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INTERNAL INVESTIGATIONS AND THE SPECTER OF STATE ACTION

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Internal investigations by private attorneys into potential criminal violations are big business. Some have led to legal bills in the tens of millions of dollars; others, even higher.

In the United States at least, they appear effective as a tool for negotiating outcomes to alleged crimes by corporations. The Corporate Prosecution Registry tracks the large and growing number of corporations that reach some form of negotiated outcome—a guilty plea, a deferred or non-prosecution agreement, or a conditional declination or dismissal—and the very small number of corporations that go to trial on criminal matters. Many, probably most, of the negotiated outcomes involved some form of an internal investigation.

While successful and, for attorneys, profitable, internal investigations may be facing a threat. When prosecutorial involvement in them increases, the investigation may no longer be viewed as either "private" or "voluntary" and may be viewed instead as a form of state action. That carries significant consequences.

Distinguishing Among Internal Investigations

To understand the risk, we must distinguish among several undertakings that are sometimes grouped together as "internal investigations" but are really quite different from each other. At its simplest, any client must take steps so that a lawyer consulted on a criminal matter understands the relevant facts, without which any legal advice would be worthless. In most circumstances, factual inquiry by an attorney is covered by some form of a professional privilege. *Upjohn v. United States*, 449 U.S. 383 (1981), famously established that in the United States, an informative, defensive investigation—regardless of whether conducted by an in-house counsel or a retained outside attorney—is covered by the attorney-client privilege and work-product protections benefiting the corporation.

By contrast, outside the United States, the confidentiality of such an inquiry may not be so robust or automatic. In-house corporate counsel may not be considered "attorneys" for purposes of any applicable professional privilege. And the jurisprudence in some countries is unclear or evolving on the precise parameters of professional privileges relating to a corporate inquiry.

But if properly managed with a wary eye to local variants, a corporation should be able to engage an attorney to learn relevant facts, yet never be forced to share the fruits of such an investigation with a prosecutor.

At the other end of the spectrum, corporations embarrassed by publicity surrounding a potentially criminal event may make a public announcement that they are retaining a prominent law firm to conduct an investigation and ultimately publish its findings. That kind of an investigation, which is not specifically done for criminal defense, may raise questions at the margin, such as whether the law firm's drafts are accessible to discovery in related litigation; but by definition there is little or no concern about the confidentiality of the lawyers' core findings, as they are designed from the outset to be published upon completion.

Between those poles lie circumstances in which prosecutorial involvement may significantly change important dynamics. In many circumstances, a confidential investigation may lead a corporation to direct its attorney to approach a prosecutor to negotiate an outcome. In some instances, a company's attorneys may reach out to a prosecutor very early in an investigation, sometimes even at its outset, to coordinate the investigation.

Early coordination may have advantages for both sides. For the prosecutor, it can permit so-called de-confliction, by which the prosecutor orders an investigating attorney to defer interviewing certain

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witnesses to avoid inadvertently causing a tip-off or other detrimental result. For a target corporation, it may allow the corporation to get added benefit for its voluntary cooperation; the corporation and its counsel can evaluate the extent of the prosecutor's knowledge and likely strategy, and react accordingly; and the corporation can negotiate to limit the scope of the investigation. Perhaps most importantly, the corporation can fine-tune its investigation to satisfy the prosecutor and thus achieve an optimal result under the circumstances.

Once communication with a prosecutor has been established, that prosecutor may well influence, have a hand in, or even direct the lawyer's investigation. And when that happens, a new question arises: Is the investigation being conducted by counsel who is truly "private" or has it taken on aspects of state action?

While that issue long has been recognized, its importance was emphasized in dramatic fashion by a May 2019 decision of Chief Judge Colleen McMahon of the Southern District of New York in *United States v. Connolly*, 2019 U.S. Dist. LEXIS 76233 (S.D.N.Y. May 2, 2019). In her opinion, Judge McMahon explored in detail a purportedly "private" investigation conducted by a prominent New York law firm for its client, Deutsche Bank, into possible manipulation of the London Inter-Bank Offered Rates (known as LIBOR).

While the investigation led to a negotiated result that Judge McMahon noted was a "conspicuous success" for the bank, she focused on the manner in which the investigation was conducted and its impact on witnesses who had been interviewed, one of whom was subsequently prosecuted. She concluded that because the prosecutor was so intimately involved in the conduct of the investigation, the private law firm's acts were "fairly attributable to the government" and thus took on certain aspects of being state acts, not private ones.

