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For more information,  
contact:

Adam Baker  
+1 212 556 2376  
[abaker@kslaw.com](mailto:abaker@kslaw.com)

Yelena Kotlarsky  
+1 212 556 2207  
[ykotlarsky@kslaw.com](mailto:ykotlarsky@kslaw.com)

Joe Zales  
+1 212 827 4087  
[jzales@kslaw.com](mailto:jzales@kslaw.com)

Michael Shagrin  
+1 212 827 4084  
[mshagrin@kslaw.com](mailto:mshagrin@kslaw.com)

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**King & Spalding**

New York  
1185 Avenue of the Americas  
New York, New York 10036-  
4003  
Tel: +1 212 556 2100

## Recent Developments in Coburn: Walking the Tightrope of Cooperating with DOJ while Maintaining an Independent Investigation

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In February 2022, a District of New Jersey court in *United States v. Coburn* took the surprising step of compelling a private company to produce internal investigation materials to two of its former executives, who were indicted in connection with an alleged foreign bribery scheme while at the company. The court found that the company waived privilege by selectively disclosing portions of its investigation materials to the Department of Justice (DOJ) in connection with the company's effort to self-disclose the conduct and earn cooperation credit from DOJ.

The potential ramifications of this decision did not stop there. In April 2023, the court held an extensive two-day evidentiary hearing in which the indicted former executives further argued that the government (1) directed the company's internal investigation by providing input into things like who would be interviewed and the topics to be discussed during those interviews; (2) received a detailed proffer from the company on the key findings of its investigation; and (3) ultimately failed to perform its own independent investigation, and instead relied on the company's findings to bring the indictments. Based on this, the former executives asserted that the company had acted as an arm of the government in its investigation and moved to suppress any statements they made in their interviews during company's investigation, citing *U.S. v. Garrity*. In addition, they further argued that the government's *U.S. v. Brady* obligations should extend to the company, as the company was effectively a member of the prosecution team.



While the court recently issued an order denying the defendants' motions, the case highlights significant considerations for companies and their counsel in maintaining the independence of an investigation when cooperating with DOJ.

## BACKGROUND

In 2019, the DOJ declined to prosecute Cognizant Technology Solutions Corp. (Cognizant) for potential violations of the Foreign Corrupt Practices Act (FCPA). The matter involved certain Cognizant employees authorizing a two-million-dollar bribe and other improper payments to Indian government officials to secure a planning permit for construction of an office park. DOJ's declination was based on the company's substantial cooperation—namely, its voluntary self-disclosure of the issue, thorough internal investigation, and provision of “all known relevant facts about the misconduct.”<sup>1</sup>

Despite this declination of the company, two former Cognizant executives—former president Gordon Coburn and former chief legal officer Steven Schwartz—were indicted in connection with the alleged bribery scheme. As part of their defense, the defendants subpoenaed Cognizant for documents and communications relating to Cognizant's internal investigation, including witness interview summaries that Cognizant's counsel prepared, as well as Cognizant's communications with a public relations firm and accounting firm. After Cognizant withheld these materials on the basis of attorney-client privilege and work-product doctrine, defendants moved to compel production, arguing, in part, that based on Cognizant's “detailed oral downloads” to the government, the company waived privilege as to its entire internal investigation.

The court agreed that the company's disclosures of internal investigation materials, including “detailed accounts of 42 interviews of 19 Cognizant employees” to a potential adversary (the government) while under threat of prosecution undermined the purpose of the attorney-client privilege and the work-product doctrine and waived any protection. Accordingly, Cognizant was ordered to produce witness interview summaries authored by outside counsel to the defendants, amongst other materials.

## THE SUPPRESSION HEARING

More recently, the court held a hearing in April 2023 on certain suppression motions brought by defendants, including *Garrity* motions to suppress statements they made during Cognizant's internal investigation and *Brady* motions to compel the government to search the company's files for exculpatory materials. At their core, these motions alleged the company essentially functioned as an arm of the government in conducting its investigation.

### *Garrity Motions*

In *Garrity*, the Supreme Court held that the government cannot compel statements from its employees for use in subsequent criminal proceedings by threatening termination for non-compliance.<sup>2</sup> That rule was extended to private conduct when the actions of the private employer are “fairly attributable to the government.”<sup>3</sup> Here, the defendants argued that because the interviews during the company's internal investigation were compelled, and because the company's investigation is fairly attributable to the government, the statements they made during those interviews should be suppressed, as they violate their Fifth Amendment rights.

In its recent ruling on the motions, the court rejected the defendants' argument, finding there was insufficient evidence that the actions of Cognizant during its internal investigation were “fairly attributable to the government.” Central to the court's holding was its finding that Cognizant's investigation was incentivized by “generally applicable” government policies intended to promote self-disclosure of FCPA violations, rather than specific state involvement in



the interview process.<sup>4</sup> That holding was further justified by the timing of the interviews—nearly all of the interviews at issue were conducted *prior* to the government learning of the existence of the internal investigation. Once the government was made aware of the investigation, the court found no evidence establishing that the government instructed Cognizant to ask any witness any “specific questions.”<sup>5</sup> And throughout its cooperation efforts, Cognizant continued in certain instances to assert privilege and maintain exclusive possession of certain materials.

