

FROM THE YATES MEMO TO THE JUSTICE MANUAL: THE EVOLUTION OF THE FOCUS ON INDIVIDUALS IN WHITE COLLAR CRIMINAL PROSECUTIONS

Featuring:

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*Moderated by Joe D. Whitley^{****}*

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Moderator. Thank you very much for the kind introduction. I want to thank Lucian Dervan and the Belmont Law School for this kind invitation and also it was wonderful to see Judge Gonzales, as he is an old colleague and friend. It is wonderful to be here this afternoon after that great lunch. We want to make this panel open and interactive, and if you want to ask questions, go right ahead and we will try and recognize you. If you have questions and you want to wait until the end of the program then do so. We want to try and take advantage of a more intimate setting this afternoon and give direct responses to some of the questions. Our panel this afternoon may be a little duplicative of the earlier panels looking at the Yates memo and how it has been incorporated. Today, whenever you get a car, there is always an instruction manual. Usually everything is online nowadays. That is the way the Justice Department manual is today.¹ The manual itself, although it used to be a book, is now. I remember when I was first a U.S. Attorney in Georgia locking myself away in my office with, I do not know how many volumes it was, maybe 10, of these books, which are electronic.²

I want to introduce our panel. To my left is Ms. Kat Booth. She is an Assistant United States Attorney in the middle District of Tennessee, during a few stints she was with a professor here at Vanderbilt law school. She worked at the Tax Division of Main Justice and received her law degree from Georgetown Law Center.

To her left is, Steve Hinkle who is a Chief Compliance Officer. He was a trial attorney with the Criminal Justice Division of Main Justice. Steve received his JD from George Washington University.

At the end of our panel is Paul Kish, who is an attorney based in Atlanta, Georgia. Paul is widely known throughout Georgia and the U.S. as a great trial attorney. He has defended over 100 cases in front of juries in federal and state court. He has handled numerous appeals. He has also represented companies and individuals throughout investigations. He graduated from the University Georgia School of Law. What we want to do today is get into the Yates Memo a little, talk about it, and give you the text so you can see it.³ To that end, I want to start with you, Kat.

Booth. Good afternoon everyone. To get us started, I thought we would go through some of the tools that we as prosecutors look to when we are deciding whether to prosecute a corporation and the tools we use to navigate that. There are three main sources of guidance for those of us who are in the government space in terms of when to prosecute an individual versus a corporation. The first panel touched on the Yates Memo and you guys have been hearing about it this morning, but we are going to go a little more in depth and you guys

¹ Justice Manual, The United States Department of Justice (2018), <https://www.justice.gov/jm/justice-manual> (last visited Mar 8, 2019).

² *Id.*

³ *Yates Memo*, Justice Manual, The United States Department of Justice (2018), <https://www.justice.gov/jm/justice-manual> (last visited Mar 8, 2019).

will see is that there are updates to the Justice Manual which was also called the U.S. Attorneys manual that were in November of 2018, the U.S. sentencing guidelines chapter eight, just a basic overview of the policy considerations that are there.⁴ I do have to give a disclaimer that although I am a government attorney, all of the things I say are my views and not the views of the Department of the Justice. You guys might be able to tell I am not the most senior person in the Department of Justice, and everything I say today is just based on my views.

First, we have the Yates Memo, which was from September of 2015. The other panel touched on how the Yates Memo changed or did not change internal investigations in corporations. The Yates Memo has six basic components or things to look at.⁵ In order to get cooperation credit, corporations must provide all relevant facts relating to the individuals responsible for the misconduct.⁶ That particular statement has changed a little bit since 2018, but it is the idea that to get cooperation credit, corporations have to provide information they know about the individuals responsible. Number two: focus on individuals from the inception of the investigation. I would agree with the panelist who spoke earlier that really the focus was on individuals even prior to Yates and continues to be so. On the criminal side, when we are looking at a case, most of the time, cases come to us as individual misconduct, or they come to us where there was a parallel investigation in a civil case ongoing and the civil case uncovers that there is actually a person or persons who are particularly criminally responsible. We decide what we focus on and most cases come to us through the individual context. That is not to say that there are not some investigations started by we see a corporation doing malfeasance then go and do an investigation into that corporation, but that is the exception and not the rule in the Middle District of Tennessee. Would you like to take breaks?

Moderator. Paul, any thoughts on that?

Kish. I guess I would just echo what you said which is *deja vu* all over again of same old same old. When you look at these rules, I do not know that they have changed that much and that it was really always an individual focus depending on whom you are representing. If you are representing the company, you want them to be interested in individual parties. If you represent individuals, you do not want them to be interested in your individual client. I do agree with Aubrey Harwell earlier. I think there is a greater sensitivity in a boardroom or a corporation today about the change. If you are an executive, you want to have the designated felon in your corporation. You want to have the guy with the circle on your back. There are all sorts of things that go through your mind about so many positions in corporations today. I do not think that. It is true. So many executives I represent today have different feelings about whether that is real or not.

