

WHITE-COLLAR CRIME AND REGULATORY ENFORCEMENT

Day 1 – Wednesday, November 6th, 2019

Agenda

3:00 p.m. +	Check-In
7:00 p.m.	Welcome Reception & Dinner ~ Palm Grove

Day 2 – Thursday, November 7th, 2019

7:00 a.m.	Breakfast ~ 14Thirty-Five-Lounge
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8:30 a.m.	Welcome Remarks & Introductions	Discussion Leaders
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Session 1	Effective Advocacy to Avoid Charges Against Your Client	Anirudh Bansal <i>Cahill Gordon & Reindel LLP</i> <i>New York, NY</i>
9:00 a.m.	Every client who hires a white-collar lawyer hopes that the lawyer will find a way to convince the Government not to issue criminal charges. Yet, often there is no transparency when pre-charge advocacy results in a non-criminal resolution. Although pre-charge advocacy tactics are rarely discussed, they are one of the most effective tools in the defense of government enforcement actions. We will explore the judgments that are being made behind closed doors in discussions with the Government to reveal best practices to convince the Government that your client should not be charged with a crime.	Jennifer Belveal <i>Foley & Lardner LLP</i> <i>Detroit, MI</i>
Miami Ballroom	Select questions for discussion:	
	<ul style="list-style-type: none"> • Is there a way to prevent a regulatory matter from being referred to criminal authorities? • How much of your client's case do you reveal to the Government in attempting to avoid charges? Under what circumstances do you allow your client to proffer? • What is the best way to respond to a reverse-proffer? • How do you get the Government to engage in meaningful dialogue about the case? Do you involve a supervisor? • Particularly under post-Yates guidance from DOJ, is it possible for a corporation to cooperate and avoid charges against the entity? 	

Session 2**Dealing with Difficult Clients (and Lawyers)**

10:20 a.m.

Famed criminal defense lawyer Edward Bennett Williams once said, " I will defend anyone as long as the client gives me total control of the case and pays up front." Unfortunately, these two requirements can rarely be extracted from today's clients that are caught in the cross hairs of a government investigation, or worse, face an indictment. While it is easy to adhere to the first mantra of criminal defense, that is, if anyone is going to jail, make sure that it is not you, navigating clients through these stressful circumstances can present challenges from our clients that test our ability to effectively represent them.

In corporate criminal representations, general counsel's offices now more than ever employ former prosecutors and litigators that have significant experience in such matters, and often times will have different strategic perspectives and viewpoints. Corporate boards also now frequently have executives who have suffered through a corporate criminal investigation, and companies can often be swayed by appeasing these executives' viewpoints in managing outside counsel in a corporate criminal investigation. And since corporate criminal investigations are more civil in nature, considering the unlikelihood of an indictment and the great likelihood of a resolution, cost considerations as well as maintaining key employees, partners and business relationships often play a key role in managing an investigation and resolution.

Representing individuals in criminal matters, namely because an individual's freedom is at stake, can cause clients to act in bizarre ways, often engaging in conduct that hinders rather than helps their chances at avoiding jail time. From engaging in conduct that ultimately forms the basis for criminal liability to simply refusing to accept their lawyer's advice, representing clients in these circumstances can present a number of challenges that goes beyond simply defending your client.

This session will discuss examples of the many difficulties that can arise in these circumstances and debate the various ways counsel deal with "difficult" clients. Some examples include:

- How to deal with clients that will not accept your advice in whole or part, and what steps counsel should take in these circumstances.
- How to mitigate your client's refusal to accept your advice, i.e., how to not harm your client's defense through your representation.
- How to deal with CEO/ executives who want to be involved but don't understand how to engage with the Government.

Jon Fetterolf*Zuckerman Spaeder
LLP
Washington, DC***Samuel Waldon***Proskauer Rose LLP
Washington, DC*

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Discussion Leaders

Session 2 cont'd

- How to deal with client's focus on media scrutiny and business opportunities when to do so is inconsistent with counsel's belief on how to best defend the client.
- Dealing with client's who blame your advice and representation as the reason for lost business opportunities.
- How to deal with client's who have big personalities, and either refuse to take these matters seriously, or believe by force of personality they can negotiate their way out of criminal liability?
- How to identify "difficult" clients from the outset.