The court also looked to Cognizant’s broader corporate existence, acknowledging that the company had myriad reasons to conduct an internal investigation separate and apart from the potential to earn cooperation credit and avoid criminal prosecution. Finally, the court found that the government did not merely rely on Cognizant’s findings and work product, but also conducted its own interviews without simply accepting the company’s “version of events.”<sup>6</sup>

These bases for denying the defendants’ motions should be instructive for how in-house counsel can guard the independence of its internal investigations, even when it seeks to cooperate with DOJ. The court also provided useful guidance in this regard, including:

- Whenever possible, pursue internal investigations under the framework of trying to benefit from *existing* government prosecution policies and priorities, rather than as a result of tailored prosecutorial inducements.
- Prevent indecision and begin conducting a genuine internal investigation in earnest prior to alerting government authorities to the potentially problematic conduct.
- Avoid affording the government the opportunities to provide specific instructions with regards to any particular witness or line of questioning.
- If there are opportunities to inoffensively ignore prosecutors’ suggestions, do so.
- Foster a scenario where there is not a substantial gap in time between alerting the government to the internal investigation and the beginning of the government’s own parallel investigation.
- Memorialize the many potential reasons to conduct an internal investigation beyond the risk of criminal prosecution (e.g., “potential securities litigation, employment litigation, [and] shareholder derivative lawsuits”).<sup>7</sup>
- Document each of the above justifications in a manner that can be produced without waiving privilege.

#### *Brady Motions*

*Brady* requires government prosecutors to disclose to defendants any exculpatory material in its actual possession.<sup>8</sup> The Risha ruling extended *Brady* to material in the government’s constructive possession. Here, the defendants argued that Cognizant performed the government’s investigation by providing them input into key decisions, including which interviews would be conducted by the company, the topics and documents discussed during those interviews, etc. In addition, by providing detailed information about its findings, the company provided the government with a “road map” for its case and the government failed to perform its own independent investigation. This, according to the defendants, made Cognizant a part of the prosecution team and therefore *Brady* disclosure obligations of exculpatory evidence extended to the company.



Ultimately, the court found that the defendants could not establish that the government had constructive possession of potentially exculpatory materials held by Cognizant. In so finding, the court relied upon the following three questions:

- 1) Was Cognizant acting on the government’s behalf?
- 2) Was Cognizant and prosecutors part of a “team” or “joint investigation” sharing resources?
- 3) Did prosecutors have “ready access” to the evidence held by Cognizant?<sup>9</sup>

The court answered each of these questions in the negative, pointing to the fact that the government conducted its own witness interviews while issuing more than two dozen grand jury subpoenas. The court also pointed to the fact that Cognizant did not hand over all responsive materials requested by the government, citing privilege. This reaffirmed its independence from prosecutors and made clear that their interests were not necessarily aligned.

**TAKEAWAY**

This recent decision in *Coburn* demonstrates the tightrope in-house and external counsel must walk: do everything you can to earn cooperation credit from DOJ while still maintaining the independence of a company’s investigation. While this can be difficult to do, the court’s recent order – as detailed above – includes some practical advice on how to appropriately strike this balance.

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<sup>1</sup> Letter from the Department of Justice, U.S. Attorney’s Office for the District of New Jersey to Counsel for Cognizant Technology Solutions Corporation (Feb. 13, 2019) <https://www.justice.gov/criminal-fraud/file/1132666/download>.

<sup>2</sup> *Garrity v. State of N.J.*, 385 U.S. 493 (1967).

<sup>3</sup> *United States v. Coburn*, et al., No. 2:19-cr-00120, 2022 WL 357217, at \*10 (D.N.J. Jul. 20, 2023).

<sup>4</sup> *Id.* at \*12.

<sup>5</sup> *Id.* at \*14.

<sup>6</sup> *Id.* at \*17.

<sup>7</sup> *Id.* at \*15.

<sup>8</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

<sup>9</sup> *Coburn* at \*18.



