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Intellectual Property | Litigation | Corporate

What Civil Lawyers Need To Know About Criminal Law

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Invoking the Fifth Amendment

- How do I know when my client can take five?
- Does my client actually have to be guilty of the conduct at issue?
- Can my client take five outside of a court proceeding?
- I'm worried about the adverse inference which flows from my client taking five, is there any way around this?
- My client received a subpoena for records. Can she take five?
- My client received a discovery request in a civil proceeding. Can she take five?

Invoking the Fifth Amendment

- Can my client take five when filing an answer to a civil lawsuit?
- Can my client waive her right to take five?
- Can my client answer some questions but take five as to others?
- Can my client ever be sanctioned for taking five in a civil administrative, or regulatory proceeding?
- Can my client retract the fact that she took five?

Responding to Non-Jail House Emergencies

- Search Warrants
- Employee Interviews
- *Instant* Requests for Information
- Grand Jury Subpoenas and Proceedings
- Press Inquiries
- Obstructive Conduct

Responding to Search Warrants

- Increase in surprise searches
- In some cases, it might be appropriate to attempt to obviate the need for the search (and its adverse effects) by promising cooperation (i.e., clear and secure premises, make arrangements for *instanter* production of records)

Responding to Search Warrants

- Immediately contact counsel
- If not alone, contact counsel and monitor agents' activities (take notes)
- Do not consent to the search
- Ask the agents to wait until counsel arrives

Responding to Search Warrants

- Ask for identification
- Review the search warrant carefully (i.e., items to be seized and premises to be searched)
- Ask for the search warrant affidavit
- Fax the warrant to company counsel
- Send non-essential employees home
- Don't remove, dispose of, or secrete documents or tangible items

Responding to Search Warrants

- Carefully monitor any search made (take notes)
- Ask to photocopy original documents seized (though they don't have to grant this)
- Attempt to maintain confidentiality of privileged information
- Obtain a receipt for items seized

Government Interview of Employees

- Exercise extreme caution
- Non-search warrant situation – advise employees of the likelihood of an interview
- Consider handout setting forth employee rights
- Do nothing that could be construed as directing or instructing the employee not to submit to govt interviews

Government Interview of Employees

- “You have the absolute right not to be interviewed, although you should provide your name and identification.”
- “You also have the right to agree to an interview if you so choose. The choice is yours.”
- “We are not asking you to agree or not agree to an interview; rather, we simply want you to know your rights.”
- “If you choose to participate in an interview, the Company will provide you an attorney.

Government Interview of Employees

- “If you choose to participate, anything you say can be used against you in a criminal prosecution in a civil enforcement proceeding. This is true regardless of whether the officers give you any so-called Miranda warnings.”
- “Do not obstruct the search. The officers have a legal right to search the premises and to seize what is designated in the search warrant.”

Instant Requests for Information

- Rarely, do investigators have the right to demand information on the spot
- Exception – regulators
- At a minimum, contact counsel before disclosing any information

Initial Inquiries/Grand Jury Subpoenas

- Speak w/ prosecutor soon after learning of existence
- Important to ascertain whether witness, subject, or target
- Learn about subject matter of the investigation and nature of any evidence
- Narrow the breadth of GJ (and administrative) subpoenas
- Advise prosecutor that unless notified of a conflict of interest, represent company and its employees – request all interviews go through counsel
- Trigger document retention

Dealing With The Press

- Martha Stewart case
- Client's strengths may hurt them
- “I can explain whatever it is they need to know and get this behind my quickly.”

Responding to Jail House Emergencies

- Garden variety of middle of the night calls:
 - DWI
 - Public Intoxication
 - Drugs
 - Family Violence
- General information you need to solicit:
 - Nature of charge
 - Has a bond been set
 - Has the individual been “magistrated”
- Hurdles to getting someone out of jail

Responding to Jail House Emergencies

- DWI and alcohol related offenses
- Family violence
- Drugs
- Two other “middle of the night” calls



Responding to “Criminal” Emergencies

- Time is of the essence
- Importantly, preparing for these emergencies is imperative
- Know the name and number of a good white collar and blue collar criminal defense attorney

The Criminalization of Civil Practice



- Newspaper reminds us that no lawyer can assume his/her practice is immune from the criminal enforcement process.
- Almost any individual or company can find themselves entangled in a criminal investigation, as well as any lawyer representing the individual or company.

