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Attorney-Client Privilege in the Corporate Setting

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I. Introduction

With the August 2008 release of the Principles of Federal Prosecution of Business Organizations—known informally as the Filip Memo—federal prosecutors, under most circumstances, are no longer permitted to ask a cooperating corporation or entity to waive its attorney-client or work product privileges as part of its cooperation. See [Memorandum from Mark Filip, Deputy Attorney Gen., Dep’t of Justice, to all U.S. Attorneys et al., “Principles of Fed. Prosecution of Bus. Orgs.”](https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf) (Aug. 28, 2008), <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> (Filip Memo). This new policy was the controversial result of lobbying the Department of Justice (the Department) and Congress by the business community. While much of the dust has settled, prosecutors still need to understand how the policy works in practice so that they know what information they can expect from a cooperating corporation and can prevent defense attorneys from using the policy as a shield to avoid disclosing information damaging to their clients.

II. The evolution of the Department's waiver policy

To fully appreciate how a corporation under investigation by the Department views cooperation and a possible waiver of its privileges, prosecutors should be familiar with how the Department's waiver policy has evolved. The controversy over the Department's corporate privilege waiver policy can be traced back to its first publication of principles regarding the prosecution of corporations by then Deputy Attorney General Eric Holder in 1999. See [Memorandum from Eric Holder, Deputy Attorney Gen., Dep’t of Justice, to all U.S. Attorneys et al., “Bringing Criminal Charges Against Corps.”](https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF) (June 16, 1999), <https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2010/04/11/charging-corps.PDF> (Holder Memo). When evaluating a corporation's effort to cooperate, that policy explicitly permitted prosecutors to consider “the corporation's willingness . . . to waive the attorney-client and work product privileges” as one of ten factors to consider when determining whether to charge the corporation. The Holder Memo defined the scope of the potential waiver as “limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue.”

As a practical matter, the scope of waivers anticipated by the Holder Memo consisted primarily of reports prepared by attorneys conducting internal investigations, as well as the interview memos and corporate documents that backed up those reports. The investigative reports and their backup materials, when produced, helped focus investigations early on, saved government resources, and prevented witnesses from changing or forgetting their version of events when they later met with the government.

After a series of high-profile corporate fraud cases arose from 2000 to 2002, including Enron, Worldcom, and Cendant, then Deputy Attorney General Larry Thompson issued revised principles in early 2003. See [Memorandum from Larry Thompson, Deputy Attorney Gen., Dep’t of Justice, to all U.S. Attorneys et al., “Principles of Fed. Prosecution of Bus. Orgs.”](http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf) (Jan. 20, 2003), http://www.americanbar.org/content/dam/aba/migrated/poladv/priorities/privilegewaiver/2003jan20_privwaiv_dojthomp.authcheckdam.pdf (Thompson Memo). The Thompson Memo reaffirmed

the Holder Memo's approach to corporate cooperation and privilege waivers. While the Thompson Memo's language regarding waivers largely mirrored that of the Holder Memo, its reaffirmation of the policy led many to believe that a corporation's willingness to waive privileges had taken on greater significance as a factor to be considered when deciding whether to charge a corporation.

The Department's policy with respect to privilege waivers became the subject of intense lobbying of Congress by the defense bar and the business community over the next few years. The American Bar Association, the U.S. Chamber of Commerce, and the National Association of Manufacturers decried what they claimed was a “culture of waiver,” in which prosecutors almost immediately demanded privilege waivers upon initiation of an investigation. The evidence of the culture of waiver consisted primarily of anecdotes and surveys of corporate counsel. The lobbying groups enlisted former high ranking Department officials, many of whom were then in private practice, to write letters and articles extolling the virtues of the attorney-client and work product privileges and arguing that the Department’s policy hindered efforts to comply with the law by discouraging free communication within corporations. The letters and articles also noted, often seemingly as an afterthought, that waiver for the government also acted as a waiver for private and class-action plaintiffs as well. One cannot help but conclude that the fear that waivers would put evidence of corporate fraud, like interview memos, into the hands of class action counsel was the primary motivation behind the lobbying efforts—unless one believes that officials of the Chamber of Commerce and the National Association of Manufacturers were really concerned about the sanctity of legal privileges.

The Department responded to this lobbying effort by revising the policy by issuing the McNulty Memo in December 2006. *See Memorandum from Paul J. McNulty, Deputy Attorney Gen., Dep’t. of Justice, to all U.S. Attorneys et al., “Principles of Fed. Prosecution of Bus. Orgs.,”* (Dec. 12, 2006), https://www.justice.gov/sites/default/files/dag/legacy/2007/07/05/mcnulty_memo.pdf (McNulty Memo). The McNulty Memo required prosecutors to demonstrate a legitimate need for the information they sought by a waiver. It also required prosecutors to obtain the approval of their U.S. Attorney or Assistant Attorney General (AAG) before requesting waivers for purely factual information, such as investigative reports and interview memos, which the McNulty Memo called Category I information. U.S. Attorneys and AAGs were required to consult with the Assistant Attorney General for the Criminal Division before deciding whether to approve the Category I requests. The McNulty Memo also required that prosecutors obtain the approval of the Deputy Attorney General before requesting waivers of attorney-client communications in which legal advice had been actually sought or provided, or before seeking non-factual work product such as counsel's mental impressions, which the McNulty Memo called Category II information.

One of the benefits of the McNulty Memo's requirement of consultation with the Assistant Attorney General for the Criminal Division was that it allowed the Department to keep track of the actual number of waiver requests that were made nationwide. In the 20 months that the McNulty Memo was in effect, there was approximately one request per month for approval of waivers for Category I information, and a total of two requests for waivers for Category II information. Most of the Category I requests were approved in a narrowed form after consultation with the AAG. Both of the Category II requests were denied. Even accounting for what was likely the deterrent effect of having to seek approval to make a waiver request, one Category I request per month did not constitute a culture of waiver in the Department.

III. The Department's current policy

The McNulty Memo's approval requirements did not reduce the controversy over the Department's waiver policy or the efforts to lobby against it. In most instances, legislation prohibiting federal prosecutors from requesting privilege waivers passed the House of Representatives. The Sentencing Commission rescinded an amendment it had made to Chapter 8 of the Sentencing Guidelines only two years earlier that had included a corporation's willingness to waive privilege as a factor in

evaluating the corporation's cooperation. See [U.S. SENTENCING GUIDELINES MANUAL App. C, Amendment 695 \(U.S. SENTENCING COMM'N. 2006\)](#). In June 2008, legislation similar to what had already passed in the House was introduced in the Senate. Leading Senators of both parties advised Department officials that the Senate bill was likely to pass.

The Filip Memo was implemented two months later. In most instances, it barred federal prosecutors from asking entities for privilege waivers as a condition of their cooperation. See [Memorandum from Mark Filip, Deputy Attorney Gen., Dep't. of Justice, to all U.S. Attorneys et al., "Principles of Fed. Prosecution of Bus. Orgs.," \(Aug. 28, 2008\), <https://www.justice.gov/sites/default/files/dag/legacy/2008/11/03/dag-memo-08282008.pdf> \(Filip Memo\)](#). It drew an analogy between cooperating entities and cooperating individuals by noting that individual cooperators are ordinarily expected to provide factual information and are rarely asked to waive any privilege. *Id.* Accordingly, the new policy provided that cooperating entities needed only to disclose facts concerning its misconduct and the misconduct of its directors, employees, or agents:

For example, how and when did the alleged misconduct occur? Who promoted or approved it? Who was responsible for committing it? In this respect, the investigation of a corporation differs little from the investigation of an individual If a corporation wishes to receive credit for such cooperation, . . . then the corporation, like any person, must disclose the relevant facts of which it has knowledge.

Id. at 9-28.720.

The Filip Memo recognized that its policy focused, as a practical matter, primarily on interview memos when it acknowledged that a corporation's knowledge often came from interviews conducted by counsel during an internal investigation. The Filip Memo made clear that while the attorneys' memoranda of such interviews were subject to the attorney-client or work product privileges, the "factual information acquired through those interviews" was not. *Id.*

There is little doubt that the Filip Memo's policy with respect to privilege waivers is here to stay. In September 2015, Deputy Attorney General Sally Yates issued a new policy memorandum stating that corporations had to provide all relevant information regarding individuals involved in misconduct before they received any credit for cooperation. [Memorandum from Sally Quillian Yates, Deputy Attorney Gen., Dep't. of Justice, to all U.S. Attorneys et al., "Individual Accountability for Corp. Wrongdoing," \(Sept. 9, 2015\), <https://www.justice.gov/dag/file/769036/download> \(Individual Accountability Policy\)](#). The policy also directed federal prosecutors to prioritize their investigations and prosecutions of individuals, as opposed to corporations, because the prosecutions of individuals would more effectively deter corporate misconduct. The Deputy Attorney General reiterated the Filip Memo's policy on privilege waivers when she acknowledged that the requirement that companies cooperate completely as to individuals was limited by the bounds of legal privilege, and cited to the Filip Memo's policy on corporate cooperation in the United States Attorneys' Manual. The Deputy Attorney General emphasized this point in a speech at a conference sponsored by the American Banking Association and the American Bar Association:

Additionally, there is nothing in the new policy that requires companies to waive attorney-client privilege or in any way rolls back the protections that were built into the prior factors. The policy specifically provides that it requires only that companies turn over all relevant non-privileged information and our revisions to the USAM—which left the sections on the attorney-client privilege intact—underscore that point.

[Sally Yates, Deputy Attorney Gen., Dep't. of Justice, Remarks at Am. Banking Ass'n and A.B.A. Money Laundering Enforcement Conference, \(Washington, D.C., Nov. 17, 2015\) <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>](#).

IV. The Filip Memo in practice from 2008 to 2016

At first blush, the Filip Memo's distinction between facts and the process through which facts are learned and recorded should be a simple one. After all, “[a] fact is one thing and a communication concerning that fact is an entirely different thing.” *Philadelphia v. Westinghouse Elec. Corp.*, 205 F.Supp. 830, 831 (E.D. Pa. 1962). Facts, whether discovered by counsel or not, are not privileged, but the process by which counsel gather and record those facts can be. *In re Linerboard Antitrust Litig.*, 237 F.R.D. 373, 380 (E.D. Pa. 2006). That is particularly true where, as in most cases, the attorneys taking notes and drafting interview memos are more than mere scribes in that the notes and memos reflect which facts they believe are important. *Securities & Exchange Comm. v. Schroeder*, 2009 WL 1125579 at *7 (N.D. Cal. 2009).

The distinction between facts and communications is not always so clear in practice. That lack of clarity can cause even defense counsel who are sincere about their clients' cooperation to hesitate to provide some information out of fear that they might inadvertently waive a privilege. That concern is not without basis, as class action plaintiffs' counsel routinely request production of all documents and information the corporation gave to the government. Courts routinely uphold such discovery requests. The lack of clarity can, however, cause defense counsel and their clients who are less enthusiastic about cooperating to use potential waiver as an excuse not to provide incriminating facts.

Prosecutors, therefore, need to understand what is covered by the privileges, what triggers a waiver, and the scope of any waiver. Written reports of an internal investigation drafted by counsel solely for the client's use and interview memos prepared by counsel are generally considered to be covered by the attorney-client and work product privileges. *See, e.g., Upjohn Co v. United States*, 449 U.S. 383, 394 (1981) (memoranda describing interviews of employees conducted at direction of corporate superiors as part of internal investigation protected by attorney-client privilege); *In re General Motors LLC Ignition Switch Litig.*, 80 F.Supp.3d 521, 532 (S.D.N.Y. 2015) (interview notes and memoranda prepared by counsel as part of internal investigation “have long been considered classic attorney work product”); *see also* USAM 9-28.720 at n.3 (Filip Memo acknowledges “certain notes and memoranda generated from the interviews may be subject, at least in part, to the protections of attorney-client privilege and/or attorney work product” if conducted by counsel for the corporation). While there are cases to the contrary, it is reasonably well settled that disclosure of internal investigation reports and interview memos to the government by a corporation under investigation waives both privileges, at least as to the documents that were disclosed. *General Motors*, 80 F.Supp.3d at 534, *citing* Fed. R. Evid. 502; *Gruss v. Zwirn*, 2013 WL 3481350 at *12 (S.D.N.Y. July 10, 2013); *Bank of America, N.A. v. Terra Nova Ins. Co.*, 212 F.R.D. 166, 170 (S.D.N.Y. 2002); *Granite Partners v. Bear, Stearns & Co.*, 184 F.R.D. 49, 54-55 (S.D.N.Y. 1999); *but see In re Nat. Gas Commodities Litig.*, 232 F.R.D. 208, 211-12 (S.D.N.Y. 2005) (corporation's voluntary disclosure of documents to the government pursuant to a confidentiality agreement did not waive privileges).

Disclosure of the contents of a report or an interview memo, without disclosure of the actual report or memo itself, can trigger waiver of the privileges that would otherwise protect the report or memo from discovery. While attorney-client privilege is waived, at least to that document, by disclosure to a third party, the work product privilege is waived when disclosure is made in such a way that the otherwise protected materials might end up in the hands of an adversary. *Bank of America*, 212 F.R.D. at 170. Disclosure of facts, as distinguished in the Filip Memo from protected communications, does not waive either privilege. *General Motors*, 80 F.Supp.3d at 528-29. Neither does orally proffering “hypothetical understandings, based on the interviews, of what certain witnesses would likely say about the facts,” at least according to one case. *Id.* at 530. That holding, however, could be at odds with other cases holding that disclosing selected quotes from witness interviews to the government waives the privileges. *Gruss*, 2013 WL 3481350 at *11 (rejecting practice as an attempt at selective waiver), *citing In re Steinhardt Partners*, 9 F.3d at 234-36 (disclosure of work product to an adversary waives privilege

as to other parties); *Granite Partners*, 184 F.R.D. at 55 (disclosure of selected quotes from witness interviews waives privilege as to unquoted portions of interview). The distinction between *General Motors* on the one hand and *Gruss* and *Granite Partners* on the other may be the disclosure of quotes from witness interviews in the latter cases, as opposed to the more general descriptions of witness statements given in *General Motors*. Regardless, disclosure of the source of a particular fact runs the risk of waiver, and the more detailed the disclosure, the greater the risk.

The other key issue is the scope of a waiver. Federal Rule of Evidence 502, which came into effect in 2011, provides that disclosures in a federal proceeding, or to a federal office or agency, could waive a privilege as to undisclosed communications or information if “the disclosed and undisclosed communications or information concern the same subject matter” and “they ought in fairness to be considered together.” FED. R. EVID. 502(a). The advisory note explains that subject matter waivers are “reserved for those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary.” FED. R. EVID. 502(a) advisory committee’s note to 2011 amendment. An inquiry into what fairness requires is obviously fact based, but courts recently have recognized the Filip Memo’s distinction between a disclosure of facts as opposed to a disclosure of protected communications, quite possibly because of the new Rule 502. Compare *General Motors*, 80 F.Supp.3d at 527-28 (comparing disclosure of facts in internal investigation report to disclosure of facts in publicly filed brief does not waive privilege), with *In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 469-71 (S.D.N.Y. 1996) (disclosure of report to SEC waived privilege as to underlying source materials). A disclosure of portions of one interview may waive privilege just to the memo for that interview alone. See, e.g., *Sec. & Exch. Comm’n v. Berry*, 2011 WL 825742 at *5-7 (N.D. Cal. Mar. 7, 2011). Or, such a disclosure could result in a broader subject matter waiver. See, e.g., *Gruss*, 2013 WL 3841350 at *12-13. Generally, however, waivers would likely be limited to the one interview memo alone, unless disclosure of additional memos or information was necessary under the fairness doctrine.

How does all of this play out in daily practice? Say, for example, that counsel conducted an internal investigation of allegations that the Smith Corporation fraudulently accelerated recognition of revenue from the Jones contract. Counsel then met with the government and orally disclosed the facts that the corporation did accelerate recognition of the revenue and that it had no legitimate basis for doing so. Counsel also disclosed that the plan to predate the contract came out of a meeting attended by salespeople Alice, Bill, Chris, and David. Additionally, counsel revealed that Eunice, the chief financial officer, later approved the plan when Alice told her about it. Some would argue those facts alone satisfy the rhetorical questions quoted above from the Filip Memo.

Most prosecutors, however, would not be satisfied. They would want to know more about the sources of particular facts so that they could evaluate the quality of the evidence and map out an investigative plan. For example, are there material differences in the witnesses’ respective versions of the events? Did Alice, Eunice, or both describe their private conversation, or is defense counsel relaying a secondhand version of the conversation? If the latter, did Alice report the conversation back to her fellow salespeople, thereby possibly making it admissible against Eunice and the others as a statement of a co-conspirator in furtherance of the conspiracy? If the salespeople never discussed the accounting impact of their plan, did any of the salespeople admit they understood the fraudulent nature of predating the contract and its effect on the Smith Corporation’s revenue? Did anyone admit that he or she acted with at least an intent to benefit the corporation, thus establishing an element of corporate liability?

Even those defense attorneys who are sincere about their corporate clients’ efforts to cooperate would approach these questions carefully so as not to waive the corporation’s attorney-client or work product privileges. The corporation’s admission that it accelerated revenue on the Jones contract without basis would not be a waiver in this case because the corporation would likely be required to report such a material event on a Form 8-K filed with the Securities & Exchange Commission.

