



Managing Government and Internal Investigations



PBI Business Law Institute
November 2018

cassidylawpllc.com



Why Investigate?



cassidylawpllc.com



● How Does the Government Find Out?

- Statutes and laws often give government right to audit
- Competitors whistleblower
- Employees whistleblower
- Third parties whistleblower
- Prosecutors read the newspaper
- Government investigating a related party
- The industry is exhibiting possible illicit behavior
- Self-disclosure

● Government Enforcement Regimes

- Criminal investigations/prosecutions
- Administrative/regulatory investigations/prosecutions
- False Claims actions – including qui tam relators
- Audits and reviews
- Mandated reps, certs, disclosures in RFP's
- Contract Terms and Conditions
- Whistleblowers:
 - Competitors
 - Employees
 - Third Parties

● Internal Investigations

- Government subpoena, search warrant, audit, etc.
- Internal complaint to:
 - Leadership, Board
 - Ethics Hotline
 - Human Resources
 - Finance
 - Legal
- Call from the media
- Complaint from business partner
- Internal or external auditors encounter an issue
- Risk assessment identifies an issue

Rules of Criminal Procedure

● Search Warrants - Basics

Pa. R. Crim. Pro. 200. Who May Issue.

- A search warrant may be issued by any issuing authority within the judicial district wherein is located either the person or place to be searched.

Pa. R. Crim. Pro. 201. Purpose of Warrant – To Search for & to Seize:

- contraband, the fruits of a crime, or things otherwise criminally possessed; or
- property that is or has been used as the means of committing a criminal offense; or
- property that constitutes evidence of the commission of a criminal offense.

Pa. R. Crim. Pro. 202. Approval of Search Warrant

- DA may require law enforcement have DA approval before obtaining warrant

● Search Warrants - Requirements

Pa. R. Crim. Pro. 203. Requirements for Issuance.

- No search warrant shall issue but upon probable cause supported by one or more affidavits sworn to before the issuing authority in person or using advanced communication technology.
- The issuing authority, in determining whether probable cause has been established, may not consider any evidence outside the affidavits.
- Challenge through a suppression motion
- Need "reasonable cause" for why a night search is needed

● Search Warrants - Content

Pa. R. Crim. Pro. 205. Contents of Search Warrant.

- Signed by the issuing authority, stating they found “probable cause”
- Specify the date and time of issuance;
- Identify specifically the property to be seized;
- Name or describe with particularity the person or place to be searched;
- Search must be executed within a specific period of time, not to exceed 2 days
- Can be prospective must describe event and why needed
- Identify if “daytime” which is 6 a.m. to 10 p.m.
- For “good cause” can seal the warrant

● Search Warrants - Content

Pa. R. Crim. Pro. 206. Contents of Application for Search Warrant.

- Written, sworn, signed affidavit(s) identifying the affiant and their agency
- Identify specifically the items or property to be searched for and seized;
- Name or describe with particularity the person or place to be searched;
- Identify the owner, occupant, or possessor of the place to be searched;
- Specify or describe the crime which has been or is being committed;
- Describe facts and circumstances which form the basis for probable cause
- If a “nighttime” search state the reasonable cause for nighttime search;
- When prosecutors want it sealed – state “good cause” why

● Search Warrants - Executing

Pa. R. Crim. Pro. 207. Manner of Entry Into Premises.

- Before entry, must make “reasonable” effort to notify of officer’s authority, and purpose
- Unless exigent circumstances require the officer’s immediate forcible entry.
- Then, may forcibly enter the premises and may use as much physical force as needed

Pa. R. Crim. Pro. 208. Copy of Warrant; Receipt for Seized Property

- When taking property must leave a copy of the warrant and affidavit(s) and a receipt for the property seized.

Pa. R. Crim. Pro. 209. Return With Inventory.

- Return the search warrant promptly after search, along with inventory to the issuing authority.
- Unexecuted warrants shall be returned promptly to the issuing authority
- An inventory of items seized shall be made in the presence of the person from whose possession or premises the property was taken, or least before one witness.
- Office shall attest to the inventory subject to crime of Unsworn Falsification to Authorities

cassidylawpllc.com



● Grand Jury Investigations

Pa. R. Crim. Pro. 220. Motion and Order for Investigating Grand Jury.

