Key Issues in Representing Corporations in White Collar Investigations

by Daniel R. Margolis

Daniel R. Margolis
Litigation/Corporate Investigations
& White Collar Defense
+1.212.858.1758
daniel.margolis@pillsburylaw.com

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Since the Enron debacle, the tolerance of both the general public and the government for white collar crime, especially corporate crime, has waned. Public sentiments are manifested most readily in jury verdicts. Corporate executives, especially C-level executives, charged with inflating corporate earnings stand a difficult chance of having their case heard before an impartial jury. This bias has spread beyond cases alleging inflation of corporate earnings and into other areas of white collar crime. Though I have not seen statistics on this, I would bet that more white collar defendants are pleading guilty today than a decade ago.

Soon after the fraud at Enron came to light, Congress responded swiftly, perhaps too swiftly, by passing the 2002 Sarbanes-Oxley Act (SOX). With new criminal provisions for, among other things, certifying periodic reports to the SEC, altering corporate documents, and retaliation against whistleblowers, Congress has sought to use the prospect of prison time to transform corporate culture. Though many have decried the often draconian procedures companies must undergo to demonstrate proper internal controls, no one can deny that the criminal provisions of SOX have sent shivers down the spines of corporate America. This has all led to more inquisitive CEOs and CFOs and greater roles for independent audit committees and boards of directors in general. No one wants to be the next poster child for corporate fraud.

The crackdown on corporate crime has also permeated the Justice Department over the last several years. In 2002, President George Bush created the Corporate Fraud Task Force to "restore public and investor confidence in America's corporations."[1] Federal prosecutors across the country have been charged with the formidable task of routing out corporate crime in all of its forms and have obtained hundreds of indictments of corporate executives in the process.

Despite the DOJ's successes, it soon became readily apparent that prosecutors did not have the resources for such a monumental task. The result was the establishment of a "culture of cooperation," whereby the government essentially deputizes corporations to investigate allegedly improper behavior and report the findings of their investigations to the government. In exchange for this cooperation, the corporation hopes to avoid indictment, or at least negotiate a resolution that is more palatable to the company's board of directors. As discussed below, this culture of cooperation often leads to

a waiver of the company's attorney-client privilege. Whether the prosecutor requests the waiver or whether the corporation offers it in the face of indictment ultimately does not matter. The expectation that companies may end up waiving privilege not only compromises the ability of a corporation to communicate openly and honestly with its counsel, but it may expose the company to civil lawsuits, the prevention of which is not high on the government's list of priorities.

Various groups, including the United States Sentencing Commission, the Justice Department and Congress, have tried to address this significant concern. The effectiveness of these efforts remains to be seen.

Common Issues in Handling White Collar Cases

To Cooperate or Not

When representing a corporation in an investigation, probably the most common and also the most difficult issue that defense counsel needs to address is whether to cooperate in the government's investigation. Given the significance of this decision, one would hope to have a substantial amount of time to make it. More often, however, the decision whether to cooperate needs to be made without the benefit of a full internal investigation. This is because other events often transpire outside the corporation's control that can impact the extent to which the company would benefit from cooperation.

An example of such an urgent situation might be a letter from a potential whistleblower asking for a specific amount of money in exchange for not revealing to the government certain alleged accounting improprieties. The letter demands a response within two weeks. Full-blown investigations into accounting improprieties, especially at large, publicly traded companies, can take several months of intensive work by dozens of professionals. In this case, however, the company, with the advice of defense counsel, must decide whether to call the SEC before the whistleblower does. To properly advise my clients, I usually try to assemble a team to interview key employees and review key documents as quickly as possible—to be completed in a matter of days—so I can report my findings to management or, if appropriate, the audit committee of the board of directors, and advise them whether self-disclosure is appropriate. Though the information on which that decision is made is usually less than perfect, the circumstances do not afford anything more.

Another context in which the decision whether to cooperate needs to be made quickly is in government investigations into common practices by several players in an industry, such as an antitrust or Foreign Corrupt Practices Act investigation. Where there is a common illegal business practice among several competitors, one or more of them will likely have information on the practices of others. The corporation must conduct a preliminary investigation into the alleged conduct to determine whether: (1) the company actually committed the violation that is the subject of the government's investigation, (2) the company has a chance of fighting the allegations, and (3) employees within the company have information to provide to the government about the practices of other companies. Time is invariably of the essence in these situations. Once the company decides to cooperate in the government's investigation, the race is often on to be the first company to meet with the government, thereby hoping to reach the most favorable resolution. In fact, the Department of Justice's Antitrust Division Manual specifically provides for leniency to the first corporation to self-report wrongdoing and assist the government in its investigation of other corporations.

