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Investigating While Under Investigation: Protecting Privilege and Confidentiality in Internal Investigations

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When corporate misconduct comes to light, corporations often must conduct an internal investigation to effectively assess potential liability, craft remediation, and engage with regulatory scrutiny. Companies rely on investigative findings in advocating for DOJ, SEC, and other regulators to forgo charges or enforcement.

Cooperating with regulators, however, requires caution. Government investigators increasingly rely on the legwork of corporate investigations. But when company investigators fail to maintain sufficient independence, the company risks becoming embroiled in criminal litigation involving individual wrongdoers, waiving attorney-client privilege and work-product protections, publicly exposing confidential details of its investigation, and, in extreme circumstances, potentially being labelled a member of the government's prosecution team subject to expansive disclosures. Corporate counsel must remain vigilant of these risks and maintain appropriate guardrails to protect against them.

The Cognizant Case

The ongoing case of *United States v. Coburn*, No. 2:19-cr-120-KM (D.N.J.), illustrates the

potential pitfalls of failing to maintain adequate independence. The case arose from allegations that executives at Cognizant Technology Solutions Corp. paid bribes to Indian officials in connection with construction permits in violation of the Foreign Corrupt Practices Act ("FCPA"). Upon learning of the misconduct, Cognizant hired outside counsel to investigate and cooperated with the U.S. government's enforcement efforts. That cooperation paid off when DOJ opted not to charge the company, crediting Cognizant's "thorough and comprehensive investigation" and its willingness to provide "all known relevant facts about the misconduct."

Individuals at the company, however, did not fare as well: Prosecutors charged two former

executives, Steven Schwartz and Gordon Coburn, with violating the FCPA, among other counts. In the government's prosecution of those individuals, Cognizant's cooperation has become a key issue, raising significant questions concerning privilege, the Fifth Amendment right against self-incrimination, and the government's due-process obligation to disclose material, exculpatory evidence under *Brady v. Maryland*.

Waiver of Applicable Privileges

As part of its cooperation, Cognizant gave multiple presentations to DOJ and provided the government with its internal investigation findings. Among other information, Cognizant gave "detailed accounts" of numerous witness interviews, including interviews of Schwartz and Coburn. Aware of that cooperation, Schwartz and Coburn served subpoenas on Cognizant in their criminal cases, seeking production of those interview summaries, the underlying documentation, and other information related to the company's investigation.

Cognizant resisted production, asserting privilege and work-product protection. But the court held that Cognizant's disclosure of information related to its internal investigation constituted a subject-matter waiver of those protections. The court thus ordered Cognizant to produce information from the company's investigation, including summaries, notes, and memoranda from employee interviews to the extent those documents' content was conveyed to the government, either in writing or orally. The court also required the company to produce any other materials that company attorneys reviewed in preparation for presentations to DOJ or that otherwise formed the basis of such presentations.

The court's rulings highlight the risks for cooperating companies. Even where mitigating steps are taken – such as providing information to prosecutors through oral downloads – cooperation, as a practical matter, may waive applicable protections. Current DOJ policy forbids prosecutors from seeking privileged material or requiring it as a condition of cooperation. Justice Manual §§9.28.710, 9.28.720. But prosecutors still expect "timely disclosure of all facts relevant to the wrongdoing at issue," including facts gathered during a corporation's internal investigation. *Id.* §9.28.700. That expectation effectively pressures companies to disclose details that may lead to a finding of waiver. And because courts have generally rejected selective waiver arguments, once privileged information is disclosed to the government, it is likely discoverable by all future litigants.

To minimize waiver risks, counsel should carefully plan disclosures to the government. Early in the investigation, counsel should communicate with the government about privilege issues, describing the information the company intends to withhold. Clearly documenting privilege concerns when engaging with the government will position the company to more effectively rebut allegations of waiver in future proceedings. Companies should also consider entering into non-waiver agreements before disclosing information.

Because the attorney-client privilege protects *communications*, not facts, counsel should also, whenever possible, disclose facts to the government, rather than summaries of what a particular witness *said*. And counsel should avoid disclosing "core" work product – attorney opinions, thoughts, strategies, and mental impressions.

***Garrity* and the Fifth Amendment**

Under the Fifth Amendment, the government cannot force an individual to incriminate himself. That principle is straightforward when government agents ask the questions. But, under the Supreme Court's decision in *Garrity v. New Jersey*, the Fifth Amendment can also apply when a private company demands that its employees answer incriminating questions under the threat of termination if the company's conduct was "fairly attributable" to the government.

Garrity issues present significant risk for companies. Often, in litigating a *Garrity* claim, defendants will seek sensitive information about the company's internal investigation. That's precisely what occurred in *Coburn*, after the defendants moved to suppress statements they made to company investigators. At an evidentiary hearing on the issue, the defendants elicited testimony from Cognizant executives and outside counsel regarding internal investigation details and various legal issues – including information falling within the scope of the company's privilege waiver. That information is now potentially available for use by future plaintiffs with claims against the company.

Brady and Due Process

The government's obligations under *Brady v. Maryland* may present even larger risks. Under *Brady*, the government must disclose all material, exculpatory information known to the "prosecution team," which includes not only prosecutors, but also other actors who assist with the investigation.

In *Coburn*, the defendants alleged that Cognizant effectively performed the government's investigation by soliciting and receiving input from the government, including on the order and priority of interviews, which topics to explore, and which documents to cover. The defendants further claimed that Cognizant performed the government's investigative work by curating the information collected, making credibility and relevance determinations, and effectively providing a prosecutorial "road map" to the government. As a result, the defendants argued, Cognizant's internal investigators were part of the prosecution team and the government's *Brady* disclosure obligations extended to any exculpatory information known to Cognizant.

If the court agrees with that argument, its decision would be ground-breaking. To date, no court has concluded that corporate investigators qualify as part of the "prosecution team" for *Brady* purposes. Should the court reach that conclusion here, prosecutors would be required to review Cognizant's entire investigative file (and, potentially, more) to identify material, exculpatory information to produce to the defense, or otherwise ensure such material was provided.

Managing the Relationship with Prosecutors

Given the risks associated with disclosing internal investigation findings, counsel should carefully manage the company's relationship with regulators. Counsel should take steps to ensure independence from government investigative efforts, including by setting independent goals early on. Internal investigators should chart their own course, rather than taking direction from the government about whom to interview, what topics to discuss, and what documents to use. Finally, companies should present only objective facts to the government, avoiding, where possible, subjective analysis that a court might construe as the work of a government investigation.

At the same time, company counsel must remain sensitive to the ultimate goal – charting a course for the company that addresses the alleged wrongdoing while minimizing regulatory sanction. Cooperation with government investigators often plays a large role in achieving that objective. Companies should therefore stay vigilant regarding legal developments concerning *Garrity* and *Brady* claims related to corporate internal investigations.

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