

Criminalization of Negligent Acts by Employees of U.S. and Foreign Corporations

More and more, prosecutors in the United States and elsewhere are mounting criminal proceedings in traditional tort situations. There's cause to be wary

By Richard M. Dunn, David Hazouri and Julie Rannik

WHILE the investigation of aircraft, maritime, train and pipeline incidents are normally regarded as the province of governmental administrative agencies, such as the U.S. National Transportation Safety Board (NTSB), increasingly they are becoming the subject of U.S. grand jury deliberations. Agencies such as the NTSB are charged with the duty of making factual determinations regarding the cause or causes of these accidents. Their findings sometimes lead to important operational changes that enhance safety. Now, however, many NTSB investigations are being superceded by federal and state prosecutor's offices, which, in cooperation with the Federal Bureau of Investigation and other prosecutorial agencies, are pursuing criminal allegations against companies that might otherwise be guilty of nothing more than negligence.

In view of this trend, it now behooves the civil defense practitioner to replace the familiar duality of parallel administrative and civil proceedings with a potential tripartite overlay of administrative investigations, civil suits and discovery, and criminal prosecutions.

Anticipating this triple threat is key. Often the criminal investigation remains undisclosed until after critical statements have been obtained by administrative agencies or important witnesses have been deposed by civil litigants. It is crucial for defense counsel to make an early assessment regarding potential criminal liability, because once disclosed, the statements and associated documents can and will be used

IADC member Richard M. Dunn is a partner in the Miami, Florida, law firm of Bilzin Sumberg Dunn Baena Price & Axelrod L.L.P. and a graduate of the University of Notre Dame (B.A. 1967) and the University of Miami (J.D. 1970). He is a veteran of aviation, product liability and complex business litigation cases.

David R. Hazouri, an associate at the same firm, is a graduate of Duke University (B.A. 1986) and the University of Miami (J.D. cum laude 1995). He concentrates in tort law, commercial litigation and labor law.

Julie K. Rannik, also an associate at the firm, was educated at Davidson College (B.A. 1994) and the University of Miami (J.D. 1997). She concentrates in admiralty and maritime law, as well as insurance coverage.

by prosecutors against the client to support a criminal prosecution.

Indeed, defense and corporate counsel risk greater liability for their clients by making decisions regarding the degree of cooperation to be provided in civil matters without giving due consideration to the criminal ramifications. An unannounced criminal investigation will bring a level of subsequent scrutiny to bear on erroneous responses to written civil discovery requests or questions at deposition that can create consequences far different from those normally attending the civil proceeding.

The potential cooperation between the participants lined up against the client also creates some unique problems. Plaintiffs' attorneys will meet with prosecutors and supply information, documents and analysis obtained during the course of civil discovery. In turn, prosecutors will review

court filings, depositions and other discovery to buttress their case. Prosecutors also can rely on the expertise of administrative agencies to guide their criminal inquiry. With prosecutors contacting former employees, grand jury subpoenas suddenly being issued for witnesses and documents and the need looming in the distance to coordinate three parallel proceedings, the job of leading a successful defense is simply growing more difficult.

SOME NEGLIGENCE PROSECUTIONS

In 1909, the U.S. Supreme Court set precedent against one of America's railroad giants by allowing the criminal prosecution of New York Central & Hudson River Railroad Co. and its agents for criminal liability to proceed.¹ For a broad host of reasons, including the interruption of two industry-favorable world wars, the next 75 years saw little in the way of similar corporate prosecutions. This trend began to reverse in 1978-80 when there was an attempt to prosecute Ford Motor Co. and its executives for the allegedly defective gas tank design of the Ford Pinto.

The trend now appears to be gaining steam.² According to the U.S. Sentencing Commission, somewhere between 200 to 300 corporations, partnerships and other business entities have been found guilty of criminal wrongdoing every year for the past 10 years. In some measure, the foundation for this trend was laid in the 1970s through enactment of criminal provisions to the Water Pollution Control Act, 33 U.S.C. §§ 1251-1387, the Clean Air Act, 42 U.S.C. §§ 7401-7462, and the Resource Conservation and Recovery Act, 42

U.S.C. § 6928(d). An Office of Criminal Enforcement was created within the U.S. Environmental Protection Agency in 1981.

