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Corporate 'Miranda' Warnings

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Corporate wrongdoing has received great attention during the last decade. Once again it is at the center of national news as President Obama and congressional leaders debate the need for greater regulation of corporations. Internal investigations of corporations and other organizations have accordingly been on the rise, and both corporate and outside counsel play important roles in such investigations. Administrative agencies and prosecutors have adopted formal and informal measures to push corporations to establish compliance programs, to disclose wrongdoing voluntarily, and to cooperate with government investigations, creating what some commentators refer to as a culture of cooperation. This culture creates complex and often ambiguous roles and duties for corporate counsel.

Key to internal investigations are employee interviews by counsel. One court has called such interviews "a potential legal and ethical mine field." (In re Grand Jury Subpoena, 415 F.3d 333, 240 (4th Cir. 2005).) Employees, especially senior employees, may assume that the lawyers representing their organizational employers represent them as well in matters relating to their work. To avoid this misunderstanding, both in-house and outside counsel now use "corporate *Miranda* warnings" or "*Upjohn* warnings." Clear warnings advise the interviewee that counsel represents the organization and does not represent the interviewee; communications between the lawyer and the interviewee are protected by the organization's attorney-client privilege and confidentiality rights; the privilege and confidentiality rights belong to the organization; and the organization, not the interviewee, decides whether to consent to disclosure or to waive the privilege, thereby controlling government access to information from the interview.

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In law enforcement interrogation, the *Miranda* warning is an antidote to the coercive effect of a custodial setting. In a corporate internal investigation, the corporate *Miranda* warning is an antidote to employee misunderstanding of the lawyer's role and whom the lawyer represents. In both contexts, the warnings are safeguards for the person being questioned against potential overreaching by the questioner.

There are competing perspectives on warnings in internal investigations. Without a warning, the employee is likely to be more cooperative and help counsel uncover and remedy wrongdoing that could otherwise injure both the organization and the public. The lawyer's effective representation of the organizational client is furthered when the employee freely shares information. On the other hand, a clear warning helps to guarantee that the employee is not misled and advances the legal profession's interests in preventing the lawyer from being unfair to an unrepresented person. A clear warning also helps prevent an employee from later arguing that the lawyer established an attorney-client relationship with the employee that could trigger disqualification in any legal matter in which the employee's interests conflict with the organization's interests.

But why do corporations and their lawyers cooperate with the government in the first place? What ethical rules bear on conducting an internal investigation? In this column, we explore these and other issues concerning the use of corporate *Miranda* warnings.

Why Cooperate with the Government?

The current culture of corporate cooperation is a product of voluntary disclosure programs, prosecutorial charging guidelines, and sentencing guidelines, all of which reward cooperation with either immunity from prosecution or reduced sanctions. State and federal agencies have implemented a number of voluntary disclosure programs and have established formal cooperation guidelines that benefit corporations and other organizations that self-police and report wrongdoing. Voluntary disclosure programs offering leniency exist in a number of areas, such as antitrust, defense procurement, and health care, as well as

environmental and tax law. For example, the Department of Justice (DOJ) Antitrust Division's Leniency Program promises no prosecution for a company that is not the subject of an ongoing investigation if the corporation is the first to self-report illegal antitrust activity completely and honestly, has terminated the activity upon its discovery, and cooperates fully with the government. In some other areas, the government may stop short of promising not to prosecute and instead offer to consider the cooperation in determining whether to prosecute. (*See* Lee Stein & Steven J. Monde, *Culture of Cooperation: Weighing Benefits and Risks*, NAT'L L.J., Mar. 8, 2010, at 16.)

In addition to voluntary disclosure programs, DOJ charging guidelines advise prosecutors to consider, among other factors, whether a corporation has made a voluntary and timely disclosure of wrongdoing, is willing to cooperate in the investigation, has in place an effective compliance program, and has taken action to remediate the wrongdoing. Federal Sentencing Guidelines also encourage self-reporting by reducing fines for timely and complete disclosure, cooperating with the investigation, and accepting responsibility.

These programs and guidelines together create and reinforce powerful incentives to cooperate to reduce liability for wrongdoing. These incentives also push organizations to implement ongoing compliance programs and to engage in periodic investigations that may put an employer's interests at odds with an employee who may have engaged in wrongdoing. When a conflict between the employer's interests and the interests of an employee occurs, the lawyers involved in the internal investigation have to be careful to demonstrate that they have clearly identified their client and their role.

Without a warning, an employee interviewed during an investigation may not understand the lawyer's role. Such an employee may assume that the lawyer for the employer also represents the employee and will protect the employee's interests. Several ethics rules address this concern.

Ethical Obligations

A number of ethics rules provide guidance to a lawyer conducting an internal investigation. When the interests of the organization are not adverse to those of the employee, joint representation is permitted under Model Rules 1.7 and 1.13(g) provided an appropriate representative for the organization consents to the dual representation. The employee to be represented, however, may not consent for the organization. While joint representation may be attractive in some situations, often it will be difficult to ascertain at the start of an internal investigation if the interests of the organization and the client will eventually conflict. For that reason, lawyers should be reluctant to recommend joint representation before conducting initial interviews.

Because the interests of the organization may diverge from those of the organization's employees, the lawyer representing an organization must be clear about whom the lawyer represents. It will typically be clear that the lawyer represents the organization. Where ambiguity is likely to occur is whether the lawyer represents *only* the corporation. In other words, whether the lawyer jointly represents the corporation *and the employee* may often be ambiguous both in the lawyer's mind and in the eye of the employee. In dealing with employees, Model Rule 1.13(f) states that a lawyer for an organization must "explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing." While a lawyer conducting an internal investigation may not be certain that the employee's interests are in conflict with those of the organization, the lawyer will often be aware that such a conflict may arise. This is especially true if the internal investigation is prompted by a suspicion that one or more employees have engaged in wrongdoing.

