In Hot Pursuit of *Federal Criminal Justice*

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Federal Bar Association

Spring, 2008

MESSAGE FROM THE EDITOR

By Kevin McGrath, Chair, FBA Criminal Law Section

It is my pleasure to announce the Criminal Law Section's upcoming Fifth Annual Criminal Law Conference, which will be held this year on June 19, 2008 in New York City. This is the Criminal Law Section's first conference in New York after four consecutive years hosting the event in New Orleans.

The Criminal Law Section prides itself on providing not just up-to-date, but hands-on, practical advice to practitioners. Attendees will receive guidance and insights from a wide range of current and former federal prosecutors, leading defense attorneys and in-house counsel on a host of cutting edge legal topics. This year's panels will discuss: 1) managing a criminal case or internal investigation involving international legal or factual issues, including how to deal with international evidence gathering and witness interview challenges; 2) navigating your way through parallel criminal and civil securities enforcement proceedings, including tips on balancing the often competing interests of various federal agencies and third parties; 3) the ethical perils and challenges of e-discovery, with a focus on ensuring thorough identification, preservation, review and production of all potential sources of electronic evidence; 4) and the ever popular Supreme Court update, by the entertaining and informative Tim Crooks.

We are also honored to have as our keynote, luncheon speaker Eastern District of Virginia Federal Public Defender Michael Nachmanoff, who briefed and argued *Kimbrough v. United States*. Mr. Nachmanoff will share his experiences preparing for and arguing this groundbreaking sentencing guidelines case before the Supreme Court and will offer his thoughts on the practical consequences of this and related recent federal sentencing rulings.

Each year the audience for the Criminal Law Conference is a wide cross-section of federal criminal law practitioners from private law firms, in-house counsel for multinational corporations, the Department of Justice, the Securities and Exchange Commission, the Federal Defender's Office, CJA attorneys and the military. We come together from across the country to learn, exchange ideas and experiences, renew acquaintances and make new friends. Attendees frequently remark on the practical usefulness of the ideas and strategies shared by our panelists, as well as the high quality of the information concerning new developments.

With this year's conference in midtown Manhattan, we look forward to expanding our network of attendees and anticipate an invigorating, enlightening and entertaining program. We hope you will join us in making the inaugural Criminal Law Conference in New York a resounding success.

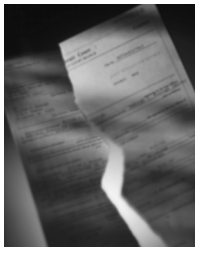
Inside this Issue Spring 2008

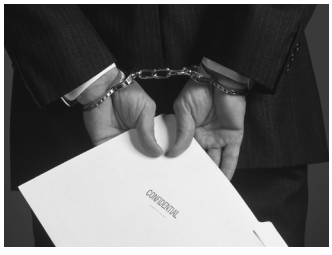
The Fifth Annual CLE Conference and National Meeting of the
Federal Bar Association Criminal Law Section

The BIG Apple Criminal Law Conference

Hot Topics and Practical Advice







June 19, 2008

Networking Reception June 19, 2008

Seyfarth Shaw, LLP—New York, NY

Sponsored by the Criminal Law Section of the Federal Bar Association

Program Schedule—June 19, 2008

Registration Opens . . . . . 7:30 a.m.

Welcoming Remarks . . . . . 8:30–8:45 a.m.

International Panel. . . . . 8:45–10:15 a.m.
Distinguished panelists who have substantial experience prosecuting and defending cases involving international issues will provide practical advice about key issues that arise when a federal prosecution or investigation is based upon foreign evidence. The panel will discuss the effects of international laws and treaties, obtaining evidence and testimony in foreign countries, how to challenge foreign evidence gathered by the government, and how counsel should deal with international and foreign parallel proceedings.

Kevin J. Cloherty, John Hancock Financial Services, Inc., Boston, MA

Mark Califano, GE Commercial Finance, Stamford, CT

Steven M. Goldsobel, Law Office of Steven M. Goldsobel, Los Angeles, CA

Break . . . . . 10:15–10:30 a.m.

Navigating Your Way Through Parallel Civil and Criminal Securities Enforcement Proceedings . . . . . 10:30 a.m.–Noon
It begins with a call for advice from an individual or corporate client facing a potential SEC investigation. It can end with multiple private civil suits, substantial civil penalties, a criminal conviction, and jail. Experienced government and private counsel explore the moving parts of an SEC investigation that turns criminal. Counsel discuss the parallel and at times competing interests of governmental authorities; how parallel investigations may significantly complicate internal investigations and cooperation with the government, the pressures and dangers of waivers and privilege; and other recent developments in this important practice area. The panel will provide concrete advice for handling these complex issues.