Motion and order for grand jury shall be presented to the president judge or their designee

Pa. R. Crim. Pro. 222 – 231: Empaneling the Grand Jury

- Summon and swear jurors
- Swear in stenographers
- Swear in court personnel
- Swear in witnesses
- Witness’ lawyer may attend
- Must record proceedings
- Proceedings are sealed until certain time when witness testified

Grand Jury Powers:

- Issue subpoenas
- Take testimony
- Indict
- Issue reports

cassidylawpllc.com



● “Other” Types of Subpoenas

- Government subpoena, search warrant, audit, etc.
- Internal complaint to:
 - Leadership, Board
 - Ethics Hotline
 - Human Resources
 - Finance
 - Legal
- Call from the media
- Complaint from business partner
- Internal or external auditors encounter an issue
- Risk assessment identifies an issue

● The Fifth & Sixth Amendments

The Fifth Amendment – Right to Remain Silent

- Attaches when law enforcement seek to interview a person
Attached when subpoenaed to the grand jury or trial
- Hearing before court on whether right “attaches”
- Based on persons exposure to criminal liability

The Sixth Amendment – Right to Counsel

- “Attaches” during post-arrest interrogations, line-ups, other identification procedures (such as one-person show-ups), and all court proceedings

Kicking Off An Investigation

● Initial Questions For The Corporation

Who is the "client"?

- The Board
- The CEO
- The Audit Committee
- An individual employee, executive or board member

External or internal lawyers?

- Is there an actual or potential government investigation?
- Is there actual or potential civil litigation?
- Who is implicated in the matter?
- What type of matter is it?
- Need to manage cost
- Size of the organization
- Need for objectivity/impartiality

● Scoping an Investigation

What is the scope of the investigation?

- If government investigation – that will define scope – generally
- Must determine if need to investigate more broadly than government investigation
- Which divisions, locations are involved
- Who is involved?
- What is the nature of the issue?

Who “needs to know”?

- Define who in the entity will know about the investigation
- Define who has authority to make decisions about the investigation

● The Communications & Notification Plan

Significant matters deserve a communications plan & require certain parties be notified:

- Who will speak to the employees
- Who will speak to the media
- Who will decide on the message
- What will the message be
- Do lenders need to know
- Have you informed insurance provider
- Do clients, business partner contracts require disclosure

Pointer: Develop the comms plan before the crisis!

Protecting the Investigation & Its Findings

● Attorney-Client Privilege

- Applies to individuals and to entities
- The privilege “encourage[s] full and frank communication between attorneys and their clients.”
- Protected Communications:
 - Giving professional advice to those who can act on it
 - Giving information to a lawyer to enable the lawyer to provide sound and informed advice

Upjohn Co. v. United States, 449 U.S. 383 (1981)

● Attorney Work Product - PA and Federal

PA and Federal law differs.

Feds: Reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the investigation or defense; or statement made to the defendant, or the defendant's attorney or agent, by the defendant; a government or defense witness; or a prospective government or defense witness. *Fed. R. Crim. Pro. 16(b)(2)*

Pa: Even if prepared in anticipation of litigation or trial may obtain unless it's the attorneys "mental impressions" conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. *Pa.R.Civ.Pro. 4003.3*

● Losing Protections

PA and Federal law differs.

Feds: Reports, memoranda, or other documents made by the defendant, or the defendant's attorney or agent, during the investigation or defense; or statement made to the defendant, or the defendant's attorney or agent, by the defendant; a government or defense witness; or a prospective government or defense witness. *Fed. R. Crim. Pro. 16(b)(2)*

Pa: Even if prepared in anticipation of litigation or trial may obtain unless it's the attorneys "mental impressions" conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. *Pa.R.Civ.Pro. 4003.3*

● Crime Fraud Exception to Attorney- Client Privilege

- USAM - prosecutors should not seek the waiver of attorney-client privilege
- A joint defense agreement or paying for attorney's fees for employees no longer indicates lack of cooperation
- Crime – Fraud Exception:
 - Turns on client intent when seeking legal advice – was advice used to further crime?
 - In camera* review permitted whether documentary or verbal counsel
 - In camera* review when good faith showing that privilege may be overcome
 - In re Grand Jury Subpoena*, 745 F.3d 681 (3d Cir. Pa. 2014)

Disclosing to the Government*
(Reminder: Its not always required by law)

● Sarbanes-Oxley

- Mandates effective means for disclosing controls and procedures over financial reporting accuracy
- Disclose in organization's financial reports
- Must disclose material weakness
- Ongoing disclosure requirements
- Criminal and civil penalties

15 U.S.C. 7241; 15 U.S.C. 1350

● Foreign Corrupt Practices Act

- DOJ and SEC place significance on self-disclosure
- Self-policing – ability to detect criminal activity
- Investigations must be thorough and objective
- Disclosures should be timely
- Must identify executives, employees and third parties who may be involved
- Must take remedial action in response to the findings

A Resource Guide to the U.S. Foreign Corrupt Practices Act, 54-55

Federal Government Contractors/Subcontractors

Contractors must report to the government:

- Substantial overpayments
- Violations of criminal fraud laws
- Violations of civil False Claims Act

When, after an investigation, there is credible evidence of a reportable event.

