

INTERNAL INVESTIGATIONS AND THE INDIVIDUAL IN THE AGE OF COOPERATION

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*Moderated by Ty E. Howard^{*****}*

Moderator. My primary job today is to give you an introduction and then get out of the way. I am going to do my best to do just that. I am going to start at the far end, my left. We are happy to be joined by Lisa Rivera. Lisa is a partner at Bass Berry and Sims where she

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handles white collar criminal defense claims, false claims act litigation, and internal investigations. Before joining Bass Berry and Sims, Lisa enjoyed a long and distinguished career as a state and federal prosecutor in Florida, Puerto Rico, and her native Tennessee. She most recently was an Assistant United States Attorney in the Middle District of Tennessee. She is a graduate of Tennessee Tech and the University of Memphis Law School. She clerked for the U.S. District Court in the Southern District of Florida and although she is too modest to admit it, she holds the title of the smartest and toughest former prosecutor in her family. This is a distinction in her case, as she is married to my friend, Nick Rivera, who himself had a distinguished career prosecuting, and most recently, an outgoing U.S. Attorney in this district. Welcome Lisa Rivera.

To Lisa's right is Aubrey Harwell. If one were making a short list of the most prominent white-collar litigators in the last half century here in Nashville, there may be some debate as to the content or order of that list, but there would be no debate by anyone that Aubrey Harwell would be at the very, very top of that list. He is, of course, the Harwell of Neal and Harwell, the distinguished and preeminent white collar and boutique litigation firm that he founded many years ago with the late great Jim Neal. He has represented public officials, high ranking corporate officers, and handled some of the most high profile cases in this region and beyond. Most recently a Pilot and Flying J matter in the Eastern District of Tennessee. He is a proud Commodore, holding both his Bachelor's and Juris Doctor degree from Vanderbilt University.

To Aubrey's right, we are joined by Chris Covington. Chris is the current assistant special agent in charge of Department of Health and Human Services in the Office of the Inspector General, a position where he supervises approximately eleven or twelve offices across Tennessee, Kentucky, and Mississippi and is an active, and I can speak from bitter experience, effective, agency where he has been a member for nearly 20 years. Before joining HHSOHE, Chris worked for the fraud division of Cigna Insurance, and like every law enforcement agent that you know, is a Phi Beta Kappa graduate of University of Tennessee and holds a Masters in Finance from Vanderbilt University.

Finally, last but far from least to my immediate left is Kathryn Hays Sasser. Kathryn joins us from HCA where she is the Vice President of Litigation. She previously held a similar position at Life Point, another prominent Nashville healthcare company. She spent a number of years in private practice before going in house, first with Vinson and Elkins and more recently at Walker Tipps and Malone, a highly regarded boutique litigation firm here in Nashville. This being SEC country, Kathryn is our obligatory SEC West representative, holding degrees, both Bachelor and J.D. degrees, from Louisiana State University. She began her legal career as a clerk on the United States Court of Appeals for the 5th Circuit. Welcome Kathryn and everyone. With those introductions I thought we'd begin with a little discussion sort of setting our conversation. The title of this panel is: Internal Investigations and The Individual in the Age of Cooperation. I thought we ought to start with: what is an investigation and how do they arise? So I'll turn to Lisa perhaps to start us off. What are some of the scenarios in which an organization may conduct an internal investigation?

Rivera. So there are so many to name. We heard a bit of discussion from the previous speaker that companies have now taken it upon themselves to explore any irregularities or concerns that they have about operations and steps within the organization that may run afoul of some regulatory requirement whether it be state or federal or their own policies and the way that they want to conduct business. That can come from a multitude of areas. You hope not the receipt of a subpoena from a governmental entity, also agents like Chris showing up at your office asking questions or requesting particular documents, or from visiting your employees at their homes at some particular time. Now data mining companies conduct their own analysis looking for outliers, looking for things that don't look the norm or weren't anticipated or expected. It could also come from employment settings. There could be allegations by an employee against the corporation that something was not right, something was not adhered to, a policy was not followed, they were mistreated. It could come from a lot of different sources. Tip lines, whistleblower suits, the list goes on and on so they're already set up in many instances to anticipate many of the sources that could generate an internal investigation.

Moderator. Sticking with internal investigation for a moment, Kathryn, you are our in-house representative here, if one of those scenarios that Lisa described occurs, launching an internal investigation, what's the purpose you are trying to achieve by doing that?

