Cooperating Witnesses: Changing Pressures Create Risks and Opportunities

By Jon Buck

We’ll try to cooperate fully with the IRS, because, as citizens, we feel a strong patriotic duty not to go to jail.

- Dave Barry (American Writer and Humorist)

Cooperating witnesses have long been a critical tool for prosecutors and enforcement agency lawyers in both investigations and criminal proceedings. The vast majority of individual defendants are faced with a series of choices – all of which are unattractive – about whether to “cooperate” or dig in and fight. Corporations and their directors also face difficult risk analysis decisions that can lead to self-disclosure and cooperation in cases involving securities, antitrust, and Foreign Corrupt Practices Act (FCPA) violations. And as the SEC scrambles to implement rules in support of the Dodd-Frank Act, including its whistleblower provisions, the risk of whistleblowers approaching the government seeking financial reward likely will lead corporations to take an even harder look at whether cooperating with the government is appropriate. This practice pointer flags a few issues that defense attorneys should consider early in cases that involve any chance of cooperation.

In most cases, the decision to cooperate with the government is not made lightly, nor should it be. The government is not omniscient, and in the absence of cooperating witnesses the DOJ, SEC, and other agencies likely would not uncover – much less be able to prove – many claims arising out of questionable conduct or practices. Companies must balance not only the legal risk attendant in a government investigation, but also reputation considerations and the risk of civil suits that now seem to follow almost any disclosure of unexpected bad news from a public company. A corporation’s resolution of a government investigation or criminal charge often signals the start, not the end, of a company’s woes as shareholders and their lawyers race to file securities and shareholder derivative suits.

For potential targets of criminal and regulatory investigations, the decision is made even more difficult by the fact that prosecutors and government investigators often are unwilling – or unable – to promise that there will be any specific, tangible benefit for a cooperating witness until the government knows what a witness is going to say. This catch-22 dynamic makes it difficult for defense lawyers to provide concrete assurances to clients. In the end, cooperation is not always the right decision, and in some situations it can make matters worse. Even in criminal cases, sometimes offense is the best defense.

In many cases involving multiple parties, however, at least one party will “flip” and cooperate with the government. While some defense counsel will bristle at the idea of representing a cooperating witness, the fact remains that evaluation of the pros and cons of cooperation will help ensure zealous representation of clients, and proactively doing so can sometimes add value to a difficult situation. Some issues to consider in such an evaluation include the following:

(1) Explore cooperation opportunities early

The idea of cooperation should be considered early in a case, including before charges are brought or a formal administrative proceeding begins, even if it is ultimately disregarded as an option. For reputation and policy reasons, prosecutors and regulatory agencies are usually reluctant to “drop” a criminal case or civil charge after it is filed without demanding a significant plea, fine, or penalty.

If cooperation opportunities are explored before the government publicly discloses a charge, claim, and sometimes even the existence of an investigation, then a broader range of outcomes are possible. Under appropriate circumstances, cooperation with government inquiries may sow reasonable doubt about the strengths of a case that will lead the government to close an investigation in its entirety. Even if that is not possible, engaging the government prior to public charges can lead to resolutions under arrangements like deferred prosecution agreements (DPAs), Non-Prosecution Agreements (NPAs), or some alternative agreement whereby the target of the investigation agrees to address, in some identified way, the concerns raised by the government.

Furthermore, in light of current economic pressures, the Department of Justice and other regulatory agencies are being forced to make tough decisions about how to allocate enforcement resources. The SEC, in particular, is saddled with not only budget pressures but also the challenge of converting the Dodd-Frank Act to rules and
regulations. In the right cases, proactive evaluation of cooperation opportunities might help guide the government’s resources away from your client and toward other enforcement priorities.

As a practical matter, the best way to explore cooperation early is simply to ask questions. Once the government attorneys know counsel is involved, ask for a meeting. Ask what they are looking at, why, what they will tell you about the scope of the investigation, and how they view your client in relation to the investigation generally. While government attorneys will often hold their cards close to the vest, if they are looking for cooperating witnesses and willing to provide incentives to encourage cooperation they may signal those interests if the opportunity presents itself.

The following case study provides a concrete example of how early, proactive cooperation can provide tangible benefits:

**Case Study: J & J Cooperation Deal**

J&J’s “extraordinary cooperation” was a mitigating factor in a deal recently reached with the government arising out of an FCPA investigation. In April 2011, Johnson & Johnson (J&J) reportedly settled various charges related to violations of the FCPA with both the DOJ and SEC. **See, e.g., SEC v. Johnson & Johnson,** Civil Action No. 1:11-cv-00686 (D.D.C. Filed April 8, 2011). According to a DOJ press release, J&J accepted responsibility for the actions of subsidiaries, employees and agents who made improper payments to health care providers in Greece, Poland and Romania in order to induce the purchase of medical devices and pharmaceuticals manufactured by J&J subsidiaries. Kickbacks also were paid on behalf of J&J subsidiary companies to the former government of Iraq under the United Nations Oil for Food Program in order to secure contracts to provide humanitarian supplies. The alleged infractions took place between approximately 1998 and 2006. J&J voluntarily disclosed the conduct to the government after an extensive internal investigation following an internal whistleblower complaint.

J&J entered into a DPA with the government, and by any measure did not escape unscathed. Under the DPA, J&J agreed to improve and enhance its internal compliance systems and internal controls, and pay approximately $71 million in fines to the SEC and DOJ. However, in what the DOJ deemed J&J’s “extraordinary cooperation,” J&J made a timely self-disclosure of the FCPA issues, and also reportedly provided federal prosecutors with information on competitors’ transgressions. These steps undeniably mitigated J&J’s risks and losses. By “tattling” on itself and others, J&J avoided more serious penalties such as the possibility of criminal convictions, the imposition of a corporate monitor, and potentially long and protracted litigation. Moreover, J&J reportedly saved approximately $17 million in civil and criminal fines as a result of its cooperation.

