**February 11, 2020 J. Edgar Murdock Inn of Court**

**Group 4 Presentation**

**Roles:**

**MC/Narrator: Kevin Dinan**

**Commentator: John Marston**

**Joseph Smith: Stu Bassin**

**IRS CI Special Agent Gunner: Starling Marshall**

**IRS CI Special Agent Cuffington: Elizabeth Kanyer**

**FBI Agent Burnham: Katie Powers**

**Attorney Dewey: Douglas Charnas**

**Attorney Cheatham: Nancy Knapp**

**Attorney Howe: Alan Levine**

**Smith’s Accountant Ms. Cruncher: Jennifer Auchterlonie**

**AUSA Panino Hamm: Bob Carney**

**GJ Witness/Smith’s Former Attorney, Geld Launder: Teresa Abney**

**Grand Jury Panel Member 1: Daniel Sosna**

**Grand Jury Panel Member 2: Samantha Souza**

**Introduction:**

**Kevin:** Our topic this week addresses administrative investigations as compared to grand jury investigations. After each of our skits, I or one of our new members, John Marston, will briefly discuss some practical points about what we saw. John is also going to introduce our first skit.

**John:** Our first set of short skits are different scenarios faced in what agents sometimes call “knock and talks.” Knock and talks are that critical moment in a case when agents have decided the time is right to approach a witness, subject, or target, without an arrest warrant, and simply knock on their door and try to get them to talk.

So, to set the scene, our potential tax criminal, Joseph Smith, has gotten advice from a recent law school graduate, who told Mr. Smith to invoke the 5th to avoid the IRS civil summons he got. While it is true CI or DOJ would never base a prosecution solely on someone invoking the 5th, they certainly could use it as a basis for a criminal referral or opening a GJ investigation.

**Kevin:** After Smith invoked, IRS CI got involved. Eventually, CI agents put together some of the highlights of their case in a binder, and they go out to confront Smith…at his house…at 6 a.m. We are going to show two short versions of this interaction, with differences on both the government side and Smith’s side.

**Skit 1A, Clearly an Admin Investigation; Confession by Smith:**

[Two IRS CI agents walk up to center front of room, pretend to knock. Knocking sound made by member of our team in front row. Smith walks up and pretends to open door.]

**SA Gunner:** Good morning, are you Joseph Smith?

**Smith:** Uh, yeah?

**SA Gunner:** Hey, Mr. Smith, sorry to bother you this early, I am Special Agent Gunner, and this is Special Agent Cuffington, and we are with the IRS and we just wanted to chat with you a few minutes.

**Smith:** No, I don’t have time unfortunately.

**SA Gunner:** Well it won’t take long, we have just been looking at a couple things on your tax return and wondered if you could just explain them to us and then we’ll get out of your hair. Not a big deal.

**Smith:** Well, I have to go to work soon, so…

**SA Gunner:** Well look, we don’t want to bother you, but even if you have 15 minutes that would help. We’re just confused about a couple things, and I think you can probably clear this all up for us quickly and then we’ll be on our way. You mind if we come in?

**Smith:** Well, ok. [Agents and Smith sit at a table.]

**Kevin:** 30 minutes later…

**SA Gunner:** [SA Cuffington is feverishly writing on a notepad.] So I’m not here to judge, Mr. Smith, that’s not my job. But just so I’m clear, let’s just recap: The logo for Sip and Sing was just one you found on the internet and you never owned it or actually transferred it to anyone?

**Smith:** [Head down, dejected.] Yes, that’s right.

**SA Gunner:** And your UK business in Leeds doesn’t own it?

**Smith:** Yes, that’s right.

**SA Gunner:** And you had Sip and Sing pay royalties for that logo, but you know, they weren’t really something Sip and Sing actually owed?

**Smith:** That’s right.

**SA Gunner:** Ok, and I think you said you just made up the amount of the royalties anyway, they weren’t really what you thought the logo was worth?

