



COMMUNICATING WITH FEDERAL INVESTIGATORS IN THE EARLY STAGES OF A CRIMINAL INVESTIGATION

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When The Feds Come Knocking: Tips on Communicating with Federal Investigators in the Early Stages of a Criminal Investigation

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The most sophisticated of in-house counsel or executives can be thrown off-guard when federal agents knock on employees' doors or a grand jury subpoena arrives. This article offers one former Assistant United States Attorney's views on how to advise organizational clients to interact effectively with the authorities, while avoiding typical pitfalls, when a criminal matter first surfaces.

For some corporations, in some highly regulated industries—securities and health care, for example—the path for responding to criminal inquiries is well worn. In others, such as banking and telecommunications, responding to criminal subpoenas and search warrants related to their customers is also a matter of routine. In other sectors of the economy, companies have far less regular interaction with criminal authorities. However, such companies can easily find themselves enmeshed in federal criminal investigations involving fraud, export controls, or environmental crimes, to name but a few areas.

This article is intended as a primer for counsel who may not be criminal law specialists, but who receive a frantic call from an organizational client who is also unfamiliar with the federal criminal law process when the client receives a grand jury subpoena or—much scarier—is faced with a search warrant of its premises. After providing a brief overview of the basics of a federal white-collar criminal investigation, this article outlines three overarching goals

for counsel in the early stages of a criminal inquiry.

Typical Framework for a Federal Criminal Investigation

Federal criminal charges follow one of two events: (1) a “reactive” arrest of someone who is caught in the act of breaking a federal law; or (2) following an investigation by a federal law enforcement agency, in conjunction with a prosecutor from one or more components of the Department of Justice. In the vast majority of federal criminal cases that are likely to ensnare an organization—the archetypical “white-collar” case—charges follow an investigation of some length. Most federal criminal investigation are initiated within one or more federal law enforcement agencies, ranging from well-known entities like the Federal Bureau of Investigation or the U.S. Secret Service, to lesser-known ones such as the Department of Commerce Bureau of Industry and Security or a federal agency's Office of Inspector General.¹ The case may be initiated in a myriad of ways, including by referrals from civil regulatory agencies, in response to citizen complaints, or as a result of reporting by banks or other entities about suspicious financial activity.

When an investigation is in its infancy, federal agents may undertake their work without the involvement or guidance of a federal prosecutor—reviewing publicly available information, conducting surveillance, and interviewing witnesses. Certain agencies also have the power to issue administrative subpoenas for information, though

1 The expansive nature of federal criminal authority is well documented: there are now thousands of federal offenses on the books. See, e.g., Gary Fields and John R. Emshwiller, “As Criminal Laws Proliferate, More Are Ensnared,” *Wall Street Journal*, July 23, 2011. As of 2008, which the last time the Department of Justice conducted a census of federal law enforcement officers, there were more than 120,000 sworn federal law enforcement officers with criminal law enforcement authority, spread across 73 agencies. See Brian J. Reaves, *Federal Law Enforcement Officers, 2008*, Bureau of Justice Statistics, June 2012, available at <https://www.bjs.gov/content/pub/pdf/fleo08.pdf>.

this power is limited to certain types of cases.²

At some point in the investigation—and certainly before any criminal charges are brought—the agents will need to involve a federal prosecutor, most likely an Assistant United States Attorney (“AUSA”) in one of 93 offices across the country, but perhaps a Trial Attorney in one of the criminal enforcement components of Main Justice. The involvement of an attorney for the government is necessary to tap the subpoena power of a federal grand jury,³ to obtain tax return or other information from the IRS,⁴ or, as a practical matter, to obtain the issuance of any court-authorized process, especially search warrants.⁵