The more recent acceleration of the trend, however, may arise from prosecutors' desires to achieve a higher level of impact amid both popular and corporate culture. The impact derives from directly threatening corporate executives with heavy fines and possible jail time. The public, tired of seeing "faceless" corporations absorb damage awards like so many body blows, probably enjoys the spectacle of the wizard not only exposed, but also tarred and feathered. The media attention generated by the penetration of the corporate façade can be counted on to carry the message of increased personal accountability directly to corporate management.

Whatever the sociological impetus, it is clear that the range of organizational misconduct being subjected to prosecutorial scrutiny is expanding rapidly in both scope and frequency. At the edge of this expansion is corporate conduct that might previously have been the object of civil liability based on theories of negligence alone.

TARGET: AVIATION INDUSTRY

The most recent hotspot in the ongoing criminalization of corporate behavior appears to be the aviation industry. This trend appears to have been kicked off by the 1991 federal indictment of several supervisory and management level employees at Eastern Airlines for falsifying maintenance records. The indictments in the U.S. District Court for the Southern District of Florida ultimately were dismissed because of violations of the federal Speedy Trial Act. 1991 also is the year changes in the federal sentencing guidelines governing organizational defendants went into effect in the United States. Given the gravity of multiple passenger and crew fatalities that can occur in major aviation accidents, the industry is perhaps a predictable target.

A. ValuJet Crash

The U.S. Attorney's Office for the Southern District of Florida appears to be

1. *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481 (1909) (both corporation and its agents may be joined in indictment charging violation of anti-rebate provisions of Elkins Act, under which commission by corporate officers or agents, acting with scope of employment, of criminal violations of provisions of act, is imputed to corporation for purposes of criminal prosecution).

2. See Sean Bajkowski & Kimberly R. Thompson (Note), *Corporate Counsel Liability*, 34 AM. CRIM. L. REV. 445 (1997).

at the forefront of the trend and has announced publicly that criminal prosecution of aviation-related misconduct is one of its top priorities. The May 11, 1996, ValueJet Flight 592 crash, for example, has become a definitive case study for how nightmarish criminal complications can grow from parallel regulatory and civil proceedings. In rather short order, the cause of the crash was pinpointed to oxygen generators removed from service, improperly secured and then loaded into the cargo hold of the ValueJet MD 80. Both regulatory and law enforcement agencies had representatives at the scene of the crash almost from the beginning.

Owing to the early knowledge of causation, the National Transportation and Safety Board and the Federal Aviation Administration vied along side criminal investigators for relevant evidence. The Federal Bureau of Investigation executed a search warrant at the maintenance company, SabreTech's, Miami facility and served wide-ranging grand jury subpoenas duces tecum on both SabreTech and ValueJet. The U.S. Attorney's Office, the FBI and the local Metro-Dade Police were present at the NTSB hearings investigating the crash. FBI agents and local law enforcement made night-time visits to employees at their homes in an attempt to obtain interviews. At one point, police officers were posted outside SabreTech's Miami facility in an effort to solicit information from employees coming and going to work.

The scope of the criminal inquiry blossomed over the course of the investigation. SabreTech and three of its mechanics were charged by federal authorities in a 24-count indictment for conspiring to falsify aircraft records, falsifying aircraft records, violating hazardous materials regulations, and placing a destructive device on board an aircraft. It is important to note that a number of the counts involving the maintenance paperwork were unrelated to the crash in any way.³

The lesson to learn is that companies must be prepared for the likelihood that any and all negligent conduct may become

fair game once a criminal investigation is under way. Although SabreTech ultimately was acquitted of the federal charges based on its willful mishandling of the oxygen generators, it was convicted on the charge of reckless mishandling of the generators. SabreTech was slated to stand trial in October 2001 in Florida state court for 110 counts of third-degree murder and 110 counts of manslaughter—one count per each fatality in the crash. According to the assistant state attorney handling the case, the parties were scheduled in court in December 2001, when it was expected that the defendants would enter their plea.