**Smith:** Yeah, that’s right. Oh, and I think I forgot to mention what I used the royalty money for, should we go over that?

**SA Gunner:** [Playing it cool/nonchalantly.] Well, I don’t know, what you do think Cuffington? [Cuffington shrugs and nods at same time.] Why don’t we, just so we have it down….

**Skit 1B, Almost Certainly a GJ Investigation; Smith Lies But Then Confesses.**

**Kevin:** That’s the end of our first run through. Now we will go through a second version of this at-home confrontation. We’ll skip past the knock on the door, and Smith has invited the agents in and agreed to talk to them, but now we have our 2 IRS CI agents Gunner and Cuffington and also an FBI agent, Burnham.

**SA Gunner:** Thanks for agreeing to talk with us. We just had a few questions because we got some information from tax returns for Sip and Sing and we were having a hard time making sense of it. Do you own Sip and Sing?

**Smith:** Yeah.

**SA Gunner:** Ok, well, I guess we will start with the royalty payments that you reported. What were those for?

**Smith:** Well, you know, our brand is a critical. We came up with the perfect logo, but it we thought it should be owned in a more globally-centered place, so we wound up, for business reasons, having the logo owned by our design company in Ireland, and we pay royalties for it.

**SA Gunner:** Ok, I think I might have seen your logo on Sip and Sing’s website. It looks pretty cool.

**Smith:** Yeah, yeah, it’s a guy singing and his microphone is a wine glass. Very unique. Totally one of a kind.

**SA Gunner:** Right, I’m glad you said that. Never seen this logo anywhere else in the world, am I right?

**Smith:** No, totally one of a kind.

**SA Gunner:** So who is it that owns the logo?

**Smith:** Well, you see, what happened was, a friend in Ireland told me there’s so much Karaoke there and in Europe and Asia, that having your IP there really centralizes ownership in a strategic area. So we’ve made great use of our logos by having them in our company over there, but to use them here, I have to, you know, pay royalties. Just to keep it 100 with you, I wish I could have just used it for free or even bought it, but, you know, my lawyer said I have to royalties.

**SA Gunner:** So who runs your company over there?

**Smith:** Yeah, you know, we’re sort of between people.

**SA Gunner:** When you paid these royalties, you know, who’d you pay? How’d you do it?

**Smith:** You know what, I’ll just be 100% honest, it went to some kind of account that belongs to the design firm, but I wasn’t really in charge of that day to day type of stuff, so I don’t know for sure.

**SA Gunner:** Look, I agree with you, let’s keep it 100.

**Smith:** Ok.

**SA Gunner:** Burnham here is kind of a wiz with online image searches, and he also has some friends that work with him on things in Ireland.

**Smith:** [Starting to look panicky.] Uh, sure, ok.

**SA Gunner:** Yeah, Burnham, can you give me that folder you were showing me yesterday? Right, this one. See, here’s your same logo, exact same colors and everything, at a pub in Australia. Ever heard of that?

**Smith:** You know what, I think I heard maybe our last designer was doing a deal with someone in Australia.

**SA Gunner:** Oh, so, if we call this pub, they’ll be able to explain they use this logo and pay royalties to the Irish firm?

**Smith:** They should yeah, or else we’re getting ripped off I guess. That’s always possible.

**SA Gunner:** Well, see, Cuffington called down there the other day, and they said they made that logo and have been using it for 25 years.

**Smith:** Oh, really? Well, they could be lying.

**SA Gunner:** Well, here’s another thing, we checked on those royalty payments you have been making, and look at these bank records [showing documents]. Yeah, see, you are the person on the accounts where the money goes.

**Smith:** They must have stolen my identity!

**SA Gunner:** Well, you know, here’s the withdrawal details from those accounts. Here’s one ATM withdrawal from last month, from right here in DC.

