MEMO TO MIDDLE MANAGEMENT: HOW TO AVOID BECOMING ROAD KILL IN A CORPORATE INTERNAL INVESTIGATION

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The hottest thing in white collar defense these days is an extensive internal investigation. Big law firms love them, and so does the government. Big firms are now stocked with highly paid former prosecutors and SEC lawyers looking for important and complex matters to investigate. They don't do tax, mergers, or corporate transactions, for the most part, but they love digging into corporate fraud. And they are good at it—these firms generally get the cream of the crop when it comes to top drawer former prosecutors. For its part, the DOJ and SEC love to have these firms do their work for them, and present cases neatly tied in a bow. The feds could never afford on their own to do a thorough FCPA investigation, for example, interviewing employees and reviewing millions of documents world-wide, but when the company presents them with a through internal investigation its pretty much shooting fish in a barrel for the government to nail the errant executives or employees. In return, the company usually gets a pass for cooperation, the Board can tell investors it vigorously rooted out the bad guys, insurance often pays the millions in legal and accounting fees, and business more or less returns to normal.

Although no one wants formally admit it, in the typical internal investigation the company lawyers are basically highly-paid deputy prosecutors with the badge hidden under their suits. It was not always this way. When I came out of the U.S. Attorney's Office and hung up a shingle in the early '80s, there was also nothing better than to get a well-healed client involved in a DOJ or SEC investigation of a big corporation. Typically, the company would hire a big firm as counsel to protect it, and the lead lawyer would call around town to enlist his friends to represent the individual executives or employees under investigation (with the company often footing the bill, at least in the early going). The "team" would meet at corporate counsel's firm, and the wagons would quickly be circled. A joint defense agreement would be signed (or at least verbally pledged) and the (typically) unspoken understanding was that the lawyers for the individuals were expected to hang tough until they saw no other way out than to cut a cooperation deal with the government. If you caved too early, you might not get that next referral. But when you did cave, company counsel generally understood and did not throw your client under the bus until it was clearly necessary to protect the corporation. The idea that company counsel's top priority from the beginning was to investigate its own people and assist the prosecutors in sending them to prison was unthinkable.

Today, of course, we live in a new world of presumed corporate cooperation with the government. Pressed into a corner by corporate federal sentencing guidelines, SEC and DOJ policies favoring cooperating companies, and the general rush to turn over every stone in hopes of avoiding indictment, corporations are quick to investigate and turn in their officers and employees to gain favor with prosecutors. Thus, upon almost any allegation of fraud or corporate misconduct, nervous corporate boards typically quickly

retain big firm counsel to investigate and turn over to the government every shred of evidence that may implicate their own people. In a high-stakes game of musical chairs, the company grabs most of the seats as soon as the music starts. There are no more lunches among brethren counsel plotting ways to slow down the investigation. Now, when I get a referral (for which I continue as always to be thankful), I am usually representing an officer, director, manager, or mid-level employee who has already been through an intensive interview with counsel conducting the internal investigation, and already turned to the investigators their documents, including the dreaded email collections.

Many of these folks come to me with a clean conscience, since they feel they have fully "cooperated" as a good employee should, and believe their openness and honesty should serve them well. Sometimes, but not always, they are right. Generally, I tell them that as benign as their employer's lawyers may have seemed, the internal investigators' job is to protect the company at any cost, to convince the government they have thoroughly gotten to the bottom of the matter, and aggressively cleaned house of those found to be the "rogue" employees.

I usually advise my new clients that everything they said to the internal investigators is most likely going directly to the government, just as if a federal prosecutor had been sitting in the room. I also feel constrained to tell them that the government now views lying to or misleading internal investigators akin to lying directly to the government, and has begun selectively indicting and convicting employees for such statements or "misrepresentations," even though they had no lawyer, were not

under oath, and most likely had no idea the feds were figuratively camped out right behind the filing cabinets.

I also have to explain the frightening monster that modern federal criminal law has become, criminalizing previously civil offenses, making alleged "fiduciary breaches" of corporate policy into criminal failures of "honest services", roping in those who acted without actual knowledge but may have wandered into the forbidden zone of "conscious avoidance" and sometimes threatening draconian prison sentences for even tangential involvement (otherwise known as "aiding and abetting") in a complicated business transaction or failed business deal. God forbid if today's common business practice, blessed by corporate counsel and the accountants, becomes tomorrow's fraud (try, for example, options backdating, or commissions to someone you thought was a well-connected private citizen abroad with close friends in a foreign government buying your products).