Grand jury subpoenas are the basic building blocks for any white-collar criminal inquiry. Such subpoenas can be issued by AUSAs in the name of the grand jury, without any application or notice to a judge—or even to the grand jury itself—prior to its issuance. No showing of probable cause is required.⁶ Subpoenas may of course be issued for testimony before the grand jury, but they are equally useful for commanding the production of records. While there are certain categories of information that are not available to the government by issuance of a subpoena alone, grand jury subpoenas will give investigators access to much of the information they need in a criminal case, including most categories of business records, telephone toll records, and banking and other financial information. Other forms of investigative process require that the government make an application to the court justifying their issuance. The most common orders falling in this category are search warrants, which require a showing of probable cause to a judge that a crime has occurred, and that evidence of it will be found in the place to be searched.⁷ While subpoenas command compliance by the recipient to turn over certain information or provide testimony, search warrants typically authorize law enforcement officers to enter into particular physical spaces to search for evidence.⁸ A search warrant is also required to access certain types of records in the custody of third parties, for example, email or other files stored

with an electronic communications provider.⁹ Other less common forms of court-authorized process in white-collar cases may include tracking warrants or even wiretap orders—which, though uncommonly used in white-collar cases, are not unheard of in that context.¹⁰

Most criminal inquiries operate with a high degree of secrecy. Grand jury proceedings are secret, and search warrant applications and other investigative filings are typically sealed by the issuing court at the request of the prosecutor to avoid jeopardizing an ongoing investigation. At some point in the investigation, however, the case is likely to become known to an organization before charges are filed—if only because the organization or one of its employees is summoned to the grand jury, or perhaps when a search warrant is executed on company premises.

The latter scenario—federal agents showing up, warrant in hand, at a company’s office to seize documents and computers—is a problematic experience for any business. Fortunately, it is the exception rather than the rule in white-collar cases. Search warrants are fraught with risk for executing agents, and are time-consuming to apply for and require greater resources to execute as compared to obtaining information via subpoena. Thus, agents and prosecutors are likely to request searches of company premises where:

- The government fears targets will destroy or refuse to turn over evidence over in response to subpoena;
- The government believes it is particularly important to have forensically sound images of hard drives, cell phones, or other electronic storage media—and not just authentic copies of business records; and/or
- The government wants to make a show of force, in which case a search warrant execution is often coordinated with early-morning interviews of employees at their homes.

Though the impact on a company is likely to be much greater in the case of a search warrant than in a subpoena, company counsel’s goals should be essentially the same in either situation—or even in a situation where a criminal probe comes to light through other channels: (1) establish contact with the prosecutor overseeing the case; (2) determine the role of the company in the government’s eyes; and (3) avoid conduct that is or could be construed as obstructive.

² See, e.g., 21 U.S.C. § 876 (Controlled Substances Act cases) and 18 U.S.C. § 3486 (certain health care fraud and other cases).

³ See generally Fed. R. Crim. P. 6.

⁴ See 26 U.S.C. 6103(i)(1) (providing for application to view confidential tax information, including tax returns, in federal criminal cases).

⁵ See generally Fed. R. Crim. P. 41.

⁶ See *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297 (1991) (“[T]he Government cannot be required to justify the issuance of a grand jury subpoena by presenting evidence sufficient to establish probable cause because the very purpose of requesting the information is to ascertain whether probable cause exists.”).

⁷ See Fed. R. Crim. P. 41.

⁸ A search warrant also allows executing agents to break down doors, force entry to containers, or even crack encrypted electronic protections to access information that is encompassed by the warrant. See generally *United States v. Ross*, 456 U.S. 798, 820-21 (1982) (“A lawful search of fixed premises generally extends to the entire area in which the object of the search may be found and is not limited by the possibility that separate acts of entry or opening may be required to complete the search.”).

⁹ See 18 U.S.C. § 2703. Such warrants are typically served on providers who turn over records as they would in response to a subpoena.

¹⁰ See 18 U.S.C. § 2516 (listing a large number of offenses that may be targeted using wiretap orders, including bribery and antitrust crimes).

Goal One: Establish Contact with Government Counsel

Whether served with a subpoena, or faced with the execution of a warrant, it is critically important to establish a direct line to the AUSA or other government lawyer overseeing the case as soon as possible—just as one would want to establish contact with opposing counsel when served with process in a civil matter.