⁴ See Justice Manual, *supra*, note 1; Guidelines Archive, United States Sentencing Commission, <https://www.usc.gov/guidelines/archive> (last visited Mar 8, 2019).

⁵ See Justice Manual, *supra*, note 1.

⁶ *Id.*

Booth. Continuing on the Yates Memo, it established or set out in writing what was already happening to a large degree, which is that criminal and civil attorneys should be able to team investigations.⁷ The Yates Memo made it more mandatory than it was before. In an ideal world, this would have always been happening, now after Yates, it has to be happening. We have to communicate on the white-collar side. We have to communicate with the attorneys on the civil side. Which often times looks like in a weekly facet. It means coming up with a game plan from the outset to make sure we do not have duplicative efforts. Everybody is investigating. For example, the civil side is going to want certain information, which if they are able to get that information, they are going to get it. We get it through a grand jury subpoena, which we will not be able to share it.

I think Yates is trying to get at that. Absent exceptional circumstances, we are not going to release culpable individuals from civil or criminal liability. You would not resolve a corporation's liability without a clear plan to resolve an individual case. Civil attorneys, in addition to the criminal attorneys, should focus on the individual cases. You can see the word individual appears in almost every one of the mandates of the Yates memo. I do not think that is anything revolutionary or new, it is just more of a mandate with Yates than just a practice. Turning to the relevant guidance from the Criminal Justice Manual, there are a few sections of the Justice Manual that focus on the intersection of corporations and individuals.⁸ There is the focus on individual wrongdoers again. This is what that came out in November of 2018. Rob Rosenstein issued this new guidance⁹. It is really, in my opinion, not all that different, from Yates. I think that the new guidance and the way the Justice Manual has been changed is very consistent with Yates, with maybe a little discretion with prosecutors to make calls in the interest of justice.

There seems to be a new focus with that in the Justice Manual. Materially, I do not think it differs all that much from Yates. The idea is to prosecute individuals who do not have a corporate resolution without considering individual criminal liability. And consider both corporate and individual prosecutions when corporations act criminally to benefit the corporation. This is kind of a reverse when you are prosecuting an individual. The guidance from the Justice Manual and the guidance to the U.S. Attorney offices is to consider if there should be a corporate prosecution of an individual.¹⁰ Go through the factors that we are about to talk about concerning whether you should charge the corporation as well as the individual.

When my office takes a case, and we are trying to decide whether we are going to go after the individual or the corporation, these are the factors. We walk through this list and balance the factors to see what would be in the best interest of justice. The nature and seriousness of the offense is obviously a serious consideration. Whether there is going to

⁷ *Id.*

⁸ See Justice Manual, *supra*, note 1.

⁹ Rosenstein Memorandum, *Restoring Public Confidence in the FBI*, Office of the Deputy Attorney General, May 9, 2017.

¹⁰ See generally Justice Manual, *supra*, note 1.

be harm to the public if you continue to let a corporation to exist. For example, if you provide a fraudulent business, that is a situation that would be more likely to see criminal action, that business would be more likely to see criminal action than would a business that is engaged in legitimate business that might have one or two bad actors in a business that are doing one or two bad things in a business. The nature of the business itself is not fraudulent. The pervasiveness of wrongdoing by the corporation goes to just what I was talking about. It is whether the corporation has engaged in similar misconduct in the past. Is this the first time? Is this a repeat offender? Is this someone who really needs to be out of business? This is one of the tools in our tool kit, to prosecute them criminal.

A corporation that gets prosecuted criminally is less likely to be viable--especially if it is multiple times over. The adequacy and effectiveness of the corporation's compliance program both before and after charging. You can imagine that most large corporations have solid compliance programs in place. There are sometimes when we do see corporations with sham compliance programs. This is a compliance program that has no teeth. It is just sort of there for show. That would be a factor that we would think about. And it is before and after charging. After charging, although we would certainly prefer to see people with compliance programs in effect prior to charging; it is also important to us that it's under investigation and takes remedial steps, puts a compliance program in place, or takes other steps to make sure this conduct does not happen in the future.

The corporation's timely and voluntary disclosure of wrongdoing, this is something I suspect we will talk about more, the other panelists will touch on this, but this is a really big one. If the corporation comes forward and identifies the wrongdoing, and identifies the individuals who are responsible, that will weigh against charging the corporation itself. Again, the corporation's remedial actions, which we talked about already, have collateral consequences: hardship to shareholders and employees. If we indict this corporation, are we going to end up laying off a whole bunch of employees who had nothing to do with the fraud, and everyone's 401K is going to tank, and we are really going to wreck some havoc in the space where the corporation is? Or, is it a situation where there are one or two people who really need to be weeded out, to answer individually for their criminal conduct? That is just something to weigh, it does not mean that we will not indict the corporation if there are collateral consequences; it just means that is something to think about.

