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October, 2011

Federal Litigation Strategy – Understanding the Mind of the Case Agent

The Best Defense is a Strong Offense

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*“The United States government is the most frequent, most important and most successful litigant in the American federal courts”.*¹

Much like a quarterback calling and making plays, a Case Agent has a major role influencing the course of federal proceedings before, during and after litigation. Professionals who know how Case Agents think, operate and form their investigative approach can provide valuable insight and unique advantages when responding to federal inquiries and prosecutions. A well-established advantage in competitive sports is being able to predict your opponent’s actions and reactions. In federal litigations, knowing how a Case Agent thinks can be an effective tool in creating a winning game plan.

In a recent example that demonstrates the benefits of understanding the role and actions of the Case Agent, a partner in a small hedge-fund was served with a target letter from the government concerning an alleged \$30 million fraud. The partner maintained that he had no knowledge of a fraud, and that if any fraud was being perpetrated it was being done so by his partner who operated a separate, out-of-state office. The defense counsel created a strategy that anticipated the actions of the government’s Case Agent and identified several witnesses whom the Case Agent would likely interview in building the case for prosecution. Using knowledge provided by a former Case Agent, the defense believed that the Case Agent would be prepared to begin witness interviews only after having first analyzed the voluminous trading records. Defense counsel recognized this opportunity and moved quickly to interview witnesses and obtain statements before the government conducted their own interviews. These interviews produced credible statements by the target’s former assistant, who said that it was her belief that the target did not know of the fraud. She also provided additional information and documentation that supported her statement. Defense counsel obtained an affidavit from this witness and presented this and other exculpatory evidence in a meeting with the prosecutors prior to the

¹ Political Research Quarterly, vol. 55, No. 1 (March 2002): pp.145.

decision to prosecute. The prosecutors did not pursue prosecution of the target based largely on the evidence and interviews presented by the defense counsel.

At the onset of an investigation, the Case Agent assists prosecutors in developing a case theory and investigative plan. Following this phase, the Case Agent becomes “the face” of the government initially meeting with witnesses and obtaining, analyzing and summarizing the documentary evidence. It is during this phase that an investigation turns into a prosecution.

As the investigation progresses, the prosecutor and the Case Agent interview witnesses together. Many times these interviews are led by the Case Agent, as the Case Agent has the best command of the evidence prior to trial. During these interviews, the prosecutor relies on the Case Agent’s evaluation of the credibility of the interviewees as well as the roles that each played. These evaluations are critical, as the decision made by the prosecutor will determine whether or not the individual is considered a witness in, or a subject of the investigation. It is during this phase that a subject or his/her defense counsel have the greatest opportunity to devise an investigative strategy focused on collecting evidence which directly refutes or contradicts the government’s prosecution theory. As such, it is critical for the defense to have an in-depth understanding of the Case Agent mindset and to accurately predict how, when and where the government will proceed with evidence collection. The subject and counsel must take a proactive approach in identifying and interviewing witnesses and obtaining documentary evidence in advance of the Case Agent, and before the government has made a decision regarding prosecution.

If the decision to prosecute has been made, the Case Agent will often be asked for input regarding charging decisions and plea negotiations. During a trial, the Case Agent manages the trial exhibits and coordinates government witness appearances. In addition, the Case Agent is typically the primary source of information used to rebut the testimony of defense witnesses. Upon conviction, the Case Agent may play a critical role preparing the U.S. Probation Department’s pre-sentence report. The Case Agent may be asked to provide to the Probation Officer the government’s version of the case, the amount of the loss, the number of victims and the role of the defendant. This information may affect whether or not sentencing enhancements will be included in the report and can impact the type of sentence imposed, the length of incarceration, and the amount of restitution required.

The Case Agent's critical and influential role in a federal prosecution makes it an important component in the planning of an effective defense strategy. Targets of federal investigations and their counsel who understand the mindset, role and likely actions of a federal Case Agent can use this intelligence to develop a proactive defense and investigative strategy. In turn, they stand better positioned to proffer an effective response to a government inquiry or prosecution. ✦

About the Author:

John La Perla is the Founder and Managing Partner of Renaissance Associates, Ltd. He has over thirty five years of experience investigating and resolving complex, white collar crime, including securities fraud, money laundering, and accounting fraud for government, corporations and individual parties. Mr. La Perla is a former, highly decorated Postal Inspector for the United States Postal Inspection Service where he spent 25 years investigating some of the most high profile cases in the nation. Recently, Mr. La Perla and Renaissance Associates were retained to provide forensic services to court-appointed trustee and his counsel in the liquidation of Bernard L. Madoff Investment Securities LLC. He can be reached at jlaperla@renusa.com, 516- 742-9125.

About Renaissance Associates, Ltd.

Renaissance Associates, Ltd. is a specialized advisory firm lead by highly experienced, former Federal Agents from the United States Postal Inspection Service and the Federal Bureau of Investigation. The firm provides comprehensive services to corporations and leading law firms by applying years of field-proven investigative skills and computer forensics expertise in the areas of corporate fraud, intellectual property theft, data breach, cyber crime, financial fraud, due diligence, background investigations, electronic discovery and expert witness services.

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