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Enlisting Law Enforcement in Corporate Competition

By Joseph F. Savage, Jr.

Companies battling competitors may ask how to get a competitor criminally investigated. Two issues appear: Is this a good idea? If "yes," how do you do it effectively?

Is This a Good Idea?

It's not just a bad idea — it's a crime — to report someone falsely to authorities. *See, eg,* 18 U.S.C. § 1001. Threatening to report criminal activity solely to obtain an advantage in a civil matter is unethical. Disciplinary Rule 7-105, adopted by most states. *See, eg,* 22 N.Y.C.R.R § 1200.36. A lawyer needs to do due diligence, assuring a factual basis and proper motive for an investigation. Beyond those hurdles, certain risks need to be evaluated:

Law enforcement might get interested in your client. At the competitor's urging, your client's conduct might raise criminal issues. Investigative techniques such as wiretaps may generate unseemly facts. Is the client comfortable with agents reviewing documents and interviewing employees? If your client's commitment to compliance is less than absolute, an investigation can be dangerous. This can take forever. The client needs to understand that it is giving up control by starting an investigation including, perhaps, facing a stay of civil proceedings. Cooperation has costs. Providing documents and testifying are expensive diversions. Nonetheless, in rare and extraordinary cases it might be worth enlisting investigators against a competitor.

How Do We Do This Effectively?

How to best interest law enforcement in starting an investigation is a complex exercise in understanding the publicly announced bases prosecutors use for accepting cases, and also appreciating the unstated agendas and personal motives of regulators. As general background, there is the ubiquitous affliction of "competition" for high-profile cases. An otherwise uninteresting matter for a State Attorney General may suddenly seem enchanting when a U.S. Attorney is interested. Prosecutors also compete in assigning blame for unsuccessful cases, such as two New Jersey Attorney Generals trading barbs with a U.S. Attorney in a mishandled case. *See* David Kocieniewski, Ex-Prosecutors in Trenton Respond to U.S. Scolding. *N.Y. Times*, Jan. 27, 2006, at B2. And, certain offices have reputations for "stealing" cases. Thus, appealing — implicitly — to the competitive spirit of "officers engaged in the practical business of law enforcement," *Trupiano v. United States*, 334 U.S. 699, 715 (1948) (Vinson, C.J., dissenting), can start a race in your client's favor.

Try to Call Someone You Know

A personal relationship here can persuade a regulator. Your credibility and knowledge of a prosecutor's motives makes a difference. Research reflects that prosecutors in high-turnover offices favor high-profile trials before they head to private practice, while careerist prosecutors in smaller offices seem disinclined to do that. *See* Todd Locher, Strategic Behavior and Prosecutorial Agenda Setting in United States Attorneys Offices. 23 *Just. Sys. J.* 271, 272 (2002). (Non-careerist prosecutors are "likely to take complex, high-profile cases to increase their future 'marketability' to private firms," while "many career assistants will seek the easiest types of cases that require the least work.") That finding provides a general hint as to whether you pitch the case as "sexy" or "easy." Knowing the individual prosecutor provides the clearest insight. Think about approaching investigative agents directly. An agency may be more receptive to certain cases than the prosecutor and provide the momentum of an ongoing investigation to overcome a prosecutor's reluctance.

Understand the 'Automatic' Declination Policies

Most prosecutors' offices have automatic declination policies. The vast majority remain unwritten, some say to avoid giving attorneys arguments for declination. Michael E. O'Neill, When Prosecutors Don't: Trends In Federal Prosecutorial Declinations. 79 *Notre Dame L. Rev.* 221, 236-241 (2003). Typically for business crimes, the "loss" determines the declination threshold. Large prosecuting offices often have fraud loss thresholds of $100,000 or more, while smaller offices have significantly lower cutoffs. The components of the Department of Justice likewise have automatic cutoffs such as a minimum amount of "tax due and owing." Agencies also have declination rules that are, sometimes, not as rigid as those of prosecutors. Ralph C. McCullough, II, Bankruptcy Fraud: Crime Without Punishment II. 102 *Com. L.J.* 1, 30 (1997). Understanding the automatic cutoffs permits you either to induce a prosecutor to ignore the policy for an important reason or to seek another venue, such as a small U.S. Attorney's Office or a state prosecutors' office.

