White Collar Defense Do's and Don'ts For Meeting With DOJ

By **Scott Brady, Andrew Lelling and Brian Rabbitt** (June 18, 2021)

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Early appointments and pronouncements by the Biden administration confirm what white collar practitioners have been expecting: The next few years will see a spike in white collar regulatory and criminal enforcement, especially involving securities, money laundering and the Foreign Corrupt Practices Act.

In modern corporate investigations, prosecutions rarely proceed without pre-charging negotiations between the U.S. Department of Justice and defense counsel, and the anticipated spike in enforcement renders these kinds of negotiations more crucial than ever.

These discussions often include advocating for anticipated charges to be dropped, for deferred or nonprosecution agreements, or simply for the government to go away.

The inflection point for these negotiations is nearly always a meeting between counsel and DOJ decision makers late in the government's investigation. Given the stakes, these meetings require careful and precise advocacy.

As former U.S. attorneys and senior DOJ officials, we have heard dozens of these presentations. Collectively, we have seen the good and the bad, the effective and the counter-productive.

As with all advocacy, techniques vary depending on circumstance and audience. But, in our experience, even veteran practitioners make mistakes that undermine their effectiveness and harm their clients' interests.

In this article, we draw on our experience to offer suggestions for how best to approach meetings with senior DOJ decision makers in white collar matters, and explain how counsel can maximize the odds of a favorable outcome.

Credibility is Influence

There is a direct relationship between your credibility and the chances of persuading the DOJ to accept the proposal you are making, because most meetings of this kind require the government to trust counsel's representations about key issues.

There are a few principles to keep in mind.

First, when possible, know the underlying facts better than the government does. This is especially true when dealing with line prosecutors, who have limited resources and expect counsel — especially from larger firms — to have mastered the voluminous documentation and data internal to the company. The government raising a bad fact that you were unaware of can be fatal to your cause.

Similarly, government lawyers will appreciate, and be inclined to credit, your efforts to explain complex processes like corporate accounting or drug development. A teaching dynamic, in which you educate the government about your client's business and systems, can greatly enhance your credibility.

But we have an important caveat: Concede error if error there be. Counsel too often refuse to acknowledge clients' errors when those errors were made in good faith. This invariably damages your credibility, because the government is unlikely to have pursued a lengthy investigation, presumably now nearing a charging decision, if there wasn't at least some smoke suggesting fire.

Veteran DOJ officials know mistakes happen. In nearly all instances involving accounting, securities or other corporate fraud, it is the intent behind the error that will matter.

Your client's chief financial officer made a drastic accounting error in recognizing revenue? Admit it and, mustering whatever factual support you can find, forcefully argue that it was a good faith mistake — it will only raise your stock with the government.

Concerned that the admission may result in civil enforcement by the DOJ or a parallel entity like the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission? Your concession is unlikely to affect the odds of that happening, but it could help you avoid criminal exposure.

Under the Federal Rules of Evidence, nothing you say in the meeting will be admissible in any event, and the government lawyers will appreciate your candor.

Mind Your Manners

While being respectful sounds obvious, practitioners occasionally cause offense when none was warranted or intended. In a meeting with the U.S. attorney or more senior personnel in Washington, most counsel know to avoid needless criticism of line prosecutors, even in hard-fought cases. But despite this, counsel sometimes commit the related sin of condescension.

Many white collar practitioners are former prosecutors, and often much older than the line prosecutors investigating their clients. Nonetheless, be sure to treat the line personnel as professional peers. In those rare instances where counsel has real concerns about the ethics, candor or competence of the line prosecutor, counsel should raise them.

If respectfully done, no DOJ official will take offense. Consider, however, first raising them with a mid-level supervisor. Your discretion will be appreciated, and you will avoid getting sidetracked in the larger meeting.

We suggest avoiding ominous predictions about trial risk unless you can point to a discrete, significant flaw in the government's case. Prosecutors work in a trial culture — they, and their bosses, have considered the odds of winning at trial, and they may know key evidence better than you do, including what witnesses said in the grand jury.

Also, remember that whatever litigation risk the government faces, the risks your client faces — financially, reputationally and otherwise — are likely far greater.

If counsel has had the good fortune to identify a significant factual or legal flaw in the government's case, resist the urge to save it for a later surprise, and use it for leverage in

your meeting. This includes work by defense-hired forensic, accounting or other experts.

Your client is better off winning before indictment, via declination or other favorable resolution. Statistically, your odds of actually trying your case are exceedingly low, so post-indictment resolutions often result in needless financial and reputational harm.

You Probably Get One Meeting — Make the Most of It

In our experience, counsel usually get one shot to convince a senior DOJ decision maker to forego enforcement or agree to a more favorable resolution. To maximize your chances of a positive reception, consider the following.

Informal is usually better than formal.

The more time you spend making a formal presentation, the less time you spend drawing out the government lawyers in order to respond to their concerns. Government lawyers tend to remain mum in meetings of this kind, preferring to let you speak while not tipping their own hand.

Counsel who encourage a more informal exchange will learn more from the government and perhaps build relationships that could influence the final outcome. Ask open-ended questions that force the government to either respond or appear unhelpful — e.g., "Can you better explain your charging theory so that we can address your concerns?"

