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## A Prosecutor Segues Into A New Role

*The Editor interviews **Julian Solotorovsky**, Partner and Chair of the White Collar Crime and Investigations Practice Group in the Chicago office of Kelley Drye & Warren LLP.*

**Editor:** Please describe the focus and particular strengths of the white collar crimes and internal investigations practice at Kelley Drye.

**Solotorovsky:** Our focus and particular strengths are pretty broad because we have five former assistant U.S. attorneys who are the backbone of the white collar crimes and internal investigations practice group. Added up, it equals 165 total years of experience or an average of 33 years per attorney. Our strengths include securities work, financial investigations and prosecutions. We also have special expertise in healthcare fraud, export control, the Foreign Corrupt Practices Act and DOD defense contracting cases.

**Editor:** You served as assistant U.S. attorney for the Northern District of Illinois. Can you tell us a bit about that?

**Solotorovsky:** I was in the U.S. attorney's office for almost nine years and in the Criminal Division the whole time. I was the deputy chief of the Criminal Receiving and Appeals Division, and later, the deputy chief of the Special Prosecutions Division. I did a variety of criminal cases, including quite a bit of organized crime prosecution. Then, I was involved in *Operation Greylord*, the prosecution of various corrupt officials in the Circuit Court of Cook County.

**Editor:** How has that influenced your work, now that you are on the other side of the table in terms of defending cases?

**Solotorovsky:** It was pretty much a natural evolution in that you take the experience you get as a prosecutor and then segue into

private practice. The investigations I do are really grounded on what I learned as an assistant U.S. attorney conducting large grand jury investigations. Some of the internal investigations that I conduct are at the behest of federal prosecutors.

**Editor:** Are internal investigations increasing?

**Solotorovsky:** I think so because so much credit is now given to corporations for voluntarily looking into possible problems and self-reporting. Companies today are more keenly aware of the need to self-police than they were previously. I would say that internal investigations are more prevalent today than in the past.

**Editor:** Walk us through the process when you, as outside counsel, get that telephone call. How early in that process do you request electronic documents?

**Solotorovsky:** Very early. For one thing, electronic document production is cumbersome and can be very involved. So, you know that is going to take a lot of time. If you don't get to work on it quickly, then your investigation is going to drag on forever.

**Editor:** Is it normally a special committee or is it the audit committee that gets involved?

**Solotorovsky:** More typically it is a special committee. It is cleaner that way, and, if possible, it is helpful to have the members of the special committee be outside/independent directors of the company.

**Editor:** What is your take on corpora-



**Julian Solotorovsky**

tions who are undergoing this process? Should they reach out to counsel who have worked for them before, or look for counsel who might be considered to be totally independent?

**Solotorovsky:** My experience is that no two companies are the same in terms of their corporate structure, atmosphere or how they function. So, there is no hard and fast rule as to what is best. In general, it is cleaner and easier to bring in outside counsel who haven't necessarily done extensive work for the company.

**Editor:** What about precautions on multiple representations once you're called in? How do you convey that you are solely counsel to the corporation as your client?

**Solotorovsky:** It is an extremely important component of conducting an internal investigation because when you get to the interview stage, where you are interviewing employees, it's essential that those people you are interviewing understand that you represent the corporation and the corporation alone. You have to be extremely careful to make sure that it's crystal clear whom you represent and what you are doing when you're sitting there interviewing people. You cannot have any confusion about that.

**Editor:** I see that you've written on the Thompson Memorandum, on the McNulty Memorandum, and now we have the Filip Letter. Can you bring us up to date as to where we are in terms of guidelines or restrictions on federal prosecutors?

**Solotorovsky:** The Department of Justice has long had guidelines for prosecutors in determining how to treat corporations during grand jury investigations and what kind of credit to give them for their cooperation. Some prosecutors were overstepping the fair boundary. In the KPMG tax shelter case in

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New York, Judge Kaplan ruled that the guidelines were unconstitutional because as part of the process the U.S. Attorney's Office in the Southern District of New York was requiring that KPMG not pay the legal fees of partners that were under investigation, and further that KPMG waive attorney-client privilege during the process in order to be credited with being a good corporate citizen. Judge Kaplan said that that overstepped the boundaries of fair prosecution and the DOJ has now agreed and revised the guidelines in the so-called Filip Letter. These new guidelines say to federal prosecutors that they should not require companies to waive attorney-client privilege and should not require companies to refuse to pay the legal fees of employees under investigation.

**Editor: As long as the specter of Senator Specter is around, will the DOJ have to watch its step?**

**Solotorovsky:** I think it goes beyond Arlen Specter because the DOJ did the right thing in revising their guidelines. A lot of institutions were lining up behind Senator Specter, most importantly the American Bar Association. There was a lot of momentum gathering, and the DOJ wisely recognized that and made the right decision.