Use a Common Language

Federal law enforcement has prosecution guidelines. State prosecutors tend to have fewer. Although a universal guideline seems to be that prosecutors prefer cases that are easy, important, and likely to result in a big sen-

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tence with favorable public reaction, the actual federal prosecutors' guidelines are, supposedly, outlined in *Principles of Federal Prosecution*, U.S. Attorney's Manual § 9-27.000 *et seq*. More specific guidance relating to corporations is found in the memorandum of former Deputy Attorney General Larry D. Thompson to U.S. Attorneys (The Thompson Memo, Jan. 20, 2003). Likewise, Intellectual Property prosecutors have their own, slightly different, standards. *See* U.S. Department of Justice, Computer Crime and Intellectual Property Section, Prosecuting Intellectual Property Crimes Manual, Sec. VI.D (2001). The principles are non-exhaustive and general, and few prosecutors have copies handy or refer to them explicitly when making day-to-day decisions. But they provide a potential starting point to discuss an investigation.

The Thompson Memo proposes nine factors. Of those, counsel urging a prosecution likely will emphasize seriousness of the offense, persuasiveness of misconduct, prior bad acts, and, perhaps most importantly, the likelihood of success of the prosecution. *See* U.S. Attorney Manual § 9-27.220(A), § 9-27.230(7). While those are important factors, when a competitor is urging a prosecution, he must be ready to address "the adequacy of remedies such as civil or regulatory enforcement actions," explaining why civil litigation is inadequate to achieve the government's objectives, which are primarily deterrence, restitution and punishment. Thus, even if civil litigation may make your client whole, it is crucial to pitch the government's independent interests.

You will also need to address the prosecution's concern that they are being manipulated. The DOJ is explicit about this in its Intellectual Property crime manual. Prosecutors' cases can be compromised by their cooperation with victims. Until the Sixth Circuit stepped in, a district court reduced a sentence on the basis that the manufacturer Avery Dennison and the Department of Justice were too enmeshed, and that their relationship allowed the company to put unfair pressure on a competitor. *See U.S. v. Yang*, No. 97-00288 (N. D. Ohio), *rev'd*, 281 F. 3d 534 (6th Cir. 2002). The California Supreme Court held that victim assistance may force a prosecutor to recuse himself. *People v. Eubanks*, 14 Cal.4th 580, 927 P.2d 310 (1996). As a result, the DOJ cautions prosecutors:

- Government attorneys should be cognizant of possible undue victim involvement and its ramifications in intellectual property investigations and prosecutions;
- Prosecutors should be wary of accepting offers of in-kind assistance of goods or services that could easily be obtained elsewhere, such as provision of simple storage facilities; and
- When meeting with victims and when evaluating all aspects of a case, a prosecutor should be aware of the potential for perceived impropriety.

Prosecuting Intellectual Property Crimes Manual, § VI.D. When pitching a case, this "victim" factor will be in the back of prosecutors' minds and needs to be addressed and overcome.

Make the Case Seem Easy

Collect enough evidence so you can demonstrate that the proof is or will be clear. Show directly the likelihood of success. Do you have direct, corroborated, evidence of criminal intent? Are records and witnesses easily available? Are "technical" elements clear — proof of mailings and wire transmissions, trade secret status, etc.?

Make the Case Seem Important

Show that the conduct is serious and promotes the DOJ's "applicable policies and priorities." The competitor may have violated environmental laws and securities laws. It makes sense to emphasize the latter, which is a priority, over the former. Take advantage of changing priorities. For example, last year, the Antitrust Division advertised for cases involving post-Katrina market manipulation. U.S. Dept. of Justice, *Preventing and Detecting Bid Rigging, Price Fixing and Market Allocation in Post Disaster Rebuilding Projects* (2005). While it might seem that everything is a "high" priority, even high priorities get "renewed emphasis." *See* Memorandum from Attorney General to U.S. Attorneys *et al.* (Oct. 10, 1995) (on file with U.S. Dep't of Justice). ("In 1992, the Department of Justice made the aggressive prosecution of bankruptcy fraud a high priority of the Department of Justice. It is time to place a renewed emphasis on the Department's efforts in this area.")

Conclusion

Pitching a case for prosecution is an exercise in judgment, persuasion and common sense. The most effective pitches come from a thorough understanding of the institutional and personal priorities of the regulators. Such awareness allows you to explain the facts and laws that most appeal to a particular prosecutor's broad discretion.

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