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BUSINESS CRIMES UPDATE

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The Privilege Against Self-Incrimination

The prosecutor leaned across her desk. She said: "I don't get it, Mr. Defense Lawyer. You tell me your client is innocent, that he had no involvement in the fraud the grand jury is investigating. Yet in the next breath, you tell me he won't testify without immunity." Pausing to control her barely concealed anger, she snarled: "I don't give immunity to people who are innocent. If as you say your client is innocent, then he has no Fifth Amendment privilege against self-incrimination. I expect him to testify without immunity."

Sadly, this fictitious scene is all too often real. Whatever the reason, prosecutors hate immunity as much as a not guilty verdict. Well, maybe not that much, but they sure don't like it. By contrast, defense lawyers usually love it. A grant of use of immunity, while not a guarantee of no prosecution, usually leads to that conclusion.

With the lines drawn thusly, the Supreme Court last term came to the aid of the defense. In *Ohio v. Reiner*, __ U.S. __, 121 S. Ct. 1252 (2001) (per curiam), the Court addressed the question whether immunity was appropriate for a witness who had asserted her innocence.

In *Reiner*, the defendant was charged with involuntary manslaughter in connection with the death of his two-month-old son. In the coroner's opinion, the baby died from "shaken baby syndrome." Reiner had been alone with his child for half an hour just before the baby stopped breathing.

Reiner's experts testified that the child could have been injured several hours before his respiratory arrest. At that time, the baby was in the care of his babysitter, Susan Batt. It was the theory of the defense that Batt, not Reiner, was the culpable party.

While maintaining her innocence, Batt nonetheless advised the trial court that she intended to assert her privilege against self-incrimination. The prosecutor then asked the court to grant Batt transactional

immunity. Once granted, Batt denied any involvement in the child's death. She testified she had never shaken the baby. Reiner was convicted.

His conviction was, however, reversed by the Court of Appeals. The State then appealed to the Supreme Court of Ohio. That court affirmed the reversal, but did so on the ground that Batt had no valid Fifth Amendment privilege. Therefore, the court reasoned, the trial court's grant of immunity was unlawful. The court then found that the wrongful grant of immunity prejudiced Reiner, because it effectively told the jury that Batt did not cause the child's injuries. The court added that the defense's theory of Batt's guilt was not grounds for a grant of immunity in the face of her continuing denial of involvement.

The Supreme Court reversed. First, it determined it had jurisdiction over the State court judgment that rested on a determination of federal law – here the contours of the Fifth Amendment privilege. Then, the Court examined its previous holdings on the privilege.

The Court acknowledged that the privilege extends only to witnesses who have "reasonable cause to apprehend danger from a direct answer," and acknowledged that that inquiry is one for the court. Tellingly, it then said: "But we have never held, as the Supreme Court of Ohio did, that the privilege is unavailable to those who claim innocence." Quoting from its decision in *Grunewald v. United States*, 353 U.S. 391, 421-22 (1957), the Court stated: "[W]e recognize[ ] that truthful responses of an innocent witness, as well as those of a wrongdoer, may provide the government with incriminating evidence from the speaker's own mouth."

Then, the Supreme Court determined that the Ohio court's determination that Batt did not have a valid Fifth Amendment privilege "clearly" conflicted with prior precedent. The Court found that Batt had "reasonable cause" to apprehend danger from her answers. The Court noted that the babysitter was with the child victim within the timeframe of the fatal trauma.

And so, the next time a prosecutor says that innocent people aren't entitled to immunity, tell her that the Supreme Court in *Ohio v. Reiner* held otherwise. Who knows, you may even get the immunity you seek for your client.

Honor and Fair Play – Electronic Recordings of Conversations by Lawyers

Our sense of honor and fair play has undergone changes over the years. While in the early 19th century, dueling was considered to be an honorable way to settle a dispute between gentlemen, that conduct is now criminal. In athletic competitions today, there is much debate and dispute over whether the use of certain stimulants should be proscribed.

So too, the sense of honor and fair play that guides the conduct of lawyers, after much debate and dispute, has undergone changes. Last year, the ABA formally recognized an important change.

In Formal Opinion 01-422, the American Bar Association Standing Committee on Ethics and Professional Responsibility addressed the question of whether it is ethical for lawyers to electronically record conversations without the knowledge of all participants. In its June 24, 2001, opinion, the Committee determined that such recording does not necessarily violate the Model Rules of Professional Conduct.

In reaching this determination, the Committee withdrew its 1974 Formal Opinion 337. That Opinion was decided under the Code of Professional Responsibility, which had incorporated the principle that a lawyer "should avoid even the appearance of impropriety." The Committee noted that this proscription was not incorporated in the Model Rules.

