Plan ahead before trouble walks in

Preparing for charges of criminal conduct

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It's hard to avoid tales of corporate criminal conduct these days.

Companies have allegedly defrauded or otherwise injured shareholders and consumers to the tune of billions of dollars. Politicians are capitalizing on the allegations. Prosecutors are making their marks on the backs of criminals, who recently were pillars of their communities and regulars at the country club. There are more investigators focused on business crimes and more whistleblowers willing to blow their whistles on management.

Company counsel must consider how to handle criminal allegations ahead of time. By waiting until discovery of the allegation and responding in the panic of the moment, counsel can do more harm than good.

The initial question almost always involves whether and when to engage outside "criminal" counsel. Given the cost of that counsel, the rush to hire in the panic of receiving grand jury subpoenas can be enormously expensive. Similarly, the failure to engage outside criminal counsel because the allegations involve a powerful officer of the company can have serious long-term ramifications.

There is no bright line as to when outside counsel should be engaged, but the following factors should be considered:

- What is the nature of and how serious are the allegations? Obviously, the more serious, the more crucial it is to engage experienced criminal counsel. Sometimes, the alleged criminal conduct is so unique that a specialist must be retained.
- What is the risk that the evidence uncovered might implicate company counsel? In such cases, rules of ethics bar the involvement of company counsel. Therefore a mechanism to permit outside criminal counsel to report directly to management or the board should be implemented. A bright-line policy established in advance is wise and avoids the company counsel's temptation to handle the investigation personally.
- What is the risk that the evidence uncovered might implicate management to whom company counsel reports? Because of Sarbanes-Oxley requirements and workplace realities, company counsel may not be able to advise the company effectively when the criminal allegations involve an officer to whom counsel reports. Outside counsel with direct reporting to management above the implicated officer or the board is prudent. Advance agreement by management to this policy and its expense is useful and often necessary.
- Do the advantages of company counsel's knowledge of and relationship to the company outweigh the advantages of outside criminal counsel's experience and relationships with law enforcement? Company counsel knows the company and its players, documents, data, traps and culture. Many times, company counsel has personal relationships that will either elicit or inhibit candid responses to inquiries.

Company counsel can engage criminal counsel for high-level advice and to act as a sounding board, which can often span any gaps in criminal experience. This is important because, due to company counsel's lack of regular experience with criminal matters, the risk of false positives (that is, wrongly concluding that the criminal allegations are serious or will be thoroughly investigated by law enforcement) or false negatives (that is, wrongly concluding that the criminal allegations are not serious) is high. On the other hand, criminal lawyers bring a wealth of knowledge about criminal procedures and processes, its actors and its signals.

For example, investigative or criminal law experience can give the criminal lawyer the ability to read — or otherwise determine through law-enforcement contacts — whether serving a grand jury subpoena on a company means that that company should expect a lengthy investigation with the government interviewing hundreds of witnesses and reviewing millions of pages of documents and electronic data in a manner that is their equivalent of drilling cavities without Novocain. Or maybe the company should expect that after it produces certain documents, the grand jury investigation will pass silently in the night.

Other attributes that outside criminal counsel possess include greater perceived independence or credibility with law enforcement or no need to maintain long-term relationships with the company's

employees and executives that must be preserved by avoiding sensitive topics.

Like the question with respect to engaging outside criminal counsel, it is axiomatic that every discovery of a criminal investigation does not give rise to the need for the company to conduct an internal investigation. Company counsel should spell out in advance the circumstances under which the company typically will conduct an internal investigation.

These circumstances include the nature of illegal activity (such as, price-fixing v. environmental crimes v. speeding in a company car), the scope of the illegal activity (such as, a single low-level employee v. division-wide v. senior executives), and the seriousness of the illegal activity (such as, speeding v. homicide caused by a company car).

In many instances, gaining an immediate understanding of what took place gives the company tactical advantages in dealing with law enforcement, in preparing for parallel civil proceedings brought by shareholders, consumers or the government, or in remedying deleterious conduct harming the company's profitability.