48 C.F.R. 3.10

cassidylawpllc.com



Developing the Investigative Strategy

cassidylawpllc.com



● Who Should Execute the Investigation?

- Lawyers internal or external:
 - If any chance need to protect privilege
 - If entity will ultimately need legal counsel on its rights and potential liability
- Otherwise – non-lawyers –
- Need a policy on this or investigations will spring up without legal oversight
- Need functional expertise – finance, audit, environmental, etc.
- Clearly define who will participate and their roles

cassidylawpllc.com



● What Information Needs to Be Gathered?

Witnesses:

- Determine as an initial matter who needs to be interviewed
- Determine what information they have
- Determine if they will ask for counsel
- Are they indemnified

Documents:

- If needed, institute a litigation hold
- Work with IT to determine where information is housed
- Work with IT to determine how to access – voicemail, email, instant message, internal company chat communities

**Pointer: Know this about documents before an investigation
Map your data!**

cassidylawpllc.com



Interviewing Witnesses

At the onset of the interview....

Must be clear on who the attorney represents – the Upjohn (supra): warnings

- I am not your lawyer
- I represent the company so I look out for their interests
- You are entitled to your own attorney – the company may pay
- Your statements may be privileged but owned by the company
- The company may waive that privilege
- You may be subpoenaed to testify about this matter
- Corporate policy requires you talk to me, or,[depends on the jurisdiction]
- Do not discuss with other employees but... Cannot keep them from talking with the government or their lawyer

Pointer: Have these drafted before you have to say them!

● Preparing & Conducting the Interviews

- Determine the order of how witnesses will be interviewed
- Be sure to avoid frightening or intimidating witnesses
- Take precautions to assure witnesses do not "help" each other remember
- Be sure to avoid suggesting how witnesses should answer but – be effective at "refreshing" a witnesses recollection with documents or other statements
- Determine what you want to learn from that witness
- Determine the witness' position on the investigation and the interview
- What role did the witness play
- Generally, try and conduct witness interviews after documents have been gathered and reviewed
- Start with lower level employees, move up the hierarchy
- Try and interview before the government or adverse parties do

● Drafting a Report of Interview

- Generally, two people should conduct the interview –A note taker and a questioner
- Notes should be reviewed by both the note taker and the questioner after the interview
- Generally avoid recording interviews
- Determine the nature of the memo – just facts, impressions in another document
- Lawyer impressions and assessments – than rely on the protection
- MARK the memo accordingly
- Determine who will safe keep it
- Determine who will be briefed on it or who will receive a copy

Gathering Documents

● At the onset of collection....

- **Search warrants** – Documents are going out the door electronic and otherwise
- **Subpoena** – Must respond but counsel may “negotiate” production with prosecutors – eg. narrow time frame, scope, tiered production
- **Client Education** –
 - Explain why documents are needed
 - Discuss the scope of the collection
 - Discuss the risks of incomplete collection
 - Discuss the risks of destruction
 - Discuss preserving privilege
- **Lawyer Education** –
 - Learn about the IT and document management systems
 - Understand destruction policies
 - Learn about who has what and who does what

● Goals of Document Collection

- **Comprehensive**
 - Need to gather everything if subpoenaed
 - Otherwise define scope of what needs to be gathered
 - Scope may be more broad than what government wants
 - Assure function gathering – knows what to gather
 - Assure document review teams know what to look for
- **Integrity/Security**
 - Have methods to secure both electronic and hard copy documents
 - Have methods to track what has been reviewed, what is relevant, etc.
 - Have methods to track what is provided to the government
- **Protect Privilege**
 - Make sure to develop a privilege log

Pointer: Have plan to grab laptops, phones, tablets, voicemails etc. before the crisis hits

cassidylawpllc.com



Other Topics to Consider

cassidylawpllc.com



Perjury & Obstruction of Justice

Perjury:

- Knowing and willful making of a false statement (18 U.S.C 1621, 1623)
- Suborning perjury - procures another to commit perjury (18 USC 1622)

Obstruction of Justice:

- Expansive statute
 - Cover false statements
 - Witness tampering
 - Document destruction
- (18 USC 1501– 1520)

DOJ Yates Memo

- Released September 9, 2015
- Named after its author, Sally Yates former United States Deputy Attorney General
- Details DOJ's policy to prosecute individuals as corporate wrongdoers
- Created guidelines for prosecuting corporations and their employees

● Yates Memo Instructions

- To get cooperation credit corporations must disclose to DOJ the individuals “responsible” for the misconduct
- DOJ will focus criminal and civil corporate investigations on individuals – not just on the corporation
- DOJ criminal and civil attorneys should communicate on corporate investigations
- DOJ will pursue individuals in corporate wrongdoing cases– unless unique situation
- DOJ will not resolve corporation investigations unless individual liability addressed
- DOJ civil attorneys should consider factors beyond an individual’s ability to pay a fine

The Findings – What To Do With Them?