However, because Opinion 337 had proscribed conduct that involved misrepresentation, dishonesty, fraud or deceit, it clearly encompassed recordings without the consent of all, and further because the Model Code still prohibited conduct involving deceit and misrepresentation, the Committee met to address the vitality of Opinion 337.

In addressing this question, the Committee first noted that reception of the principle embraced in its 1974 Opinion had been mixed. The Committee cited a number of State and local bar opinions that had deviated from the position taken in Opinion 337.

The Committee then noted the widespread acceptance in evidence of one-party consent recordings and the fact that recording devices are readily available and widely used. Based on these factors, the Committee first concluded that "absent a special relationship with or conduct by [a] party inducing a belief that the conversation will not be recorded," it is "questionable whether anyone today justifiably relies on an expectation that a conversation is not being recorded by the other party."

The Committee also recognized that Opinion 337's absolute prohibition might also defeat a legitimate and necessary activity, such as documenting criminal utterances, documenting conversations with witnesses to protect against potential perjury, or documenting conversations for the self protection of the lawyer. The Committee observed that State Committees had permitted exceptions to the general prohibition for "testers" in investigations of housing discrimination and trademark infringement. Still others had recognized that, given the well recognized exception for nonconsensual recordings by law enforcement personnel, defense lawyers should be permitted to do likewise, otherwise prosecutors would have an unfair advantage.

Finally, focusing on the approach of the Model Rules that proscribes means of gathering evidence that has no substantial purpose other than to embarrass, delay or burden a third person, the Committee determined that lawful recordings do not violate any legal rights of the person unknowingly being recorded. For this reason, too, the Committee found cause to abandon Opinion 337.

While in this manner Formal Opinion 01-422 provides general guidance that a lawyer may ethically record a conversation without the knowledge of all participants, several notes of caution are in order. First, if that conduct violates state law, the Committee recognized that such recording "likely" violates the Model Rules. Second, because the Model Rules proscribe the making of a false statement of material fact to a third person, a lawyer cannot falsely state that a conversation is not being recorded. Third, although the Committee was divided on whether a lawyer ethically could record a conversation with a client without the client's knowledge, the Committee stated it was "almost always" advisable to inform the client the conversation was being recorded. Finally, in circumstances such as these, where the sense of honor and fair play is in flux, it is certainly always advisable to consult the rules of conduct applicable to the places where the lawyer practices.

Another Big Year for Fraud Recoveries

On November 14, 2001, Robert D. McCallum, Jr., Assistant Attorney General for the Civil Division of the Department of Justice, announced record receipts from civil fraud cases for the fiscal year ending September 30, 2001. McCallum said the amount recovered was $1.6 billion. Of that amount, $1.2 billion was recovered in *qui tam* whistleblower cases filed under the False Claims Act.

By far, the largest share of these recoveries came in health care fraud suits. HCA-The Healthcare Company alone paid the government $745 million, almost half of the total amount received, in connection with a number of alleged schemes. Quoran Health Group reportedly paid $104 million after it was accused of submitting false hospital expense cost reports to Medicare. Venior, Inc. paid $103 million for asserted fraud on the Medicare, Medicaid and TRICARE programs in its nursing homes business.

Beyond health care, the government received over $190 million from suits involving allegations of underpaid royalties on government leases of oil and minerals removed from federal lands.

In the years immediately following the passage of the 1986 amendments to the False Claims Act, Defense Contractors used to lead the list of payors to the government, but that was not the case this year. With the War on Terrorism and the anticipated increase in spending for homeland security, however, this is likely to change.

Accountants at Risk

In the early 1990s, two health care maintenance organizations paid KPMG Peat Marwick $200,000 to prepare Medicare and Medicaid cost reports. Nine years later, the accounting firm agreed to settle alleged violations of the civil False Claims Act for that amount, plus an eye-popping $8.8 million dollars more. The settlement was filed on October 23, 2001, in the case *United States ex rel. Schilling v. KPMG Peat Marwick*, M.D. Fla. No. 98-901-CIV-T-17F.

The government and the *qui tam* relator alleged that KPMG knowingly made false, exaggerated and ineligible claims for payment on behalf of five hospitals. The government also alleged that KPMG prepared "reserve" cost reports that estimated the impact on the hospitals' reimbursements in the event the government in an audit determined that the claimed costs were unallowable. KPMG defended that conduct on the ground that at the time it was standard industry practice to prepare "reserve" cost reports.

According to Schilling's lawyers, the $9 million settlement figure was more than the full loss to the government.