Sasser. So as in-house counsel, my client is the corporation, so what I am trying to achieve is an understanding of what went on. There are various reasons for that. One certain reason is we want our employees to do the right thing, whether or not it implicates the law. Bad employees cost you a lot of time, money, and heartache and so if an employee is doing something wrong, even if it has not reached a level of a violation, we want to know that because we want to fix it and we want to know the possibility that it has reached the level of a legal violation. The other thing we want to do is if we have found something wrong, we want to fix it. More often than not something at the heart of the investigation is costing us efficiency and money. Because we are a for-profit corporation as many corporations are, we want to be efficient and bad employees making bad decisions decrease efficiency, and more importantly, in health care bad employees making bad decisions impact patient care. So we want to make sure we are doing right by our corporation and our patients. Investigations help with that. There was some mention previously of going in and taking a disclosure and getting some form of leads and cooperation. A lot of times we have an obligation to report things and we do, so that is to start the whole reporting process just for an investigation so you know what the plan is and what has happened. You may thoroughly explain what you have done to stop it and you can work cooperatively with the government 99% of the time and land in a good spot and call it a lesson learned and move forward.

Moderator. I think we will dig in to some more particular details of the internal investigation as we continue this discussion. Turning to cooperation portion of the title here, the title of the panel is "Age of Cooperation," turning to Aubrey now you've been doing this for many years, is this an age of cooperation we are in now? And if so, compared to what?

Harwell. Ty, I think it is driven by the specific facts. If you have a corporate client and it appears the criminal exposure is widespread throughout the corporation you are going to do one thing. If in fact it appears that a few people are involved you are going to do another. When you talk about internal investigations, you have to look at the sort of things we talked about a minute ago and then you have to look at the outside independent council coming in and conducting a massive internal investigation. If that occurs and in fact you have a rogue few people acting inappropriately, then you call up Chris and say "I want to cooperate", and say, "I have some really good information for you."

However, the truth is that inside council does not have the same credibility that outside investigators have. If I go in and say, "Chris we have three people acting inappropriately," and he says, "we believe it is more than that," then I say, "let me give you independent investigations by a great attorney in New York and he interviewed everybody". Of course, you have issues with how you get there, in terms of what people are investigating, but what we see today that is most telling is conveyed in databases. People send emails and text messages and they do not think. These messages are a goldmine and the chances are there is going to be a subpoena. I want to get in before that happens and so I go to Chris and say, "let me just tell you what happened", and I can back it up with cooperation.

Moderator. Well I want to get the perspective from everyone on the value of cooperation, for Chris here in Nashville. First Chris, do you take that call when Aubrey calls and secondly how do you view, from an investigator's standpoint, the value of corporate cooperation?

Covington. Not only do I take Aubrey's call, but we actually go out in venues and discuss the importance of cooperation and how it benefits, in my case the healthcare industry, to new investigations of Medicare and Medicaid fraud. We want to sell to the entity and the defense council that this is actually beneficial to you. So when Aubrey calls, even if he simply invites us to his law office to simply sit down and speak to someone, even if he hasn't gone that next step of a nice professional independent outside investigation, we are happy to run over, sit down, and hear what these employees have to say. I happen to be a huge believer having done this for almost twenty years in two things, first of all, it helps Kathryn's corporation to cooperate, but if Aubrey is representing an individual defendant it helps him too. What do you think? Yeah it helps him too, hopefully he has some buddies he is willing to throw under the bus. And so, who ultimately wins, in my case, certainly as an agent you love collaboration and cooperation. If this is a healthcare fraud investigation the government wins too. Whether we end up with a civil false claims settlement, whether we end up with criminal penalties, we are just believers in the fact that we can have an adversarial relationship and we often do...Ty...but that being said, I think collaboration and cooperation is a win, win, win. It is a win for the corporation, the individual, and the government.

Moderator. I appreciate those comments, that sounds very good in the abstract. I am sort of harkening back to Professor Gilchrist's comments with attention, with compliance and wonder if there is a sort of analogue there with cooperation. Is there a maximal amount of

cooperation? Are there costs associated with that? It seems to me that there is some tension there. There is some cost of cooperation there. There are potential ethical and other strategic considerations. More cooperation is not always the answer, or is it?

Harwell. Well I said earlier that the facts should drive the decision in all of those situations. You made a reference to Pilot and Flying J earlier, I talked Reid Weingarten into conducting an independent counsel investigation of the Board under the Board, not under me, not under the President, not under the General Council. It's incredibly effective when dealing with prosecutors, and in that situation we didn't care about cost. The risk to the company was so great, if we did not convince them that the company shouldn't be prosecuted and that senior management was not involved. I hate to say this, but we really did not care about the cost because the priorities were such that we had to get it done right, get it done with credible people, and get it done thoroughly. I am not going to tell you what it cost because it was an incredible amount because Steptoe & Johnson is a great firm and Reid Weingarten, a senior member, has prosecuted more public officials in his day than anyone in America. I said, "Reid, I need you to do this, I need you do it right, I need to do it thoroughly, and I need you to go and talk to the prosecutors and support what I am saying. My senior guys weren't involved." I think there are situations where you have to look at the money issue and the scope of the issue. Sheila Birdwell is a great civil litigator. She has an impression I love she says, "we are going to open it a little or open it a lot. If you're going to cooperate, you'd better understand that you better open up a lot." Do you agree, Chris?

