INSIDE THE MINDS

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Effective Pre-Prosecution Strategies to Prevent Indictment

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Introduction: The Importance of Preventing Indictment to Corporate Officers and Directors

A fundamental principle of the American criminal justice system—indeed, a constitutional imperative—is that citizens are innocent until proven guilty. However, in the eyes of the public, and certainly the press, a criminal indictment is often equated with guilt. For corporate executives and directors, as well as professionals such as doctors, lawyers, stockbrokers, government leaders, and professional athletes, an indictment can be devastating. Corporations often suspend executive officers immediately upon indictment. Even if the suspension is with pay, the public humiliation and professional blemish on their record tarnishes the executive for years to come, even if criminal charges are ultimately dismissed or the executive is acquitted at trial. Many will argue "a slick defense lawyer 'got the executive off'" rather than conclude the defendant must have been innocent.

It is thus imperative that lawyers hired to represent corporate executives or directors, or other professionals, do everything within their power to prevent indictment. In most federal white collar criminal cases, executives learn they are "targets" long before indictment, giving their lawyers months, and sometimes years, to investigate the allegations and make presentations to the federal prosecutors to convince them not to indict. Often federal criminal investigations remain relatively confidential and the identity of "targets" is not publicized, allowing corporate executives or other targets to avoid negative press or even knowledge in public that they are under investigation.

This chapter will discuss effective strategies to avoid indictment by convincing prosecutors that the corporate officer or director has not committed any criminal offenses, or even if they committed a technical violation of the law, the case does not have prosecutive merit.

Obtaining a Commitment from the Prosecutor to Meet Before Making a Decision

Corporate executives or other professionals may find out they or their companies are under investigation in one of several ways. In many cases, a search warrant is executed at their companies, and perhaps also at their houses. In other cases, they and/or their company receives a subpoena *duces*

tecum for electronic and paper documents and files issued by a federal grand jury, a federal government agency, state prosecutors, or state grand juries. Searches and subpoenas generally are required to state the nature of the investigation, but rarely state who is the "target" of the investigation. Regardless, once a subpoena is received or a search conducted, the corporation and its officers and directors are on notice that the government is conducting a criminal investigation.

One of the first priorities for the attorney representing the corporation is to contact the federal prosecutor[1] who is leading the investigation. There are multiple purposes for that call. First, counsel needs to know the nature of the investigation, including the crimes under investigation. Second, counsel needs to inquire as to whether officers, directors, or other corporate employees are targets. In federal investigations, there are three categories of individuals or entities: (1) "targets," (2) "subjects," and (3) "witnesses."

"Targets" are individuals or entities whom the government believes have committed one or more crimes, and against whom the government is attempting to build a case for prosecution. "Witnesses" are individuals or entities that the government does not believe have any culpability in the matter. They may be individuals or entities that possess relevant information, but the government does not believe there is any realistic possibility they will be charged. "Subjects" are basically everyone in between "targets" and "witnesses." The government has not yet determined if a "subject" should be a "target" or a "witness." As a result, "subjects" of government investigations should consider themselves "targets" because there is the potential that the prosecutors could conclude that they have committed criminal offenses. Thus, both "targets" and "subjects" should retain experienced criminal defense attorneys to represent them in the investigation.

Federal prosecutors generally refuse to disclose the status of an individual or entity to anyone other than that person's attorney. Thus, prosecutors often refuse to tell counsel for a corporation whether individuals are "targets." In such cases, it may be necessary for each executive or director to have his personal attorney contact the prosecutor to inquire of their

[1] Most criminal investigations of corporations and corporate executives or directors are conducted by the federal government. Therefore, this chapter will refer to "federal" investigations; however, the strategies applicable to federal investigations are equally applicable to state investigations.

status. In many cases, corporations retain one attorney to represent all or a large number of corporate employees, including officers, as "pool counsel." Counsel for the pool of clients can then ask the prosecutor if any of the members of the pool are targets or subjects. As a general rule, each "target" should have separate criminal defense counsel. Defense counsel may have a conflict of interest in representing more than one "target." Pool counsel is often retained to represent "witnesses"; that is, corporate employees who are not "in the line of fire," so to speak. Whether pool counsel can ethically represent one or more "subjects" in addition to "witnesses" depends on the facts and jurisdiction of the case.

Once it is determined that counsel's client is a target or subject, defense counsel should request that the federal prosecutor make a commitment to meet with defense counsel prior to making a final decision on whether to seek an indictment. If the prosecutor agrees to do so, that agreement should be memorialized in writing. In many jurisdictions, it is standard practice for federal prosecutors to enter into such agreements. Indeed, many prosecutors offer to do so even without a request by defense counsel. Such meetings give the prosecutor an opportunity to convince defense counsel of the strength of the government's case, hoping that will lead to a pre-indictment plea agreement, thus saving the government the time and resources that would be required to prosecute the case. It is also an opportunity for prosecutors to learn of potential defenses that will be offered at trial if there is an indictment, allowing the prosecutor to assess the strength of his case and of the potential defenses. Notwithstanding the benefits of such meetings, some federal prosecutors refuse to commit to such a meeting. If that occurs, defense counsel should make the request in writing and repeat the request periodically throughout the investigation. If the prosecutor leading the investigation persists in refusing to meet, defense counsel should request that supervisors in the US attorney's office or whatever other agency is going to make the charging decision, agree to meet. It is critical that defense counsel learn from the government why they believe the client has committed one or more criminal offenses, and have an opportunity to make a presentation in response in an effort to convince the prosecutors that they are wrong, or at least that there are alternatives to prosecution that are appropriate in this particular case. Hopefully, the prosecutor will eventually agree to meet. If not, and if there is an indictment and subsequent trial, the prosecutor's refusal to meet may not be looked upon favorably by the jury or the judge.

