

**COLLATERAL DAMAGE: REPRESENTING INDIVIDUALS WHO ARE *NOT*
THE TARGET OF AN INVESTIGATION – (THEORETICALLY)**

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I. INTRODUCTION

Recent multiple disastrous accidents have reemphasized the legal issues associated with the subsequent investigations and prosecutions by Federal and State entities. The administrative and civil roles of MSHA and State agencies are well known. However, when significant accident events occur, the combination of federal and state investigations, along with public and political outcry, makes an already difficult situation even more difficult. Significant legal landmines exist for the uninitiated. The heavy lifting is often done by those representing and coordinating the Company's response to any given investigation. The significance of the potential ramifications for the Company should not be underestimated. However, representation of individuals can also be problematic. It must be remembered that while the penalties against a Company can be significant, Companies don't go to jail –people do. To a lesser extent, a loss of livelihood and other financial ramifications are of great significance to every individual who is within the realm of the accident investigation.

This paper will attempt to highlight common issues that may arise with the representation of an individual whether or not the individual is identified as a “target” of the investigation.

II. SUBJECTS AND TARGETS

While it is recognized that MSHA and individual state agencies have significant authority over investigations, the real “hammer” is held by the Department of Justice through its various United States Attorney's Offices in each federal district. In addition to Special Investigators

associated with various federal agencies, the United States Attorney has at his or her disposal the Federal Grand Jury, which conducts investigations with the use of subpoenas for documents and testimony. State or County Grand Juries are not generally investigative bodies, and have far fewer remedies at their disposal. Moreover, the decision of criminal prosecution rests primarily with the United States Attorney's Office and the federal criminal statutes which are in play as a result of significant mining accidents are varied and significant. *See e.g.*, 30 U.S.C. § 820(d); 33 U.S.C. § 1319(c); 18 U.S.C. § 1501.

The Department of Justice, through its Assistant United States Attorneys, identifies those who are "targets" and those who are "subjects." As the United States Attorney Manual at § 9-11.151 states:

A "target" is a person as 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 a putative defendant. An officer or employee of an organization which is a target is not automatically considered a target even if such officers' or employees' conduct contributed to the commission of the crime by the target organization. The same lack of automatic target status holds true for organizations which employ, or employed, an officer or employee who is a target.

A "subject" of an investigation is a person whose conduct is within the scope of the Grand Jury's investigation.

Essentially, if you are designated as a target, you are in the cross-hairs of prosecution. Any others, who are relevant to the investigation, are subjects. Subjects can become targets, and targets can sometimes become subjects. Of course, in a perfect world, you are neither a target nor a subject and are only a witness. It is within the Prosecutor's discretion to designate the individual's status. Often times no designation is made until the initial investigation is completed.

III. FIFTH AMENDMENT RIGHTS

The Fifth Amendment Right to assert the fundamental rights to not incriminate yourself is constitutionally protected. *Counselman v. Hitchcock*, 142 U.S. 547 (1852); *Malloy v. Hogan*, 378 U.S. (1964) (applied Fifth Amendment to States through Fourteenth Amendment). Fifth Amendment Rights can be asserted in any civil, criminal, administrative, judicial or investigatory procedure in which it is specifically believed that the information can be used in subsequent criminal proceedings. *Kastigar v. United States*, 406 U.S. 441, 444-445 (1972). Corporations have no Fifth Amendment rights. *Hale v. Hinkel*, 201 U.S. 43, 74-75 (1906).

The Fifth Amendment privilege against self-incrimination may and sometimes should be utilized by parties and witnesses in civil proceedings. *See, United States v. Saline Bank of Virginia*, 26 U.S. 100, 104 (1828); *Pillsbury v. Conboy*, 459 U.S. 248, 263-643 (1983) (assertion of 5th Amendment privilege in deposition).

The privilege can and sometimes should be asserted in administrative proceedings for state or federal agencies. *Murphy v. Waterfront Comm'n of New York Harbor*, 278 U.S. 52 (1964). A blanket assertion cannot be raised to avoid going to the proceeding, or hearing or other procedure. A specific assertion of the privilege must be made.¹

In the event one asserts their Fifth Amendment rights in a non-criminal case, they should expect an adverse inference drawn to be drawn from their refusal to testify. *See, e.g.: LaSalle Bank Lakeview v. Seguban*, 54 F.3d 387, 390 (7th Cir. 1995); *SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991).

¹ Generally speaking if one is identified as a target of a Federal Grand Jury Investigation and the Government is alerted that the target will assert his/her Fifth Amendment right, the witness is not generally forced to assert the rights at Grand Jury and they are excused from appearing. United States Attorney Manual, § 9-11-150.

