

5 Tips For Internal False Claims Act Investigations

By **Dietrich Knauth**

Law360, New York (August 13, 2014, 2:39 PM ET) -- When federal contractors investigate potential violations of the False Claims Act within their company, they must walk a fine line between self-preservation and cooperation with the feds.

Contractors are required to report credible evidence of fraud or significant overpayments on their contracts, but sometimes they struggle with ways to protect themselves during internal FCA investigations. The topic was the subject of a panel discussion involving representatives from law firms, in-house counsel and the government, moderated by Marcia Madsen of Mayer Brown LLP, at the American Bar Association's recent meeting in Boston.

Here are some tips that emerged for balancing the competing interests in such investigations and minimizing potential liability:

Take Care When Interviewing Employees

Interviewing employees can require a delicate touch, as it's easy for an internal investigation to scare employees and disrupt their work. The right approach requires careful coordination between in-house attorneys and outside counsel on a range of issues, from explaining the purpose of interviews to employees to agreeing on who should keep interview notes, attorneys say.

Angela Styles, co-chair of Crowell & Moring LLP's government contracts group, said that outside attorneys like her often have to overcome a poor first impression with the employees they're interviewing.

"I don't think I'm scary, but apparently lots of employees do, and I think outside counsel has that problem a lot," Styles said. "It's so important to realize that when you're outside counsel and you're coming in and you're talking to employees, you are a really scary individual to a lot of men and women."

Employees can freeze up as soon as outside lawyers give them an "Upjohn warning," reminding them that they represent only the corporation and not the individual, Styles said. It's crucial to quickly develop a rapport and deliver the warning in a way that is both gentle and clear, allowing the interview to proceed smoothly, Styles said.

"I've got to say, it's very, very difficult because you don't have that long-term relationship [that inside counsel has with employees], but it really affects the entire tenor of the interview, as to how gently you

are able to give the Upjohn warning and make this person feel comfortable but get out everything that you need to get out there," she said.

It's part of in-house counsel's job to clearly explain the need for interviews by outside counsel, said Scott MacKay, vice president and general counsel at Lockheed Martin Information Systems & Global Solutions. Generally, employees are willing to cooperate if they understand what's happening, he said.

"It shouldn't be just the outside counsel parachuting in and meeting these people out of the blue," MacKay said. "You need to work these people. You need to work the organization so they're ready, so they know who Angela is, so they know that she's really a good lawyer and a nice person, and not scary, and they hear that from someone they know."

Outside counsel should also resist the urge to "travel in packs," which can make employees uneasy, and generally try to minimize disruption in the workplace, Styles said.

"These people have work to do," Styles said. "They're operating under a lot of stress, and you're bringing in a completely new unknown factor to them, and they also have to walk out the door and continue to do their job."

In the relatively rare event that a False Claims Act relator still works at the company and is interviewed during an internal investigation, MacKay said, the interview could represent a "free shot" at the relator.

"To the extent that you know you have a whistleblower, it would strike me as prudent to interview that person as quickly as possible and reduce to writing what that person tells you," MacKay said.

Preserve Attorney-Client Privilege ...

In the recent case *U.S. ex rel. Barko v. KBR*, the D.C. District Court heightened the attention paid to questions about attorney-client privilege for internal FCA investigations by finding that internal investigations were performed to comply with regulatory responsibilities and not for the purpose of legal advice. Although *Barko* was recently overturned by the D.C. Circuit, it serves as a warning to companies that they should be as clear as possible that they are seeking legal advice if they want to preserve privilege later on, attorneys said.

If companies do not have attorneys do the employee interview, they should make it very clear that the investigation is being performed at the direction of their legal department, according to Brian Miller of Navigant. Miller, who helped write the mandatory-disclosure rule while serving as inspector general of the General Services Administration, said that the initial *Barko* decision tried to enforce an artificial separation between internal investigations performed for legal purposes and those performed for business purposes.