William Johnson, U.S. Attorney's Office, Southern District of New York, New York, NY

Mark K. Schonfeld, Securities and Exchange Commission, New York, NY

Richard D. Owens, Latham & Watkins (former chief, Securities and Commodities Fraud Task Force, U.S. Attorney's Office, Southern Distirict of New York), New York, NY

Luncheon and Keynote Address . . . . . Noon–1:30 p.m.
Eastern District of Virginia Federal Public Defender Michael Nachmanoff, who briefed and argued *Kimbrough v. United States*, will share his Supreme Court experience with participants over lunch. There will be a discussion of the practical effect of the holding that a particular sentence is "sufficient, but not greater than necessary" is entitled to great weight, even if the district court's judgment is based on its disagreement with the policies behind the applicable guideline.

Michael Nachmanoff, Federal Public Defender for the Eastern District of Virginia, Alexandria, VA

Supreme Court Update. . . . . 1:30–3:00 p.m.
In the ever changing world of criminal defense, it is necessary to consider the practical implications of the most recent decisions from the country's highest Court. Timothy Crooks will provide attendees with a comprehensive review of recent Supreme Court decisions and their impact.

Timothy Crooks, Office of the Federal Public Defender for the Southern District of Texas, Chief of Appeals, Houston, Texas

Break . . . . . 3–3:15 p.m.

The Ethical Perils and Challenges of E-Discovery . . . . . 3:15–4:45 p.m.
Overseeing compliance with subpoenas and document requests can be daunting under the best of circumstances; ensuring complete and cost-efficient compliance, while honoring one's ethical obligations to both the client and the government, is especially challenging in the age of e-discovery. An expert panel of current and former AUSAs, in-house counsel, and computer forensic experts will identify traps for the unwary when dealing with e-discovery and discuss best practices for dealing wtih e-document retention and litigation holds, identifying all repositories of e-documents, e-document review, and production protocols to avoid spoilation claims, preservation of attorney-client and work product privileges, and privilege logs. Recent developments in e-discovery case law will also be discussed.

Geoffrey Kaiser, U.S. Attorney's Office, Eastern District of New York, New York, NY

Seth Rodner, Medicis Pharmaceutical Corporation, Scottsdale, AZ

Stephen Whetstone, Stratify, Inc., Boston, MA

R. Jason Straight, Kroll Ontrack, New York, NY

Kevin McGrath, Seyfarth Shaw LLP, New York, NY

Reception . . . . . 5:00–7:00 p.m.

Location
Seyfarth Shaw LLP
620 Eighth Avenue
New York, NY
Located in the New York Times Building in Times Square

Enrollment and Fees
The deadline for registration by mail, fax, or online is Thursday, June 5, 2008. Attendees may also register onsite, provided space is available. Price includes registration fees, lunch, and one set of course materials. After the conference, additional course materials can be purchased at a cost of $100 for FBA members and $130 for nonmembers.

CLE Credit
This program has approximately 6 hours of CLE credit pending.

Join the FBA Now and Receive $100 Off the Nonmember Conference Fee!
Visit www.fedbar.org for membership information or call (571) 481-9100.

Registration

Registration

A registrant who cancels on or before June 5, 2008, will receive a full refund. No refunds will be made for cancellations received after June 5, 2008. Substitutions may be made at any time. All requests must be received in writing, addressed to the Office of Accounting at the FBA national office. Register online at www.fedbar.org or mail to: Criminal Law Conference, 1220 North Fillmore Street, Suite 444, Arlington, VA 22201. Fax to: (571) 481-9090. Please call the FBA Programs Department at (571) 481-9100 with any questions.

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Firm/Agency

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City State Zip

Phone Fax

E-mail Address

Indicate above for which states you require CLE credit.

Indicate above if you have any special needs requiring assistance/services, including dietary.

Conference Fees

❑ **$295 FBA Member**

❑ **$395 Nonmember**

❑ **$150 Government Employee**

Additional Conference Materials

Additional sets of conference materials for purchase will be available immediately after this conference.

❑ $130 Nonmember

❑ $100 FBA Member

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❑ Check, made payable to the "Federal Bar Association," is enclosed.