There should be a balance between the costs involved and the benefits of an early investigation. Company counsel should look at the following factors:

- the risk that the allegation of illegal activity is only the tip of the iceberg or that the activity is still continuing;
- the likelihood that the alleged illegal activity will form the basis for civil or administrative liability or exposure under Sarbanes-Oxley;
- the opportunities to gain tactical advantage by early investigation of illegal activities, including but not limited to, reduced sentences under the Federal Sentencing Guidelines and amnesty from criminal prosecution by some federal and state agencies;
- the risk that management is implicated by the criminal conduct;
- the risk that the failure to investigate contributes to obstruction of justice;
- the risk that employees or management will expect an internal investigation; and
- the risk that exculpatory evidence will be discarded.

While the decisions of whether and when to engage outside criminal counsel and whether to conduct an internal investigation are judgments requiring the balancing of interrelated factors, what should be done as part of *internal* investigation is more set in stone.

The first object of an internal investigation is controlling, reviewing and understanding what a company's documents say or do not say with respect to the subject matter of the investigation. The next object involves quick and thorough interviews of current and former employees.

Controlling and understanding the universe of information available is critical to a company that wants to gain the best tactical advantage by undertaking an internal investigation. Given the costs involved and the fact that any interview into allegations of criminal conduct can be very sensitive, advance "buy-in" by management is very helpful.

There are several proper and effective ways to conduct an employee interview in the context of criminal allegations. The following guidelines may be helpful:

- It is useful to have a witness (such as a paralegal) attend the interview, who is sophisticated with respect to witness interviews and is knowledgeable about the subject matter of the investigation. The witness should review and sign off on the accuracy of any interview memoranda. It may be necessary for the witness (as opposed to company or outside counsel) to later testify about what the witness said during the interview.
- Interviewing counsel must appropriately explain the privileged nature of the interview (discussed below).
- Interviewing counsel should take notes and prepare an accurate interview memorandum. These interview memoranda should then be summarized, along with the salient documents, into an investigation report that can be used to evaluate the company's overall exposure.
- Interviews should take place at a location that will elicit the greatest degree of candor from the employee. Sometimes, this will be at the general counsel's or outside counsel's office. Sometimes, this will be a conference room near the employee's workstation or at a restaurant near the employee's home.

If the company decides to proceed with an internal investigation, it needs to take steps to preserve the attorney-client privilege for existing communications and any communications made as part of the internal investigation.

First, management must direct, in writing, that an internal investigation begin for the purpose of providing management legal advice with respect to the subject of the investigation. Second, the company should segregate, store and catalog all privileged documents. Third, it should maintain the confidentiality of all interviews. This means that no third parties, including co-workers or management, should be present during interviews or be given any access to interview memoranda or notes.

Fourth, the company should clearly inform all current and former employees interviewed that:

- the interview is subject to the attorney-client privilege,
- the privilege belongs to the company,
- only the company and not the current or former employee can waive the privilege,
- the purpose of the interview is to enable investigative counsel to provide legal advice to management, and
- the current or former employee has a duty to maintain the confidentiality of what was asked and what was said in response.

The beginning of each interview memoranda should reflect that all these points were communicated to the interviewee. Likewise, each interview memoranda should be stored separately and marked on each page, "attorney-client privilege," with distribution only to those persons within the company who need to see the memoranda for purposes of providing legal advice.

Sometimes company counsel does not have the advantage of advance warning to gather and control the pertinent information. For example, law enforcement may "drop- in" at an employee's home to interview the employee about the employer's alleged illegal activities. Some advance planning may, however, minimize the harm from a "drop-in" interview.

Every corporate compliance policy should contain a directive along these lines:

ACME Corp. strongly believes in full and complete cooperation with law enforcement in all respects. If a person claiming to be with law enforcement contacts you, whether at work or at home with respect to ACME or activities at ACME, it is your duty to (a) inform that person that you and ACME wish to cooperate fully with the government's investigation, (b) ask for the business card of the person claiming to be with law enforcement, (c) state that you will have company counsel contact law enforcement to set up an interview, and (d) politely excuse yourself, leaving the presence of the person claiming to be with law enforcement. There should be no substantive discussion — no matter how serious the investigation appears or how threatening law enforcement becomes. Immediately after leaving the presence of the person claiming to be with law enforcement, the employee must call company counsel at x 5555. If company counsel is unavailable or the contact takes place after hours, the employee should leave a message detailing precisely what the person claiming to be with law enforcement said and asked about. Company counsel will contact the employee and law enforcement as soon as practicable to allow for ACME's full cooperation.