The example of J&J is notable but not unusual. Other pharmaceutical companies, including Eli Lilly & Co. and Baxter International, have disclosed that they are cooperating with the government in investigations related to business practices overseas. The same trend is seen in other industries as well. Frequently companies – particularly public companies – decide that the benefits of timely disclosure and cooperation outweigh the risks of silence.

(2) **Know your client and the facts.**

Before seriously considering presenting your client to a government interview, know your client and your case. Talking to the government is not without risks. False or misleading statements made to government investigators, even in the course of informal interviews, can give rise to criminal obstruction of justice and false statement charges. The high-profile convictions of people like Lewis “Scooter” Libby and Barry Bonds, among others, provide notable examples of the risks of stretching (or avoiding) fair responses in the face of a government inquiry.

In advance of a planned interview, most government agencies should, and will, advise witnesses of these risks in writing. The SEC, for example, provides a “Form 1662” to each witness setting out the witness’ rights and the risks of false statements. Similarly, Assistant U.S. Attorneys normally provide a “proffer letter” in advance of any interview. These documents should be carefully reviewed with the client. In addition, clients should be warned about the importance of responding fairly to government questions – or not responding at all. If clients are going to talk, truthful statements are of paramount importance.

In addition, take stock of whether your client has collateral criminal or civil exposure outside the scope of the disclosed investigation. Many financial fraud investigations, for instance, can implicate questions about tax filings and tax fraud. Similarly, inquiries into business practices can lead to questions about competitive practices or employment issues. Because it is difficult to restrict the scope of questions the government may ask in a witness interview, practitioners should be aware of the potential for collateral risks of cooperation. One way to mitigate the chance of unexpected topics arising in a government interview is to ask the government attorneys, in advance of any meeting
with a witness, to identify key areas upon which the discussion will focus. This can be framed as a request to help ensure the government’s time is spent efficiently.

Knowing your client’s background has become all the more important in recent years. For example, the SEC has received increased judicial scrutiny in recent, high-profile resolutions with Bank of America and Citigroup. As a result, the SEC may react by demanding more information from defendants before any settlement is proposed, whether they are cooperators or not. This may force a cooperator to disclose more information about her underlying conduct to support any “deal” with the SEC, even if such disclosure goes against a cooperator’s wishes. Such information may also be disclosed by the SEC filing supplemental information or letters to the court as a matter of course in order to avoid unnecessary delays in the judicial approval of settlements, even for cooperators.

(3) Keep pressing

Unfortunately, even after a cooperation decision is made there are multiple impediments to getting as much “credit” for cooperation as a defendant seeks or expects. Most significantly, government attorneys seldom want to make promises of benefits until they know what a witness will say, and thus as a practical matter some of the negotiation about cooperation credit is left until after the cooperation decision has been made. Again, regularly questioning the government about their views and perspective on a particular witness or matter can help frame client expectations.

Moreover, the “Government” in its many forms does not always view cooperators in the same way. At the recent ABA National Institute on White Collar Crime Conference in early March 2011, the SEC’s Associate Regional Director for Enforcement Michelle Layne talked about a “disconnect” between corporations and the SEC’s staff concerning corporate cooperation efforts. Layne explained that actions that corporations believed to be cooperative were viewed by the SEC to instead be mere—and minimal—compliance with the law. At the same ABA Conference, the DOJ Antitrust Division’s Deputy Assistant Attorney General Scott Hammond emphasized that the Division expected to continue to seek “carve outs” to exclude individuals who had culpability but did not cooperate with government investigators from NPAs with a company. Conversely, even with cooperation many U.S. Attorney offices will not agree to move for a downward departure for substantial assistance under the United States Sentencing Guidelines (USSG) § 5K1.1 unless the cooperation leads to successful prosecution of another party in the same or a different matter.

In light of the different perspectives on cooperation and the different policies that impact decisions at each step in the criminal process, one of the keys to getting the most out of any cooperation decision is to press the issue at each step in the process, including:

- In situations where a witness may “flip” on another witness or company, requesting immunity protection;
- Highlighting the timeliness of the cooperator’s assistance, especially if it is being provided before others cooperate;
- Prior to a public charge, seeking a NPA or DPA, or some other arrangement that may avoid a public proceeding;
- If an administrative or civil proceeding is instituted by the SEC or some other agency, questioning the regulatory attorneys about whether a criminal investigation exists and the potential impact that cooperation may have on the criminal investigation;
- Deciding whether a global resolution in a parallel investigation by civil regulators and criminal authorities makes more sense than just cooperating with one agency at a time;
- In a charged criminal case, requesting the government to formally seek a downward sentencing departure for substantial assistance to the government under USSG § 5K1.1;
- If the government declines to submit a 5K1.1 motion, the details of cooperation can still be a factor in an appropriate sentence, and potentially a downward departure from the sentencing guidelines, under the 18 U.S.C. § 3553(a). (The government will sometimes seek to provide the details of any cooperation in camera or under seal in order to avoid undermining ongoing investigations.)

In many cases, cooperation will not be the right option, and the ultimate analysis will turn on the specific circumstances of a case and more factors than are set forth in this article. In general, however, early analysis of cooperation opportunities, the right questions, and careful consultation with a client can help make sure the right strategic decisions are made, and all options for a favorable result are explored.

Notes


2 See, e.g., 18 U.S.C. § 1001; § 1503; § 1505.