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A Cautionary Tale For Law Firms Engaging With Prosecutors

By **Matthew Kahn**

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Law360, New York (August 30, 2017, 2:12 PM EDT) -- On June 5, 2017, the First District Court of Appeal held that a law firm representing a company whose former employee was being prosecuted for embezzlement was not a member of the prosecution team.[1] Overruling the trial court, the court reasoned that the law firm acted on behalf of its own client rather than at the direction of the district attorney's office.[2] Consequently, the court held that the law firm was not subject to Brady disclosure obligations, meaning that the government was not required to search for potentially defendant-friendly documents and materials within the law firm's files.[3]

This ruling provides critical guidance for law firms considering cooperating with prosecutors on behalf of their clients and highlights several traps for the unwary in navigating such cooperation. This law firm was fortunate — the Court of Appeal overturned the trial court's ruling, which could have resulted in the law firm being forced to disclose attorney-client privileged communications — but its experience serves as a cautionary tale, and the Court of Appeal's decision provides a road map to enable other firms to avoid a similar fate.

The Case

Valla and Associates Inc. PC was representing IAR Systems Software Inc. in a civil case against IAR's former CEO, who was accused of paying off personal debt with company money as well as paying a salary and benefits to his wife, who was not an employee.[4] Days before the first trial date, the San Mateo County district attorney brought charges of felony embezzlement against the former CEO.[5] As Valla pursued the litigation on behalf of IAR and the DA concurrently developed its prosecution, the two parties were often in communication.[6]

In December 2015, the former CEO filed a motion in the criminal case to determine whether Valla should be considered part of the DA's prosecution team and thus obligated under Brady to disclose material and exculpatory evidence notwithstanding the attorney-client privilege.[7] In August 2016, the trial court ruled that Valla was part of the prosecution team and must comply with Brady requirements.[8]

The trial court based its decision on three specific interactions between Valla and the DA. First, the DA had requested, through Valla, that IAR provide information and expertise from a forensic accountant,

who could help elucidate the former CEO's crimes.[9] IAR then paid an accountant who had provided services to IAR in the past to offer such assistance.[10] Second, a Valla attorney asked the police for the Penal Code citations for the offenses charged against the former CEO, explaining that Valla would attempt to ask about the elements of those offenses in an upcoming deposition of the former CEO.[11] The police responded with the citations, and Valla later sent the DA a copy of the deposition transcript with portions underlined.[12] Third, the DA asked if Valla would share case citations for the former CEO's "ratification" defense in the civil case.[13] Valla sent the DA an email with copies of statutes from the Civil Code that included case citations as well as some analysis, which Valla previously had compiled in connection with the civil case.[14]

On appeal, the First District Court of Appeal ruled that the trial court erred.[15] The court held that, based on a totality of the circumstances test,[16] "the particular facts of this case demonstrate that [Valla] cannot be deemed part of the prosecution team."[17] In characterizing the issue in question, the court asked "whether the prosecution has exercised such a degree of control over the nongovernmental actor or witness that the actor or witness's actions should be deemed to be those of the prosecution for purposes of Brady compliance."[18] The court answered this inquiry, "no," holding that Valla was not acting on behalf of the DA, nor did the DA have the right to control Valla's conduct.[19]

In reaching this holding, the court considered each of the three interactions between Valla and the DA on which the trial court had focused and found them to be "more benign than the trial court's ruling would suggest."[20] As to the forensic accountant, the court highlighted the fact that the DA's office did not "exert the degree of control, direction, or assistance over [the accountant's] work as would be necessary to trigger the prosecution's disclosure obligations under Brady" and reasoned that just because "law enforcement may have obtained more specialized information and expertise from the crime victim, IAR, in this case than it would have in a more ordinary criminal case does not, without more, prove Valla and the prosecution were 'team members' for purposes of Brady."[21]

As to the Penal Code citations and deposition transcript, the court found that there was no evidence that Valla had asked questions during the deposition at the direction of the DA, nor did the DA request a copy of the transcript.[22] Rather, Valla was merely "discharging its fiduciary duty to thoroughly investigate the facts and seek appropriate legal redress on behalf of its client rather than working on behalf, and as an agent, of the government to prosecute defendant in the criminal realm."[23]

Finally, as to the case citations for the ratification defense, the court distinguished between sharing a previously existing compilation of research with the government and conducting new research at the government's behest.[24] The court concluded that because the law firm had already done the legal research and analysis in its own matter, sharing "a handful of legal citations and some analysis" with the government, "a task that took only about five to 10 minutes," did not amount to conducting any legal analysis "on behalf of, or at the direction of the district attorney," which could amount to "the sort of the cooperation that ... might place a private party under the prosecution-team umbrella."[25]

The Takeaway

The Court of Appeal's decision has far-reaching implications for law firms considering whether to cooperate with prosecutors. Being deemed "a member of the prosecution team" could lead to disclosures not otherwise required by discovery,[26] potentially including materials normally protected by the attorney-client privilege or the work-product doctrine, although in the IAR case both the trial and appellate courts declined to rule on whether the attorney-client privilege or work-product doctrine would override Brady obligations.[27]