**Editor: Are you comfortable that the Filip Letter effectively deals with the problem?**

**Solotorovsky:** Well, the Filip Letter addresses the problem, but the bigger issue is how each individual prosecutor reads the letter and conducts an investigation. It could vary from district to district. So it's a universal letter to all the DOJ prosecutors, but it won't be enforced uniformly throughout the country.

**Editor: But won't the decision to prosecute have to be reviewed by an assistant attorney general?**

**Solotorovsky:** Actually, no. It depends on whether the investigation or the grand jury process is being conducted by a main DOJ attorney or if it's being conducted by a U.S. attorney's office. In U.S. attorney offices all prosecutions do not have to be reviewed by DOJ; and in some U.S. attorney's offices the review process, delegated to supervisors, is far less rigorous than it may be in other offices.

**Editor: That's an interesting distinction that I'm sure our readers will appreciate.**

**Solotorovsky:** In some offices I have found

there is almost no supervision of the line assistants. In other offices, there's close supervision by supervisors who make sure that those assistants adhere to DOJ guidelines.

**Editor: While you are located in Kelley Drye's Chicago office, the firm's white collar and investigations team comprises attorneys in New York and Washington, D.C. How does this arrangement work?**

**Solotorovsky:** There are no set rules. It depends on whom you get a call from and what particular cases partners are working on. For example, I work on quite a few cases in New York with certain partners in the Stamford and New York offices. I am currently working closely on a case with one of the white collar crime partners in our New York office because I find that his expertise is an added benefit to my client.

**Editor: Your practice is not confined to the territorial U.S. but has become international in scope. What events or persons led to this major breakthrough?**

**Solotorovsky:** I do cases all over the country. In fact, at any given time, I typically have more white collar crime cases outside of Chicago than I do here; and some of those cases involve events that took place outside of the country. I've done a number of cases involving alleged violations of export control laws. Those investigations can take you anywhere. One of our new partners is Darryl Jackson in our Washington, D.C. office, who recently completed a stint as the assistant secretary of commerce for export enforcement in the Bush administration; so, he too is very experienced in export control cases and also travels a lot.

**Editor: You have handled internal investigations and audits with a geographic reach as far as Iran. How did that come about?**

**Solotorovsky:** Actually, I've had two cases concerning Iran. One involved the shipping of military aircraft parts by an air freight carrier to Iran, and recently I had an investigation for a worldwide telecommunications company involving broadcasting via satellite of TV into Iran.

**Editor: Both must have been interesting assignments.**

**Solotorovsky:** Yes, each was quite different. The aircraft parts case was one where I found a document in a warehouse in Bournemouth, England. The document indicated that one of our client's employees was

actively misleading the company as to what he was doing. That resulted in the U.S. attorney deciding not to prosecute the company, but rather to prosecute the individual.

**Editor: What's your take on deferred prosecution agreements? Are they positive or a negative from a target company's point of view?**

**Solotorovsky:** I have mixed emotions about deferred prosecution agreements. I think they are very much in vogue today, and I am undecided whether they are positive or negative in general. I'm not so sure that they're really worthwhile. By the way, based on actions so far in 2009, it appears that the DOJ under President Obama will continue to use Deferred Prosecution Agreements with corporations. The DOJ is currently on pace to have more deferred prosecution agreements with corporations in 2009 than the DOJ entered into in 2008.

**Editor: If you'd like to speculate a little bit, starting with the Foreign Corrupt Practices Act, Enron and Sarbanes-Oxley, and moving up to the present, what's the trend in investigations? What should our readers be looking for?**

**Solotorovsky:** The FCPA is much more on the upward trend. If you go back just five or six years, there were few FCPA cases being pursued. But now, they seem to be definitely on the rise. The other big areas, post-Mad-off, that you're going to see is the SEC pursuing securities cases much more frequently. My time spent on SEC investigations and related grand jury matters has risen significantly in the last five years, but I suspect that's going to rise even further. The other area where we're going to see more activity is antitrust criminal investigations. There weren't many during the Bush administration, but the Obama administration has clearly stated that they're going to be picking up the pace.

**Editor: What sort of advice do you give to your clients or when you speak in seminars?**

**Solotorovsky:** The best advice I give is common sense: anytime you see people in your company acting questionably, or anytime you are asked to do things that give you cause to stop and be concerned, then it probably is something you shouldn't be doing. You should be cautious and consult with attorneys as to whether what you are doing, or considering doing, will be acceptable. You have got to think before you act in today's world.