Covington. I do and I will segue to something Professor Gilchrist said earlier. Because you have to realize I am not an attorney, and I am certainly not a defense attorney. I am an investigator. So you know, I come from a different side of the house. But what Professor Gilchrist said in his presentation earlier, is he mentioned that a company hiring a senior official's daughter as an employee, who is well qualified. So, in other words I am an American company and I hire a Nigerian daughter's official to work in a prominent position. He said, "that is not in essence a crime." You do not want to be making that argument to a jury. I mean you do not. It doesn't look good. That is why we not only look at things from the perspective of avoiding improprieties, but avoiding the appearance of improprieties. So as a company where it is an individual defendant, when you come before the government, it is incredibly important to be open and honest and truthful and transparent. But keep in mind that if you are sitting across the table from a government attorney and a government investigator, we think we know what happened and you are definitely going to be in a position where you have to argue the opposite thing.

Harwell. I believe there is one book that I have that I would like to share with you all that is so important to me. I agree with what Chris said. You take another whole new risk on when you do this. Because you better be sure the people involved in your company are telling the truth. What you have amounts to one violation. You better trust that is your only exposure. You have to be careful that the people understand that they've got to tell the whole truth. Or it opens up other prosecution.

Sasser. I have not reached the professional point or the personal point yet where costs does not matter so maybe I am an idiot, on both fronts. I do think there is, when you are talking about cooperating with the government, I do think it does have to be complete and wholesome, and open. But as the lawyer representing the client, it also has to be measured and deliberate cooperation. There are often government lawyers and investigators you will encounter who will want to know everything. And back to the balance you have to strike, the cost, not just the financial cost, but the people cost and the time cost of investigating everything is a lot. And we work very hard as in-house counsel to make our business colleagues understand that conducting investigations is good. It is really good for their long term personal interests and their long term corporate interests. What makes them nervous is when something that should be a relatively contained matter all the sudden turns into years and sixty different employees being interviewed six different times. And a lot of commotion and disruption when what they want is to do their jobs ten hours a day and they want to go home at the end of the day. I do think you do need to cooperate and you have to be wholesome. But you also have to continue to represent your client and push back where appropriate, say, “yes this is important and this is what we need to talk about and dig into, but here’s why we don’t need to go down this rabbit trail right now.”

Rivera. That is the rub because your cooperation is only as good as your internal investigation. If you can’t make those kinds of decisions about where you are going to head in the scope and review the extent of what you are going to look at the time period, the people, the particular conduct. You have to make educated decisions about how to do that before you can walk into the government and say we are cooperating we are going to give you this information. So it is really only as good as those types of decisions. And then you can focus in on whatever you determined was the scope. You have a basis for why you selected that as your reference point and how you frame an issue and time period you want to bring in be ready to say why you didn’t go further if that’s the case. So you really do have to be in the position to not increase initial risk, by walking into the government by knowing only a tenth of really the information that you should have reviewed or at least determined why you were not going to review it before you walk in and offer it.

Moderator. The third component of the title, which I know if really the central concept which is the individual and I will sort of probe the panel and ask the pertinent question. What are we even talking about with individuals? Corporations are a creature of the law and can’t act. They can only act as individuals. What’s the rub?

Sasser. I will dive into that first. I think the rub is that there can be as a lawyer there can be confusion between who is the individual and who is the corporations. And that is a dangerous place to be as a lawyer, you may have a very charismatic and very strong CEO that you talk to on a regular basis, but that woman is not your client. The corporation is. And just as a side note if you haven’t yet, I would encourage you to read *Bad Blood*¹ which is the wall street journal deep dive into the Theranos corporation which no longer exists. That book provides a lovely example of the true confusion between what was the company

¹ See Carreyrou, John. *Bad Blood*, May 2018.

and what was the very charismatic leader of the company and how many of the lawyers in working with her lost sight of who they truly represented. And that lead to some obvious bad outcomes, the least of which, now she's being criminally prosecuted. But it is important to remember that there is an entity. Even if it is just a legal construct to which you owe duties and the entity can only function through the individuals. And so, at every point you have to be asking yourself, "who is this person? Are they a client? Are they a witness? What are they telling me that I need to report back to the client? Or that I have to make some decisions on behalf of the client that may not necessarily benefit the individual, no matter how high up in the organization they are."

Moderator. One of the questions is have we seen a change real or perceived with respect to individuals and individual prosecution and I am curious to get the defense and the investigator's perspective on that. You all know the Yates Memo,² September 2015, increased the focus, shall we say, on individual prosecution and those that have toiled with prosecution for many years might say individuals have always been the focus. So, my question is there a change and has there been a change with respect to individuals and how they are viewed?