In general, if it can be of benefit in their situation, I have imparted to clients variants on the following themes, based on client experiences I have encountered over the years in my practice:

- Never assume that a questionable business practice at your company will be viewed as innocent or harmless just because "it has always been done that way" or because someone above your pay grade, or even a government contract officer, is aware of or at least appearing to condone it. When it all hits the fan, those folks will deny they knew of or approved it, will get company paid counsel to help them, or will be terminated and or charged as well.

- If someone else who is also being investigated tries to influence you, or "remind" you how they recall something went down, or what they actually "meant" when they said or did something questionable, head in the other direction. If you are later asked about it, tell the truth (or decline to talk further) but do not lie about it to protect anyone else in the company. This can prove fatal to your chances of being viewed favorably at the typical "last judgment" when the internal

investigators sort out the bad guys from the rest of the pack before they write the report that goes to the board and the government

- Regarding emails, I am continually amazed by how many clients have saved just about every email they ever sent or received. They fail to realize that most white collar cases are made by emails these days. They just hang out there, buried in your discard box, until they rise up with a click and bury you. Maybe you didn't mean it that way, maybe you actually didn't read the little bombshell on page eight of that boring email, maybe you get 500 a day and literally don't read most of them, but internal investigators and prosecutors salivate for those emails. Companies spend millions to have $400 an hour associates pore over thousands of old emails in the course of an internal investigation. Search engines pull up the long forgotten nasty ones in seconds. Of course, once an investigation starts you can't start deleting, for that may be treated as obstruction of justice (the government's favorite crime, easy to prove, very few defenses). However, prior to an investigation, you can and should periodically clean out your in/out/delete and any other boxes you have. Delete them into computer oblivion, if you can. Don't be selective—kill them all. If the company really wants to find them they may have them on their server anyway, but don't make their case against you by hanging on to old emails you should have discarded long ago.

- Don't decide against getting counsel because of the potential cost. Hiring an experienced white collar lawyer may cost more than a DUI defense, but there are such lawyers in every city that can represent clients without bankrupting them. Look for former prosecutors or SEC attorneys in small firms. Seek recommendations from big firm lawyers whose required retainer is over your pay grade. Is it worth it to save some money and trust the company's lawyer, but lose your job, and potentially go to prison, in the process? Do not kid yourself that this is business as normal. Treat your involvement in an internal investigation as if you think you may be having the legal equivalent of a heart attack, and seek appropriate help.

- If you find yourself called into the general counsel's office, confronted by a group of lawyers with grave faces, and you are told to answer their questions or face adverse consequences, do not panic: you may have more leverage than you think. Company counsel should give you the corporate equivalent of *Miranda* warnings, the so-called "Upjohn" warnings (named for a Supreme Court case on corporate attorney client privileges). You should be told, although it is not always a required procedure, that the internal investigators represent the company, not you, and the attorney-client privilege is the company's, not yours, and can be waived if the company sees fit. You will probably be told the interview is "confidential" and you cannot discuss it with anyone (sometimes, but not always, they will say "except your own counsel"). You probably won't be told that the government is already aware of the matter (or soon will be) and that the company will in all likelihood be providing it a full report, including your statements). You will almost certainly never be told that you could be indicted criminally if you lie

to or mislead the investigators. You should be told you can consult your own lawyer, but, unlike top executives, few employees are so informed. The simple reason: under intense pressure to deliver information to the Board of Directors, and then on to the government, the investigators really want you to talk. The last thing they want is to scare you into going out to consult a lawyer. Stripped down to its essentials, it can be pretty close to a scene from *Law and Order*.

- In this situation, put it to the investigators directly—ask if it likely the U.S. Government will be reading a summary of this interview. Ask the investigators if they were in your position, would they go forward without counsel. In truth, if the lawyers were being asked these kinds of questions themselves, *their* careers in jeopardy, they would most certainly seek their own counsel before opening up. Ask them if they feel they may have a conflict of interest with you. Most people just ask, "do I need a lawyer" and get the stock answer that counsel for the company cannot answer that question. You need to push back, and create a situation in which it seems most reasonable for you to announce you wish to cooperate but simply need more time to consult counsel before continuing the interview. Also ask if the company will pay for such consultation. Unless you are a top officer, the initial answer will probably be "no" but your lawyer may be able to get that decision modified or reversed later. The New Jersey Supreme Court has recently held that, under certain conditions, companies under criminal investigation may retain and pay for counsel for employees who are also targets or may become witnesses.