**Smith:** News to me.

**SA Gunner:** Well, before you say that, here’s the photo from the ATM during the withdrawal. You see, that’s you right there. And you can see you’re on your phone. Cuffington here got some information the other day showing where your cell phone was located at exactly that time. And you know what it showed?

**Smith:** [Looking more and more defeated as Gunner is talking, then takes a deep breath and starts to confess.] Ok, let me tell you what’s going on. I thought I could save my business by just coming up with a plan to pay less taxes. Everyone’s doing it…

**John:** To help a client who has had this happen, you really have to read the signals sent by the government and have a frank discussion with the client from his/her perspective. In an administrative investigation, IRS is by itself, other agencies/DOJ not involved, can do things to really help minimize problems, prepare a defense. Prosecutors tell agents no all the time, so if they’re not in yet, you might have an exit ramp that doesn’t involve a conviction. In a GJ scenario, there’s multi-layered government buy-in, very likely FBI or others can and will get involved, DOJ is necessarily involved, and you’re much closer to charges.

Need to think about both sides of interaction:

* Government side.
  + This moment arrives in nearly all crim tax cases. IRM instructs agents to do it.
  + It is planned/orchestrated/intentional. Can be small one-on-ones, or can be wider-ranging takedown. Multiple agencies/agents, target or subject letters (explain), search warrants, arrest warrants, that’s clearly a GJ case with DOJ backing it. 2 CI agents without any nasty-grams from DOJ, that’s an admin investigation.
  + Agents want confession as evidence, but also to sell the case to the prosecutors, they might actually have to have a confession.
* Client/defense side.
  + On the other side, silence is golden. Best = respectfully decline, ask for lawyer. Worse case is Skit 2, lie, then confess; lies make it much harder to attack willfulness/intent.
  + Had a client approached in airport who had some tax and, unfortunately, other problems too. Just questioned. No subject letter, no target letter. No warrants. Was prepared to shut up. Simply by keeping his mouth shut, agents walked away empty-handed, and after dealing with this, he was not charged. Need to advise client to keep silent, even among friends and family. Personally have orchestrated attempts to elicit confessions by recorded conversations with the subject’s friends, colleagues, family members, undercover agents, etc.
* Some things to ask the client:
  + How many agents showed up?  Which one was doing the questioning?  Did they give you anything – letter, subpoena – and if so, what did it say?  Did they tell you you’re a witness, subject, or target (explain differences)?  What did they tell you this was about?  Did they show you any documents?  What questions did they ask?  But most important of all, what did you say, and have you been talking about this with anyone else recently?

**Skit 2: Grand Jury Subpoena Arrives, What Do We Do?**

**Kevin:** Our next skit deals with GJ subpoenas. Imagine a flurry of GJ subpoenas has just gone out, including to Sip and Sing and the accountant. Smith and his accountant, Ms. Cruncher, get together, and decide they need some legal help. They show up at the law firm of Dewey, Cheatham and Howe, and beg for an immediate consultation. [Smith, Cruncher, and the lawyers are all seated around a table. Dewey is meek but upbeat. Cheatham is a wild-eyed crazy lawyer. And Howe is calm voice of reason.]

**Smith:** … So like I was saying, me and my accountant here have a real problem. These dirtball agents who came to my house gave me this letter that says they’re after me, but I’m innocent! Then I got this subpoena down at my business, Sip and Sing. They basically want all of Sip and Sing’s records. All of them!

**Cruncher:** Yeah, I got a subpoena that says I have to show up at the grand jury in two weeks with every shred of paper I have about Mr. Smith and his businesses. Even emails! We want to hire you guys to help us. We’ll each give you a $25,000 retainer.

**Dewey:** You both want to hire us…together? I’m not really sure we can do that?

**Cheatham:** Uh, why don’t you two leave us for a moment. We have some things to talk about. But leave us these subpoenas. [Smith and Cruncher step away from table.] Listen, Dewey, you know we only have one real rule in this firm. If someone offers a retainer, we take it! We can represent them both – we represent multiple parties and witnesses in civil cases all the time. Come on, it’ll be great!