The potential for waiver becomes more of an issue when the government starts asking questions that, if answered, would identify the sources of particular facts. If counsel identifies Alice as the source of the fact that Eunice approved the plan, does that waive privilege, at least with respect to the interview of Alice? If Eunice denied everything, would counsel then have to reveal that to give a fair presentation of the facts? If some, but not all, of the salespeople admitted to understanding the accounting implications of their scheme, would counsel waive privilege, at least as to their interviews, by identifying those who made admissions? What if the company learns that Bill admitted fraudulent knowledge and conduct during the interviews but denied it when he was interviewed by the government? If corporate counsel chooses not to reveal Bill's admissions in his interview after he made inconsistent statements to the government, are they condoning his false statement?

Many defense counsel would prefer to describe orally what the corporation did, without attribution to particular sources. They realize, however, that such a bland description would not satisfy most prosecutors. They therefore try to figure out a way to get prosecutors the information they need without taking a serious risk of waiving a privilege. For example, they might say that “most” or “three out of four of the salespeople” admitted to understanding the accounting rules, without saying who the outlier was. Instead of saying that Alice alone admitted she and Eunice discussed the fraud, they might say they have “direct evidence” of Alice's conversation with Eunice, but that there is “disagreement” about what was said. They might also recommend that prosecutors talk with one or more specific witnesses on particular issues. These sorts of hints and directions require investigative work on the government's part, but they are still helpful in focusing an investigation by allowing prosecutors to reverse-engineer the defense attorney's investigation. As far as reports of internal investigations go, many counsel no longer prepare them or are careful to draft and maintain them in such a manner so as not to waive the privileges protecting them.

Corporations will still waive privilege as to interview memos on occasion. A closely held corporation might choose to produce interview memos because they have little reason to fear a class action suit by shareholders. Similarly, a corporation might be more likely to produce interview memos in instances where the conduct does not have a material impact on its financial statements, thus reducing the likelihood of shareholder litigation. In instances where an interview memo might be particularly useful, such as when an employee or former employee goes to trial in a criminal case, the corporation may elect to produce that memo. A corporation may waive with respect to an interview memo of a former employee when it expects the employee to challenge his or her termination, particularly when the corporation believes the memo would assist the government in prosecuting the former employee. While the Filip Memo directs that prosecutors may not consider a corporation's decision to waive or not in evaluating its cooperation, prosecutors may consider the value of any additional facts contained in the interview memos the corporation produces.

V. Conclusion

It's easy to see how the issues can become difficult, even for honest counsel. It is equally easy to see how less ethical counsel can take advantage of the confusion, for example, by keeping admissions establishing corporate liability under wraps under the guise of a privilege claim. Prosecutors, therefore, need to understand how far counsel can go without taking a serious risk of waiver, so they can get the information that the Filip Memo says they should have from a corporation seeking cooperation credit. Further, it is not unusual for a prosecutor to point a worried defense attorney to favorable case law in an effort to reassure him or her that the corporation privileges will likely remain intact if it provides information that the government would find valuable, or that the consequences of any voluntary waiver it is considering would be limited.

Cooperating corporations take a risk whenever they disclose anything beyond factual conclusions from their internal investigations. It is not unfair for them to bear that risk. That is just one of the costs of criminal conduct and cooperation.

ABOUT THE AUTHOR

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Pursuing Individuals for Civil Corporate Wrongdoing Under the Individual Accountability Policy

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I. Introduction

Over the past year, the Department of Justice reemphasized its commitment to pursuing claims against individuals for their role in corporate fraud and white collar wrongdoing. In September 2015, Deputy Attorney General Sally Quillian Yates issued a memorandum titled “Individual Accountability for Corporate Wrongdoing” *See* [Memorandum from Sally Quillian Yates, Deputy Attorney Gen., Dep’t. of Justice, to all U.S. Attorneys et al., “Individual Accountability for Corp. Wrongdoing,” \(Sept. 9, 2015\), <https://www.justice.gov/dag/file/769036/download> \(Individual Accountability Policy\)](#). In January of this year, the Department updated the U.S. Attorneys’ Manual to incorporate the Deputy Attorney General’s guidance. *See* [USAM 9-28.000 et seq.](#); and [USAM 4-4.000 et seq.](#) The Individual Accountability Policy provides “key steps to strengthen [the Department’s] pursuit of individual corporate wrongdoing.” [Individual Accountability Policy, at 2.](#)

The Department has long recognized that corporations act through human beings. As Deputy Assistant Attorney General for the Antitrust Division Brent Snyder aptly noted: “*Individuals* commit the crimes for which corporate offenders pay. Every corporate crime involves individual wrongdoing.” [Brent Snyder, Deputy Assistant Attorney Gen., U.S. Dep’t. of Justice, “Individual Accountability for Antitrust Crimes,” Remarks Prepared for the Yale Sch. of Mgmt. Glob. Antitrust Enforcement Conference \(New Haven, Conn., Feb. 19, 2016\), at 2 \(emphasis in original\)](#). Since individuals commit the crimes and wrongdoing, and often personally profit from their misdeeds, “[p]rosecuting the corporate entity, and imposing a fine and other impersonal conditions, simply is not enough—in most instances—to fully punish and, more importantly, deter corporate misconduct.” [Leslie R. Caldwell, Assistant Attorney Gen., Dep’t. of Justice, Remarks at the Second Annual Glob. Investigations Review Conference, \(N.Y.C., N.Y., Sept. 22, 2015\)](#).

Instead, the Department’s philosophy has been that “one of the most effective ways to combat corporate misconduct is by seeking accountability from the individuals who perpetrated the wrongdoing.” [Individual Accountability Policy, at n.1](#). Nonetheless, the Department recognizes that there are “many substantial challenges unique to pursuing individuals for corporate misdeeds.” *Id.* at 2. To address those challenges and ensure that the Department fully leverages its resources to identify culpable individuals in corporate cases, the Individual Accountability Policy identifies measures to guide Department attorneys “in any investigation of corporate misconduct.” *Id.* at 2, 3 n.1.

II. Directive for criminal and civil coordination

As an overarching principle, the Individual Accountability Policy reiterates the Department’s oft-repeated direction that the “criminal and civil attorneys handling corporate investigations should be in

routine communication with one another.” *Id.* at 4. The Department has long recognized that “[c]onsultation between the Department’s civil and criminal attorneys . . . permits consideration of the full range of the government’s potential remedies . . . and promotes the most thorough and appropriate resolution in every case.” *Id.* at 5. As early as 1986, Attorney General Edwin Meese issued a memorandum recommending that every United States Attorney “institute a system of coordination of the criminal and civil aspects of all matters within the office.” Memorandum from Edwin Meese III, Att’y Gen., Dep’t. of Justice, to all U. S. Attorneys., et al., “Coordination of Criminal and Civil Fraud, Waste and Abuse Proceedings,” (July 16, 1986), (on file with author) (Meese Memo), at 2. Eleven years later, Attorney General Janet Reno’s 1997 memorandum expanded that directive by recommending that “every United States Attorney’s office and each Department Litigating Division should have a system for coordinating the criminal, civil and administrative aspects of all white-collar crime matters within the office.” Memorandum from Janet W. Reno, Attorney Gen., Dep’t. of Justice, to all U. S. Attorneys, et al., “Coordination of Parallel Criminal, Civil, and Administrative Proceedings,” (July 28, 1997), <https://www.justice.gov/ag/ag-memo-coordinate-parallel-criminal-civil-administraative> (Reno Memo).

Similarly, in 2012, Attorney General Holder issued a memorandum stating that “[e]very United States Attorney’s Office and Department litigating component should have policies and procedures for early and appropriate coordination of the Government’s criminal, civil, regulatory and administrative remedies.” Memorandum from Eric H. Holder, Attorney Gen., Dep’t. of Justice, to all U. S. Attorneys., et al., “Coordination of Parallel Criminal, Civil, Regulatory, and Administrative Proceedings,” (Jan. 30, 2012), <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings> (Holder Memo). Attorney General Holder emphasized that, as a matter of Department policy, “criminal prosecutors and civil trial counsel should timely communicate, coordinate, and cooperate with one another and agency attorneys to the fullest extent appropriate and permissible by law.” *Id.* at 1.

In accordance with the Meese, Reno, and Holder directives, each U.S. Attorney’s Office or Department of Justice component should have in place internal policies and practices governing the coordination of parallel proceedings. As a practical matter, the system for coordinating within an office may vary from district to district. Nonetheless, any system should involve formal or informal practices designed to timely assess the civil and administrative potential in all criminal case referrals, indictments, and declinations, and the criminal potential in all civil case referrals and complaints, including *qui tam* actions. Reno Memo . See also Holder Memo. (“From the moment of case intake, attorneys should consider and communicate regarding potential civil, administrative, regulatory, and criminal remedies, and explore those remedies with the investigative agents and other government personnel.”); USAM, Chapter 1-12 (“Intake: consider and communicate regarding potential civil, administrative, regulatory, and criminal remedies, and explore those remedies . . .”).

Possible approaches for cooperation include, but are not limited to:

- Automatic notifications to criminal or civil counterparts when a new matter is opened
- Joint criminal and civil intake interviews for all referrals
- Joint criminal and civil intake interviews for certain categories of referrals (e.g., business and securities fraud matters, consumer fraud matters, *qui tam* actions)
- Discretionary notifications to criminal or civil counterparts after initial intake interviews, or
- Regularly scheduled meetings between criminal and civil attorneys responsible for intake and assignment to review possible coordination in new matters

Notwithstanding initial coordination determinations, the Individual Accountability Policy urges Department attorneys to continually reevaluate the potential for parallel proceedings or remedies throughout their investigations. Individual Accountability Policy, at 4 (“Criminal and civil attorneys

handling corporate investigations should be in routine communication with one another.”); *Id.* at 5 (recommending that criminal and civil attorneys notify their counterparts “as early as permissible. . . even if criminal liability continues to be sought” and “regardless of the current status of the civil corporate investigation.”). For example, what initially may look like a purely criminal investigation into a direct mailing fraud scheme may later benefit from a parallel civil anti-fraud injunction action to enjoin further solicitations and losses to victims pending a criminal resolution. Similarly, a purely civil investigation into false certifications to obtain federal insurance of FHA loans may uncover related and independently prosecutable criminal activity, such as bank fraud and fraud on governmental agencies.

In order to facilitate communications and consultation between the Department’s civil and criminal attorneys, both sets of attorneys should consider investigative strategies that allow information to be shared among criminal, civil, and agency teams to the fullest extent appropriate and permissible. [USAM, Chapter 1-12](#). See also [Reno Memo](#) (“With proper safeguards, evidence can be obtained without the grand jury by administrative subpoenas, search warrants and other means. Evidence can then be shared among the various personnel responsible for the matter.”). Practically, this often means using Civil Investigatory Demands or IG, HIPAA, or FIRREA subpoenas, rather than defaulting to the use of Grand Jury subpoenas. Even “[w]here evidence is obtained by means of a grand jury,” Attorney General Holder recommended that “prosecutors should consider seeking an order under [Federal Rule of Criminal Procedure 6\(e\)](#) at the earliest appropriate time to permit civil, regulatory, or administrative counterparts access to materials.” [Holder Memo](#). Such an approach furthers the goal of civil and criminal attorneys routinely communicating about the results of discovery in their investigations, to the extent permissible under law.

Ultimately in order to achieve “the most thorough and appropriate resolution in every case,” both civil and criminal attorneys should consider the “full range of the government’s potential remedies” against individuals. [Individual Accountability Policy, at 5](#).

When both criminal and civil remedies are available and defendants request global negotiations, Department attorneys can negotiate both types of relief simultaneously. As a matter of practice, some offices require that the defendants make these requests in writing before Department attorneys will engage in global settlement discussions. Where criminal and civil resolutions are being separately negotiated, best practices require attorneys to “assess the potential impact of such actions on [their colleague’s] criminal, civil, regulatory, and administrative proceedings to the extent appropriate.” [Holder Memo](#). One example of such consideration is having criminal attorneys consider how facts set forth in a plea agreement could affect a subsequent civil case. *Id.* (“For example, a prosecutor, when considering a plea agreement, should also consider the impact the charge used as a basis for the guilty plea (e.g., health care fraud as opposed to obstruction) and the facts set forth in support of the plea agreement could have on a subsequent civil case (collateral estoppel, res judicata) and/or administrative exclusion or debarment.”). See also [Meese Memo](#), at 3 (“When negotiating a plea, the collateral estoppel effect should be kept in mind. For instance, a guilty plea to a conspiracy count will generally be of less assistance to a civil case than a plea to substantive counts.”). Another example is determining whether and how agreements about a loss amount for forfeiture or sentencing calculations may reduce a defendant’s calculated single damages under the False Claims Act and therefore limit the multiple damages that the United States could recover. Whenever negotiating, Department attorneys should remember that they cannot compromise criminal liability when resolving a civil case.

III. Early focus on individuals

The Individual Accountability Policy reminds Department attorneys to focus on potential individual actions and liability from the inception of the investigation. [Individual Accountability Policy, at 4](#). As both the Individual Accountability Policy and the U.S. Attorneys’ Manual explain, focusing on individual wrongdoers: (1) efficiently and effectively reveals the facts and extent of the corporate

misconduct, (2) increases the likelihood that those with knowledge will be identified and will cooperate with the investigation, providing information about the individuals involved higher up in the corporate hierarchy, and (3) maximizes the chance that any final resolution will include civil or criminal charges against individuals, as well as the corporation. *Id.*; [USAM, Chapter 4-3.100\(1\)](#) (“Pursuit of Claims Against Individuals”).

As a practical matter, in order to satisfy this directive, Department attorneys should consider:

- During initial intake or relator interviews, identifying all involved individuals, their roles and responsibilities within the organization, their supervisors and subordinates, their involvement in the wrongdoing under investigation, and their motivation for committing the wrongdoing, to the extent known by the agent, relator, or witness. *See* [Snyder Remarks, at 4](#); *See also* [USAM, Chapter 9-28.210B](#).
- From first contacts with the company where they are seeking cooperation credit, requiring the company to identify involved individuals and their roles and to update the Department concerning the involved individuals on a regular basis.
- Early in the investigative process, obtaining organizational charts, performance reviews, and compensation data (including performance-related bonuses) for all involved individuals. It may be useful to also obtain comparative compensation data for a broader time period surrounding the wrongdoing or for the individuals’ peers.
- Interviewing subordinates and coworkers of individual wrongdoers.
- Asking witnesses and wrongdoers at the company to identify all individuals involved in the conduct.
- Serving compulsory process (e.g., CIDs, FIRREA and IG subpoenas) directly on individual wrongdoers, as opposed to through the company.

In any particular investigation, Department attorneys will be in the best position to determine what investigative steps and evidence are most likely to further develop the investigation. Nonetheless, both criminal and civil attorneys should take steps to ensure that they are developing evidence not only that the company committed wrongdoing, but also establishing the identities, knowledge, and roles of the individuals through which the business committed the wrongdoing.

In addition to directing civil attorneys to focus on individuals from the commencement of the investigation, the Individual Accountability Policy also directs that the decision to file an action against an individual “should not be guided solely by” the individual’s ability to pay.” [Individual Accountability Policy, at 6](#). Rather, civil attorneys should make more individualized assessments, based on a number of factors, including:

- The individual’s misconduct
- The individual’s past history
- The circumstances relating to the commission of the misconduct
- The needs of the communities the Department serves, and
- Federal resources and priorities

Id. at 7. *See also* [USAM Chapter 4-3.100\(2\)](#).

The Individual Accountability Policy and USAM recognize that this list is not exhaustive. [Individual Accountability Policy, at 7](#). (“civil attorneys should make individualized assessments in

deciding whether to bring a case, taking into account numerous factors, *such as* the individual’s misconduct and past history . . .”) (emphasis added). Other possible factors may include:

- The likelihood that the pursuit of civil claims against the individuals may have a deterrent effect for other individuals
- The availability and pursuit of other administrative, criminal, or negotiated equitable remedies against the individuals
- The individual’s cooperation and/or remedial efforts, and
- The individual’s likelihood of repeated conduct in the absence of civil relief

IV. Corporate cooperation credit

One of the more significant changes in Department practice was the Individual Accountability Policy’s directive that “in order to qualify for *any* cooperation credit, corporations must provide to the Department all relevant facts relating to the individuals responsible for the misconduct.” *Id.* at 2 (emphasis added). The policy explains that “the company must completely disclose to the Department all relevant facts about individual misconduct,” including identifying “all individuals involved in or responsible for the misconduct at issue” and providing “all facts relating to that misconduct.” *Id.* at 3.

The policy emphasized that this “condition of cooperation applies equally in civil matters.” *Id.* Specifically, a company under civil investigation must provide to the Department all relevant facts about individual misconduct in order to receive any consideration in the negotiation. For example, under the False Claims Act, in order to qualify for a determination that the corporation provided “all information known . . . about the violation” and qualify for reduced liability, the company must provide the civil investigation with all relevant facts about responsible individuals. [USAM, Chapter 4-3.100\(4\)](#) (“Pursuit of Claims Against Individuals”).

The change in the disclosure requirement means that “[c]ompanies cannot just disclose facts relating to general corporate misconduct and withhold facts about the individuals involved. And internal investigations cannot end with a conclusion of corporate liability, while stopping short of identifying those who committed the underlying conduct.” [Leslie R. Caldwell, Assistant Attorney Gen., Dep’t. of Justice., Remarks at Am. Conference Inst.’s 32nd Annual Int’l Conference on Foreign Corrupt Practices Act \(Nat’l Harbor, Md., Nov. 17, 2015\)](#).

