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Investigations Put Employees in Tough Spot

Are 'cooperating' corporations violating constitutional rights?

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THE INSISTENCE by the Department of Justice and the Securities and Exchange Commission that corporations promptly reveal any alleged wrongful conduct, agree to perform an "internal investigation" and turn over notes of interviews with or affidavits and questionnaires received from employees in "real time"[1] in order to secure credit for "cooperation," has spawned anew the question of whether counsel conducting these investigations and interviews, or the corporation itself, are functioning as "state actors." In turn, there is a renewed focus on whether employers, during internal investigations, must advise their employees of their constitutional rights at the outset of questioning. This raises the corollary of whether the employer can terminate an employee who asserts constitutional rights in declining to respond to the employer's inquiry.

If the employee asserts constitutional rights, including the Fourth Amendment right against unreasonable searches and seizures, the Fifth Amendment rights not to bear witness against oneself and Due Process, and, depending on the agreement between the corporation and government, perhaps the Sixth Amendment right to counsel, is the corporation also barred from terminating the employee on the grounds that the termination amounts to an impermissible penalty for invocation of a constitutional right? Are immunity issues implicated? Is suppression of the statements coerced in these circumstances, and their fruits, an appropriate remedy for the courts to impose?

This issue has been reborn in light of the Department of Justice's indictments of employees of Computer Associates[2] and El Paso Corporation[3] who allegedly provided false information to the cooperating corporation and its outside law firm, and failed to provide certain other information, knowing that their respective corporation's notes, memoranda, and other information would be shared with the government and with regulatory agencies. In fact, in both the Computer Associates and the El Paso matters, the employees were criminally indicted for obstruction of justice in part for "withholding" information from their respective employers. In light of these indictments, what options do corporations and their employees have?

Pressure to Cooperate

After the collapse of Arthur Andersen, it would be folly for a company with a serious issue to refuse to cooperate with the prosecutors. However, those prosecutors are demanding that companies agree, often before an internal investigation has begun or is concluded, to ferret out their own alleged wrongdoers, turn over their attorney-client privileged or attorney work product notes and memoranda of attorney interviews with those employees, and in some instances terminate any employees who refuse to cooperate with the company's investigation.

In the present environment, companies understand going into an internal investigation that they have few if any alternatives if they wish to receive cooperation credit from federal prosecutors under the so-called "Thompson" and "Holder" Memoranda.[4] In some instances they agree in advance to conduct the internal investigation for the benefit of the government. The SEC, other agencies, and even self-regulatory agencies, also have begun demanding the same sort of corporate "cooperation" to avoid having the corporation named as a defendant in a regulatory action or heavily fined.

The pressure on corporations to "cooperate" by waiving their attorney-client and attorney work product privileges, and turning over any evidence of, and identifying, potential corporate miscreants is enormous, and it may be growing notwithstanding the recent decision by U.S. District Judge Lewis Kaplan in *United States of America v. Jeffrey Stein*.[5] In *Stein*, Judge Kaplan held the Thompson Memorandum unconstitutional to the extent that the government pressures and coerces corporations to withhold advancement of legal fees and defense

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costs from employees on threat of refusing to grant them "cooperator" status.

The *Stein* decision did not address retaliatory firings of employees who invoke their other constitutional rights in declining to respond either to corporate counsel or government investigators. The Thompson Memorandum and the Holder Memorandum have produced a "culture of cooperation" at the expense of fundamental rights of employees. Nor are these government intrusions limited to criminal matters.

In 2001, the SEC issued the "Seaboard Report"[6] making it clear that early "cooperation," often entailing waivers of the attorney-client and attorney work product privileges—the latter rising to the level of a Sixth Amendment constitutional right in criminal cases[7]—was expected. In January 2006, the SEC went further and, in essence, informally codified the "Seaboard Report" with issuance of new guidelines.[8] Among the emphasized factors justifying leniency was "Cooperation with the SEC and Law Enforcement," including self-reporting and waiver of constitutionally protected privileges and rights.