Counsel should avoid the urge to negotiate or argue with law enforcement agents who come bearing process. There are two reasons for this. First, as discussed in further detail below, it is critically important to avoid giving the appearance that your client is obstructing an inquiry or interfering with the collection of evidence. Federal agents, while typically well-trained to gather evidence, are likely to take umbrage at a lawyer or other company representative who questions the scope of a subpoena or search, and may react poorly to the perception that his or her authority is in doubt. Second, the agent is likely to be simply the messenger—albeit one who should be treated at all times with courtesy—and is thus not likely have the authority or willingness to negotiate modifications to a subpoena, or receive objections to the scope of a search warrant. The AUSA, a fellow lawyer who is likely to be more accustomed to the give-and-take inherent in an adversarial legal system, is the proper place to direct your concerns about a subpoena or warrant.

If possible, your first contact with the government's counsel should be by telephone. (Typically, a subpoena will list the contact information for the AUSA requesting it; if the government counsel's name and contact information are not apparent, then a call to the U.S. Attorney's Office should allow you to establish contact with the right lawyer.) Too often as an AUSA, I saw lawyers experienced with civil practice spend their clients' money writing a detailed letter objecting to the response window or scope of a subpoena, when their concerns about the subpoena could have been resolved with a short phone call. That first phone call is also an opportunity to let the government know that your client is represented by counsel, and to establish yourself as the channel for any future requests for information (including, where permitted by the applicable Rule of Professional Conduct, for any requests to interview your client's employees). Additionally, an initial phone call is an opportunity to discover basic information about the government's inquiry that is not apparent from the face of the subpoena or warrant, including—most importantly—to find out the company's role in the investigation.

Goal Two: Find out the Company's Role in the Investigation

In your initial contacts with the AUSA, your overarching goal should be to determine the government's view of your client in the investigation. That is, you should ask if your client is a target of the investigation, merely a repository for information that the government believes is relevant, or something in between?¹¹

Even in situations where a search warrant is executed at its offices, the company may not be the target or even the subject of the inquiry. Assurances from government counsel that, for example, the target of the investigation is a single employee who happens to have used the company's computers for illegal activity unrelated to his job, or that the government is seeking records about a single client who happens to have transacted business with the company, will likely ease the decision about whether or not to cooperate with the government's inquiry, or whether it is necessary to involve experienced criminal defense counsel in the matter. On the other hand, indications from the AUSA that the company or key personnel are suspected of wrongdoing in the conduct of its business may indicate that a more robust response is necessary.

Goal Three: Avoid Setting Up an Argument That Your Client or Its Employees Obstructed Justice.

We have all heard the adage that “it's not the crime, it's the cover-up.” Nowhere is this truer than in the white-collar criminal context. Indeed, federal prosecutors have not hesitated to charge targets with making a false statement to investigators or obstructing justice even in matters where a person is never formally accused of an underlying offense. (Martha Stewart is perhaps the most famous such case, but more recent examples can be seen in the Special Counsel's probe of Russian interference in the 2016 election.) Additionally, obstructive conduct can become evidence of consciousness of guilt if someone is later prosecuted for a substantive crime.¹² If an agent's or prosecutor's view of a case is colored early on in the matter by conduct that looks obstructive, the government may be less willing to give the company or its employees the benefit of the doubt in making charging decisions.

How, then, do you avoid the appearance that the company is obstructing justice?

¹¹ See Justice Manual 9-11.151. “A ‘target’ is a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” Id. “A ‘subject’ of an investigation is a person whose conduct is within the scope of the grand jury's investigation.” Id. A “witness” is anybody else not falling in the previous two categories.