"If you're doing an internal investigation to comply with the mandatory-disclosure rule, one of the issues is: Do you have credible evidence of an FCA violation? How is that not a legal issue?" Miller said. "When we did the mandatory-disclosure rule, we wanted to take privilege off the table and encourage companies to do these compliance reviews and investigations. The harder you make things to do, the less likely it is that companies will do it."

... But Don't Be Too Cagey With the Feds, Either

For Styles, there is some tension between protecting attorney-client privilege and the mandatory-disclosure rule, but companies shouldn't obsess about protecting privilege at the expense of compliance with the rule.

"If you're making a disclosure and you're too worried about privilege, I can tell you that the disclosure isn't going to go well," Styles said. "If you or your client errs too far on the side of privilege, [the government is] not going to have enough information."

MacKay said that companies will get themselves in even more trouble if they try to be too cagey when making a disclosure to the government.

"You really can't slice the bologna thinly in disclosures," MacKay said. "The fact is that you're going in and making a disclosure. ... OK, that's given. You've said there's credible evidence, so you don't need to spend a lot of time discussing the legal niceties of whether it is implied certification or whether it's something else under the False Claims Act."

Kelley Hauser, a trial attorney in the U.S. Department of Justice's Civil Fraud Division, said that incomplete disclosures can encourage whistleblowers to come in after a disclosure, expanding on the original disclosure or finding things that aren't included in the original disclosure.

DOJ attorneys are generally skeptical of overly broad claims of privilege, especially for lawyers who primarily act in a business role for a company or act in a hybrid capacity, Hauser said. The DOJ will look for relevant documents and facts underlying a company's legal opinions, not the opinions themselves, he added.

"On the one hand, I'm not interested in knowing what an in-house attorney or ... outside counsel thinks about an FCA case or your exposure," Hauser said. "I don't care, and I'm not going to agree anyway. That's clearly privileged and we don't want to see that and that's fine."

"On the other hand, documents that are pre-existing and just happen to have been swept up in an internal investigation are not necessarily privileged and they should be produced, and everything in between is a more difficult call."

Don't Go Broke Fighting Over Document Requests

Companies should resist the urge to fight back against apparently overbroad subpoenas and discovery requests, MacKay said.

"The case law is replete with the carnage of companies that have sought to litigate the scope of discovery requests, and they always lose," MacKay said. "At the end of the day, you're going to have to produce the documents because the government does have a right to get it, and if you narrow it and work cooperatively with the agency attorney, you really are advancing your client's interest. As distasteful as you may find it sometimes, the point is, it really advances the ball toward a faster, cheaper, quicker resolution — even if the resolution isn't one that you are particularly enamored with."

Instead of arguing with the government, a company can make more headway in narrowing a request if it just talks to the agency or trial attorneys and figures out what they really are looking for, Miller said.

"Contact the attorney right away and work with the attorney from the government to try to narrow the scope down or have a rolling production," Miller said. "I think there's a lot you can do, and I think you'll find that government attorneys are cooperative and easy to work with these on these issues."

Without that cooperative interchange, the only ones that benefit, really, are the outside counsel, because the legal fees can rack up quickly during scorched-earth fights over document production, MacKay said.

Work to Shape the Investigation

Cooperating with a trial attorney or the agency can also give a company insight into the case against them and can give the company an opportunity to help shape the investigation as it progresses, MacKay said.

"The key to cooperating with a trial attorney or the agency is that you learn about their case, what it is that they're focused on, so that you can then start working with that investigator or regulator to formulate your defenses," MacKay said.

Cooperating proactively can also help a company navigate potential suspension and debarment risks related to FCA allegations, according to Wayne Wisniewski, director of the U.S. Navy's civil recovery division. Good attorneys can play a key role in getting that cooperation off to the right start, Wisniewski said.

"There's a real distinction between those that are represented by counsel and those, maybe a small or midsized business, that come in and think that he or she can do everything by themselves," Wisniewski said. "They don't shape the case, they're all over the place, and it's very unwieldy. It puts us in an awkward position as well, we have to assist them and it's an ethical dilemma on our side."

--Editing by Jeremy Barker and Brian Baresch.