Obstructive Conduct



- A number of significant changes in the obstruction laws under Sarbanes-Oxley.
- Perhaps the most prominent trend amongst federal white collar prosecutions.
- Important to keep federal obstruction laws in mind.

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U.S. v. Arthur Andersen



- **Specific Issue:** Ability of corp counsel to provide legal advice regarding (1) doc retention policies and (2) alteration of corp docs – w/o subjecting counsel or company to criminal liability.
- **General Issue:** The criminalization of otherwise legitimate, everyday business judgment.
- **“Who among us has not thought: There but for the grace of God go I.”**

Section 1512(b) and (f)(1)

Whoever knowingly uses intimidation, threatens, or *corruptly persuades* another person ... with intent to –

(2) Cause or induce any person to –

(A) ... withhold a record, document, or other object from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(f)(1) an official proceeding need not be pending *or about to be instituted* at the time of the offense

To: Michael C. Odom@ANDERSEN WO

cc:

Date: 10/12/2001 10:53AM

From: Nancy A. Temple, Chicago 33 W. Monroe, 50 / 11234

Subject: Document Retention policy

Mike-

It might be useful to consider reminding the engagement team of our documentation and retention policy. It will be helpful to make sure that we have complied with the policy. Let me know if you have any questions.

Nancy

<http://www.intranet.andersen.com/oncfirm.nsf/content/ResourcesFirmwidePoliciesPolicy-ClientInformationOrganization!> Open Document

18 USC § 1519 - Destruction, Alteration or Falsification of Records in Federal Investigations

- “Whoever *knowingly* alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object *with the intent to impede, obstruct, or influence* the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under Title 11, or in relation to *or contemplation of any such matter or case*, shall be fined under this title, imprisoned not more than 20 years or both.”

18 USC § 1519 - Destruction, Alteration or Falsification of Records in Federal Investigations

- Obstruction of any “matters” w/i jurisdiction of any US department or agency, or bankruptcy proceeding (versus official proceeding).
- Don’t have to prove D’s knowledge of govt jx -- only whether it came under the jx of a particular agency.
- “[I]n relation to or contemplation of any such matter or case” – anticipatory obstruction.
- Criminalizes not only destruction of documents, but false creation of documents and the making of false entries.
- No “corrupt persuasion” required.

Caveat Counsel

- Dusting off document retention policy
- Revising draft memos – surely not?
- What about:
 - Attorney asked to review draft report to be sent to regulatory agency. Aware that government will likely use in anticipated investigation.
 - Lawyer suggests changing language to exclude factual information that is not technically required in the report, but which he knows would greatly assist the government’s fact gathering.

Caveat Counsel

- Employee possesses critical (and exclusive) info in a case being investigated by a regulatory agency.
- Investigators request an informal interview and the in-house lawyer advises the employee not to cooperate.
- Client follows the advice and govt never learns critical facts.
- Section 1512 says: “induce[d] [a] ... person to ... withhold testimony ... from an official proceeding.”

Caveat Counsel

- Employee subpoenaed before grand jury. She has relevant info but is concerned about embarrassment (or maybe unrelated civil consequences).
- Lawyer counsels her not to volunteer info, to answer only the question asked, and to interpret the scope of each question as narrowly as possible.
- Client follows advice and govt fails to ask the right questions.
- Has the lawyer “induced the withholding of testimony from an official proceeding?”

Caveat Counsel

- Company receives grand jury subpoena for documents as part of an investigation.
- Attorney advises client that certain docs (e.g., personal calendars of officers) are personal docs, not corporate documents, and hence not responsive to subpoena even though they contain relevant information
- Company doesn't produce.
- Section 1512 says: “cause[d] [a] ... person to ... withhold a ... document ... from an official proceeding.”

