Practice Tips

The McNulty Memorandum, *Upjohn* Warnings, and a Few Basics When Interviewing Company Employees

By David Z. Seide

It's a common situation. You are counsel to a corporation and are investigating a report of an internal problem. You are about to interview an employee — an employee who must answer your questions or else risk termination. Typically, the interview would be covered by the attorney-client privilege and work product doctrine, but a federal prosecutor may want to hear about the interview too. What do you tell the employee?

First, some background. At the end of last year, the Department of Justice issued somewhat revised principles of federal prosecution of business organizations, the McNulty Memorandum (*www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf*), to establish new procedural hurdles for federal prosecutors before they can demand that corporations under investigation waive the attorney-client privilege. The Memorandum replaces the government's earlier Thompson Memorandum, from 2003, that required prosecutors to seek waivers of the attorney-client privilege from companies before the prosecutors could reward them with credit for cooperation. The McNulty Memorandum was intended as a response to mounting criticism of the Thompson Memorandum's privilege waiver requirement from across the business and legal communities, as well as from Congress.

Those groups effectively argued that the Thompson Memorandum promoted a "culture of waiver." In practice, that meant that corporations waived the attorney-client privilege and the results of internal investigations conducted by company lawyers — chronologies of key events, reports summarizing internal investigations, "hot" documents, memoranda of employee interviews and the like — were anxiously turned over to prosecutors by companies eager to avoid indictment. And that material has since served as the foundation for many a prosecution of company employees.

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The Justice Department now claims that the McNulty Memorandum addresses the problem with the Thompson Memorandum, e.g. the culture of waiver (if there ever was such a culture) has disappeared because requests for waiver of the attorney-client privilege are now well-managed by prosecutors and their supervisors. But critics remain skeptical. Most of the defense and business bar continue to believe that companies under investigation still are expected to waive the attorney-client privilege and produce to the government the work product of internal investigations conducted by company counsel.

Because the jury is still out on the issue, company counsel — whether inside or outside the company — investigating reports of possible wrongdoing should continue to assume the worst. In other words, you should still assume that the corporation will decide it is in its best interests to waive the privilege and your work product may one day be turned over to the government. With that operating assumption in mind, here are some basics to use any time an employee is interviewed as part of an internal investigation.

1. *Provide* Upjohn *Warnings*. In *Upjohn v. United States*, 449 U.S. 383 (1981), the Supreme Court held that the attorney-client privilege applies to communications between company counsel and all company employees, but that, in order for a company to enforce the privilege, company counsel must make clear the nature and purpose of the investigation, whom counsel represents (the company), and who holds the privilege (the company, not the employee). Even though the company may later waive the privilege, counsel still needs to spell out the basics in a few simple steps. Topic sentences should be:

- *"Let me tell you what this investigation is about."*
- *"I don't represent you; I represent the company."*
- *"This interview is covered by the attorney-client privilege; let me explain what that means."*
- *"This interview is confidential; let me explain what that means."*
- *"The attorney-client privilege belongs to the company, not you; the company may choose to waive the privilege."*

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American foreign policy, or involves disparate application of the same federal statute in different jurisdictions, it is imperative that you described the pressing and broad implications of the court's failure to decide the issue.

Of course, there are certain areas where certiorari is likely to be granted. For example, some fact bound cases involving the 1st Amendment are frequently granted review. Another area where the Supreme Court frequently grants Certiorari is in cases involving the extent to which the government may become involved in personal and family decisions. Of the criminal cases granted certiorari each year, many involve statutory interpretation or application of the death penalty. And the Court will be certain to act in areas where Congress has recently acted or may act such as with regard to the sentencing guidelines or amendments to the habeas statutes. Finally, the Court traditionally becomes involved in areas where it is setting the benchmark for constitutional rights.

I will close by telling the story of a federal public defender, Jack Carter, who had the nerve to question the application of the commerce clause in the context of federal gun in school zone cases. Decades of litigation before had resulted in seemingly limitless extension of the commerce clause and, with it, federal jurisdiction. This did not seem right to Jack Carter. And he was right. In *U.S. v.Lopez* the Court struck down the gun in school zone statute because the law did not require a sufficient federal nexus, an effect on commerce.

It is never too soon to start framing your issue for certiorari. Think about these practical tips in each case at the trial level and onward as you preserve error and develop the facts in support of your claim. Soon you will be in the unenviable position of appearing before our highest Court.

Endnotes

1. This is the reference to the rare case of national importance in which the Court will grant certiorari to correct perceived error. A good example is Bush v. Gore, 517 U.S. 952, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996).

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2. *Discuss the Possibility of Waiver.* Given the continuing uncertainty over the benefits of waiving the privilege, it remains good practice to explain in more detail that the company may elect — at its discretion and its discretion alone — to turn over the statements made in the interview to the government.

3. *Make a Clean Record.* Because of the potential import of these issues, it also makes sense to have an unambiguous record memorializing your statements and the employee's understanding of them. Since the record may one day be seen by third parties, it also makes sense, if possible, to distinguish between pure facts, mental impressions, and legal advice — although such distinctions are far easier to describe abstractly than to apply in real life.

4. *Be empathetic.* Let's not kid ourselves — these can be exceedingly difficult issues. The company seeks to learn the true facts, so that it can make reasonable judgments, and report wrongdoing, if wrongdoing has actually occurred, in order to demonstrate its cooperation. For the employee who may have possible exposure, difficult choices also await, among them: decline to be interviewed and face termination; agree to be interviewed, make incriminating statements, and risk prosecution; or agree to be interviewed, make false exculpatory statements, and still risk prosecution. The McNulty Memorandum does nothing to make any of this easier, for you or your client.

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