The adequacy of civil and regulatory remedies, especially if there is a parallel investigation where the civil side is considering---they get treble damages under the False Claims Act.¹¹ So they have a lot more ability to inflict a financial penalty on a corporation. So if that is already going to happen that is something we think about. We do not want to duplicate efforts if we can solve whatever the problem is by letting the civil side do their investigation. The adequacy of prosecution of individuals. Again, if you have got one or two people who are the ones causing the harm, and causing the problem---and that is usually what we see---corporations have the one or two individuals. And it is very

¹¹ False Claims Act, 31 U.S.C. §§ 3729-3733 (2018).

important that we have corporate cooperation so we help can identify those people. That is again where the cooperation comes in.

Part of what I think the Rod Rosenstein guidance¹², and the changes to the Justice Manual¹³ in 2018 really tries to emphasize is that prosecutors must exercise thoughtful and pragmatic judgment in applying and balancing these factors, so as to achieve a fair and just outcome, and promote respect for the law. That is certainly not to say that prosecutors were not doing just that before this guidance came out in November of 2018, but this is a nod toward flexibility. I do not know that practically it makes any difference to be honest, but it is sort of nice to have the guidance of flexibility. Getting into the value of cooperation, cooperation is a mitigating factor, and you heard the first panel talk about doing the internal investigations and trying to cooperate with the government. Whereas Yates¹⁴ said that in order to get credit--I think Lisa Rivera talked about this on the last panel¹⁵--Yates¹⁶ said, corporations have to provide all relevant information, and if they do not provide it, then no cooperation credit whatsoever. This is a little bit mushier I would say. It gives a little bit more discretion to the prosecutor. The idea is to identify all of the individuals who are substantially involved and responsible for the misconduct, instead of all of the information.

Now, in the criminal context, the cooperation credit really means less than it does in a civil context. That guidance seems more important in a civil context. In a criminal context, the degree to which a corporation is cooperating is one of the factors that we think about in deciding whether they get charged at all. What is the current guidance was always kind of the same considerations that we were thinking about, but is less stringent on a bright line rule, whereas Yates¹⁷ said, you have to provide everything and if the government determines you have not provided everything you are done. Now, we want to see that you have made a good faith effort to comply, and credit may still be available.

The Justice Manual¹⁸ identifies some of the reasons why it is important to have cooperation by the corporation. It certainly allows the government to conduct a quicker investigation if a company goes in and does a corporate investigation and brings us the results of that. We can very quickly, easily, and efficiently go interview those people, or interview witnesses, gather documents that are related to a much more targeted investigation if the corporation has cooperated. Certainly it benefits the government to have the corporation's cooperation.

¹² Memorandum from Rod Rosenstein, Deputy Attorney Gen., to Jeff Sessions, Attorney Gen., *Restoring Public Confidence in the FBI* (May 9, 2017).

¹³ Justice Manual, The United States Department of Justice (2018), <https://www.justice.gov/jm/justice-manual> (last visited Mar 19, 2019).

¹⁴ Memorandum from Sally Yates, Deputy Attorney Gen., to The Department of Justice, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015).

¹⁵ See Symposium Panel, *Internal Investigations and the Individual in the Age of Cooperation* (Feb. 1, 2019).

¹⁶ See *Yates Memo*, *supra*, note 3.

¹⁷ *Id.*

¹⁸ Justice Manual, The United States Department of Justice (2018), <https://www.justice.gov/jm/justice-manual> (last visited Mar 8, 2019).

But it also benefits the corporations to cooperate, because they avoid a long, protracted litigation and investigation. As some of the panelists earlier were saying, it may be hard to keep from the people you are interviewing that there is an investigation going on once it sort of leaks out. What happens to your stock? What happens to your employees? Do you have attrition? Do people leave? Do people try to cover it up? Do people get nervous and shred documents? Certainly you hope that's not the case, and from a white collar prosecutor's perspective, that is such good evidence of intent that you love to see that because it just bakes the case. It is done once people try to cover things up.

