




ENVIRONMENTAL CRIMES

What to do in the first 30 days



October 11, 2018

Today's Discussion

- Background
 - Step 1: Stopping the Bleeding/Asserting Control
 - Step 2: Immediate Legal Issues
 - Step 3: Setting the Stage for Investigation/Trial Preparation
- 


Background

- **2009:** Oregon DOJ Environmental Crimes Unit
- **Oregon Environmental Crimes Act (1993):**
 - **6 felony provisions (generally Class B (max 10 yrs., \$250K fine))**
 - Actor must have acted “knowingly.”
 - Act must have violated statute, rule, standard, license, permit, or order.
 - Act must have recklessly caused substantial harm to human health or the environment *or* have been done in knowing disregard of the law.
 - **5 misdemeanor provisions**
 - No requirement of harm to human health/environment or knowing disregard.
 - **Affirmative Defenses:**
 - Bypass
 - Upset
 - Didn’t create the condition, reported immediately, took steps to correct.
 - **Felony Prosecutorial Guidelines**

Background

- **How a criminal case can be initiated:**
 - Referral from DEQ, city regulators, etc.
 - Indictment
 - Search warrant
 - Grand Jury subpoena
 - Target/subject letter

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Asserting Control – Presence at Search Warrant Execution

- Large team of armed agents swarms the premises.
- Frequently federal (e.g., EPA's Eric Martenson) and state (e.g., OSP's Craig Ball) presence.
- Secure entrances and exits.
 - Nobody let in or out.
- Computers, trade secrets and privileged materials may be taken.
- Agents will attempt to interview employees.
- Process will take the entire day.

Asserting Control – Presence at Search Warrant Execution

- **Make contact with law enforcement (lead agent) ASAP.**
 - Employees allowed to leave.
 - No contact with upper management.
 - Obtain a copy of the search warrant and understand scope.
 - Make efforts to preserve privilege.
- **Stay onsite.**
 - Prioritize business necessities.
 - Obtain receipt/inventory.

Asserting Control – Preservation of Evidence

- Litigation hold.
- Understand what was seized.
 - Search warrant inventory
 - Debrief interviewed parties.
- Identify key players and gather documents.
- Request copies of documents from the government.

Asserting Control – Rights and Obligations

- *May not* advise employees *not* to talk to law enforcement.
 - But *may* advise them that they are not *required* to talk to law enforcement.
 - And of their right to have counsel present if they agree to be interviewed.
- May advise management not to speak with law enforcement without counsel.
- If someone talks, must be 100% honest.

David Angeli

From: David Angeli
Sent: Wednesday, November 01, 2017 10:41 AM
To: [REDACTED]@usdoj.gov
Cc: Joanna Perini-Abbott
Subject: [REDACTED]

[REDACTED],
Thanks for the time on the phone just now.


As we discussed (and as I also advised Special Agent [REDACTED]), for purposes of the no-contact rule, [REDACTED] includes the company's control group. That group includes, among others, [REDACTED] and [REDACTED]. We request that you and all other agents of the United States refrain from contacting: (1) members of the company's control group; and (2) any individual whose conduct is at issue in this matter (because, for example, the Government might seek to hold [REDACTED] vicariously liable in whole or in part for the individual's acts or omissions), with regard to your investigation. Rule 4.2 of the Oregon Rules of Professional Conduct and its predecessor (DR 7-104(A)), made applicable to federal prosecutors under the Citizens Protection Act, 28 U.S.C. § 530B, have consistently been held to preclude the type of contact at issue here. See, e.g., Or. Eth. Op. 2005-142; Or. Eth. Op. 1995-142. We would view any further contact with the above-described individuals as improper contacts with represented parties, and the Government should refrain from such contact without our prior approval.

the Government violates a defendant's constitutional rights when it knowingly obtains privileged information that results in "prejudice" to the defendant. And the mere possession by the prosecution of otherwise

Furthermore, the paper and electronic documentation at [REDACTED] includes a large volume of material that is protected by the attorney-client privilege and/or the work product doctrine. The Ninth Circuit has held that the Government violates a defendant's constitutional rights when it knowingly obtains privileged information that results in "prejudice" to the defendant. And the mere possession by the prosecution of otherwise confidential knowledge about the defense's strategy or position is sufficient in itself to establish that prejudice. For these reasons, once you begin to inspect the computers and other materials that your agents may seize, your investigation may be irrevocably tainted. For that reason, we hereby demand that you immediately return those materials so that we may review them in the first instance to remove any privileged information. At the very least, we assume that the team of agents that arrived at [REDACTED] this morning included a "taint team," and that no materials will be seized from the facility unless and until proper procedures are devised and implemented to allow the taint team to deal with privileged materials. To be clear, [REDACTED] does not waive, and hereby asserts, all applicable privileges, including but not limited to the attorney-client privilege and the work-product doctrine.