While some lawyers have shied away from such an instruction because of fears of being accused of obstruction, there is clearly nothing obstructive about it. We do not know, with any level of certainty, that the person claiming to be law enforcement is in fact law enforcement. The employee is likely, in a surprise interview setting, to give false or misleading information inadvertently, which could be a criminal act. Even if these two reasons were eliminated, the act of not voluntarily providing information belonging to the employee's employer has never been construed by a court as obstructive.

Surely, very few employers would give an employee permission to turn over business records in such circumstances, and there is no principled distinction between a company's documents and its information.

To be effective, this policy must be clear and known by employees. Only if they agree with and understand the validity and import of such a policy will employees abide by it. Thus, compliance training with respect to this policy is necessary.

Another situation where advance planning can minimize the harm caused by a law enforcement tactic involves responding to search warrants. Search warrants executed on businesses are happening more frequently. Law enforcement has realized that a search warrant is often more effective than a grand jury subpoena in gathering the relevant documents, in securing interviews outside the presence of company counsel, and in sending the "right" message to a company, its executives and its employees.

Advance planning to develop policies and practices to respond to a search warrant is critical. Any company policy or plan with respect to search warrants should include the following:

- Management of the facility must instruct all employees not to obstruct the search in any way;
- Facility management must not expressly consent to the search;
- Facility management should immediately instruct all employees in the area of the search to step outside to a central location;
- Facility management should consider whether it is feasible to close the facility immediately and, if so, immediately direct all employees to go home and remind them of the company's policy with respect to law enforcement interviews;
- Facility management should ask the lead agent if they will delay the search until company counsel arrives;
- Facility management should ask for a copy of the warrant and supporting affidavit;
- On company counsel's arrival, facility management should leave the facility if feasible;

- Company counsel should insure that the search and seizures are limited to the express scope of the search warrant and, if not, contact the prosecutor or magistrate to attempt to rein in the search; and
- Company counsel should videotape as much of the search as permitted.

The seizure of documents and other items included in a search warrant poses a couple of unique problems. First, the agents may seize documents and other items (such as hard drives containing data) that are critical to the company's day-to-day business operations. Facility management and company counsel therefore must compile a list of all critical documents and items.

Company counsel should immediately engage in negotiations with the lead agent or supervising prosecutor to obtain copies of the critical documents or items seized. If negotiations fail, company counsel can file for a temporary restraining order to require the prosecutors or law enforcement to provide copies or move under Rule 41 of the Federal Rules of Criminal Procedure for return of the items and documents. (Most states have a similar procedure.)

Second, the agents may seize attorney-client privileged documents. If privileged documents have been segregated prior to the search, company counsel should inform the agents. If the agents insist on searching the areas and files containing the privileged documents, company counsel should ask the agents to maintain separate boxes of these files.

After the search, company counsel should contact the prosecutor and attempt to negotiate for a set of copies of all documents seized and a procedure by which privileged documents can be identified. (Also, access to the documents is needed to determine if any are confidential proprietary information and how to preserve that confidential nature.) If the prosecutor is unwilling to cooperate, company counsel can seek court intervention.

There are a number of other concerns that company counsel should address as part of the company's criminal representation in a post-Enron world. These include:

- Under what circumstances should the board of directors be involved?
- Is auditing the company's compliance program necessary?
- When and under what circumstances should the company stop or modify the company's document-retention policy?
- Under what circumstances should the company notify its employees about the existence of the criminal investigation?
- Under what circumstances will the company be required to or voluntarily pay for separate counsel for employees, and what steps should to be taken to avoid problems from multiple representation?
- Who should and should not deal directly with the authorities?
- When and under what circumstances will the company make a presentation to authorities?
- What considerations will be given to implementing a public relations campaign?

Advance planning can lay the foundation for effective criminal counseling for the company. Advance planning will give company counsel a leg up and a sense of comfort should criminal allegations hit. It will help prevent situations where a panicked company or its counsel does more harm than good in responding to criminal allegations, help control the costs of engaging outside criminal counsel, and help maximize the company's ability to know and understand the information in its documents as well as the knowledge of employees and executives.

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