

# Litigation & Dispute Resolution Practice Group

June 23, 2017

Why do you need to know what terms like “obstruction of justice”, “spoliation” and “litigation holds” really mean?

Tips to keep you and your clients  
out of hot water.

# Panelists

- \* David R. Neste, CPA
- \* Kenneth Rosenfield, CPA
- \* Jeffrey E. Oleynik
- \* Randall S. Leff
- \* Henry I. Willett III

# Topics

- \* The panel will discuss legal issues related to potential individual liability for bad acts committed within a business from multiple perspectives.
- \* Topics include investigations by individual and corporate counsel, representation in civil litigation, and assessing potential criminal liability.

# Topics

- \* How such investigations or litigation may impact you and your firm
- \* How to protect you, your firm and your client

# Framework

- \* Recognize spectrum of potential liability
- \* Duties: to investigate, to assess risk, to respond, to apprise senior management
- \* Recognize company priorities
- \* Recognize government priorities
- \* Recognize your firm's risks and priorities

# Framework Company Priorities

- \* Convergence / divergence of interests
  - \* Business priorities vs client priorities
  - \* Acting within environment shaped by actions of corporate counsel
    - \* “Yates is my playbook”
  - \* Potential legal conflicts of interest between client owner / officer and company
  - \* Different legal standards – respondeat superior / negligent supervision vs intentional act



# Framework

## You and Your Firm's Priorities

- \* Legal/ethical obligations
- \* Financial considerations

# Hypo 1

## Misappropriation of Trade Secrets

- \* Gary Smith was employed by Acme Inc., where he worked on a team that developed proprietary software. He left Acme a little over a year ago to become a Vice President for Research and Development for Beta Corp. He is the primary developer of Beta's "next generation" software, which Beta just released two months earlier and its sales are already skyrocketing.

# Hypo 1 (cont.)

- \* Acme's lawyer puts counsel for Beta Corp. on notice that Smith has "stolen" Beta's trade secrets and used them in the development of Beta's next generation software. He threatens suit against Smith, Beta Corp, and its owners for conversion, misappropriation of trade secrets, violation of the computer crimes act and conspiracy. Smith learns that corporate counsel intends to raise the issue with him immediately, so he absents himself from the office and consults with you that afternoon.

# Hypo 1 - Issues

- \* DuPont case
- \* Potential conflict of interest between employee and Beta Corp.
- \* Corporate counsel will need to provide Upjohn warning/disclosure

# Hypo 1(a)

- \* Beta Corp. is closely held by a family, with the principal owner, Sherri Green, holding 51%, and multiple relatives and trusts owning shares that total 49%. Green aggressively recruited Smith from Acme knowing about his software work at Acme; Smith and Green had numerous conversations about Smith's work. Green is worried that Smith might point the finger at her. Green comes to you for advice.

# Hypo 1(a) - Issues

- \* Potential individual civil exposure for Green
- \* Exposure for the company based on Green's conduct
- \* Potential conflict of interest between Green and the company
- \* Need to investigate Green's conduct
- \* Preservation and search of emails etc. ... to determine extent of Green's potential knowledge/involvement in Smith's purported misappropriation
- \* Rules 1.2, 1.6, 1.7, 1.13

# Hypo 1(b)

- \* Acme's letter states that they have forensic evidence that Smith downloaded information from his Acme computer to an external device and that critical development documents have been removed from Acme's computer system.

# Hypo 1(b) - Issues

- \* Additional criminal and civil implications, i.e. if Smith intentionally removed or destroyed information versus relying on his memory
- \* Duty to preserve/search for evidence that this information may have been uploaded at Beta
- \* Need to investigate who at Beta might have had knowledge of such conduct and those individuals' potential need for their own counsel



# Hypo 1(c)

- \* Smith's work at Beta is largely funded by a subcontract on a larger federal government contract. The US and prime contractor become aware of Acme's allegations and you become aware that Beta's counsel has spoken with the US Attorney's Office and counsel for the prime.

# Hypo 1(c) - Issues

- \* Potential civil and criminal implications
- \* The sentencing guidelines and Yates are potentially implicated here if you are counsel to Beta particularly
- \* In regular conversations with regulators, the management of subcontractors and disclosing subcontractor fraud has emerged as a theme.
- \* Ethical implications

# Hypo 2

## Accountants

- \* Family owned larger business in the automotive business. Eight (8) dealerships owned by two cousins. They could not work together and wanted to split up the business. One took three (3) dealerships and the other took five (5). Dispute arose over valuation of the dealerships and accounting for profit splits and expense sharing during the interim period.
- \* Dealership accountants for the group became a special master to provide the true up of earnings and determine amounts owed to each party. And file final tax returns as a technical termination developed for tax purposes.

