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UNLEASHING THE LEVIATHAN: Tips for Companies Referring Cases to Law Enforcement

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When harmed or in heated disputes, companies sometimes think about bringing the “big guns”—law enforcement agencies—into the fight. Often acting through counsel, a business may seek to refer a matter to the government for potential investigation and prosecution of competitors, business counterparties, former employers or employees, or entirely unrelated persons who have victimized the company. In some cases, this may complement or even replace the use of civil litigation as a remedy; in others, it may be the only practical option.

While this aggressive approach can make sense in some cases, it is not without risks, as highlighted by a recent high-profile case involving an allegedly misleading referral by an attorney at a prominent national firm.¹ Even when the tactic makes sense, there are basic steps a referring company and its counsel can take to maximize the government’s ability and willingness to act, or at least to avoid undercutting the effort. Below are a few suggestions for those considering such a step.

Consider whether a lawsuit is preferable to a criminal investigation

Begin with the threshold question: should I make a referral to law enforcement at all? For a victim—whether individual or company—who is deciding whether to seek a government investigation in lieu of or alongside a civil lawsuit, there are pros and cons to weigh.

Successfully initiating a government investigation can certainly have advantages. The government has powerful investigative tools, such as search warrants and grand jury subpoenas, that are not available to a civil litigant. The possible consequences of providing false information or of a conviction on the merits (i.e., jail time) also means that the government has far more leverage in drawing the truth from witnesses and resolving cases with at least some penalty. And, of course, a complaining victim need not incur attorney fees or other litigation costs when it is the government pursuing the case.

At the same time, there are risks and drawbacks to a government referral. Most importantly, it is the government—not the complaining victim—who controls the advancement and resolution of the criminal proceedings. Although the victim often has certain rights to be heard by the government and court, and to be informed of certain key developments in the case, it is the government that ultimately decides what investigative steps to take, whether to bring charges, and when these things will happen. That process may take far longer than a victim would like—possibly even longer than civil litigation would last. The

¹ Adam Goldman and Charlie Savage, *A Prominent Lawyer Pleads Not Guilty in the Inquiry Examining the Russia Investigation*, New York Times, September 17, 2021.

opening of criminal proceedings may also lead to a related civil lawsuit being stayed, which could delay a victim's recovery. Further, the cost of responding to a criminal investigation and prosecution may drain the defendant's resources to the point that there are none left for the victim.

Don't misstate, exaggerate, or omit material information

Perhaps obvious but worth repeating: if you are going to make a referral, don't mislead the government. Although prosecutions of referring parties or counsel—like the recent Michael Sussman case—are rare, they underline the fact that deliberate misstatements in a criminal investigation are illegal, whether under the federal false statements statute (18 U.S.C. § 1001) or a state law such as California Penal Code § 148.5.

And there can be other consequences. Inaccuracies in a report can undermine the credibility of the reporter and damage that person's value as a witness. This, in turn, can discourage the government from pursuing an investigation at all. Even if authorities do move forward, a false report can upend a criminal case, for example by invalidating a search warrant based on the information supplied. If a false accusation leads to an investigation or charges that are ultimately dropped or beaten, the accused may have a civil claim for malicious prosecution against the reporting party.

To avoid this, make sure that any report to law enforcement is as accurate as possible. That means not only correctly disclosing relevant facts and events, but also not omitting or concealing important points, such as notable evidence weighing *against* criminal culpability. This may require a careful review of relevant documents, communications, or other evidence, ideally in chronological order. It may also call for cross-checking information with multiple witnesses or sources where possible, perhaps as part of an internal investigation.

Often, it may also be important to disclose information about the reporting party or its representative. For example, law enforcement referrals often come from parties to civil litigation—such as business competitors, contractual counterparties, or former employees—who may seek to gain advantage in their lawsuit by initiating a government investigation. Even if such a person has a good-faith belief that their opponent is engaging in illegal conduct, it would be unwise to conceal the underlying civil case or other indicia of potential motives when making the report. While such an omission may not be unlawful, the government will view it with suspicion, and the litigation opponent may raise it in either the civil case or any government action.

Don't overwhelm

At the same time, there is such a thing as too much information. While the victim or witness may have years' worth of data and events to relate, much of it may not pertain to anything the government has the power to address. Drowning the government in irrelevant detail can do worse than testing investigators' patience; it can bury the key points that might actually support launching an investigation. As with any form of advocacy, less is often more.