Practically, Department attorneys should raise this requirement early in communications with corporate defendants, and again throughout the government’s investigation. While the Department does not require a company or individual defendant to know all of the facts concerning all individuals involved in the wrongdoing, the Department will require that the company or individual disclose all relevant facts known after a reasonable inquiry and within a reasonable time after the company or individual learns the facts. A company cannot expect to receive *any* cooperation credit if it either (a) chooses to not perform an appropriate inquiry and then plead lack of knowledge, or (b) investigates thoroughly and then waits to disclose all relevant facts only at the conclusion of the government’s investigation and in the midst of settlement negotiations.

Conversely, the Department does not require “a years-long, multimillion dollar investigation every time a company learns of misconduct.” [Sally Yates, Deputy Attorney Gen., Dep’t. of Justice, Remarks at Am. Banking Ass’n and A.B.A. Money Laundering Enforcement Conference, \(Washington, D.C., Nov. 17, 2015\) <https://www.justice.gov/opa/speech/deputy-attorney-general-sally-quillian-yates-delivers-remarks-american-banking-0>](#). *See also* [Bill Baer, Acting Assoc. Attorney Gen., Dep’t. of Justice, Remarks on Individual Accountability at A.B.A.’s 11th Nat’l Inst. on Civil False Claims Act and Qui Tam Enforcement \(Washington, D.C., June 9, 2016\)](#) (“Let me remind you what cooperation does not require. It does not demand wide-ranging and costly internal investigations that are unrelated to our FCA

inquiry. As the Deputy Attorney General and others at the department have stated, we expect investigations to be tailored to the scope of the wrongdoing. However, we also expect cooperating companies to make their best effort to determine the facts with the goal of identifying the individuals involved.”). To the extent that defendants are unclear about the appropriate scope of an investigation, Department attorneys should be willing to discuss their expectations with the defendants’ counsel and to consider the company’s arguments about cost, time to produce, and other implications for the company in conducting the inquiry. [Yates Remarks at Am. Banking Ass’n](#). (“[I]f there is any question about the scope of what’s required, you should do what many defense attorneys do now—pick up the phone and discuss it with the prosecutor.”). *See also* [Caldwell Remarks at the Glob. Investigations Review Conf.](#). (“To the extent companies and their counsel are unclear about what this means, I make this suggestion: call us.”).

The policy recognizes that “[t]here may be circumstances where, despite its best efforts to conduct a thorough investigation, a company genuinely cannot get access to certain evidence or is actually prohibited from disclosing it to the government.” [USAM Chapter 9-28.700 fn.1](#). The USAM cautions that “the company seeking cooperation will bear the burden of explaining the restrictions it is facing to the prosecutor.” *Id.* However, these restrictions will not necessarily disqualify the company from eligibility for cooperation credit. As Deputy Attorney General Yates has said, “if a company conducted an appropriately tailored investigation and truly did everything they could reasonably be expected to do to determine who did what, but simply can’t figure it out, they are not precluded from receiving cooperation credit.” [Sally Q. Yates, Deputy Attorney Gen., Dep’t. of Justice, Remarks at the N.Y.C. Bar Ass’n White Collar Crime Conference \(N.Y.C., N.Y., May 10, 2016\)](#). Accordingly, Department attorneys should discuss and consider whether a company has access to all of the facts or whether facts and evidence may be in the hands of third-parties or non-cooperating witnesses. *See* [Caldwell Remarks at Am. Conference Inst.](#) (“A company that does not have access to all the facts, despite its best efforts to do a thorough and timely investigation, will not be at a disadvantage. Our presumption is that the corporate entity will have access to the evidence, but if there are instances where you do not, or you are legally prohibited from handing it over, then, again, you need to explain that to us. And know that we will test the accuracy of your assertions.”); [Caldwell Remarks at the Glob. Investigations Review Conference](#). (“[W]e sometimes can obtain evidence that a company cannot. We often can obtain from third parties evidence that is not available to the company. Also, we know that a company may not be able to interview former employees who refuse to cooperate in a company investigation. Those same employees may provide information to us, whether voluntarily or through compulsory process. . . . If so, the company will not be penalized for failing to identify facts subsequently discovered by government investigators.”).

The disclosure of all relevant facts concerning individuals is a “threshold requirement.” [USAM Chapter 4-3.100\(4\)](#) (“Once a company meets the threshold requirement of providing all relevant facts with respect to individuals, it will be eligible to receive consideration for cooperation.”). The full extent of consideration given for cooperation will depend on all the various factors that have traditionally applied, including “the timeliness of the cooperation, the diligence, thoroughness and speed of the internal investigation, and the proactive nature of the cooperation.” [USAM Chapter 4-3.100](#). *See also* [Baer Remarks](#) (beyond the threshold requirement, in assessing “[f]ull cooperation” in a civil FCA matter, “the department will also take into account the fact that a company reports information that might otherwise not have been discovered in the ordinary course of an investigation, or that saves the government time and resources otherwise dedicated to further investigation. Examples of this cooperation could include making available current or former officers and employees for meetings, interviews, examinations or depositions; disclosing facts gathered during an internal investigation; or identifying opportunities to obtain evidence not in the possession of the organization.”).

The Individual Accountability Policy does not change pre-existing Department policy on waiver of attorney-client privilege. *See* [Yates Remarks at Am. Banking Ass’n](#) (“there is nothing in the new policy that requires companies to waive attorney-client privilege or in any way rolls back the protections that were built into the prior factors.”). *See also* [Baer Remarks](#) (“[T]o emphasize a point the department has

repeatedly made, there is nothing – I repeat, there is nothing – in the individual accountability policy that requires companies to waive attorney-client privilege.”); [USAM Chapter 9-28.720\(a\)](#) (“[T]he government’s key measure of cooperation must remain the same as it does for an individual: has the party timely disclosed the relevant facts about the putative misconduct? That is the operative question in assigning cooperation credit for the disclosure of information—not whether the corporation discloses attorney-client or work product materials. Accordingly, a corporation should receive the same credit for disclosing facts contained in materials that are not protected by the attorney-client privilege or attorney work product as it would for disclosing identical facts contained in materials that are so protected.”). For a fuller discussion of the corporate attorney-client privilege and the Department’s current policy, please see James McMahon’s article in this issue of the U.S. Attorneys’ Bulletin, “Attorney-Client Privilege in the Corporate Setting,” [James McMahon, *Attorney-Client Privilege in the Corporate Setting*, 64 U.S. ATT’YS’ BULL. 1\(2016\)](#).

Finally, despite the protestations of defense counsel in response to requests for information and the identification of individuals, “[c]ooperation does not require a company to characterize anyone as ‘culpable,’” nor to agree with the government’s characterization of the facts as violating the law. [Yates Remarks at Am. Banking Ass’n](#). See also [Baer Remarks](#) (“[W]e are not asking companies to do our work for us by delivering litigable cases as a condition of cooperation. Cooperation does not require a company to characterize anyone as ‘culpable’ —that is our job. But it does require that a company provide us with all facts about all individuals involved. We need to understand the conduct that occurred and who was involved or sanctioned it. That is the obligation of a company seeking cooperation credit.”).

V. Individuals in the context of corporate resolutions

The Individual Accountability Policy’s emphasis on individuals continues through and beyond any resolution with the corporation. First, the Individual Accountability Policy directs that the “Department will not release culpable individuals from civil or criminal liability when resolving a matter with a corporation” barring “extraordinary circumstances or approved department policy.” [Individual Accountability Policy, at 2, 5](#). Recognizing that Department attorneys may reach negotiated resolutions with a company before reaching a resolution with responsible individuals, the Individual Accountability Policy expressly disallows prior model civil settlements that may have, as a matter of course, released all claims against the owners, officers, directors, or employees of a settling company. *Id.* at 5. See also [Baer Remarks](#) (“[Y]ou should not assume we will be amenable to releasing individuals from False Claims Act liability when we settle with the organization. The presumption is flipped in the other direction. Admittedly, this is a departure from past practice, where a settlement would release not only the corporation, but also its individual directors, officers and agents. But it is a change we view as necessary to pursue company officials involved in the wrongdoing.”). Likewise, the Individual Accountability Policy specifically directs attorneys not to agree to a corporate resolution that includes immunity for, or a dismissal of, charges against individual officers or employees. [Individual Accountability Policy, at 5](#).

Second, the Individual Accountability Policy directs that Department attorneys not resolve corporate liability “without a clear plan to resolve related individual cases.” *Id.* at 6. In the context of civil FCA matters, this means that “if we do not resolve the issue as to individuals’ FCA liability at the time of the corporate resolution, we [are expected] to have a plan for how to proceed in the investigation with respect to those responsible.” [Baer Remarks](#). By requiring a clear plan prior to finalizing a corporate resolution, the Individual Accountability Policy contemplates that there may be situations where the company’s continued cooperation is necessary to investigate and pursue individuals, and allows the Department to require the corporation to cooperate as part of a corporate resolution. In some situations, resolution of a corporation’s liability may also include monetary or equitable components designed to address the role of culpable individuals. For example, a civil resolution may require that culpable individuals receive additional training or oversight, or other equitable relief. Although there may be instances where such measures address the roles of culpable individuals, each case will turn on its own

facts, and Department attorneys will be in the best position to determine the most appropriate relief to ensure individual accountability. And if a decision is ultimately made not to pursue an individual, the Individual Accountability Policy requires that the decision be memorialized. [Individual Accountability Policy](#), at 6.

These various steps—not releasing individuals in a corporate resolution; formulating a plan for how to proceed with individuals where a corporate resolution is reached first; and memorializing instances where an individual is ultimately not pursued—are designed to ensure that we “assess individual responsibility” not only “at the beginning of,” but “throughout our FCA investigations.” [Baer Remarks](#).

Third, the policy recommends that, where a limitations period may expire, “all efforts should be made either to” resolve claims against culpable individuals before the limitations period expires or to obtain a tolling agreement. [Individual Accountability Policy](#), at 6. To the extent the tolling of applicable limitations periods is unavoidable, civil attorneys should seek tolling agreements sufficiently in advance to avoid being forced to request a last-minute tolling agreement.

VI. Conclusion

The Department and its attorneys have always recognized that corporate wrongdoing only occurs through the actions of individuals. As set forth in the Individual Accountability Policy, the Department can best remedy and deter future corporate misconduct through investigations that focus on individuals from day one and seek to hold accountable those who committed the wrongdoing.

ABOUT THE AUTHOR

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U.S. Attorneys' Options for Managing Case Investigative Information in Small, Medium, and Large Cases

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I. Introduction

You are scratching your head. You have three new cases with vastly different quantities of electronic discovery materials:

- **Small eDiscovery case:** The first case is a drug conspiracy with 10 sales and three defendants. It has a small amount of electronic information: 100 PDFs of investigative reports, interviews, and transcripts; 50 electronic documents; 30 digital photos; 10 videos; and 8 witnesses.
- **Medium eDiscovery case:** The second case is a health care fraud case with 25 treatment facilities, 2,000 victims, and seven defendants. It involves a medium collection of electronic information: 3,000 electronic investigative reports, interviews, and transcripts in various formats; 240,000 business records in PDF and other electronic formats; 9,000 emails; 1,500 digital photos; 100 audio recordings; and 75 witnesses.
- **Large eDiscovery case:** The third case concerns a residential mortgage fraud scheme. The investigative information encompasses 15,000 home loans, 10 banks and mortgage companies, two securities ratings firms, three government investigations, and substantial parallel civil and administrative proceedings. It is a large eDiscovery case with 5,000 electronic investigative reports, interviews, and transcripts; 5,000,000 electronic business records (from loan files and spreadsheets to structured data sets); 100,000 emails and text messages; 10,000 digital photos; 200 video and audio recordings; and 1,200 witnesses.

How should you manage each case when they have such vastly different quantities and types of electronic information?

This article will discuss the software tools and resources available to Assistant United States Attorneys (AUSAs) for managing small, medium, and large eDiscovery cases. Litigators in the other Department components have different litigation support software tools, staffing, capabilities, and resources.

Today, even routine drug, bank robbery, and teller embezzlement cases often contain voluminous or complex electronically stored information (ESI) in the form of surveillance tapes, wiretaps, social media posts, and electronic communications. Admittedly, categorizing cases as small, medium, and large is artificial, but it can be useful when conceptualizing how to manage cases of different sizes.

For example, many common cases do not require the most robust, sophisticated litigation software and a big team. You can accomplish a lot on small eDiscovery cases with just yourself and a little help from your legal assistant. When you move into medium and large eDiscovery cases, you have choices. You can keep litigation support for your case in-house, or, when appropriate, you can get outside

help. What choices you have—and how successful they will be—depends in large part on how carefully you collect information. You need the right information, such as metadata for electronic communications, and you need to avoid over-collecting electronic information, as it leads to an unmanageable investigation for your resources and capabilities. Finally, success requires planning.

II. Planning for success

The key to planning for a successful technology selection is knowing where you want to end up for the particular case. That means understanding your needs when gathering investigative information, organizing and reviewing it, and producing it as discovery. Some things to consider:

- What types of electronic information are you receiving?
 - Native files (original format, such as Word or Excel)?
 - PDF files (the natives have been converted to PDF)?
- How much will you end up with?
 - How to avoid over-collection?
 - What is critical to the case?
 - What is too much to process, review, store, and produce in discovery?
- How much staff and other resources will you have?
 - Can you get a litigation support technologist and paralegal involved early to help craft subpoenas, make sure ESI is processed correctly, and help you decide which tools to use?
- Do you have sufficient capacity for processing your ESI?
 - Are your in-house resources adequate?
 - Do you need outside support?
- Who will review the documents, transcripts, emails, social media, and bookkeeping files like QuickBooks?
 - Prosecutor?
 - Agent?
 - Paralegal?
- How will you manage the work?
 - Who will be the eDiscovery project team leader?
 - Who will choose the software/document review platform?
 - Who will be responsible for setting data input protocols to ensure consistency?
 - Who is responsible for assignments? For reviewing certain documents? For quality-control?
- Can you collect metadata that will tell you key facts like:
 - Who authored it?
 - When it was created?
 - Who it was sent to?

- How will you produce metadata to the defendant completely and accurately?
- Do you need to categorize, code, or tag individual items?
 - Who produced it to your investigation?
 - What issue does it relate to?
 - Is it discoverable?
- Do you have multiple types of information that you want to tie together to build your case?
 - Facts and their source?
 - Witnesses and their prior statements?
 - Documents and the issues and witnesses they pertain to?
 - Emails, chats, and text messages to key events?
 - Wiretaps and their transcripts?
 - Sentencing issues and case law?
- Who needs access to the case files?
 - Investigative federal agencies?
 - State or local task force officers?

III. The small eDiscovery case

Our hypothetical small eDiscovery case is a drug conspiracy with 10 sales and three defendants. It has a relatively small amount of electronic information: 100 PDFs of investigative reports, interviews, and transcripts; 50 electronic documents; 30 digital photos; 10 videos; and eight witnesses. You can manage a case of this size on your own with locally-hosted software and only minor help from your legal assistant.

The CaseMap suite—CaseMap, TextMap, and TimeMap—is excellent for creating and managing all of the things prosecutors already do with legal pads, binders, post-it notes, Word, and Excel. *CaseMap is not something extra—it is more efficient.*

The CaseMap suite works well for cases of all sizes—not just small cases. But we will introduce it here because, standing alone, it will satisfy many of your needs in small cases. You can succeed without additional, sophisticated software tools like Eclipse SE or Relativity, both of which are discussed below.

A. CaseMap

CaseMap is designed for organizing your case team’s value-added thinking about what is important: the key facts, documents, witnesses, issues, questions, and legal research. CaseMap will help you create a list of victims and witnesses and their contacts; a chronology of key factual events; a list of hot documents that you can turn into an exhibit list; an outline of factual and legal issues for charging, motions practice, and sentencing; a log of subpoenas issued and returned; a file of key case law, statutes, and regulations; and a To-do list. CaseMap is a set of interconnected spreadsheets that hold just your key information about facts, people, documents, issues, questions, and legal research. Importantly, you add to the CaseMap file only what information you decide will serve your needs. You can customize the file to suit your needs. Figure 1 is an illustration of a CaseMap documents spreadsheet with links to the source items.

The screenshot shows the LexisNexis CaseMap interface for a case titled 'DOJ Demo Case - US v. Al Capone'. The main window displays a table under the heading 'Objects - Documents'. The table has five columns: 'Doc date', 'Description', 'Doc Summary', 'Linked File', and 'Produced to Def'. There are four rows of document entries, each with a trash icon on the left. The 'Linked File' column contains file paths starting with '...\' followed by a file name. The 'Produced to Def' column contains a checked checkbox for each row.

Doc date	Description	Doc Summary	Linked File	Produced to Def
Fri 10/31/1928	Johnny Welder's hand-written notes from 10/31/1928.	Johnny Welder's notes about job to cut Chicago Bank & Trust alarms with welding torch	...\'Johnny W	<input checked="" type="checkbox"/>
Tue 05/08/1928	FBI's Al Capone records - vol 1a	Information from FBI files beginning in 1928	...\'FBI's Capo	<input checked="" type="checkbox"/>
Fri 06/22/1928	Photo: Louis Clementi and Phil Mangano.	Picture taken outside brothel of Al Capone's principal deputies, Louis Clementi and Phil Mangano.	...\'Photo - Ca	<input checked="" type="checkbox"/>
~ Sat 12/15/1928	Photo of Capone Gang at pool hall.	Picture taken inside 8 Ball Pool Hall in Chicago in December 1928. Depicts Al Capone, Louis Clementi, Johnny Torres, and	...\'Photo - Ca	<input checked="" type="checkbox"/>

Figure 1

Clicking on the “linked file” field will open the source item, which can be anything you can browse on your computer, whether a native file, TIFF image, PDF, photo, audio file, videotape, or Web site.

