

Thoughts on Investigative Strategies from a Former Federal Prosecutor

By Carlos Singh

Do you ever wonder what prosecutors think about while conducting an investigation? What strategies and tactics do prosecutors employ to advance an investigation? How do prosecutors investigate a company, its officers or other entities or individuals — without their finding out about it?

This article provides insight into the thought processes and strategies prosecutors employ when conducting an investigation.

ESTABLISHING A FRAMEWORK

Assume that a corporate officer has engaged in fraud with other officers and has benefited financially. Or, perhaps a whistleblower has come forward to report the misconduct. In evaluating the claim, prosecutors will consider the elements of possible criminal violations and use them as a framework in pursuing the types of evidence needed in an investigation.

Because prosecutors carry the burden of proof, they must employ a rigorous strategic thought process for evaluating the strengths and weaknesses of the evidence that may be uncovered in an investigation. To do this, many find it helpful to rely on the following three levels of thinking:

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First, evaluate the evidence necessary to establish the government's case-in-chief at trial. In the process of the investigation, a prosecutor must be thinking about and evaluating the strength of the evidence that will be needed to prove the government's case-in-chief at trial. Not only does this type of thinking assist a prosecutor in preparing for trial, but it also avoids a misstep that could lead to a possible motion for judgment of acquittal (akin to a directed verdict) at the close of the government's case. But, if prosecutors think their thought process and planning should end here, they are mistaken.

Second, consider how the defense will attack the evidence presented in the government's case-in-chief and what substantive defenses could be raised. Prosecutors must elevate their thinking to a second level. They must learn to become alternative thinkers and see their case from multiple perspectives, objectively scrutinizing any possible weaknesses in their case. They must anticipate how the opposition will attack their witnesses and documentary evidence and what substantive defenses the opposition will raise. If they don't, prosecutors most likely will encounter trouble as they pursue an investigation, and they certainly will encounter trouble during a trial. Again, this is not the stopping point in the strategic thought process. Prosecutors must further elevate their thinking.

Third, assess how to overcome the opponent's substantive defenses and attacks on the prosecutor's evidence. Prosecutors must consider how they will overcome a defendant's substantive defenses and attacks on the government's evidence. If a prosecutor can reach this level of thinking, they will be in a position to consider how they can better present their case-in-chief and possibly foreclose defenses. Prosecutors who fail to consider or cannot overcome the defenses can expect problems at trial and disappointment in a jury's verdicts.

EVIDENCE ESTABLISHING INTENT

In employing this thought process, a prosecutor is in a better position to amass evidence to prove intent, or *mens rea*. Intent is an element of a crime that must be proved in order to obtain a conviction. It is the most difficult element to prove because of the nature of intent. Intent is formed in the mind, and the question becomes how a prosecutor knows what is on a suspect's mind.

A prosecutor can prove intent by circumstantial evidence, such as through the suspect's statements and actions. For example, we tend to think first of what we want to say before articulating it or stating it in a conversation. Thus, a statement (or action) is reflective of what one intended. It circumstantially shows what influenced a suspect to commit a crime, helping to prove intent.

Establishing intent further demonstrates the importance of learning to become a strategic thinker. Strategic thinking allows a prosecutor to better evaluate facts and assess the strengths, weaknesses and weight of evidence — leading to success.

ASSESSING CREDIBILITY AND CORROBORATING INFORMATION

Prosecutors will want to interview the reporting individual, whether that person is an officer involved in the fraud or an employee reporting it. In addition to obtaining information about the alleged wrongdoing, the prosecutor will be thinking about at least two overarching issues. The first involves initial assessments of the witness's credibility; the second, efforts to corroborate the witness's information — all without the suspect's knowledge.

To assess credibility, the prosecutor will question the witness from different angles to determine whether the information provided by the individual is consistent. The prosecutor will attempt to determine whether the witness's informa-

tion is first-hand or based on hearsay by asking whether the witness can provide documents that support the allegations of fraud. If no documentation is immediately available, prosecutors will have the witness identify the types of records that could support the allegations, as well as other records that might be relevant, and identify individuals who may have knowledge of the alleged fraud. The prosecutor will also elicit details concerning the witness's knowledge of the individuals involved in the alleged scheme in order to learn how, if at all, the individuals relate to each other. The prosecutor will want to know if the suspects have made any statements (and their actions in the face of statements or acts by conspirators), as this tends to provide evidence of intent.