Responding to Government Subpoenas

Targets and subjects of federal criminal investigations almost always receive subpoenas *duces tecum* requiring the production of both paper and electronic documents, and one of defense counsel's primary roles early in the representation of corporate officers and directors is to respond to such subpoenas. The subpoenas may come from many different sources and may or may not require production of the same documents. In a securities fraud investigation, for example, separate subpoenas may be issued by the US Securities and Exchange Commission (SEC),[2] one or more federal grand juries, state securities divisions in whatever states are involved in the investigation, shareholders in shareholder derivative action lawsuits, and others. In some securities cases in which the corporation is in bankruptcy, a bankruptcy trustee may also issue subpoenas.

The same is true in a wide variety of other types of corporate criminal investigations. In environmental investigations for potential violations of the Clean Air Act,[3] Clean Water Act,[4] or other federal and state environmental criminal statutes, subpoenas may be issued by the US Environmental Protection Agency (EPA),[5] state environmental protection agencies, federal and state grand juries, civil litigants, or others. In bank fraud cases, subpoenas may be issued by the Office of Comptroller of the Currency (OCC),[6] the Federal Deposit Insurance Corporation (FDIC),[7] federal and state grand juries, and possibly other agencies. In most federal and state criminal investigations involving corporations and their executives, subpoenas are received from multiple sources, including both governmental agencies and private litigants. It is essential that defense counsel ensure consistency in the production of documents in response to these subpoenas, and that defense counsel communicate with other attorneys who are representing the

[2] 15 U.S.C. § 78u (b) (2014).
[3] 42 U.S.C. § 7621(c) (2014).
[4] 33 U.S.C. § 1319(g)(10) (2014).
[5] *United States v. M/V Sanctuary*, 540 F.3d 295, 300 (4th Cir. 2008) (acknowledging EPA's subpoena power extends to persons or entities who may be compelled to testify or to produce reports, documents, or other information while citing the chapter involving Control of Toxic Substances, 15 U.S.C. § 2610(c)).
[6] *Abrams v. United States Dep't of the Treasury Office of the Comptroller of the Currency*, 458 F. Supp. 2d 304 (N.D. Tex. 2006) (citing 12 U.S.C. §§ 1818, 1820(c) (2014) as authorizing OCC's administrative subpoena power).
[7] 12 U.S.C. §§ 1818, 1820(c) (2014).

corporation and other targets to ensure that counsel knows what subpoenas their clients have received and what documents have been produced. That subject will be examined below.

Coordination with In-House Counsel and Counsel for Other Targets and Subjects

One of defense counsel's challenges is to make sure he is aware of and involved in responses to all subpoenas his client receives relating to the matter under investigation, as well as subpoenas issued to other targets or subjects. This may sound obvious and easy, but it is easier said than done. Here are some examples where problems can occur.

Defense counsel may be retained by a corporation to represent the president of the company in a federal securities fraud investigation. Separate counsel may represent the company, and other attorneys are representing other potential targets. Defense counsel will undoubtedly be responsible for responding to subpoenas issued to his client. However, if the president of the company is sued by shareholders in a derivative action lawsuit that is filed against the company and its directors and executives, the company may hire another law firm to represent all defendants, including the president.[8] Requests for production of documents in that civil litigation will be responded to by the law firm representing all of the defendants in that case. There is thus a risk that counsel defending the civil lawsuit may produce documents on behalf of the president in that lawsuit without consulting criminal defense counsel for the president, and indeed without criminal defense counsel even knowing that a request for documents has been issued to his client in that case. However, the documents produced in the civil case may be given by plaintiffs' counsel to the government in the criminal investigation. It is not only embarrassing but can be devastating during negotiations with the government if criminal defense counsel is not

[8] Although criminal defense counsel may ethically be able to represent only one client in a criminal investigation, it is common for attorneys defending civil lawsuits to represent multiple clients. In a civil case filed against the corporation and its executives or directors, if there is a judgment entered against the defendants, the corporation invariable pays it, not the individual defendants. Thus, there is no conflict that prohibits one attorney from representing all defendants. However, in criminal cases, each individual defendant faces potential incarceration and fines or other financial penalties imposed on him personally. In such cases, the rules of professional conduct generally prohibit representation of more than one individual. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (2013).

aware of documents the government has in its possession that were produced by the president, though not by criminal defense counsel.

Similarly, a disgruntled ex-employee may file a wrongful termination of employment lawsuit against the company and may name the president as a defendant. The company may retain a labor and employment lawyer to defend the case and to represent both the corporation and its president. The labor and employment lawyer may produce documents responsive to discovery requests received from the plaintiff. Criminal defense counsel may not even know of the lawsuit. Worse, there have been cases where depositions of the president or other corporate executives have been taken in shareholder derivative action lawsuits or wrongful termination of employment cases, and other civil litigation, and criminal defense counsel was not even aware that his client's deposition had been taken. Fifth Amendment[9] privileges were not likely even discussed with the president or other corporate executives in those cases because civil trial counsel may not have been aware of a related criminal investigation.