Your in-house case team—your co-counsel, legal assistant, and paralegal—can access and assist you in building your CaseMap file, which can be password protected. However, giving access to case team members outside your office may present some access hurdles that you need to discuss with your litigation support technologist and systems manager. Access is limited to your authorized case team members.

CaseMap gives you many advantages:

- Organization:** CaseMap has a place for everything you want to capture, and you and your team can put things where they are easily found. However, the CaseMap suite does not just help prosecutors capture and organize key information. You can also link each fact, document, and transcript to its source so that you never have to waste time hunting down the report, transcript, binder, or box that holds the original evidence. CaseMap builds up your team’s institutional knowledge of the facts, witnesses, and issues. If a prosecutor or agent leaves, their knowledge and work product stays with the case. All of your team’s value-added thinking is at your fingertips, whether in your U.S. Attorney’s office (USAO), at home, on the road, or in the courtroom.
- Easy to use:** The CaseMap suite is easy to learn and master. It is portable, and you can easily share it with team members inside your office. Multiple team members can use it simultaneously. Or you can create a replica file that you or team members use outside the office and synch with the master file later. All AUSAs and Department litigators have access to the CaseMap suite. Other case team members must have CaseMap to use a replica file.
- Integration with many other software tools:** Many software tools, such as Eclipse SE, Adobe, Outlook, Concordance, and IPRO, have built in “Send to CaseMap” buttons to help you easily link source information to your CaseMap file.

While CaseMap will search across your CaseMap file, it is not designed to browse and search across your linked, underlying source materials, that is, your case evidence. Thus, you should use other tools, like Eclipse SE and Relativity, if you need to review and search through voluminous eDiscovery.

B. TextMap

TextMap is a simple-to-use transcript review tool for quickly reading, searching, and annotating properly-formatted, text-based files—for example, interview and investigative reports and grand jury and deposition transcripts. TextMap will search across all of the transcripts and reports that you load into it. TextMap links the key passages to corresponding entries in your CaseMap file so you can easily pinpoint important testimony. Figure 2 is an illustration of a TextMap file, showing the list of transcripts (below, FBI 302s), text of the Brian Bolton interview report (key text highlighted in blue and yellow), the word search window, and options for advanced searching.

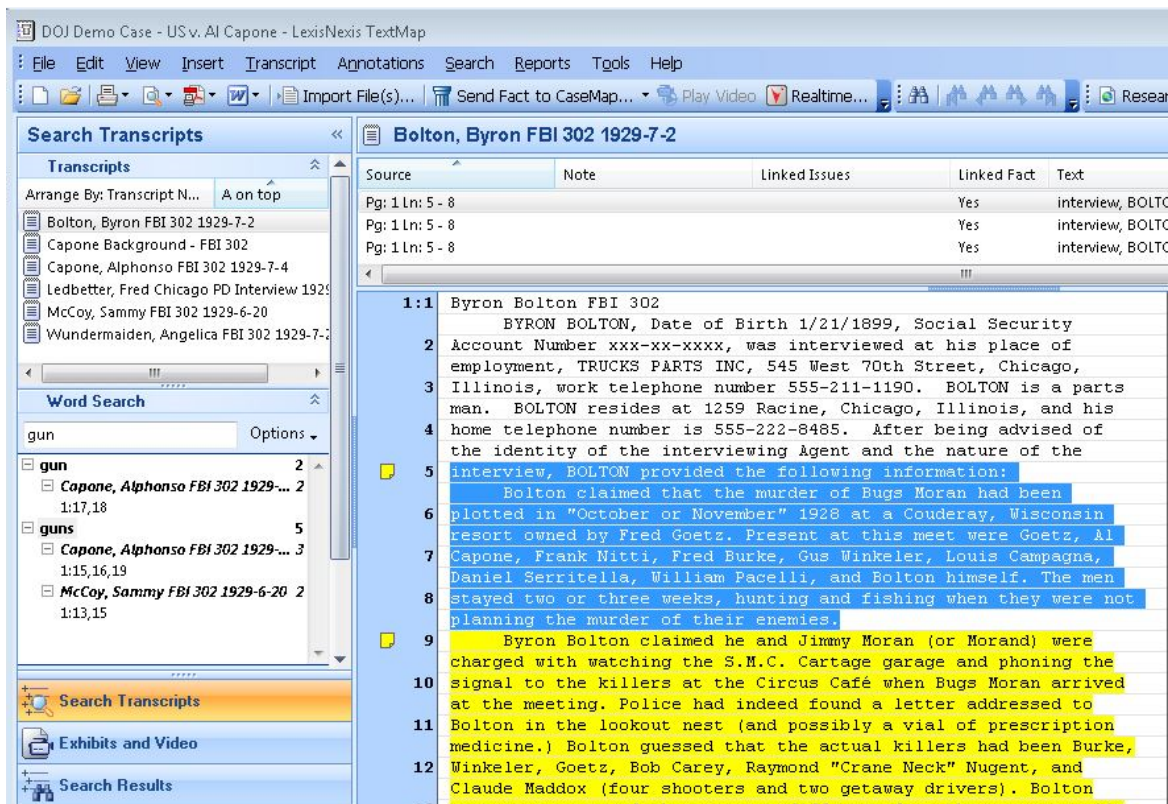


Figure 2

C. TimeMap

TimeMap quickly generates a simple timeline graphic of your key CaseMap facts to help you explain the story of your case. You can even annotate the timeline with photos, documents, audio, and video. Figure 3 is an illustration of a timeline you can create in seconds.

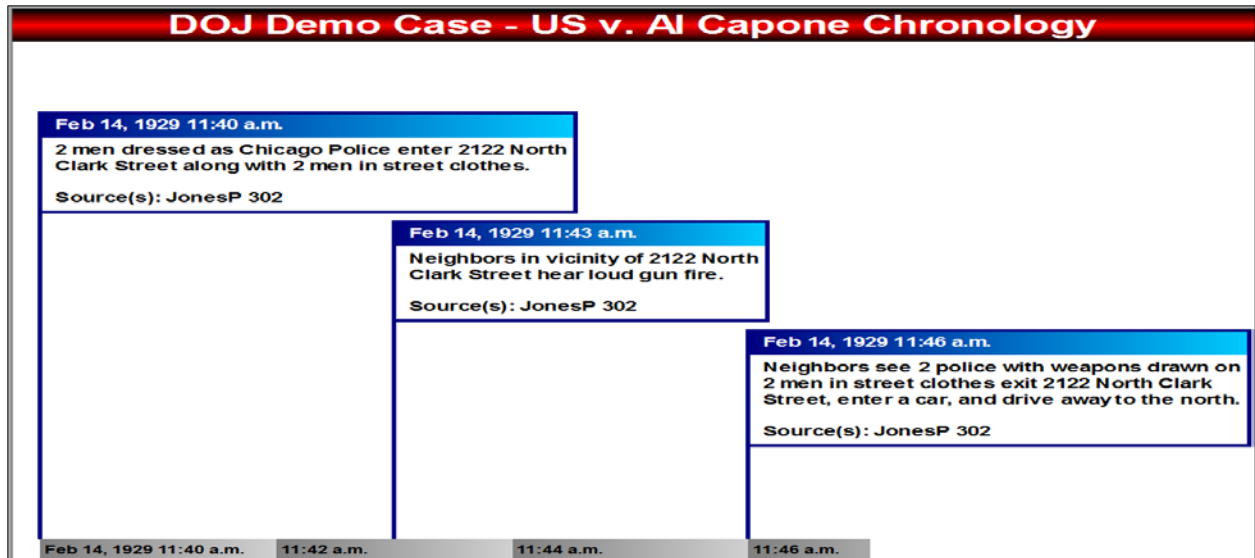


Figure 3

IV. The medium eDiscovery case

Our hypothetical medium case is a health care fraud investigation with 25 treatment facilities, 2,000 victims, and seven defendants. The investigation has collected 3,000 electronic investigative reports, interviews, and transcripts in various formats; 240,000 business records in PDF and other electronic formats; 10,000 emails; 1,500 digital photos; 100 audio recordings; and 75 victims and witnesses. You can still manage a case of this size on your office's IT system, but you will need some help from your litigation support technologist, legal assistant, paralegal, and case agent.

A. CaseMap

CaseMap is an excellent tool in medium-sized cases for organizing and managing information about the key parts of your case—facts, witnesses, documents, subpoenas, issues, legal research, and questions.

But with a medium-sized eDiscovery case, you have more information to manage than you can comfortably handle on your own with only the CaseMap suite to help you. Powerful document review tools—like Eclipse SE and Relativity—will help you more efficiently and reliably search, review, cull, code, tag, and produce voluminous eDiscovery. Linking key documents located in a review tool to your CaseMap file may require an extra step or two, but it allows your case—and your case team—to stay organized, allowing you to respond quickly to changing events and tight deadlines.

B. Eclipse SE

Ipro Eclipse SE is a document review tool available to United States Attorneys' Offices. It will help you efficiently execute critical tasks:

- **View documents:** You can view native files or processed images.
- **Identify relevant documents and cull out irrelevant documents:** You can cull documents by date range, source, topic, or other characteristics.
- **Sophisticated searching:** You can search across the different documents in your collection—business records, reports, emails, transcripts, spreadsheets—to identify similar characteristics

across data types, much like Westlaw allows you to search for terms and ideas across its information sources. You can also search within searches and by document tags.

- **Sort by characteristics:** You can sort by date, author and recipient, document type, or other information.
- **View, code, and tag:** You can view documents (for example, business records, investigative reports), and tag documents (such as hot doc, the issue or witness they relate to, etc.).
- **Highlight, annotate, and redact:** You can record your value-added assessment of individual documents.
- **Tracking and production:** You can track when and how documents were received and produced as discovery and create discovery productions in various formats.

It is important to note that to get the most out of Eclipse SE, you should request that electronic information be provided to you in either (1) native format (with original metadata) so that someone in your office can use eDiscovery software to process it into a format that Eclipse SE can handle, or (2) load files with associated text and TIFF images. You should involve your litigation support technologist early so that they can assist you in navigating the best way to gather and process electronic information so that it is usable.

Eclipse SE allows you to manage your case within your USAO, with help from your litigation support technologist, paralegal, and systems manager. The USAO's practices and procedures with respect to eDiscovery processing, loading, and productions, will continue to govern how your case is supported, including issues of priority and timing.

Access to Eclipse SE for case team members outside of your USAO requires extra effort. Thus, you should discuss that with your litigation support technologist and your systems manager prior to making a decision as to the appropriate document review tool.

C. Litigation Technology Service Center

Medium-sized eDiscovery cases may benefit from services offered by the Litigation Technology Service Center (LTSC). The LTSC supplements the capacity of USAOs' in-house resources by offering a range of litigation support services, including:

- Conversion of paper documents to electronic files:
 - Scanning of paper documents into electronic image files (TIFF, PDF), including OCR
 - Physical unitization of paper documents, whereby relationships between paper documents are determined based on physical boundaries, e.g., folders, paper clips, staples, etc. That is in contrast with logical unitization, which requires that someone read the documents and then attempt to interpret the proper breaks and relationships based on the documents' content.
- eDiscovery processing:
 - Converting raw, native electronically-stored information into refined formats that work with eDiscovery review software
 - De-duplication
 - Metadata extraction
 - OCR

- Data filtering
- Email threading
- Near-duplicate identification
- Discovery production to defense in a variety of formats
 - Image file conversion
 - Load files
- eDiscovery hosting
 - Hosting information in Relativity

V. The large eDiscovery case

Finally, our hypothetical large eDiscovery case concerns a residential mortgage fraud scheme. The investigative information encompasses 15,000 home loans, 10 banks and mortgage companies, two securities ratings firms, three government investigations, and substantial parallel civil and administrative proceedings. It is a large eDiscovery case with 5,000 electronic investigative reports, interviews, and transcripts; 5,000,000 electronic business records (from loan files and spreadsheets to structured data sets); 100,000 emails and text messages; 10,000 digital photos; 200 video and audio recordings; and 1,200 witnesses.

A. Planning

You have some decisions to make revolving around how much time, money, and personnel you have available. You still may be able to manage a case of this size with locally hosted software and storage, but this case requires substantial help from your litigation support technologists, legal assistants, paralegals, and case agents. Alternatively, you could tap resources outside of your office to supplement your in-house resources. Below are some of your options.

B. USAOs' in-house software tools

Even in cases involving large amounts of eDiscovery, CaseMap is an excellent tool for organizing and managing information about the key parts of your case—facts, witnesses, documents, subpoenas, issues, legal research, and questions. However, you will need to use robust document review software, either Eclipse SE or Relativity, in conjunction with CaseMap and TextMap.

Eclipse SE is robust enough to handle many large cases, but you should consult with your litigation support technologist when evaluating whether it is an appropriate tool to use, weighing factors such as the amount of information in your case and who will need to access it.

C. Outside-of-USAO litigation support resources

1. Relativity

Relativity is a very robust document review platform that can handle very large cases. It is web-based, meaning your documents reside on a centralized group of servers, and you can access and review them via a web portal. USAOs have access to Relativity through the LTSC, located in Columbia, South Carolina, which can host Relativity databases that are in the range of low single-digit terabytes in size. If you want to know whether the LTSC can host your cases, contact the LTSC directly.

Like Eclipse SE, Relativity can help you search, cull, review, code, tag, organize, and produce voluminous eDiscovery. However, Relativity can handle very large data collections better and faster than Eclipse SE. In addition, the LTSC's Relativity tool offers advanced analytical searching tools, including concept searching and "find similar searches," both of which can be more effective than searches for specific terms.

Case team members outside of USAOs may be able to access Relativity. However, there are special requirements for access, and these requirements should be discussed with the LTSC or LTHD staff and your systems manager to determine whether access may be permitted. The AUSA must sponsor outside users, and a background investigation is required.

2. Mega IV contractors

The Executive Office for United States Attorneys (EOUSA) maintains relationships with four Mega IV litigation support contractors who are staffed, equipped, and pre-qualified to handle a wide range of on-site and off-site services for cases. On-site services include a wide range of functions, such as project manager, electronic data processing, document management analyst, paralegal, and database administrator. Off-site services include web-hosted, automated litigation support such as database creation, data extraction, de-duping, and forensic data recovery.

Mega IV contractors can scale up or down relatively quickly. When considering Mega IV contractors, make an early determination of the costs that your USAO would incur. For a case with a substantial potential recovery or a significant public interest, Mega IV contractors can be an effective means to supplement an office's existing resources. For more information, contact your budget and acquisitions staff.

VI. Where else can you get help?

A. Litigation Technology Help Desk (LTHD)

EOUSA's Litigation Technology Help Desk (LTHD) provides training and technical support for USAOs on litigation technology software—the CaseMap suite, Eclipse SE, Relativity—and advice regarding technical aspects of eDiscovery issues. The LTHD is staffed Monday through Friday from 8 a.m. to 9 p.m. EST by contract personnel. They do not provide legal advice.

B. ADAM Lab

In a new initiative, the Civil Division is offering advanced technology and litigation support to all litigating components. The Civil Division's Advanced Data Analysis & Mining (ADAM) Lab provides both civil affirmative and criminal case teams with specialized, short-term litigation support to answer questions about large or complex case data. Advanced technology can decrease the costs and time of manual review and increase attorneys and investigators' abilities to identify key evidence. The ADAM Lab has assisted USAOs in culling out relevant and irrelevant data within a massive data set; analyzing data by performing calculations and comparisons; visualizing data to craft a case; and revealing relationships between correspondence, documents, and unique data sources.

The ADAM Lab performs analysis on data that traditional processing workflows cannot typically handle by providing highly-skilled analysts and powerful software to complement the case team's traditional litigation support. The ADAM Lab has the capability to handle complex data formats such as audio files, databases, and large amounts of structured and semi-structured data (e.g., excel, csv, SQL, NoSQL). Experienced ADAM Lab analysts are assigned to each individual case and use specialized tools

to help the case team dissect its case data. For more information about how the ADAM Lab may be able to help, you may email the lab.

C. Affirmative Civil Enforcement (ACE) eDiscovery Litigation Support Team

If your criminal case has an ACE counterpart, you may be able to get additional litigation support assistance from the ACE eDiscovery Litigation Support Team. They are project management professionals dedicated to supporting your ACE case team in numerous tasks, from assisting in the plan for review and production to ensuring that case data is tracked, maintained, and organized effectively.

For more information about how the ACE eDiscovery Litigation Support Team may be able to help you, email Jason Fliegel, the ACE eDiscovery Coordinating Attorney.

VII. Who can you turn to for advice?

Within your office, start with your supervisors, senior litigation counsel, and litigation support technologist. Each office also has a Criminal Discovery Coordinator and an eDiscovery Office Coordinator (EDOC) to whom you can turn for advice and help.

Additional resources are EOUSA's Criminal eDiscovery Coordinator, John Haried; Senior Litigation Counsel for Civil eDiscovery, Virginia Vance; Litigation Support Technologist Advisor, Susan Cooke; and Managing Attorney of the LTSC, Marc Fulkert.

ABOUT THE AUTHOR

John Haried is the Criminal eDiscovery Coordinator and the co-chair of the eDiscovery Working Group in the Executive Office for United States Attorneys. He was the Assistant National Criminal Discovery Coordinator from 2010 to 2012. He has been an Assistant U.S. Attorney in Colorado for 26 years, where he served as the Senior Litigation Counsel, Professional Responsibility Officer, and White Collar Section Chief. He was also a state prosecutor for eight years. He serves as a lecturer on criminal eDiscovery issues for the Office of Legal Education.

