Ethical Issues When Defending Parallel Investigations or Proceedings

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Topics for Today

- Common Types of Parallel Investigations and Proceedings
- **Part I:** Key Ethical Questions Raised When Representing a Company During Parallel Investigations or Proceedings
- **Part II:** Key Ethical Questions Raised During Dual Representation in Parallel Investigations or Proceedings
- Q&A

Common Types of Parallel Investigations & Proceedings

- SEC and DOJ
- DOJ and other federal agencies (CFPB, Treasury/OFAC, CFTC, IRS, EPA, etc.)
- Congressional committees
- Industry regulators (FINRA, NYSE, Chicago Board of Trade, etc.)
- Multi-development banks (World Bank, Asian Development Bank, African Development Bank, etc.)
- Regulatory/criminal investigation and parallel civil litigation

Common Types of Parallel Investigations & Proceedings

- Multiple State Attorneys General
  - Multiple states coordinate to conduct investigations
  - Covid-19 litigation
  - Big tech antitrust litigation
  - Data breach and data privacy litigation
  - False claims
  - Racial equity investigations and litigation
  - Usually led by larger states with more resources (CA and NY)
- State Attorney General and State Agencies
  - Parallel investigations by state AGs and state agencies or county prosecutors and City Attorneys

Common Types of Parallel Investigations & Proceedings

- In a recent filing, several States Attorneys General, including those of Arkansas, Connecticut, and Ohio, argued that claims against a consulting firm should be stricken from the litigation brought by several states' local governments against opioid manufacturer Purdue Pharma.

- The consulting firm is in the process of settling with 47 states for hundreds of millions of dollars for its role as a consultant for Purdue in the lead-up to the opioid crisis. However, the suit by the local governments are preventing that resolution from being finalized.

Common Types of Parallel Investigations & Proceedings

- One emerging area of joint federal/state investigations to look out for are the Federal Trade Commission and state Attorneys General.
- In May 2021, the Supreme Court unanimously held that the FTC did not have the authority under Section 13(b) of the FTC Act to seek monetary damages when it sought permanent injunctions to stop an alleged fraud. The Court held that a "permanent injunction" has a "limited purpose – a purpose that does not extend to the grant of monetary relief."
- A path forward for the FTC may be to forge stronger partnerships with state AGs for monetary relief on behalf of consumers. Most states allow for restitution. A natural aspect of this type of partnership will be parallel (or joint) investigations by the FTC and State AGs.
- Since the *AMG* decision, the FTC has gone the route of issuing blanket letters, or "Notices of Penalty Offenses," to thousands of companies warning them that they could inur penalties of up to $43,000+ per violation if they engage in unfair or deceptive business practices.

AMG Capital Management LLC, et al. v Federal Trade Commission, No. 19-508, slip op., 141 S. Ct. (2021).

Part I: Key Ethical Questions Raised in Representing a Company During Parallel Investigations or Proceedings

- Disclosure obligations
- Privilege and other waiver concerns
- Discovery/subpoena obligations

Ethical Concerns During Parallel Investigations or Proceedings

- A concern for company counsel facing parallel investigations or proceedings is whether information that counsel shares with one government agency will be made available to other federal or state agencies, prosecutors or third parties.
  - Does counsel have a duty to disclose the existence of one investigation to a government entity initiating a second investigation?
  - What are counsel's discovery obligations in relation to subpoena and productions to multiple government entities?

Is There a Duty to Disclose?

- Company counsel may assume that government entities may be coordinating and working together, but that is not always the case.
- Consider then: does counsel representing a company during parallel investigations have an ethical (or legal) duty to disclose to one government entity running an investigation that another entity has begun a separate inquiry?
- Regardless of any duty, should counsel still disclose?
- What about disclosing settlement discussions with one agency?

Attorney-Client Privilege

- Attorney-Client Privilege. A lawyer has a duty to keep their client's confidences, whether the client is a corporation or an individual.

- **Rule 1.6(a) states:** A lawyer shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) unless the client gives informed consent, or the disclosure is permitted by paragraph (b) of this rule.
  - Business and Professions Code section 6068, subdivision (e)(1), provides that it is the duty of a lawyer to "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

Privilege Waiver Concerns

- Under federal common law, the attorney-client privilege protects (1) a communication between client and counsel that (2) was intended to be and was in fact kept confidential, and (3) was made for the purpose of obtaining or providing legal advice.

