Fox Rothschild Podcast

Featuring Partner Matthew D. Lee

Federal Agents at the Door Episode 4

Interviewer: *Welcome to episode four of Federal Agents at the Door. We're talking today with Fox Rothschild partner Matt Lee about what to do if government investigators show up at the front door. Matt has a wealth of experience on both sides of investigations. He started his career as a trial attorney with the U.S. Department of Justice and now represents companies that are on the receiving end. You could say he knows them inside and out.*

Previous episodes focused on what a company should voluntarily disclose, how to respond when investigators compel disclosure and preserving evidence. In Episode 4, we'll focus on handling issues of legal representation during an investigation.

Matt, is it OK for a corporation and its individual employees to be represented by the same attorneys?

Matt: The answer to that question is tricky and it really depends on the facts and the circumstances of each case. Often, it's necessary, and sometimes even required, that employees be represented by separate counsel. That's especially the case if the employees in question are directly involved in the alleged conduct that is the subject of the investigation. On the other hand though, if the employees are simply fact witnesses, meaning they have knowledge about what happened, then they don't necessarily need to have separate council.

Interviewer: *So who pays for that?*

Matt: So when separate counsel is brought in to represent employees, generally the company should pay, and that's usually what happens in these cases. And even in some cases, the company has an legal obligation to pay for the legal fees of corporate officers or board members. This is because this type of arrangement is often required under the company's bylaws, or state laws where the company is incorporated, such as Delaware.

Interviewer: *What about employees who simply have knowledge related to the subject matter of the investigation, but aren't implicated in any wrongdoing? Providing every one of them with their own attorneys could get expensive.*

Matt: It sure can. And this is what I referred to a moment ago when I talked about employees who are simply fact witnesses. These are employees who know something about the underlying allegations or the underlying investigation, but they are not accused of doing anything wrong. In these cases, generally what we do is we arrange for them to be represented by separate counsel who we call "pool counsel." Pool counsel can be a laywer or law firm hired by a company to

represent employees who are witnesses in the investigation. This is a way for the company to provide legal counsel to the employees but also not have to hire a separate lawyer for every individual, and instead you have pool counsel who represent these employees as a group.

Interviewer: *Should all these financial arrangements be disclosed to investigators?*

Matt: No. Agents and prosecutors should not be permitted to ask about legal representation arrangements. If they do, it's simply none of their business.

Interviewer: *Speaking of privilege, the company may want its attorneys to interview company employees about the investigation. Are those discussions privileged?*

Matt: This is a good question. And it is something that comes up in virtually every internal investigation or government investigation. You are always going to want to interview your company employees about what happened. You are going to want to get their take on the underlying allegations and find out what they know. When corporate counsel interviews employees, those conversations are privileged, but this is an area for extreme caution.

Interviewer: *What do you mean? Who controls the privilege?*

Matt: What I mean by that is that the company controls the privilege, not the employee. That means it is the company's right to assert the attorney-client privilege, and also the company's right to waive the attorney-client privilege, not the employee. The employee needs to be advised of that fact and to agree to keep any discussions confidential prior to being interviewed by corporate counsel.

Interview: *Kind of like the police reading a suspect his Miranda rights?*

Matt: That's exactly right, except in this area we call it an Upjohn Warning, not a Miranda warning. This comes from a 1981 Supreme Court case called *United States v. Upjohn*. In that case, which was a landmark ruling in the privilege area, the Supreme Court held that communications between corporate counsel and employees are privileged, but the privilege belongs to the company and only the company can waive the privilege.

Interviewer: *So how does the Upjohn warning go?*

Matt: What you want to do in each case where you have corporate counsel interviewing a company employee – and this is going to apply to both inside counsel as well as outside counsel – you have to give this so-called Upjohn Warning. It is a series of cautionary statements that you have to give to the employee at the outset of the interview so that the employee understands the relationship between you as counsel, the company and the employee.

Here is what we typically say in this situation:

We have been retained as counsel for ABC Corp. to assist in the conduct of the investigation. You are being interviewed in connection with the investigation.

We as counsel, represent ABC Corp. only, not you individually.

This interview is privileged, but the company controls the privilege and may decide to reveal the substance of the interview to regulatory authorities, law enforcement, or other third parties.

We ask that you keep the substance of this interview confidential.

Do you have any questions? Do you wish to proceed?

That is the nature of the so-called Upjohn Warning that we would give to an employee of a company in the context of an interview by counsel.

Interviewer: *Can an employee refuse?*

Matt: Yes, of course, an employee can say "No, I don't want to talk to the company's counsel," but typically, in that context, the company can condition future employment on cooperation, meaning that if an employee refuses to cooperate it could potentially jeopardize their continued employment at the company.

Interviewer: *What's the goal of the Upjohn warning?*

Matt: You want to encourage employees to cooperate with the investigation, and you also want them to clearly understand the privileged nature of the interview. But you also have to ensure that the employee understands that company controls the privilege, and that the attorney conducting the interview represents the company and not the employee himself. This avoids any later claim down the road that the employee was thrown under the proverbial bus and avoids any appearance of dual representation. What I mean by that is you don't want the employee to have any perception that the lawyer conducting the interview is representing both the company and the employee.

Interviewer: *That makes a lot of sense.*

Matt: And one other thing. As the old adage goes, put it in writing. It's critical to memorialize in writing that the Upjohn Warning has been given to an employee in the context of an interview. What I like to do in these situations is I always prepare a file memo after I conduct an interview of an employee, and I will always document in my file memo that I have given the Upjohn Warning to the employee. That way if there is any dispute down the road, there is a contemporaneous written account of what the employee was told.

Interviewer: *That's time-tested advice. Thanks Matt. In the next episode of Federal Agents at Your Door series, we'll sum it all up with some steps companies can take to minimize risk.*

Have specific questions about responding to federal investigators? Matt can be reached at Fox Rothschild's Philadelphia office at 215.299.2765 or via email at mlee@foxrothschild.com. That's M-L-E-E at FoxRothschild dot com.