

LAW UPDATE

Ruskin Moscou Faltischek's White Collar Crime & Investigations Capabilities

- Mortgage fraud
- Bribery and political corruption allegations
- Internet/computer crimes
- Healthcare fraud
- Federal RICO violations
- Medicare and Medicaid fraud
- Mail and wire fraud
- Money laundering
- State Enterprise Corruption cases
- Pollution and other environmental crimes
- Anti-kickback allegations
- Financial institution, insurance fraud and embezzlement
- Securities and other financial frauds
- Insider trading
- U.S. Customs violations

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The Role of Defense Counsel in White Collar Investigations



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The experience required and the range of strategies which can be employed when counsel is called upon to defend a federal or state white collar criminal investigation are very different from those which are necessary to defend criminal charges at trial. The actions or inactions by counsel and client in the former can and will have significant effect in either preventing the latter or determining how one defends at trial.

Selection of the right counsel during the investigative stage by clients or general counsel in a corporate investigation is a critical decision with long-term ramifications. It goes without saying that the earlier in the process the individual or corporate targets of government investigations bring in defense counsel, the better. Much to the frustration of law firm public relations personnel, oftentimes the best work performed by white collar defense counsel during the investigative phase of a matter cannot be publicized because the investigation has been resolved and no criminal charges leveled against the client.

Once counsel has been selected and brought into an investigation, the first decision to be made is whether or not the client should be proactive in dealing with the government or hunker down and wait to see what happens. There are a multitude of issues which contribute to this decision, but the only way that counsel can advise a client fairly in that regard is to convince a client and relevant witnesses to be honest and forthright, divulging all the necessary facts as quickly as possible. Unlike preparation for trial defense, during the investigative stage, defense counsel wants complete answers to "hard questions" concerning what a client did and knew. This approach instills confidence in the client and elicits information in a condensed time frame.

What kind of internal investigations should be conducted by defense counsel likewise depends upon the particular facts and circumstances of the case. In the corporate setting, it should be planned and conducted by outside counsel in order to protect the results under the attorney-client privilege. The preparation of reports of internal investigations come with their own peculiar considerations. For instance, the government, as a condition precedent to a settlement, will often require that the client waive privilege and turn over the

results of an internal investigation. Whether to agree to such a condition is a difficult decision, sometimes made easier by careful attention in the preparation of the investigation and investigative report, if any is prepared at all.

When outside counsel interviews employee/witnesses during an internal investigation, they must give careful attention to ensure that the employee understands who counsel actually represents (the company, not them), while at the same time being able to foster an open and honest dialogue for the interview. This is not an easy task without experience. Employees also need to understand what their rights and responsibilities are if contacted by the government during the investigation. This contact will very often happen during non-work hours to encourage employees to talk freely. There is a fine line between explaining to an employee that he might want to utilize corporate counsel for this type of interview – and delay it for that purpose – and being seen as tampering with a potential witness or impeding an ongoing investigation. At a minimum, they must be made to understand and accept their obligation to notify their employer of such contact, whether they opt for counsel or not.

Decisions must be made quickly whether outside counsel can represent the company, its officers, employees and other witnesses or any combinations thereof without posing a conflict of interest. Rarely should outside counsel represent everyone and who should be offered separate or group counsel is a sometimes-complicated question to answer. The results of the wrong or ill-advised decision, though, can have serious implications. When separate counsel is called for, questions such as who will pay for

them, whether a joint defense agreement is appropriate and whether all or some witnesses should avail themselves of the opportunity to meet with the government must be addressed. Depending upon experience and an ability to anticipate and resolve issues quickly, outside counsel can quickly become a skilled ringmaster or a hapless attendant holding a tiger by the tail in the defense of a complicated white-collar prosecution.

In the end, the best outcome is when the government declines to commence an actual prosecution of your client and/or employees. That result is rarely achieved without some contact with or presentation to government investigators or prosecutors. Without a competent defense investigation beforehand by experienced counsel and in turn, a complete understanding of the facts and potential outcomes, such meetings or presentations are at best counterproductive and at worst disastrous. When to meet, who to offer as witnesses at meetings and what, if any, agreements to negotiate concerning immunity or – use by the government of the details shared at meetings – are all issues to be dealt with as well. An understanding of how federal, state and local prosecutors' offices will likely deal with such issues is a must to ensure as much protection as possible for your client and in turn secure the best result in the end.

The issues raised in this article are a small part of the many considerations counsel must plan for, advise the client of and implement effectively to provide the best representation in a white-collar investigation. Consideration and selections of the right attorney for that task is perhaps one of the biggest decisions you may ever make.



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