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CL-6-08

1. Please tell us about yourself *(Please Print)*

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Title

❍ Male ❍ Female Date of Birth / /

First Admission to Bar in U.S. (required, unless applying for law student or foreign associate status)

Court State Bar Date

Please supply both your business and home addresses.

My preferred mailing address is ❍ Business ❍ Home

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❍ Corporate/In-House

Public Sector

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❍ Military ❍ Non-profit

❍ Association Counsel

❍ University/College

2. FBA Annual Dues

2a. Active Membership *Please choose one.*

	Private Sector	Public Sector
❍ **Member** *Admitted to practice* **0-5 years**	$75	$60
❍ **Member** *Admitted to practice* **6-10 years**	$125	$100
❍ **Member** *Admitted to practice* **11 years or more**	$150	$115
❍ **Retired** *(fully retired from the practice of law)*	$75	$75

2b. Sustaining Membership

❍ *Become a sustaining member today! This optional category is* ***in addition to regular dues****. It is used to support CLE programs & publications.* $60 $60

2c. Associate Membership

❍ **Foreign Associate** *Admitted to practice law outside the U.S.*	$150	$150
❍ **Law Student Associate** *Currently enrolled in law school*	$25	$25

Dues Total.....**$ _____**

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3. Local Chapter Affiliation, Sections & Divisions

For a complete listing of chapters, sections and divisions, visit www.fedbar.org. Write in chapter, section(s) or division(s), and dues if applicable.

❍ Criminal Law Section.....$10

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The undersigned hereby applies for membership in the Federal Bar Association and agrees to conform to its Constitution and Bylaws and to the rules and regulations prescribed by its Board of Directors.

X

Signature of Applicant *Date*

***Note** Contributions and dues to the FBA may be deductible by members under provisions of the IRS Code, such as an ordinary and necessary business expense, except 3.1% which is used for congressional lobbying and is not deductible. Your FBA dues include $14 for a yearly subscription to the FBA's professional magazine.*

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MARCH 3, 2008: CRACK COCAINE GUIDELINE CHANGES AND RETROACTIVITY

The U.S. Sentencing Commission approved guideline changes to federal crack cocaine penalties. The April 2007 amendment affected approximately 78 percent of defendants convicted of crack cocaine offenses, reducing their sentences by an average of 16 months. It was sent to Congress on May 1, 2007. Because Congress took no action to nullify this change resulted in a two point reduction in all crack cocaine base offense levels on November 1, 2007 subject, of course, to the statutory mandatory minimum.

While this incremental change does not equalize crack and powder cocaine as the Commission recommended in 1995, it is a start. For 15 years, the Commission has researched crack cocaine and its penalties and concluded current federal crack sentences are unjustifiable. Among the findings from its 2002 report to Congress, "Cocaine and Federal Sentencing Policy," are that crack penalties

1) exaggerate the relative harmfulness of crack cocaine
2) sweep too broadly and apply most often to lower level offenders
3) overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality
4) and mostly impact minorities

Despite this evidence, Congress and the U.S. Sentencing Commission had been in a stalemate for a dozen years over how to improve crack sentences. During that time, nearly 56,000 people were sentenced under the existing federal crack cocaine statutes and guidelines. The United States Sentencing Commission advised that this amendment will affect over 19,000 people across the country.

Retroactivity of the crack cocaine amendment became effective on March 3. Not every crack cocaine offender will be eligible for a lower sentence under the decision. A Federal sentencing judge will make the final determination of whether an offender is eligible for a lower sentence and how much that sentence should be lowered. That determination will be made only after consideration of many factors, including the Commission's directive to consider whether lowering the offender's sentence would pose a danger to public safety. In addition, the overall impact is anticipated to occur incrementally over approximately 30 years, due to the limited nature of the guideline amendment and the fact that many crack cocaine offenders will still be required under Federal law to serve mandatory five, ten, or twenty--year sentences because of the amount of crack involved in their offense and recidivism statutes.

SUPREME COURT UPDATE, Crack cocaine guidelines, Armed Career Criminal Act

KIMBROUGH V. U.S.: (128 S. Ct. 558, 2007) The Supreme Court ruled 7-2 that the federal guidelines on sentencing for cocaine violations are advisory only, rejecting a lower court ruling that they are effectively mandatory. Judges must consider the Guideline range for a cocaine violation, the Court said, but may conclude that they are too harsh when considering the disparity between punishment for crack cocaine and cocaine in powder form. Justice Ruth Bader Ginsburg wrote the decision in *Kimbrough.* The ruling validates the view of the U.S. Sentencing Commission that the 100-to-1 crack v. cocaine disparity may exaggerate the seriousness of crack crimes.