So, the policies from Chapter 8 of the United States Sentencing Guidelines¹⁹, to the extent that a corporation is charged and either is convicted at trial or pleads guilty, we move to the sentencing phase. The sentencing guidelines provide guidance in terms of how to punish a corporation. This is not a deep dive into the sentencing guidelines by any means, but I wanted to give some of the policy considerations to show how they are consistent with the Justice Manual²⁰ guidance that we have. The idea behind sentencing a corporation is to remedy the harm caused by the corporation. If the corporation is out there doing 100% fraud, that is a corporation that probably needs to be shut down. But if it is a corporation that had a few bad actors, who can be reined in and excised from the corporation, and the corporation can keep going, then maybe a less severe punishment is acceptable. The fine range is based on the seriousness of the offense and the culpability of the organization, and you can see those things echoed throughout the Justice Manual.²¹

Factors that aggravate the punishment are the corporation's tolerance for criminal activity, so very similar to whether the corporation has remedial programs in place that you see in the Justice Manual.²² The prior history: is this a first time offender or a corporation that has been in the criminal space for a long time? Violation of an order, obstruction of justice. Factors that mitigate punishment are again, corporate compliance and ethics programs, if those are in place and effective that will mitigate punishment. Also self-reporting, cooperation, and acceptance of responsibility all go a long way toward mitigating punishment, not just when it comes to corporations, but also individuals. That is just a brief overview, and I will turn it back over to Joe.

Moderator. Thank you, Kathryn. That is a great quick summary of a lot of salient information. Steve, I want to ask you, after you heard this you have a key role at your company as Chief Compliance Officer, has the guidance from Yates caused any concern to your executives or the executives at other companies you may be aware of, about their liability, civil or criminal?

¹⁹ United States Sentencing Commission, *Guidelines Manual*, §3E1.1 (Nov. 2018).

²⁰ Justice Manual, The United States Department of Justice (2018), <https://www.justice.gov/jm/justice-manual> (last visited Mar 8, 2019).

²¹ *Id.*

²² *Id.*

Hinkle. I will probably echo what people have already said, but I do not think it really changed the practice. If it is a criminal case, they are always going to want to know which individuals, so I am not sure it changed that. From my perspective, thankfully we have not gone through a criminal investigation, but what we were able to do is use the Yates Memo²³ to train our executives. We basically call it the scared straight lecture. We will have leadership conferences and we are able to put the Yates Memo²⁴ up on a screen like we did here and say, “Look, you guys need to take this seriously because they are coming after you, they will look at you, this is about individuals. The company may be limited, and also has an incentive now to also look at individuals as part of that cooperation.” That is the main way we use the Yates Memo²⁵, as a leadership training tool.

Moderator. Does it impact how people approach their jobs? Do they take seriously your cautionary tale about what could happen to them? Does it impact how they perform their duties, and do you have more of them coming to see you, and consult with you than you might have had pre-Yates?

Hinkle. I think it helps to establish tone at the top when people know you are serious about it. But it does make them more sensitive to thinking through when they do transactions, or have any kind of involvement with these issues. We also get a lot of questions about kickback statutes, which can be very complex and hard to sort through, so there will be a lot more of, “Well I need to call a lawyer and sort of walk through this.”

Moderator. I want to come back to you and engage in some more discussion Steve, but Paul, I want to move to you. You and I both serve in some similar capacities, representing individuals to corporations. There are different levels of representation. There is the audit committee, there is corporate counsel, there is corporate counsel for individuals, in a publicly traded corporation there are lots of other different issues. You have seen Yates²⁶ come down. We know Sally Yates because she was our colleague at the U.S. Attorneys’ Office in Atlanta, and I am sure she probably had good reason for issuing the Yates Memo²⁷, but what is your view on the impact of it, and your thoughts on it?

Kish. Joe, here is the deal from my perspective. The title of this seminar is, “When Corporations and Individuals Collide.” I only represent individuals. Whatever label we put on prosecutorial decision making, Yates²⁸, Rosenstein²⁹, whatever label we put on it, by the time an individual comes to see me, they are in trouble. The reason they are in trouble is because of the dynamic here. We have two large entities, one being the United States government, the second being the corporation, which is a profit making institution. The duty of its officers, employees, and compliance officers is to keep the company going. My

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

client, the individual, who might have done something stupid, is going to get crushed in between those two what I call tectonic plates. You would be surprised how normally patriotic Americans are so surprised when they find out that their own company and their own government believes that they did something wrong. And that they---regardless of whether we call it the Yates Memo³⁰, or whatever label we put on it---that they are going to be, as my friend Don Samuel in Atlanta likes to call it, be designated as the vice president in charge of going to prison. I also agree with what Mr. Harwell said this morning, which is that all of this stuff is fact driven. Each individual case depends upon the facts.

I do not disagree with what Agent Covington said. He said most federal agents - most prosecutors - all of them want to do the right thing. They do. No one wakes up in the morning thinking, "I am going to go make a case against somebody who is really innocent." That is not the real world. However, federal agents, federal prosecutors do not get pats on the back for dropping a case. They do not get their names in the paper when they have decided no crime happened. There is an institutional bias in favor of finding a crime, no matter how honest and well-meaning the individual assistant U.S. attorney and agent might be. And because of that institutional bias, my client, who is on the precipice between these two tectonic plates, needs to call me.