But it is not always the clients that are "difficult," at times outside counsel (particularly in corporate criminal investigations) can exacerbate an already stressful situation by either taking actions that reduce a client's choice in how to defend a criminal investigation, or cause business disruptions that are unnecessary to the effective representation of their client. And in this session, we will discuss examples where this has occurred, including getting insights from those in the room that are clients, including their unfortunate experiences with difficult lawyers.

Jon Fetterolf
Samuel Waldon

11:40 a.m.

Luncheon ~ Coconut Grove

Session 3

Crisis Management

1:10 p.m.

While crises are unpredictable, they should not be unexpected, and the decision a company makes at the outset can have lasting implications on reputation, market share, competitive edge, investor confidence, and long-term health. Lawyers, among other professionals, play a key role in stabilizing a situation fraught with chaos and indecision. Each crisis requires first recognizing and then balancing competing objectives from different internal and external constituents. All of these priorities must happen under both time pressure and the watch of critics.

Among the issues this session will explore are:

- Preparation:
 - How do you communicate the need for a well-organized emergency plan when no current crisis exists?
- Participation:
 - Who needs to be a part of an internal crisis response team?
- Reaction:
 - How does a company balance the competing interests of determining root cause and remedy, while simultaneously cooperating with multiple (and often global) government

Kevin Bailey
Brunswick Group
Washington, DC

Alex Bourelly
Baker Botts LLP
Washington, DC

Myron Marlin
FTI Consulting
Washington, DC

Sean McKessy
Phillips & Cohen
LLP
Washington, DC

Benjamin Naftalis
Latham & Watkins
LLP
New York, NY

Session 3*cont'd*

- investigators; keeping employees, the public, and shareholders informed; and protecting privileges and other information necessary to the company's defense and reputation?
- Do you need to make an SEC disclosure? If so, when?
 - How do you respond without endangering insurance coverage or creating material liabilities?
 - How do you keep auditors informed?
 - Proactive Defense:
 - Is an outside public relations firm indispensable in such situations?
 - What issues arise in using them?
 - How do you control social media?
 - How do you ensure that facts are accurate and what are the pitfalls of getting things wrong in the 24-hour news cycle?
 - Employees:
 - How to handle the whistleblower?
 - What advice can be given to employees regarding speaking to regulators, social media, reporters, friends, and family?
 - When do executives and other employees need their own lawyers?

Kevin Bailey**Alex Bourelly****Myron Marlin****Sean McKessy****Benjamin Naftalis**

3:10 p.m.

Refreshments

Session 4

3:30 p.m.

Pitfalls and Privileges: An Advanced Guide to Privilege in Complex White-Collar Investigations

In the course of an investigation, counsel has a critical role in establishing and defending the attorney-client privilege. But from the start, counsel will face a series of hard choices on how best to advocate for the client's interests while preserving the privilege. This panel will discuss recent developments and decisions that will shape the use and preservation of privileged information. Topics will include privilege protections for internal investigation reports and cooperation with authorities, the scope of the privilege as applied to non-lawyers like accountants and public relations experts, joint defense and common interest privileges, and implications of foreign discovery and privilege law in cross-border investigations. Participants will be invited to make judgment calls on how best to handle certain privilege dilemmas, evaluate real-world scenarios that counsel are likely to face, and discuss best practices for protecting the privilege at all stages of the attorney-client relationship.

Select questions for discussions:

Jessica Nall*Farella Braun**+ Martel LLP**San Francisco, CA***Matthew Solomon***Cleary Gottlieb Steen**& Hamilton LLP**Washington, DC*

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Discussion Leaders

Session 4*cont'd*

- The Martha Stewart insider trading case involved a media relations expert. The case involved heavy media attention, and S.D.N.Y. found discussions involving the media relations expert remained privileged. But not all courts have extended privilege to media relations experts and similar third parties. When is the best time to engage a third party, and how can counsel ensure their discussions are privileged? If there's a serious risk that privilege will not cover the conversations, how can companies most effectively manage their media relations without waiver?
- What is the best way to deal with collateral consequences from waiver? The company may want to disclose arguably nonprivileged material or waive privilege over certain subject areas in its cooperation with enforcement, but how can counsel manage the risk that these materials become available to private plaintiffs or the public?
- Giving legal advice to a foreign client on foreign law may raise different legal questions than advising on U.S. law. U.S. courts often look to foreign law in these situations, including foreign approaches to privilege and discovery. What should be the best practice for a U.S. lawyer dealing with multiple legal regimes? Which legal regimes have the highest and lowest risk?
- Outside auditors may demand reports explaining the nature and scope of any misconduct before signing off on audited financials. How can counsel work to secure signoff from auditors or outside stakeholders, while also limiting waiver to the greatest degree possible?
- Foreign enforcement often operates without U.S. norms of privilege and may seize or request material that is privileged under U.S. law. What steps can counsel take to balance the demands of foreign enforcement officials with U.S. privilege waiver concerns?
- What are some recent trends and developments regarding joint defense and common interest agreements and understandings across various jurisdictions? What are some pitfalls and best practices with regard to such agreements as between individual and company counsel? What happens to these understandings and agreements when an individual subject to such an agreement becomes a cooperator?

