WHITE COLLAR CRIMINAL LAW FOR THE CIVIL PRACTITIONER: A FIRST AID KIT

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I. INTRODUCTION.

For decades it has been common for attorneys representing business clients to stop thinking about criminal law as soon as they leave law school. Of necessity, however, transactional attorneys and civil litigators are now having to revisit the criminal law and learn a whole new world of criminal statutes that either did not exist or were not rigorously enforced when they were in law school. Increasingly, our economy is regulated through criminal, as well as civil, sanctions. In areas as diverse as health care, the environment, banking, food safety, securities, bankruptcy, and antitrust, businesses and their officers and employees are finding themselves to be targets of federal white collar criminal investigations. In this environment it is essential for the attorney representing business clients to have a basic understanding of how white collar criminal investigations work and how a business and its employees should respond to one.

II. HOW THE TYPICAL WHITE COLLAR INVESTIGATION OPERATES.

Extensive white collar investigations tend mostly to be the province of the federal government rather than state prosecutors. Federal prosecutors have some fairly strict rules and procedures they must follow in pursuing criminal investigations. While the types of investigations and the procedures followed in them can vary widely, here are some typical features of white collar investigations.

A. Stages of the Investigation.

1. Document Gathering Stage.

The prosecutors and investigating law enforcement agents will gather documents and tangible evidence relevant to the investigation. At this point a grand jury has usually been convened, and that grand jury issues subpoenas for documents the prosecutor and the agents want. Increasingly in recent years, however, the federal government has used search warrants as well as subpoenas as a method for obtaining documents and tangible evidence in white collar cases.

2. The Interview Stage.

After documents and other evidence have been obtained, analyzed, and digested by the government, the government will seek to interview relevant witnesses. Where possible, those interviews will occur informally at first in interviews conducted by law enforcement agents. The interview stage will also include, however, the calling of witnesses before the grand jury. At this stage witnesses may be offered immunity in order to secure their testimony in the face of Fifth Amendment objections.

3. Exceptions.

Don't assume that the government's document gathering activities mean that the government is not yet talking to witnesses. It may be that an inside source, such as a disgruntled employee, is giving the government intelligence on what it should be looking for. It is also possible that the government may have a person inside the company wearing a "wire" or is otherwise using electronic surveillance to obtain emails and recordings of oral conversations.

B. How the Company Learns It Is Being Investigated.

1. The company receives a subpoena duces tecum from a grand jury.

2. Employees relay to the company that they are being approached by law enforcement agents.

3. A search warrant is executed at the company's premises.

4. The government simply says so. In some cases U.S. Department of Justice procedures call for advising targets of grand jury investigations by letter that they are in fact targets.

5. A company should also be on the lookout for events that might trigger a criminal investigation. For example, a spill of some environmental pollutant that attracts significant media attention may trigger a criminal investigation. In the wake of a significant adverse event that attracts public attention, the company should consider the possibility that it will be investigated.

C. Categories of Persons and Entities Being Investigated.

U.S. Department of Justice rules effectively divide persons and entities involved in criminal investigations into three categories. Prosecutors will often tell those parties, or their attorneys, how they are categorized. The categorization is not permanent, however. Upon discovery of additional information, the government may change its view of a person or entity. The categories are as follows:

1. Targets. A target is someone for whom the government has substantial evidence showing that he committed a criminal offense and whom the government considers a putative defendant for that offense.

2. Subjects. Subjects lie somewhere in the middle. The government does not view the individuals as targets, but their conduct is within the scope of the grand jury's investigation. They may become targets if sufficient information develops.

3. Witnesses. Witnesses are defined as persons the government considers as neither targets or subjects. Witnesses are generally not prosecuted, even if the government has reason to believe they may have been involved in criminal activity.

III. THE CARDINAL RULE IN RESPONDING TO A WHITE COLLAR INVESTIGATION: DO NOT OBSTRUCT JUSTICE.

In responding to a white collar criminal investigation, counsel should be well aware, for purposes of self-protection as well as protection of his or her clients, of the various federal statutes relating to obstruction of justice. The broadest obstruction of justice statute provides in pertinent part as follows:

> Whoever . . . corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). [Subsection (b) provides a maximum sentence of ten years imprisonment for all but violent offenses.]

