

INSIGHT: Fresh Perspectives on Witness Interviews as Pendulum Swings to Individual Culpability in White Collar Investigations

By Todd Blanche and Stephen Weiss

Posted Aug. 31, 2018, 12:10 PM

Two attorneys with Cadwalader, Wickersham & Taft LLP explain that with the government placing more emphasis on holding individuals responsible for corporate wrongdoing, unique styles and approaches to interviews with prosecutors are a necessity.

Investigating corporate misconduct and bringing to justice individuals responsible for those misdeeds has always been a priority for government attorneys.

But following a September 2015 memorandum issued by Sally Yates, the then-deputy attorney general at the Department of Justice, titled "Individual Accountability for Corporate Wrongdoing" and otherwise known as the "Yates Memo," government attorneys have shown renewed interest in prosecuting individuals for corporate wrongdoing.

The Yates Memo states that "[o]ne of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing," and that civil and criminal corporate investigations "should focus on individual wrongdoing from the very beginning... ." Accordingly, prosecutors, in the midst of a corporate investigation, have emphasized interviewing individuals to determine who is responsible for the company's misconduct. This is a trend that will likely continue.

In our experience in government and private practice, we have developed unique styles and approaches to government interviews.

There are, however, some consistent themes worth remembering any time you are preparing a witness to meet with a government attorney. These themes are basic but important:

- (1) ensure that your client is prepared, credible, and comfortable,
- (2) understand the government's view of the interviewee's "position" as either a witness, target, or subject,
- (3) find out which agency or prosecutors' office is investigating, and
- (4) determine the quantity and quality of information that the prosecutors have.

Goal Setting: Preparation, Credibility, and Comfortability

When defense counsel is retained to represent a current or former company employee for a government interview as part of an investigation into corporate misconduct, counsel's goals are typically modest: the interviewee must be prepared, credible, and comfortable. To make sure that the interviewee is prepared, ask the government attorneys if your client has liability and if he is a witness, target, or subject of their investigation. Also, request relevant documents from company counsel, confer with company counsel for insight into the government's case and potential individual targets (but beware of any conflicts of interests that may arise if the company's and the witness's interests stray—after all, that is why you were retained in the first place), ensure that you go through all potentially incriminating issues and documents with the individual, and spend time educating your client on the setting and timing of the interview.

To build credibility with the prosecutors who will be conducting the interview, understand which agency is investigating and why (is it in response to a whistleblower, an audit, or self-reporting by the company?), and most importantly, communicate with the government attorneys to establish trust. Also consider contacting the prosecutors early to build goodwill. But before calling the government attorneys and offering information, defense counsel must fully understand the interviewee's role in the conduct being investigated, assess if there are others who can implicate the interviewee, and evaluate the overall strength of the government's case.

If your client is a fact witness with no obvious exposure, the best course will typically be for your client to request a meeting with the government and cooperate in the investigation's early stages. There is relatively little risk for a cooperating witness in this position because he has no exposure and saying what he knows will keep him firmly in the "witness" camp. The opposite is true, too: a witness facing evidence that puts him at the center of the misconduct should consider cooperating early and often. But that assumes the government wants to talk to your client and will independently have enough evidence to charge your client if you remain on the sidelines. If you do decide to take your client in early, make sure he is prepared to be completely truthful. The government will spend considerable time after meeting with your client corroborating information provided and chasing down new leads discovered from your meeting. Incomplete information, bad facts, or facts contradicted by another cooperating witness might de-rail the government's investigation and lead the government attorneys to question you and your client's credibility and reliability.

As for making the interviewee comfortable, inquire about his background—both personally and professionally—to build a productive relationship with your client and to maintain open lines of communication, make sure your client knows it is okay that mistakes were made, ensure that he is comfortable talking about others at the company, and review emails and files to help the interviewee recall and clarify information.

Preparation, credibility, and comfortability all amount to keeping the witness intact, strong and sturdy leading up to and during the government interview.

What Position Is the Interviewee in?

Your client's role at the company and in the alleged misconduct will, in part, shape the prosecutors' interview, and if they view your client as a witness, target, or subject. If a line employee committed the alleged misconduct at an off-site location, the interviewee may have been present and have detailed and specific information. Alternatively, the interviewee may be a senior executive at the company whose actions indirectly triggered the misconduct and who is responsible for the actions of those he supervises. The obvious distinction here is between the interviewee's first-hand knowledge about certain misconduct as opposed to committing the wrongdoing. Either scenario will have prosecutors looking for information for either a first-hand account or for leads to assist them in interviewing other witnesses or collecting additional documents.

Also, assess your client's motivations at the time the alleged wrongdoing occurred to help determine any level of potential culpability and guide communication with the prosecutors. Business executives and other senior company officers confront business and personal quandaries that other company employees may not face. Pressure from a board of directors, for example, or for personal financial gain, can drive decision-makers to act in arguably improper and irrational ways.