At this stage, the prosecutor is attempting to determine whether a witness's information makes sense. Skeptical prosecutors know that future investigations may uncover information that does not completely support initial accounts of the fraud. But at the initial meeting with a witness, they begin to assess the type of witness the individual will make if the investigation leads to criminal charges and a trial. At the same time, they are thinking of other avenues through which to pursue the investigation, in order to help corroborate the initial information and uncover other relevant facts. Such avenues include the possibility of asking the witness to wear a wire or to make recorded calls to other people who took part in the scheme, particularly if the witness was directly involved in the alleged fraud. As noted earlier, a significant aspect of the prosecutor's thinking will concern the amount of information that can be obtained without the suspects knowing that they are being investigated.

THE FINANCIAL INVESTIGATION

The prosecutor may also conduct a financial investigation of the company, and of the individual suspects, in order to corroborate and establish other evidence of possible criminal activity. Investigative avenues include grand jury subpoenas and obtaining the suspects' bank and financial records to determine if, and how much, they have benefited from the scheme. Such information can be relevant to establishing the fraud and money laundering charges, and in determining criminal sentences if convictions result from the investigation.

At this point, it is unlikely that the prosecutor will have private bank or other financial account information permitting direct access to those records. A prosecutor will serve grand jury subpoenas, seeking account information from the three major credit bureau agencies. Normally the subpoenas will be accompanied by a letter asking the credit bureaus not to disclose to suspects that a subpoena has been issued for information about their bank and credit card accounts.

Upon receiving the account information, the prosecutor will then direct grand jury subpoenas to the specific banks for financial information. Prosecutors can legally ask for these financial records because federal law prohibits banks from disclosing to their customers that the government has requested an individual's financial records.

Thus, without the suspects' knowledge, the prosecutor will receive a wealth of information, including bank deposits and check-writing and check-cashing history. The prosecutor can then begin to determine whether a suspect is living within his or her financial means. Bank subpoenas may also reveal the names of other financial institutions and entities in which a suspect conducts business or other transactions.

Along with a letter requesting nondisclosure to the customer, the prosecutor can follow up with grand jury subpoenas to credit card issuers, in order to obtain spending information (such as airline and hotel charges) which can establish circumstantial evidence that suspects know each other, or have met.

OTHER AVENUES OF INVESTIGATION

There are other avenues of investigation prosecutors can pursue while keeping the case nonpublic or confidential. They can obtain by grand jury a subpoena for telephone, e-mail and other communications records, such as phone numbers and information about call frequency and length, which can establish whether the targets know each other. By requisite showings of evidence (probable cause or less) in applications to a court, the prosecutor can obtain tax records, wiretaps to record suspects' conversations, pen register information and e-mail content.

In addition, prosecutors can seek financial information confidentially from government institutions and databases that track international financial transactions. Through mutual legal assistance treat-

ties, they can also seek the assistance of foreign law enforcement agencies. Such investigative requests may include obtaining records, identifying and seeking biographical information of suspected individuals and possibly interviewing individuals residing outside of the U.S.

Government agents can conduct internet research and learn more about the company and its officers. Agents can conduct surveillance of suspects and even search their garbage, given that the Supreme Court has determined that a person has no expectation of privacy concerning items placed in the trash.

CONCLUSION

Whether the prosecutor pursues any or all of these forms of investigation is a matter of strategy, tactics, necessity and timing. Whatever methods are used, strategic thinking and planning are required to execute the investigation properly.

Through the initial investigative period, the prosecutor and government agents can identify individuals that they may want to interview. The timing for interviewing witnesses is a matter of strategy, involving, among other things, the level of confidence the prosecutor has that potential witnesses will keep the interviews confidential.

By using the strategies described above, prosecutors will accumulate a great amount of information that can corroborate aspects of the initial witness's information and credibility (or refute or damage it). Through good strategic thinking, they will have created a number of investigative leads, without the suspects ever knowing that they are being investigated.

At some point, the prosecutor may believe that he or she has insufficient evidence to charge the suspects, at which time the investigation becomes a matter of public knowledge. Having exhausted confidential avenues in which to pursue an investigation, the prosecutor may serve grand jury subpoenas or execute search warrants at the company for accounting, business transaction and employment records. Search warrants also may be executed at suspects' homes for records.