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Covert Investigative Techniques in Securities Fraud Investigations: Developing Key Evidence for Successful Prosecutions

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I. Introduction

It is no secret that the days of limiting covert investigative techniques to organized crime and narcotics investigations are long gone. Several high-profile insider trading prosecutions in recent years involving court-authorized wiretaps illustrated the invaluable evidence that such techniques can generate and demonstrated that the Department of Justice can and will aggressively investigate potential securities violations using all available tools.

Covert investigative techniques continue to provide extraordinary opportunities for law enforcement agents and prosecutors to develop evidence necessary to successfully prosecute some of today's most sophisticated and complex securities fraud crimes. These include, among others, offenses involving manipulative trading such as layering and spoofing or other illegal trading strategies, insider trading, and market manipulation schemes.

As with most fraud cases, establishing fraudulent intent can be the most challenging aspect of a securities fraud prosecution. This is especially true in cases involving complex securities transactions that can give rise to numerous interpretations, explanations, and defense theories. Evidence obtained through covert investigative techniques can assist investigators and prosecutors in overcoming these challenges, and it can make the difference between a securities violation resulting in regulatory action alone and one that also involves a federal criminal prosecution. Moreover, these investigative tactics can help distinguish those seeking to abuse the securities markets from those engaged in lawful financial transactions that may, on their face, appear improper.

This article will discuss the use in securities fraud investigations of court-authorized wiretaps, confidential sources and cooperating witnesses, and undercover law enforcement agents and operations. It will also highlight several case examples and other relevant considerations.

II. Court-authorized wiretaps

Obtaining judicial authorization to intercept telephone communications, text messages, or other electronic and wire communications or to engage in similar electronic surveillance is a difficult and time-consuming endeavor that involves substantial investigative resources. Generally speaking to obtain judicial approval to tap a telephone or other communication device, the government must show probable cause that an offense specified in the wiretap statute has been committed and that evidence of the offense will be discovered through the requested tap. [18 U.S.C. § 2518\(1\)\(b\) \(2012\)](#). Also, the government must demonstrate “whether or not other investigative procedures have been tried and failed or why they

reasonably appear unlikely to succeed if tried or to be too dangerous.” [18 U.S.C. § 2518\(1\)\(c\) \(2012\)](#). This is commonly referred to as the necessity requirement of Title III. In light of this requirement, wiretapping is a technique that, if available, should be used at an advanced stage of an investigation.

Prior to seeking judicial authorization for the wiretap, the government must obtain authorization from the Department’s Electronic Surveillance Unit of the Office of Enforcement Operations and, ultimately, a senior official of the Department, usually a Deputy Assistant Attorney General.

An important consideration at the outset of this process is the nature of the offenses under investigation. Securities fraud is commonly prosecuted under Section 10b of the Securities Exchange Act of 1934, but this statute is not a predicate offense under Title III. However, criminal conduct that constitutes securities fraud can, and often is, prosecuted under the wire fraud statute, which is a predicate offense under Title III. Notably, in [United States v. Rajaratnam, No. 09 CR 1184 RJH, 2010 WL 4867402 at *6 \(S.D.N.Y. Nov. 24, 2010\)](#), the court held that, “when the government investigates insider trading for the bona fide purpose of prosecuting wire fraud, it can thereby collect evidence of securities fraud, despite the fact that securities fraud is not a Title III predicate offense,” but it must still show “that it is investigating wire fraud in good faith.” *Id.*; see also [United States v. Gupta, No. 11 CR 907 JSR, 2012 WL 1066804 \(S.D.N.Y. Mar. 27, 2012\)](#) (denying motion to suppress same wiretap evidence at issue in *Rajaratnam* and adopting the *Rajaratnam* court’s holding that the subject wiretaps had the “bona fide purpose of investigating wire fraud”). Accordingly, in the absence of contrary authority in a particular jurisdiction, prosecutors likely can investigate securities fraud offenses using Title III wiretaps, so long as the government is conducting a good faith investigation of wire fraud.

Once law enforcement obtains approval to engage in electronic surveillance, there are numerous important issues to consider, including: continued use of other investigative techniques during the wiretap based upon evidence collected through the interceptions, effectively organizing the intercepted communications and any law enforcement-generated summaries or line sheets of those communications, and implementing a comprehensive minimization strategy.

“Minimization” refers to Title III’s requirement that law enforcement “minimize the interception of communications not subject to interception” [18 U.S.C. § 2518\(5\) \(2012\)](#). The Supreme Court has articulated a broad “objective reasonableness standard” based upon the facts and circumstances of each case to determine whether law enforcement agents have complied with the minimization standards. [Scott v. United States, 436 U.S. 128, 136-40 \(1978\)](#).

This can be a challenging area in investigations involving securities fraud or other white collar offenses because the content of communications between individuals involved in the suspected unlawful conduct could appear benign at first (e.g., communications about securities transactions), but viewed in the context of other communications or evidence, may actually be pertinent to the investigation. Additionally, law enforcement agents monitoring the intercepted communications must be mindful of privilege issues and should at the outset of the wiretap take note of any attorneys known to represent the subjects of the investigation so that communications with those attorneys can be minimized. For these and other reasons, it is important to familiarize the monitoring agents with the specific facts and circumstances of the investigation. Additionally, it is important for prosecutors to maintain an ongoing dialogue with the monitors and other agents involved in the investigation in order to provide minimization guidance throughout the course of the wiretap.

Wiretaps continue to be used in a variety of cases. According to an annual report to Congress providing wiretap statistics for 2014, a total of 3,554 wiretaps were authorized that year, with 1,279 authorized by federal judges. [UNITED STATES COURTS, WIRETAP REPORT 2014 \(2014\)](#). While drug offenses continue to be the most prevalent type of criminal offense investigated using wiretaps, conspiracy, money laundering, and other major offenses outside of the narcotics category were also the subject of wiretap investigations. Federal prosecutors and investigators should continue to carefully

consider using Title III wiretaps to develop evidence in securities fraud and other white collar investigations.

III. Cooperating witnesses and confidential informants

Another effective covert investigative technique that is being used more commonly in securities fraud investigations is collecting evidence through cooperating witnesses or confidential informants. Consensually recorded telephone calls and meetings can generate recordings of the subjects and targets of an investigation discussing criminal activity. This can be a particularly useful source of evidence in cases involving manipulative trading and other complex securities transactions. Without such recordings or other direct evidence of criminal intent, it often is difficult to establish that the target was engaged in a criminal act rather than a legitimate trading strategy, or simply an innocent mistake.

For example, “layering” and “spoofing” schemes involve placing and then canceling large volumes of orders for securities for the purpose of artificially moving the price of the security. These schemes can be carried out using trading algorithms or through live trading by a person using special trading software. But regardless of whether a person programs an algorithm to layer or spoof securities transactions, or manually does it himself, the core issue remains the same—what was the trader’s intent? Simply placing orders and later canceling them is not a securities violation unless the trader acts with scienter. Given the various interpretations that can apply to these and other sophisticated trading strategies, developing evidence through covert investigative techniques, such as cooperating witnesses or confidential informants, can make an enormous difference.

The U.S. Attorney’s Office for the District of New Jersey brought the Department’s first criminal securities fraud case for a layering scheme against Aleksandr Milrud. [Criminal Complaint, *United States v. Aleksandr Milrud* \(D.N.J. Jan. 12, 2015\) \(Mag. No. 15-7001\)](#). Milrud managed a group of traders located in Korea, who engaged in layering, and provided them with access to the securities markets through broker-dealers located in the United States. During the investigation, the government obtained key evidence through recorded calls and meetings between Milrud and a cooperating individual. In these recordings, Milrud made numerous admissions, and he acknowledged that the principal purpose of his traders’ strategies was to manipulate the market for the securities in which they traded. He also discussed steps he took to avoid detection and to transfer the illicit proceeds of the scheme. In one meeting, the cooperating individual was equipped with an FBI laptop that was set up to record all activity on it, and Milrud used the computer to log into his trading platform to show the cooperating individual his co-conspirators’ manipulative layering trades in real time. *Id.* at 5-8. Milrud pled guilty on September 10, 2015.

Consensual recordings provided key evidence in several other significant securities fraud prosecutions in recent years. In [United States v. Kluger, 722 F.3d 549 \(3d Cir. July 9, 2013\)](#), one of the longest running insider trading schemes ever prosecuted, the defendant, an attorney at various prominent corporate law firms, stole material non-public information from the firms concerning their public company clients. He then passed the information to a third party who, in turn, passed it to a trader to buy or sell securities based upon the information. The group then shared the illegal profits. The defendant pled guilty and was sentenced to prison for 12 years, the longest sentence to date in a federal insider trading prosecution.

During the investigation, one of the co-conspirators began cooperating with law enforcement and engaged in recorded communications with the defendant in which the defendant made numerous admissions. *Id.* See also, [Criminal Complaint, *United States v. Kluger* \(D.N.J. Apr. 5, 2011\) \(Mag. No. 11-3536\)](#). These admissions included the defendant discussing whether the government had sufficient evidence to convict him for insider trading, steps that could be taken to destroy evidence, and acknowledging that he was the source of the inside information. In one recorded conversation with the

cooperator, the defendant stated: “But the question is, is that enough for them to go to a jury to get beyond a reasonable doubt with and I don’t think so. I think without phone calls, they’re not going to get anywhere.” Later in the call, the cooperator stated that he had purchased a “throwaway phone,” prompting the defendant to warn the cooperator to put the phone in an “offsite location” because law enforcement had “dogs that can sniff, that can sniff for cell phones.” *Id.* at 14-15. Notably, in affirming the conviction and sentence in the *Kluger* case, the Court of Appeals for the Third Circuit commented on the significance of the recorded communications between the cooperator and another co-conspirator, Garrett Baurer, and stated:

The incriminating conversations not only implicated the parties based on their past conduct but also revealed their plans to obstruct justice by destroying key evidence, such as cell phones and computers, and by agreeing not to cooperate with the government. A bizarre example of their attempts to obstruct justice was Bauer’s proposal that [the cooperator] burn \$175,000 in cash obtained in the latest ATM withdrawals to eliminate Bauer’s fingerprints, or, alternatively, to run the cash through a washing machine, a suggestion that gives a new and literal meaning to the term “money laundering.”

Kluger, 722 F.3d at 555.

Likewise in another case, six defendants were charged with securities fraud offenses in connection with a lucrative insider trading scheme that traded on illegal stock tips from corporate insiders at several pharmaceutical companies. *Criminal Complaint, United States v. Lazorchak*, (D.N.J. Nov. 19, 2012) (Mag. No. 12-6755). The investigation included a cooperating witness engaging in recorded communications with some of the defendants. For example, in a recorded call described in the criminal complaint filed in the United States District Court, defendant Lawrence Grum discussed with the cooperating witness the insider trading scheme and claimed that law enforcement would not be able to “link everybody up” to the scheme because the co-conspirators were careful. Grum claimed that there was no “direct connection” between him and one of the corporate insiders, and then stated, “At the end of the day, the SEC’s got to pick their battles because they have a limited number of people and huge numbers of investors to go after. . . . When you look at it that way, I don’t know . . . either way, we’re prepared for the worst. We are prepared for the worst.” *Id.* at 25-26. All six defendants charged in that case pled guilty.

It is important to consider the timing of approaching targets that have the potential to cooperate proactively in an investigation, particularly in cases involving multiple subjects and targets. Generally speaking, these approaches should take place covertly and as early in the investigation as possible, keeping in mind the implications that could arise if an approach is unsuccessful. At the very least, conducting selective approaches when the investigation is ready to transition to an overt phase could provide a final opportunity to develop a cooperating witness.

IV. Undercover operations

Another covert investigative technique that can be highly effective in securities fraud investigations is the use of undercover law enforcement agents and operations. Such tactics have been used to successfully investigate and prosecute market manipulation and pump-and-dump schemes. In a case, the government established an undercover operation in connection with an investigation of pump-and-dump securities fraud schemes. Information, *United States v. Gottbetter* (D.N.J. Sept. 3, 2014) (Crim. No. 14-467 (JLL)). During the investigation, a cooperating individual purporting to be a stock promoter had a consensually recorded meeting with the defendant, a securities lawyer in New York City, in which the cooperating individual showed the defendant a law enforcement-created promotional mailer that contained several false and misleading statements about a company that the defendant planned to fraudulently promote. The defendant made various admissions during the meeting, including saying that he “never saw” the mailer, when asked by the cooperator if he wanted to keep a copy of it. *Id.* at 8.

Similar evidence developed in the undercover operation led to the convictions of two of Gottbetter's co-conspirators. See Information, *United States v. Kenneth David Stevenson* (D.N.J. Dec. 9, 2013) (Crim. No. 13-777 (JLL)); Criminal Complaint, *United States v. Mitchell Adam* (D.N.J. May 15, 2015) (Crim. No. 15-349 (JLL)).

Likewise, in another case, the government charged five individuals with conspiracy to commit securities fraud in connection with a scheme to manipulate the securities of a publicly traded company. Criminal Complaint, *United States v. Andrew Affa* (D. Mass. Feb. 5, 2016) (Mag. No. 14-01051 (RBC)). Unbeknownst to the defendants, the FBI had taken over the target company, which at the time was a shell company with no operations and no market interest. The FBI controlled it during the time the defendants were attempting to manipulate its stock, and used the shell company to collect evidence of the defendants' illegal conduct. All five defendants pled guilty. Vince Lisi, the Special Agent in Charge of the FBI's Boston Division, made the following statement in a public announcement of the charges in that case:

Fund representatives, CEOs, traders, fund managers, equities analysts, lawyers and publicists should take note that Boston FBI agents purposefully designed multiple undercover operations aimed directly at rooting out market manipulation and insider trading. As the scope and design of our undercover operations become well-known, no one should think that future undercover operations will be the same as prior ones because in this instance the FBI took control of a publicly traded company making it nearly impossible to discover.

Press Release, U.S. Sec. and Exch. Comm'n, SEC, Mass. U.S. Attorney and FBI Charge Five with Attempted Manipulation of Microcap Co. (July 11, 2014) , <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370542281500>.

These cases highlight the creative undercover techniques that can be employed to successfully investigate and prosecute securities fraud schemes.

V. Assistance at sentencing

In addition to securing invaluable evidence to assist in convicting a defendant in a securities fraud prosecution, evidence obtained from the above investigative actions can provide substantial assistance at the sentencing phase. Indeed, having audio or video recordings of the defendant or their co-conspirators discussing the scheme, its scope and profitability, and those potentially impacted by it, can assist prosecutors in establishing at sentencing certain enhancements under the United States Sentencing Guidelines. Specifically, this evidence can assist in demonstrating the actual or intended loss in cases involving difficult loss calculation issues and numerous victims, such as pump-and-dump or other market manipulation schemes. It can also help establish the sophistication of the scheme, whether the defendant occupied an enhanced role, and other important sentencing considerations. More fundamentally, this evidence can powerfully demonstrate to the court the nature and severity of the offense conduct in order to properly balance it against the host of other information about the defendant that courts routinely receive in sentencing hearings in white-collar cases.

Lastly, evidence developed from covert investigative techniques can significantly assist in obtaining and satisfying forfeiture judgments and restitution awards. For example in a case involving wiretaps or other covert recordings in which the defendant is recorded discussing the movement of scheme proceeds, victim money, or other assets, this evidence can be invaluable in determining the amount of forfeiture to seek, identifying assets to seize, and in recovering funds for victims entitled to restitution.

VI. Conclusion

Individuals engaged in securities fraud continue to find new and advanced ways to abuse the securities markets and defraud their participants. These schemes have become more sophisticated and elaborate as technology advances. They often involve computer algorithms, network intrusions, and various methods to hide illegal profits, including using shell companies and offshore bank and brokerage accounts. Yet, traditional covert investigative techniques historically reserved for organized crime or narcotics investigations can allow prosecutors and investigators to stay one-step ahead of these crimes and to hold accountable the individuals who commit them.

ABOUT THE AUTHOR

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Maximizing Asset Recovery With a Team Approach

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I. Introduction

This article covers two topics: (1) the value of involving the Financial Litigation Unit (FLU) early in the case to restrain assets for crime victims, and (2) employing creative strategies to disgorge profits from unjustly enriched parties to a Ponzi scheme. Through teamwork and early involvement of the Financial Litigation Unit and asset forfeiture components of the office, nearly \$380,000 was preserved pre-judgment for the crime victims in the *Hahn* case. Without this cooperative approach, the victims' recovery would have been significantly lower.

II. Factual background

In late 2014, FBI and IRS agents in Tyler, Texas, were tipped off that Robert Hahn, a 64-year-old local insurance broker, had conducted multiple suspicious financial transactions at local banks over the past several months. Among the suspicious transactions was a day when Hahn received three checks that were made out for the same amount from the same individual. Hahn deposited the checks into three different accounts at three different banks. At the time, Hahn was a well-known and long-established insurance broker in Tyler, Texas. Hahn's agency offered individual and group health insurance, accident and cancer supplements, dental insurance, life insurance, long-term care, Medicare supplements, and worker's compensation policies.

In response to Hahn's banking activity, the U.S. Attorney's Office for the Eastern District of Texas opened a grand jury investigation. FBI and IRS agents used subpoenas to obtain records from three different local banks where Hahn had accounts. Their analysis of the banking records revealed that over the past 24 months, Hahn had taken in more than \$1.5 million in checks from individuals and businesses that appeared to be for investment purposes, not for insurance services. Several of the checks deposited into Hahn's account had notes in the memo lines, such as "Investment," "Loan," and "6 mos., 20%." Furthermore, the amounts of the checks were in round, thousand-dollar increments and were payable directly to Hahn. The agents knew that if the payments had been intended to be insurance premiums, the checks would have been made payable to the respective insurance companies rather than to Hahn directly. The bank records also showed that most of the funds from more recent investors were used to make payments to earlier investors. The agents recognized this activity as being consistent with a classic Ponzi scheme.

