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Eastern District

Grand Jury Investigation Advice to In-House Counsel

Peter F. Vaira, The Legal Intelligencer

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The notice of a grand jury investigation of a company often starts in this fashion: in-house counsel arrives at the corporate office in the morning to be told that a company official has learned that several of his employees were visited by government agents the night before requesting an interview. The official is not sure what government agency is involved, and how many employees were contacted. He reports that he is running it down. It takes at least until the afternoon to determine the identity of the agents, the identity of the employees contacted, and the subject matter of the inquiry. The report from the supervisor usually omits the most important information, "what did the employees tell the agents."

In-house counsel must quickly employ outside counsel to determine the scope of the investigation, how company employees or officials are involved, the need for a grand jury, and the need for unannounced interviews of employees at their homes. It is important to get as much information as possible about the possible criminal violation and who may be involved. The existence of the investigation means that the government has come across some evidence of wrongdoing; perhaps the prosecutors have not discovered the entire problem, but in-house counsel cannot wait to see what they find. It is possible that there is an employee who is a whistleblower giving information to the government. Only outside counsel with experience in white-collar matters can handle such an engagement. A local criminal lawyer who deals mainly with street crime is not the choice. Another reason for outside counsel is that the investigation may involve matters that house counsel has handled; therefore, house counsel may be a potential witness.

A word of caution. Many large law firms have departments described as corporate or business investigation departments. These are generally staffed to perform large scale investigations of corporations to determine any malfeasance by corporate officers or employees. They operate with large staffs, partners and associates with laptops that could be costly. The attorneys are generally not defense minded, and rarely go to trial in defense of a corporation or corporate officials. These units are often staffed by former prosecutors who are operating as civilian prosecutors. There are many smaller firms that are in business of defending a corporation or corporate officials. Michael J. Engle, a white-collar defense attorney, offered this advice, "When selecting outside attorneys, in-house counsel should always request a proposed budget. Does the client want the functional equivalent of a private prosecutor or a more defense oriented advocate leading the matter? How many lawyers does this investigation really require? These are key questions for house counsel and the client when deciding to engage the services of a law firm."

Once retained, outside counsel will conduct an internal investigation. The information obtained by outside counsel will be protected by the attorney-client privilege. It is important to note the attorney-client privilege is the company's privilege, and not the employees who are interviewed. The employees who are interviewed should know the company can waive the privilege. Quite often the government attorneys, when negotiating with company counsel for a final settlement of the matter, will insist that in exchange for leniency for the company, the company must waive the attorney-client privilege regarding what the employees told the outside counsel.

Outside counsel will interview the employees who were visited by the investigators, and attempt to learn as much as possible, what the investigators were seeking. These interviews should be conducted as soon as possible as memories quickly fade. Quite often the persons interviewed have given incorrect information, either on purpose to protect themselves or are mistaken as to historical facts. The employees should be asked to list all questions asked by the interviewing agent. This is the best method to refresh the employee's recollection. Many witnesses tend to give summaries and a great deal of information can be lost through such procedure.

Outside counsel will arrange a meeting with the prosecutor who is in charge of the investigation. It will be an assistant U.S. attorney in a federal case, a deputy attorney general in a Pennsylvania state case, or an assistant district attorney in a Pennsylvania county case. Unlike the U.S. attorney, the attorney general of Pennsylvania and the district attorneys of the Pennsylvania counties have no regular grand jury procedure for their prosecutors, and outside counsel must attempt to figure out what to expect in those situations.

Outside counsel will ask that if the prosecutor would like to interview any other employees the company will make them available; but would appreciate that an attorney representing the company be present. The response to this will vary. If the investigation involves a large company, the prosecutor might respond that the house counsel or outside counsel does not have an attorney-client relationship with all the employees and the investigative agents are free to visit them. The prosecutor might say that the company's outside counsel may have a conflict representing all the individuals and those persons need independent counsel who can establish an attorney-client relationship with the individual employee.

The way to alleviate employees from being subjected to surprise interviews, without the benefit of counsel, is to have in-house counsel send a letter to all relevant employees explaining that there is a grand jury investigation and the employees may be contacted at their homes for an interview. Emphasize that it is the employee's choice whether to agree to be interviewed but it would be better if the employee informed the investigator that the company is making available an independent counsel who can advise them on whether to agree to be interviewed, and, if so, the attorney will be present. The counsel represents them, and not the company, although the company will pay the fees. Explain that quite often the agents are seeking historical information and the employee should verify the information he or she supplies, lest it appear that the employee is deliberately supplying incorrect information. Point out that the agents may interview other employees who might have a different recollection of the events, and the employee should be certain of what they relate. It is a crime to willfully provide false information to an agent.

The letter should advise the employee that quite often the agent will tell the employee that if he or she does not agree to be interviewed they will be subpoenaed to testify before a grand jury. This is simply a ploy. The attorney in charge of the investigation will decide who should be subpoenaed, and the attorney for the employees can work out a time for an interview.

A crucial issue for outside counsel is how to handle interviews of company employees or officers who are subpoenaed before a grand jury or are requested to be interviewed by investigators. Outside counsel is in the best position to determine if outside counsel should represent them or

they should be afforded separate counsel. A good solution is to offer them separate counsel, whose fees will be paid by the company. Pennsylvania Rule of Professional Conduct 1.8 and the Pennsylvania business code, 15 Pa. C.S. 1741, et seq, permit paying such fees as long as the company has no role in controlling the counsel as to his advice. Outside counsel can enter into a joint defense agreement with the counsel for the employees, and outside counsel can learn for the most part what the investigators are seeking.

If the investigation is conducted by the use of a Pennsylvania state grand jury there may be a problem with attorneys sharing information with anyone else, or grand jury witnesses telling anyone else about their grand jury testimony. The state grand jury statute permits the prosecutor to obtain a court order from the supervising grand jury judge which prohibit the witness from disclosing his grand jury testimony to anyone, or an order prohibiting the attorney for the witnesses from disclosing the testimony to any other person. There is a question whether this provision can prohibit the attorney from exchanging information in joint defense agreement, which is for the protection of the client. These are questions that outside counsel and separate counsel must work out.

Another issue is the possible existence of a whistleblower. The company should take no steps that may imply that management is trying to retaliate against the individual, or trying to silence him or her. In the course of the internal investigation, that individual may be a key person that outside counsel may decide must be interviewed. The problem is that the whistleblower may well contend that the interviewer really did not pursue the issue, and attempted to white wash the allegations. In this process, I recommend departing from the usual trustworthy method of interviewing a witness without a laptop or some recording device. I suggest recording the entire interview, with knowledge of the witness, and give the witness a copy immediately upon conclusion.

As the investigation progresses, it will become apparent if any officers or employees may be charged with criminal offenses. By that time, those persons will be represented by separate counsel. It will then become an issue if the company will continue to pay for the defense of the persons and what steps must be taken to protect the company as an institution. These issues require discussion that is beyond the space available here.

In summary, contending with a grand jury investigation is a serious and complicated matter; one of the most complex in the criminal law. There are many issues of personal liability, conflict of interest of employees, officers, and the company. Use of a state grand jury further complicates matters because the position of the state prosecutors vary, and supervising grand jury judges often have no reliable precedents to consult. In-house counsel must engage experienced outside counsel from the beginning. •

Peter F. Vaira is a member of Greenblatt, Pierce, Funt & Flores. He is a former U.S. attorney, and is the author of a book on Eastern District practice that is revised annually. To obtain a copy of "The Federal Grand Jury: A Frank Appraisal," which was previously published in The Legal by Vaira, email p.vaira@gpfflaw.com.