Now, as Joe said, many of these investigations come up with a bunch of different levels. One of the confusing - and I was talking to somebody at lunch about psychology - one of the confusing things about many corporate investigations is that a lot of companies, especially in the new tech field, the people grew up together. They were in the garage together. They had the ideas. They started this doggone corporation. Now we are all worth gazillions of dollars, we are all friends, are we not? Well, when the CEO says - and somebody was talking about the *Upjohn*³¹ warnings this morning - "Let us just have corporate counsel go talk to everybody." And, of course, despite the words coming out of well-meaning corporate counsel's mouth, which is "I am not your lawyer. I am getting information for the company so that we can give it to the government and decide which individuals under all of this is going to be crushed," the individuals just cannot believe that their buddy with whom they play golf, their friend with whom they walk the babies together, that that person really is not their lawyer. But it is not their lawyer, it is the company's lawyer.

Here is another dynamic that is very strange for the people on the inside, the individuals. Believe it or not, I actually charge pretty good fees. And it costs money to represent people in one of these things. And sometimes the corporation will pay my fee. Well, general counsel in the corporation, he or she knows, "look, just because I am paying your fee, Paul, that does not mean you work for me." But one of the people on the panel this morning let slip, which is, "well you want to keep control of the investigation to make sure you have got 'good lawyers' representing all of the individuals." What that means from corporate

³⁰ See *Yates Memo*, *supra*, note 3.

³¹ *Upjohn Co. v. United States*, 449 U.S. 383, 384, 101 S. Ct. 677, 680, 66 L. Ed. 2d 584 (1981).

counsel's perspective, not that there is nothing wrong with this, is that they want "good lawyers" who are going to tell the company what the individuals are saying.

On the other hand, the lawyer who is in this chair also has to work with Kat and her people. You have to be honest. You have to have a good reputation. We were talking about this before. Because they are not going to believe you when you say, "I am going to be able to prove to you that my client did not do anything wrong." So, the representation of the individual in this context is really tricky because of these competing forces. Both based upon what the individuals, what the two forces need - the government needs to find out if crime happens, and, if it did, that they are going to prosecute it. The company needs to make sure that they, if a crime happened, excise, to use Kat's word, the bad actors and allow themselves to keep going. The problem, of course, is that these individuals in the middle, often who are clueless about these pressures, are the ones that can get crushed, and that is the art form of doing what Joe and I do.

Moderator. So, Kat - we are all, Paul and I are very honest lawyers. I mean, you can trust everything we say to you. You have total confidence in us right when we walk in your door, but that is something we have to earn, right? I know reputationally, you know me by reputation, but you do not know me by having worked with me. So, you have tremendous power as a prosecutor to exercise discretion, so what are some things that level the playing field - if I come in and make a presentation to you, what are some things that you are looking for and thinking about when you have Paul and I come in who represent an individual and sit down with you and start the discussion and move ourselves to the place where we are not - the three categories, right? The three categories are subject, witness, and target. Well, the one we want to be is witness, right? And, anyway with you, so how does this affect you? And I realize that none of what you say will create any rights, substantive or procedural...

Booth. You anticipated my disclaimer. So, I think you are correct that having trust in the attorneys is part of it. It is not something that goes without - it is something I think about in some way when someone comes in my office. But you also have to remember that AUSA's are different people across the country. What an AUSA tells you here in Nashville in the Middle District of Tennessee applies, it may be slightly different if you are in Jacksonville, Florida. You know it will be based on both my read of things, my supervisor's read of things, the U.S. Attorney's priorities - now, of course, we all operate under departmental priorities, but even within departmental priorities, individual U.S. Attorneys can have different priorities, as well. So that is going to be an overlay that you as defense attorneys, I am sure, are aware of as you go and talk to an AUSA.

The thing that I would say is that usually by the time that someone has counsel and they are coming to have a proffer, or make a presentation, we know a lot already at that point, usually. So, what we are looking for is a presentation that is consistent with the other evidence that we have gathered in the case. Because cooperation is only helpful if it is true and completely forthright.

If an individual is going to cooperate and is going to come forward, usually if they are criminally - I guess there are sort of three ways that that can go - they do not get charged, maybe your presentation is so good and is so consistent with what we have and you are able to throw some people under the bus, which is great, we have got some other targets to focus on, and so we sort of let you go. Or the person comes in and pleads guilty, right? And if they come in and plead guilty, and just admit their guilt, fall on the sword. They are the target. After them, we are done. Then we need to know that you are actually cooperating, that you are being forthright. And sort of the third category is the people who are going to come in and cooperate who do have criminal culpability, who are going to get charged, they are going to cooperate against some other people in the organization who may be higher up or may be more criminally culpable, somebody we really feel like we want to take out of the stream of commerce, for whatever reason, because they are really causing problems.