# Hypo 2 - Issues

- \* Conflicts of interest
  - \* Who did/do you work for?
  - \* Are you a witness?
- \* Special master
  - \* Can you serve?
  - \* What are your duties and obligations?

# Hypo 3

## Payroll Tax Arrearages

- \* Harry Blue and Mary Yellow co-own Green Mountain Software 50/50. In their division of duties, Harry handles sales and marketing, while Mary runs the office, including finances. Facing a tough market, Blue Sky falls behind in its payroll tax obligations. The IRS sends intermittent delinquency notices that Mary receives but does not bother to share with Harry, until one night he swings by the office and sees the latest notice for \$500,000 inadvertently left out on Mary's desk. Harry seeks your advice the next morning without speaking with Mary.

# Hypo 3 - Issues

- \* May give rise to disclosure obligations to the U.S.G. if it involves a government contract.
- \* Trust Fund Recovery

# Hypo 3(a)

- \* Green Mountain is a large company with 5,000+ employees, including a finance department and in-house counsel, still co-owned by Harry and Mary. Gary Smith is the CFO. The company fails to pay \$500,000 in payroll taxes because of apparent gross negligence by employees in Smith's department. Smith discovers the mistake and informs Harry and Mary. They trust Smith and they all approach in-house counsel, who says he will begin an internal investigation in the morning to get to the bottom of things. Part of the investigation will include an interview of Smith. Smith absents himself from the office and consults with you that afternoon.

# Engagement Letters

- \* How to protect you and your firm?
- \* Clearly identify the client and the scope of representation
- \* What if you become a witness?



# Engagement Letters (Suggested Language)

- \* “In the event that we receive a subpoena or summons requesting that we produce documents from this engagement or testify about the engagement, we will notify you prior to responding to it if we are legally permitted to do so. You may, within the time permitted for our Firm to respond to any request, initiate such legal action as you deem appropriate to protect information from discovery. If you take no action within the time permitted for us to respond or if your action does not result in a judicial order protecting us from supplying requested information, we may construe your inaction or failure as consent to comply with the request.”

# Engagement Letters (Suggested Language)

- \* “In the event that we are requested or required to provide information, testimony or documents concerning our work in this engagement in any legal action, proceeding or administrative investigation in which we are not a party, our services in responding to such requests or demands shall be deemed a part of this engagement and you agree to compensate us for such services and to pay all of our legal fees and costs that we may reasonably incur in responding to such requests or demands. This is not intended, however, to relieve us of our duty to observe the confidentiality requirements of our profession.”

# The Perspective of Corporate Counsel

“Yates is My Playbook”

## Yates Memo – Context

- \* The DOJ has been criticized by many for failing to bring criminal prosecutions against any individuals relating to corporate misconduct.
- \* While several corporations paid multi-billion dollar fines, a perception has emerged that companies can pay their way out of legal problems and that only criminal prosecution of individual executives will have a sufficient deterrent effect.
- \* As a result, DOJ has engaged in an effort to strengthen its prosecutions of individual corporate executives.
- \* The culmination of that effort was a new policy announced by Deputy Attorney General Sally Yates September 9, 2015.

# Yates Memo – Six Key Steps

The DOJ policy consists of six “key steps”:

1. To be eligible for any cooperation credit, corporations must provide to DOJ all relevant facts about the individuals involved in corporate misconduct
2. Both criminal and civil corporate investigations should focus on individuals from the beginning of the investigation
3. Criminal and civil attorneys handling corporate investigations should be in routine communications with one another

## Yates Memo – Six Key Steps (cont.)

4. Absent extraordinary circumstances, no corporate resolution will provide protection from criminal or civil liability for any individuals
5. Corporate cases should not be resolved without a clear plan to resolve related individual cases before the statute of limitations expires and declinations as to individuals in such cases must be memorialized
6. Civil attorneys should consistently focus on individuals as well as the company and evaluate whether to bring suit against an individual based on consideration beyond that individual's ability to pay

# Yates Memo – Implications

- \* DOJ has become more focused on prosecuting individual executives and not just companies.
- \* DOJ is particularly interested in high-level executives. By targeting lower-level executives for individual prosecution, DOJ hopes that those executives will cooperate and provide incriminating information about higher level executives.
- \* When deciding whether to bring criminal charges against a company, DOJ will only give the company credit for cooperation if the company gives DOJ all relevant non-privileged information about individual executives' conduct.

## Yates Memo – Implications (cont.)

- \* Companies can no longer get “partial credit” by telling DOJ what the company did. To get credit, the company must provide all relevant non-privileged information about the individuals involved.
- \* DOJ stated explicitly that companies cannot bury their heads in the sand to avoid disclosing information about individual executives – the internal investigation must include a careful investigation of all individuals who might be responsible, no matter how high up in the company.
- \* Thus, companies ignore Yates at their peril. So it shapes how the company will approach your client.





Questions?