The bank records showed that Hahn had recently taken out two unsecured loans totaling approximately \$70,000. The records also showed that he had recently deposited a check from an advance on a credit card account and used funds from that deposit to make regular payments to multiple other

credit cards. The agents concluded that Hahn was living beyond his means and using the loans, as well as the investor income, to subsidize and maintain his personal expenses.

The agents identified several of the investors and started conducting witness interviews. The first investor they contacted told the agents that he had simply made a personal loan to Hahn. The investor advised the agents that the only documentation he had regarding the loan was a letter from Hahn, but the investor declined to produce the letter for the agents. Several other investors were similarly reluctant to talk to the agents. However, after weeks of interviews, a consistent story began to emerge. The investors reported that, dating back to as early as the late 1990s, Hahn had told them that he was raising capital for a group of doctors who wanted to expand their practice by building new clinics and buying new equipment. According to Hahn, these doctors did not want to use traditional banking methods to raise capital because the conventional loan process was too cumbersome and too invasive regarding information about their income and assets. Thus, the doctors were willing to pay higher interest rates (20 percent) for privately funded loans. Hahn suggested to several of the investors that the interest they earned on the loan would not be subject to income taxes because it could be characterized as a personal loan to a friend. Hahn gave the investors a signed letter on his insurance company letterhead that documented the principal amount invested, the interest rate, and the repayment terms. Hahn made most of the interest payments in person and in the form of cash. Hahn met the investors at various places around town and handed them a bank envelope full of cash. While several early investors reported that Hahn had made all the agreed upon interest payments, many of the later investors reported that they had received only minimal repayments despite several loan due dates lapsing.

Hahn's bank records showed no evidence that he had ever remitted funds to or received funds from any doctors' group. The bank records also revealed that when Hahn received a check from an investor, he used the funds to pay interest or repay principle to earlier investors. From the beginning of January 2013 through the middle of October 2014, Hahn withdrew at least \$458,097 in cash from the bank accounts where he had deposited investors' funds.

The agents searched the Texas State Securities Board (TSSB) and the Securities and Exchange Commission databases and determined that Hahn did not have a broker license. The agents also searched the Texas Department of Insurance database and determined that Hahn was only licensed to sell general lines of insurance and not any sort of annuity or investment-like products.

The agents also consulted with attorneys from the TSSB about Hahn's activities. The attorneys advised that the letters Hahn was providing to his investors would be characterized as securities that should have been registered with the board under state law.

In February 2015, armed with the bank records and witness interviews, the agents finally confronted Hahn at his office. The agents were surprised how quickly Hahn admitted to the fraud scheme. Hahn readily confessed that, despite his representations to investors, he never actually had an association with any doctors' group seeking capital to expand or improve facilities. He told the agents that he had begun the fraudulent investment scheme approximately 10 to 12 years ago.

Hahn wanted the agents to believe that he was simply naive and did not think he was doing anything wrong, so long as everyone was being repaid. He lowballed an estimate that he had recruited approximately 30 people to "invest" in his scheme and that he currently owed approximately \$300,000 to \$400,000 in outstanding principle and interest payments. At first, Hahn claimed that he did not keep any records on the scheme, but then later admitted that the records were at his home. Later, Hahn personally escorted the investigators to his home and surrendered all of the records.

Hahn confessed that he was running the scheme to raise money and pay for both his insurance business and lifestyle. He acknowledged that he knew it was wrong.

Hahn reported that the terms of the investment ranged from six months to one year and had a guaranteed return of 10 to 20 percent. If he could not pay off the "earned interest" along with a return

of the principle, he would ask the investor if they would be willing to take only the interest payment and “roll over” their principle investment into a new one. More often than not, the investor agreed.

When Hahn was unable to repay investors who wanted both their interest and their original principle, he would take out loans from banks in order to repay them. Hahn reported that he had a \$50,000 line of credit at one of the local banks that he used to pay off investors when necessary.

When asked about why he had his investors break up their investment payments into smaller amounts and give him multiple checks for the same investment, Hahn explained that he preferred to deposit smaller sums into different accounts because he thought that if he deposited large checks into the bank it would raise red flags.

On November 19, 2015, Hahn appeared before a U.S. Magistrate and pled guilty to a two-count information charging him with wire fraud and money laundering. At that hearing, Hahn admitted that he started the fraud scheme before January 2007, and he continued it until he was confronted by FBI and IRS agents on February 4, 2015. Hahn admitted that he falsely presented himself to approximately 100 different individuals as a representative of a group of doctors in Tyler, Texas, who were raising capital for debt retirement; construction of, or improvements to, health care facilities; and medical equipment purchases. Hahn admitted that, in truth and in fact, there never was such a group of doctors, and he simply made up this story to obtain and maintain funds for his personal use.

As a result of the scheme, Hahn collected approximately \$5,479,600 from approximately 94 individuals. In furtherance of the scheme, during the relevant time period, Hahn returned or distributed approximately \$4,072,470 in proceeds from the fraud scheme to some of the individuals, in the form of returned “principle” and “interest” or “earnings.” Thirty-one of these individuals enjoyed a combined total net gain of \$1,407,130, while 66 of them suffered a combined total net loss of \$1,757,280.

Hahn cooperated fully with investigators from the onset of the investigation and voluntarily surrendered all of his accounting records pertaining to the scheme. As part of his plea agreement with the government, Hahn agreed to surrender the net proceeds from the sale of his home (\$114,246.21) and the sale of his insurance business (\$100,000) to the court for restitution to his victims. In addition, since the investigation began in February, Hahn deposited 20 percent of his monthly gross income into an account designated for victim restitution. At the time of sentencing, the balance in that account had reached approximately \$16,000. Hahn also agreed to assign the proceeds from the sale of 80,500 shares of stock in a privately owned corporation to the court for distribution to the victims. However, at this point in time there is no commercial market for those shares.

Hahn’s sentencing guidelines, adjusted for acceptance of responsibility, called for a sentencing range of 46 to 57 months. (Hahn had faced a possible maximum sentence of 20-years’ incarceration, plus a fine of \$250,000). In consideration of Hahn’s exceptional cooperation, the government agreed to a Rule 11(c)(1)(C) plea agreement for a sentencing range of 30 to 36 months. At the sentencing hearing on April 19, 2016, the court sentenced Hahn to 36 months, to be followed by three years of supervised release. The court further ordered Hahn to pay restitution in the amount of \$1,757,280. The court ordered Hahn to self-surrender to the Bureau of Prisons Unit in Seagoville, Texas, on June 24, 2016, to begin his sentence.

The government initiated collection proceedings against the fraud scheme proceeds paid to those investors who profited from their “investments” with Hahn. At the time of sentencing, those proceedings had generated approximately \$146,000 that will be deposited into an account designated for victim restitution.

III. Few remedies allow restraint of assets pre-judgment

All employees of the Department of Justice owe a duty to maximize victims’ restitution recovery. [18 U.S.C. § 3771\(a\)\(6\) \(2012\)](#). Unfortunately, other than asset forfeiture, prosecutors have very few

procedures available to them to seize and freeze a defendant's assets to preserve them for restitution. Throughout the course of any given prosecution, defendants may actively and purposely liquidate their assets to make themselves insolvent. Also, defendants may lose their assets involuntarily through foreclosure or repossession. In either case, previously wealthy defendants can leave a sentencing hearing completely destitute—and the victims suffer the consequences.

The entire statutory scheme governing collection and enforcement of restitution is premised on the existence of a judgment to be enforced. *See, e.g.*, 18 U.S.C. §§ 3613(a),(f) (2012) ; 18 U.S.C. § 3664(m)(1)(A)(ii) (2012) (Mandatory Victim Restitution Act of 1996 provides that the United States shall enforce restitution by “all available and reasonable means.”). Because the statutory restitution enforcement scheme is premised on there being a judgment, the FLU is at a disadvantage when it comes to taking action to freeze a defendant's assets. Despite efforts by the Department to cure this problem legislatively, the government does not currently have the procedural tools necessary to restrain or freeze a defendant's untainted assets.

Another complicating factor is that the restitution-related aspects of a prosecution usually do not receive the same attention from the prosecutor, the defense attorneys, and the court as the jail time and application of the Sentencing Guidelines. Few defense attorneys realize the lifelong impact that enforcement of a restitution judgment will have on their clients: the restitution judgments can be enforced 20 years after the end of incarceration. Few defendants realize that their obligation of candor to the government and to the court, their duty to not conduct further criminal activity, and their duty to cooperate with the prosecution necessarily entails identifying and preserving their finances and their assets.

On rare occasions, the government has been able to employ the All Writs Act to have courts issue orders to preserve assets for restitution. *See United States v. New York Tel. Co.*, 434 U.S. 159, 174 (1977). This has included orders to restrain or preserve assets to help maximize the amount of mandatory restitution actually recovered. *See, e.g.*, *United States v. Simmons*, 2008 WL 336824, *1 (E.D. Wis. Feb. 5, 2008); *United States v. Abdelhadi*, 327 F.Supp.2d 587, 599-600 (E.D. Va. 2004); *United States v. Numisgroup Intl. Corp.*, 169 F.Supp.2d 133, 137-38 (E.D.N.Y. 2001); *United States v. Ross*, 1993 WL 427415, *1 (S.D.N.Y. Oct. 15, 1993); *United States v. Gates*, 777 F.Supp. 1294, 1295 (E.D. Va.1991). Although the All Writs Act has been used to preserve assets prior to a finding or admission of guilt, see *United States v. Nassar*, 1994 WL 16057055 (N.D. Ga. Oct. 14, 1994), such relief should likely be sought only in the most extreme circumstances.

Moreover, given the Supreme Court's recent decision in *Luis v. United States*, 136 S. Ct. 1083 (2016), prosecutors should take caution when considering any sort of pre-judgment restraint of nonforfeitable assets, even for purposes of maximizing restitution recovery. In *Luis*, the Court found that pretrial restraint of legitimate, untainted assets through a prejudgment injunction under 18 U.S.C. § 1345 (2012) violated a criminal defendant's Sixth Amendment right to counsel of choice. *Id.* at 1096. Although *Luis* dealt specifically with the pretrial restraint of untainted assets under 18 U.S.C. § 1345 (2012), the rationale underlying the Court's decision would prohibit seizure of untainted, “innocent” funds if there is a question as to whether the defendant needs those funds to pay for counsel of his or her choice.

In light of these limitations on pre-judgment restraint of untainted assets, it is imperative for prosecutors to involve their office's FLU early in the case, to identify assets for restitution, and to develop a strategy to preserve those assets for restitution.

IV. Early FLU involvement results in an asset preservation agreement

When the IRS scheduled its first meeting with the prosecutor to discuss the case, the prosecutor invited the FLU to participate in the discussion. The IRS and FBI ran an initial asset investigation into Hahn's assets while developing their case strategy and evaluating the possibility of forfeiting any traceable assets. Unfortunately, as is the case with many Ponzi-type cases, Hahn's scheme came to light when he ran out of assets and resorted to taking personal loans to keep the scheme going.

For a variety of reasons, none of Hahn's assets could be seized pre-judgment through traditional asset forfeiture tools. Hahn ran a legitimate insurance agency for nearly 40 years and had a sizeable book of business that included local businesses and school districts. Although Hahn blurred the lines between his insurance agency and his Ponzi activities—from banking to finding investors through his existing clientele—he had little cash on hand when authorities confronted him about the scheme. Hahn's only actual assets were his insurance agency, personal vehicles, and his home. None of those assets were viable targets for asset forfeiture.

Once Hahn was confronted by the prosecutors, he admitted to his role in the scheme. He completed a financial statement from the FLU. Following a review of Hahn's financial

circumstances that compared his monthly expenses with his income, it became clear that Hahn would soon lose everything of value if immediate steps were not taken to preserve his assets. Without artificially buttressing his income with funds from the Ponzi scheme, Hahn would be unable to afford his mortgage, even with the income from his modestly profitable insurance business. Because of the jail time associated with Hahn's criminal conduct, Hahn was going to lose his insurance agency and the associated book of business. Once the news of his prosecution became public, his insurance agency would be worth far less to any prospective buyers.

The FLU explained to Hahn's lawyers that Hahn needed to provide information about the entirety of his assets, including his wife's assets. Because Texas is a community property state, the government would be able to enforce the restitution judgment against Hahn's assets, as well as his wife's. Once Hahn's lawyers learned that the community estate would be subject to post-judgment enforcement, they realized that it was in Hahn's best interest to work with the government and to not contest the government's efforts to preserve his assets for restitution.

To prevent the victims from losing out, the FLU drafted an agreement to preserve Hahn's assets for restitution. In the asset-preservation agreement, Hahn agreed to the following:

- Sale of his business, with the blessing of the United States Attorney's Office (USAO), with 100 percent of the sales proceeds going to the clerk;
- Sale of his home, with the blessing of the USAO, and 100 percent of the sales proceeds going to the clerk; and
- Voluntary wage deduction of 25 percent of Hahn's business proceeds.

Hahn signed the agreement in April 2015, despite the fact that he had not yet been indicted. He complied with the strictures of the agreement and conferred with the prosecution team before closing any sale of assets. By the time that Hahn was sentenced in April 2016, he had voluntarily paid over \$230,000 to the clerk for application to his restitution judgment.

Getting Hahn to agree to this asset preservation achieved several goals. First, the government was able to maximize the recovery of the assets sold by not having to involve a receiver. Even a court-appointed receiver is not free, and getting one appointed in this case would have lessened the amount of

money to be preserved for the crime victims. Next, by avoiding court intervention to preserve assets, the government was able to keep the facts of the case relatively private and thereby maximize the profit for the sale of Hahn's business. Additionally, the agreement gave Hahn—a defendant with little to no leverage—a workable argument to present to the court showing his actual contrition. This helped the court with sentencing, and it resulted in Hahn receiving a shorter sentence than the Sentencing Guidelines proscribed. Finally, the agreement provided a tangible result to all of the victims of Hahn's investment scheme and showed the community that the USAO takes restitution seriously.

V. Profiting investors are disgorged of their profits

After the agents compiled a list of victims and their losses, it became clear that about 30 of the 90 investors had actually profited from their role in Hahn's investment scheme. The profits consisted of returns higher than their initial investment, consisting of principal, interest, or both. Most of these profiting investors had been involved in the earlier stages of the scheme and had been reliable sources of additional funds for Hahn whenever he began to run low on cash for the scheme. Other investors had a history of investments and full repayments from Hahn, and they were now in their second or third series of investments with him. And yet other profiting investors appeared to get preferential treatment from Hahn based on their role in the community.

Hahn typically returned principal to these investors in the form of a check, drawn on his personal account, while he paid interest earnings in cash. The investors did not report their earnings from this scheme to the IRS. When the investors learned of the scheme, some of the profiting investors claimed that they were victims because Hahn had only paid them back interest, and that he still owed them the entirety of the principal. Some of them had received back more than twice the amount of their initial investment, but still claimed that Hahn owed them more.

In order to disgorge the profits from these investors, the prosecutor, the FLU, and the forfeiture team strategized how to proceed. Aside from the major issues presented with tracing funds for forfeiture and the timing issues presented by the breadth and history of the scheme, employment of forfeiture tools to disgorge the funds from the profiting investors was decidedly problematic. None of the profiteers were considered to be appropriate targets for prosecution, and none of them appeared to know that Hahn's "investment scheme" was actually illegal. As such, seizing the profiteers' funds through criminal forfeiture was a non-starter. Civil forfeiture was likewise going to present a problem because it was unknown where the profits actually were or where the profiteers banked. And appointing a receiver to force the profiting investors to disgorge their ill-gotten gains would have raised the very concerns regarding costs and keeping the case low-profile that were avoided by having Hahn sign the asset preservation agreement.

In order to recoup assets from the profiting investors, the prosecutor sent a demand letter to all of them requesting that they voluntarily return their profits to the FBI. The prosecutor explained that all proceeds from a criminal fraud scheme involving wire fraud and money laundering violations are subject to both civil and criminal seizure and forfeiture pursuant to [18 U.S.C. §§ 981\(a\)\(1\)\(A\) & \(C\) \(2012\)](#), [982\(a\)\(1\) & \(2\) \(2012\)](#), and [984 \(2012\)](#), even if the proceeds were transferred to innocent parties. The profiteers were informed that the majority of Hahn's investors had lost money. The government asserted an informal forfeiture claim against the profiteers' funds in excess of the amounts originally invested with him. The demand letter threatened criminal and/or civil legal process against those funds if they were not returned within 30 days.

The demand letter got the profiting investors' attention, and they began paying in. Some made lump-sum payments. Others set up payment plans. The FBI worked with the United States Marshals Service to set up a dummy forfeiture account for these funds to be processed and held. The prosecutor identified the forfeited assets in the plea agreement, and these returned profits were included in the final

order of forfeiture when Hahn was sentenced. By the time that Hahn was sentenced in April 2016, the profiting investors had returned nearly \$147,000 of ill-gotten gains.

VI. Conclusion

In sum, the *Hahn* prosecution in the Eastern District of Texas was a perfect example of coordinating the FLU, asset forfeiture, and prosecution elements of the USAO team to produce a great result for crime victims. The state of the law does not make restitution recovery easy, and it makes prejudgment enforcement nearly impossible if forfeiture is not available to preserve assets. But creative remedies are available and can provide a work-around as long as the prosecutor and agents get the restitution-focused elements of their offices involved early in the process.