The remedy is simple, but not always easy to accomplish. It is imperative that criminal defense counsel be informed by the company and client of every lawsuit, subpoena, or discovery request involving the client. Coordination is the key. But, unfortunately, corporations and their in-house counsel may not perceive the need to inform criminal defense counsel for a corporate executive or director if they receive what, on the surface, appears to be a totally unrelated subpoena, lawsuit, or discovery request. One of the first priorities of criminal defense counsel for individual executives and directors is to meet with in-house counsel of the company to inform them of the importance of keeping defense counsel informed of such developments. Since federal corporate criminal investigations often last for years, defense counsel needs to have frequent communications with in-house counsel, both to remind in-house counsel of the importance of informing criminal defense counsel of any subpoenas or lawsuits, and to determine if anything has happened since the last meeting that counsel needs to know.

In large corporations, there may be an additional hurdle to overcome. Many large companies have a liability claims department that handles civil claims and lawsuits against the company. There may or may not be an effective

[9] U.S. CONST. amend. V.

communication internally within the company between the liability claims department and the office of the general counsel. The general counsel, who hires outside counsel to defend the company and its officers in criminal investigations, may not communicate to the liability claims division that there is a criminal investigation. Civil lawsuits may be filed against the company and its officers, but the liability claims division may not realize that the subject matter is the same as that of the criminal investigation. Again, the remedy is communication. Defense counsel should discuss with the general counsel the potential for lawsuits to be filed relating to the subject of the criminal investigation and the need for coordination and communication with the company's liability claims division.

Searching for and Producing Documents Responsive to Subpoenas

Subpoenas *duces tecum* are often overly broad and require production of voluminous paper and electronic documents and files, including documents that are not relevant to the investigation and others that are protected from production by the attorney-client or attorney work product privileges. Subpoenas may require production of documents going back many years. Paper documents, if they still exist, may be in storage, and searching for them would be extremely costly and time-consuming. Similarly, electronic files and documents may have been archived, or may only be accessible on back-up tapes. Much has been written about the subject of electronic discovery, commonly referred to as "e-discovery," and that topic is beyond the scope of this chapter. Suffice it to say, however, that counsel representing corporate executives and directors who receive overly broad subpoenas should attempt to negotiate with government counsel a narrowing of the scope of the subpoena, and should consider seeking a judicial protective order if an agreement cannot be reached. It is essential that counsel memorialize agreements to limit the scope of subpoenas to protect the client from allegations of non-compliance.[10]

Even if an agreement is reached with government counsel to narrow the scope of the subpoena to make it more reasonable and less burdensome,

[10] In a recent False Claims Act health care fraud investigation by the U.S. Department of Justice and the Office of Inspector General (OIG) at the U.S. Department of Health & Human Services, the author wrote a twenty-seven-page letter to counsel at the DOJ memorializing agreements to limit the scope of nine subpoenas *duces tecum* issued to the corporate headquarters of the company and its nursing centers in eight states. A copy of the letter, redacted to protect the identity of the client, is included in the Appendix.

defense counsel must review the documents responsive to the subpoena to locate and remove any that are privileged and therefore not subject to production.[11] Methods for searching electronic files and documents for privilege depend largely on the volume. If the individual client has only a reasonably small number of documents, reading and reviewing each document may be appropriate.

However, if the client has hundreds of thousands, or millions of pages of documents, litigation support software may be necessary to effectively search the documents for key words or use other parameters to identify and remove privileged documents. A "privilege log" must be prepared for any documents removed and not produced, and that log and perhaps the documents themselves may have to be produced to a federal judge or magistrate judge for *in camera* review if the government challenges the assertion of a privilege.[12]

In cases involving production of voluminous documents, it is possible that despite sophisticated procedures, some attorney-client privileged or work product-privileged documents may be inadvertently produced. To protect clients in such situations, counsel needs to insist on a government agreement to a "claw back" provision. Under Rule 502 of the Federal Rules of Evidence,[13] the inadvertent disclosure or production of privileged material does not constitute a waiver of the privilege if the disclosure was inadvertent, the holder of the privilege or protection took reasonable steps to prevent disclosure, and the holder promptly took reasonable steps to rectify the error. Rule 502 incorporates the procedures of Rule 26(b)(5)(B) of the Federal Rules of Civil Procedure,[14] which require the receiving party (the government when federal subpoenas are issued) to "promptly return, sequester, or destroy" inadvertently produced material. If the government refuses to agree to a claw back provision, counsel can seek a protective order from the court having jurisdiction over the matter. Such protective orders are generally not required because the government is well aware of these issues and routinely enters into claw back agreements to protect targets from inadvertent disclosure of privileged materials.

[11] CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2458 (3d ed. 2014).
[12] *See* FED. R. CIV. P. 45(d)(2).
[13] FED. R. EVID. 502.
[14] FED. R. CIV. P. 26(b)(5)(B).