**Dewey:** Oh, right, ok.

**Howe:** Listen, I was actually paying attention to what those two said. Obviously a grand jury is investigating this, which is not a great starting point. Did you hear Smith say agents came to his house and gave him a letter that says they’re after him?

**Cheatham:** Yeah, so what?

**Howe:** Well, very likely a DOJ lawyer is sitting and thinking right now about how Smith is guilty of crimes. Odds are Smith is getting charged with crimes here.

**Cheatham:** Great, then there’ll be even more work.

**Howe:** It isn’t that simple. First of all, if we take him on as a client, and he gets indicted, we are not easily getting out of this case even if he stops paying us. I’m not doing a lengthy criminal case for that retainer. And how about the conflicts?

**Dewey:** Uh, what conflicts, can’t we just, you know, get waivers from everybody?

**Howe:** Even with waivers, I don’t know how we can do this. What if Cruncher is called as a witness against Smith. We can’t maintain her confidences and cross-examine her at the same time, can we?

**Cheatham:** We’ll cross that bridge later. That’s a trial problem. These cases never go to trial.

**Howe:**  Well, how about these subpoenas now. How can we evaluate whether the business has a 5th in responding to this subpoena, and if it does, whether it should invoke it? I mean, it’s true that corporations have no 5th Amendment rights, but I’ve also heard of a single-owner entity that had no real separate identity from the individual that invoked and successfully resisted a subpoena. Or how about this: What if before trial we learn Cruncher is implicated, and she gets a great cooperation offer? Are we supposed to help her plead, then walk into Smith’s trial and cross examine her about bias based on the plea we helped her get? Look, I just don’t see how we can do this. I say we agree to represent Cruncher, only as a witness, and we specify if she’s indicted, we’ll need more money or we’re out.

**Cheatham:** I don’t like it. But I’m just looking at Cruncher’s subpoena. It’s so broad it isn’t even funny. I say we write up the longest, most repetitive, redundant, duplicative, superfluous Rule 45 objection letter we’ve ever done. Maybe we’ll just get to 50K with one client!

**Howe:** Cheatham, Rule 45 is a rule of civil procedure. It doesn’t apply here. You can’t just lob in a bunch of objections and give over a handful of things that you claim were what you found in a “reasonable search.”

**Cheatham:** Why not?

**Howe:** I mean, first of all, if the prosecutor and agents think we’re playing games on behalf of Cruncher, you know what they might just do? Get a search warrant! I guarantee Cruncher does not want the feds rifling through all of her files and making a mess. And that would be about the best outcome. Worst case, we and Cruncher all get charged with obstruction!

**Dewey:** Well, what do we do then?

**Howe:** We can take Cruncher’s case and call the prosecutor and ask what it is they really want. Maybe we can work on the scope of this thing by talking to them. But I think we should gather everything and review it carefully, and plan to just turn it over unless there’s a privilege or we find out Cruncher is culpable in some way. Hopefully we can make a production and keep Cruncher out of this grand jury.

**John:** 1) Conflicts/joint representation of witnesses/subjects in a criminal case heading towards real prosecution is not advisable/sustainable. 2) The typical way of handling subpoenas (esp. third-party subpoenas) in civil litigation does not apply.  That doesn’t mean you can’t do some lawyering though, by communicating with the prosecutor and getting a sense of what’s going on, and managing response timing/scope.  3) Try to keep your witnesses out of GJ if possible – usually the government thinks this same way.  Exceptions: loose cannons, potentially biased witnesses, certain cooperators.

**Skit 3: Mock GJ Session with Smith’s Former Lawyer.**

**Kevin:** So now we will move to our final skit. The only people who see the goings on in a GJ are jurors, witnesses, and prosecutors.  Even judges and defense attorneys don’t get to go inside.  Here’s our chance, though, to be part of a GJ session and see how it goes.

