



Litigation: I Thought You Were My Lawyer!

The importance of clearly defining the scope of outside counsel's representation.

BY PATRICIA A. PILEGGI

The case of *United States v. Norris*, demonstrates the importance of clearly defining in a consistent manner, to an entity under investigation, its executives and employees, as well as to investigating government agencies, precisely who outside counsel is representing, as well as the scope and duration of that representation. Once the scope of the representation is defined, it should be memorialized in a contemporaneous writing to the corporate entity and in a consistent manner to investigating agencies. If the scope of the representation changes, all interested parties should be notified. The failure to clearly define, communicate and memorialize the scope of the representation can lead to unanticipated adverse consequences for the entity as well as executives and employees who are interviewed by outside counsel during the internal investigation.

In April 1999, the Antitrust Division initiated a federal grand jury investigation into price fixing by companies engaged in the sale of carbon and engineered graphite products. That investigation focused on, among other companies, the Morgan Crucible Company (Morgan). Morgan is a publicly held corporation, based in the United Kingdom, which sells carbon brushes around the world.

During the investigation, Morgan was represented by Winthrop, Stimson, Putnam & Roberts (Winthrop).

At the conclusion of the investigation, Ian Norris, the CEO of Morgan, was charged with conspiring to engage in price fixing in

the United States (Count One); conspiring to engage in obstruction of justice (Count Two); witness tampering (Count Three); and the destruction of records (Count Four). Norris was extradited from the United Kingdom to face trial on the obstruction counts, but not the price fixing violation, pursuant to the extradition treaty between the United Kingdom and the United States.

At Norris' trial, over his objection, a Winthrop attorney testified about conversations that he had with Norris during the investigation. Norris maintained that the Winthrop attorney, Sutton Keany, represented him personally during the antitrust investigation and that these conversations were protected by the attorney client privilege. In support of that argument, Norris pointed to oral and written representations made by Keany to Morgan executives, the Antitrust Division, and to Norris. In an E-mail to Morgan executives, Keany stated that the Antitrust Division was notified that Winthrop represented Morgan employees. In his testimony, Keany confirmed that he did, in fact, advise the Antitrust Division orally and in a letter that he represented Morgan's employees. At an evidentiary hearing, another Winthrop attorney testified that Winthrop represented Norris personally. Keany, on the other hand, testified that he did not represent Norris and that he advised Norris to get his own attorney.

Norris also relied on a memo that he received from Keany and other Winthrop attorneys. In that memo, Keany and the other attorneys provided direction in the event that he was questioned in the United

States by law enforcement officials or served with a grand jury subpoena. The memo contained the instruction that, in the event that he was stopped by law enforcement officials, he should "advise that you are represented by counsel, and that you are respectfully requesting an opportunity to contact him for anything beyond routine travel questions. Give us a call, and we'll handle it from there." The memorandum went on to direct that he should provide the names of his attorneys, including Sutton Keany. The Winthrop attorneys followed up with two letters that Norris was to hand to any government agent if he was detained. One letter stated that "we represent him as his lawyers here in the United States and outside the U.S. This representation specifically includes, but is not limited to [the antitrust investigation]." The other letter stated that the Winthrop attorneys were authorized to accept service of any grand jury subpoena addressed to Norris, that Norris wished to remain silent, and that Norris wanted to speak to the Winthrop attorneys.

Keany acknowledged that he had represented Norris in connection with a parallel Canadian antitrust investigation. When Canadian officials travelled to the U.K. to interview Norris, Keany represented Norris in connection with that appearance. Keany also represented Norris in connection with an unrelated sworn FTC appearance.

Applying a five factor test, established in *In re Beville, Bresler & Schulman Asset Mgmt. Corp.*, the district court found that Winthrop did not represent Norris personally in the U.S. antitrust grand jury investigation

and that he could not, therefore, successfully assert that his conversations with Keany were protected by the attorney client privilege. When asserting that conversations with corporate counsel are protected by the attorney client privilege, Bevill requires that corporate officers demonstrate the following:

“First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached counsel they made it clear that they were seeking legal advice in their individual rather than the representative capacity. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that possible conflicts arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.”

Applying this test, the district court found that Norris failed “to meet the central tenet of Bevill,” that is “Mr. Norris did not seek legal advice or representation from the law firm in general, or from Mr. Keany specifically, as it related to the Grand Jury Investigation.” Finding that the conversations with Keany were not privileged, the district court allowed Keany to testify about his conversations with Norris, including Norris’ accounts of meetings with competitors.

United States v. Norris, *supra*, illustrates the importance of providing clear corporate Miranda warnings (“Upjohn” warnings). When interviewing employees, and being precise about the scope of representation in internal and external communications. Employees should be advised that counsel represents the company, not the employee. That warning should be made in the presence of another corporate attorney. The employee should be informed that the company may decide that the conversations are not confidential. The warning should be memorialized in writing, at a minimum in a memo to the file. Care should be exercised to communicate the scope of the representation in a consistent manner, both inside and outside of the company.

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