B. Fine Air Crash

The development of the criminal investigation surrounding the August 7, 1997, Fine Air plane crash stands in marked contrast to the investigation involved in ValueJet in certain respects. In the Fine Air disaster, the company's cargo plane crashed shortly after takeoff from Miami International Airport, killing the plane's three-member crew, an on-board security guard, and one individual on the ground. Within days of the crash, a former Fine Air pilot appeared on local television and accused Fine Air's management of routinely requiring its pilots to fly with improperly loaded cargo.

In spite of this early and rather public allegation, the criminal investigation initiated by the local U.S. Attorney's Office remained hidden for some time. Relying on the investigative results obtained by the NTSB, as well as a few former employee interviews of their own, federal prosecutors waited until a year after the crash to bring their criminal investigation into the open.

3. The individual SabreTech employees ultimately were acquitted by the jury of all charges. SabreTech initially was acquitted of all charge except nine counts based on violations of federal hazardous material regulations. The convictions were reversed by the 11th Circuit based on the technical argument that the regulations at issue had not been authorized by the Federal Aviation Act, as required by 49 U.S.C. § 46312. *See* 271 F.3d 1018 (11th Cir. 2001).

By mid-1998, the NTSB had found that Fine Air failed to oversee inexperienced employees from Aeromar Airlines in the loading of the plane's cargo, which resulted in an improperly loaded payload that shifted during takeoff. The NTSB also found that some Fine Air employees had disposed of or altered a number of company records unrelated to the accident following the accident, including forms recording the weight of cargo pallets for prior flights. In March 2000, Fine Air pleaded guilty to two charges—making false statements concerning maintenance matters and obstructing the government's investigation by destroying, disposing of or altering evidence. These charges involved conducted entirely unrelated to the crash.

TARGET: NON-AVIATION

A. Olympic Pipeline

In the non-aviation context, Olympic Pipeline Co. found itself the object of a wrongful death action for the June 10, 1999, deaths of three individuals caused when a nearby company's pipeline burst, spilling thousands of gallons of gasoline into Whatcom Creek in Bellingham, Washington. Joined as co-defendants in the wrongful death suit were Olympic's president at the time of the explosion, the vice president and general manager. Also joined was the supervisor of product movement, Ron Brentson.

Regulatory investigations by the NTSB and U.S. Department of Transportation (DOT) had began almost immediately after the accident. The DOT's Office of Pipeline

Safety investigated and proposed a record \$3.05 million fine against Olympic for various safety violations. At the same time, the criminal division of the EPA, the FBI and the U.S. attorney conducted ongoing investigations into potential criminal violations of the Clean Water Act and other environmental laws. Although the individual defendants in the wrongful death suit were not indicted, they clearly were the focus of the criminal investigation.

The individual defendants then moved in the wrongful death suit for a stay of discovery to preserve their right to invoke their Fifth Amendment privileges or, alternatively, to be granted a protective order precluding dissemination to non-parties of discovery taken from them. After the trial court denied the motions, the Washington Court of Appeals remanded, holding that the lower court had failed to consider all relevant factors. In so doing, the court adopted a "considerable body of [federal court] jurisprudence for the balancing of the divergent interests involved."⁴

The court described the situation facing one of the individual defendants this way:

For example, within weeks of the disaster, an assistant U.S. attorney questioned Brentson's former wife about any statements Brentson had made to her concerning the incident. In July 1999, Brentson's personnel files and other documents were subpoenaed and later produced to a federal grand jury. By November 1999, numerous grand jury subpoenas had been served upon individuals believed to have knowledge regarding the incident and the operation of the pipeline. Immunity from federal prosecution was offered to and accepted by some Olympic employees in exchange for their testimony before a grand jury. Brentson supervised at least one of these employees. In December 1999, federal investigators served a search warrant and seized a section of the pipe involved in the incident.⁵

