

Gatekeeper Liability Comes To Ireland

Law360, New York (September 7, 2011) -- Most lawyers subscribe to the maxim that if anyone has to go to jail, it should be the client and not the lawyer. As gatekeeper liability expands around the globe, however, that advice is becoming ever more difficult to follow. Ireland is the latest country to up the ante on professionals who may learn of their client's misdeeds.

Lawyers and other professionals angling to perform corporate investigations in Ireland should first consider the potential impact of Ireland's Criminal Justice Act of 2011. Under the act, it is a criminal offense to withhold from the government information that could prevent or reveal the existence of a white collar crime, e.g. theft, fraud and corruption offenses as well as company law, banking and other financial offenses.

The act was passed in summer 2011 by Ireland's government in response to the perceived public demand for action in the wake of the global financial meltdown and, more acutely, Ireland's own national financial crisis. At its core, the act is intended to increase and sharpen the tools available for Ireland's police force, the Garda Síochána, to investigate white collar crimes and bring white collar perpetrators to justice.

Some of the measures include: a new system to allow the Garda Síochána to make more effective use of detention periods; provisions aimed at reducing the delays associated with voluminous document productions to the Garda Síochána in the course of its investigations; and provisions aimed at reducing delays in such investigations arising from claims of legal privilege.

An important provision in the new law makes withholding information that could prevent or reveal the existence of a white collar crime a criminal offense. Section 19 of Part 3 of the act states:

"A person shall be guilty of an offence if he or she has information which he or she knows or believes might be of material assistance in — (a) preventing the commission by any other person of a relevant offence, or (b) securing the apprehension, prosecution or conviction of any other person for a relevant offence, and fails without reasonable excuse to disclose that information as soon as it is practicable to do so to a member of the Garda Síochána."^[1]

The law is intentionally broad and heavily weighted toward mandating disclosure. For example, information that might be of assistance in preventing or prosecuting a white collar crime presumably covers quite a bit of ground.

Attorneys, accountants and other professionals may key in on the “without reasonable excuse” clause in Section 19 and, after breathing a sigh of relief, think to themselves that this provision must exempt professionals from the act’s disclosure obligation. Not so.

Although other provisions of the act provide some protection for legally privileged documents, Section 19 affords no such protection to people with information implicating criminal liability. Indeed, Ireland’s Minister for Justice and Equality Deputy Alan Shatter — who is the act’s primary sponsor — minced no words when he remarked:

"Whether one is a lawyer or an accountant, if one discovers that a client is engaged in money-laundering, one has an obligation to report that to An Garda Síochána. It is in that area that the balance between the confidentiality of a solicitor-client or accountant-client relationship and the public good is tilted towards the public good by requiring reporting." [2]

And the penalty in Ireland for withholding information regarding a white collar crime? A stiff fine and/or up to five years in prison, depending on whether you are indicted. Accordingly, lawyers and other corporate investigators can no longer take shelter under a privilege that previously shielded them from the unenviable choice of: Turn in the client or be subject to criminal prosecution themselves.

Minister Shatter’s focus on money laundering extends a trend we have seen developing in the British Isles. In the United Kingdom, regulated professionals such as auditors, accountants and lawyers have a duty under the Proceeds of Crime Act to report suspicions of money laundering, or be subject to criminal consequences if they fail to do so. Ireland’s Criminal Justice Act is another example of the growing trend of targeting so-called “gatekeepers” of corporate information as another means to prosecute white collar crime.

Whether the Garda Síochána has the resources to utilize the new tools they are equipped with is unclear. In any event, Section 19 of the Criminal Justice Act should give lawyers and other professionals pause before jumping into the next corporate investigation in Ireland. Professionals would be well advised, as aptly noted by Senator Feargal Quinn, “to upskill immediately in this area as they will be sitting ducks for failure to comply with the professional standards of their own professional bodies, and will probably be those most at risk from prosecution under section 19 as they will have the most information.” [3]

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[1] www.attorneygeneral.ie/eAct/2011/a2211.pdf

[2] Statement of Minister for Justice and Equality Deputy Alan Shatter Before The Seanad Éireann (Senate of Ireland), July 26, 2011, <http://debates.oireachtas.ie/seanad/2011/07/26/00008.asp>

[3] Statement of Senator Feargal Quinn Before The Seanad Éireann, July 26, 2011 <http://debates.oireachtas.ie/seanad/2011/07/26/00008.asp>