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Whistleblowing for Profession and Profit

1. Difference between Darren's remarks and my remarks

Darren accurately addressed the sorts of things that will get you in trouble with the IRS and in some instances with the state Attorney General.

I agree totally with the substantive observations made by Darren. A lawyer must be continually mindful of all the rules in order to advise his or her client in a manner that achieves client goals while complying with law.

One area Darren did not address at length is foreign grants. FinCEN, OFAC, Homeland Security, etc., have essentially automatic felony "strict liability" indictment rights. I will not belabor but be aware that is a tripwire-filled area of law. There is no meaningful requirement of *scienter*.

2. My qualifications to present the perspectives I will address

2.1 In addition to doing in California what Darren does in Texas – advising charities and other nonprofits – a high percentage of my firm's legal services are rendered on a contingency fee basis. Part of that effort is responding to non-employment law and non-FCPA WB claims filed by, typically, an employee or former employee. *Example*: "The boss has been embezzling \$100,000 per year."

a. These are matters for which we bill on an hourly basis to conduct an investigation, prepare a report, and testify if

called. *I will address these types of claims – from the perspective of my client -- the charitable organization.*

b. My first job out of college was gaining my CPA experience conducting management audits/investigations. Fraud investigations are fun – just “follow the money.”

2.2 The vast majority of my firm’s annual revenues come from class action litigation (contingency by law). We have secured about \$800 million in cash for our clients over the past 15 years.

2.3 We also have a vigorous and growing practice in the filing and prosecution of whistleblower claims. These take the form of IRS, SEC, and hopefully in the future, Qui Tam claims. *I will describe these sorts of claims from the perspective of the WB.*

3. **Investigating a Garden-Variety Non-Employment Law, Non-FCPA Whistleblower Claim.** *Example: CEO and CFO have jointly embezzled hundreds of thousands, or COO has forged various documents to secure governmental grants*

3.1 Typically the phone call comes from the Board Chair who is highly anxious. Four questions: (i) How long? (ii) How much? (iii) How public? *And most importantly:* (iv) Will I do it?

3.2 How long?: Typically the client’s business operations are “deer in the headlight” dead-in-the-water standstill. All employees are at the water cooler whispering to one another. My response: Typically 45-90 days. We move as fast as we can consistent with accuracy.

3.3 How much?: Typically \$30,000 per month for the investigation and report. (It’s hourly, but that is just the actual “backwards looking” result.) After the investigation we are available for follow-on engagement(s) to fix issues we reported on. Total costs for our type of investigation, report, testimony and follow-on is typically \$200k to \$400k, but we had one at about \$15k

investigation with perhaps \$10k follow-on (CFO immediately pleaded guilty to federal charge). [Compare: FCPA investigation starting point is \$1m owing to overseas travel for interviews, etc.]

3.4 How public?: The charity typically wants as much secrecy as possible because the public disclosure will hurt both image and contributions. Likewise, the crook and the WB typically desire that the matter not become newspaper headlines. My experience, however, has varied widely.

a. In one case we got the money repaid, a quiet resignation, and various other items. No criminal referral. Everyone happy.

b. In a different case, the WB had a vendetta against the CEO and held multiple press conferences, possibility hacked the CEO's email, sent in accusations to the federal prosecutor, etc. [In all of this, there are state statutes protecting the job security of WB. This was a *terrible* situation for the charity.]

3.5 Will I Take the Matter? Most professionals shy away from this kind of work. Mud might be slung -- from all sides -- against the attorney if the investigation/report or result do not satisfy one party or another. My analysis might involve a duty to implicate another professional in the community in professional malpractice. The investigation might implicate my own client -- **the board** -- in lax oversight and resulting possible personal liability. Plus, if there is a civil or criminal trial, the investigator will be the first witness called -- quite possibly as an "adverse witness" -- a technical definition that means the attorneys get to be particularly nasty in cross-examination.

4. **Profiting by Filing Whistleblower Claims (without even knowing the people or the target)**

4.1 IRS Form 211. (Probably over 200)

- a. Requires \$2 million minimum. If less than \$2 million of “proceeds” – taxes, interest, penalties – are collected, then fall under a pretty much flat rate of 10% reward. If more than \$2 million of proceeds are collected, then the award is in the range of 15% to 30%. (Can be only 10% if solely public record materials, e.g., clip a local newspaper article and mail in.)
- b. Process is to submit the F211 with all accompanying information. The WB’s identity is to be kept confidential, but cannot be guaranteed. (Our clients frequently ask us to file in my name – Paul J. Dostart – to provide a double-blind confidentiality as to the informant’s identity.)
- c. Oftentimes there is a taint review meeting.
- d. Information flow is one-way, i.e., WB can tell the IRS what new information the WB has, but the IRS will generally NOT be able to tell the WB the status. Some Very Limited exceptions.
- e. This can take years. Say, 1-2 years to complete an audit, then the appeals process, then the Tax Court and Circuit Court of Appeal, then payment (if the target has money left). This is a situation in which a closing agreement – even if the IRS agrees to some compromise in the collection – might work to the favor of the WB.
- f. Denials come quickly if IRS already on the matter, and longer if they audit. Then a Preliminary Denial Letter (“PDL”) gives the WB a supposedly last chance to offer information – *I think often useless as there is no sharing from the IRS (or maybe not!)* – following which there is a Final Denial.
- g. WB has 30 days after Final Denial to file a USTC case. Can file with Motion to Proceed Anonymously – case is kept under seal and must be paper-filed.

4.2 SEC Form TCR. (Fewer than 50)

- a. WB reward is 15% to 30% of fine collected by the SEC
 - b. One nice thing about SEC filings is that one can track the progress through the 10-Q and 10-K of the reporting entity!
- 4.3 Qui Tam (Relator) status. ("[he] who sues in this matter for the king as well as for himself.")

Informally referred to as the “Lincoln Law”, technically known as the False Claims Act, 31 U.S.C. § 3729 *et seq.*, which allows a private individual, or "whistleblower," with knowledge of past or present fraud committed against the federal government to bring suit on its behalf.

- a. Must be represented by an attorney, cannot file *pro se*.
- b. Filed under seal in order for the US Attorney to review. Absent court permission, the defendant is not permitted to issue press release or put in SEC filing – which creates a whole different set of problems for the publicly reporting defendant.
- c. US Attorney has the right to intervene and join the action, or may allow the Relator to proceed alone
- d. WB fee is generally 15% - 20% of restitution received by the US Government if jointly prosecuted with US Attorney; 25% to 30% if Relator proceeds alone
 - i. Plus attorneys’ fees in both such cases