¹² See, e.g., *United States v. Begay*, 567 F.3d 540, 552 (9th Cir.2009) (finding evidence that defendant intimidated two government witnesses was admissible to show consciousness of guilt)

- If the company is served with a search warrant, make sure that employees do not attempt to “bar the door” or become argumentative with searching agents. Instead, employees faced with a warrant should be advised to: (1) request to see identification and to be given business cards for the executing agents; (2) request to see a copy of the warrant; and (3) comply with the instructions of the executing agents to access areas or materials called for in the warrant. If the company or its employees believe that agents have exceeded the scope of their authority, those concerns should be communicated through counsel to the AUSA overseeing the case. If necessary, defense counsel can move for the return of property that is improperly seized, items that are necessary for the company’s ongoing operations, or for a protective order to avoid giving agents and prosecutors access to the company’s privileged information.¹³
- Where a warrant is executed and/or agents seek to interview employees at their homes or offices, employees should be informed that while they have no obligation to volunteer information to federal investigators, if they choose to submit to an interview the company expects them to be completely truthful. Employees may also be advised that if they wish to have counsel present when interviewed, the company will provide a lawyer.
- Sometimes, when the nature of a government inquiry becomes known, well-meaning employees may gather to put together a timeline of past events, or a crisis response plan. If such discussions occur, it is imperative that counsel for the organization lead and direct them. Without the presence and involvement of counsel, it will be difficult to shield such discussions under the attorney-client privilege. Worse, if the government believes that the past conduct of certain employees is criminal, then meetings or discussions between those employees about the substance of the case after the investigation has become known to them may be cast as attempts to obstruct justice by “getting their story straight.”
- As you would in any other litigation matter, you should instruct an organizational client to issue notice to employees to preserve documents and other evidence that may be relevant to the government’s inquiry. Your initial call with the AUSA is a good opportunity to let the government know that your client will be issuing a litigation hold; it may even be prudent to obtain the government’s input as to the scope of that hold—both to show a cooperative posture and to head off later claims that evidence was lost due to the company’s failure to preserve it.

Conclusion

Responding to a criminal inquiry can be particularly fraught with anxiety for organizational clients, and with good reason. However, responding calmly with the goals outlined above can set up the company to resolve the matter on favorable terms and with a minimum of disruption to its operations.

¹³ See Fed. R. Crim. P. 41(g).

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Overview

- Basics of federal white-collar crime investigation
- What to do when faced with an investigation, especially a warrant on company premises

Basics: Roles of Agents and Prosecutors

- Most state prosecutions: investigating law enforcement officers pass their files to a prosecutor once the investigation is substantially completed.
- Most federal prosecutions: federal prosecutors work closely with agents to build the case.

Basics: Roles of Agents and Prosecutors

- Why are federal prosecutors so involved?
 - Federal law and Department of Justice policy leaves them with control over the investigative process
 - Charging standards are high
 - Legal standard for charging is probable cause, but under DOJ policy cases should not be charged unless evidence will secure a conviction

Basics: Building Blocks

- Public records
- Voluntary interviews
- Subpoenas
- Search Warrants
- Other court orders

Basics: Building Blocks

- In the federal system, prosecutors control many of the tools needed to build a white-collar case:
 - The Grand Jury (subpoena power)
 - Search warrants
 - Tax records
 - Other court orders, including wiretaps

When The Feds Knock

U.S. Dist. Ct. 1300 Street and Street Street

UNITED STATES DISTRICT COURT
for the

In the Matter of the Search of _____)
(which describes the property to be searched)
or during the period of time established) Case No. _____)
_____)
_____)

SEARCH AND SEIZURE WARRANT

To: Any authorized law enforcement officer

An application by a federal law enforcement officer or an attorney for the government requests the search of the following person or property located in the _____ District of _____
(identify the person or describe the property to be searched and give its location)

The person or property to be searched, described above, is believed to conceal (insert the person or describe the property to be searched)

I find that the affidavit(s), or any recorded testimony, establish probable cause to search and seize the person or property.

YOU ARE COMMANDED to execute this warrant on or before _____ (month, day, year) (if any)

in the daytime, 6:00 a.m. to 10 p.m. at any time in the day or night as I find reasonable cause has been established.

Unless delayed notice is authorized below, you must give a copy of the warrant and receipt for the property taken to the person from whom, or from whose premises, the property was taken, or leave the copy and receipt at the place where the property was taken.

