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Outside Counsel May Face Criminal Liability In Complex Business Cases

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When a complex transaction directed by a CEO or CFO is later deemed criminal and the executive is charged, what exposure could outside counsel face having advised and presumably approved the transaction? Similarly, when working with high-ranking executives at a company, when does outside counsel have an obligation to report and update a company's board of directors regarding their work for the CEO on behalf of the company?

Serving as outside counsel can be a minefield, and when the prospect of criminal liability emerges, outside counsel beware. As the recent conviction of Martin Shkreli's outside counsel, Evan Greebel, shows, sometimes counseling clients on transactions that are later deemed to be illegal can cause the government to view outside counsel as a co-conspirator, as opposed to trusted advisor.

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The government alleged that Greebel “greased the wheels” for Shkreli and did Shkreli’s “dirty work” in order to increase his own compensation at his law firm. Of course, most outside counsel would describe at least some of what they do as “greasing the wheels” for clients, and doing some of the “dirty work” that goes along with running a successful business. But, the difference in the Greebel case is that the government offered evidence, which the jury ultimately accepted, that Greebel helped Shkreli not as outside counsel, but as co-conspirator. According to the government, Greebel helped Shkreli, the CEO of Retrophin, keep certain stakeholders and board members of the company in the dark about material

challenges and assisted Shkreli in compensating investors who lost money in a prior hedge fund by creating “sham” consulting agreements with Retrophin. Thus, Greebel went from outside counsel to partner in crime, even though much of his conduct was consistent with work outside counsel do every day.

Walking the Tightrope As Outside Counsel

We, as lawyers, are bound by: (1) ethical duties to not knowingly help clients violate the law; (2) a duty to be zealous advocates for our clients; and (3) the legal duty not to break the law. We are also taught to balance zealous advocacy for our clients with legal responsibilities. We are, after all, considered by

many as the gatekeepers to maintaining a clean business environment. These general maxims, however, provide little specific guidance when trying to advise clients that are structuring transactions in a manner that takes advantage of loopholes or permissive laws. Trying to walk the tightrope between a commitment to aggressive clients while not subjecting oneself to potential personal liability for violating the law, presents unique legal risks for outside corporate attorneys.

Most concerning is that when the United States Attorney's Office comes calling, there is little room for error. Advising clients that a particular course of action does, or does not, violate the law is something that lawyers do every day—indeed it is our job! But what stops this advice and counsel from being labeled part of a conspiracy, especially if outside counsel believes that a particular course of action *does not* violate the law and a grand jury later disagrees?

The answer is, alas: it depends. Certainly being careful and thoughtful in the advice given and the work performed is a must. Understanding the reason for the course of action, and knowing the background on why such course is necessary, is also of tantamount importance. In addition, transparency throughout the process, as discussed below, is key to rebutting a later charge of illegally conspiring with your client.

DOJ Is Targeting Outside Counsel in Criminal Prosecutions

While the government targeting outside counsel is not new, outside counsel traditionally received the benefit of the doubt when investigations focused on their clients. However, that tradition is changing as the DOJ broadens the range of actors accountable for a corporation's illegal acts. As outside counsel's responsibilities have broadened, the risk of criminal liability has concomitantly increased.

DOJ's investigations and prosecutions of outside counsel who allegedly conspired in a client's criminal activity highlights **a trend in criminal enforcement of business decisions.**

Safe harbors that once existed, such as claiming that counsel only advised a client on business matters, have evaporated, with clients involving outside counsel more and more in business decisions that structure corporate transactions. As the recent prosecutions of attorneys in the EDNY and SDNY demonstrate, the government is comfortable characterizing, and prosecuting, outside counsel as co-conspirators.

Today, government regulators—particularly the DOJ—are not sympathetic to outside counsel when their clients are criminally charged if the indicted client involved outside counsel in all phases of business decisions. Outside counsel serves many hats: a pioneer capable of weaving around compound regulatory issues, a tactician that outsmarts the adversary in litigation, and a visionary capable of engineering a client's path for

success. In turn, outside counsel must manage a client's business not in isolation, but as an influencer who is held accountable for the sanctity of our business communities. With the added tension of playing company protector and public servant, outside counsel must carefully advise clients on the outer boundaries of business matters and remain mindful that they are working under the government's watchful eye.