GALL V. U.S.: (128 S. Ct. 586, 2007) Ruling in a second Guidelines case, the Court - also by a 7-2 vote - cleared the way for judges to impose sentences below the specified range and still have such punishment

regarded as "reasonable." The Justices, in an opinion written by Justice John Paul Stevens, told federal appeals courts to use a "deferential abuse-of-discretion standard" even when a trial court sets a punishment below the range.

WATSON V. U.S.: (128 S. Ct. 579, 2007) In *Watson* the court decided that 924(c) does not apply to a person who receives a gun in a trade for drugs. The Court decided unanimously that one does not "use" a gun, for purposes of imposing a mandatory five-year sentence, if the person receives the gun in a trade for drugs. Justice David H. Souter wrote the opinion in *Watson.*

LOGAN V. U.S.: (128 S. Ct. 475, 2007) The United States Supreme Court held voted unanimously (opinion by Ginsburg) that a violent felon who has not relinquished civil rights does not fall under the exception under the Armed Career Criminal Act (ACCA) for felons who have had their rights "restored." The Court held that the exemption for felons who have had their civil rights restored does not cover felons who have retained their civil rights at all times. This undercuts what ever was left in the first Circuit of *Indelicato*, and means that a number of older MA priors will probably now count as ACCA predicates.

Cert granted recently in four criminal cases:

The Supreme Court recently granted cert in three more criminal cases:

BURGESS v. U.S.: (case no. 06-11429). From the Fourth Circuit (US v. Burgess, 478 F.3d 658 (4th Cir. 2007)), the Supreme Court will be deciding: 1. whether the term "felony drug offense" as used in 21 U.S.C. 841(b)(1)(A) , which carries a mandatory minimum of 20 years if the defendant has a prior conviction for a "felony drug offense," must be defined consistent with federal statutes defining both "felony" and "felony drug offense", so as to require that the prior drug conviction be both punishable by more than one year in prison and characterized as a felony by controlling law; and 2. when the court finds that a criminal statute is ambiguous, must it then turn to rule of lenity to resolve ambiguity? Note: Mr. Burgess, appears to have filed his cert petition pro se!!!

INDIANA v. EDWARDS: (case no. 07-208). This government appeal raises the issue of whether a trial court can deny a mentally ill but competent defendant the right to represent himself on the ground that permitting him to do so would deny him a fair trial . The trial court refused to allow the defendant to waive his right to counsel and the Indiana Supreme Court reversed and remanded the defendant's conviction, holding that because the defendant was competent to stand trial, he was also competent to waive his right to counsel. *State v. Edwards*, 866 N.E.2d 252 (Ind. 2007).

U.S. v. RESSAM: (case no. 07-455). Here the government appeals from the Western District of Washington. The Supreme Court will decide whether 18 U.S.C. 1844(h)(2)'s 10 year mandatory minimum for carrying an explosive during the commission of a felony requires that the explosives be carried "in relation to" the underlying felony . The Ninth Circuit (*US v. Ressam*, 474 F.3d 597 (9th Cir. 2007)), agreed that it does.

ROTHGERY v. GILLESPIE COUNTY, TX: (Docket No. 07-440) Court Below: 491 F.3d 291 (5th Cir. 2007): The issue in this case is whether a criminal defendant is entitled to an attorney when brought before a Magistrate by a police officer without a prosecutor's involvement. Rothgery was arrested and brought before a magistrate judge who informed him of the accusation against him and found probable cause to detain Rothgery until such time that bail was posted or judicial proceedings began. The Fifth Circuit Court of Appeals held adversary judicial proceedings against the Petitioner had not commenced in this case; therefore, Sixth Amendment rights to counsel had not attached. The Fifth Circuit reasoned this was because no prosecutor was involved in petitioner's arrest or appearance before the magistrate. The Fifth Circuit held a defendant has no right to counsel unless he can demonstrate that a prosecutor is aware of or involved in those events.

INTERNAL INVESTIGATIONS - What should a company do when one of its employees lies to the government?

By Craig S. Denney - Downey Brand LLP

"If there were no bad people there would be no good lawyers."[1]

As a general rule, it is a bad thing when a company employee lies to a federal, state, or local governmental agency. Criminal investigations are often triggered. Grand jury subpoenas arrive at the company's office. Agents carrying badges and guns come knocking at the door. The company may lose customers and can go out of business. And employees may go to prison.

