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The Postal Inspector Only Rings Once

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April, 2008

CRIMINAL JUSTICE

By Robert Sanger

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INTRODUCTION

One of the issues that recurs in our practice in white collar cases is the failure of corporate counsel to identify the fact that a criminal prosecution is, or may be, running parallel to a civil governmental investigation. In this column we will discuss this issue in the context of a new case from the Ninth Circuit which, more than simply standing as precedent, serves as a cautionary tale. Judge Schroeder, former Chief Judge of the Ninth Circuit, has written a fairly straight forward opinion in *United States v. Stringer III*, 535 F.3d 929 (9th Cir. 2008) but it may cause even sophisticated corporate counsel to shudder.

THE POSTAL INSPECTOR ONLY RINGS ONCE

Unlike the postman who always rings twice, government criminal investigators may only ring once or not at all. That is to say, it is critical that corporate counsel be acutely aware of any signs that a criminal investigation is, or may be, under way. I have used this metaphor before but it takes on even more urgent significance in light of the *Stringer* case. The consequence of not being attentive to a possible secret parallel criminal investigation is that important constitutional rights may be waived, incriminating evidence and statements may be given and, in general, a criminal prosecution may gain momentum where it could have been dealt with at an earlier stage. In addition, the lawyer who does not see this possibility may faces consequences her or himself if a criminal case does ensue.

In *Stringer*, that is exactly what happened. A corporation believed that it was being investigated by the SEC and that the investigation was civil in nature. The corporation brought in outside civil counsel with expertise in SEC matters. That counsel represented the corporation and two officers. In the course of her representation she voluntarily disclosed documents, allowed individuals to incriminate themselves and did not believe she had a conflict. She evidently did not consider that all of the testimony of her clients and documents she produced might be going from the SEC investigators directly to the United States Attorneys Office (USAO). In fact, the SEC was secretly providing everything to the USAO and a criminal investigation was running parallel to the civil case.

Two important points before going on: 1) counsel in *Stringer* was apparently sophisticated counsel with a background in SEC investigations; and 2) this happens all the time. I have seen the *Stringer* scenario unfold many times in my career, often with big firm, experienced outside counsel. Because most of the investigations do not result in criminal referrals, such lawyers are often simply caught unawares when there is a referral to the USAO. By the time criminal defense counsel gets involved, there is a paper trail that is embarrassing and irreversible. The criminal prosecutors have gained tremendous and, it may be argued, unfair, advantage. Individuals, and even the company, have been irreparably harmed. What may have been resolved civilly is now inextricably headed toward indictment.

As referenced by the postal inspector metaphor, it is not just the SEC that can make secret referrals to the USAO or law enforcement. Virtually any government agency can serve as the stalking horse for a parallel and undisclosed criminal investigation. We have seen this with agencies such as the FTC, the Department of the Interior, the FDA, the State Department, the EPA and others. In a typical scenario, a regulatory agency steps in and makes contact with corporate officials. In house counsel gets involved. A corporate internal investigation is commenced by the company itself. Outside counsel with experience in regulatory matters is often engaged. Statements are made to federal investigators. Documents are produced. Several individuals are represented by the same corporate or outside counsel. Unbeknownst to the attorneys, the information is then referred to the FBI or other criminal investigation division special agents and ultimately to the USAO for indictment and prosecution.

SEC FORM 1662

What makes *Stringer* even more dramatic is that it is an SEC case. The SEC has a very formal approach to investigations. They have Staff Attorneys who serve as investigators, they have formal orders of investigation and they take "investigative" statements in the form of depositions. They do not criminally prosecute anyone. At most, they commence civil enforcement actions. However, they are fairly clear that they can refer a matter to the FBI and the USAO for criminal investigation and prosecution. Nevertheless, experienced SEC lawyers, as in *Stringer*, somehow allow themselves to be led down the garden path and to not take the possibility of criminal action seriously.

Presently, the SEC not only orally advises subjects being interviewed but they provide each subject with SEC Form 1662. It expressly advises subjects of their right against self-incrimination and states that the information being developed in the investigation can be sent confidentially to other federal, state or local agencies for criminal prosecution. Form 1662[1] is worth quoting in relevant part:

Routine Uses of Information

The Commission often makes its files available to other governmental agencies, particularly United States Attorneys and state prosecutors. There is a likelihood that information supplied by you will be made available to such agencies where appropriate. Whether or not the Commission makes its files available to other governmental agencies is, in general, a confidential matter

between the Commission and such other governmental agencies.