The goal of the government and the SEC is clear: easy access to all information, regardless of relevance, and the "targeting" by private attorneys of corporate employees for the government investigators to focus upon. All this "cooperation" has as an objective the funneling of every shred of untested and unverified testimonial or documentary information from private lawyers, both outside counsel and in-house counsel, to the government. Little heed is paid to traditional notions of the right to counsel, right not to bear witness against oneself, or the prohibitions upon government punishment for the mere invocation of rights. These activities are, in fact, effectively delegated to "private" attorneys to execute for the benefit of the government.

As for the employee, the choices are equally stark. Currently, if the employee refuses to speak to the internal investigators (either in-house or outside counsel), the likely result will be termination from employment. Obtaining new employment may be difficult when the employee is asked whether he or she was terminated and the reason therefore.

Alternatively, employees have the equally unpalatable choice of cooperating with corporate counsel and risking that not only will their statements be turned over to the government, but that any false statement or a failure to overtly implicate oneself will, in itself, lead to charges of "obstruction of justice" or "false statements" to a governmental body, albeit by second hand.

The slippery slope is apparent; even "innocent" employees are at risk. If employees speak with the corporate internal investigators and either misstate something or leave anything out, whether intentionally or otherwise, such as knowledge of certain facts that would be a link in the chain in proving their own or a colleague's culpability but as to which the particular interviewees had not consciously made that factual or evidentiary connection,[9] they face the risk not only of employment action, but of indictment for obstruction of justice and/or impeding a government investigation. This would be so even though no prosecutor or FBI agent was even present during the employees' interviews. Moreover, the employees may not have known that the government was involved, or even if so, what the subject area of the government's interest was. In fact, this is one of the criteria used by some federal prosecutors in assessing whether a corporation has cooperated: whether it interviewed its employees and kept the subject of the government's interest from them while doing so.[10]

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So, if employees refuse to answer, they may be fired; if the employees did something potentially culpable and speak to the company about it, they may be fired and indicted; regardless of whether the employees did or did not do anything potentially culpable, if they speak to the company about it, they may be indicted if anything was misstated or if they simply forgot to mention something. In truth, if "failure to disclose" can support the obstruction and false statements charges in *Singleton* and *Kumar*, then an employee might well face indictment on the same charges for simply declining to speak to the corporation's lawyers and accepting employment termination as a consequence.

Rights Implicated

It would seem that in this environment, the corporation and its private lawyers become "deputies" of the government[11] and statements made to them have formed the basis for false statements charges. In *Kumar*, the basis for the false statements and obstruction of justice charges was that the defendant knew that Computer Associates had retained independent counsel. Defendant also knew that Computer Associates was "cooperating" with the government and that its independent counsel was revealing to the government whatever counsel learned. Computer Associates' Audit Committee also retained counsel to investigate alleged false financial statements. The indictment alleged that *Kumar* "did not disclose, falsely denied, and otherwise concealed…concocted and presented to [the outside private law firms] an assortment of false justifications…[which he knew] would be present[ed] to the United States Attorney's Office, the SEC, and the FBI as part of an effort" to persuade them there had been no wrongdoing and to reflect the entity's cooperation.

In *Singleton*, the government charged the defendant, Greg Singleton, with "obstruction of justice" because the employee was sent an e-mail stating that he "must attend" a meeting with El Paso Corporation's legal department and provide a written response to a questionnaire seeking information to be turned over to the Commodity Futures Trading Commission (CFTC) and to the Federal Energy Regulatory Commission (FERC). Mr. Singleton was charged with obstruction of justice because, in this process, he allegedly "did not disclose, falsely denied, and otherwise concealed" from the corporation and its private counsel that he had provided false information to a third party.

When the government and regulatory agencies, such as the SEC, CFTC, FERC and others enlist private lawyers, whether by deputization or by denying "cooperation" credit to their corporate clients, to interview employees and to turn over all information received, this implicates fundamental constitutional rights including the right not to bear witness—i.e., the right to decline to respond to questions from the employer or counsel hired by the employer—and the right to counsel.

