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For additional information on this or any white collar criminal law related issue, please contact RMF's White Collar Crime & Investigations co-chairs: Alexander G. Bateman, who can be reached at 516-663-6589 or abateman@rmfpc.com or Gregory J. Naclerio, who can be reached at 516-663-6633 or gnaclerio@rmfpc.com

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## The Second Semester Begins: Outcome of High School SAT Scandal Prosecutions May Hinge Upon Privilege Issues

### by William J. McDonald


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The SAT cheating scandal in Nassau County underscores every school district's need for quality, proactive advice whenever a traditional school disciplinary matter may require referral to law enforcement. As the Nassau County District Attorney's arrests and press releases have pointed out, transgressions that may have previously been handled internally within a school now carry the potential for criminal prosecution. Because these investigations now tend to grow beyond original expectations, the value of having independent counsel perform investigations cannot be understated. Independent counsel reduces the risk of conflicts of interest and the costly litigation that can follow.

For that reason, a school district cannot rely on traditional advice and procedures that may box an investigation into the confines of compliance with the New York State Education Law. Sophisticated student schemes and aggressive law enforcement both create the real prospect of parallel proceedings, in which violations of school rules will also be investigated to see whether criminal statutes have been violated. What a school district must guard against is whether it makes promises to students who participate in the school disciplinary process. If a school subsequently refers cooperating students for criminal prosecution, it may open itself up to litigation when those students allege that the school violated confidentiality or disciplinary settlement terms.

A December 1, 2011 Newsday article details accounts from attorneys representing some of the current or former high school students charged in the criminal probe. Those attorneys claim that their clients were assured participation in the school disciplinary process would end the matter for them.

However, the Principal of Great Neck North High School, disputed this notion. He said that he does not believe the students received any assurances that their cases would not be referred to prosecutors, and since some students had already graduated and were no longer subject to school discipline, the school needed law enforcement to assist. "We are not investigators. We are not the FBI," the Principal told Newsday.

Another attorney cited by Newsday said that his client (who was subsequently criminally charged) took part in disciplinary hearings without his own attorney, and that he was told the matter would end there. As a result, this student may seek to sue the school district based upon misrepresentations and false promises. Even more, the criminal cases may feature hearings to determine whether any alleged admissions made by the students and former students during the disciplinary process should be suppressed. Since a school district attorney very likely participated

in the disciplinary hearings, the individuals who participated in the proceedings may have a basis to argue that they believed the statements they made were protected by attorney-client privilege. Depending on the circumstances, these students may even seek to sue the school district attorneys for malpractice under a theory that these attorneys failed to adequately advise them that the school district would turn over any statements they make to law enforcement. .

Experienced White Collar counsel frequently encounter these potential pitfalls in internal investigations, whether the entity is a corporation, a school district, or a not for profit agency. Therefore, school districts and other entities facing investigations that may yield parallel proceedings should consider supplementing traditional counsel with White Collar Counsel to help avoid potential conflicts and to minimize fallout that may create new litigation.

Based upon Newsday's account, it sounds as if the district counsel may not have provided what are commonly called *Upjohn* warnings, or "corporate Miranda rights." These warnings take their name from the Supreme Court case of Upjohn Company v. United States. Upjohn established the principle that communications between a company's counsel and third-party employees do not constitute a waiver of the company's attorney-client privilege.

Put another way, attorney-client privilege is normally not granted to discussions between an attorney's client and a third party. However, in the context of an internal investigation, the Supreme Court held that conversations with third-party employees of a company do not vitiate the privilege, and the company retains the right to protect the content of the communication. The holding also stresses the importance of advising the third-party employee that the privilege extends to the company alone, and it may be relinquished by the company if it so desires.

The failure to adequately advise a third-party employee that the attorney-client privilege exists between the company that hired counsel and the attorney, and not between the attorney and the third-party employee, can carry significant complications. For example, if any discussions that occurred between current or former students and school administration contain communications necessary for law enforcement to move its investigation forward, those students could seek to have the court block the school district from sharing that information. This prohibition could follow if a court finds that the circumstances under which the school disciplinary investigation took place created a reasonable belief on the part of the students that their conversations were protected by attorney-client privilege with school district counsel.

## Health Care, Pharmaceutical and Medical Device Fraud Investigations-Unprecedented Developments in Federal Prosecutions

### By Douglas M. Nadjari, Esq.

Douglas M. Nadjari, Esq.

In a recent press release, the U.S. Justice Department announced that in 2011 its health care fraud prevention and enforcement efforts recovered nearly $4.1 billion, the highest annual amount ever recovered from individuals and companies engaged in health care fraud. The unprecedented recoveries are related to stepped up efforts to form health insurance fraud strike forces throughout the country. The strike force teams use advanced data analysis techniques to identify high-billing levels in health care fraud "hot spots." In 2011, strike force operations charged 323 defendants, who allegedly collectively billed the Medicare program more than $1 billion. 199 of those charged pleaded guilty or were convicted after trial. In addition, the Justice Department announced that it had filed criminal charges against 1,430 defendants for health care fraud related crimes during 2011 as well — all record numbers. In criminal matters involving the pharmaceutical and device manufacturing industry, an additional 21 convictions (and $1.3 billion in criminal fines, forfeitures, restitution and disgorgement) were obtained. These matters included the illegal marketing of medical devices and pharmaceutical products for uses that were not approved by the Food and Drug Administration (FDA) or the distribution of products that failed to conform to the strength, purity or quality required by the FDA. In addition, according to the press release, about $2.4 billion was recovered by way of civil health care fraud cases brought under the False Claims Act. These matters included unlawful pricing by pharmaceutical manufacturers, illegal marketing of medical devices and pharmaceutical products for uses not approved by the FDA, Medicare fraud by hospitals and other institutional providers, and violations of the Stral-law and federal anti kick-back statute.

As a reflection of these stepped up efforts, in a recent alert, we discussed the Justice Department's "revival of the "Park Doctrine". In United States v. Park, the Supreme Court upheld the misdemeanor conviction of a "responsible corporate official", absent knowledge, intent (or

even criminal negligence) based on his or her position of responsibility and authority to prevent and correct violations alone. The legality of the Park Doctrine was recently upheld by the Supreme Court. Now, as an apparent response to this and other stepped up efforts to prosecute health care fraud in the medical device and pharaceutical industry, a large insurance conglomerate recently announced that it will begin selling an unprecedented form of insurance associated with liability that may arise under the doctrine. The insurance will be available to life science, pharmaceutical, and health care executives that are potential targets of such investigations. For further details about managing risk under the Park Doctrine, feel free to contact us.