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Asserting Control – Parallel Cases

- Implications for discovery obligations.
 - Pleading the Fifth (for individuals).
 - Potential benefits of civil discovery.
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Asserting Control – Business and Media Plan

- Can the company survive?
- Are immediate changes necessary?
 - Policies/practices
 - Personnel
- Reassure employees.
- Engaging with the press:
 - Control the message.
 - Don't get over your skis.

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Legal Issues – Filter Process

- Government may not review privileged information.
- Set parameters of filter process with AUSA/DDA:
 - List of counsel used by company
 - Search terms
 - Procedures before passing to prosecution team

Legal Issues – Government’s Theory

GOAL: Identify the potential charges.

- Talk to the prosecutor.
- Review any documentation:
 - Indictment
 - Subpoena
 - Search warrant affidavit (if unsealed)
- Talk to any interviewed employees.

Legal Issues – Early Motion Practice


- **Challenges to the charging instrument:**
 - Higher bar than 12(b)(6).
 - State court: must generally be made at or near time of arraignment (except for good cause).
- **Challenges to the search:**
 - Not supported by probable cause.
 - Search exceeded the scope of the warrant.
 - Criminal search masquerading as an “administrative” search?
- **Challenges to interviews**
 - Custodial interrogation?
 - Violations of the no-contact rule?

Legal Issues – Sentencing Analysis

GOAL: Identify exposure to drive strategic decisions.

- Statutory maximums:
 - Prison/fines (for individuals)
 - Fines (for company)
- Federal Sentencing Guidelines
- Analysis of similar cases

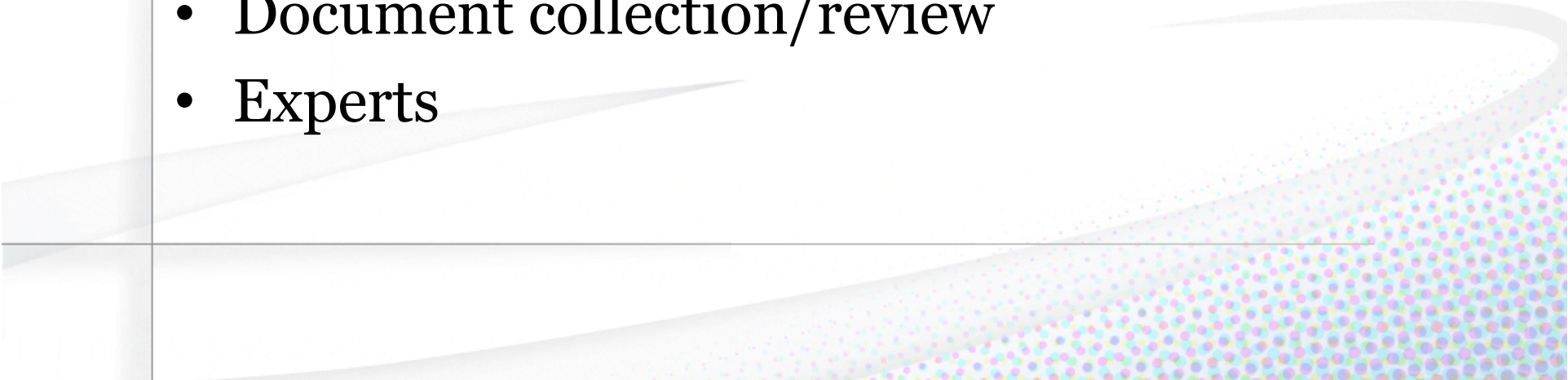
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Step 3: Setting the Factual Stage – Learning the *government* narrative

- Meeting with the prosecutor (“reverse proffer”)
- Public records requests
- Discovery demand
 - *Brady* material
 - Witness statements
 - Government exhibits
 - Witness list
- *Brown/O’Key* motions

Step 3: Setting the Factual Stage – Developing the Defense Narrative

- Interviews
 - Anyone interviewed by the government
 - Key players
 - Management
 - Third-party subpoenas
 - Document collection/review
 - Experts
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QUESTIONS?