Jessica Nall**Matthew Solomon**

Session 4
cont'd

- Which enforcement agencies have you found to be the most accommodating when it comes to privilege? Which have been the most aggressive? Has the group noticed significant changes or trends over time, or across different types of conduct?

Jessica Nall
Matthew Solomon

4:30 p.m. End of Day 2

6:30 p.m. Departure ~ Main Lobby

7:00 p.m. Offsite Reception & Dinner at The Betsy Hotel ~ Hosted by Brunswick Group

Day 3 – Friday, November 8th, 2019

7:30 a.m. Breakfast ~ 14Thirty Five-Lounge

Session 5

Billions: Becoming a Rainmaker in White-Collar Law

David Markus

9:00 a.m.

In today's extremely competitive legal environment, white-collar attorneys are under increasing pressure to bring in new business. In-house counsel is increasingly moving investigative work internally to drive down legal costs, and with hourly rates soaring, the same counsel have become savvier about rate negotiation and less loyal to particular firms regardless of historical relationships. At the same time, many law firms are putting a premium on entrepreneurship and increased revenue. These factors, coupled with increased market saturation, have increased the need for white-collar lawyers in private practice to proactively seek business rather than rely on reputation and past work product.

Markus Moss PLLC
Miami, FL

Miami
Ballroom

But business development for the white-collar lawyer isn't easy. One of the hurdles many white-collar attorneys face is the fact that most clients do not have--and do not want to have--a constant stream of white-collar matters. White-collar attorneys deal with the constant challenge of marketing to clients that are not currently facing a government investigation, indictment or crisis but who will inevitably have a need for their legal services in the natural course of a business's life cycle.

Erica Williams
Kirkland & Ellis LLP
Washington, DC

This session will discuss how to best address the business development challenges in white-collar law, best practices for developing and maintaining client relationships, and practical tips for growing your practice. We will also hear directly from in-house counsel on what business development practices they find most effective and which ones to avoid.

Some questions we will address:

Discussion Leaders

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Session 5*cont'd*

- How do you decide which clients to target for business development?
- What business development techniques do successful rainmakers in the white-collar world employ?
- What can you include in a response to an RFP to distinguish your proposal?
- How do you cultivate authentic relationships with potential clients without sounding like a salesperson?
- What business development techniques do in-house counsel hate?
- How can white-collar attorneys effectively leverage social media for business development?
- How should you best position yourself to obtain referrals from within their law firm and from other firms?

David Markus**Erica Williams**

10:20 a.m.

Refreshments

Session 6

10:50 a.m.

Hot Topics

In this session, you decide the topics. Brief subject introductions by experienced practitioners will be followed by wide-open, moderated discussion.

Send us your suggested topics at any time up to the session itself. The final agenda and order of the discussion will remain fluid until the very start.

Possible topics, in no particular order, may include:

- Assessing 'kickbacks' in a post-Skilling world.
- New corporate compliance guidance issued by DOJ.
The recent decision in *U.S. v. Connolly* and the impact it has on internal investigations where government authorities are in effect outsourcing their investigations.
- Recent corporate charges being brought in the opioid manufacturing/distribution context and implications from those cases to corporate liability more generally.
- Use of RICO in white-collar cases (e.g., college admissions case).
- *SEC v. Mylan*: whether and when to disclose a Government investigation.
- The rise of 18 U.S.C. § 1348 to prosecute insider trading.

Jonathan Jeffress*KaiserDillon PLLC**Washington, DC***Robert Pommer***Kirkland & Ellis LLP**Washington, DC*

12:10 p.m.

Closing Luncheon ~ Coral Gables

1:30 p.m.

End of *Forum* & Departure