In addition, counsel must be careful to determine if the employee is represented by another lawyer in the matter. An employee learning of an internal investigation may retain a lawyer before a scheduled interview. Model Rule 4.2, the anti-contact rule, prohibits a lawyer from communicating with a person the lawyer knows to be represented by another lawyer in the matter. If the lawyer knows the employee is represented, then the lawyer conducting the internal investigation must have the consent of the employee's lawyer before conducting an interview. If during the interview the investigating lawyer learns that the employee has counsel, the investigating lawyer should terminate the interview until and unless consent is obtained from the employee's lawyer.

If the employee is not represented by counsel at the time of the interview, the investigating lawyer

representing the organization must comply with ethics rules for dealing with an unrepresented person. Model Rule 4.3 requires that when "the unrepresented person misunderstands the lawyer's role in the matter," the lawyer must "correct the misunderstanding." Model Rule 4.3 also prohibits the lawyer from giving any legal advice except the advice to secure counsel "if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client."

The Content of Corporate *Miranda* Warnings

Unless joint representation is contemplated because the lawyer has determined that the interests of the corporation and the employee are not likely to be adverse, a lawyer conducting an investigation should usually give an employee a corporate *Miranda* warning. What should the warning include? The ethics rules are ambiguous on the content of such a warning, as are cases dealing with warnings.

Consider, for example, the warnings given in *In re Grand Jury Subpoena.* The warnings clearly indicated that the lawyers represented the corporation. But they were somewhat ambiguous about whether the lawyers also represented the employees. The warnings also explained that the attorney-client privilege belonged to the corporation, that the corporation could decide to waive the privilege, and that the employee had no say over possible waiver.

The trial court found these warnings sufficient to defeat a claim that an attorney-client relationship was formed between the investigating lawyers and the employees. (415 F.3d at 338.) The trial court also found that the investigating lawyers' statements that "we *can* represent you as long as no conflict appears," read in context with the rest of the warning, *id*. at 340 (emphasis in the original), was not "sufficient to establish the reasonable understanding that they *were* representing" the employees. (*Id*. (emphasis in original).) The Fourth Circuit affirmed, but stated that its "opinion should not be read as an implicit acceptance of the watered-down '*Upjohn* warnings' the investigating attorneys" used. (*Id*.)

As the Fourth Circuit's opinion indicates, an investigating lawyer's statements that he or she can or could, under certain circumstances, jointly represent the employee tread close to the line of leading an employee to believe that the employee is being jointly represented. The opinion suggests that a lawyer should steer clear of suggesting the possibility of joint representation when giving a corporate *Miranda* warning.

How else might the "watered-down" warnings found in the *In re Grand Jury Subpoena* case have been made more robust? In addition to the investigating lawyer clearly stating that the lawyer does not represent the employee, there are two additional matters the inclusion of which would have strengthened the warnings. The first would have been to explain that in addition to privilege, confidentiality rights are held and controlled by the corporation alone and not the employee. Second, the warning could have included an explanation that should the corporation decide to cooperate with the government the corporation could disclose the contents of the interview as part of its cooperation.

Some may believe that any warning, much like a *Miranda* warning in a criminal case, may make the employee feel like a suspect and withhold information during the interview. But it should be kept in mind that employees have an incentive to cooperate with an investigation because failure to cooperate could cost them their jobs. In addition, employees might also be able to gain immunity or reduced sanctions if they disclose their past wrongdoing and cooperate with the investigation and the government.

Consequences for Violating Ethical and Legal Obligations

If the organization's lawyer is found to have represented the employee as a result of the lawyer's statements or ambiguity created by the lawyer during an internal investigation, significant negative consequences may follow. First, and most likely, the employee could seek to disqualify counsel from representing the organization should the organization and employee take conflicting positions in the matter. If the lawyer is disqualified, the conflict would be imputed to all other lawyers in the firm.

If a court decides the lawyer jointly represented the employee and the organization, then the employee and the organization would jointly hold confidentiality rights and the attorney-client privilege. Instead of the organization exercising exclusive control over consenting to disclosure and waiving privilege to cooperate with the gov-

ernment, the employee could refuse to consent to disclosure and refuse to waive work-product protection and attorney-client privilege relating to information counsel collected, thereby hampering the organization's ability to cooperate with the government.

The employee could also file an ethics complaint against the lawyer alleging breach of the duties of loyalty and confidentiality as well as conflict of interest. Allegations may also include violations of other ethics rules discussed previously, depending on the circumstances of the investigatory interview. If disciplinary authorities find that the complaint has merit, the lawyer could face professional discipline. In addition to the possibilities of disqualification and professional discipline, a lawyer who states or implies that the employee as well as the organization is the lawyer's client may face malpractice liability. Liability could be found if the lawyer harms the employee by breaching the duties of loyalty and confidentiality by turning over the contents of the interview to the government. If the lawyer is outside counsel, there is also the possibility that the organization may initiate a malpractice action.

If there isn't a record of what the lawyer stated to the employee during the interview, it may be hard for the lawyer to prove that an attorney-client relationship did not exist. While some courts are skeptical of such claims, especially when disqualification is sought, failing to give a warning to an employee before conducting an internal investigatory interview carries potential risks.

Conclusion

Counsel conducting an internal investigation for a corporate client faces a difficult task of balancing the need to obtain cooperation from employees and maximize access to information against the danger of misleading employees about counsel's role. To avoid misunderstanding and possible disqualification, a lawyer should give a warning to each employee at the start of the interview and memorialize the warning. While such warnings may cause some employees to withhold information, they ensure that employees understand that the lawyer does not represent them and that the organizational client controls the disclosure of information. ■