Firing an employee, in these circumstances, for "failing to cooperate" may at best be an impermissible retaliatory action for invocation of a guaranteed right and, at worst, a constitutional deprivation attributable to the government. In fact, the U.S. Supreme Court held in *Ohio v. Reiner* that even an innocent person may invoke the Fifth Amendment, going so far as to hold that the Fifth Amendment may be validly invoked by one who simultaneously proclaims their innocence of wrongdoing.[12]

Put another way, in conducting its internal investigation with full knowledge of the government's requirements in order to receive "cooperation" credit in charging and sentencing, the corporation is acting under "color of law" during its employee interviews. Such an interpretation is warranted by the developments in corporate prosecutions over the past five to eight years: (a) the requirements imposed on federal prosecutors by the Holder and Thompson

Memoranda in determining the level of corporate cooperation; (b) the coercive threat of prosecution to the corporation coupled with the overt or implied promise of leniency in charging and sentencing in exchange for the corporation's "full cooperation;" (c) the corporation's understanding of these practical realities at the outset of the internal investigation and that it will in fact be turning over its internal employee interview notes to the prosecutors, possibly in "real time;" (d) the Hobson's choice facing employees of giving an interview to their employer or being terminated; and (e) the potential for the employee to be criminally indicted for "obstruction of justice" or "impeding a government investigation" in light of *Kumar* and *Singleton*.

Since the government has taken the position that employee statements to the corporation or its counsel conducting an internal investigation are equivalent to statements made to the government itself, and may be indictable, it is hard to conceive of a valid basis for penalizing employees for invocation of their Fourth and Fifth Amendment rights, other constitutional rights, or rights guaranteed to them under state law.[13]

The Fifth Amendment applies to the actions of a private entity that are found to be "fairly attributable" to the government. This occurs where there is a sufficiently close nexus between the actions of the private entity and the government. Such a nexus lies "where the state has exercised coercive power over a [private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State."[14]

At least two U.S. District Courts have analyzed this nexus in the Fourth Amendment context, under factual circumstances analogous to corporate internal investigations in the present environment:

> ...any evidence taken by individuals must be free of any implication of government complicity in its acquisition. The timing of the search by a private citizen is critical in determining whether the government was motivating the search. If the government is already involved in the investigation and has contacted the private individual, some government encouragement may be presumed, unless there are facts rebutting this. In *United States v. Stein*, 322 F.Supp. 346 (N.D. Ill. 1971), the court suppressed evidence obtained by a private person who feared his own possible indictment. The court found that the evidence was produced on a number of occasions during the process of interrogation sessions with the individual. The court there felt that he perceived that he was under pressure to seize evidence on behalf of the government or face his own indictment. Where the evidence was produced because of governmental encouragement, even if subtle, "it cannot be said that the government was totally divorced from the situation under which (he) came into possession of these records." 322 F.Supp. at 348.[15]

According to the U.S. Supreme Court, "the protections of the Fourth Amendment are surely not limited to tangibles, but can extend as well to oral statements."[16]

While the most obvious implications of this analysis concern the admissibility of prosecutors' evidence at trial and employees' rights, there may be additional collateral consequences to the corporation as a result of such "cooperation." Undoubtedly, many in-house and outside counsel are familiar with the scenario of potential plaintiffs lying in wait for the corporation to turn over its documents and information to the government, and then issuing subpoenas for that information in connection with private lawsuits and/or class actions, or even deposing the lawyers who conducted the investigation in light of the privilege waivers.

What may not be so familiar is that in the course of its investigation, the corporation's denial of its employees' constitutional rights, whether Fourth Amendment search and seizure rights, or related to employment termination for asserting Fifth Amendment rights, or otherwise, may give rise to civil rights actions under 42 U.S.C. §1983 naming not only the government, but the corporation's investigators and/or its outside counsel as defendants as well.[17]

Conclusion

The radical changes in law enforcement practices brought on by the Holder and Thompson Memoranda, as exemplified by the *Kumar* and *Singleton* indictments and in the governmental actions criticized by Judge Kaplan in *Stein*, have opened a Pandora's box not only for employees, but for prosecutors seeking to obtain "admissible" evidence of wrongdoing, and for corporations seeking to avoid criminal indictment and lessen their exposure to civil actions.