Set forth below is a list of the routine uses which may be made of the information furnished.

1. To coordinate law enforcement activities between the SEC and other federal, state, local or foreign law enforcement agencies, securities self-regulatory organizations, and foreign securities authorities.

2. By SEC personnel for purposes of investigating possible violations of, or to conduct investigations authorized by, the federal securities laws.

3. Where there is an indication of a violation or potential violation of law, whether civil, criminal or regulatory in nature, and whether arising by general statute or particular program statute, or by regulation, rule or order issued pursuant thereto, the relevant records in the system of records may be referred to the appropriate agency, whether federal, state, or local, a foreign governmental authority or foreign securities authority, or a securities self-regulatory organization charged with the responsibility of investigating or prosecuting such violation or charged with enforcing or implementing the statute or rule, regulation or order issued pursuant thereto.

Why would experienced counsel still represent multiple subjects, allow them to incriminate themselves and not prepare for a possible criminal indictment? I suppose it is human nature to want to think things will work out and to want to appear cooperative. It may be that former SEC lawyers may also think that they can remain members of the “group” and work with their former colleagues. The fact is that many cases are resolved civilly but, the devastating fact also is that there are many criminal referrals to the USAO which result in parallel secret criminal investigations and, ultimately, public criminal indictments.

STRINGER AS A CAUTIONARY TALE

The nice thing about reading the advance sheets is that we can learn from the mistakes of others. This is not *schadenfreude*; this is the legitimate purpose of the study of law. We are not here to be gratuitously judgmental in second guessing the conduct of the lawyer in *Stringer*. We are simply here to learn from it. In fact, in fairness to that lawyer, District Court Judge Ancer Haggerty, the trial court Judge in *Stringer,* sided with the defendants and found the government's conduct reprehensible. He said: "The USAO spent years hiding behind the civil investigation to obtain evidence, avoid criminal discovery rules, and avoid constitutional protections." (408 F. Supp. 2d 1083 at 1089 (D. Or. 2006)). Despite the clear warnings of SEC Form 1662, he suppressed evidence and dismissed the indictment.

However, the Ninth Circuit opinion, reversing Judge Haggerty, (*United States v. Stringer III*[2]) is the law of the Circuit and sets forth exactly what corporate counsel's expectations should be regarding secret parallel criminal investigations. In essence, Judge Schroeder's opinion holds that 1) Form 1662 gives sufficient notice to the individuals and their attorney that "Defendant have forfeited any claims that the use of their testimony against them in the criminal proceedings violates the privilege against self-incrimination." (Id. at 3560); 2) There was no violation of due process in that "the SEC investigation was a bona fide civil investigation" despite the fact that information was freely exchanged with the USAO. (Id. at 3562); 3) The government did not improperly mislead the individuals or their joint attorney into believing that there was no parallel criminal investigation. (Id. at 362-64); and 4) The fact that the attorney, who represented the individuals and the corporation, turned over incriminating information at the request of the government "does not constitute deliberate intrusion on the part of the government when the attorney complies." (Id. at 3567).

This is now the leading case in the Ninth Circuit and counsel has to plan accordingly. Of course, if confronted with a similar situation where the lawyer had already blundered, we would look for a basis to distinguish this case. There is general law permitting an attack on the government's conduct if there had been more evidence of deceit or trickery in concealing the criminal investigation or other behavior that undercut the advisement to the individuals of their constitutional rights. Nevertheless, going forward, corporate counsel and outside lawyers advising

corporations and individuals in civil governmental investigations cannot afford to ignore this case. They have to consider the possibility of a parallel criminal investigation and its implications for the rights of the clients as well as the implications for the well-being of the attorneys themselves.

CONCLUSION

Stringer involved the SEC and Form 1662, a formal written advisement of the right to remain silent and the possibility of the sharing of information with the USAO and law enforcement. Other agencies generally do not have such formalized procedures. However, you can bet that the agencies and the AUSA's handling white collar cases are also reading *Stringer*, particularly here in the Ninth Circuit. We may see seemingly perfunctory forms from other agencies and we can expect that admonitions will be given. Whether or not there is an advisement, after *Stringer* if not before, lawyers advising corporations or individuals in governmental investigations should assume that there may be a parallel secret criminal investigation and act accordingly.

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[1] The entire Form 1662 can be found on the SEC website at: http://www.sec.gov/about/forms/sec1662.pdf

[2] __ F.3d __, 2008 WL 901563 (9th Cir. April 4, 2008)