A corporation's general counsel may contact you for legal advice when such an event occurs. For example, a company may learn that one of its employees appears to have falsified documents that were submitted to a federal agency in response to a request for information from the company.

The general counsel will want to know what the company should do. Should it call in the suspect employee and confront him on the behavior? Should the company notify the government agency of the false information? Should the company immediately suspend or fire the employee? Will any of these things trigger a criminal investigation? What will be the impact on the company's reputation if the misconduct is reported by the news media?

There are a numerous questions and various options for the corporation to consider. Doing nothing, however, is not one of the options. Covering up the incident creates more problems and can be a crime in itself. A more prudent course of action is for the company to conduct an internal investigation. The timing, nature of the investigation, and the investigators are crucial components for the internal investigation to be successful.

By conducting an internal investigation, the company will be able to determine if the problem is isolated or systemic in the organization. Were the actions intentional or negligent? Is this the action of a rogue employee or concerted action (or inaction) by more than one employee? To find the answers to these questions is the goal of the investigation. And it is better for the company to figure out who, what, when, why the problem occurred before the government agent comes knocking at the company's door.

Timing: Act Promptly When Conducting an Internal Investigation

Unlike fine wine, investigations do not improve with the passage of time. When an incident happens, people may remember things vividly if the incident is fresh in their minds and if they have first hand knowledge of the event. But as time passes, people forget the details. If nothing is done to address the incident, employees may begin to talk and gossip. Rumor and innuendo circulate. Morale and productivity may decline. And, believe it or not, a disgruntled employee may contact law enforcement or the news media.

In addition to memories of events, employees may have generated email messages, made notes from telephone calls, and created documents that pertain to the incident. These records may be deleted or discarded as time passes. A prompt investigation will assist in preservation of documents to refresh, memorialize, and corroborate statements of witnesses in the investigation.

[1] Charles Dickens, English novelist.

It is imperative for the company to act swiftly by conducting an internal investigation. Depending on the nature of the incident, allegations, or event, the company needs to determine who should do the investigation.

Independence - Employ Outside Counsel as Investigator

To avoid any appearance of general counsel going on a witch hunt, covering up facts, or showing favoritism/retribution to employees, it is recommended that the company hire outside counsel to conduct the investigation. The investigator must have independence in order for the investigation to be objective and fair.

If isolated or systemic impropriety is discovered, the investigator can advise the company's board of directors on the nature of the problem(s) and present courses of action. An outside investigator will feel less pressure or incentive to achieve a preordained result that might exist if the general counsel conducts the investigation.

Employees may be confused as to why general counsel is asking them questions in an investigation. The employees may be confused about who general counsel represents in the investigation. Outside counsel should explain that he is doing the investigation for the company and is not providing legal advice to the employees.

Objective Factfinding - Interviews Not Interrogations

The investigator's role must be to figure out the facts.

Should the interview be recorded or summarized by the investigator? It may be prudent to make a recording of the interview so that the employee does not claim that his or her answers are inaccurate. In those states which require two party consent to recorded conversations, the consent of the employee will be necessary. In any event the employee should be advised that the conversation is being recorded. The employee may be more reluctant to speak openly in such cases. If a decision is made to record the conversation, explain to the employee that the recording is being made to ensure that his or her statements are being accurately recorded.

Some attorneys prefer to prepare a summary of the interview. This can present challenges in the event the attorney's recollection of the interview answers differs from the employee. If this format is used, it may be beneficial to show the employee the summary and ask the employee to review and verify the accuracy.

Upjohn Warnings – Who Does the Attorney Represent?

If counsel is the investigator, it is prudent to provide *Upjohn* warning (corporate *Miranda* warnings) to the employee. These warnings are crucial to avoiding confusion about the relationship. "The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn v. United States*, 449 U.S. 383, 389, 101 S.Ct. 677, 66 L.Ed. 2d 583 (1981) "[W]hen the privilege applies, it affords confidential communications between lawyer and client complete protection from disclosure." The Supreme Court narrowly construes the privilege, and recognizes it "only to the very limited extent that ... excluding relevant evidence has a public good transcending the normally predominant principle of utilizing all rational means for ascertaining the truth." *Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 63 L.Ed. 2d 186 (1980). The privilege applies only to "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance." *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed. 2d 39 (1976).