**John:** And we’re going to skip some introductory stuff that happens at the start of every GJ witness’ testimony. The main thing is going over the rights of the witness, which are: 1) to know what’s under investigation, and the prosecutor will say what it is; 2) the right not to answer a Q if telling the truth would tend to incriminate the witness; 3) the right to know the reporter is taking down their testimony, and anything they say can be used against them by the GJ or in another legal proceeding; 4) the right to an attorney, paid or appointed, who can’t come in, but can wait outside for questions if they arise. Some just state the rights and ask if the witness understands. Some will ask the witness to waive the rights and testify. Why waive? Prosecution likes it because it helps avoid claiming the rights down the road; witness agrees because otherwise the process gets longer and can result in motions to compel. It helps to prepare clients on this point because it isn’t really intuitive. Anyway, we pick back up with the skit.

**AUSA Hamm:** I’m AUSA Panino Hamm. I’m here on your case 73, In re: Possible Violation of 26 USC 7201. We have one final witness to present to you, and that’s Mr./Ms. Launder, who had been an attorney for Mr. Smith. You might wonder if Mr./Ms. Launder can or should testify given that the attorney-client privilege protects his/her communications with Mr. Smith. I want you to know we have addressed that issue at length separately from this Grand Jury proceeding, and Launder is able and ready to answer questions here today. Unless you have any questions, I will bring in Mr. Launder?

[Launder walks in and sits down.]

**Hamm:** Tell us about the kinds of services you provided to Mr. Smith and Sip and Sing.

**Launder:** It was all related to Mr. Smith’s business, which is running Karaoke bars in DC. He originally came to me to help him structure some of the arrangements of the business, and to review contracts, leases, insurance policies, general business advice like that.

**Hamm:** At any point were you aware that Mr. Smith’s business arrangements might have violated the law?

**Launder:** No.

**Hamm:** Did you help Mr. Smith with his taxes?

**Launder:** No, his only tax need was return preparation. I have always said, there’s two things I don’t do: tax returns and toilets. Mr. Smith had an accountant for his tax needs, so I didn’t get involved in it.

**Hamm:** At some point though, did Mr. Smith ask you for help with some intellectual property and royalties payments?

**Launder:** Yes. He came to me and said he needed an agreement that transferred some intellectual property, mainly brand or logo type stuff, to a foreign company. He gave me all of the details, like what he wanted to accomplish, and I wrote up an agreement.

**Hamm:** Did you have any knowledge of who the party was that would receive the royalties?

**Launder:** No, it seemed a little strange, but Mr. Smith just asked me for sort of a form document, with certain items left blank for him to fill in. Parties and dollar amounts were the main things left blank.

**Hamm:** Did you ever learn what became of this agreement?

**Launder:** Well, yes, at some point, I asked him if he ever finalized it, and he said, “Yes.” And I told him I usually like to keep copies of finalized contracts in my files, and I said I would like to see it. He told me, flat out, “No.”

**Hamm:** What was your reaction to that?

**Launder:** Well I asked again, and explained why it was helpful for me to know what’s going on with his business, so I can provide effective advice, and that I was not going to bill him to review the final document, I just wanted to have it in case it became relevant to my work for him.

**Hamm:** What was Mr. Smith’s reaction?

**Launder:** You know, the more I pressed, the more he resisted. Eventually, he became irate with me and threatened to fire me. He had already told me the contract was finalized and signed, but then he said maybe it hadn’t been. I said to him, look, I’m going to withdraw from representing you, I’m just not comfortable with how this is going.

**Hamm:** Did you do that?

**Launder:** Well, I was going to, but then he came in one day with a significant payment to retain me for future work, and he begged me to keep helping him. He had a copy of the contract, which he gave me. I glanced at it, and it all looked totally fine.