18 U.S.C. §1503(a).

Another statute deals more particularly with attempts to influence witness testimony:

> Whoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to --
>
> (1) influence, delay, or prevent the testimony of any person in an official proceeding;
>
> (2) cause or induce any person to --
>
> (A) withhold testimony, or withhold a record, document, or other object, from an official proceeding;
>
> (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or

(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both.

18 U.S.C. §1512(b).

Among the federal obstruction of justice statutes there are also sections applying to particular types of investigations. See, e.g., 18 U.S.C. §1516 (obstruction of a federal audit) and 18 U.S.C. §1517 (obstructing examination of a financial institution). Another example is 18 U.S.C. §1510(b), which makes it a crime for an officer of a financial institution "with the intent to obstruct a judicial proceeding" to directly or indirectly notify any other person about the existence or contents of a subpoena for the records of that financial institution.

IV. OBTAIN COUNSEL FOR PARTIES WHO NEED IT.

A. In-House vs. Outside Counsel.

The first decision to be made is whether the business or any of its officers or employees should be represented by the company's in-house counsel if it has one. Usually the safer course of action is for outside counsel to conduct all of the criminal representation. In addition to outside counsel having more experience with criminal matters, there are several considerations that argue in favor of the use of outside counsel:

1. In-house counsel may have had some involvement, however slight, with the transaction or event giving rise to the investigation. In-house counsel may therefore have a conflict as a witness in the case.

2. Outside counsel may better cement the attorney-client privilege and work product protection for materials generated during the company's response to the investigation.

    a) Because in-house counsel often serves multiple roles in a corporation, and it may not always be clear when in-house counsel is rendering legal advice as opposed to performing

some other function, the attorney-client relationship is more clear for outside counsel and easier to defend.

b) In order to further buttress claims of privilege regarding materials generated in response to the investigation, the company should formally document its request to outside counsel for legal advice regarding the pending investigation. This should be done with, at minimum, a letter to outside counsel. A corporate resolution may provide further support.

3. Outside counsel has the ability to be more objective. Outside attorneys who are not so beholden to the company will be better able to level with the company's high executives regarding the exposure of the company or its executives to criminal liability. In-house counsel may have more difficulty telling a CEO that he or she faces criminal liability. In addition, outside counsel may have more credibility with the prosecutor by having a more objective and distant relationship with the corporation.

B. Who All Needs Counsel?

All targets and subjects in a criminal investigation should be separately represented, since they may have adverse interests with one another. In particular, the company may have interests adverse to its officers or employees. This is particularly the case where there is a dispute about whether the corporation is criminally liable for the actions of an individual officer or employee.

For persons who are purely witnesses, there may be no conflict with the company's attorneys representing them in the investigation. There may be some advantages to having witnesses represented separately from the corporation, however, since separate counsel for the witnesses will diminish the government's perception that the company's attorneys are trying to influence the testimony of those witnesses. That may make the difference between the government interviewing those witnesses informally, with their attorney in the room, or subpoenaing those witnesses before the grand jury so that no lawyer is present for the questioning. As long as they are not targets or subjects, there is no conflict in one attorney representing multiple witnesses, and that can provide a cost savings.

C. Joint Defense Agreement.

Notwithstanding separate representation of the various parties in the investigation, those parties can share information among each other without waiving the attorney-client privilege and work product protection, so long as they enter into a joint defense agreement requiring them to preserve and protect the privilege for information they receive from the other parties. Such an agreement

can pose problems, however, if one party, particularly the company, decides later on that making a selective disclosure of information to the government is in its best interest.

D. Can the Company Pay for the Attorneys Representing the Officers and Employees of the Company?

This question is controlled by the company's articles of incorporation and bylaws as well as by the general corporation statute in the applicable state. In Iowa, the applicable statute is Iowa Code §§490.850-.859. Because it is often the case that counsel cannot be paid for by the company if it turns out that the represented person is guilty of criminal wrongdoing, a common solution is to have the corporation advance the funds to the represented individual pursuant to a written agreement calling for reimbursement of the funds to the business in the event the individual is found to have committed criminal wrongdoing. See, e.g., Iowa Code §490.853.

