

Selecting Counsel When Your Company is Under Investigation

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In today's world your company, large or small, can come under investigation at anytime by a plethora of agencies, state and federal. With a new Administration in Washington and the perception that the previous Administration was lax on enforcement things are likely to become a lot more interesting. The costs to the company of an investigation are not merely the potential fine and embarrassment and the cost of counsel but the lost utility of key employees who are bogged down in finding documents, extensive interviews, meetings and the other distractions and loss of focus that come with a criminal investigation.

Assume that you and your company have never had need of counsel in a criminal matter, how does one go about selecting a lawyer to help the company and its key management through the shoals of a criminal investigation?

First, let us consider who might investigate your company. The Department of Labor handles OSHA and whistleblower investigations. EPA investigates federal environmental laws. SEC looks at securities violations. FDA and the Department of Agriculture deal with food supply and drug issues Department of Justice handles, among other things, anti-trust investigations and prosecutions. These are just the tip of the iceberg. For example, Department of Defense has its own investigative arm, the Defense Criminal

Investigative Service. Typically, each State has its counterparts with investigatory powers.

If you have been targeted by the federal authorities more than likely the local US Attorney, a presidential appointee, and his staff will have jurisdiction and will make the decision as to whether there has been a criminal violation. While large multi-national corporations may have a fleet of outside legal talent regularly on call, sometimes these folks can make the local federal prosecutor think that she has hit the jackpot. Often using a smaller local firm keeps things in better prospective.

It is critical to have a detailed understanding of the local US Attorney's office and its line prosecutors as well the individual US Attorney. Thus, consideration should be given to local counsel who have regular contact with the office, or, better yet, are alumni of the office. Some factors to consider include the following :

Does the fact situation indicate that special expertise in the area (e.g.- environmental, health and safety, securities law, government procurement, immigration or anti trust) is critical? It is surprising to some but often even in smaller metropolitan areas there are well qualified attorneys that have these skills and know the local regulators.

How much control does house counsel want or need? Team players can be very important in a successful defense of allegations. People who can come in and work closely with key corporate employees and managers make a stressful situation more manageable. Size up the people skills of those firms and attorneys you are looking at hiring. Do they meet the criteria you have set out as skillful crisis managers as well as being a great attorney. Often, the initiating event for an investigation is an explosion or accident that results in loss of lives or there is a sudden revelation of a large embezzlement or other internal foul play. The ability to work with house counsel, their communications staff and key managers in a high pressure, very fast moving situation is essential. There is not a lot of time for detailed research or planning. Decisions need to be made on the available facts and right now.

In the present economic downturn costs are always a primary concern. There is a great temptation to do the inquiry with existing in house resources. This can result in serious privilege issues and a lack of objectivity that ignores the opportunity to gain significant knowledge in a timely fashion about a critical situation. Consider this analogy. If you knew you would likely be exposed to a deadly virus that could kill or cripple you but for few hundred dollars there was a vaccine available that was proven effective in preventing or reducing the impact of this virus would you pay for the vaccine? A good, thorough internal investigation can be the functional equivalent of that vaccine for corporations. Often a mid size to smaller firm can provide quality service at lower price than the larger firm. Given a relatively equal amount of experience in the area in question this can be a good economic choice. In many situations it is possible to form a team combining in house resources with experienced outside counsel to achieve substantial savings. Care must be exercised even by knowledgeable practitioners to assure that the proper safeguards are set in place to protect privileged information and communications.

Corporate criminal defense is one area where experience really does count. Be cautious about using your regular corporate or business counsel because they “know” your company and operations. While there may be a place for them on the team, usually a set of fresh eyes and new points of view are likely to determine most quickly (and cost effectively) if you have exposure, what that exposure is and how serious it is likely to become. Ask how many of these types of in-

vestigations they have run. What were the results? How did they manage media issues? If you have government contracts, have they handled successfully suspension and debarment consequences of a criminal violation of federal statutes? In their prior legal experience have they ever prosecuted a corporation under the statute or regulation in question? Don't be shy. If they haven't you need to know and if they have they will be delighted to discuss what may be in store for your company.

A final word of advice – as author Steven Covey says, “Begin with the end in mind”. You know how you want this situation to turn out. Take the time and care to put the right team on the field to assure you get there in one piece and at a fair cost.

Checklist for seeking local counsel

- Expertise with the agency doing the investigation
- Relationship with local U.S. Attorney
- Subject matter knowledge and experience
- Comfort level in a team environment
- Resources to staff in-house needs

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