Because managerial officers in environmental prosecutions can be held liable for a mere negligent violation of an environmental statute, the individual defendants in the Olympic matter have had to remain particularly self-protective regarding their

4. *King v. Olympic Pipeline Co.*, 16 P.3d 45, 50 (Wash.App. (2001), *citing* *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995), *cert. denied*, 516 U.S. 827 (1995); *Fed. Sav. and loan Ins. Corp. v. Molinaro*, 889 F.2d 899 (9th Cir. 1989); *Afro-Lecon Inc. v. United States*, 820 F.2d 1198 (Fed. Cir. 1987); *Golden Quality Ice Cream Co. v. Deerfield Specialty Papers Inc.*, 87 F.R.D. 53 (E.D. Pa. 1980). The Washington Supreme Court denied a petition for review. 21 P.3d 290 (Wash. 2001).

5. 16 P.3d at 49.

own civil testimony. One of the byproducts of their understandable reluctance to testify has been to frustrate safety regulators' ability to make a speedy determination of the cause of the accident.

Speaking before a House subcommittee on hazardous material and pipeline safety issues in October 1999, NTSB Chairman Jim Hall bemoaned the situation:

... [M]y investigators have been stymied by the prospect of criminal prosecutions. ... [A] number of our investigative activities have been suspended because most of the central players will not talk to us. And, prosecutors have asked that we not test the valve of the pipeline until their concerns regarding evidence preservation can be allayed. We are hopeful that steps can be taken to clear up the concerns of needed witnesses and the U.S. Attorney's Office. But, for now, we simply do not know all we need to know about the pipeline's operations and its level of safety.⁶

A similar dilemma also frustrated the NTSB's initial investigations into the cause of the Alaska Airlines Flight 261 crash off Point Mugu, California, on January 31, 2000.

B. Euromin

From an international perspective, the Dutch-owned stevedore company Euromin recently faced corporate manslaughter charges in England over the April 1998 death of a dock worker killed by a crane. The company's British general manager, Richard Martell, also was indicted. It has been typically difficult to bring successful corporate manslaughter charges in England for work-related deaths. England's Health and Safety Executive states that since 1992, 125 work-related cases had been given to the Crown Prosecution Service, with only 33 ending in prosecution. Of these, eight convictions have been obtained, with only three involving verdicts against the companies as opposed to the individuals.⁷

The U.S. conviction rate generally has been higher for corporations than for corporate employees. Nonetheless, the crimi-

nal process—replete with grand jury subpoenas, Fifth Amendment assertions, offers of immunity, and employment of criminal counsel—is a grueling process for everyone involved, whether as a target or merely as a peripheral witness.

STATUTES FOR PROSECUTIONS

There are a number of federal and state statutes available to the federal government for prosecuting corporate conduct related to accidents. The more common examples include statutes criminalizing (1) false statements; (2) mail and wire fraud; (3) obstruction of justice; (4) violations of the Hazardous Materials Act and Resource Conservation and Recovery Act; and (5) homicide.

A. False Statements

The False Statement Act, 18 U.S.C. § 1001, is a clear favorite of the U.S. government. The act is handy because, simply put, it covers any false statement that is material and is within the jurisdiction of a federal agency. It applies to any false statement made to federal agents, including those working for the Federal Aviation Administration (FAA) or the NTSB during the course of their investigations. The statute is particularly useful in the aviation context because of the extensive industry reporting requirements overseen by the FAA.

In the ValuJet crash, for example, the government accused mechanics from

6. Testimony (October 27, 1999) of James T. Hall, Chairman, NTSB, before the House Committee on Transportation and Infrastructure Regarding the June 10, 1999, Pipeline Rupture and Fire in Bellingham, Washington.