● Prepare a Report?

Work with counsel to determine if an investigative report should be drafted:

- Producing the report to the government may waive privilege not only with government but in civil actions
- The government may require a report
- A report may be the roadmap to prove criminal or civil liability
- May expose the organization or its employees to libel
- Shareholders may seek the report as they initiate actions against the organization
- Consider oral report outs to those who need to know

● Action Items

Government wants to see mitigation plans

- Develop a plan of action to improve operations to avoid the issue in the future
- Identify precise actions
- Identify owners for each actions
- Identify a time line
- Create a budget
- Develop a plan to report out on executing the actions

● Disclosing to the Government

FCPA Disclosure Motivation Plan:

- The Policy offers presumption of declination to companies that self-disclose, fully cooperate, and timely remediate, absent aggravating circumstances
- If the company is charged, incentives to self-disclose include the potential for a 50% reduction off the bottom of the Sentencing Guidelines fine range and a company may avoid the requirement to hire a compliance monitor

Export Controls Disclosure Motivation Plan:

- Commerce 's Bureau of Industry and Security (BIS) issued guidance regarding Export Administration Regulations (EAR) violations emphasis voluntary self-disclosure.
- There are mitigating factors for self-disclosure of export violations
- BIS noted that less than 3% of self-disclosed submissions resulted in a civil penalty

Yates Memo: Tips for Dealing with Its Implications for Business

● Assess Impact on Business

- Is business adequately insured?
- Are third party contracts adequate to protect business in making disclosures about individuals?
- Do policies and procedures need to be updated to be more clear, more proscriptive to protect employees?
- Does business have a defined process for undertaking investigations and documenting investigations?
- Is training sufficient to inform leaders and employees about policies and procedures?
- Do employees and third parties have a way (ways) to raise concerns?

● Review D&O Insurance

- Does business have D&O insurance?
- What is the nature of coverage for criminal acts?
- If one director is found guilty, are innocent directors covered?
- Are there any particular exclusions for criminal acts?
- Are regulatory violations covered? If so, are any excluded?
- Does insurance provide for legal counsel?

● Educate Board and Leadership

- Individuals will be exposed to criminal sanctions and civil sanctions for their actions or inactions
- Inform on notion of criminal liability to include – “willful blindness”
- Encourage more robust culture of “ask first” rather than seek forgiveness later
- Encourage more robust culture of open dialogue

● Educate All Employees

- Individuals will be exposed to criminal sanctions and civil sanctions for their actions or inactions
- Vital to follow policies and procedures
- Vital to raise concerns and questions
- Encourage more robust culture of “ask first” rather than seek forgiveness later

● Review Employment Practices

- Do employee agreements notify that business will now disclose employee wrongdoing to the government?
- Do exiting procedures assure business is able to secure hard and soft copy materials?
- Do exiting procedures provide forum for employee to disclose concerns?

● Third Parties - Review Contracts

- Do contracts allow for disclosure of wrongdoing to government?
- Do contracts include “morality” clause to permit business to walk away?
- Do contracts include ethics and compliance requirements?
- Do contracts include a right to audit third party?
- Do contracts include requirement that third party disclose ethics and compliance concerns to business?
- Do contracts include a notice requirement before third party goes to the government?

● Update Disclosure Policies

- Does business have policies and procedures requiring leaders and employees to disclose to business concerns about non-compliance with policy?
- Does business have a number of avenues for employees to disclose?
- Does business have an avenue for third parties to disclose?
- Is there a method for leaders, employees and third parties to disclose anonymously?
- Does business have procedures to investigate, document and close out concerns that have been raised?

● Update Investigative Policies & Procedures

- Does business have policies and procedures directing how investigations will be conducted?
- Do procedures identify:
 - who leads investigations;
 - who knows about investigations;
 - when to use outside counsel;
 - how to gather evidence and conduct interviews?
- Do procedures include managing internal and external communications on significant investigations?
- Does business have robust procedures to document and close out investigations?
- Does business have process for determining when to disclose to the government?