Harwell. I think there's been a change. I think the Yates Memo,³ according to the commentators at CLE's [continuing legal education programming, where lawyers are required to complete a certain number of hours annually] that do a lot of talk about that, that may change. Now the Yates Memo⁴ in a large part has been diluted by the present department of justice. I think the thing to remember is a resolution of a matter between a corporation and a prosecutor, or in your situation your department, does not necessarily take an individual out of harm's way. The truth of the matter is if you have got rogue employees who really have done a lot of damages, the fact is that my view is you should not try to take them out of harm's way. Your obligation is to the corporation, they have taken advantage of corporation violated policy violated the law. So my view is full swing.

Covington. I love this guy. No seriously, what Aubrey is talking about is exactly right. If someone has done something wrong, the last thing the company should do is to embrace them and try to protect that person. That's stupid for the company. And it's only going to make them quite frankly it's going to make the government suspicious that the company was aware of this conduct, encouraged this conduct, facilitated this conduct.

But, going to Ty's point very briefly, when you think about the difference the change that's happened before, after the Yates Memo,⁵ and I wanted to defer to Lisa because I actually

² See Memorandum from Sally Quillian Yates, Deputy Att'y Gen., U.S. Dep't of Justice, to Heads of Dep't Components & All U.S. Attorneys, *Individual Accountability for Corporate Wrongdoing* (Sept. 9, 2015), <https://www.justice.gov/archives/dag/file/769036/download> [hereinafter *Yates Memo*].

³ *Id.*

⁴ *Id.*

⁵ *Id.*

heard her speak about the Yates Memo.⁶ But I think about our increased focus on opioids and protecting the health and well-being of Medicare and Medicaid beneficiaries by targeting over prescribing physicians. I think about a recent story⁷ that came out within the past week about the family, the pharmaceutical family, that was behind the oxycodone, oxycontin push. And you can do your own research on this. But there were serious discussions at the [Department of Justice] about criminally charging some individuals in that family. And ultimately the defense attorney, persuasive like Aubrey, was able to convince the government to step away from that prosecution.

I do not think anyone on this panel thinks that that would happen today. I think today there is a much more serious interest in focusing on someone who might have criminal culpability who is sitting at the top of that pyramid making executive decisions, one benefit of that is to set an example to other corporations, and say this is something you should not do. We have to be very careful about, because we do both civil and criminal investigations, is the companies don't have the perspective that is simply the cost of doing business that occasionally the government will come along and we have to settle this matter civilly. There has to be the threat of serious criminal consequences for breaking the law. And that is one reason I think, again I will defer to Lisa, that the Yates Memo⁸ was published.

Rivera. Well, you know we have talked about this and you guys are going to have a Yates [Memo]⁹ discussion this afternoon on the panel. But I think it made the biggest difference from the practical standpoint. Previously with the government we were always looking at individuals. That's not revolutionary for the Yates Memo.¹⁰ We were always looking at individuals and those responsible for this conduct, just how it is now as well. So that was always happening I think from a standpoint of, so I did both civil and criminal. From that standpoint there were many times when these larger investigations that were civil and had some criminal flavor to it as well in potential. The focus was not necessarily at the beginning on the individuals. I think that the Yates Memo¹¹ helped to try to bring some maybe some consistency to bringing that to the forefront of an investigation and making it a box to check.

Before [the Yates Memo],¹² at least in my experience, it was really up to the discretion of the [Assistant United States Attorney] and his or her supervisor and the approach the [United States] Attorney wanted to take with respect to any particular case and the scope of it and how to pursue it. Individuals are very difficult cases to make on intent corporations you can pull from a lot of different sources to try to demonstrate corporate culpability. So individuals are always tough, you've seen the department criticized before because there

⁶ *Id.*

⁷ See Pre- Hearing Memorandum from Gillian Fiener, Chief, False Claims Division., Mass. Office of the Attorney General (2019).

⁸ See U.S. Dep't of Justice, *supra* note 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

was not a head or two on the platter in one of these criminal matters that were very large because that's difficult burden of proof for the government. But I think also from a practical standpoint, before [the Yates Memo]¹³ as a prosecutor you really did not have to say definitively why you were not pursuing individuals. You might put your case together and say, "this is our evidence, this is what we also looked at, this is what we are ruling out, this doesn't help us." I mean there's all those considerations that might include an individual view, but you did not really have to check a box to say definitively, "I am not pursuing the individual here because of X". That was sort of a given and a part of the conversation. I understand that after the Yates Memo¹⁴ that was something that had to be determined, reviewed, approved in terms of whether that was the proper way to charge or intervene an intervention decision or a resolution of the matter, so it became important. And on the other side of the fence the Yates Memo,¹⁵ knowing that that is going to be pushed to the front and knowing that is going to be a box that has to be checked or reviewed. Might limit the ability to even have any cooperation at all, which is what the Yates Memo¹⁶ says.