Determining Whether a "Team Defense" Is in the Client's Best Interest

In most federal criminal investigations of alleged corporate wrongdoing, the best approach is a "team defense" where the corporation, corporate executives, and directors work together in a joint effort to avoid prosecution. There are exceptions to this rule. In some cases, an officer or director may have disagreed with and objected to the conduct of others under investigation. In those circumstances, counsel for that individual may need to contact the federal prosecutors to seek immunity from prosecution for his client to prevent the client from being prosecuted for wrongdoing of others to which he was not a party. More often than not, however, corporate executives have defenses to the allegations in common with other high-ranking executives and the corporation itself. In such cases, working together as a team can have significant advantages, including sharing of confidential information, division of labor, cost savings, and, most importantly, presentation of a common defense to the government.

Joint Defense Agreements among "Targets" and "Subjects"

When counsel decides that a joint defense is in the individual client's best interest, entering into a "joint defense agreement" (JDA) is advisable. The purpose of a JDA is to permit counsel for parties having a common interest to share attorney-client privileged and work product-privileged information with other members of the JDA without waiving any privilege. JDAs have been recognized and enforced by federal courts throughout the country.[15]

Conducting an Effective Defense Investigation

As previously stated, the number one goal of representing corporate officers and directors pre-indictment is to convince the prosecutor not to prosecute. Success in achieving that goal is dependent upon a thorough understanding of the facts relating to the alleged criminal wrongdoing. Thus, a thorough defense investigation of the facts is critical to the defense strategy. If defense counsel is working with other targets of the investigation and their counsel, the team may

[15] *Roosevelt Irr. Dist. v. Salt River Project Agr. Imp. & Power Dist.*, 810 F. Supp. 2d 929 (D. Ariz. 2011); *United States v. LeCroy*, 348 F. Supp. 2d 375 (E.D. Pa. 2004); *United States v. Henke*, 222 F.3d 633 (9th Cir. 2000); *Minebea Co. v. Papst*, 228 F.R.D. 13 (D.D.C. 2005); *St. Louis Convention & Visitors Comm'n v. NFL*, 46 F. Supp. 2d 1058 (E.D. Mo.1997).

assign various parts of the investigation to different attorneys, and the results of those separate investigations can be shared confidentially with other members of the team pursuant to the JDA. If there is no team defense, then counsel for the officers and directors must conduct the entire investigation themselves. There is no substitute for mastering the facts. Government investigators may have reached conclusions that are not accurate. Being able to demonstrate shortcomings by government investigators to the federal prosecutors who are making the charging decision can mean the difference between a client being indicted and the prosecutor closing the file.

A thorough defense investigation includes several distinct, but related, parts: debriefing the client, investigating the government investigation, interviewing witnesses the government has interviewed or who have testified at federal grand juries, reviewing documents and electronic data produced to the government, and conducting a thorough investigation of the alleged wrongdoing independent of the government investigation. Each of these elements of an effective defense investigation will be further examined.

Debriefing the Client

The starting point in any effective defense investigation is debriefing the client. Defense counsel must thoroughly understand everything the client knew, when he knew it, what he did with that knowledge and information, what he knew of actions by others, why he did what he did, what documents evidence his knowledge and actions or the knowledge and actions of others, and whether the client relied upon the advice of counsel in making any decisions relevant to the subject matter of the investigation. Corporate officers and directors, especially of publicly traded companies, may have made public statements relevant to the issues under investigation. These statements may have been made in press releases, content in the company's website, SEC filings, e-mails, letters, or other documents. The client may have authored voluminous internal memoranda, e-mails, directives, or other writings that will be scrutinized by the government and thus need to be reviewed thoroughly by defense counsel. The client is also the best source to identify other employees or individuals who should be interviewed to gather the facts and locate documents relevant to the investigation.

One of defense counsel's key responsibilities is to educate and advise his client on the manner in which the defense investigation must be conducted.

Corporate executives are, by definition, decision makers. They are individuals who give direction to others as part of their everyday business responsibilities. And when they need information, they direct employees to provide answers to questions and other information needed. However, when there is a criminal investigation, corporate executives need to be instructed that their attorney, not the client, needs to conduct this investigation. There are good reasons for this. First, there is no privilege to the communications between employees and the corporate executive. Statements made by the corporate executive to employees in such meetings are not privileged and can be repeated to federal prosecutors or in any subsequent trial. There is no assurance that the employee with whom the executive has discussions about the investigation will keep those communications confidential. Nor is there any assurance the employee is not already a government whistleblower and a cooperating government witness. Second, government prosecutors may regard direct interviews or meetings between the "target" corporate executive and the "witness" employees as obstruction of justice[16] and witness tampering,[17] which can result in separate criminal charges. Defense counsel is trained in proper procedures to conduct the investigation to avoid allegations of obstruction or witness tampering, and to avoid pitfalls that a corporate executive who tries to conduct his own investigation may fall into. It is imperative that counsel educate the client on the risks inherent in the client attempting to conduct an investigation on his own.

Investigating the Government Investigation

Federal prosecutors and their investigative agencies rarely disclose details of the government's investigation in its early stages. As a result, defense counsel must conduct his or her own investigation of the government investigation to discover what it is that the government believes is criminal activity.

[16] 18 U.S.C. § 1510 (2014) makes it a federal criminal offense to willfully obstruct a criminal investigation.

