

Ethical Issues in Internal FCPA Investigations

Prepared for PLI Foreign Corrupt Practices Act 2010

May 19, 2010

James J. Benjamin, Jr.
Akin Gump Strauss Hauer & Feld LLP
One Bryant Park
New York, New York 10036

Interviews of Individuals by Entity Counsel

- If the individual has personal counsel, entity counsel may not interview the individual about the subject of the representation unless personal counsel is present or consents to the ex parte interview. *See* Rule 4.2(a).
- Before beginning interview, it is important to give and document thorough *Upjohn* warnings. *See* Rule 1.13(a) (when lawyer representing entity deals with individuals (termed “constituents” under the rule) whose interests may differ from those of the entity, “the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the “constituents”).
- Key elements of proper *Upjohn* warning are the following (*see* report of ABA White Collar Crime Committee Task Force on “Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees (July 17, 2009)).
 - Counsel represents the entity and does not represent the individual.
 - Counsel is conducting the interview to gather facts to assist in counsel’s representation of the entity.
 - The interview is protected by the attorney-client privilege, but the privilege belongs solely to the entity. As a result, the entity, and only the entity, controls the decision about whether to maintain or waive the privilege. As a practical matter, this means that the entity may decide to reveal the information provided in the interview to third parties, including the government, without notifying or obtaining consent from the individual.
 - The individual should treat the interview as confidential and should not divulge its contents to anyone except the individual’s personal counsel.
 - Counsel should ask if the individual has any questions.

- Counsel should make a contemporaneous note of the *Upjohn* warning and then include a detailed account of the warning in the interview memo. As noted in the ABA Task Force report, “using a written warning is not common practice” and “can have a chilling effect on the [individual’s] willingness to share information, which defeats the fact-finding purpose of the interview, especially if the [individual] has no reason to believe that counsel personally represents [him or her].”
- If the individual asks “Do I need a lawyer?” best practice is to say “I can’t provide advice on that question but if you want to have a lawyer you can do so.” See ABA Task Force Report at 6; see also ABCNY 2004-02 (“Because affirmatively advising a corporate employee to secure counsel may work against the interests of the corporation, we believe it is appropriate for corporate counsel to be reluctant to render that advice – at least in the absence of the consent of his client to do so”).

Multiple Representation – Entity and Individuals

- This scenario has potential for serious problems if not handled with care. See *United States v. Nicholas*, 606 F. Supp. 2d 1109 (C.D. Cal. 2009), *rev’d*, *United States v. Ruehle*, 583 F.3d 600 (9th Cir. 2009) (serious ethical issues raised when company counsel interviewed officer without proper warnings at a time it represented him in private class action litigation).
- Putting aside ethical issues (for the moment), what are the pros and cons of representing an entity and individuals in a FCPA investigation?
 - Advantages
 - Efficiency
 - Common strategy
 - Coordination
 - Avoid perception of diverging interests
 - Disadvantages/Risks
 - Potential for diverging interests and adverse effect on lawyer’s judgment
 - Thorny questions about client confidences
 - Ability to focus properly on interests of individuals
 - Risk of loss of credibility in government’s eyes
- ABCNY Formal Opinion 2004-02; “Representing Corporations and Their Constituents in the Context of Government Investigations” (June 2004)
 - Two pronged test:
 - (1) Disinterested lawyer would conclude that multiple representation is in interests of both clients; and