IV. CONFLICTS

There is a common belief by some that the Company's lawyer can represent the Company and individuals' interests. This is not always correct. Lawyers risk ethical violations, as well as damaging their client's cause if they are not acutely aware of the loyalty issues in representing multiple parties. Guidance for those lawyers who represent Companies when employees are also potentially implicated can be found in *Upjohn v. United States*, 449 U.S. 383 (1981). Attention must also be paid to the *ABA Model Rules of Professional Conduct* – and particularly Rules 1.7, 1.13(f), 4.2, and 4.3. There are also several recent decisions which should be read by lawyers who want to represent both Company and an individual. Perhaps none are as interesting as *United States v. Henry T. Nicholas, et al*, 606 F.2d 1109 (C.D. Cal. 2009), *reversed on other grounds*, *U.S. v. Ruehle*, 583 F.3d 600 (9th Cir. 2009). In *Nicholas*, counsel for the Company interviewed the Company's Chief Financial Officer and client contact, Ruehle. The substance of the interview was later disclosed to the Government by the Company lawyers. Understandably, Ruehle objected on the grounds of attorney/client privilege, and stated that he believed that the Company's lawyer was also acting as his lawyer and that the statements must, therefore, be suppressed. Ultimately, the Ninth Circuit Court of Appeals declined to suppress the statement, but left intact the District Judge's scathing language against the law firm with respect to their alleged ethical violations in dealing with Mr. Ruehle.

V. ATTORNEY'S FEES

Officers, Directors, and Managers of Companies are often the beneficiaries of indemnification provisions for legal fees to be paid by the Company. Assuming the actions being investigated were within the scope of their responsibilities, indemnification provisions may cover payment of legal fees. Employees are not necessarily the beneficiaries of such provisions.

Employees who are considered subjects need counsel, and the Company often has the discretion to advance or reimburse legal fees to employees. Most employees do not have the financial means to pay for quality and experienced private representation.²

It is important to recognize that there is a difference between indemnification of fees and advancement of fees. Two sources of information must be reviewed to determine potential fee sources. First, the By-Laws of the Corporation will likely have some type of provision relating to legal fees incurred as a result of work done on behalf of the business entity involved. Sometimes these provisions are silent on the specifics of when the fees are paid, but usually a great deal can be learned from the By-Laws about the Company's position with respect to these matters. Second, State business statutes usually have specific provisions with respect to the payment of legal fees for not only managers and officers, but also employees. *See, Texas Business Organizations Code, § 12:19 (2009)*. You should check both of these resources prior to entering into an agreement to defend an individual who works for a particular company. It may be that you will be required to enter into an Undertaking Agreement, which will set forth the terms of the fee payment. Most employees do not have the resources to pay the fees first and then seek reimbursement. An undertaking can provide for an "advancement" of fees, but it will also no doubt include when those fees will be terminated and when and if those fees need to be repaid. The Delaware Corporate Code, which most states have adopted at § 145 states that Corporations are allowed to indemnify its employees for certain proceedings. *8 Del. C. § 145 (2010)*. Other states are broader and more mandatory on their language, and you need to check the statutory language for your particular jurisdiction. *See, e.g., Texas Code, supra*.

² If an individual is designated as a "target" by a United States Attorney's Office, that will be generally sufficient for that person to obtain the services of the Federal Public Defender, assuming they qualify.

It used to be that the United States considered the advancement of fees to employees as a failure to cooperate. *See, Principles of Federal Prosecution and Business Organizations* (Thompson Memorandum) (2003),³ which linked the decision on whether or not a Company was cooperating with, in part, its advancing of attorney’s fees to “culpable” employees and agents. However, this policy was eviscerated in *United States v. Stein*, 541 F.3d 130 (2008). In *Stein* the Court of Appeals agreed with the District Court’s findings that KPMG’s decision to stop the advancement of fees to its employees because of the Government’s suggestion that such conduct could constitute a lack of cooperation was improper. The Court agreed that the individual defendants were unable to retain the counsel of their choosing as a result of the termination of fee advancement upon indictment. The Department of Justice was criticized for depriving the defendants of their right to substantive due process of the Fifth Amendment by use of the “cooperation” tactic. *See, United States v. Stein*, 435 F.Supp. 2d 330, 367-73 (S.D.N.Y. 2006) (“Stein I.”) The Court of Appeals also found the Government unjustifiably interfered with the defendants’ relationship with their counsel and their ability to mount a defense in violation of the Sixth Amendment. *Stein*, 541 F.3d at 136.