[17] 18 U.S.C. § 1512(b) (2014) makes it a federal criminal offense to knowingly use intimidation, to threaten, or to corruptly persuade another person, or to engage in misleading conduct toward another person, with the intent to influence, delay, or prevent the testimony of any person in an official proceeding, or to cause or induce any person to withhold testimony, or withhold a record, document, or other object, from an official proceeding. It also makes it a crime to cause or induce any person to alter, destroy, mutilate, or conceal any object with intent to impair the object's integrity or availability for use in an official proceeding.

Interviewing witnesses whom the government has interviewed to discover the questions they were asked and the information they provided is a key strategy that can be utilized to understand the nature of the government investigation. Reviewing documents the government has obtained through subpoenas may reveal what the government is looking for; but, if voluminous documents were produced, reviewing them may not be particularly instructive.

How the defense investigation is conducted and the scope of the investigation depends on the facts of each case. An investigation by the EPA and grand jury after a toxic waste spill into a navigable waterway does not require much searching to determine the nature of the government investigation. However, even investigations that begin narrowly can expand into other areas, and defense counsel is likely to discover that the investigation has expanded in scope only by interviewing witnesses whom the government has interviewed.

In other cases, the nature and scope of the government investigation may not be clear. A corporation may learn it is under investigation when it receives a lengthy subpoena demanding the production of such a wide range of documents that the company cannot determine what the government is investigating. In some cases, particularly large-scale investigations of national or international corporations, the government may only interview whistleblowers or other cooperating employees in the early stages of the investigation and the company may be completely unaware of which employees or former employees have been interviewed. In those cases, it may be months or even years before the defense investigation unearths the focus of the government investigation. In other cases, the government's focus may shift drastically from where it originally began. The government may determine there is insufficient evidence of criminal violations in what it began investigating, but during the investigation may come to believe that other actions are criminal. Defense counsel must therefore continue to investigate the government investigation on an ongoing basis to learn of any changes in direction or scope and be prepared to respond to them.

Interviewing Witnesses the Government Has Interviewed

One of the best ways to determine the focus of the government investigation is to interview persons whom the government agents or prosecutors have

interviewed. Current and former employees of the company are almost always first in line for agents to interview. If they are willing to meet with defense counsel, they should be interviewed as soon as possible after the government agents interviewed them—i.e., while their memories are fresh. Discovering the questions they were asked often reveals the focus of the government investigation.

Some of these employees or former employees may themselves be "targets" or "subjects" of the investigation. If they are represented by counsel, they can be interviewed only in the presence of their attorney or with their attorney's consent. If they are not represented by an attorney, defense counsel should clarify his role to avoid any ethical violations. This is more of an issue when they are current employees of a corporate target being interviewed by counsel for the corporation, but counsel representing high-ranking officers or directors should also clarify their role to avoid confusion and subsequent problems. Current employees of a corporation may believe that defense counsel representing the company or its top officers or directors also represent them. To avoid an incorrect perception, it is best to give the employees *Upjohn*[18] warnings at the outset of the interview. The White Collar Crime Section of the American Bar Association has developed "best practices" for conducting such interviews.[19] These include unambiguous disclosure to the employee that the defense counsel interviewing them is not their attorney and that, although what they say is protected by the work product privilege, only the corporation or the client of the attorney owns the privilege, not the employee being interviewed, and thus the client can waive the privilege at any time.

Under federal law, witnesses who have testified before a federal grand jury may be asked about their grand jury testimony, including questions they

[18] *See Upjohn Co. v. United States*, 449 U.S. 383 (1981) (affirming that an entity can have an attorney-client privilege and discussing the context in which warnings for an individual might be necessary).

[19] ABA WHITE COLLAR CRIME COMM., UPJOHN WARNINGS: RECOMMENDED BEST PRACTICES WHEN CORPORATE COUNSEL INTERACTS WITH CORPORATE EMPLOYEES (2009), *available at* http://www.watergatecle.com/wp-content/uploads/2012/06/ABA_Upjohn_Task_Force.pdf; *See also* MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2013). ("In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.").

were asked, answers they provided, and exhibits they were shown. Rule 6(e) of the Federal Rules of Criminal Procedure does not impose on a grand jury witness any obligation of secrecy.[20]

Reviewing Documents and Electronic Data Produced to the Government

Perhaps the most difficult task in conducting a defense investigation is attempting to identify and obtain possession of all of the documents that have been produced to the government, and then analyzing them to identify relevant documents. Defense counsel should have access to the company's and the individual client's records that have been produced. Through cooperation with lawyers representing other potential targets and subjects, defense counsel should also have access to documents produced by them on behalf of their clients. However, defense counsel will not likely have any effective way to determine if third parties—banks and other financial institutions, governmental agencies such as the Centers for Medicare and Medicaid Services (CMS) in health care fraud investigations, or other third parties that may possess paper or electronic documents relevant to the investigation—have produced documents to the government pursuant to subpoenas. Federal prosecutors routinely instruct third parties not to disclose the existence of grand jury subpoenas to anyone under penalties of obstruction of justice, further limiting defense counsel's ability to learn of the existence of subpoenas or the documents produced pursuant to them.