In that case, if you come in and you have a proffer and it's not 100% truthful, well you are not going to be a very good witness down the road if you lied to us the first time, right? How are we going to put you on the stand? We are really going to have to rehabilitate you. So, we rely on, you know, individuals themselves to be honest, but also their attorneys to make sure that they come in, and if you are going to cooperate, there is no - I think Aubrey Harwell said, "you do not open the kimono a little bit. It has got to be all the way." You have got to come in - It has got to be full ward cooperation or you are going to get jammed up down the road.

Moderator. I am glad you used that expression. It really tells the tale. Steve, you are really one of the two tectonic plates. You are grinding the individual, and we just heard from Kat talking about what her expectations are, you know you are working with your general counsel, you are working with Paul in this particular case where he is representing the individual, Kat is going to hear from Paul, what are you telling people inside of your corporation about the different world they are in today as opposed to maybe the world you remember when you were in Fraud section of the Justice?

Hinkle. Yes, well you know I had this experience when I went to work for HCA back in 1997 when they were going through criminal and civil investigations. Just basically in general, not just about that, changes in the whole, the environment, is definitely going to get people's attention, it is going to have involvement in the board, it is going to absorb the corporation until it is over. In the meantime, it is operating a hospital, position, practices that sort of thing, you have got to do the blocking and tackling of that, so, it is a huge deal.

Moderator. As you are going through all of this, Paul, with your representation you have got these, as Steve points out, there is the operation of the corporation, which your client may be a high level executive, so he want to or she wants to continue doing her day job of running the corporation, but then you have got the audit committee which may want to talk with your client, right? And then you have counsel for the corporation who may want to talk to you because they may be preparing an internal investigation for Kat, so that she can look at it and assign the corporate liability, so how do you negotiate these different

audiences that you have to deal with in a way that gets your client under Yates, or post Yates, in a better position?

Kish. That really is, and I use the phrase “art form” to describe what we do, that is part of the art because as a criminal defense lawyer, my default mode is to say nothing and have my clients... You know I always give them the speech, “You cannot catch a fish that does not open its mouth.”

Booth. Yes, you can.

Moderator. There is always the spear.

Kish. But when somebody is a high ranking executive at a corporation they not only probably want to continue working, if they do not cooperate, they listen to their idiotic lawyer and go into default mode and say nothing, they are going to get fired. So, we have to work with Steve and the people that he works with.

Now, Joe’s point is that when these investigations begin and especially with larger entities, there are different groups of lawyers representing different institutions. There is the general counsel. We all know what that is. That is the company’s lawyer. The company’s employee. They usually have their own offices. Then the company often has outside counsel, often a big law firm that represents only the entity. Then the audit company appointed by the board of directors to get to the bottom of what has happened, they hire yet another law firm, often peopled by people who were previously assistant US attorneys who have a lot of experience in doing this, to go and see if they can do their own investigation. Let us make it more complicated. The CEO usually has his or her own attorney. So, you have got four or five different lawyers who want to speak to my foolish client who either does or does not want to answer everyone’s questions, who wants to keep his or her job, but who does not want to be designated as the vice president of going to prison.

So those are some of the things you have to balance and weigh in terms of when you are going to respond to questions and when you are not. And that is why it is so important for the lawyers representing the individuals to note everything but you are handcuffed because you do not have any other resources. You do not get to have the corporation produce documents. You do not have the subpoena power the government has. So, it is absolutely imperative that your client tells you the truth. And here is a shocker - some of my clients lie to me. And so that is the - I keep coming back to this phrase - the art form of representing the individual. You have to learn as much as you can. You have to cooperate as much as you can with the other constituencies, while at the same time making sure that you do not advocate a position for your client that puts you in the position of getting crushed.

Hinkle. They do not lie to you. They just do not tell you all the facts.

Kish. Yes, right. They forgot that. I remember that. I forgot that. Or, as Aubrey this morning said, “you know, everything is data.” To me, emails are the devil’s work.

Booth. I love emails. Emails are the greatest invention.

Kish. I have always said in the history of litigation, civil, criminal, whatever, there has never been an email that has ever helped anybody. It does not work that way, folks. You do not get to put up in front of the jury, “Here is my exculpatory email.” It does not work like that.

Hinkle. So not only is Paul [Kish] dealing with the identities you have talked about, but there are other parties who are represented, right, and those counsel for those parties are knocking on your door, calling you up saying, “I would like to interview your client. Do you mind?”