7. See Keith Lee (1 April 2000), "Family of British casual worker killed on job presses for corporate manslaughter charge," at World Socialist Web Site, www.wsws.org/articles/2000/apr2000/jone-101_prn.shtml; Keith Lee (3 January 2001), "Britain: Company faces corporate manslaughter charges over death of student," at www.wsws.org/articles/2001/jan2001/mans-j03_prn.shtml; and Keith Lee (10 December 2001), "Britain: Dock company Euromin cleared of corporate manslaughter," at www.wsws.org/articles/2001/dec2001/jone-d10_prn.shtml.

SabreTech of falsifying aircraft records when certifying the completion of certain work that had never been performed. The pending investigation of the January 2000 Alaska Airlines crash off the coast of California also involves an official inquiry into the falsification of similar paperwork.

B. Mail and Wire Fraud

18 U.S.C. §§ 1341 and 1343) encompass almost any scheme to defraud using either the U.S. mails or any interstate wire communications, including telephone, radio, television or computers.

C. Obstruction of Justice

18 U.S.C. §§ 1501-1518) provides that an effort to destroy, alter or falsify records with an intent to obstruct a civil investigation can be prosecuted as an obstruction of justice. This crime was raised in the Fine Air crash prosecution.

D. Hazardous Materials Act and Resource Conservation and Recovery Act

Under these acts, 49 U.S.C. §§ 5101-5127 and 42 U.S.C. §§ 6901-6987, an offer or acceptance of hazardous material or hazardous waste for transportation in commerce can be a crime unless regulations regarding packing, labeling and transportation are fully complied with. The Resource Conservation and Recovery Act was the basis for a prosecution of American Airlines for improper storage of hazardous waste in 1999 in Miami, Florida. American agreed to pay an \$8 million fine as a result of its guilty plea.

E. Homicide

Prosecution by state authorities is also possible when there are accident fatalities. Following the 1996 ValuJet crash, the Florida decided to charge SabreTech with 110 third-degree murder and manslaughter counts under Florida law, one for each fatality.

CORPORATE LIABILITY

Under the current standard as stated in Section 2.07(1)(a) of the American Law Institute Model Penal Code, a corporation can be held criminally liable for the unlawful acts of its officers, employees and/or agents performed within the scope of their authority where that conduct provides some benefit to the corporation. Corporate liability may be found even when employee violations are contrary to a specific corporate policy.⁸ One of the obvious goals of corporate criminal liability is to look beyond mere victim compensation to assure that management, who may be found individually liable as well, will have greater incentive to improve their company's compliance with statutes and regulations.

Corporate personnel can be held criminally liable under the "responsible corporate officer doctrine." Under this doctrine, an individual corporate manager or officer can be held liable for a subordinate's actions even if there is no criminal intent or of participation in knowledge of the acts, on the ground that the officer/manager is in a position to stop or correct criminal actions.⁹

In 1999, the Criminal Division of the U.S. Department of Justice promulgated "Principles of Federal Prosecution" to guide prosecutors in deciding whether to bring charges.¹⁰ Some of the "principles" included as positive indicators for prosecution—for instance, the seriousness of the offense or a history of similar conduct—are fairly easy to anticipate. But some other factors are downright unnerving. These include corporate willingness to co-operate with the government's investigation in identifying culprits, making witnesses available, and waiving the attorney-

8. *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656 (2d Cir. 1989).

9. *See United States v. Dotterweich*, 320 U.S. 277 (1943).

10. *See* "Federal prosecution of Corporations," at www.usdoj.gov/04foia/readingrooms/6161999a.htm. *See also* www.usdoj.gov/criminal/fraud/speech/ethics.htm for the enightening remarks of James K. Robinson, former U.S. Assistant Attorney General, Criminal Division.

client privilege or the work product protection. The prosecutorial perspective advocated therein clearly tends to penalize corporations that attempt to honor individual employees' exercise of their personal privileges and constitutional rights. In deciding whether to exercise corporate rights or encourage individuals to exercise their own, defense counsel would be well served by a careful review this document.

