Global Compliance Readiness – Law Firms

Corporate Investigations: Understanding The Business Rationale

The Editor interviews ***Mark J. Biros****, Proskauer Rose LLP.*

Editor: Mr. Biros, please tell our readers something about your professional background.

Biros: I worked as an Assistant Counsel for the U.S. Senate Committee on Presidential Campaign Activities, dubbed the "Watergate Committee." That whetted my appetite for investigative work and criminal law. I then joined the Office of Special Prosecutor in Philadelphia to investigate and prosecute police and political corruption in the city. I returned to Washington as an Assistant U.S. Attorney and a member of the Special Prosecutions Unit. My prosecutions focused on financial fraud and included an undercover operation investigating illegal munitions and technology sales, political corruption in municipal financing, Foreign Corrupt Practices Act matters and the prosecution of a Supervisory FBI agent in connection with a Teamster's Union investigation. I have tried over 125 jury trials.

Editor: How did you come to Proskauer? What were the things that attracted you to the firm?

Biros: In the early 1990s I was in private practice with a small boutique healthcare firm – Casson & Harkins. Joe Casson and Malcolm Harkins had been practicing health care law for decades and knew health care law; I knew the courtroom. They needed a first-chair trial attorney, and I filled that role. In 1992 the firm merged with Proskauer. Proskauer attracted us because the attorneys we met demonstrated quality professional skill and were uniformly extraordinarily personable.

Editor: Please tell us about your practice. How has it evolved over the course of your career?

Biros: The representation of organizations has changed over time. Historically, an organization retained an attorney when it learned it was under investigation. One investigated the allegations with a view towards exploring available defenses.

The advent of corporate compliance programs dramatically changed the representation of organizations. Concepts such as "reckless disregard for" and "conscious avoidance of" the truth formed the legal basis upon which culpable knowledge was premised. An organization could no longer avoid learning about allegedly improper conduct by its agents and was deemed to possess the "collective knowledge" of its officers, directors and employees. Directors and officers had an affirmative duty to identify and investigate illegal activities and no longer could claim that there were so many employees that no one person could know of all culpable conduct.

Formal internal corporate investigations developed as an outgrowth of the above legal doctrines and propagated compliance programs. Through its compliance program, an organization seeks to detect culpable conduct early (before it learns of a government investigation), which triggers its obligation to investigate. Historically, an attorney might have counseled an organization to do nothing. Today's environment surrounding prosecutions renders such a decision much more problematic.

Voluntary disclosure programs in various federal and state enforcement agencies exist in great numbers and reward revelations to the government *before* it is aware of wrongdoing. Deferred prosecution agreements, which may contain draconian provisions, are generally available to organizations that cooperate. Cooperation begins with and continually includes voluntary disclosure. Whether to waive legal privileges as part of cooperation is a critical decision with dramatic effect. Interacting with employees who are under investigation while maintaining a cooperative relationship with the government is now more difficult. More and more the government aggressively requires attorneys for cooperative organizations to be almost co-counsel with the government. This poses real problems.

Mark J. Biros

Editor: Your practice today is in both the criminal law area and in civil litigation. Would you give us an overview of your work in these two areas?

Biros: My clients call me when faced with government agency allegations of wrongdoing or when they must go to court to vindicate their legal position.

My more sophisticated clients understand that civil or regulatory investigations can easily evolve into criminal ones. Poor interaction with the government can create an environment where criminal prosecution becomes a preferred option.

Criminal prosecution is likely to occur when: (1) senior management are involved in the alleged wrongdoing; (2) the financial impact on the putative victims is great; (3) the number within the organization who are inculpated (without regard to their level of authority) is large; (4) the organization previously has had civil or regulatory actions in the same or related areas; (5) the offending conduct fits within the investigative priorities of the government enforcement agency; and (6) there are allegations of destruction of documents or falsification of evidence. If the result of an investigation would not satisfy the government in deciding whether to use criminal sanctions or clients otherwise respond inappropriately, whether the focus of the government is civil or criminal, I am asked to intercede.

Editor: How has your practice been impacted by the corporate scandals of the early years of this decade and Sarbanes-Oxley and the regulatory and statutory regimes that derive from that legislation?

Biros: The stakes to our clients are incredibly significant and have intensified. While the government comprehends that prosecution of an organization victimizes many innocent employees and shareholders, its enforcement appetite seems to grow. A powerful example of that appetite was the case against Arthur Andersen that destroyed the business before the conviction was overturned.

Editor: Would you share with us some of the high points of your practice in recent years? Some of the really big cases you have handled?