In many cases, a referring party (or its counsel) may prepare a written presentation for the government, whether in the form of a "white paper," a set of exhibits, a slide show, or some combination thereof. This can certainly help clarify issues for investigators, while also preventing later questions about what was actually represented at a meeting. Focus and brevity, however, remain virtues. A written "road map" that covers too much terrain can have the same effect as an overbroad oral presentation, obscuring the key points that might show why an investigation is viable and worthwhile.

Know what is likely of interest

To reconcile these conflicting mandates—don't omit the important, don't overshare the trivial—it helps to have a sense of what government enforcers would consider significant. Experience helps, but there are a few basic guideposts that even counsel who do not regularly practice criminal law can consider.

First, and most obvious, *is the conduct at issue illegal?* Careful review of the elements of the potential criminal offenses at issue can help determine whether this threshold has been crossed. In the case of white collar offenses such as fraud and computer crimes, it is especially important to consider the required mental state—such as intent to defraud—and any jurisdictional requirements (e.g., use of the mails or interstate wires), as prosecutors will look carefully at whether these can be proven.

Second, *is the suspected crime a law enforcement priority?* Law enforcement agencies lack the resources to pursue every potential case of illegal conduct, and thus tend to focus on offenses that have certain key features, the details of which can change over time. For example, the Department of Justice's Justice Manual (currently, at Section 9-27.230) lists a series of factors for prosecutors to consider when deciding whether to pursue a case, such as "the nature and seriousness of the offense" and the criminal history of the accused. Specific law enforcement offices in different regions may have even more detailed criteria. A person or entity seeking to make a referral should consider emphasizing these factors if possible.

More specifically, prosecutors and agents will often look at the number and nature of the victims harmed, and the degree of harm. For example, in a fraud case, how much money was taken, and from how many people? At the federal level, and in a large U.S. Attorney's Office within a large district, a suspected fraud involving dollar amounts below a certain threshold—say, \$500,000—may not be likely to draw an investigation unless there are other aggravating factors present. In other jurisdictions or for other agencies, the amount required may be smaller. Likewise, if the victims include public entities or especially vulnerable persons (such as children or the elderly), the dollar figure may be less important.

Another factor in the Justice Manual is "federal law enforcement priorities, including any federal law enforcement initiatives." These can change over time with the coming of new administrations, legislative developments, or other events. Investigations of matters that fall within one of these announced priority areas are more likely to be pursued, even if other criteria are lacking. Thus, for example, if the Justice Department and Department of Health and Human Services are emphasizing enforcement against telemedicine fraud, a referral of even a smaller-scale scheme in that area may draw interest from investigators.

Third, if the accused is a company, *do the government's criteria for charging companies apply?* In considering federal charges against a company, DOJ applies its Principles of Federal Prosecution of Business Organizations, which occupy a full chapter of the Justice Manual (Section 9-28.000 *et seq.*). The details of those Principles have been repeatedly amended and are too extensive to review here, but anyone making a referral against a corporate target should consider them and highlight for the government those factors that apply.

Be prepared to wait

Victims and others who refer matters to law enforcement are usually eager to see signs of progress in the investigation. Unfortunately, as alluded to above, those signs may come very slowly, if ever. Government

investigators prize secrecy in their work, and are not in the habit of disclosing their activities even to those who caused the matter to be opened. At the same time, case backlogs may mean that it takes weeks or months before the authorities even decide whether to open a formal investigation or take specific action, and they may not be willing to apprise referring parties of the case status. While the federal Crime Victims' Rights Act (18 U.S.C. § 3771) and state analogues afford certain rights to victims—such as the right to notice of relevant public court proceedings and to “confer” with the government attorney on the matter—those rules generally do not compel the government to inform victims of events in ongoing investigations.

Conclusion

DOJ and other law enforcement agencies often welcome referrals of potential cases from victims, witnesses, or other informed parties; indeed, it can be a critical source of investigative leads for the government. But that policy is not unconditional, and parties reporting suspected wrongdoing must tread carefully, particularly when they have an interest in the outcome. Although criminal charges against reporting parties will likely remain a rare occurrence, more prosaic risks—from disrupting civil litigation to simply wasting one's time—call for a thoughtful approach to blowing the whistle.



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