

## Tips For Representing Cos., Employees In Gov't Investigations

By **Holly Drumheller Butler and Marc Raspanti** (October 24, 2019, 2:47 PM EDT)

Individual liability continues to be at the forefront of criminal investigations and the litigation that often follows. Throughout the past five years, the U.S. Department of Justice's edicts on individual culpability have varied in tone and rigidity, but the underlying focus on individuals has remained constant.

On Sept. 9, 2015, former Deputy Attorney General Sally Yates authored a memorandum on corporate prosecution, now referred to as the "Yates memo."<sup>[1]</sup> The Yates memo, which memorialized the DOJ's long-standing policy that individual accountability is one of the most effective ways to deter corporate crime, recommended an all-or-nothing approach that sent shock waves through the legal community, who feared that cooperation credit had been rendered an unattainable fiction.

On Sept. 25, 2018, the DOJ updated the U.S. Attorney's Manual to include a modified version of the Yates Memo, requiring corporations to "identify all individuals substantially involved in or responsible for the misconduct at issue" to obtain consideration for cooperation credit.<sup>[2]</sup>

Subsequently, DOJ leadership has reiterated its focus on individual liability. As recently as last month, Deputy Assistant Attorney General Matthew Miner delivered remarks at the Sixth Annual Government Enforcement Institute in which he highlighted that the DOJ remains "focused on investigating and prosecuting the individuals responsible for fraudulent behavior and corporate crime."<sup>[3]</sup>

To underscore his point, he referenced the DOJ fraud section's recent prosecution numbers, noting that in 2018, that section alone prosecuted 422 individuals, representing an almost 37% increase from the prior year.<sup>[4]</sup> Indeed, this focus on individual prosecutions was emphasized emphatically several weeks later, on Sept. 27, when the DOJ filed charges against 53 individuals in a health care fraud law enforcement action and 35 individuals in a fraudulent genetic testing ring in one of the largest health care fraud schemes ever charged.<sup>[5]</sup>

However, the U.S. government is not the only one who recognizes the impact of individually named defendants. Qui tam relators and their private counsel are initiating a majority of the litigation stemming from whistleblower complaints, particularly in the healthcare field. Relators are naming individuals,



Holly Drumheller  
Butler



Marc Raspanti

private equity firms, corporations, and even competitors at an unprecedented rate.

As a result, the corporate client may be in conflict — current or future — with its executives or employees whom the government, relator, or the corporation itself, has identified as engaging in the misconduct. On a bad day, that conflict could lead to disclosure of client confidences or disqualification of both sets of outside defense counsel. One needs to look no further than *U.S. v. Weissman* to understand the adverse implications of counsel concurrently representing the corporation and potentially targeted executives in connection with a government investigation.[6]

To avoid this unfortunate result, investigations of corporations and its executives or employees require attentiveness to who is the “client” much sooner rather than later and should adhere to the following best practices:

### **Corporation vs. Individuals**

Defense counsel who are hired to represent a company do not represent the individual employees. This is the reason a chilling “Upjohn” warning must be given to every executive or individual employee before any interview is conducted of them. At the outset of an investigation, corporate counsel usually does not have a robust picture of where the government investigation is going or which individuals may be involved or implicated. Therein lies the relevant conflict issue.

The prudent course is to suggest, or even insist, that potentially impacted employees retain competent independent counsel before any meaningful interviews begin. Corporate counsel should resist the temptation to exercise sole control and envelope everything within their reach. The temporary gains obtained in information and control can all be jeopardized if and when a conflict arises

### **Clients Must Choose Defense Counsel Wisely**

Government investigations are becoming more, not less, complex. They are multifaceted and often highly coordinated. A typical investigation often includes state, federal and regulatory authorities. Individual targets, subjects or even witnesses who become embroiled in an investigation must choose their defense counsel carefully. Relevant experience in the subject matter is an important requisite to retention. More importantly, the ability to sort through an ever changing landscape of government enforcement personnel, co-defendants and their counsel, and even qui tam relators and their counsel is necessary.

### **Joint Defense and Common Interest Agreements**

Joint defense and common interest agreements enable the parties to work together to investigate the facts, while preserving each party’s defenses, privileges, confidences, and protections — so long as a common interest exists. The common interest doctrine, which is an extension of the attorney-client privilege, applies even where there is no litigation in progress.