Biros: I represented members of a Native American Indian Tribal Council individuals approached by Jack Abramoff and Michael Scanlon, who provided support for their election to the Tribal Council. After the election, Abramoff and Scanlon received a contract to provide services to the tribe. Both the Department of Justice and U.S. Senate Subcommittee on Indian Affairs investigated the matter as part of the overall Abramoff corruption scandal. The irony in the Senate investigative effort was the manner in which the questions were posed to my client. Congressional investigators asked in a sinister tone if a *quid pro quo* existed for the campaign assistance provided by Abramoff. Ironically, the questioners were unable or unwilling to accept my client's statement that no *quid pro quo* existed. The investigator's position was not unlike the overwhelming number of members of Congress who accept the lifeblood of campaign assistance – financial contributions – without giving a *quid pro quo*. But in this case, the staff found that hard to believe. None of the tribe members were in any way found culpable.

Recently, I concluded an internal investigation for a multinational corporation in which a whistleblower alleged that corporate restructuring of a subsidiary that accounted for 5 percent of the international revenue – a figure in the tens of millions – carried nearly one billion euros in debt and was designed to avoid Mexican tax laws illegally and concentrate the corporation's debt in a country where the inflation rate favorably affected it. This disproportionate revenue-to-debt relationship led the whistleblower to conclude the restructuring and debt transfer had a nefarious purpose. Our investigative team interviewed many of the senior executives and the person who made the allegations, evaluated both American and foreign legal advice the company had received and concluded there was no wrongdoing. The effort underscores a crucial aspect of investigating a whistleblower complaint – an investigative attorney must understand completely the business rationale for the underlying conduct and evaluate it objectively. I advise my clients not to demonize an employee who raises a problem. The more the employee is demonized, the more likely the government will question why the organization did not know of the Satan in its midst.

I have also been involved recently in investigations by the Office of Foreign Assets Control and the Commerce Department's Bureau of Industry and Security involving the illegal sale of goods to embargoed countries. Allegations of payments to foreign agents to facilitate overseas business transactions have also proliferated a significant number of internal investigations.

Editor: In 1997 you were instrumental in setting up the firm's Criminal Defense and Corporate Investigations Group. For starters, what was the origin of this initiative?

Biros: Our clients, and prospective clients, were more and more the focus of government inquiries into their business activities. While business attorneys understood our clients' business activities, we recognized the need to have attorneys who understood the enforcement environment and the attorney mindset in that field.

Editor: Would you give us an overview of the practice today?

Biros: The group consists of more than 40 attorneys, residing in our Washington, DC, New York, Los Angeles and Paris offices. These are lawyers with a clear understanding of the investigative and enforcement mindset because many of them have held positions such as state Attorney General, United States Attorney, Supervisory Assistant United States Attorney, former state Deputy Attorney General, as well as positions such as that of supervisory Securities and Exchange Commission litigation attorney.

Editor: How does the practice relate to other disciplines and practice groups within the firm and other firm offices? Are you able to draw upon the full resources of the firm in staffing your projects?

Biros: This is a team-oriented practice group that is integrated fully within the firm. Corporate attorneys at Proskauer work closely with the Criminal Defense/Corporate Investigations Group and provide insight into the business rationale for the activity under scrutiny. This rationale may then be conveyed to the government enforcement attorneys, who may lack a clear insight into why businesses engage in certain financial transactions. Enforcement attorneys need to understand so they do not assume the activity has some nefarious purpose even though it may have had an unintended impact.

Editor: Corporate investigations have received a great deal of attention recently, perhaps as a consequence of the corporate scandals and Sarbanes-Oxley. Is this a passing phenomenon, or are corporate investigations going to be part of American corporate culture going forward?

Biros: Through legislation and regulatory action, the government is placing more and more responsibility on businesses to investigate problems internally. One recent example is contained in a white paper issued on July 9, 2007 by the National Procurement Fraud Task Force Legislation Committee. It contained a recommendation that would require government contractors to report in a timely manner "any suspected violations of law, regulations, other requirements or contractual provisions." If that recommendation becomes law, then every "*suspected* violation[] of [a] contractual provision[]" will have to be investigated so that a decision can be made whether to report it or not. Just what impact do you think that provision will have on corporate investigations?

Editor: And how do you see the future of Proskauer's Criminal Defense and Corporate Investigations Group?

Biros: We monitor the investigative goals announced by the enforcement agencies to provide as much pro-active advice as possible for our clients. The demand for proactive advice will grow as we continue to focus upon inter-office and interdisciplinary integration to respond to government actions.

Please email the interviewee at mbiros@proskauer.com with questions about this interview.