When determining whether a law firm is part of the prosecution team, a court will conduct a totality of the circumstances test.[28] “At its core, members of the team perform investigative duties and make strategic decisions about the prosecution of the case;”[29] however, “no single factor is the touchstone” for making this determination.[30] Moreover, while team members have included “testifying police officers and federal agents who submit to the direction of the prosecutor and aid in the Government’s investigation,”[31] agents involved in the investigation “are not always so integral to the prosecution team that imputation is proper.”[32] Indeed, simply “[i]nteracting with the prosecution team, without more, does not make someone a team member.”[33] Instead, the court considers “whether [counsel] actively investigates the case, acts under the direction of the prosecutor, or aids the prosecution in crafting trial strategy.”[34]

Based on the analysis in IAR, there are several factors that law firms should take into account before engaging with the prosecution on a given matter. While interacting with prosecutors may often be unavoidable in the course of advocating for a client, there are ways that counsel can limit its interactions to avoid being considered part of the prosecution team.

First, law firms should consider when engagement with the prosecution occurs, and in particular whether it takes place before or after the law firm has chosen to act on behalf of its client. The IAR court found timing to be relevant when deciding whether Valla’s sharing of legal research and analysis with the DA supported a finding that Valla was a member of the prosecution team.[35] The Court of Appeal found this sharing to be insufficient to make Valla part of the prosecution team because Valla had already completed this work for its client in the course of its independent civil litigation.[36] As a result, Valla could not have conducted the research and analysis for the DA; rather, Valla was simply passing along pre-existing work product. Thus, when answering potential requests for information from the government, law firms should consider whether they can fulfill the requests without undertaking new work.

Second, law firms should be cognizant of whether they are acting at the direction of the prosecution or independently and on behalf of their clients. In the IAR case, the Court of Appeal did not consider Valla’s sending a deposition transcript to the DA relevant to the prosecution-team inquiry, even though Valla had asked questions at the deposition about the criminal charges, because the DA never asked the law firm to take either of these actions.[37] Instead, both of these decisions were made by the law firm, with no pressure or inducement from the DA.[38] Consequently, when engaging with the prosecution, a law firm should ideally lead the cooperation efforts, rather than act on instruction from the prosecution.

Third, decisions and actions by law firms ideally should be made in furtherance of a clear advocacy strategy. Out of all the factors that the IAR court considered when determining whether Valla could be characterized as part of the prosecution team, the most important was whether Valla’s actions could be said to benefit its client, IAR.[39] Even if a law firm’s actions “sometimes overlap[]” with the government’s efforts to prosecute a defendant, counsel still should not be considered part of the prosecution team when those actions were taken in pursuit of a strategy to put forth the best advocacy for a client.[40] The Court of Appeal applied this reasoning when determining how to give weight to the accountant’s role in the DA’s prosecution when the accountant was paid by IAR.[41] Ultimately the court held that the accountant’s expertise on both the defendant’s civil and criminal liability served IAR’s interests.[42] Thus, when actions are taken to advocate for a client in furtherance of a client’s particular matter, such actions are less likely to be seen as evidence of prosecution-team membership.

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[1] See IAR Sys. Software, Inc. v. Superior Court of San Mateo Cty., 218 Cal. Rptr. 3d 852, 854 (Cal. Ct. App. 2017).

[2] See id., at 863-66.

[3] See People v. Jordan, 133 Cal. Rptr. 2d 434, 440 (Cal. Ct. App. 2003) ("The prosecution must disclose evidence that is actually or constructively in its possession or accessible to it.").

[4] IAR, 218 Cal. Rptr. 3d at 854.

[5] Id. at 855.

[6] Id. at 855-57.

[7] Id. at 855.

[8] Id. at 857.

[9] Id. at 856.

[10] Id. at 857.

[11] Id.

[12] Id.

[13] Id.

[14] Id.

[15] Id. at 858.

[16] Id. at 862 (citing U.S. v. Meregildo, 920 F. Supp. 2d. 434, 442 (S.D.N.Y. 2013)).

[17] Id.

[18] Id. at 863.

[19] Id.

[20] Id.

[21] Id. at 864.

[22] Id.

[23] Id.

[24] See id. at 863.

[25] Id.

[26] See id. at 860.

[27] Id. at 858.

[28] Id. at 860 (citing U.S. v. Meregildo, 920 F. Supp. 2d. 434, 442 (S.D.N.Y. 2013)).

[29] Id. at 861 (citing Kyles v. Whitley, 514 U.S. 419, 438 (1995); Giglio v. U.S., 405 U.S. 150, 154 (1972)).

[30] Id. at 862 (citing U.S. v. Bin Laden, 397 F. Supp. 2d 465, 481 (S.D.N.Y. 2005)).

[31] Id. at 861 (citing Pina v. Henderson, 752 F.2d 47, 47 (2d Cir. 1985); Bin Laden, 397 F. Supp. 2d at 481).

[32] Id. (citing Barnett v. Superior Court of Butte Cty., 237 P.3d 980, 988 (Cal. 2010)).

[33] Id. at 862 (citing U.S. v. Stewart, 323 F. Supp. 2d. 606, 616-18 (S.D.N.Y. 2004)).

[34] Id. (citing U.S. v. Diaz, 176 F.3d 52, 106-07 (2d Cir. 1999)).

[35] Id. at 863.

[36] Id.

[37] Id.

[38] Id.

[39] Id. at 866.

[40] Id.

[41] Id. at 864.

[42] Id.

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