In many federal corporate criminal investigations, millions of paper and electronic documents are produced in response to government subpoenas. Even if defense counsel has access to them, searching them for relevant documents is a monumental task about which there is a wealth of articles and publications.[21] Litigation support software is of great benefit in

[20] FED. R. CRIM. P. 6(e)(2) exempts witnesses from any obligation of secrecy. FED. R. CRIM. P. 6(e)(2)(B), however, prohibits federal prosecutors, grand jurors, interpreters, and court reporters from disclosing grand jury proceedings, including testimony. Thus, somewhat ironically, defense counsel is permitted to learn from a grand jury witness what a federal prosecutor cannot disclose.

[21] *See* Jessica Lynn Repa, *Comment, Adjudicating Beyond the Scope of Ordinary Business: Why the Inaccessibility Test in Zubulake Unduly Stifles Cost-Shifting During Electronic Discovery*, 54 AM. U. L. REV. 257 (2004); Mia Mazza et al., *Article: In Pursuit of FRCP1: Creative Approaches to Cutting and Shifting the Costs of Discovery of Electronically Stored Information*, 12 RICH. J.L. & TECH. 11 (2007); THE SEDONA CONFERENCE OF SM. WORKING GROUP ON ELECTRONIC DOCUMENT RETENTION PRODUCTION, *The Sedona Principles: Best*

narrowing the number of relevant documents, but even with such software, counsel is often confronted with hundreds of thousands of documents that may be relevant. The task is far more difficult in those investigations in which the government's focus is not clear. For example, in a federal quality of care investigation of a national long-term care provider, the Office of the Inspector General of the US Department of Health and Human Services may issue subpoenas for paper and electronic records from nursing homes in multiple states and the corporate office of the company. Federal grand juries in multiple districts may also issue subpoenas. In addition, state Attorney General Medicaid Fraud Control Units (MFCUs) may issue additional subpoenas. Each of the subpoenas may require the production of hundreds of thousands or even millions of pages of paper and electronic files covering myriad issues and involving hundreds or thousands of residents. Until the government discloses the nature of the investigation, which nursing facilities are at issue, which residents are the focus of the investigation, and which quality of care issues the government is investigating, it may be impossible for defense counsel to identify those documents that are critical to either the prosecution's case or the defense.

Regardless of the difficulty of concluding the analysis early in the investigation, it is essential that counsel gather all of the documents that have been produced that are available to defense counsel and input them into a litigation support database program for subsequent analysis once the government's focus is learned. As will be seen, in cases in which the government meets with defense counsel and presents a "reverse proffer"—a government presentation of potential charges and evidence to support the government's allegations—defense counsel will need to have the litigation database available to search for documents to counter the government's anticipated evidence. Waiting until the meeting with the government to set up the database may be too late. In a number of investigations, counsel for the government imposes short time periods within which defense counsel must respond to the government's presentation. Failing to meet those time constraints could result in an indictment because the government is unwilling to delay grand jury proceedings for defense counsel to finish preparing his presentation.

Practices, Recommendations & Principles for Addressing Electronic Document Production, 5 SEDONA CONF. J. 151 (2004).

Conducting a Thorough Defense Internal Investigation

In addition to interviewing individuals who have been interviewed by the government, and gathering and reviewing documents produced to the government, defense counsel needs to conduct an independent internal investigation of the issues under investigation. When defense counsel is working with lawyers representing the corporation and other potential individual targets through a joint defense agreement, the outside counsel for the corporation generally takes the lead in the internal investigation. However, it is essential that counsel for high-ranking corporate officers and directors have access to the results of the company's investigation and the opportunity to participate in it. Key potential witnesses should be interviewed by both the corporation's outside counsel and private counsel for the corporate officers and directors. In a team defense, it is essential that each member of the team be fully informed of the facts so that strategic decisions are made based on evidence that may be presented in court in the event of an indictment.

The defense internal investigation also requires counsel to search for both paper and electronic documents that are relevant to the government investigation regardless of whether they have been produced in response to government subpoenas. Often the government prosecutors and agents who drafted their subpoenas did not know what documents existed and thus may have failed to require that critical documents be produced. If defense counsel has been successful in securing a commitment of the government prosecutors to meet prior to making a charging decision, being able to produce documents that the government was unaware of that help prove no crime was committed can have a powerful impact on the prosecutor's confidence in the thoroughness of the government investigation and the strength of the government's case. In short, such documents can be "game changers."

Convincing the Prosecutors Not to File Criminal Charges

The best opportunity counsel for corporate officers and directors has to obtain a favorable outcome for their client is pre-indictment. It is difficult to convince prosecutors to dismiss charges once they have been filed, and few cases are dismissed by courts. Also, as noted above, the client's reputation and ability to earn a living is damaged, often irreparably, if there is an indictment, regardless of whether the client is acquitted at trial. Upon

being retained, defense counsel should request a commitment from the prosecutor to meet prior to making a final charging decision. The purpose of the meeting is to learn from the prosecutor what crimes are under investigation and what facts the government believes demonstrate the guilt of the client. Some federal prosecutors are more willing than others to "show their hand" and reveal details of their case. Others, especially those who are confident of the strength of their case, may be eager to share their evidence with defense counsel in hopes of securing a pre-indictment guilty plea. Defense counsel's goal is to obtain as much information as possible so counsel can assess the strength of the government's case and determine whether there are defenses that should be presented in advance of the prosecutor's final decision on whether to seek an indictment.

