "aggressive" and "independent" investigation.
  - Defendant entered into favorable plea agreement following hearing.

The Danger of Corporate "Deputization": Fifth Amendment Implications

- *U.S. v. Connolly, et al.* (S.D.N.Y. 2016)
  - After multi-year internal and government investigations, Deutsche Bank entered into a DPA relating to LIBOR manipulation.
  - In subsequent criminal case against two former DB traders, Defendant moved to suppress "compelled statements that he made to Deutsche Bank's counsel" under threat of termination.
  - Relied on *Garrity v. New Jersey*, 385 U.S. 493 (1967), and its progeny: Statements made by employees to private employers under threat of termination are involuntary where employer's actions are "fairly attributable to the government."

The Danger of Corporate "Deputization": Fifth Amendment Implications

- *U.S. v. Connolly, et al.* (S.D.N.Y. 2016)
  - Court ordered evidentiary hearing on the issue.
  - Evidence presented by Defendant:
    - Letter from CFTC requesting that DB initiate internal investigation.
    - Letter from CFTC outlining "agreed-upon actions" to be taken in connection with internal investigation.
    - Government direction to counsel to "let us know about process of internal investigation and give us heads up about actions."
    - Email summarizing steps CFTC wanted DB to take, including interviews of specific traders.
    - Government direction to counsel to approach interview "as if he were a prosecutor."
    - Bank employees interviewed without counsel by 8-10 lawyers with little information provided to them beforehand.
    - DB white paper outlining extent of cooperation.

The Danger of Corporate "Deputization": Fifth Amendment Implications

- *U.S. v. Connolly, et al.* (S.D.N.Y. 2016)
  - At hearing, the court defined the issue as whether the CFTC "outsource[d] its investigative responsibilities to Deutsche Bank" and whether counsel "took their marching orders" from the CFTC.
  - On this point, the Court noted that Defendant's evidence was "highly persuasive."
  - Following hearing, DOJ decided not to offer evidence of Defendant's statements to corporate counsel.

Implications for Restitution: *Lagos* (S. Ct. 2018) and *Napout* (E.D.N.Y. 2018)

- Supreme Court reduced the scope of company internal investigation costs eligible for restitution under MVRA.
- MVRA "does not cover the costs of a private investigation that the victim chooses on its own to conduct" (e.g., investigation to demonstrate cooperation, avoid prosecution, or preserve victim status).
- Restitution limited to fees and expenses for investigative activity that the government specifically "invited or requested" (e.g., attorneys' fees to prepare company witness for trial testimony).
- Tension between getting restitution and risk of deputization.

The Danger of Corporate "Deputization": Key Takeaways and Practice Pointers

- Memorialize corporate reasons for commencement of internal investigation.
- Make clear in memorialization that company has elected to initiate investigation for reasons independent of cooperation with government investigation.
- Document corporation's scope, action plan and priorities for internal investigation, and distinguish from government's instructions and demands.
- Produce documents only pursuant to government subpoena.

The Danger of Corporate "Deputization": Key Takeaways and Practice Pointers

- Distinguish employee interviews from government proffers by setting non-adversarial tone (e.g., minimize number of attorneys present, and consider providing employees with counsel and documents beforehand).

- If an employee is terminated for refusing to be interviewed, make clear that termination is based on failure to cooperate with internal investigation, as is required under company policy.

- If employee misconduct is discovered warranting termination or other employment action, record should reflect that termination is based on company's finding of misconduct.