



Fox Rothschild Podcast

Featuring Partner Matthew D. Lee

Interviewer: Welcome to episode three 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.

Episode 1 ended with a discussion of how investigatory status affects how much information a company should voluntarily disclose. In Episode 2, we looked at how to respond when investigators compel disclosure. In Episode 3, we'll focus on preserving evidence.

So Matt, I suppose hauling out the paper shredder when a federal agent knocks on the front door would be a mistake?

Matt: Yes, that's absolutely correct, unless you are looking to be charged with obstruction of justice. Your obligation to preserve evidence kicks in as soon as you receive a subpoena, agents execute a warrant or you get a call from law enforcement. But really, it kicks in long before that. If you think you're about to be investigated, and the legal term for that is "reasonable expectation," then that will also trigger your obligation to preserve evidence.

Interviewer: Even before you're investigated?

Matt: Yes, under certain circumstances it can be. In fact, the Supreme Court just ruled in a very recent case to clarify the law in this area. Generally, the rule is if there is a pending investigation, the company has an obligation to preserve evidence. Now that seems completely logical because there is an investigation under way and the company knows about it. But the Supreme Court also ruled that if an investigation is reasonably foreseeable, then a company or an individual has an obligation to preserve evidence. So the standard is this "reasonably foreseeable." That is a tricky one but the best practice in this area is to be safe and to preserve evidence as soon as there is any possibility that you think there may be an investigation on the horizon.

Interviewer: Wow. So what's a company to do?

Matt: The first thing to do if your company is facing an investigation, or like I said a moment ago if an investigation is reasonably foreseeable, is to communicate to all affected employees that no documents, paper or electronic, should be destroyed, similar to what you should do if you were facing civil litigation. This is what we often refer to as a litigation hold. Any existing document disposal policies should be suspended. And it's really important to have a standard

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document retention policy in place before any investigation takes place. Nobody wants to be charged with obstruction of justice.

Interviewer: Right.

Matt: The penalties for failing to preserve documents in a criminal investigation are really serious. There are a number of federal statutes that govern obstruction of justice in numerous contexts, including just general criminal investigations but also more specific investigations such as involving health care or financial institutions. And if you are found guilty of obstruction it can seriously enhance any type of sentence that is imposed on the underlying allegations. That can result in a significant increase in prison time upon conviction.

Interviewer: That's a good incentive to preserve those documents.

Matt: Simply put, it's never a good idea to destroy documents in an effort cover up wrongdoing. Back in 2002, the Sarbanes-Oxley law was passed by Congress. That's a financial reporting law, and it includes language setting a penalty of up to 20 years in prison for document destruction with the intent to impede, obstruct or influence an investigation, even in situations where you're thinking a case might be brought. There's no requirement that any government action be underway in that circumstance.

Interviewer: But has anyone ever been convicted under that theory? That seems a little hard to prove.

Matt: Yes, there are a number of cases in this area that are very instructive and that any company should be aware of. Back in 2012, we had a case that came out of the Sixth Circuit, that involved an obstruction of justice conviction against a man who had hacked into then-vice presidential candidate Sarah Palin's email, and then he destroyed the evidence of the hacking on his computer. This was before there was any investigation whatsoever. He thought there might be an investigation that would result from the fact that he hacked into her computer. And of course, a few days later, the FBI seized his computer. He was convicted of obstruction of justice, and again, at the time he hacked into the computer, there was no investigation. A year earlier, we had a case out of the Eighth Circuit where we had a hospital employee who was convicted for obstruction of justice. In that case, the employee had destroyed records when the hospital had launched an internal investigation into purchasing irregularities. Here, in this case, there was no government investigation. There was an internal investigation by the hospital, but no government investigation. Nonetheless, the court in that case upheld the conviction of this hospital employee for obstruction of justice.

Back in 2008 we had a case out in California that was very instructive as well. In that case, the vice president of human relations of a company lied to the company's general counsel in the course of an investigation into post-dating of stock options. The employee who lied in that case did so at a time when there was no government investigation whatsoever, there just was again an



internal investigation being conducted by the company. In that case, this individual, the human resources employee who lied to the general counsel, was subsequently prosecuted in a federal case for obstruction of justice.

The bottom line here is that it's critical for a company to have a standard document retention policy in place for electronic and paper documents, and to follow it at all times. And if you suspect your company might face government action, suspend any document destruction activities.

Interviewer: Excellent advice. Thanks Matt. In the next episode of Federal Agents at Your Door series, we'll discuss the details of how to handle legal representation of your company and its employees in an investigation.

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.

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