If the investigator is an attorney, he should explicitly advise the interviewee of the following: (1) counsel represents the company, not the employee; (2) information learned in the interview is privileged to the company and it is the company's decision whether to waive the privilege and disclose the information to the government or third parties; (3) the contents of the interview is to be kept confidential so the company's privilege can be preserved.[2] Lawyers who elect to "water down" these warnings during an investigation should be wary of the

[2] Rule 4.3 of the ABA Model Rules of Professional Conduct places a duty on lawyers to "make reasonable efforts to correct" a misunderstanding of the lawyer's role of someone who is not represented by counsel if the lawyer "knows or reasonably should know" of the misunderstanding.

potential consequences. *See In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 340 (4th Cir. 2005)(noting that doing so creates a "potential legal and ethical minefield").

Preservation of Documents – Don't Destroy Them! (including electronic mail)

If an internal investigation is conducted, employees should be advised to preserve documents. Destruction of documents (reports, electronic mail, financial data) can lead to prosecutions of obstruction of justice.[3] Having the company employees preserve their notes, correspondence, and records during the investigation is a prudent step to take. Corporate officers should be particularly cognizant of any message to employees to destroy records.

An illustrative example is worth noting that involves the federal prosecution of investment banker Frank Quattrone. The indictment alleged: "…Quattrone directed, and caused a subordinate to direct, the destruction of evidence related to the IPOs, he knew of the existence and nature of the regulatory and law-enforcement investigations and knew that CSFB had received subpoenas that required the production of documents relating to the IPOs."[4] The indictment also alleged that Quattrone acted "with the intent to obstruct the investigations by the SEC and the grand jury." *Id.*

The indictment makes Quattrone's conduct sound downright nefarious. The facts, however, show that Quattrone's conduct involved the sending of two emails. One of the emails endorsed an colleague's message to "clean up those files" which resulted in document destruction.[5] After incurring millions of dollars in legal fees and enduring several jury trials and an appeal, Quattrone's conviction for obstruction of justice was eventually overturned. The end result, however, is cold comfort for an employee, officer, or board member who would prefer not to run the gauntlet of federal prosecution.

As a result, preservation of documents for the duration of an internal investigation is a wise protocol to follow.

What if the Company Does Nothing? "Vicarious Liability?"

The devil's advocate may suggest that conducting an internal investigation is expensive and that the company should do nothing. This course of action is a dangerous one.

In recent years, the U.S. Department of Justice (DOJ) has come down hard on companies who violate the law. In addition to putting the company out of business, DOJ will prosecute employees of the company who participate in the conduct as well as employees who cover up the conduct.

Under the doctrine of vicarious liability or *respondeat superior*, a company can be held liable for the crimes of its officer, directors, employees, and agents.[6]

Courts will look at two factors in determining whether to hold a company liable for its employee' actions. Did the employee/agent act within the scope of his duties and was the conduct done to benefit the company or the

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[3] The company should consider issuing an internal investigation "litigation hold" directive so that employees preserve documents for the investigator and avoid spoliation of potential evidence.

[4] http://fl1.findlaw.com/news.findlaw.com/hdocs/docs/csfb/usquattrone51203ind.pdf

[5] New York Times, "Star Banker, With Future, Emerges Free" by Andrew Ross Sorkin (August 23, 2006) (http://www.nytimes.com/2006/08/23/business/23star.html)

[6] *See* DOJ "Principles of Federal Prosecution of Business Organizations" Memorandum (known as the "McNulty Memorandum") at http://www/usdoj.gov/dag/speech/2006/mcnulty_memo.pdf (Dec. 2006).

employee. To trigger the doctrine, case law requires that the corporation's agent act within the scope of his duties and at least in part with the intention of benefiting the corporation.[7]

Cooperation with Government Agency?

Once the internal investigation is completed, the company's board of directors can decide on what action to take (i.e. firing the employee; issuing a corporate policy to provide clear guidance to employees; etc.). The company may desire to "self report" the incident to the government to show it is proactive in pursuing the investigation and taking action to ensure the problem is solved.

Cooperation with the government agency may avoid criminal charges. However, cooperation may also require the company to waive its privilege and disclose the internal investigation to the government investigators.

Conclusion

When an incident occurs that may trigger a potential criminal investigation, the company should be proactive and conduct an internal investigation. The investigation must be timely, objective, and independent in nature. Doing nothing is simply not an option.

Craig S. Denney is counsel with Downey Brand LLP. He practices in the areas of white collar criminal defense and litigation in Nevada and California. He served as a federal prosecutor before joining the firm. Mr. Denney is board certified by the National Board of Trial Advocacy.