- Further, the work product doctrine protects from discovery documents and "tangible things" that are *prepared in anticipation of litigation*.

- When company counsel discloses privileged information to one enforcement agency, the privilege may be waived as to all future enforcement agencies as well as to private litigants.

Protecting Privilege

- Counsel should be aware of current and/or possibility of future civil litigants.
- Counsel should be cognizant of the form with which they choose to disclose.
- Some suggested courses of action to protect the attorney-client and work product privileges while maintaining client confidences during parallel investigations are:
  - Provide downloads that only disclose underlying facts and do not reveal communications between company's counsel and witnesses
  - Deliver downloads in a hypothetical format and provide less details than those given by the witness
  - Paraphrase content and present it thematically, rather than a complete recount (i.e., oral download) of the witness's statements
  - If possible, provide lists of witnesses interviewed, rather than what each individual witness said
  - Provide downloads from newly created document made for that purpose

Protecting Privilege

- If company counsel is conducting an internal investigation (usually the case) and sharing privileged information with third parties – such as its outside auditors or accountants – the same privilege waiver issues are raised.

- When communicating with outside auditors:
  - Stick to the facts
  - Avoid disclosing mental impressions or legal conclusions
  - Communicate orally as much as possible
  - Avoid sharing written materials like a final investigative report or PowerPoint presentation
  - Avoid "oral downloads" of privileged interviews or "readouts" of privileged interview memoranda.

Discovery Obligations

- Discovery/subpoena obligations: When counsel receives a subpoena request, it will usually comply and produce documents.

- But consider, what happens when the documents have already been collected (and perhaps produced) in another investigation?

  - Should counsel produce the documents previously collected and produced in earlier investigations?

Part II: Key Ethical Questions Raised During Dual Representation in Parallel Investigations or Proceedings

- Benefits of Dual Representation
- Attorney-Client Privilege and Conflict of Interest
- Risks of Dual Representation
- Assessing Risks of Dual Representation
- When the Company Pays for an Employee's Counsel
- Employee's Fifth Amendment Rights
- When a Current Employee is Non-Cooperative
- Former Employees

Benefits of Dual Representation

- Why would a company want to have the same representation for itself and its employee(s)?
  - Efficient
  - Economically sound
  - Common strategies and coordination
  - Counsel has more information at their disposal to better advocate for all parties
    - More documents
    - More information
    - Closer to all the relevant facts
  - Avoids view that the company and individuals' interests diverge
  - Company policy may dictate

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Conflicts of Interest

- An important aspect of representing a company and an individual (or several individuals) during parallel proceedings, is potential or actual **conflicts of interest**.
- Under California rules, "A lawyer shall not, without informed written consent from each client and compliance with paragraph (d), represent a client if the representation is directly adverse to another client in the same or a separate matter." Rule 1.7(a).
- Additionally, a lawyer cannot represent a client if there is a "significant risk the lawyer's representation of the client will be **materially limited** by the lawyer's responsibilities to or relationships with another client, a former client or a third person or by the lawyer's own interest." Rule 1.7 (emphasis added).

Conflicts of Interest

- A lawyer can still represent a client where a conflict of interest *may* arise if:
  1. The lawyer reasonably believes that they will be able to provide competent and diligent representation to each client;
  2. The representation is not prohibited by law;
  3. The representation does not involve the assertion of a claim by one client against the other in the same litigation or proceeding; and
  4. Each client gives their informed, written consent. Rule 1.7(b)-(d).

Risks of Dual Representation

- **What are the risks for the company, the lawyer, and the employee if a dual representation is undertaken?**

1. The interests of the company and the individual employee can diverge
2. The lawyer's duty to protect client confidences (Rule 1.6) is tested
3. The lawyer may not be able to advocate to the fullest extent for each client, particularly given privilege concerns (Rule 1.9)
4. If a conflict arises, the lawyer will need to withdraw representation of at least one client
5. Privilege and ethical limitations may prevent Company from disclosing information learned from employee to government to receive cooperation credit
6. The government may view representation of employee as the company's lawyers guiding the employee

Steps to Assess Dual Representation

1. **Conduct scoping interviews focusing on the relevant employees' level of involvement in the key issues known or suspected**
   - A scoping interview to determine a witness's role, the extent of that witness's general knowledge, and what relevant documents or information the witness may have is a good first step that can help guide counsel as to whether it is possible a conflict between the company and the witness may later arise necessitating separate counsel for each party.