Thus, in most circumstances the doctrine can apply in the context of a corporate entity’s internal investigation of potential wrongdoing, whether or not the government is already involved or a whistleblower has made a claim. While the timing of the communications (e.g., before litigation is initiated or reasonably anticipated) is not controlling for the doctrine to apply, the substance is; only those communications made in connection with and in furtherance of the common enterprise are privileged.

While the joint defense arrangement is in place, counsel for the corporation and counsel for the employees or executives should share relevant facts and information. The government will have a full picture of the underlying issues and potential defenses from its broad document review and compelled witness interviews. Corporations and individuals should endeavor to be on even footing and to have the same fulsome understanding of the facts or the representation will be in jeopardy.

### **Reevaluate Potential Conflicts Between the Corporation and Individuals**

Although joint defense arrangements can be mutually beneficial, factual developments and various strategic decisions can impact the continuation of that arrangement. For example, an individual's or corporation's decision to cooperate with the government in an investigation may impact joint defense. Individuals and corporate entities have different considerations for determining whether to cooperate in a government investigation.

If an employee or executive is facing personal criminal exposure, that individual can obtain benefits from early and complete cooperation with the government. Such cooperation benefits run the spectrum from nonprosecution agreements or deferred prosecution agreements to reduced sentences/financial penalties to immunity for the criminal conduct the government has charged or may charge.

To obtain such relief, the government may require cooperative assistance — including participation on investigative operations, such as recording telephone calls or wearing a wire to in-person meetings under an agent's supervision — that is at odds with the interests and legal defenses of the corporation.

Conversely, for a corporation to be eligible for cooperation credit, the entity must provide the DOJ with all relevant facts related to the misconduct and identify of all individuals substantially involved in or responsible for the misconduct.[7] If a corporation is brought into the investigation following a grand jury indictment or guilty plea of an executive, the entity may have a compulsion to cooperate and identify any additional wrongdoings for its own protection and preservation. This may create untenable conflicts if individuals and the company are represented by the same counsel.

### **Potential Insurance Coverage**

As a final note, whether representing the corporation or, just as importantly, an employee, all relevant insurers should be notified immediately of a government investigation if it could potentially be considered a claim. Unfortunately, too many seasoned practitioners ignore this important step at significant peril to the client.

Corporations and individuals should err on the side of caution in determining whether to notify the insurer of a potential claim emanating from a government investigation. Although coverage will vary depending on the definitions of the "claim" and the "insured," prompt written notice, containing a plain statement of the claim, should be provided to the carrier to avoid a denial of coverage for lack of timely notice.

As government investigations and qui tam litigation continue to focus on allegations of individual's misconduct, it is imperative to be cognizant of the risks and emerging best practices associated with the legal representation of those employees and their current or former employer. Strategic and privilege considerations are not static and must be reevaluated and revisited throughout the investigation as facts develop.

---

*Holly Drumheller Butler is a principal at Miles & Stockbridge PC.*

*Marc S. Raspanti is a name partner of Pietragallo Gordon Alfano Bosick & Raspanti LLP.*

*The opinions expressed are those of the author(s) and do not necessarily reflect the views of the firm, its clients, or Portfolio Media Inc., or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.*

[1] <https://www.justice.gov/archives/dag/file/769036/download>

[2] <https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations#9-28.700>

[3] <https://www.justice.gov/opa/speech/deputy-assistant-attorney-general-matthew-s-miner-delivers-remarks-6th-annual-government>

[4] *Id.*

[5] <https://www.justice.gov/opa/pr/midwest-health-care-fraud-law-enforcement-action-results-charges-against-53-individuals> (Midwest Health Care Fraud Law Enforcement Action Results in Charges Against 53 Individuals Alleging \$250 Million in Loss); <https://www.justice.gov/opa/pr/federal-law-enforcement-action-involving-fraudulent-genetic-testing-results-charges-against> (Federal Law Enforcement Action Involving Fraudulent Genetic Testing Results in Charges Against 35 Individuals Responsible for Over \$2.1 Billion in Losses in One of the Largest Health Care Fraud Schemes Ever Charged).

[6] *U.S. v. Weissman*, 1996 WL 737042 (SDNY Dec. 26, 1996 (involving corporate counsel representing both the company and CFO at initial stages of investigation and in course of witness interviews with government investigators prior to CFO seeking separate representation, resulting in disclosure of arguably privileged memoranda).

[7] See *infra* fn. 2.