VI. JOINT DEFENSE PRIVILEGE AND AGREEMENTS

The Joint Defense Privilege was first recognized to protect communications between criminal co-defendants and defense counsel. *See, Chahoon v. Commonwealth*, 62 Va. (21 Gratt) 822 (1971). The Ninth Circuit Court of Appeals confirmed the existence of the Joint Defense Privilege in federal courts and expanded it in *Hunydee v. United States*, 355 F.2d 1983 (9th Cir. 1965) wherein the Court held:

Where two or more persons who are subject to possible indictment in connection with the same transactions make confidential statements to their attorneys, these statements, even though they are exchanged between attorneys,

³ Subsequent policy positions by the USDOJ have significantly modified the position on corporations.

should be privileged to the extent that the concern common issues and are intended to facilitate representation and possible subsequent proceedings.

355 F.2d at 185.⁴

It should be noted that a Joint Defense Agreement, by way of the Common Interest Doctrine, does not need to be in writing. *See, e.g., Hanover Insurance Company v. Rapo & Jepsen Insurance Services, Inc., et al*, 870 N.E. 2d 1105 (2007).

There are essentially three elements required in order to assert a Joint Defense Privilege:

1. The communications were made in the course of a joint defense effort;
2. The statements were designed to further the effort; and
3. The privilege has not been waived.

United States v. Bay State Ambulance and Hospital Mental Service CRV, Inc., 874 F.2d 20, 28 (1st Cir. 1989); *United States v. Melvin*, 650 F.2d 641 (5th Cir. 1981); *United States v. Lopez*, 777 F.2d 543 (10th Cir. 1985).

Joint Defense Agreements are fairly common and do not raise any significant issues *until someone decides to cooperate with the Government or testify as a prosecution witness against some other member to the agreement.* (Italic added). However, once the participant to the agreement becomes a cooperating witness he or she may not disclose any information he learned in the course of the joint defense efforts. *In Re Grand Jury*, 406 F.Supp. at 394. A decision to enter into a Joint Defense Agreement is particular to a client. It may be that “going it alone” is the best method to protect your individual client given the nature of the

⁴ The Joint Defense Privilege is also applicable to civil matters. *Eisenberg v. Gagnon*, 766 F.2d 770, 77-88 (3rd Cir.), *cert denied*, 474 U.S. 946 (1985). The Joint Defense Agreement is sometimes referred to as a Joint Defense Privilege, but more correctly identified as the ‘Common Interest’ Doctrine.

potential claim against him or her. However, in the more complicated cases, having additional information can be very helpful to the lawyer representing an individual.⁵

Moreover, the decision to have a written or oral agreement is dependent on the facts. Oral agreements are more common. However, the issue regarding withdrawal from the arrangement usually becomes an issue when there is no writing to specifically detail the rights of the parties upon one of the parties wishing to withdraw from the agreement. It is up to counsel to determine what information will be shared with the other parties.

If one decides to enter into a written Joint Defense Agreement, it should include at least the following:

1. The nature and purpose of the agreement and why the agreement is being entered into;
2. What information will be exchanged and confirming that it will be considered attorney/client privilege or shared attorney work product and that it is being exchanged to further the common interests of the parties to the agreement; and
3. What happens when one wishes to withdraw from the agreement and how information obtained during the existing agreement will be handled or protected?

VII. PRACTICAL STEPS

1. If you have been retained by a Company to represent an individual (or contacted directly by the individual), assuming there is no conflict of interest, an engagement letter needs to be sent to the individual with respect to the engagement. You should determine if there is a fee arrangement whereby the Company is either advancing or reimbursing fees that term should be part of the engagement letter to the client, so that

⁵ Friction sometimes arises with individual employees who, in the Company's view, are not quite "cooperating." Companies can and often do fire employees who are not cooperating with investigations. However, such actions should only be done after careful contemplation.

the procedure is specifically set forth. You may need to formally request that fees be paid and the authority for the request.

2. Whether or not the Company had a role in recommending you or having the employee call you as his or her counsel, it needs to be made clear the loyalties are to the individual, whether or not that helps the Company's legal position. That is not to say cooperation with Company counsel is wrong. In fact, it may be to your client's benefit to be part of a joint defense. But, your loyalties to the individual are paramount.

3. Your responsibility is to keep your client off of the list of targets, and preferably on the list of witnesses. This may mean cooperating with the Government early and often and to disclose whatever information your client has to assist the investigation. Such a strategy will not generally help the Company or other individuals. However, it is sometimes the best thing to do.

4. If you enter into a Joint Defense Agreement, whether written or oral, you must make it clear to all counsel when your client is in the final state of negotiations or has entered into a corporation arrangement with the Government, and that you notify the other defense members that you are withdrawing from the arrangement.