- If you do decide to plunge ahead and talk, answer the questions succinctly, tell the truth but do not go out of your way to become a junior G man/woman and try to "help" the investigators by directing them into new areas of inquiry you may know of but about which they did not ask. Do not speculate or suggest other people or transactions they might want to look at. In other words, do not open Pandora's Box. You have no idea what kind of hole you may be digging for yourself. Their next questions will surely be: how long have you known about this and why didn't you tell us about it before. Follow this advice even if the company lawyer in the group is your friend and has been a confidant in other settings. There may be a time and place for such disclosures, after consultation with your own counsel, but these are critical decisions affecting your status that should not be made under the pressure of the interview.

Of course, there is always the risk that anything other than full and immediate cooperation will cause your termination, either immediately or later (particularly if you are an employee at will, i.e. without an employment contract). You have to weigh this outcome against the risks associated with talking, and

creating a record of your statements, without benefit of counsel, about complicated matters which may involve criminal exposure. If you are aware there is an investigation, think ahead about what you will do if called in to talk. It may be worth it to consult counsel before you get the call. In reality, company counsel may not be all that unhappy with an employee who displays some sense for self-preservation and wants to get his own counsel. This can make company counsel's life easier, especially if they suspect (based on information or allegations they already have) that they have a real or apparent conflict with you and should probably be advising you to get counsel anyway. Once you have a lawyer, that person can make contact with the company counsel and work out the ground rules for an interview, if it is in *your* best interest (not just the company's) to tell what you know. Your own counsel can also sort out your information and help you present it most effectively. Your counsel can probably get permission to attend. You may be surprised to find the company will give your information more credibility (and you more credit) if it comes after your own consultation with counsel.

An entirely different situation presents itself if you are aware of potential wrongdoing within your company but no one else has reported it, to your knowledge. You then have the choice of being a stand-up employee and reporting it, either anonymously to a company hotline or in person to a compliance officer, internal auditor, or to the general counsel's office. Although all the compliance training and ethics seminars and materials encourage employees to come forth, this still represents a very difficult decision for even the most ethical employee.

Granted, it is tempting to call the hotline and "drop a dime" on the bad guys, especially when you have no personal involvement in the wrongdoing and find it disgusting. But if it is likely that it will come to light that you are the tipster, or if you are inevitably going to be interviewed if an investigation starts and will probably need to confirm you were the source to get some credit for coming forward, odds are your identity as the tipster will get out. While federal law (the Sarbanes-Oxley Act) supposedly protects corporate whistleblowers, in reality the cumbersome process necessary to get compensation and/or reinstatement for employer retaliation rarely provides adequate relief (in fact, The *Wall Street Journal* recently reported that the government has ruled in favor of whistleblowers in only 21 of 1,455 cases since 2002, and dismissed another 996 cases). Incredibly, the current law allows companies accused of retaliation to be exempted from the law if the employee worked for a corporate subsidiary (there is a bill pending to fix this situation).

In this situation an employee should also consult non-company counsel (it should not take too much time) to determine if you should come forward, and how the information should be conveyed. Approaching the employer through a lawyer representing you can make a big difference, for the company knows it will be held accountable if anyone (such as your immediate supervisor or fellow employees) start to make your life miserable, or someone comes up with a great reason to transfer you to the Anchorage branch. Likewise, there is federal legislation now pending in Congress that contains an SEC whistleblower provision, by which those who provide original information leading to substantial recoveries by way or fines or other penalties against corporations who are found to have violated the securities laws may

receive bounties of up to 30% of the government's recovery. The hurdles to whistleblower recovery in the proposed law are much less difficult than existing law. Under the proposed law, using a lawyer will also allow the whistleblower to remain anonymous in most circumstances until the reward is claimed. My prediction is that, once a few major rewards are given under this law, this route will become the preferred way to become a whistleblower in any case involving financial, accounting or securities frauds.

Internal investigations are minefields for managers and employees caught up in the wheels of justice, corporate style. Akin to most plane crashes, they are survivable: some participants emerge unscathed, others do not fare well. Corporate loyalty is sometimes rewarded, but not always. Blind trust is often misplaced and not reciprocated. Generally, the folks on the other side of the table, however familiar and sympathetic they may be, are not your friends. The key is to understand the risks going in, seek professional advice, violate no laws, and try to make the best out of what is, for even the most honest of employees, a very stressful and sometimes perilous experience.