It says that if you do not cooperate you get nothing in the way of cooperation.¹⁷ That impacted the defense side of internal investigations and how those are going to be conducted, and if an issue is very early on in an investigation about whether an individual needs their own counsel now. The difference that you were raising, Katherine, about who is the client, started to have a practical impact on internal investigations much earlier as soon as you learned about it.

Moderator. I think it is a great point about how difficult it is to bring individual prosecution in that context and that is often lost in the media and lay person discussion of these corporations, actors, and individuals in corporate settings. That is a challenging prospect.

I do want to shift now to some of the practical ethical issues that formed the broad discussion we started to have. I think a natural place to start since we are going back to internal investigations and we have all heard this term, *Upjohn* warning, which takes its name from the Supreme Court case of the same name.¹⁸ Perhaps some of the audience members are not as familiar with that. If someone can explain what the *Upjohn* warning is and what its purpose is.

Sasser. An *Upjohn* warning is one that is given to an employee who is being interviewed in the course of an internal investigation and I think its purpose is two-fold.¹⁹ One is to remind the employee that you, the attorney sitting there, are representing the corporation.²⁰

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ See *Upjohn Company v. United States*, 449 U.S. 383 (1981).

¹⁹ *Id.*

²⁰ *Id.*

You are not their personal attorney.²¹ You are there to gather information on behalf of the corporation and report back to the corporation.²² The second purpose of it, I think, is to help ensure that if you do need to disclose the information you have learned in that interview so that you have not inadvertently created an attorney-client relationship with the person you are interviewing so that person can interfere with your ability to disclose or use that information down the road.²³

I will say this. Aubrey is right. For the most part, we would outsource any significant investigation to an outside law firm. Although I know lawyers who work with me stay very closely involved. So I have seen a plethora of versions of the *Upjohn* warning given.²⁴ It can become a very rote thing if you are one of the attorneys who are doing the investigations. I would encourage everyone to slow down on that, especially with the Yates Memo and the emphasis on the individual.²⁵

It is very important that the individual you are talking to understands what the *Upjohn* warning means.²⁶ By “understand,” I mean it is not enough for them to nod along with you, no matter who you are interviewing. I have interviewed CEOs in the biggest corporations. I have interviewed a facilities guy who was quite literally responsible for cutting the yard outside the facility. Those folks need to understand what they are really saying “yes” to and agreeing to. You have got to meet them where they are.

Moderator. Let me interrupt there and play devil’s advocate. There is a tension here that if I go real slow and really explain it, they may not talk to me.

Sasser. I agree, but I would take that risk. I have been very successful with my slow explanation of *Upjohn* warnings and getting people to say “yes” at the end.²⁷ You have to make sure. If you have a guy standing in front of you saying, “she’s talking real fast, real fancy and I did not understand what I was saying yes to,” then that is a bad day.

Harwell. I operate on the premise that everything I do professionally is going to be talked about in the courtroom and I agree totally with what she says. You have got to be fair, and you have got to be articulate, and you cannot go about it the wrong way. If they say they do not want to talk, then you have to respect it. I agree with everything she said.

Moderator. Well this is a good segue. You mentioned an employee who may need to get his own counsel, may be involved in some sort of misconduct, or may have some sort of criminal or civil exposure. If we are facing a situation like that, where an employees may have individual legal exposure of some type, what does the panel think the obligation of

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

²⁵ See U.S. Dep’t of Justice, *supra* note 2.

²⁶ See *Upjohn*, 449 U.S. 383.

²⁷ *Id.*

the company or the company's counsel is to inform that employee of that type of exposure and when do they need to do so?

Rivera. It depends on how you get that information and when you are going to understand that to be the case. If you just received a subpoena and you are looking around just trying to get information, then that may not be apparent yet. I guess you are asking once you know that there is a real problem, now you are adverse to this person. You represent the company and there is information that you have now that their interests are adverse. Then it does not necessarily mean that you cannot speak with them, but you would want to talk with them and give them an opportunity to understand that your interests are adverse and that this is focused on them and that they may want to obtain counsel.

Moderator. Can I interview them on behalf of the company first, and inform them of that scenario later?

Rivera. No.

Harwell. First of all, you have to make it clear that you represent the company and not them. Secondly, because you are not a governmental entity, you do not have to give a Miranda warning. In fundamental fairness, say "look, I represent the company and I need to talk to you about these things," and be totally fair. If they want counsel, then bring counsel in. Usually if they bring counsel in, you can work through specific issues and you may get less information but chances are you will not be cut off.