Requesting and Obtaining a "Reverse Proffer"

Government counsel may offer to listen to whatever evidence defense counsel wants to present, but without first hearing from the government as to its concerns, conclusions, and evidence, defense counsel would literally be shooting in the dark. Thus, defense counsel should request that the government present to the defense a "reverse proffer," i.e., a government presentation of the criminal offenses the government believes may have been committed and the evidence to support those allegations. Such reverse proffers have become common by US attorneys throughout the country and by Department of Justice (DOJ)[22] counsel in Washington, DC and at regional DOJ offices. Government presentations to defense counsel often involve hundreds of PowerPoint slides and binders of evidence the government contends proves its case.

In other cases in which federal prosecutors play it much closer to the vest, the government may not show the defense anything but may instead provide only a brief verbal summary of its case. Defense counsel must be creative when it comes to presenting arguments and questions that will help to convince such prosecutors to reveal more about their cases. It may be necessary for defense counsel to commit to a defense presentation of its potential case to the government to induce government prosecutors to

[22] *See* Ben Maiden, *SEC Official Lauds Cooperation Program*, COMPLIANCE INTELLIGENCE (Oct. 28, 2012), http://www.complianceintel.com/article/3109504/SEC-Official-Lauds-Cooperation-Program.html (explaining that many tools the SEC utilized, including reverse proffers, were previously only available to the U.S. Department of Justice).

provide more details. Because discovery is very limited in federal criminal cases—there are no depositions or interrogatories and, in many jurisdictions, no witness lists—this is an opportunity for the government to hear the defense case long before trial. What does the prosecutor have to lose? If he has a case, revealing it to defense counsel before indictment will not lessen the probability of conviction. However, if the prosecution is unaware of significant evidence supporting a defense, would it not be wise for the prosecutor to learn of that fact now, before indictment, rather than be embarrassed at a jury trial? If indeed there is a defense to the potential charges, the prosecutor has a duty to learn of it before asking a grand jury to return an indictment. The prosecutor's ethical duty is to seek justice, not to seek convictions regardless of guilt or innocence.[23]

Preparing and Presenting a Defense Proffer

Assuming the prosecutor made a reverse proffer, defense counsel needs to determine whether it is in the interest of the client to respond with a defense presentation, i.e., a "defense proffer." There are several factors relevant to this important decision. First, is the prosecutor open to re-considering his preliminary conclusion that the client is guilty? If not, and if there is going to be an indictment unless the client agrees to plead guilty, disclosing the defense and the defense evidence to the prosecutor before trial serves no purpose and may weaken the strength of the defense. Second, is there a viable defense? If there is, and if the prosecutor has not made a "final" decision and is willing to listen and re-evaluate his case, a strong defense proffer should be made.

Given the importance of preventing indictment, the best strategy is often to hold nothing back and make a thorough presentation to the government of the defense theories, legal arguments, and evidence the defense anticipates presenting to a jury if the client is indicted. If defense experts have been retained, disclosing the opinions and conclusions of those experts may be helpful in raising questions in the prosecutor's mind about the strength of the government case. Whether the identity of experts should be disclosed is a fact-sensitive strategy decision. However, in some cases, it may be advisable not only to disclose the identity of the expert, but have the expert

[23] *See Berger v. United States,* 295 U.S. 78 (1935); *United States v. Morena,* 547 F.3d 191 (3d Cir. 2008).

join defense counsel in making the presentation to the government. This is particularly true where the case involves highly technical subject matter. Prosecutors generally do not want a "battle of the experts" at trial for fear juries will not be convinced beyond a reasonable doubt. Thus, disclosing highly respected defense experts who make compelling presentations may help convince the prosecutor not to seek an indictment.

Should the Client Participate in the Defense Proffer?

As a general rule, most defense attorneys agree that the client should not be subjected to questioning by government prosecutors prior to trial, including defense proffers. However, like most rules, there are exceptions. There are cases in which, for example, the intent of the client will determine whether his actions were criminal. Defense counsel must assess the client's ability to withstand intense questioning, the client's demeanor and temperament, the client's knowledge of the subject matter, how articulate and convincing he is when he speaks, and myriad other factors in making the decision as to whether the client should attend and participate in the defense proffer. In some cases, the client may play an active role in the presentation and answer questions posed by prosecutors and their agents. In others, the client may be present to hear what the government prosecutors and agents say, but may not speak. Defense counsel and the client need to thoroughly explore the pros and cons of the client participating in meetings with the government. There is no right or wrong answer, and whether the client should participate depends on the facts and circumstances unique to each case.

Proposing Alternatives to Prosecution

Although the goal of defense counsel is to convince the federal prosecutor not to seek an indictment, government counsel may inform defense counsel that they still intend to present the case to the grand jury and seek indictment notwithstanding the defense arguments and evidence. Even in these circumstances, there may still be alternatives to prosecution.

The United States Attorneys' Manual, published by the Department of Justice, directs federal prosecutors to consider non-criminal alternatives to prosecution when they deem it appropriate.[24] In particular types of cases, a

[24] U.S. ATTORNEYS' MANUAL 9-27.250 (2014).

civil resolution may be appropriate. In health care fraud cases, for example, there may be an opportunity for a civil False Claims Act[25] settlement in lieu of prosecution. In a securities fraud investigation, there may be disgorgement and civil remedies that adequately address the alleged misconduct.[26] In some cases, a deferred prosecution agreement may be available.[27] If the government regards the client as less culpable than other targets, it may agree to grant immunity from prosecution to the client in exchange for the client's cooperation in the prosecution of other targets. Counsel needs to be creative in proposing alternatives that satisfy the government's concerns and provide an adequate remedy.

