

Walking a Tightrope in White-Collar Investigations

Successfully defending companies requires cooperation—and boundary-setting—with the government.

BY GEORGE J. TERWILLIGER III

Every in-house counsel with responsibility for government investigations and enforcement matters knows that an indictment is a company's worst outcome—and nightmare. Yes, there may be an occasional case when the only way to properly defend a company's institutional interests is to risk indictment and fight to the death at trial. But those instances are, in reality, extremely rare, even though as advocates we may wish for the opportunity to challenge the government's evidence and rebut allegations in an adversarial court proceeding.

More often than not—and by strong measure—a company is best served by seeking a resolution in an enforcement case that avoids all the adverse consequences that an indictment brings, not the least of which is the risk of conviction. Often, one way to pursue the best possible resolution is to cooperate with a government investigation. But what does cooperation actually entail and does it mean capitulating to the government's allegations or suspicions?

Cooperation typically involves steps such as conducting an internal investigation and sharing results with the government. When doing so, companies gain the benefit of not only being in a cooperative mode with the government, but also maintaining knowledge of the case on an ongoing basis as the relevant facts are developed.

Cooperation also may involve facilitating the government's own investigation by assisting it in obtaining facts through review and production of corporate records. Here again, because cooperation can involve more than just



tendering required records in bulk to the government, a company can obtain the advantage of factual knowledge that positions it to later engage with the government on a well-informed basis. The same is true when a company facilitates interviews with or testimony by company employees.

But such cooperation need not—indeed, should not—equate to capitulation to the government. Cooperating does not mean that counsel becomes a de facto deputy to the prosecutor rather than an advocate for the client.

For in-house lawyers, it is especially important to appreciate the cooperation-capitulation distinction. Cooperation can help establish a successful strategy to obtain the best possible result in a given matter even while protecting a company's interests in an investigation.

For outside counsel, it is equally critical that they be part of a team with in-house counterparts working to defend their mutual client's interests. Both benefit from having a common understanding of the best approach to the government in a given situation.

A time will come in most cases when cooperation with the government in developing the relevant facts ends and advocacy for the client's interests takes center stage. That work will be adversarial with the enforcement authorities, but nonetheless needs to be conducted in a professional manner. Before getting to the adversarial phase, though, cooperation with a government inquiry is typically the chosen path by a company under scrutiny.

An effective cooperative approach has a number of key elements. The first is to

establish a positive working relationship with the prosecutor or other enforcement official. Even though the prosecutor is clearly a legal adversary, nothing can be gained by creating an unnecessarily hostile relationship. Rather, establishing a rapport appropriate to the circumstances is more likely to lead to the best possible outcome for the company. For one thing, a prosecutor is less likely to share information with hostile defense counsel.

It is especially important to cooperate with the government during the development of the factual basis of an investigation. Because companies have no Fifth Amendment shield against government demands for information, meeting the obligation to respond to such demands in a cooperative way makes sense. A company risks nothing by getting credit for doing what it is required to do anyway.

Another important element of cooperation is establishing and maintaining credibility with the prosecutor. The company and counsel that establish themselves as credible in the fact-development phase of an investigation will be banking important capital with the very people whose decisions will most likely, barring trial court proceedings, control the outcome of the case. Conversely—and even more importantly—those whose credibility becomes challenged in the eyes of the prosecutor will create new obstacles to a successful outcome that very well could have been avoided. Prosecutors always take the measure of the credibility of their adversary and its counsel, which will be an important, albeit usually unreferenced, element of their assessment of the company's overall culture. For enforcement authorities, a lack of credibility translates into a culture wanting in values, especially with regard to honesty and straight dealing.

A third, but more nuanced and challenging, element of cooperation is establishing an aura of openness with the government enforcement team.

Prosecutors expect cooperation as to the facts to be full, complete and willing. However, there often are boundaries to fact-finding cooperation, and lines demarcating those boundaries need to be drawn. Maintaining privilege claims, for example, may require establishing such boundaries.

But even in these instances, privilege needs to be used as the shield it is intended to be, not a sword that carves out large volumes of marginally privileged information into a protected status. Asserting overly broad privilege claims to shield information from disclosure not only risks undermining a generally cooperative strategy, but also can invite close government scrutiny of the basis for the claims. That, in turn, may lead the government to initiate litigation to challenge the privilege claims.

So, if cooperation with a government investigation does not equate with capitulation, when and how do we engage to fight for the company's interests? First, reasoned cooperation is, in fact, the first step in such engagement, and it effectively sets the stage for more aggressive advocacy to follow. Once the facts of a given matter are on the table, then advocacy as to what those facts show is in order. That advocacy is more than just a legal analysis of the facts; it is using a reasonable interpretation of them to establish relevant factual conclusions as well.

Slicing and dicing the factual interpretation can be especially important when addressing the scope of any corporate misconduct. One of the critical elements governing the outcome of many cases will be the prosecutor's assessment of the degree to which senior management had a role in or responsibility for the conduct in question. Thus, addressing in detail the facts relevant to that assessment is an important part of advocacy on behalf of the client. Similarly, the extent to which a company may have profited from the conduct in question can also be a highly

relevant factor to the enforcement officials' assessment of the case. Obtaining expert forensic accounting assistance can often be a valued aid to factual interpretation and advocacy on such issues.

Legal analysis is also a critical aspect of advocacy in a white-collar case, of course. The outcome of such a case in an agreed-upon disposition turns, in part, on the prosecutor's assessment of the legal strength of the government's case. As a result, scrutinizing the case from that perspective is a crucial part of advocacy. Credibility matters in this context, as well, and white papers or other communications explaining to the government the weaknesses in its case should be both reasoned and realistic in their assessments.

Perhaps the most important aspect of advocacy after cooperation involves analyzing the government's interests to be secured in a given matter and advocating on the basis of that analysis for the best possible outcome for the client. All enforcement officials will be driven to a large extent by the objective of obtaining a resolution that secures the government's primary interests in a given case. Anticipating and understanding what those interests are and advocating for an outcome that secures them in a way that is also in the best possible interests of the company is a critical aspect of the post-cooperation advocacy, and is an essential aspect of advocacy in white-collar cases.

Far from constituting capitulation to the government in an enforcement case, cooperation should be the first step in a chain of actions that results in the strongest possible advocacy that counsel can perform in order to obtain the best possible result for a company.

Reprinted with permission from the September 23, 2013 edition of THE NATIONAL LAW JOURNAL © 2013 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited. For information, contact 877-257-3382, reprints@alm.com or visit www.almreprints.com. #005-09-13-07



GEORGE J. TERWILLIGER III is a partner in the Washington office of Morgan, Lewis & Bockius and co-chairman of the white-collar litigation and government-investigations practice. Prior to entering private practice, he served as deputy attorney general as well as other line and supervisory roles within the U.S. Department of Justice.

Morgan Lewis