Moderator. Let me ask a variance of that question. Not a scenario where there is an individual who is reasonably believed to have criminal exposure, but rather just a routine interview in the company and the company's counsel for understandable reasons wants to control how much is known. Perhaps they received a grand jury subpoena for something and do not want to have it become part of water cooler talks—or certainly not in the media. I am interviewing an individual and they say, "hey what's this all about? Why are you interviewing me?" Do you think that the attorney doing the interview has an obligation to inform that person of what the internal investigation is about?

Sasser. I do not think so. I am always very transparent in saying that we are taking a look at, or investigating, or reviewing. I do not think it benefits my client for me to be too transparent or too wholesome. In part, because I do not know what you know yet and I do not know what you have done yet. I do not want to enable you to not be truthful with me, or to not be complete with me, or embolden you to go out and take some sort of action that is going to hurt the company down the road.

I do not think it is my job to flip the switch on your shredder and allow you to do away with things that the company would very much want to have down the road. I try to make it clear that it is a serious interaction that the individual is having with me, and that it is important but I do not think I have to tell you everything. I think it probably benefits you and me if I do not.

Covington. Evidence aside, innocent people and guilty people are both going to be curious when they get called into Kathryn's office, right? That is natural. But be very aware that guilty people really, really, really want to know what happened. For example, if I am a guilty person in that situation, I may be particularly inquisitive about finding out how much knowledge Kathryn has, and once she says, "oh, I am looking at this." There is a great sense of relief because, "well I am not telling her about all this other stuff."

Sasser. Fortunately, I am very good at playing dumb.

Moderator. Chris, we were talking about certain nuts and bolts of how we are going to elicit information in terms of before we are talking to government counsel or investigators. Have you seen, in your experience, decisions that defense counsel and company make about how they conduct that has ramifications later on in investigations?

Covington. The truth of the matter is, generally speaking, and there are always exceptions, the involvement of defense counsel is really helpful. It typically results in the person that I am going to be interviewing being told that this is what this is about. We are interested in facilitating this conversation. People tend to shut down because the government is scary, right? So people are reluctant sometimes to speak. It is a confidence booster when a Kathryn, or Aubrey, or Lisa, or Ty is in the same room because people feel represented and that does make them more comfortable talking.

Generally speaking, having an attorney involved is not what you might think. It can typically be very helpful. The other thing I will say, and this is just generally speaking, there are people who are targets for investigation who we think have done something wrong. The vast majority of people fall in the category of witness. They may or may not know anything about what happened, but we are really just trying to get the facts from them. There are people who are on the fence. We are not sure whether they knew about, were involved in it, or whether they were not.

These conversations that we have with witnesses, the targets, and the people in between ultimately really help advance the investigation and help us make determinations as to what the best resolution is. So if you are Kathryn and you are representing a large healthcare company, that cooperation may result in us making a determination that this is a civil matter. It may not. Certainly the cooperation on its face I think looks good, both on the part of the individual as well as a corporation. As I said, the involvement of the attorneys is not a negative and I have not really seen negative consequences come from it.

Moderator. The one thing that I would inject and I would invite Lisa, or Aubrey, and others to disagree with me is that we seem to be operating on the premise that we know someone has done something wrong. I do not know that that is always the case in my experience, and I think that is a prominent characteristic of this area of criminal law, white collar criminal law.

Whereas in the more traditional street crime, the proper question is “who did it” and we know a crime was committed. We know someone robbed a bank. It is just a question of whether Bob or Joe or Steve did it. Whereas I think the operative question in white collar crime is not “who did it?” We know that Bob or Joe or Steve did X, Y, and Z action. The question is, “is that really a crime?” Does that rise to a knowingly standard or a willfully standard. Or whatever the case may be. I think those are fuzzier questions that sometimes allow for conversation.

Rivera. That is exactly right, because it’s not cocaine in a trunk. Everybody agrees that would be bad. Sometimes business operations and the people that you are talking to about it will talk to you matter-of-factly about how things happen and how business is conducted. Maybe it was set up improperly from the standard of not ideally, but not necessarily with intent or anything negative or bad to come from that.

With healthcare clients, it is a highly regulated industry. There are tons of people at the provider company that may have just a specific area they are covering, the billing. So they do not know everything else that is happening over there They see one portion of the long stream of what is occurring in this company from start to finish. So when you are trying to discern, that is why it is important to have those conversations early with the government to really drill down on what is the exact conduct that is a concern here. What is the nefarious lens they are looking through here about something in particular?