ABOUT THE AUTHORS

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Holding Corporate Leadership Accountable for Worker Safety Crimes

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I. Introduction

In September 2015, Deputy Attorney General Sally Quillian Yates sent out a memo emphasizing the importance of holding individuals accountable for corporate misconduct. She directed attorneys in the Department of Justice to tailor investigations of corporation-wide crimes to the identification and prosecution of responsible executives. This article discusses the background and a few of the issues from the prosecution and trial of Don Blankenship, a coal company executive responsible for widespread safety violations in his coal mines. The investigation and resulting prosecution held the company's highest level decision-maker accountable for misconduct that filtered down the management chain.

On March 10, 2015, a grand jury in the Southern District of West Virginia returned a superseding indictment charging Don Blankenship with conspiracy to willfully violate coal mine safety regulations in violation of [18 U.S.C. § 371 \(2012\)](#), and [30 U.S.C. § 820\(d\) \(2012\)](#), making false statements in a Securities and Exchange Commission (SEC) filing, and making material misstatements and omissions to investors. For 10 years, Blankenship was the Chairman and CEO of Massey Energy Company, one of the largest and most competitive coal companies in the country. He retired in 2010, following a mine explosion at the Upper Big Branch Mine that killed 29 coal miners, the deadliest mining disaster in the United States in 40 years. Following the explosion, an investigation into the practices at Massey revealed that the company not only had one of the worst safety records of any coal company in the country, but also that the company was plainly defiant when it came to mandatory safety regulations. The insubordination and recklessness spanned every management level at Massey. It reflected a strategy of outperforming competitors at the expense of following mine safety procedures, which would have diverted time and money from coal production.

The culture of non-compliance at Massey traced back to the corporate governance of Blankenship himself. The success of Massey depended on keeping production costs minimal, which included limiting resources for all non-production needs. Blankenship's management decisions prohibited Massey's operations from spending the time or money necessary to comply with the safety regulations that apply to every coal mine through the Mine Safety and Health Administration. The general understanding at Massey was that the fines for regulatory non-compliance were less costly than following the law.

Blankenship made it clear to his subordinates that this was Massey's way of doing business. His policies and directives echoed down the corporate chain to the very coal miners whose lives the regulations were designed to protect. The miners underground were required by supervisors to skip the steps in the coal production sequence designed to ensure that the roof would not fall or loose coal would not pile up and create a combustible hazard. Their demanding production quotas required them to leave doors and curtains open underground for quicker passage, which short-circuited ventilation. They were denied the time and equipment necessary to coat their working areas in rock dust, a substance which renders coal dust resistant to combustion. These miners were following orders and complying with the

company-wide practices, and they knew that if they did not take these shortcuts, Massey would find others who would.

Following a six-week jury trial and nearly three weeks of jury deliberation, Blankenship was found guilty of conspiracy to willfully violate mine safety or health regulations and acquitted on the other two charges. The substantive offense—willful violation by an operator of a coal mine—is only a misdemeanor. However, the significance of a CEO being held responsible for safety crimes committed to advance his corporate objectives is considerable. Blankenship was sentenced to the maximum sentence of one year in prison and a \$250,000 fine. On May 12, 2016, he reported to federal custody to serve his sentence.

II. Charging and proving a conspiracy

Charging Blankenship with conspiracy accurately characterized the nature and the pervasiveness of the crimes at Massey. As a whole, the thousands of repeated violations were evidence of an enterprise-wide conspiracy led by Blankenship. A CEO who endorses and fosters a company culture of violating whatever laws necessary to achieve financial results should be held more, not less, culpable than the rank and file miner who fails to dispose of loose coal or hang a curtain in order to fulfill a production quota in a single shift.

Typically, there will not be evidence of corporate leadership failing to take required safety precautions inside a coal mine. The conspiracy charge in this case encompassed the ground-level violators as well as the higher-compensated supervisors, managers, and executives who participated in the violations from above by enforcing the policies and constraints that made the violations inevitable. The overwhelming evidence of a mass conspiracy to violate safety regulations allowed the prosecution to focus on the individual with the most control over the conspiracy and the most decision-making power in the company.

The theory of conspiracy in a mine safety setting required cooperation from the rank and file miners, as well as all levels of management. The evidence at trial included testimony from underground workers that the safety violations were more than discrete incidents of poor judgment or laziness; they were the way of doing business at Massey. This “way of doing business” had to be connected, level by level, to the top. Some of these employees were co-conspirators testifying against their interest, as they were close in proximity to the safety violations. This presented the challenge of balancing the usefulness of co-conspirator testimony with the prejudice that an immunity agreement or prior convictions for willful violations can evoke with the jury.

Another challenge with charging this case as a conspiracy was overcoming the non-legal, but conventional, understanding of what a conspiracy is. In a corporation where employees at every level operate with the same understanding of how business is to be done, employees adapted to the conspiracy through the orders they were given, through watching others, and through the threats they received if they failed to adhere to corporate customs. It was essential to ensure the jury knew that a conspiracy can be a tacit understanding instead of an explicit agreement. This principle was emphasized throughout the trial and repeated in the jury instructions.

Even with a corporation-wide understanding to violate safety regulations, the United States had to present evidence of Blankenship’s direct involvement in the conspiracy. As the CEO, he assumed exceptional control over minute details of Massey’s operations. He approved all hiring decisions and expenditures and received coal production reports every 30 minutes, 24 hours a day. He was also regularly updated on the number and type of violations his mines received and the fines each violation generated. He routinely secretly recorded his own telephone calls and communicated through dictated memoranda. These recordings and memos were admissible at trial and revealed instances of him stressing

production over safety measures, questioning manpower that was devoted to safety compliance, and refusing to approve funding for equipment or extra miners that would have made compliance possible.

The conspiracy charge and cooperation of employees were central to convicting a CEO of worker safety violations, but Blankenship's ubiquitous control over Massey's operations was unique to his method of leadership and rare for someone at the executive level. Still, if a company engages in a widespread culture of lawlessness and employees are willing to testify about it, evidence that a corporate executive has created and enforced that culture may very well exist in communications between that executive and his immediate subordinates. It is important to know the scope of that executive's management, i.e., the decisions that require his direct approval, the facets of corporate control that are delegated to other managers, and how much oversight the board of directors provides. Understanding the executive's duties—both the official duties specified by the board and the duties that have been adopted by custom—will help locate evidence of his affirmative actions that caused criminal activity or prevented compliance with the law.

III. Logistics

Prosecuting Blankenship for conspiracy to violate safety regulations presented logistical challenges. First, the investigation generated a high volume of evidence. The records sought from Massey went back over a decade and ranged from emails between all levels of management, detailed company financial and production information, minutes from every board and committee meeting, and documents relating to investor disclosures. Several million documents and many hours of recordings were turned over in discovery. Managing and organizing this amount of evidence efficiently was crucial to establishing the elements of the charged crimes and preparing for the defense, but in the end, Blankenship elected not to put on a defense. The Litigation Technology Service Center's Relativity system was able to keep track of the documents and allowed for searches based on specific witnesses, time frames, and key words. More nuanced searches permitted sorting the documents based on who produced them or when they were produced. These records could then be organized into folders for each witness or offense element.

Maintaining a detailed timeline of all the significant evidence was also critical for document management and trial preparation. A timeline that shows who knew what and when is particularly useful in prosecutions involving an intent element. In this case, knowledge of and participation in the conspiracy compounded over several years. The timeline kept track of evidence that when Blankenship received compelling information that Massey's mines were not operating safely, he had already been informed that Massey's safety initiatives were ineffective, and he had already refused funding for new hires and equipment that would have made safety compliance more attainable.

Second, prosecuting a CEO who is wealthy in his own right, and whose defense is covered by a generous indemnification policy, meant competing against a major defense firm with unlimited resources. Blankenship's personal wealth included tens of millions of dollars in his yearly compensation packages, as well as a \$29 million payout that he negotiated upon his retirement. Prior to trial, Blankenship, through his counsel, filed nearly 40 pretrial motions, including a variety of motions to dismiss the indictment and superseding indictment. Most of these were reaching and indicative of a strategy to get the United States to commit on paper to various statements in hopes that later statements would conflict. Responding to these motions consistently and within the deadlines required a careful division of labor among the trial team. As a result, frequent collaboration was required in order to ensure that the theory of the case remained intact.

During the motions in limine stage and trial, the battery of motions continued with new and renewed motions on evidentiary issues. During trial, briefing the more complicated issues was an effective way to outline the United States' position for the court and identify the strongest arguments. This often meant a day of trial followed by a night of writing, but providing the court and the defense

with a concise brief the following morning aided in focusing the arguments and resolving mid-trial disputes.

IV. Conclusion

The challenges in prosecuting a blank-check corporate defendant are not unexpected, nor are they insurmountable. In the case of an enterprise-wide conspiracy to violate regulations and put workers' lives in danger, targeting the highest-level offender with the most control is necessary, and it is Department policy. Holding corporate executives accountable for doing business in a way that advances criminal activity at all levels of management is the only deterrent in a world where the benefits to CEOs are so lucrative. The punitive cost of putting workers' safety at risk must outweigh the financial gains.

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Prosecuting Home-Health Cases

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I. Introduction

In health care fraud cases, especially home-health cases, there may not be a “smoking gun” in the form of an email or a memo in which a doctor or nurse admits the fraud. But prosecutors and agents can effectively build the equivalent of a smoking gun by analyzing data and patient files and aggregating them into something that will clearly show the fraud.

The key thing to remember in health care fraud cases is that the perpetrators of the fraud can design the fraud to succeed on a claim-specific basis, meaning they make each particular claim appear legitimate enough to survive a random audit. But when individual claims are aggregated, the overall fraud often becomes easy to prove and sometimes even ridiculous on its face. For example, when a physician falsely certifies a patient for home-health services one time, it might be difficult to prove that particular certification was improper. The doctor can claim that the certification was based on his medical judgment or that the patient may have a poor memory of her condition that day. Consequently, it may be difficult to prove that the certification was not a mistake or a mere difference in medical judgment.

When multiple certifications and claims are examined over time, however, a pattern of fraud can emerge. Fraud becomes evident when a doctor certifies a patient for home-health services, discharges the patient from such services, and then re-admits the patient for the same services a few weeks later, and continues doing this for years. Fraud also becomes evident when a nurse claims that a patient cannot dress herself at the time of admission, can dress herself at the time of discharge, and again cannot do so when re-admitted a few weeks later.

Looking for such patterns, and understanding how to develop them, is an important part of prosecuting health care fraud cases. It is especially important in home-health cases, which can appear complicated from a distance but can be simplified through careful planning.

II. How home-health fraud works

One of the first things to do in any health care fraud investigation is to gain an understanding of how the system should work and to contrast that with how people are abusing the system to defraud Medicare.

Home-health services, in particular, have become a focus of investigations in recent years. This is not surprising given the huge growth in Medicare spending in this area. Medicare spent \$34.7 billion on home-health services in 2014, more than four times what Medicare spent in 2000 (\$8.5 billion). [CTR. FOR MEDICARE AND MEDICAID SERV., NAT’L HEALTH EXPENDITURE DATA, Table 14 \(2014\)](#). Much of this is the result of fraud. In a 2012 report, the Department of Health and Human Services Officer of Inspector General noted that home-health was an area which is “vulnerable to fraud, waste and abuse.” [OFFICE OF INSPECTOR GENERAL, INAPPROPRIATE AND QUESTIONABLE BILLING BY MEDICARE HOME HEALTH AGENCIES \(2012\)](#).

While the average home-health payment per capita nationwide in 2015 is about \$125 per quarter, some areas are seeing much higher spending. The per capita payments were about \$200 per quarter around Chicago, about \$250 around Los Angeles, and about \$500 around Miami. HEALTH AND HUMAN

Home-health services can be properly billed by nursing agencies to Medicare when a patient is confined to the home and needs skilled nursing services. For example, when a patient is recovering from a surgery or a stroke and is unable to leave his or her home, Medicare will pay for a nurse to visit that patient and perform skilled-nursing services. Those services will continue until that person is able to leave his or her home or no longer needs the services.

Unfortunately, nursing agencies and doctors throughout the country have abused this coverage and have defrauded Medicare into paying for millions of dollars of home-health services for patients who are able to leave their home and who are receiving only routine weekly checkups at their homes. This provides little, if any, benefit to the patients at huge cost to Medicare.

This fraud has several common aspects. First, rather than getting patient referrals legitimately, some nursing agencies get patients through illegal payments that violate the Anti-Kickback Statute, [42 U.S.C. § 1320a-7b \(2012\)](#). There are several ways of doing this. One is through illegal payments to physicians for referring patients and signing orders. Some agencies do this via cash, and some do this via disguised payments, such as medical directorships. Yet another way is by paying patients to receive home-health services, a red flag that the services are not medically necessary.

Another increasingly common way of perpetrating this fraud is to pay marketers (including some telemarketing companies) to find Medicare beneficiaries for the agencies. A nursing agency is allowed to pay a marketer to do advertising on behalf of the agency (such as telling doctors and patients to consider an agency when services are ordered). Agencies can violate the Anti-Kickback Statute when they pay marketers who solicit patients and who directly refer those patients to a particular agency. The distinction between advertising and referring is what drove [United States v. Miles, 360 F.3d 472 \(5th Cir. 2004\)](#), in which the Fifth Circuit characterized a marketing agency's services as advertising, rather than referrals, because the services did not involve the marketing agency making decisions as to whether any patient should receive home-health services or which nursing agency should provide such services. Some have misinterpreted the case as limiting the Anti-Kickback Statute's reach based on who gets paid, but the Fifth Circuit rejected this interpretation in [United States v. Shoemaker, 746 F.3d 614, 626-630 \(5th Cir. 2014\)](#), and focused on what an agency actually did. See also [United States v. George, No. 12 CR 559-7, 2016 WL 1161269 \(N.D. Ill. Mar. 22, 2016\)](#) (finding a marketer who referred patients to an agency that paid her on a per-patient basis guilty after a bench trial).

Second, rather than getting a patient's primary-care physician to order home-health services based purely on a patient's need, some nursing agencies find doctors who gain a financial benefit from signing orders that claim patients are confined to the home. Obviously, physicians who are willing to accept illegal kickbacks from a nursing agency have a financial incentive in signing the orders that an agency typically will send along with hundreds or thousands of dollars of cash. Physicians often sign these orders with little or no review as to whether the orders are actually appropriate.

When a nursing agency gets a patient from a marketer, the nursing agency often needs to find a doctor who will certify the patient for home-health services. The primary-care physician is unlikely to sign the orders, as he would have already ordered services for his patient if he actually believed the patient needed them. Nursing agencies often get around the primary-care physician by referring patients to a home-visiting physician company that will have its own interest in claiming that patients are confined to the home. Both the nursing agency and the home-visiting physician company benefit by helping each other bill for services that are not medically necessary. The nursing agency gets an order in the file that makes it appear that a doctor ordered the services (rather than simply signing off on the order afterwards), and the home-visiting physician company gets more patients to bill for unnecessary home visits,

unnecessary tests, and unnecessary home-health related services, including certification and the alleged oversight of such services.

Third, rather than assessing patients' medical conditions accurately, nurses at some skilled-nursing agencies lie about patients' conditions in their nursing assessments. Nurses' lies help conceal the crime by making patients appear sick enough to qualify for what are actually unnecessary services. The lies also yield more criminal proceeds, as Medicare generally pays nursing agencies more for services provided to patients who appear to be sicker in the nursing assessment data provided to Medicare.

Fourth, rather than providing home-health services only as long as a patient needs them, some nurses and nursing agencies keep patients on home-health services for years by cycling services via fraudulent patterns. Nurses keep patients on home-health services for two or three 60-day episodes of services, then discharge the patients (at least on paper), and then quickly re-admit the patient at the same agency or a related agency. This conceals the fraud by making it appear that the nurses provided a service that improved the patient's condition when, in actuality, the patients did not need the services. Nurses sometimes try to conceal this from the patients by telling them that Medicare requires a break in services. Medicare actually has no such requirement. Rather, Medicare rules specifically state that there is no limit on home-health services if a patient continues to need them. [MEDICARE BENEFIT POLICY MANUAL, Chapter 7, § 30.5.2 \(May 11, 2015\)](#) ("Medicare does not limit the number of continuous episode recertifications for beneficiaries who continue to be eligible for the home health benefit.").

Home-health fraud can include one or more of these aspects and can yield a significant amount of criminal proceeds. After all, it does not cost much to provide nursing services to patients who do not need such services. Nursing agencies typically get more than \$2,000 for one 60-day episode of home-health services (with disbursement increasing in relation to the ill health of the patient), and the fraud can be profitable even when agencies are illegally paying hundreds of dollars for referrals.