## Special Matters & Government Investigations Partners

Gary Adamson  
*New York*  
+1 212 556 2113  
gadamson@kslaw.com

Adam Baker  
*New York*  
+1 212 556 2376  
abaker@kslaw.com

Matthew H. Baughman  
*Atlanta*  
+1 404 572 4751  
mbaughman@kslaw.com

Amy B. Boring  
*Atlanta*  
+1 404 572 2829  
aboring@kslaw.com

Christopher C. Burris  
*Atlanta*  
+1 404 572 4708  
cburris@kslaw.com

Craig Carpenito  
*New York*  
+1 212 556 2142  
ccarpenito@kslaw.com

Steve Cave  
*Northern Virginia*  
+1 703 245 1017  
scave@kslaw.com

Michael J. Ciatti  
*Washington, DC*  
+1 202 661 7828  
mciatti@kslaw.com

Patrick M. Collins  
*Chicago*  
+1 312 764 6901  
pcollins@kslaw.com

Sumon Dantiki  
*Washington, DC*  
+1 202 626 5591  
sdantiki@kslaw.com

Ethan P. Davis  
*San Francisco*  
+1 415 318 1228  
edavis@kslaw.com

Alan R. Dial  
*Washington, DC*  
+1 202 661 7977  
adial@kslaw.com

Zachary Fardon  
*Chicago*  
+1 312 764 6960  
zfardon@kslaw.com

Ehren Halse  
*San Francisco*  
+1 415 318 1216  
ehalse@kslaw.com

Zachary J. Harmon  
*Washington, DC*  
+1 202 626 5594  
zharmon@kslaw.com

Amy Schuller Hitchcock  
*Sacramento/San Francisco*  
+1 916 321 4819  
ahitchcock@kslaw.com

John A. Horn  
*Atlanta*  
+1 404 572 2816  
jhorn@kslaw.com

Andrew C. Hruska  
*New York*  
+1 212 556 2278  
ahruska@kslaw.com

Mark A. Jensen  
*Washington, DC*  
+1 202 626 5526  
mjensen@kslaw.com

Dixie L. Johnson  
*Washington, DC*  
+1 202 626 8984  
djohnson@kslaw.com

William Johnson  
*New York*  
+1 212 556 2125  
wjohnson@kslaw.com

M. Alexander (Alec) Koch  
*Washington, DC*  
+1 202 626 8982  
akoch@kslaw.com

Yelena Kotlarsky  
*New York*  
+1 212 556 2207  
ykotlarsky@kslaw.com

Jade R. Lambert  
*Chicago*  
+1 312 764 6902  
jlambert@kslaw.com

Jamie Allyson Lang  
*Los Angeles*  
+1 213 443 4325  
jlang@kslaw.com

Raphael Larson  
*Washington, DC*  
+1 202 626 5440  
rlarson@kslaw.com

Carmen Lawrence  
*New York*  
+1 212 556 2193  
clawrence@kslaw.com

Brandt Leibe  
*Houston*  
+1 713 751 3235  
bleibe@kslaw.com

Aaron W. Lipson  
*Atlanta*  
+1 404 572 2447  
alipson@kslaw.com

Amelia Medina  
*Washington, DC*  
+1 202 626 5587  
amedina@kslaw.com

Andrew Michaelson  
*New York*  
+212 790 5358  
amichaelson@kslaw.com

Patrick Montgomery  
*Washington, DC*  
+1 202 626 5444  
pmontgomery@kslaw.com

Paul B. Murphy  
*Atlanta/Washington, DC*  
+1 404 572 4730  
pbmurphy@kslaw.com

Grant W. Nichols  
*Austin*  
+1 512 457 2006  
gnichols@kslaw.com

Alicia O'Brien  
*Washington, DC*  
+1 202 626 5548  
aobrien@kslaw.com

Patrick Otlewski  
*Chicago*  
+1 312 764 6908  
potlewski@kslaw.com



Michael R. Pauzé  
*Washington, DC*  
+1 202 626 3732  
mpauze@kslaw.com

Olivia Radin  
*New York*  
+1 212 556 2138  
oradin@kslaw.com

John C. Richter  
*Washington, DC*  
+1 202 626 5617  
jrichter@kslaw.com

Rod J. Rosenstein  
*Washington, DC*  
+1 202 626 9220  
rosenstein@kslaw.com

Daniel C. Sale  
*Washington, DC*  
+1 202 626 2900  
dsale@kslaw.com

Greg Scott  
*Sacramento/San Francisco*  
+1 916 321 4818  
msscott@kslaw.com

Richard Sharpe  
*Singapore*  
+65 6303 6079  
rsharpe@kslaw.com

Kyle Sheahen  
*New York*  
+1 212 556 2234  
ksheahen@kslaw.com

Michael Shepard  
*San Francisco*  
+1 415 318 1221  
mshepard@kslaw.com

Aaron Stephens  
*London*  
+44 20 7551 2179  
astephens@kslaw.com

Cliff Stricklin  
*Denver*  
+1 720 535 2327  
cstricklin@kslaw.com

Jean Tamalet  
*Paris*  
+33 1 7300 3987  
jtamalet@kslaw.com

Courtney D. Trombly  
*Washington, DC*  
+1 202 626 2935  
ctrombly@kslaw.com

Rick Vacura  
*Northern Virginia*  
+1 703 245 1018  
rvacura@kslaw.com

Richard Walker  
*Washington, DC*  
+1 202 626 2620  
rwalker@kslaw.com

David K. Willingham  
*Los Angeles*  
+1 213 218 4005  
dwillingham@kslaw.com

David Wulfert  
*Washington, DC*  
+1 202 626 5570  
dwulfert@kslaw.com

Sally Q. Yates  
*Atlanta/Washington, DC*  
+1 404 572 2723  
syates@kslaw.com