QUICK PRIMER

Some very basic knowledge of criminal legal principles will prove helpful to civil lawyers who are attempting to assist corporate decision makers in dealing with accidents that are or will be the subject of administrative investigations, civil lawsuits, and possible criminal inquiries. What follows is a quick set of general rules for criminal investigations.

A. Criminal Investigation

1. Information/Indictment

While prosecutors in some state jurisdictions can simply file an "Information" in order to charge criminal liability, many others must use the more involved grand jury investigation and indictment process. As for the federal government, it is required to obtain indictments for all felony prosecutions through the grand jury process, which is controlled by the federal prosecutors. The federal government's particularly broad control is the result of its jurisdictionally wide-ranging subpoena power to require the production of documents for review and the appearance of individuals for questioning.

Witnesses called before the grand jury must appear without the presence of counsel, thereby permitting prosecutors to use arduous intimidation tactics to obtain the answers they are seeking. If the witness has an attorney, the attorney waits outside the grand jury room until the witness requests permission to speak with the attorney concerning the testimony being sought. It is important to note that while prosecutors and grand jurors must keep

proceedings confidential, witnesses are ordinarily not under the same obligation regarding their testimony.

2. Grand Jury Subpoena

On learning of the existence of a grand jury witness subpoena for an employee, counsel for the employer usually contacts the prosecutor to determine whether the employee or the corporation is a target of the investigation. Section 9-11.151 of the *United States Attorneys' Manual* defines a "target" as "a person to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is putative defendant." A "subject" is defined as a person whose conduct is within the scope of the grand jury's investigation.

Grand juries usually do not announce publicly the subjects of their investigations, and so a party who desires to challenge a grand jury subpoena may be completely unaware of the government's purpose in seeking the requested testimony or documents.¹¹ Indeed, the party often will not know whether he or she is a primary target of the investigation, a subject, or a mere peripheral witness.

Parties subpoenaed by a grand jury therefore face a rather difficult situation, and the prosecutor's representations regarding witness status can change from day to day to suit the prosecutor's purposes. These representations should be taken with a grain of salt and re-evaluated after any length of time.

When responding to a document subpoena, counsel should review the request in detail; locate the documents; identify the competent custodian; organize, assemble, stamp and index all relevant documents; make copies of all documents produced; and ensure any attorney-client and work product privileged documents are properly protected.¹² As corporations do

11. *United States v. Enterprises Inc.*, 498 U.S. 292, 300 (1991).

12. *See e.g.*, *Upjohn v. United States*, 449 U.S. 383, 394-95 (1981).

not enjoy Fifth Amendment protection, records generated by the corporation are likewise unshielded.¹³ Neither a corporation nor its employees may avoid a grand jury subpoena request for documents on the basis that the records may expose the corporation to criminal liability.¹⁴

As a general rule, the information obtained pursuant to a grand jury subpoena will be available only for the criminal investigation and not to the civil investigation, absent a showing of "particularized need."¹⁵ Without court permission, government attorneys who do not conduct the criminal enforcement action may not use the material or information in any subsequent civil proceeding instituted by the government. Court-ordered disclosure of grand jury information is obtained only on a showing of particularized need outweighing the need for secrecy.

3. Search Warrants

The grand jury also may issue search warrants. When responding to a search warrant, counsel should be on site during service of warrant; review the warrant to determine its scope, the areas authorized to be searched and the items allowed to be seized; ask for a copy of the search warrant affidavit; assign someone to follow the agents to document the areas searched, the items seized, and the names of employees interviewed; advise the client to send all non-essential personnel home; advise the client that neither management nor employees should use cell phones to discuss the search; ask to examine all items seized; prepare an independent log of all items seized; inspect the inventory prepared by

government agent; request copies of all documents or electronically stored information necessary to operate the business; and contact the prosecutor who authorized the warrant for additional information about the investigation.¹⁶