On that note, bring fewer people. In our experience, the most effective meetings of this kind involve no more than three people from the defense side. A smaller meeting better facilitates informal, and more candid, dialogue.

In most instances, avoid bringing the company's general counsel unless internal compliance measures are a key issue — informal conversation between your client's general counsel and government lawyers may not be to your advantage.

In some instances, we have seen counsel bring another C-suite representative, e.g., the chief financial officer. While this strategy can succeed in conveying that the company has nothing to hide, it too entails significant risk.

If you must present a PowerPoint, keep it short. A binder of materials is often a better option: It encourages informal exchange, counsel can assess the government's reaction to key materials and leaving it behind increases the chance that the government will be influenced by the materials you chose to provide.

Winnow your arguments and stay focused. Do not spend six minutes apiece on 10 different arguments. Pick two or three and develop them. Anything else you want to say can be included in a follow-up letter thanking the U.S. attorney or other official for the meeting.

In conjunction with those well-chosen arguments, make only realistic requests. This is an important corollary to credibility — your client is best served by targeting items amenable to compromise.

For example, do not ask for resolutions that conflict with DOJ policies or are inconsistent with those received by similarly situated companies or individuals. It is rare for the government simply to go away; if your client has exposure, be creative and recognize — both verbally and in substance — that the government has equities to protect.

An effective approach is to ground your proposals in the DOJ's principles of corporate prosecution,[1] current memoranda from the Office of the Deputy Attorney General, or other published DOJ policies. It will increase the decision maker's comfort with the proposal and make it an easier sell to investigating agencies or superiors at Main Justice. Know what the DOJ — or even specific line prosecutors on your case — has done with similar cases in the past, and use that to your advantage.

Know Your Audience and Adjust Accordingly

Before meeting with anyone from the government, think about your longer-term engagement strategy, from opportunities to persuade line prosecutors and case agents in the first instance, to the chances of appealing to the front office — e.g., the U.S. attorney — or, in rare instances, to Main Justice.

Your approach should vary in each instance. Line prosecutors, U.S. attorneys and DOJ officials in Washington all contribute to federal enforcement in different ways. Adjust accordingly.

Generally speaking, the more senior the audience, the more you should focus on policy issues, potential collateral consequences and the proper exercise of prosecutorial discretion, instead of on granular factual disputes. In most instances, a meeting with line prosecutors is the right place to get into the weeds, focusing on specific facts or legal principles affecting the government's ability to prove a case. Encourage line prosecutors to include case agents in these meetings — they are an invaluable source of information and there is a good chance the agent would testify at trial.

A meeting with the U.S. attorney should be less fact-reliant, because he or she will be less familiar with the facts underlying your case, and will defer to the line prosecutor's assessment of events and witness credibility. This also holds for meetings with the assistant attorney generals in charge of litigating divisions at Main Justice, such as the Civil and Criminal Divisions, as well as the National Security, Tax, and Environmental and Natural Resources Divisions.

Decision makers at these levels rely heavily on briefings from line prosecutors. Raise major, unresolved factual issues if you must — e.g., the viability of a key government cooperator — but your primary focus should be larger issues of fairness or government policy. Also consider raising the anticipated economic impact of any adverse resolution involving a corporate entity, including market effects or job losses. The principles of federal prosecution expressly require consideration of collateral consequences and, on the regional level, U.S. attorneys may be especially sensitive to those concerns.

Finally, meetings with more senior principals at Main Justice — such as the associate attorney general and the deputy attorney general — are unusual, brief and at an even higher level of generality. In many cases, you may be required to make an initial presentation to staffers who will consider whether the matter warrants a meeting with the principal decision maker. These meetings will not involve factual debates; at most, the Main Justice official will have read a short memo or received a staff briefing, and will not be inclined to debate factual issues.

This is the time for policy-based arguments about why the DOJ should not further pursue your client — for example, the precedential implications of such a case; the collateral consequences for corporate employees, the markets or other third-party actors; the proper

use of DOJ resources; or the potential long-term impact on the DOJ's enforcement prerogatives, such as the risk of an unfavorable court decision undercutting the government's ability to rely on a particular statute.

A Final Note About Timing

Counsel usually wait until later in an investigation to ask for meetings to negotiate a resolution. In our experience, this can be a mistake. First, an earlier meeting, even just with a line prosecutor, can provide valuable intelligence about the parameters and direction of the government's investigation even if no substantive progress is made.

Second, and more importantly, human nature dictates that the more work the government puts into an investigation, the less likely it is to walk away with nothing to show for it. This can be a powerful dynamic, especially with federal law enforcement agencies. An early effort at resolution may more likely succeed because the government has not yet become heavily invested in the case.

During our years leading U.S. attorneys' offices and litigating divisions at Main Justice, we enjoyed a unique perspective on how defense counsel approach the DOJ on behalf of corporate clients. And while senior-most DOJ leadership changes with administrations, the overwhelming majority of enforcement personnel remain in place. What was effective in the past will continue to be so in the future. The above observations will help maximize the odds of reaching favorable resolutions in DOJ investigations, or at least help practitioners avoid hurting their chances of success.

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[1] Justice Manual §9-28.200 et seq.