The obvious case of outside counsel turned criminal defendant is the attorney who, for example, knowingly participates in a client's criminal scheme to defraud a company and its investors. But the more complicated story is when outside counsel unwittingly assists in a criminal scheme because the client is not truthful or does not provide all relevant information, thus leaving outside counsel as the client's pawn in his unlawful conduct. Government investigators believe that outside counsel should understand historical reasons for the transaction, act as facilitator and investigator, and probe alternate sources for information that may render the transaction improper. It can be a tough sell to a federal prosecutor who has exposed the CEO's massive fraud when outside counsel sheepishly says, "I didn't know."

Pitfalls to Avoid as Corporate Outside Counsel

DOJ's emphasis on investigating and prosecuting outside counsel for their involvement in business decisions that ultimately turn criminal is real. Outside counsel should understand the following pitfalls to help avoid criminal liability:

Communication to Stakeholders: Transparency Matters. Disclosure and transparency can help protect the client and outside counsel from liability, but it can be difficult to assess *when* and *to whom* to disclose. When representing public and private companies, outside counsel generally serves at the behest of investors, employees, or the board. Although outside counsel may work primarily for the CEO, the general counsel, or other high ranking executives, their duty is to the company. In the day-to-day grind of working closely with a small group of contacts (likely the people who hired outside counsel), it is easy to forget that the client is the company.

Outside counsel, then, must remind themselves that transparency through disclosure and updates to responsible parties is paramount to avoiding second guessing by others at the company when the DOJ starts asking questions. If the government later claims that the CEO acted illegally but outside counsel regularly updated the board, CFO, or the general counsel about the work he or she is doing, the likelihood of outside counsel being accused of conspiring with the bad actor decreases. If Greebel regularly updated the board of directors at Shkreli's new company about the work he was doing for Shkreli, their CEO, would the government have charged Greebel? Suffice to say the government's proof would have been much different had Greebel regularly updated the board about some of the conduct that was later part of the conspiracy between Greebel and Shkreli.

Furthermore, common sense should always help guide outside counsel's recommendation and best practices for transparency with stakeholders and disclosure obligations to regulators. Disclosure processes require that outside counsel understand their client's business, account for applicable laws and regulations, and consider company information specific to the matter at hand. Because the decision to disclose and what to disclose is not one-size-fits-all, outside counsel must draw from company-specific knowledge and industry norms to help guide clients through sometimes fickle disclosure rules. Altogether, this set of considerations helps shape outside counsel's advice to ensure that a company plays by the rules—and that counsel does not draw the ire of criminal authorities if things go wrong.

Avoid Cognitive Dissonance. Good lawyers care deeply about their clients and zealously advocate on their behalf. We are in a client-service driven industry and want our clients to be satisfied with our work. But lawyers must maintain perspective, always conscious that a client's decision may have severe ramifications for the client, stakeholders, and in extreme cases, for outside counsel.

Accordingly, outside counsel should avoid the culture of cognitive dissonance—a lawyer's natural inclination to alter one's personal beliefs to align with the arguments for which he advocates on behalf of a client. To counter a lawyer's dissonance and to protect one's self from criminal liability, outside counsel must ask hard questions of their clients. Hard questions present genuine risks for

attorneys because clients might confuse those questions for distrust and destroy the fabric of a relationship that requires trust. Still, outside counsel should be comfortable asking their clients "why?" and "are you telling me everything here?" at crucial steps of their representation. Also, the classic two-lawyer rule applies well in complicated transactions: ask a trusted colleague if there is something you are missing or if there is a question you should ask your client. A fresh perspective can be useful to counter cognitive dissonance and can further distance a lawyer from hindsight allegations of conspiring.

Conclusion

DOJ's investigations and prosecutions of outside counsel who allegedly conspired in a client's criminal activity highlights a trend in criminal enforcement of business decisions. This hardline stance reinforces outside counsels' professional and legal responsibilities and serves as a reminder that criminal liability might hinge on a client's conduct. But we as lawyers should not tiptoe around clients' issues for fear that our advice will produce the next newspaper headline about an attorney turned conspirator. Rather, outside counsel should become even more assertive in the attorney-client relationship and take more seriously the role as trusted advisor, advocate, and investigator.