**Hamm:** Showing you what’s marked as GJ Exhibit Launder-1. Do you recognize this?

**Launder:** This is the contract he gave me that day. It was in my files, it has the language I wrote, and the parties, dollar amounts, and signatures filled in presumably by Mr. Smith.

**Hamm:** Showing you now what’s marked as GJ Exhibit Launder-2. Do you recognize this?

**Launder:** Well, I saw it before when I was talking to you. I had never seen this before you showed it to me. But it looks just like the same contract I drafted, and it has the same parties and what looks like the same signatures, but it has significantly different dollar amounts in it.

**Hamm:** Did Mr. Smith ever show you this or talk to you about it?

**Launder:** No. I never saw it, and I have no idea where it came from. And he never talked to me about royalty payments like this. I would have expected royalty payments in a deal like this to be much more like the ones he gave me in the final version I saved in my files.

**Hamm:** And that version, the one you call the final version you saved in your files, is GJ Exhibit Launder-1?

**Launder:** Yes, that’s right.

**Hamm:** One final thing. This IP/royalty contract work you did, when was that?

**Launder:** It was in 2010 and 2011. I don’t remember exact dates, but we worked on the contract in 2010, and then we had our little dispute over giving me the final version, which resolved by him giving it to me in 2011.

**Hamm:** I have no further questions sir. Does anyone in the grand jury have questions for Mr. Launder?

**GJ Member 1:** [Raises hand. Hamm points and calls on GJ Member 1.] You said you did other contracts and leases for Mr. Smith. Did you ever notice anything peculiar about those?

**Launder:** Not particularly. He seemed like a sort of small business owner who was just doing what was needed to build up his business and keep it going. Nothing really stood out. And even on this contract, other than his temporary refusal to give me a copy, nothing really stood out to me. I just thought it was business as usual.

**GJ Member 2:** [Raises hand. Hamm points and calls on GJ Member 2.] Do you still represent Mr. Smith?

**Launder:** I do not.

**GJ Member 2:** Why not?

**Hamm:** So, I’m just going to stop on that one. I think we are wading into a territory that is not particularly relevant to our consideration of this case. I can understand wanting to know that, but in this particular case, I don’t think it is something we need to get into.

**GJ Member 3:** [Raises hand. Hamm points and calls on GJ Member 3.] So, you’re a lawyer, do you know anything about tax fraud? I mean, do you think Smith is guilty of it?

**Hamm:** Ok, we don’t need to get into his opinions, if he even has any, on this case or the investigation. But you know, I could ask you sir, are you aware of the details of this investigation, and are you representing Mr. Smith in this investigation?

**Launder:** I am not aware of details at all, and I do not represent Mr. Smith in this proceeding or in any other capacity at this time.

**Hamm:** Ok, and last, how would you say you have been treated by me and the members of law enforcement you have met in this case, fairly or unfairly?

**Launder:** Fairly.

**Hamm:** Thank you, you may be excused.

**John:** Just a couple points: The prosecutor is playing the role of GJ advisor/legal counsel. In that sense, he or she is really the judge, at times the defense, and of course the prosecution. While people say you can indict a ham sandwich, it does take some careful planning and patience to get the job done. You might have heard some objectionable testimony as we went, but hearsay or other inadmissible things can come before the GJ. Even inadmissible opinions. On the other hand, irrelevant or potentially inappropriate commentary should be kept out, and it is up to the prosecutor to do that. Every GJ panel is made up of 23 citizens, it takes 16 for a quorum, and 12 must vote in favor of charges for them to be indicted. They sit in windowless classroom like rooms, and here in DC, it is on the 3d floor of the annex side of the court house. This short session we just watched, we saw something that is a bit of a rarity, which was a lawyer being called to testify in a case involving his/her client.

Are there any questions on tonight’s presentation?

Otherwise, that concludes our session. Thanks very much.