E. Appointed Counsel.

For employees who cannot otherwise pay for defense counsel, counsel may be appointed for them by the court if they are targets or subjects of the investigation. Where the individual faces a legitimate threat of prosecution and is sought to be interviewed by government agents, appointment of counsel does not require a pending criminal charge.

V. PERFORM AN INTERNAL INVESTIGATION.

In almost every case where a white collar criminal investigation comes to light, it is in the company's best interests to conduct an immediate and thorough investigation of the facts relating to the government's investigation. For the reasons regarding privilege described above, that investigation should be performed by outside counsel.

A. Benefits of the Investigation.

1. An internal investigation will allow the business and individuals within it to evaluate its potential criminal liability.

2. The investigation will hopefully give the company and/or its employees facts that will enable them to help persuade the government not to bring a criminal charge or to bring a less serious criminal charge.

3. An intensive factual investigation will give defense lawyers credibility with the prosecutor because those lawyers will be armed with specific and verifiable facts. Defense lawyers can accomplish much more in terms of negotiation and persuasion if the prosecutor comes to trust their factual representations.

4. The investigation will permit the building of a defense if things turn sour and an indictment is returned.

B. How to Perform the Investigation.

The company's attorneys should perform the investigation essentially in the same manner the government does. That is, they should gather all of the relevant documents and tangible evidence, analyze those things, and then interview all of the relevant employees and witnesses. Time is of the essence, however. How witnesses recall and describe events is often influenced by who gets to those witnesses first. The company's goal should be to interview the relevant witnesses before the government does, even if this means making some shortcuts in the document collection and analysis stage of its investigation. Time is also of the essence where there is the possibility that a search warrant might be executed at the company's premises. The search can remove pertinent documents and electronic devices from the company's premises, and the company may then have no or limited access to those documents or devices until the criminal discovery process much later in the case.

C. Tips Regarding Witness Interviews.

1. Have a second person present in the interview to take notes and document what is said in the interview. This could become important later if there are allegations that something improper was said to the witness. Make sure that the notetaker is also covered by the attorney-client privilege.

2. Prepare a memorandum following the interview regarding the substance of the witnesses' statements and any advice given to the witness regarding rights or privileges.

3. When interviewing corporate employees or agents, explain the attorney-client privilege to them. If you are acting as the company's attorney, explain that what they are saying is attorney-client privileged material, but the privilege belongs to the company, not to them. The company may decide to waive the privilege at some future date. Make sure they understand that you are not acting as their personal attorney.

VI. RESPONDING TO THE GOVERNMENT'S COLLECTION OF DOCUMENTS AND TANGIBLE THINGS.

A. Preservation.

Preserve all relevant documents once you learn of an investigation. Do this before you receive a subpoena or a search warrant is executed. Once the company or its employees learn of the existence of an investigation, it could constitute an obstruction of justice to destroy documents or tangible

evidence relevant to that investigation even before a subpoena has been served. The company should document its efforts to preserve relevant documents by sending memoranda to all relevant employees instructing them not to alter or destroy documents or evidence relevant to the subjects in question.

B. Search Warrants.

1. Commercial premises such as offices, factories, or warehouses are protected areas under the Fourth Amendment, Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S. Ct. 1816 (1978); Mancusi v. DeForte, 392 U.S. 364, 88 S. Ct. 2120 (1968), but only to the extent that they are not open to the general public. United States v. Berrett, 513 F.2d 154 (1st Cir. 1975). See also, LaFave, Search & Seizure, §3.2(e). As a result, government agents cannot enter those areas to search for evidence without a search warrant.

2. What to do when a search warrant is being executed.

a) Have counsel come to the scene immediately to review the warrant and monitor the execution of the warrant.

b) Review the warrant to find out what the government agents are entitled to search for and where they are entitled to search for it. Then have individuals from the company monitor, without obstructing the search, the agents' compliance with the warrant.

c) Have company make an inventory of what the government agents take with them, as the search proceeds if possible. The agents will prepare and leave an inventory of their own, but the company's own inventory will make far more sense than the government's, since the company employees will have a much better understanding of what it is the agents are taking.

d) If the government makes forensic copies of electronic devices, collect those devices as quickly as possible, and get the company's own forensic images of them.