Moderator. Well, let us talk about the joint defense agreements.

Hinkle. That is right.

Moderator. And if I remember correctly, the DOJ said that is not counter to a cooperation.

Hinkle. Yeah, I think that is the official position.

Kish. That is what we would like for them to do, so just because you enter a JDA, does not mean you are not going to cooperate.

Moderator. So, let us talk a little bit about what the feds are bringing us, because not everybody may know this. This is where—Kat may do this as well—the government is getting a united front presentation, where people are coming in--and I see some prosecutors in the audience and, “We do not want that to happen”--but it is one way of kind of getting a better understanding, right, and I have talked, so Paul, maybe you can speak about joint defense agreements and also ...

Kish. It is basically a contract among the lawyers representing individuals to say, look, we will do a little opening of the kimono, not a whole lot, with each other, so we can get a better understanding of what we are each facing. The enforceability of that contract, as I call it, is where the litigation happens because somebody then breaks fold and becomes a government witness and the rest of us say, “Hey! You told the government what I told you during our joint defense meetings and that should not be admissible against my client in this trial.” That is usually how it happens.

The bottom line is the courts have said JDAs are okay. Justice says they are not horrible. My experience has been they are fantastic. But, it comes back to only if you are working with lawyers who are capable and trustworthy. Because if you are working with somebody who is not trustworthy, then they are just going to screw you over, quite frankly.

Remember, we each have a client. We are obligated to do as well as we can for our client, and that is the hard thing. If I learn something from a joint defense agreement and which I can use against someone else's client to enhance my client's position, I probably am obligated to try to use it. But, and here is the thing, when you practice law you are going to have another case with these people. Do I really want to get the reputation of taking semi-secret information and passing it along to the government? It is a hard call. So, joint defense agreements can be valuable, but the key is to know the people with whom you are agreeing.

Moderator. With those agreements--with Steve meeting with a corporation on some occasions versus joint defense agreements, whether it be a situation not necessarily talking about your company, but where they involve a company as part of the participants...

Hinkle. Yeah, I think so. I mean, this is a way that lawyers can communicate privileged, and I would argue that it is a good thing to remember, including the government, because I think that it is a way of ultimately getting to the facts, to the truth of the case. Kat mentioned clients coming in and lying to them and then there is no cooperation, they are kind of worthless at that point. Well the art of being a good white-collar criminal defense lawyer is not taking a client in without knowing some facts, so then you got them locked into a story. Most good lawyers say, before I take a client, let us spend a little time talking to the other lawyers in the case, talking to the company's lawyers who will probably know more information than anybody because they have access to the emails and all the other witnesses and some would call, oh, that is never going to get your story straight but, in this day and age there are too many emails, texts, that sort of thing that are out there. So, I think that mostly everybody is taking the time, slowing down a little bit. And that is where the challenge on the in-house counsels goes—to have the senior management and the board be willing to slow down a little bit and get all the facts, so that everybody, at the end of the day, can be accurate about what is going on. It does get to a point where you have to say, we are not going to talk to you anymore, so that is how that works.

Moderator. So, to stay on our Yates theme - which is basically that all these things have been happening before Yates—this concept of joint defense agreements. There have been situations where, let us say in mob cases or cases where you have a situation where the mob is paying for every lawyer that is being represented—or every individual that is being represented. But, in a white collar setting you do encounter joint defense agreements or mutual defense understandings, and every individual Assistant U.S. Attorney is different about how he or she might react, but if it is something that stands in the way of an individual or corporation getting fair consideration with? Again, I am asking for a very subjective response, so forgive me.

Booth. Yeah, I would say my very subjective response is if you as the corporation are engaging in a joint defense agreement that prevents you from providing information about the criminal and culpable individuals, I think that would weigh against cooperation. Absent some other guidance from DOJ that I am not aware of, I think that the guidance that we

have is that the corporations have to provide all of the relevant information about the most culpable people and if they do not do that then they risk not getting cooperation.

Moderator. So, there are a number of Assistant U.S. Attorneys in DOJ that—I was really delighted to meet some at lunch—but every U.S. Assistant Attorney has his or her own approach to things and I suppose to this reading of it knock on the door...let us say I call up Richard Wesling or somebody like that who has another law firm and say, “Who are you meeting with? Kat? Booth? Would you come with me?” and I think that gives me a little bit of credibility, does it not? I mean, when I come and meet with you to talk about a case in that setting?”

Booth. Sure.