- (2) Both clients give informed consent after discussion.
- Under Rule 1.7(b) of the Rule of Professional Conduct, consent must be confirmed in writing if the representation will involve the lawyer in representing “differing interests.”
 - Under Rule 1.0(f), “differing interests” are defined to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”
 - As a practical matter, Rule 1.7(b) suggests that written consent should be obtained in most circumstances.
- In gathering facts to assess whether multiple representation is possible, corporate counsel must be vigilant about giving *Upjohn* warnings to ensure that individual does not believe that statements are protected by a personal attorney-client privilege. *See* Rule 1.18(b) (lawyer who has had discussions with prospective client “may not use or reveal information learned in the consultation” except with consent).
- Additional important topics to consider and discuss thoroughly
 - Express agreement regarding confidences. Individual client must understand that counsel is free to share all information from individual client with entity and that entity may choose to waive privilege and disclose information to third parties. Such an agreement is crucial in order to permit counsel to effectively represent entity client.
 - Express agreement regarding advance waivers. Individual must agree that if conflict requires withdrawal of representation of individual, counsel may continue to represent entity.
 - Under Rule 1.9(a), a lawyer cannot represent a client in a matter where he has formerly represented another client in “the same or a substantially related matter” where the interests of the two clients are “materially adverse” unless the former client gives informed written consent.
 - Similarly, under Rule 1.9(c), a lawyer cannot use a former client’s confidential information to the disadvantage of the former client without informed consent (which need not be in writing).
 - In light of these rules and case law, there may be a question about whether advance waiver will be effective. It is important to

include as much detail as possible in outlining potential conflicts, and it may be necessary to secure a “second waiver” if the conflicts that actually develop are different than those envisioned at the time of the advance waiver.

- It is also important to be specific, in the advance waiver, regarding individual client’s prospective consent to cross-examination and use of client confidences.
 - Important to monitor situation over time and revisit discussion and conflict analysis periodically
- Additional thoughts on this subject
 - New SEC guidelines regarding individual cooperation may sharpen the potential conflicts between individuals and the entity. Note, however, that this same dynamic has existed for many years in criminal investigations.
 - Conflicts may be less pronounced when individual is the principal of a closely-held entity. In that situation, interests of individual and entity are generally aligned more closely.
 -]In situations where the interests of the entity and the individual seem to be aligned but a conservative approach is warranted, the use of “shadow counsel” can be advisable. Shadow counsel serves as co-counsel for the individual, but *only* represents the individual and does not represent the entity. Shadow counsel typically doesn’t make a public appearance, at least initially.
 - In situations where company counsel wants to take extra precautions, it may be advisable to make counsel available to individuals for the limited purpose of counseling them about conflicts, waivers, and representation issues.

Multiple Representation – More Than One Individual Client

- This situation occurs more frequently than joint representation of entity and individual client. What are the pros and cons of representing multiple individuals in the same FCPA investigation?
 - Advantages
 - Efficiency
 - Counsel has a more informed perspective through access to additional documents and more “touch points”
 - Disadvantages/Risks

- Risk of diverging interests
 - Possible dilution of counsel’s advocacy
 - Protection of client confidences
- Conflicts analysis is similar to that discussed in the ABCNY opinion – i.e., disinterested lawyer test plus informed consent – but as a practical matter the discussion may be simpler when the proposed clients are individuals.
- Traditionally, it has been the view that detailed oral discussions and consent are sufficient in at least some cases. However, as noted above, under recently-adopted Rule 1.7(b) of the Rule of Professional Conduct, consent must be confirmed in writing if the representation will involve the lawyer in representing “differing interests.”
 - Under Rule 1.0(f), “differing interests” are defined to include “every interest that will adversely affect either the judgment or the loyalty of a lawyer to a client, whether it be a conflicting, inconsistent, diverse, or other interest.”
- Additional thoughts on this subject
 - Assessing potential conflicts is inherently fact-specific, but the following factors should be explored:
 - Views and impressions of company counsel
 - Counsel’s assessment of each individual’s possible exposure
 - Degree of factual overlap among individual clients
 - Whether the individuals have a subordinate/supervisor relationship
 - In some instances, it may be worth considering whether to obtain advance waiver designating one client as “first client” and agreeing that if conflict requires withdrawal of representation of one individual, counsel may continue to represent the “first client.”
 - As noted above, advance waivers should be as detailed as possible and may not be enforceable depending on the circumstances.
 - Important to monitor situation over time and revisit discussion and conflict analysis periodically