So when you are trying to discern, that is why it is so important to have those conversations early, if you can, with the government, to really drill down on what is the exact conduct that is of concern here. What is the sort of nefarious lens they are looking through here about something in particular so that we can really focus on that and why it would look that way, if we were doing it correctly. So, I think that that is always the reason why I think Ty, when we get that phone call or the visit from the agent that that is the first thing you are going to want to try to do is understand exactly what is the conduct that is under the microscope here and then learn everything you can about it because I can tell you from having been on both sides that, you know, A.U.S.A.s [Assistant United States Attorneys] take the cases that come in the door from all over the industry, whether it is hospital work, sleep studies, opioids, whatever walks in the door and they are on it and they have agents and agencies that help inform and educate them about the regulations that concern that particular book of business. But you know defense counsel, a lot of times what we try to do is understand what is the transaction, what is the conduct here so we can walk in and describe and if it is something that needs to be fixed, explain why it does not look like the portion of the information that the government is focused on is saying this must mean X and it really does not. And so trying to educate the government about that from our perspective, you know, that really comes from understanding exactly what is, where is the rub, and what is the actual conduct that is of concern to the government.

Moderator. That is from the perspective of company counsel, and we have talked with Kathryn and others have mentioned the importance of recognizing who the client is. Let’s shift back to focusing on the individual and when it is appropriate, when it is required even,

for the individual executive or employee to get separate counsel. What is the thought on when we ought to do that and when we have to do that?

Sasser. So, and I may not be answering the exact question, but unfortunately, no one in my company dresses as a bond villain and so it is not obviously apparent when they are talking to you that they are the bad guy, so the question of when someone needs counsel can be a moving target. It could not be apparent in the first interview with that individual that he or she has done something that rises to that level, but it could be apparent in the second or third interview. So I think you are always thinking about who you are talking to and you are always listening for anything that makes you think I need to pump the breaks on this or you know, I need to stop this all-together and get separate counsel.

The issue of who that separate counsel is and who pays for that counsel is a whole other sort of kettle of fish, and it often is a very sequenced event. We have to stop talking to this individual now and then we are going to caucus and really think through about those next steps. I think who you get as counsel is important because you want to make sure that if you are recommending someone or hiring someone that you are going to do well by the individual who they are representing. And then you also need to figure out if they have an obligation to pay for counsel and if you do not, is it advisable for you to do so. And so I think that that is not a, at least in my experience, and I will refer to Aubrey and Lisa, that is not a quick, instantaneous decision and you are well served to take your time and think through each of those steps when you are faced with a situation when you do have an employee who needs separate counsel.

Harwell. I agree with Kathryn. You said something, Ty, that is very true. There are most white collar criminal cases where people create a company they go to individuals and get them to invest and they know that it is false, and they are not going to achieve their business goals. But most white collar crime I see begins with an innocent act and evolves into inappropriate conduct, foolishness and then criminality. And so taking it a step at a time is really important. What Kathryn says here applies to a lot of things in life. You need to get your arms around the facts before you decide how you are going to handle it, how you are going to respond to it. Keep in mind, what you do with employee A you are probably putting the pressure on employee B, C, and D as well so it can be a huge expense.

Moderator. I do not want to tread on the panel that is coming up later this afternoon, but has *Yates* changed that calculation of when we get someone individual counsel?²⁸

Sasser. I do not know that it has changed from my perspective. I do not know that it has changed the calculation, but it has changed the conversation. In the healthcare industry there are legions of sort of industry specific groups to which my business colleagues belong and the *Yates* Memo was publicized. If you thought it [the *Yates* Memo] got a lot of play in the legal industry, like it got a lot of play in just the business health care groups, and so I think we got far more questions nowadays from folks who are thinking about, you know,

²⁸ See U.S. Dep't of Justice, *supra* note 2.

where do I sit in this large picture. And I think that business colleagues have a better understanding than ever before that this is not a sort of environment in which we are going to erect a moat around the company and you and we are going to battle it to the death. And so I think there are more questions about the *Yates* Memo than ever before and I honestly think they are good questions.

Rivera. Well I think that it has come up a little earlier than what you might expect. I mean sort of what is being discussed is well, as we conduct this, as we go along we need to report back and see if there, along the way, rather than wait til the end for some sort of final review. We need to stay in touch with the client as we go to sort of understand the developments and how things are looking in an investigation. I mean you might do that anyway, but I think with respect to folks who might be accountable should we find some sort of a problem that that happens very early.