The solution may be for corporations and the government to recognize employees' rights during the corporate investigatory phase to be free from improper searches and seizures and to assert their Fifth Amendment rights without fear of termination or other employment-related action, and to have counsel present during their interviews by corporation counsel. If not, the courts may soon do that for them.

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1. Statement of Timothy Coleman, Senior Counsel to the Deputy Attorney General, "Welcoming Remarks," ABA White Collar Crime Institute, Henderson, Nev. (March 3, 2005).

2. *United States v. Kumar and Richards*, 2004Cr.02094 (E.D.N.Y. 2004).

3. *United States v. Singleton*, Crim. 4:06CR080 (S.D. Texas, Houston Div.) (March 8, 2006).

4. In 2003, Deputy Attorney General Thompson revised the earlier "Holder Memorandum," issued in 1999 by his predecessor and formally entitled "Federal Prosecution of Corporations." The Holder Memorandum placed emphasis on a corporation's willingness to waive its attorney-client privilege and work product privileges as indicia of corporate "cooperation." The Thompson Memorandum institutionalized the "waiver" of these rights and privileges as a precondition for securing "cooperation" credit.

5. See *United States v. Stein*, __ F.Supp.2d___, 2006 WL 1735260 (S.D.N.Y. June 26, 2006) (LAK).

6. Report of Investigations Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, SEC Release Nos. 34-44969 and AAER-1470 (Oct. 23, 2001).

7. *In re Terkeltoub*, 256 F.Supp. 683, 684-85 (S.D.N.Y. 1966). Recognizing that the lawyer's "work product" is an "indispensable part" of the administration of justice and that the "welfare and tone of the legal profession is therefore of prime consequence to society," the court quoted Justice Robert Jackson in *Hickman v. Taylor*, 329 U.S. 495 at 517, "Every lawyer dislikes to take the witness stand and will do so only for grave reasons. This is partly because it is not his role….But he steps out of professional character to do it. He regrets it; the profession discourages it. But the practice advocated here is one which would force [the lawyer] to be a witness, not on what he has seen or done but as to other witnesses' stories…" Cf., *U.S. v. Mitchell*, 372 F.Supp. 1239 (S.D.N.Y. 1973).

8. Press Release, Securities and Exchange Commission, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), as reported in the New York Law Journal (Jan. 27, 2006).

9. See *Hoffa v. United States*, 385 U.S. 293, 304 n.7 (1996) (quoting *U.S. v. Burr*, 25 Fed.Cas 38, 40 (No. 14,692e) (C.C.C.Va. 1807)).

10. Holder Memorandum §VI ¶B.

11. While the employee is not in a traditional "custodial" setting such as jail for purposes of Sixth Amendment analysis, the coercive nature and Hobson's choice facing employees is certainly worthy of analogy. Cf., *Maine v. Moulton*, 474 U.S. 159 (1985); *U.S. v. Henry*, 447 U.S. 264 (1980).

12. 532 U.S. 17, 21 (2001). Holding that "one of the Fifth Amendment's 'basic functions…is to protect *innocent* men…who otherwise might be ensnared by ambiguous circumstances.'" (Citations omitted.) (Emphasis in original.) Therefore, the fundamental assumption by both the prosecutors and by corporations that assertion of the Fifth Amendment by an employee is tantamount to a concern, if not an admission, is flawed and contrary to law.

13. *Kumar* and *Singleton*, supra.

14. *D.L. Cromwell Investments, Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002).

15. *U.S. v. Bloom*, 450 F.Supp. 323, 326-27 (E.D.Pa. 1978).

16. *Hoffa*, 385 U.S. at 301 (citing *Silverman v. United States*, 365 U.S. 505 (1961)).

17. See, e.g., *Raines v. Shoney's, Inc.*, 909 F.Supp. 1070, 1078-79 (E.D. Tenn. 1995) (denying defendant manager's motion for summary judgment as to §1983 claim where evidence suggested that manager participated along with police officers in the allegedly prohibited action in violation of plaintiff employees' Fourth Amendment rights to be free from unreasonable searches and seizures and their right to privacy).

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