Moderator. So, as we think about it, each of us, those of us defending corporations or being compliance officers, and trying very hard to build our credibility and our presentations in the Yates world we live in. What I think Rosenstein does is it makes it more of a real, real world—if I can say that—than a world without Rosenstein’s guidance did. So, I think that it is a good thing. But I wanted to come back to--I think we have about maybe a five-minute warning saying we need to move to other programming-- the training that Assistant U.S. Attorneys get. They are in classrooms just like this, and in South Carolina where a few of your colleagues go to get trained or to provide trainings to others, I am sure some of the attorneys in this room trained under lawyers there. Has Yates been—I am not asking for the materials—but has Yates been a subject of discussion of some of those training programs in South Carolina?

Booth. I have not attended any yet. I am certain that it has.

Moderator. The Freedom of Information Act claim can get filed. But as a practical matter, I am guessing there has been training on it. But uniformity is a challenge again, though. So, one part of it is when we are dealing with the 9th or at the U.S. Attorney’s Offices and seeing, your hospitals are located--actually, believe it or not, there are none in Tennessee, but they are around the country, correct? So that is something you have to consider, is it not? Locale and what.

Kish. Yeah, and I mean, we have already said this, but every U.S. Assistant Attorney is different. Some offices have little to no supervision in the U.S.A. so they can pretty much do what they want. I was in Main Justice [and] we had a lot more supervision up there—a lot more by the books. So, it just depends on whom you are dealing with.

Moderator. So, we have five minutes, so if anybody would like to ask any of the panelists a question, but if not, we can kind of roll on here a little bit longer. But let us see if anybody in the audience has a question or a comment about their experience with Yates or not. Any comments, questions? Okay. So, we will sort of move toward wrapping up. I want to take a moment to ask you, as what we have hit on and what you have seen today is the tip of the iceberg. As you might imagine when you litigate a case you spend maybe ten hours for

every hour you spend in court preparing. And so, for each of the other panelists, they spent a lot of time, and our speakers, preparing for this day today—we have enjoyed it. But I wanted to ask for a wrap-up, just something that you wanted to sort of share with the audience at the end of this presentation. Paul, we will hear some things from you and then go to Steve and then to you, Kat, about the topic and maybe where to read more about it or anything you want to add in terms of the Yates Memo.

Kish. Just look at the newspaper. More individuals are being charged, it is true.

Moderator. Alright. Succinct.

Kish. I am very busy.

Moderator. And as we know from listening earlier, every U.S. Attorney General tries to put his or her imprint on the Department of Justice and they have come in, some of them, with a hundred different objectives they are trying to accomplish, but I do think Sally Yates with the Yates memo did leave an imprint on the Department. This was a game changer of sorts. Steve, what sort of final comments do you have?

Hinkle. Yeah, I would say as a company, particularly in healthcare where if you have got a criminal conviction you lose your ability to participate in the Medicare program-- [it is] the name of the game. Plus, the government, by the way, is your biggest customer, so you are really battling with your biggest payer and you want to get back on their good side. So, cooperation is just something you are going to have to do. It is a necessity.

Moderator. And as I think about so many accomplished lawyers in this room and new lawyers who are going to be out there practicing law, and, Steven, you have been in this career as a compliance officer really for the last 15 years or so, right? So, that is a great place to be because it seems to me, before I ask Kat for her summed up remarks, that that is a significant shield against a company being investigated if you have an aggressive compliance program that self-reports and prevents things.

Hinkle. Yeah, hopefully you can avoid the problem of needing to be investigated.

Moderator. So, this to me is, and Professor Gilcrest talks about some of this, but it is important to talk about this is as a useful tool and the day has finally come when compliance really does matter. There was a time when the sentencing guidelines were issued, maybe before some of you in this room were prosecutors, where people sort of just blew it off—we do not really need a compliance plan. But Kat, let us hear some of your summary thoughts as we wrap up.

Booth. Yeah, I think obviously there is a lot of focus on the individual. My big push would also be cooperation, I think is key for corporations. You have got to cooperate. A corporation that comes in early, discloses everything they know, they do not look like nearly the bad actor and if you present that to me from the outset, then I am already thinking

of you as sort of also wronged by the criminal misconduct as opposed to part of it. And so, from a corporation perspective, I would say, I think cooperation and full disclosure are huge.

Hinkle. We should also mention that when we are talking about corporations, it goes for healthcare and not-for-profits as they have the same issues, all of this applies to them as well.

Moderator. So, there is an expression about trying to outrun a bear in the woods and identifying the other person to flee. To a certain extent, if the government is suing you or chasing you, one of the things you want to do is not be that second person who is running a little bit slowly. I do think the laudable work of the Department of Justice in this area is great. And I am really glad to see the Department take a look at Yates and step back from it a little bit with the lens that Rod Rosenstein has given it. And also, I want to stop and take a moment to thank each of you for putting up with me for the last few weeks preparing for this panel, and if I could get the audience to also thank them, I would appreciate that. Thank you so much.