And to your question about do you know when the moment is for an individual to get counsel. I mean when you know there has been misconduct in regards to a company then certainly by then, if not before. But I do think that that type of just, I do not know, maybe “keep an eye out” is happening earlier because of *Yates*. And you know now, I think that the department has sort of announced that, and there are a lot of folks in here that would be better in the know about it, about how it [the *Yates* Memo] is going to be applied, but now the department is saying with respect to *Yates*, we are not going to say all or nothing. Okay, we are not going to say all or nothing, which has always been the sort of worrisome part because if you think you are cooperating fully and they do not, then it is nothing. So now, it’s going to be sort of, I do not know, a sort of gaged sliding scale determination. That is really sort of what was happening before *Yates* frankly, I think, because that was always the case. Cooperation has always been going on at some level, some more than others, in cases throughout, that’s how cases get moved through the department and through the court system. So it will be interesting to see, now, that there is some pulling back from that, I guess you guys will talk about it more this afternoon, but it is sort of in the eye of the beholder, back to the way it was. There are a lot of beholders in here today that I see and I think that is kind of the way, at least from my experience, it was done before *Yates*, somewhat, but there is a threshold that has been established by this new policy, a sort of a minimum I guess for that, but then if you do receive, if you do cooperate to some degree, then you are expected to receive some degree of cooperation.²⁹

Moderator. We have about four of five minutes left and I thought maybe to kind of bring many of these issues together I might sort of throw out a hypothetical because of the panelists we have, this probably goes more naturally go towards Aubrey, but perhaps others can chime in. Let’s say we have had an individual client for a number of years, he or she

²⁹ See U.S. DEP’T OF JUSTICE, FREQUENTLY ASKED QUESTIONS: CORPORATE COOPERATION AND THE INDIVIDUAL ACCOUNTABILITY POLICY, <https://www.justice.gov/archives/dag/individual-accountability/faq> (last updated Mar. 30, 2018)(“Under the Policy, a company must turn over all non-privileged relevant information about the individuals involved in the misconduct in order to receive any consideration for cooperation. This is a threshold requirement, and unless it is satisfied, the company will be ineligible for cooperation credit.”).

is an executive at a local company. He gives you a call one morning and says that the company, the vice president of litigation, wants to call him in to have an interview. He says that they are doing an internal investigation and you speak with your client for some time on the phone and at the conclusion of which, you are satisfied that there is a reasonable concern that this executive has engaged in some arguable misconduct, not clear yet, but arguable misconduct, and may have some individual exposure to civil or criminal liability. And he asks you, "What do I do? Do I submit to this internal investigation interview? How do I handle this?" What say you?

Harwell. That sort of situation occurs a lot, especially in fairly small companies and private corporations. Here's the deal, if the independent investigation suggests that this individual is not guilty the others going to look at the surrounding facts and assume that this individual is guilty. So me and you have got to go in and advocate and persuade them that there should not be a prosecution of the individual and you are going to be able to use the independent counsel report to buttress your argument, to add credibility to your conclusion so it has to be plural. But one thing, guys, I said earlier: If there is a mistake of fact that is willful or intentional—a lie—you have created a whole new set of problems for your client and you have got to be careful about that. But I think the situation in the scenario is, you have a choice, you are probably going to face the prosecution if you do not prevail so you better start early to try to prevail. Chris, am I right?

Covington. You are exactly right. In fact I was going to echo some of what Aubrey is saying. First of all, if that individual who is let's just say hypothetically afraid because they have done something wrong, starts shredding documents, deleting emails, pours coffee over the server. You can imagine all the things people can do that are really, really, really stupid, but in a sense of panic they will do those things. The government is certainly going to look at that as guilty knowledge. The second thing I will say is it does not matter how much you pay that outside counsel, it does not matter how nice that report is, I am going to want to talk to the guy too. So you can produce the best document ever that says this guy is pure as the driven snow, he did not do anything wrong, he did not intend to do anything wrong, etc. He is going to end up ultimately sitting down across the table from an investigator who is going to want to ask probing questions to see whether what has been represented in the report is actually true.

Harwell. And Chris, if and in fact the lawyer knows their client is going to say, "hell no, I am not going to talk to you," you take a different course.

Covington. And I think obviously, as agents and government prosecutors who are imminently reasonable, objective, uh—

Sasser. Handsome.

Covington. Yes, my new favorite catalyst. But truth is, we really are pretty reasonable people. If I am coming across that way it is because it is true. And the government attorneys, I have worked extensively with Ty, I have worked extensively with Lisa in her

previous life before she went to the dark side, and they are absolutely great people to work with. And they are not looking to make a crime where there is no crime. So if you bring your client in and they really were either ignorant or made some mistakes even, you will be surprised at how reasonable the government can be. We are not simply looking to pounce and you know run them over and then back the bus up.

Sasser. Now, let me add one thing. We have been blessed in Middle Tennessee with decent, honest, most of the time reasonable prosecutors and reasonable agents okay. But every now and then you get a renegade out there, course they come to town they leave, but you have got to be careful dealing with a renegade as compared to those people who are doing what they are required to do, and that is to seek justice. [If] you have got a prosecutor who is hell bent to prosecute and justice is not important, you have got to handle it a little bit differently than if you have got an honorable prosecutor who is highly experienced and does the sort of thing you did.

Moderator. I think renegade is a great stopping point. I see we are out of time and so I want to thank Lisa, Kathryn, Chris and Aubrey for the discussion.