Evaluating Options if Prosecution Cannot Be Avoided

If the prosecutors insist on filing criminal charges and reject all options short of prosecution, the government will almost always present the defense with a proposed pre-indictment plea agreement that limits the client's exposure and penalties compared to what might happen if the client is convicted after a jury trial. Whether to enter into a pre-indictment resolution or take the case to trial depends on the likelihood of winning at trial, and the risks to the client if the client is convicted. How good is the offer? In federal fraud cases, the potential prison sentence a defendant faces is largely determined by the amount of "loss" under federal Sentencing Guidelines.[28]

The government may offer a plea agreement to a single count of fraud with a loss of $100,000, but threaten to seek an indictment for millions of dollars of loss if the client refuses to accept the deal. The difference in potential sentences could be several years in prison. The government may agree to allow the client and defense counsel to request probation if the client pleads guilty. The better the government offer, the more difficult the decision, particularly if the client and defense counsel believe there is a viable defense. Many corporate executives have entered pre-indictment guilty pleas pursuant to plea agreements with greatly reduced sentences to avoid

[25] 31 U.S.C. § 3729 (2014).
[26] 15 U.S.C. § 78u (2014); *See S.E.C. v. World Info. Tech., Inc.*, 590 F. Supp. 2d 574, 577 (S.D.N.Y. 2008) (finding disgorgement was appropriate where the sum the SEC requested represented a reasonable and undisputed calculation).
[27] U.S. ATTORNEYS' MANUAL 9-16.325, *Plea Agreements, Deferred Prosecution Agreements, Non-Prosecution Agreements and "Extraordinary Restitution"* (2008).
[28] *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2014).

Draconian penalties that might be imposed if the case were to go to trial and the defendant lose.

Although defense counsel's paramount goal is to avoid indictment and to have the government close its file, that result is not always achievable. Each case ultimately turns on the facts and law applicable to that case, and on the willingness of the federal prosecutor to entertain defense arguments and evidence. When prosecutors insist on a conviction, the client may have to make the Hobson's choice of pleading guilty to crimes he believes he did not commit, or being indicted and going to trial in hopes of being acquitted, but understanding that a conviction may result in penalties far more severe than those offered with a pre-indictment resolution.

Conclusion

The importance of trying to avoid prosecution for corporate officers and directors cannot be overstated. Reputations can be ruined forever if a corporate executive is indicted. Some attorneys, particularly those who practice mostly in state court, advise clients to just "wait and see" if they are indicted and the attorney will begin work at that time. Such an approach would deprive corporate executives and directors of an opportunity to convince federal prosecutors not to file any criminal charges. Defense counsel can employ effective strategies to engage federal prosecutors early and often, gain an understanding of the prosecutor's concerns, and present the defense response well before the prosecutor makes a final decision on whether to take the case to the grand jury. If successful, the corporate executive is spared adverse publicity and the possibility of conviction.

There are at least two competing interests that will affect federal prosecutions of corporate executives and directors in the future. On the one hand, post the 2008 recession and allegations of widespread fraud in the financial sector, there will be increased pressure on the Department of Justice to investigate and prosecute wrongdoings by corporations and their top-ranking employees. On the other hand, limitations on resources will require that prosecutors settle the vast majority of cases pre-indictment, or at least without a jury trial. There are simply not enough prosecutors, agents, courts, and judges to prosecute everyone accused of corporate wrongdoing. In short, there are likely to be more investigations of corporations and their executives, but increased opportunities for defense

counsel to employ effective strategies to convince prosecutors to resolve many of these investigations without filing criminal charges.

Key Takeaways

- Call the federal prosecutor who is leading the investigation of a corporate client so that you can develop an understanding of the nature of the investigation, and the crimes under investigation. Inquire as to whether officers, directors, or other corporate employees are targets.
- Make sure you are aware of and involved in responses to all subpoenas your client receives. Attempt to negotiate with government counsel a narrowing of the scope of the subpoena. Review the documents responsive to the subpoena to locate and remove any that are privileged and therefore not subject to production.
- Utilize, if possible, a "team defense" approach where the corporation, corporate executives, and directors work together in a joint effort to avoid prosecution. Debrief the client, investigate the government investigation, interview witnesses the government has interviewed, review documents and electronic data produced to the government, and conduct a thorough investigation of the alleged wrongdoing.
- Gather all of the documents that have been produced that are available to defense counsel and input them into a litigation support database program for subsequent analysis once the government's focus is learned.
- Request that the government present a "reverse proffer," a presentation of the criminal offenses the government believes may have been committed and the evidence to support those allegations. Determine whether to respond with a defense presentation, or "defense proffer." Explore the pros and cons of the client participating in meetings with the government. Propose alternatives to prosecution.
- Consider entering pre-indictment guilty pleas pursuant to plea agreements with greatly reduced sentences to avoid Draconian penalties that might be imposed if the case were to go to trial and the defendant lose.

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***Acknowledgment**: I would like to thank Erin Radefeld, an associate at Bingham Greenebaum Doll LLP, for her assistance in researching and writing this chapter.*

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