2. **Conduct a thorough internal investigation**
   - By conducting a thorough internal investigation parallel to (or before) an official government or other outside investigation or litigation is underway, the company can do as much as possible to ensure that it has all the relevant facts necessary to prepare a defense against potential wrongdoing and to immediately start mitigating and remediating any potential wrongdoing.

Steps to Assess Dual Representation

3. **As part of the internal investigation, ask yourself:**
   - What are the key questions of each investigation and proceeding? Does corporate counsel know these at the time that dual representation is being considered?
   - Is it known that an employee's behavior, or the behavior of their subordinates, is a primary focus of the parallel proceeding?
   - Did you learn about any wrongdoing by an employee during the course of the initial proceeding?
   - Is it in the company's best legal interest to identify an employee as someone responsible for any misconduct (if they are known)?
4. **Make early inquiry of government attorneys whether any specific employees are subjects or targets of investigation.**

Protecting Privilege and Avoiding Conflicts of Interest

- Generally, counsel should give a thorough Upjohn warning before speaking to any employees. A properly-given *Upjohn* requires that counsel inform the interviewee that:
  - Counsel represents the company and not them as an individual;
  - The conversation is privileged, but the privilege belongs to the company;
  - The company may waive that privilege and could choose to disclose the contents of any conversations with the employee to third parties, including the government; and
  - Ask the employee to keep the conversation confidential.
- Note that when giving an *Upjohn* warning, counsel should not give the employee any advice as to whether they need or should retain a lawyer.
- Should an employee ask after the *Upjohn* is given whether they need their own counsel, counsel should not provide advice and remind them simply that they have a right to separate counsel.

Advance Conflict Waiver

- For dual representation, consider having individual employee agree to an advance conflict waiver.

In the event an actual conflict of interest ever arises between you, on the one hand, and Company, on the other hand, we may be required to withdraw from our representation of you but we intend to remain as counsel to Company in the Litigation. That may occur, for example, if our firm receives conflicting instructions or information from you and Company with regard to your role as a potential and/or actual witness in the Litigation. By signing this letter, you agree that, should such a conflict arise between Company, on the one hand, and you, on the other hand, you consent to our withdrawal from our representation of you and our continued representation of Company in the Litigation and other matters. By signing this letter, you agree that you will not seek to disqualify and waive any right to disqualify or to object to this firm representing Company in the Litigation or any other matter as a result of this firm's representation of you as a potential and/or actual witness in the Litigation, even if a conflict actually develops between you, on the one hand, and Company, on the other hand. **Your initials next to this paragraph evidence your consent to the terms of this representation.**

Protecting Privilege and Avoiding Conflicts of Interest

- For dual representation, both privilege and ethical obligations prevent lawyer from sharing information learned from the employee without employee's express consent; that is true even if lawyer no longer represents the employee, and continues to represent Company.
- The 2015 Yates Memo made clear that for a company to receive any cooperation credit, it must identify *all* the individuals responsible for the misconduct. [1]
  - The DOJ walked back the "all or nothing" guidance of the Yates memo in 2018, requiring that companies provide all non-privileged relevant information as to those individuals "substantially involved" in misconduct. [2]
  - However, in 2021 the Garland DOJ reverted back to the Obama-era guidance.
- In November 2021, Deputy AG Lisa Monaco stated that if a company discloses information only related to those "substantially involved" in misconduct, it will give companies "too much discretion in deciding who should and should not be disclosed to the government. "

[1] U.S. Department of Justice, *Memorandum from Attorney General Sally Quillian Yates re Individual Accountability for Corporate* Wrongdoing (Sep. 9, 2015).
[2] U.S. Department of Justice, *Deputy Attorney General Rod J. Rosenstein Delivers Remarks at the American Conference Institute's 35th International Conference on the Foreign Corrupt Practices Act* (Nov. 29, 2018).

Take-Aways: Representing a Company and Its Employees

- **Make a determination early in the process as to whether the possibility for conflicts are too great for counsel to represent both the company and individual employees.**
  - Possibility of conflicts are especially high between the company and high-ranking employees and during criminal investigations.
- **Make clear at all times and during all related investigations or proceedings whom counsel represents.**
  - If counsel does not represent employees personally, *Upjohn* warnings should be given to all employees interviewed, *every* time they are interviewed. Counsel should make contemporaneous notes that the *Upjohn* was given and understood.
  - Remind interviewees that the conversation is privileged as to the company, and the company may share the information with third parties, including the government.