C. Subpoenas.

Once a subpoena is received, consult experienced counsel regarding compliance with the subpoena. In limited circumstances, the subpoena may be subject to Fifth Amendment objections if it requires disclosures of documents that amount to testimony by the person disclosing them. See United States v. Doe, 465 U.S. 605, 104 S. Ct. 1237 (1984); In re Grand Jury Subpoena (Spano), 21 F.3d 226 (8th Cir. 1994). The subpoena may

also be subject to challenge for unreasonableness or overbreadth. See Fed. R. Crim. P. 17(c).

VII. RESPONDING TO GOVERNMENT WITNESS INTERVIEWS AND GRAND JURY SUBPOENAS FOR TESTIMONY.

A. A corporation has no Fifth Amendment right against self-incrimination. Bellis v. United States, 417 U.S. 85, 94 S. Ct. 2179 (1974). Only individuals have a Fifth Amendment right against self-incrimination.

B. Invoking Fifth Amendment Protections.

An attorney representing an individual should determine whether that individual should speak to government agents or assert his Fifth Amendment right against self-incrimination.

1. Although the facts are different in every case, in general an attorney should be reluctant to permit a client to speak with government agents, or testify in front of the grand jury, if that individual is a target or subject of the investigation or if that individual's status is not known. The prosecutor may be willing to discuss the individual's status with the attorney, however.

2. It is often the case that the government will give immunity, either a formal statutory grant of immunity or a letter agreement, in order to overcome Fifth Amendment objections to speaking with the government. If there is uncertainty as to the client's possible criminal exposure, the attorney should probably hold out for an immunity arrangement before agreeing to let that client converse with the government. There are different types of immunity agreements, however, with varying levels of protection. This is territory for experienced criminal counsel.

C. Ex parte Contacts.

Don't assume that just because a person is a business employee that the government will not approach that person without counsel present.

D. Preparing a Witness for Testimony.

If an attorney is representing a company and is preparing an officer or employee for grand jury testimony or an interview by the government, the attorney should explain carefully the person's rights and responsibilities. This explanation should be accompanied by a written memorandum given to the employee explaining the employee's rights and privileges. The memorandum ensures that there is no misunderstanding about the advice given to the employee and no attempt to obstruct justice. The memorandum should contain the following items:

1. Inform the employee that the government is investigating the company and may try to interview the employee as part of that investigation.

2. The employee has the right to speak with government agents but is not required to do so.

3. The employee has the right to consult with his or her own attorney before any interview and have that attorney present during any interview.

4. [where applicable] The company has arranged for an attorney to represent employees who wish to take advantage of that service, but the employee must decide on his or her own whether to utilize the attorney.

5. The employee must provide truthful answers to all questions at any interview or grand jury testimony.

E. Immediately after any interview or grand jury testimony, the witness should be thoroughly debriefed as to what the government's questions were and what answers the employee gave. This will help the company track the investigation and anticipate where the government is going with it.

VIII. MAKE THE COMPANY'S CASE BEFORE CHARGES ARE FILED.

A. Get to the Prosecutor Early.

Once the prosecution makes a commitment to a particular charge, it is extremely difficult to change the government's mind about that charge. The return of an indictment can create a public commitment to the case and inertia toward a trial that is difficult to stop. Accordingly, any attempt to dissuade the government from bringing the company or individuals to trial must be made prior to a commitment by the government to prosecute.

B. Argue for No Criminal Action.

In all but the worst cases, an attempt should be made to convince the government not to bring a criminal action at all. In many ways, the very fact of an indictment is a defeat for the business defendant. It seriously damages the company's image, it undermines employee morale, and it can be expensive to defend. The best outcome, therefore, is a noncriminal resolution of the problem. Failing that, an appeal can be made to the government to prosecute the company or its individuals on less serious or more narrow charges than originally contemplated by the government. It is at this time that plea negotiations may be undertaken. The best time for plea negotiations is almost always before the

government has obtained an indictment. That way the government does not betray weakness by amending its charges to less serious allegations.

C. Make a Detailed and Professional Presentation.

The presentation to the government seeking to avoid or minimize criminal prosecution should be based on the company's internal investigation and should be detailed and accurate. The presentation should be made in writing as well as orally and should be formal and polished. It must address the weak points in the company's case as well as the strong points. Above all, the presentation must be factually accurate and well documented. The government will only act based upon the representations of a putative defendant's counsel if it has complete confidence in those representations.