B. Fifth Amendment and Other Privileges and Immunities

The privilege against self-incrimination can be maintained in any proceeding, civil, criminal, administrative, investigatory, or adjudicatory.¹⁷ The assertion of the Fifth Amendment should be made at the earliest possible opportunity, because if it is not properly invoked in a civil or administrative proceeding, it will be deemed to have been waived, and the information obtained through the waiver may be used against the defendant in the criminal proceeding.¹⁸ A witness should invoke the right against self-incrimination when there is even the slightest possibility of criminal prosecution.¹⁹

Individual corporate directors and officers may invoke the protections afforded by the Fifth Amendment, but corporations do not enjoy Fifth Amendment protection,²⁰ so a corporate officer or director cannot assert a Fifth Amendment privilege on behalf of the corporation or others in the corporation.²¹ Neither can a corporate officer resist a subpoena for corporate documents by invoking the Fifth Amendment, even if the subpoena names the individual instead of the corporation.²²

A director's or officer's assertion of the Fifth Amendment at trial may be of questionable value for the corporation in a civil case because the jury is permitted to draw

13. *Bellis v. United States*, 417 U.S. 85, 90-91 (1974).

14. *Braswell v. United States*, 487 U.S. 99 (1988).

15. See FED. R. CRIM. P. 6(e); *United States v. Sells Eng'g Inc.*, 463 U.S. 418, 435-42 (1983).

16. David H. Smith, *What Civil Attorneys Must Know About Criminal Law—Including Criminal Implications of Product Liability Issues*, Defense Research Institute seminar (March 30, 2001).

17. *Kastigar v. United States*, 406 U.S. 441, 444 (1972).

18. *United States v. Kordel*, 397 U.S. 1, 11-13 (1970).

19. *United States v. Miranti*, 253 F.2d 135 (2d Cir. 1958).

20. *Braswell*, 487 U.S. at 99; *George Campbell Painting Corp. v. Reid*, 392 U.S. 286, 288-89 (1968).

21. *Braswell*, 487 U.S. 99.

22. *In Re Grand Jury Witnesses*, 92 F.3d 710 (8th Cir. 1996).

an adverse inference from a defendant's invocation of the Fifth Amendment.²³ Counsel must make various determinations: (1) Does the individual have a valid basis to assert the privilege? (2) What are the ramifications of waiving or asserting the privilege both to the individual and the corporation? (3) Are there any other valid alternatives to invoking the privilege?

In testifying before a grand jury, a witness can invoke a variety of privileges—the Fifth Amendment privilege against self-incrimination, the attorney-client privilege, the attorney work-product privilege, and the joint defense privilege.

A witness can in the appropriate case receive immunity from the government following invocation of the Fifth Amendment privilege against self-incrimination. Under 18 U.S.C. §§ 6001-6005, the government may apply to the court for an order granting a witness limited immunity in all judicial, administrative, and congressional proceedings. Section 6004 covers court and grand jury proceedings.

Section 6002 provides use immunity rather than transactional immunity. Transactional protects the witness from prosecution for the offense or offenses involved, whereas use immunity protects the witness only against the government's use of the immunized testimony in a prosecution of the witness.²⁴ While transactional immunity is not available from the court, it can be obtained from the government through negotiation.

Under Section 6002 immunity, the government may prosecute the witness using evidence obtained independently from the witness's immunized testimony, but not from information directly or indirectly derived from such testimony or other information. Should the government choose to prosecute, it bears the burden of proving the existence of an independent source.²⁵

C. Protection Against Abuse of Parallel Proceedings

The fact that civil discovery is much more inclusive than criminal "discovery" raises the danger that the government may

skirt criminal procedures and protections by accessing the results of broad civil discovery. Information provided in civil discovery may form the basis for a subsequent prosecution.²⁶

A civil defendant may negotiate for or file a motion for a stay of the civil case or a protective order against the sharing of discovery with either the prosecution or an administrative agency. However, courts are unlikely to stay parallel proceedings absent special circumstances in which the rights of one of the parties are substantially prejudiced. The court will balance the harm to the moving party in the absence of the stay and the harm that may result from the stay. Counsel should argue that a stay is required to avoid either (1) waiving the Fifth Amendment privilege in answering civil discovery thereby prejudicing the defense of the criminal action or (2) invoking the Fifth Amendment and thereby prejudicing the defense to the civil action.²⁷