Paying for Employee's Counsel

- What are the ethical issues implicated when a company agrees to pay for an employee's counsel when it is not obligated to do so (e.g., by employment contract or via D&O insurance policies)?

Paying for Employee's Counsel

- The California Rules explicitly allow for a third party to pay legal fees and Cal. Labor Code 2802 specifically requires it in certain instances.
- However, the lawyer must ensure that in taking payment from someone other than their client:
  - There is no interference with their "independent professional judgment" of the lawyer or with the lawyer-client relationship;
  - The attorney-client privilege remains intact; and
  - The lawyer gets the client's informed, written consent before or at the time that representation is undertaken, or as soon as reasonably practicable. Rule 1.8.6.
- A lawyer must not permit the party that pays legal fees to "direct or regulate the lawyer's independent professional judgement" or interfere in the relationship between the lawyer and their client. Rule 5.4(c)

Paying for Employee's Counsel

- Get informed, written consent from the client (employee) that the company will be paying for their legal fees. Rule 1.8.6
- Ensure that the company does not interfere in any way with the representation, e.g., do not seek updates that would reveal confidences. Rule 1.8.6
- Do not, under any circumstances, seek to allow management or company counsel to direct or attempt to substitute the judgement of the employee's counsel. Rule 5.4(c)
- *Do* consider whether to enter a joint defense agreement with the employee's counsel. A joint defense agreement allows the company and the employee's separate counsel to share some information to form a common defense strategy without waiving privilege.

Employee's Fifth Amendment Rights

- Keep in mind that, while corporations do not have a Fifth Amendment privilege, their employees and former employees do, and an employee's decision to exercise their Fifth Amendment privilege will have implications for the company.
- The employee's assertion of the Fifth Amendment privilege in a civil or regulatory proceeding can result in an adverse inference against the company in that proceeding.
- Further, the employee's invoking of their Fifth Amendment privilege in a criminal investigation can result in limiting the company's credit earned for cooperation.
- Note that an employee's Fifth Amendment right does *not* extend to refusing to produce any corporate records they may possess.

Employee's Fifth Amendment Rights

- Strategies to consider ameliorating the effects of an employee invoking their Fifth Amendment rights:
  - Ensure that a litigation hold is in place early during any investigation to ensure that no documents related to any criminal or civil inquiry are destroyed.
  - Investigate the facts thoroughly before the enforcement agencies' investigations or proceedings are ripe which could result in the company getting the relevant information before any employee invokes their Fifth Amendment rights.
  - Company policy may dictate that an employee can be terminated if they assert their Fifth Amendment rights during a good-faith investigation.
    - Note that the employee may assert their Fifth Amendment rights if they sit for an interview conducted by the government entity.

Non-Cooperative Employees

- In some instances, a company employee that company's counsel seeks to interview refuses to speak with counsel. This may be because the employee is afraid, or the employee knows that they may be implicated in the wrongdoing being investigated, or for other reasons you may not anticipate.
- Does company counsel have an ethical duty to refrain from speaking to the employee?

Former Employees

- It is often the case that during parallel investigations or proceedings, company counsel will have to communicate with former employees that were part of the company during the relevant time period being investigated.

- The Company could consider dual representation of itself and the former employee, but that brings to bear all the same conflict of interests risks and calculations as with current employees previously discussed as well as some other unique issues. Note that:

  - **Majority View**: The Ninth Circuit treats communications between corporate counsel and former employees as privileged when related to the former employee's work. *In re Coordinated Pretrial Proceedings in Petroleum Prod. Antitrust Litig.,* 658 F.2d 1355, 1361 n.7 (9th Cir. 1981).

  - **Minority View**: Washington State has held there is no privilege in communications with former employees. *Newman v. Highland School Dist.*, 186 Wash. 2d 769, 776 (2016).

Former Employees

- If the former employee talks to company counsel without an attorney, privilege may attach to that communication in some jurisdictions (Ninth Circuit) and not others (e.g., California).

- If the former employee has separate counsel, company counsel must get consent from the former employee's counsel to interview them or have the employee's counsel present. *See* Rule 4.2.

  - *Note that privilege does not attach to an interview with former employees represented by counsel in most jurisdictions.*

Speakers – Thank You!

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