To Waive Privilege or Not

The decision to cooperate in a government investigation almost always leads to another difficult decision, as mentioned previously—whether to waive the corporation's attorney-client privilege. In some cases, the government has in effect made the decision for my clients by demanding or "strongly suggesting" that the company waive its attorney-client privilege in return for credit under the sentencing guidelines or leniency in charging decisions or settlement terms. This issue has been the subject of much discussion over the past several years, as discussed in the opening section of this chapter.

Regardless whether the waiver is truly voluntary, the corporation, with the advice of outside counsel, must weigh several factors before pulling the trigger. One of the primary factors is whether it foresees follow-on civil litigation based on the same conduct that is the subject of the government's investigation. In many jurisdictions, a waiver as to some information on a given subject may result in a waiver as to all information regarding that subject, a so-called subject matter waiver. Once a waiver is found, plaintiffs may seek to use damaging information gathered during the investigation in a class action or derivative action against the company.

The potential for a subject matter waiver has led me to try various methods of providing the government sufficient information to guarantee credit for cooperation, while not waiving protections over work product generated during the course of the investigation. In some cases, I have provided a series of verbal summaries of facts gathered during investigatory interviews. In others, in which the government has requested copies of interview memoranda, the government was satisfied with my reading the interview memoranda to them. In cases where the government has asked me to prepare an investigative report, I've sought and obtained confidentiality agreements from the government attorney. Though the efficacy of such agreements varies by jurisdiction, defense counsel needs to make every effort during each step of the investigation to limit the dissemination of investigative work product.

Requisite Skills in White Collar Practice

In general, the requisite skills for a white collar practitioner are similar to those of a general criminal defense attorney or litigator in general. Some of the most crucial skills required include: (1) fact-gathering, (2) legal analysis, (3) incorporation of facts and legal analysis into a convincing argument in written briefs, conference room negotiations and oral argument, (4) trial advocacy, and (5) appellate advocacy.

With respect to white collar practice in particular, the lawyer needs to feel comfortable addressing matters arising in multiple industries including finance, securities, manufacturing, technology and health care. One does not need to be an expert in all of these areas, but one needs a strong understanding of the basics to determine what questions to ask in order to get sufficiently up-to-speed for a particular matter. I often spend several sessions with a client representative at the beginning of a representation peppering him or her with questions about the industry in which he or she works or the particular type of transaction involved in the case. I call upon my years as a federal prosecutor in attempting to discern what a jury would need to know to understand the context in which my client's alleged conduct took place. If the matter involves a new area of accounting, for example, I often rely on my team of forensic accountants to walk me through the relevant provisions until I can earn an honorary CPA in that area. Understanding the business context in which the alleged conduct took place is critical to effective representation.

Once I become familiar with the industry and business practices at issue in the case, I turn to the elements of the crimes with which my client may be potentially charged. Clients are often shocked to see the relatively obscure statutory language that might apply to their alleged conduct. Taking bribes is charged as "deprivation of honest services." Off-label promotion of pharmaceuticals is charged as introducing a "misbranded" drug into commerce. Price-fixing is charged as a conspiracy "in restraint of trade." And everything from complex securities fraud to telemarketing scams can be charged as a "scheme or artifice to defraud." White collar practitioners need to be able to discern precisely what conduct falls within the often vague statutory language.

In some instances, this is not terribly difficult. Where fraud is alleged, I try to distill the complex pieces of information I receive from my client or the government into basic statements and omissions to determine whether my client ever tried to deceive anyone, be it his employer, the investing public, a federal healthcare program, etc. Whether I can identify a false statement or omission will be useful in advising my client how we can expect the government to proceed and what are our best prospects for resolving the matter. As discussed below, however, with respect to some white collar crimes, whether conduct falls within the statutory proscriptions is not readily apparent. Think of how many white collar attorneys, for example, myself among them, had to

advise their clients in 2006 and 2007 as to the likelihood that they would face criminal prosecution for their involvement in stock-option backdating. As it turned out, the DOJ indicted only a small number of individuals relative to the number of investigations undertaken by public companies revealing imperfect accounting practices. Such a result was less than clear, however, when the scandal broke in 2005.

Conclusion

White collar practitioners must analyze each case on its own terms. Where the government pursues a theory for which there is little or no factual or legal support, they need to be ready to force the government to meet its burden. Where there is evidence to support the government's allegations, however, the "culture of cooperation" often limits the corporation's options.

Regardless whether the client expects to fight the allegations, it should always select counsel fully prepared to try the case. Only then will it be afforded all of the options available to it.

1. Department of Justice Fact Sheet: President's Corporate Fraud Task Force Marks Five Years of Ensuring Corporate Integrity, July 17, 2007

Pillsbury Winthrop Shaw Pittman LLP | 1540 Broadway | New York, NY 10036 | 1.877.323.4171