SOME PRACTICAL SUGGESTIONS

It is important to review the known facts and prepare an analysis of possible criminal conduct. Defense counsel must draw on imagination to conjure up possible crimes. Remember, the most insignificant statement can often be made to qualify as a false statement. The moment a potential question of criminal liability arises, counsel should recommend to the client that a corporate criminal lawyer be retained.

23. *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

24. *Kastigar*, 406 U.S. at 448. The grant of use and derivative use immunity leaves the witness in basically the same position as if the witness had rested on the privilege and not testified. The *Kastigar* Court stated, "There can be no justification in reason or policy for holding that the Constitution requires an amnesty grant . . ." The *Kastigar* Court also stated that transactional immunity is not required by the statute because such a grant of immunity would be unnecessarily overprotective.

25. *United States v. Hubbell*, 530 U.S. 27 (2000).

26. *Kordel*, 397 U.S. 1.

27. *United States v. Certain Real Property*, 751 F.Supp. 1060 (E.D. N.Y. 1989); *Sec. Exch. Comm'n v. Dresser*, 628 F.2d 1368 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980).

A. Steps to Consider

- Interview all participants in the accident.
- Review company policies (written and unwritten) and determine compliance with policies concerning accident issues.
- Review the personnel files of employees who were involved with accident.
- Interview independent observers of the accident.
- Interview the officers and managers responsible for the company activity that resulted in the accident.
- Ask for relevant documents from the company.
- Review applicable laws regulating the business. Be keenly aware of documents, tests or reports required to be filed with any administrative agency. Check to assure filings have been made and that company documents have been retained.
- Compare the documents kept against the requirements of law.
- Review the personnel files of employee who were involved the accident issues for the company prior to the accident.
- Review reports from and to administrative agencies for past problems related to the area of concern.
- Interview each relevant employee a second time on an individual basis. Explain that you represent the corporation, not the employee.
- Explain to the employee the importance of honesty because of an administrative investigation or an internal investigation, and the use of statements for licensing, civil lawsuits, or possible criminal investigation.
- Explain that while you represent the company, you will do your best to assist the employee in preparing for the administrative investigation and will attend the investigation, and that the company has asked you to accompany the witness to any administrative inquiry.
- Inquire of each employee whether there were any prior problems in the area now being investigated as to the cause of the accident.

B. Questions to Ponder

- Does the company qua corporation need to retain criminal counsel?
- If so, should it employ criminal counsel for certain employees? If the company doesn't do so, is it exposing its itself by allowing the employees to be subject to prosecutorial manipulation?
- Can the company obtain reimbursement from insurance for services of criminal counsel for either company or employees?
- Will the existence of a criminal investigation fuel punitive damage claims by civil plaintiffs' counsel.
- What effect will invocation of the Fifth Amendment by key corporate employees have on the corporation in civil and criminal proceedings? Will this be held against the corporation at trial?
- Is there a legal method by which to ascertain what prosecutors are investigating?
- Is it possible to cooperate with the government, protect the company's rights, and at the same time respect employees' rights as well?

CONCLUSION

Prosecutors in the United States and elsewhere are growing increasingly aware that the criminal prosecution of tortious corporate conduct involving mid- to high-profile elements plays well to the public and promises access to a host of new prosecutorial tools arising from parallel administrative and civil proceedings. Defense counsel must adapt their actions to this reality. Where once, for instance, the concern in an aircraft disaster may have been only what portion of the NTSB report would be admissible at a trial for negligence, now counsel must be concerned about how the information revealed in both the administrative and civil investigation will impact the client's and its agents' exposure to criminal liability.

Adapting to this environment requires the willingness to understand the issues at hand and the focus to proceed cautiously with this new model in mind.