Other Areas of Concern – *Computer Associates*



- GC Steven Woghin was convicted of obstructing justice b/c he not only hid information from outside lawyers, but gave them false information too.
- Woghin did so knowing his outside lawyers would be passing along its findings to the government.
- Woghin also coached employees on how to hide information when they were questioned by Wachtell lawyers and SEC officials.

Other Areas of Concern – Corporate Whistleblowers (18 U.S.C. § 1513)



- “Whoever knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense, shall be ... imprisonment not more than 10 years ...”

Other Areas of Concern – Federal False Statements Statute (18 U.S.C. § 1001)

- “[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the ... United States, knowingly and willfully
 - falsifies, conceals, or covers up ... a material fact;
 - makes any materially false, fictitious, or fraudulent statement; or
 - makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry

Parallel Proceedings

- Example -- Enron (ERISA, Class actions, SEC, DOJ, CFTC)
- Same individuals are being deposed and interviewed by civil plaintiffs, criminal defendant, and the government.
- Criminal and civil defense counsel
- Advice given may conflict depending on the audience
- 5th Amendment v. adverse inference

Internal Investigations



- Who is the client? Audit committee? Board of Directors? Officers? Other employees?
- Who should do the internal investigation? New law firm?
- Written report? Preservation of the attorney-client privilege?
- Wedge between Company and its employees
- Corporate Miranda warnings?

Corporate Criminal Liability Basics

- Did a corporate agent act?
- Did he/she/they act within the course and scope of their employment?
- Did the corporation form the requisite intent (intent to benefit)?

Did A Corporate Agent Act?

- A corporation may be criminally liable for the conduct of any agent or employee, regardless of status or position
- Agent need not be identifiable
- Agent need not be prosecuted
- Agent might even be acquitted
- Parents can be liable for acts of subsidiaries
- Independent contractors can also create liability

Did The Agent Act Within The Course And Scope?

- Actual authority
- Ratification or corporate assent
- Apparent authority
- BUT -- What if the agent acts contrary to corporate policy or instructions?
- Corporation is still responsible for agents' acts done w/i the scope of their employment even though their conduct may be contrary to actual instructions or stated policy

Did The Corporation Form The Requisite Intent?

- Three Ways To Impute Intent
- 1st -- Intent to benefit the corporation
- What if the employee/agent only intended to benefit himself and breached his fiduciary duty?
- **CORPORATION IS NOT LIABLE IF EMPLOYEE BREACHED FIDUCIARY DUTY**
- 2nd -- Collective knowledge
- 3rd -- Corporate indifference



E-Mails Kill

- Be sure to caution clients who say things in e-mails that they shouldn't say.
- Mind your own P's and Q's

From: [REDACTED]
To: conadmin, condevel
Date: 6/10/98 2:55pm
Subject: get a grip

OK, I just opened a facesheet and in the urgent notes it was marked "contract signed- terms and conditions still being negotiated". Let us explore that statement. If you were, say, AN AUDITOR, and saw that, what might you think? Perhaps, that no real deal was signed and, say, perhaps that revenue SHOULD NOT HAVE BEEN TAKEN?

We all know some squirrely things happen in the world of quarter end at [REDACTED]
But, guys, GET A GRIP!!!! This is not the type of thing one should publicize.

Please, stop what you are doing RIGHT NOW and go and remove any verbiage like this from CDA. If you have anything like this, tell me, get my opinion. BUT DO NOT PUT IT INTO CDA.

Also, for your information only accounting talks to or responds to any auditor questions. If an auditor approaches you, send them directly to [REDACTED] or [REDACTED]. Do not give them a copy of a contract or any information. [REDACTED]—make sure the library folks know this!!!!

A closing thought:

Tonight, as I head down 120 to my home, I plan to drive about 70mph. The posted speed limit is 45. Do you think I should call the cops and tell them this???????