The officer executing this warrant, or an officer present during the execution of the warrant, must prepare an inventory as required by law and promptly return the warrant and inventory to United States Magistrate Judge _____ (judge)

I find that immediate notification may have an adverse result listed in 18 U.S.C. § 2703 (except for delay of field), and authorize the officer executing this warrant to delay notice to the person who, or whose property, will be searched or seized (not to be appropriate here) For _____ days (not to exceed 30) _____
 until, the facts justifying the later specific date of _____

Date and time issued: _____ Judge's signature: _____
City and state: _____ Printed name and title: _____



The Feds Knock: What are your Goals?

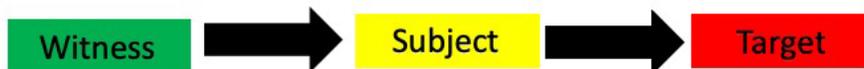
1. Make contact with government counsel
2. Understand the company's role in the investigation—is it the target?
3. Avoid making a difficult situation worse by obstruction (or the appearance of obstruction)

Goal 1: Make contact with the AUSA

- Cooperate with agents, but get in touch with the lawyer who is calling the shots
- Let the prosecutor know the company is represented by counsel

Goal 2: Determine the Role of the Company

- How does the government see your client?
- There are a range of possibilities:



Goal 3: Avoid Obstruction

- Things may already be bad—don't make them worse
 - Don't interfere. Litigate return of property later.
 - Instruct employees:
 - May speak to investigators if they choose
 - If they speak, company expects them to be 100% truthful
 - Company can arrange a lawyer for them
- Counsel should lead all crisis response discussions

Conclusion



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A former federal prosecutor, Josh is an experienced trial lawyer who represents corporations and individuals in white-collar criminal matters, government and internal investigations, and complex civil litigation.

Prior to joining the firm in 2019, Josh was an Assistant United States Attorney in Seattle and Baltimore. During his more than four years as a federal prosecutor, he represented the government in court at all stages of the federal criminal process, including wiretap and grand jury investigations, multiple jury trials, and appeals to the Fourth and Ninth Circuits.

Josh began his legal career at WilmerHale in Washington, DC. His practice was nationwide in scope and focused on representing clients in government investigations, federal criminal litigation, and related administrative proceedings. Josh defended individuals and corporations in cases involving alleged violations of the federal securities laws, the Foreign Corrupt Practices Act, the False Claims Act and the Anti-Kickback Statute, and the Food, Drug and Cosmetic Act. While at WilmerHale, Washington DC Super Lawyers named Josh a "Rising Star" in the category of White-Collar Criminal Defense.

Featured Cases

- Prosecuted Washington methamphetamine trafficker at jury trial ending in guilty verdict.
- Obtained guilty plea of Seattle credit union employee for embezzlement of hundreds of thousands of dollars from member accounts.
- Obtained guilty verdict against violent felon at jury trial for firearms and obstruction of justice charges.
- Prosecuted drug trafficking case involving maritime smuggling of cocaine and methamphetamine worth millions of dollars from Washington to British Columbia.
- Prosecuted eleven defendants following multi-line wiretap investigation into smuggling of heroin from Guatemala.
- Prosecuted death-penalty eligible murder-for-hire conspiracy in Baltimore.
- Investigated and prosecuted violent robbery spree in Baltimore and suburbs involving 20 separate incidents.
- Defended corporate executive at contested sentencing for strict-liability misdemeanor violation of federal Food, Drug and Cosmetic Act and in administrative exclusion proceedings before Department of Health and Human Services.
- Represented global software company in successful defense of trade secret misappropriation and commercial disparagement claims in Maryland state court.
- Represented global software company in Foreign Corrupt Practices Act investigation by Department of Justice and Securities and Exchange Commission involving alleged bribery of Chinese government officials.
- Defended investment bank in securities fraud lawsuit by teachers' pension fund.
- Represented health care technology company in grand jury inquiry and related audit committee investigation of alleged kickback scheme; no charges filed.
- Advised industrial conglomerate in cooperating with FBI investigation into scheme by employee to illegally export sensitive technology.
- Assisted investment advisory firm in internal investigation into employee misconduct.

Education

- J.D., University of Virginia School of Law, 2008
- B.S., Cornell University, 2003