In particular, she concluded that some of the interviewees' testimony was "compelled" by fear of being fired by the corporation if they did not cooperate with the investigation, and because of prosecutorial involvement, those statements were covered by the Fifth Amendment provision, normally limited to state action, that no person "shall be compelled in any criminal case to be a witness against himself."

The extent of prosecutorial involvement in *Connolly* was unusual. Judge McMahon described virtually day-to-day management of the law firm's investigation by prosecutors. She dryly noted that the prosecutors gave "marching orders" to the law firm actually conducting the investigation.

But the situation was hardly unique. Any time a law firm conducts an investigation

Illustration by Lisa Haney

in coordination with a prosecutor, it risks that a judge will later determine that the extent of prosecutorial involvement meant that the investigating law firm's conduct was no longer private and instead implicated legal principles normally applicable only to the state.

Determining when prosecutorial involvement crosses a line so that a "private" investigation takes on "public" implications is very fact specific with no simple test. The analysis may vary depending on the issues raised, and in some circumstances, the relevant determination may be made by a foreign judge unfamiliar with the relevant practices.

It also is an issue about which the Department of Justice is sensitive. The department's *Justice Manual* provides that the department "will not take any steps to affirmatively direct a company's internal investigation efforts," but it adds that the department will request "de-confliction" in situations that it deems "appropriate."

Consequences of Outsourcing

However it occurs, such "outsourcing" may lead to a number of consequences.

Self-incrimination and immunity. The issue specifically addressed by Judge McMahon was whether the prohibition announced in *Kastigar v. United States*, 406 U.S. 441 (1972), of using even indirect fruits of immunized testimony invalidated the prosecution of a witness interviewed by a private law firm. The *Kastigar* holding already had been given extraterritorial impact by the Second Circuit in *United States v. Allen*, 864 F.3d 63 (2017), which held that immunized testimony obtained by authorities in the United Kingdom could not be used, directly or directly, in a U.S. prosecution.

The reasoning in *Connolly* took the *Kastigar/Allen* line of cases a major step forward. *Kastigar* and *Allen* each involved official immunity, where prosecutors interviewed witnesses knowing that the testimony would be "immunized" and might have an impact on subsequent investigation. *Connolly*, however, effectively allocated to private actors—lawyers representing a corporation—the power to obtain immunized testimony.

The prospect that an officially sanctioned, but privately conducted, internal investigation can empower private lawyers to generate immunized testimony, thus giving the interviewees possible *Kastigar* defenses if they are indicted, raises profound risks of inadvertent, or even intentional, "immunity baths" for corporate interviewees.

Blocking statutes. A number of countries have statutes that prohibit their nationals or others acting in their territory from transferring evidence, including interview testimony, to a foreign authority. Those statutes typically require some form of state involvement; an international corporation simply transferring information across international lines, to inform itself, would not violate them. But lawyers perceived to be acting under some form of state authority could well find themselves the target of a criminal prosecution for conducting an "outsourced" investigation on foreign soil.

***Brady/Giglio* and discovery issues.** In the United States, a prosecutor has a number of obligations, some of constitutional dimension, to share certain evidence or information with the accused. Those include the obligation to turn over information that may be exculpatory or helpful to the defense. How will prosecutors respect those important duties when much of the relevant evidence or information was gathered not by the police or another state actor under governmental control, but by a private law firm, whose corporate client may choose to turn over to the prosecutor some but not all of the evidence it obtained?

Workplace, database, and privacy concerns. When an international investigation crosses borders, many countries in which evidence may be gathered have workplace traditions and rules about database integrity and personal privacy that are notably more stringent than those in the United States. Some of those rules are particularly sensitive when the entity seeking evidence, or to which evidence may be sent, is a state. Private lawyers conducting an investigation for a corporate client pursuant to an understanding with a foreign prosecutor may create a hornet's nest of controversies based on them.

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Coordination among prosecutors. At a very general, but extremely important, level, privatized corporate investigations risk disturbing coordination of prosecutorial responsibilities among sovereigns. The success of U.S. officials in prosecuting and obtaining very large financial settlements from non–U.S. corporations has created significant tensions overseas. Many non–U.S. prosecutors are resentful of the success of their U.S. counterparts, who are often viewed as territorially aggressive.

"Outsourced" investigations through which public goals are achieved in significant part by agreements with private corporate attorneys are essentially unheard of in Europe and much of the rest of the world and, in some countries, would not be possible because of strict professional rules. While the Department of Justice appears to be making sincere efforts to work cooperatively with fellow prosecutors in other countries, the perception that it often operates by outsourcing its powers to private attorneys will complicate those efforts. ■