Where counsel knows early on that your client is the subject of an investigation, it is fruitful to be forthcoming with information, thereby avoiding adversarial encounters. Demonstrating a willingness to cooperate can narrow the investigation's focus and help to obtain assurances that government attorneys will not prosecute your client to the fullest extent of the law.

An employee's job responsibilities and relationships at the company will also style defense counsel's approach with managing your client and the prosecutors, regardless of whether your client is a witness, target, or subject. Senior corporate executives may have experience navigating the complex waters of government investigations. Executives may approach the investigation and any interviews with clear (although sometimes unrealistic) goals, as well as a willingness to engage in a lengthy knocked-down-dragged-out fight with government attorneys. On the other hand, line employees with no exposure to white collar investigations may be nervous, guarded, and perhaps hesitant to take your advice. They also might be more reticent than their superiors to talk freely about what they know or saw.

Given your client's status as witness, target, or subject, consider if the opportunity to present the facts and the interviewee's side of the story is important and makes sense, and if an interview with the government is the best way to do so.

Which Agency or Prosecutors' Office Is Investigating?

Consider the federal government office or agency leading the investigation—each has a different prosecutorial style that influences their objectives, as well as defense counsel's strategic approach to an interview. Certain prosecutors' offices are known to be more aggressive, yet others are more willing to share information prior to an interview. Never demand information from government attorneys, and resist the urge to spar with the prosecutors working the case, at least until you know whether honey will get you more than vinegar. More often than not, flexibility on the part of defense counsel and the witness will pay dividends later.

Consider as well if the investigation is a joint enforcement action coordinated across several agencies, whose attorneys may be competing for an edge in the case. In understanding the prosecutors and their investigative goals, you can prepare and protect the interviewee from becoming entangled in an overzealous or overtly aggressive investigation.

Furthermore, assess the likelihood that your client will be compelled to testify by a government subpoena. For example, at the “matter under inquiry” stage in an investigation by the Securities and Exchange Commission, the SEC has no subpoena power and can only conduct informal interviews. With a formal order of investigation, however, the SEC Division of Enforcement may compel an individual to testify and produce certain records or documents. Correctly anticipating a government subpoena and making the initial contact with the prosecutors, where appropriate, to establish credibility and offer information is typically well-received and can pay dividends as the investigation develops.

If your client has received a subpoena, there is often little upside to being uncooperative with government attorneys. At this stage, the power lies with the government, and leveraging goodwill before an interview can often give way to compromise on significant efforts such as document collection, and on practical concerns such as the scheduling and location of an interview. But defense counsel should not allow the government attorneys to monopolize negotiations and dictate strategy. Be respectful and cooperate incrementally. Engage in a healthy back-and-forth with the prosecutors, giving the space needed to reach an amicable resolution beneficial to your client.

Can You Assess the Quantity and Quality of the Prosecutors' Information?

After the information-gathering stage and initial conversations with government attorneys, you can hopefully more definitively evaluate if your client is a witness, target, or subject of a government investigation. Any public statements about the case could also unveil the objectives and direction of the government's case.

The best-case scenario is for the prosecutors to view your client as a fact witness; meaning your client likely has no criminal exposure. Where you cannot assess your client's status, but believe he is a target or subject of the government's investigation, defense counsel has two options: wait and let the government make the first move, or make initial contact with the prosecutors. If a client's job and responsibilities place him in the middle of a matter under investigation, consider making the first contact to frame your client's narrative, regardless of what information the prosecutors have gathered.

Knowing the quality of the government's information and the likelihood that law enforcement will want to know more is important, too. Any additional information that counsel can provide to expedite the government's fact-gathering process will help defense counsel's efforts to shape the parameters of government attorneys' inquiries. In other instances, the government can be unpredictable and prolonging engagement with the government may allow you to gather more information. Such a passive approach, however, might lure you and your client into an unfriendly position and increase any leverage the prosecutors have.

Conclusion

Despite wide philosophical differences between presidential administrations, the talk about prosecuting individuals has not changed from the Yates Memo to current Department of Justice leadership: the consensus is to hold accountable and prosecute individuals who are responsible for corporate misconduct. In targeting individuals responsible for corporate wrongdoing, prosecutors will prioritize and place greater emphasis on witness interviews in government investigations.

Author Information

Todd Blanche is a partner in Cadwalader's Global Litigation Group in New York. His practice focuses on representing corporations and individuals in criminal and regulatory matters involving all types of white collar investigations, prosecutions, and enforcement actions.

Stephen Weiss is an associate in the White Collar Defense and Investigations Group in Cadwalader's Washington, D.C., office.