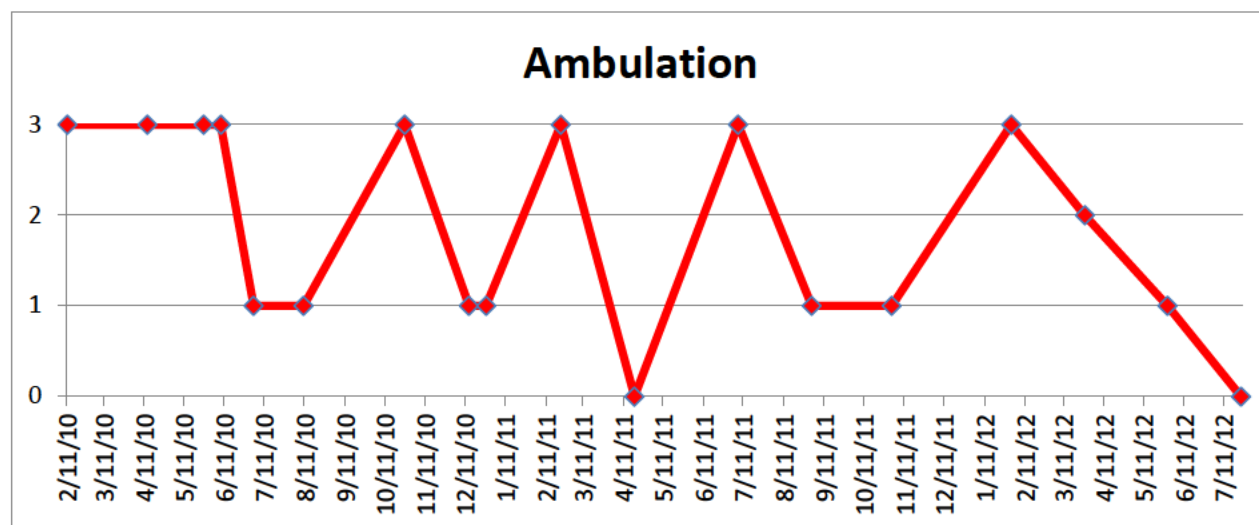
III. Using data to investigate home-health cases

Health care fraud, particularly home-health fraud, results in voluminous data that, while initially daunting, can be very valuable for investigations. There are several kinds of data available in home-health investigations. Claims data shows the number of visits allegedly made, the doctor who supposedly ordered the services, and the payment received by the agency. Prosecutors or agents can obtain claims data via their region's zone program integrity contractor or through someone who has direct access to the STARS Informant system. Assessment data shows what nurses claimed about patients' conditions, including what nurses claimed about patients' abilities to perform daily activities of living, such as dressing and bathing. This data can be obtained from the Centers for Medicare and Medicaid Services. Reviewing and analyzing both kinds of data can be very useful in showing patterns of fraud, such as re-admissions occurring soon after discharges or patterns of patients vacillating between being able and unable to dress themselves.

First of all, making a simple patient list can be a great tool for investigating home-health cases. Basic counting and summing functions in Excel can turn huge spreadsheets into a manageable list of patients who (a) have been discharged and re-admitted multiple times, (b) are certified for home-health services by physicians they have never seen, (c) are certified for home-health services by physicians while the patients are doing office visits with their actual primary-care physicians, or (d) have received home-health services for chronic conditions not generally associated with being confined to the home, such as diabetes without complications or nonessential hypertension. Such a list can be a great starting point for determining which patients should be interviewed and which doctors are involved.

Second, a closer look at the assessment data for particular patients can show patterns that are clearly false. For example, the graph below shows how a nurse regularly lied about one patient's ability to walk by herself. Each point reflects an assessment of the patient's ambulation by the nurse. Level 3

indicates that the patient was able to walk only with the supervision or assistance of another person at all times, and level 1 indicates that the patient could walk independently only with the use of a one-handed device. The patient, when interviewed, said that she never needed help walking and that she often went out to casinos during the time that the nurse and doctor were falsely claiming that she was confined to the home.



Third, while a provider engaged in fraud may be careful to make consistent claims, the provider’s data can be effectively contrasted against other sources of information, including claims submitted by patients’ actual primary-care physicians. In particular, office-visit data for patients who are supposedly confined to the home is a valuable tool that can confirm that many patients do not qualify for home-health services. If a nursing agency is billing home-health services for a patient and claiming that Doctor X has certified the patient, while Doctor Y has seen the patient for multiple office visits in the same period, then Doctor Y may be a good witness to establish that the patient did not qualify for the nursing services. Cooperating witnesses can also establish that the services they provided are not consistent with how their services were billed. For example, a nurse can explain that he conducted simple checkups with patients rather than providing skilled-nursing services, and a home-visiting physician can explain that her visits qualified for less-expensive billing codes than the ones used by her employer.

IV. Patient files and records

While much can be done with just data, patient files are almost always necessary to successfully investigate and prosecute home-health cases because they tie false statements to particular doctors and nurses. Prosecutors and agents should have a plan to obtain and analyze patient files.

Prior to an investigation going overt, prosecutors and agents may be able to covertly obtain patient files. Medicare has contractors that may have already audited a particular provider, and state agencies regularly audit nursing agencies as well. Each of these entities may already have patient files that can be reviewed and analyzed. If a company under investigation uses electronic medical records, investigators and agents should consider getting files from the electronic medical record company via subpoena or search warrant.

When an investigation is ready to go overt, prosecutors and agents should discuss what files are needed for the investigation and how they should be obtained. Typically, it is impractical to get all the patient files from a provider. First, a provider probably has not committed fraud in all cases. Second, the investigating agency probably has limited resources in storing files.

One approach to narrowing the field for patient files is to use a statistical sample to randomly select some patients or claims. This can be useful in terms of proving loss amounts, but should only be done when the prosecutors and agents have a firm grasp on how the fraud worked and have a good plan in place for completing the sample efficiently. Conducting a statistical sample can be very expensive if an expert is required, and it may take a long time. Also, a statistical sample may prove to be unnecessary if the government can prove loss by other ways, such as by using cooperators to establish a reasonable estimate of loss.

Another approach is to come up with more specific criteria that are tailored to the particular scheme or schemes being investigated. For example, agents could seize files only for patients who were the subject of kickback payments, or who had certain diagnoses that were manipulated, or who were discharged and re-admitted multiple times. Using such criteria may make for a stronger case overall.

Prosecutors and agents should also consider whether a search warrant or a subpoena would be an effective way to get the necessary patient files. Serving a subpoena (either a grand jury subpoena or an administrative subpoena under [18 U.S.C. § 3486 \(2012\)](#)) puts the burden of copying and scanning patient files onto the company, whereas in the case of a search, the burden may fall on the investigating agency. However, executing a search warrant does reduce the risk of patient files being altered, but such alterations may not be material and may yield more evidence down the road.

A targeted search warrant of nursing agencies combined with a subpoena may be the most effective way to go overt on a nursing agency that is using kickbacks and committing fraud. Agencies may well destroy kickback records easily, but they cannot destroy patient files without violating Medicare record-keeping requirements. Additionally, they cannot make too many alterations in patient files without creating inconsistencies with past billing. Prosecutors and agents should consider executing a search for kickback records and a very limited number of patient files while simultaneously serving subpoenas to get other patient files.

Once prosecutors and agents have files, they should make a plan to review the files in an organized way. Each individual file will probably look appropriate on its face, but will look ridiculous in sequence. For example, prosecutors and agents can simply track the “orders for disciplines and treatment” box on every home-health certification and order (Form 485) for a particular patient. One order telling a skilled nurse to do “skilled observation and assessment” of a chronic condition like hypertension might comply with Medicare rules, but five years’ worth of such orders obviously will not. One assessment marking moderate level of pain at the time of admission could be accurate, but not if the same nurse marked no pain two weeks earlier when discharging the patient. This kind of review turns voluminous patient files into both something manageable and something that doctors and nurses will have a hard time rationalizing.

V. Building a smoking gun

Charging decisions should probably focus on long-term patterns that can be shown to be false or even ridiculous rather than one-time incidents that could simply be a mistake or a disagreement regarding medical judgment. Trials should work the same way.

Prosecutors and agents should not underestimate the power of simply walking jurors through patient files one at a time. A binder compiling files chronologically (such as putting a nurse’s assessments together and tracking certain aspects in a summary table) and publishing those files either through an agent or directly without a witness will make a powerful point through repetition, even if they take a lot of time to prepare. Effective presentation of the patterns should make jurors realize that something is wrong even before they hear from a cooperating witness or patient.

For example, in a recent jury trial involving a doctor who was convicted of falsely certifying patients for home-health services, an FBI case agent testified at length about the contrast between the

home-health services that the doctor ordered and the doctor's own files. On the one hand, the doctor repeatedly signed home-health certification orders claiming that patients were confined to the home and needed skilled-nursing services; he also signed discharge forms that agencies sent him and then signed new admission orders. On the other hand, the doctor did monthly visits to the same patients and regularly wrote each time that the patients had no new problems or changes in their medical conditions. The doctor made no effort to reconcile the orders with his own visit notes, and this helped prove the main point: the doctor simply signed whatever he was asked to sign without regard for patients' actual need. Defense counsel even told the case agent afterwards that the defendant ultimately did not testify because the defendant could not provide a credible explanation for why he discharged patients and re-admitted them soon afterwards.

Prosecutors and agents should also keep the Medicare rules as simple as possible. Experts can explain the Medicare requirements for home-health services using their own words, but this kind of testimony can inadvertently create distinctions from the actual rules.

Summarizing or excerpting the rules leaves out key portions and distinctions that are important in order for the jurors to understand how the system actually works. For example, while a defendant may choose to highlight certain words or phrases from the Medicare definition of "confined to the home" in order to make the definition appear counterintuitive, the full definition tracks with a common sense understanding of the term and refutes defendants' efforts to turn the definition inside out. Using the full definition and admitting it so that the jury can study the definition for itself during deliberations may be much more valuable than an expert's explanation, which may come off as more subjective than the actual rules.

Calling experts can be helpful, but only if the experts can review enough accurate files to give reliable opinions (which can be difficult in cases where there is false information in files) or if the experts are also fact witnesses who actually saw patients at relevant times. An example of a helpful expert is the primary-care physician who saw the patient at the same time that another doctor falsely certified the patient for home-health services. There is no requirement that the government put on expert testimony to sustain a health care fraud conviction. Doctors have tried to overturn convictions in the drug-distribution context when the government did not admit expert testimony, but courts have uniformly rejected such arguments. See *United States v. Pellman*, 668 F.3d 918, 924 (7th Cir. 2012) (surveying cases and rejecting argument that expert testimony was required for there to be sufficient evidence to support a conviction, and finding that there was sufficient evidence of defendant's practice to support the convictions); *United States v. Armstrong*, 550 F.3d 382, 389 (5th Cir. 2008), *overruled on other grounds by United States v. Balleza*, 613 F.3d 432, 433 (5th Cir. 2010).

VI. Proving knowledge

When data and patient files are properly organized and marshalled, the biggest challenge in a home-health case should not be proving the fraud, but proving that individual defendants knowingly and willfully participated in the fraud. As in any fraud case, emails, interviews, and recordings can help prove these elements, but there are some additional opportunities that may be useful to consider in health care fraud cases.

First, prosecutors and agents should check the Health and Human Services Office of Inspector General's complaint lines regarding a particular provider. These complaints can identify patients or employees to be interviewed, and they may identify people who can make covert recordings that will firmly establish the defendants' knowledge of the fraud.

Second, it is useful to check with the Medicare zone program integrity contractor to see what information has been given to the providers who are being investigated. Comparative billing reports, in

particular, are sometimes sent to providers informing them that they are an outlier in terms of particular services. These reports should make it more difficult for providers to claim lack of knowledge afterwards.

Third, an initial, non-confrontational interview can lock a defendant into admitting knowledge upfront. If an agent simply walks into a subject's office with some questions and a limited subpoena, the subject may well admit that he knows Medicare rules and requirements even though such admissions may make it easier to prove knowledge in a future criminal case, because not doing so will raise immediate problems.

Fourth, it may be useful to work with the Medicare zone program integrity contractor or state officials to take a proactive approach towards home-health education or any other field that is ripe for abuse. Educational outreach in the early stages of an investigation can help deter those people who actually do not know Medicare's rules and can make it easier to prove that others did know the rules, especially if a doctor or nurse continues with the fraud scheme despite receiving such outreach.

Finally, for the home-health industry, or any other health care field where there is a large amount of fraud, it may be useful to weigh the goal of general deterrence over individual prosecutions. Proving knowledge can sometimes be difficult, especially for non-medical professionals such as company owners. Prosecutors and agents may want to consider bringing charges against nurses and doctors who lied on forms for a significant amount of time, even if charges are not yet possible against an owner, rather than deferring action for a significant amount of time in the hopes of charging an owner. Taking action will stop Medicare from giving more money to fraudsters, and stopping such spending upfront may save more money than post-charging efforts ever will recover.

ABOUT THE AUTHOR

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Fraud Takes a Village: Charging Considerations after Seven Connected Mortgage Fraud Trials

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Eastern District of California

I. Introduction

Vera Kuzmenko ran a Sacramento tax preparation business that from 2006 to 2008 also doubled as an assembly line for fraudulent real estate transactions. The investigation led to the indictment of 56 individuals in multiple cases in the Eastern District of California that, to date, have resulted in seven jury trials. Total losses from the mortgage fraud conspiracy were in excess of \$16.7 million. Trying so many related cases has provided an opportunity to reflect on the considerations that go into charging decisions in a sprawling fraud case, including the circumstances that favor a broader charging approach that includes a wide range of participants.

II. Vera Kuzmenko's mortgage fraud conspiracy and cover-up

From 2006 to 2008, people having difficulty selling their homes in the Sacramento area could come to Vera Kuzmenko. She and her coconspirators would match the seller with an underqualified buyer who was willing to buy the home in exchange for a cash payment. “If you need money, buy a house,” was her counterintuitive pitch to buyers. They would structure the transaction at an inflated amount, telling the lender that the buyers were paying more than the actual asking price. When the inflated loan funds came in, Vera Kuzmenko and other conspirators would skim the extra money from the loan funds out of escrow, often to one of six different shell company accounts, and distribute it among the co-schemers as the proceeds of the fraud. To get the loans, the buyers signed documents containing false statements about their income, assets, and intent to occupy the home as a primary residence. The stated purchase prices were also false, and the conspirators concealed the kickbacks from the lender. Fraudulent bank statements were submitted with the loan applications to back up the lies about buyers’ income and assets. The buyers were instructed to avoid first payment defaults, but after a few months they would stop paying and the lenders would eventually foreclose. In the meantime, the coconspirators often further profited by renting out the homes.

The fraud involved a long roster of participants. Vera Kuzmenko’s sister, Nadia Kuzmenko, worked at the tax preparation business and had a real estate license. She helped Vera to organize the transactions, obtain forged documents, and distribute the fraud proceeds. Aaron New worked out of the same building and acted as the mortgage broker for most of the fraudulently obtained loans. He also acted as a straw buyer and helped distribute fraud proceeds. Vera Kuzmenko’s romantic partner, Edward Shevstov, her brother, Peter Kuzmenko, Sergiy Blizenko, and others controlled shell accounts that were used to collect fraud proceeds and performed various other roles. For example, both Shevstov and Peter Kuzmenko also acted as straw buyers and recruited others to do the same. Andrey Kim was paid \$700 to \$1,500 per transaction to create fake bank statements for the buyers until Vera Kuzmenko learned to do it herself. On the escrow side, title company employees Rachel Siders and her sister, Leah Isom, helped conceal the distribution of both fraud proceeds and the kickbacks in closing documents provided to

lenders. Dozens acted as straw buyers, signing fraudulent documents, getting paid, then defaulting on the loans and letting the homes foreclose. Still others spun off their own similar schemes.

To top it off, when the investigation started, Vera and Nadia Kuzmenko told others in the conspiracy to lie and direct blame at Sofiya Kravets (name changed for family privacy), an uninvolved Sacramento woman who had recently been murdered in Ukraine. Multiple participants falsely implicated Kravets. Some buyers claimed that Kravets had prepared their loan applications, while omitting or minimizing the roles of Vera Kuzmenko, Nadia Kuzmenko, and others who were involved in the conspiracy. Vera Kuzmenko even helped one coconspirator find a picture of Kravets online so that he could describe what Kravets looked like to law enforcement. In the beginning of the investigation, multiple participants closed ranks by falsely implicating Kravets, telling other lies, or otherwise refusing to cooperate. This initially made getting to the center of the case more difficult. Against this backdrop, the government had a number of charging decisions to make.

III. The indictments, trials, and sentences to date

Ultimately, 56 individuals were indicted in 15 different cases that were connected in one way or another to Vera Kuzmenko's scheme. To date, the U.S. Attorney's Office in Sacramento has prosecuted seven trials resulting from those indictments. Seventeen defendants have been convicted at trial, another 16 defendants have pleaded guilty, several others are fugitives or remain pending, two were dismissed on the government's motion, and four were acquitted. Sentences have ranged from 14 years for Vera Kuzmenko to over 22 years for her brother, Peter (who had an extensive criminal history and was convicted in two separate cases), all the way down to six months of home confinement for several of the convicted straw buyers. A number of defendants' sentences fell in between, and some sentences are still pending.

IV. Charging decisions and the factors in the US Attorneys' Manual

There are basic questions that come to mind when deciding against whom to pursue charges. How serious is the person's offense and how culpable is he or she? Should limited federal resources be spent prosecuting the person? Is there any likelihood of state prosecution? Has the person cooperated and been truthful with law enforcement? The United States Attorneys' Manual captures these and several other factors in a non-exhaustive list of eight factors to be considered when initiating and declining charges. [USAM 9-27.230\(B\)](#). Additional factors include the deterrent effect of prosecution, the person's criminal history, and the person's personal circumstances. *Id.* at 9-27.230. These provisions in the Manual expressly do not create any legally enforceable right or benefit, but Department attorneys are expected to be guided by these principles "to promote the reasoned exercise of prosecutorial discretion." *Id.* at 9-27.110(A); *see also id.* at 9-27.120; 9-27.130; 9-27.140.

No matter how such discretion is applied, stakeholders in the criminal process will often offer contrary opinions about charging decisions once a broad fraud scheme has been indicted. When the government pursues charges against only a very limited number of those with potential exposure, the defendants will likely complain that they are being left to hold the bag for a crime that was truly a group effort. And they will point at this alleged unfairness through cross-examinations and argument at trial as a way to deflect their own personal culpability. When the government pursues charges against a wider group of those involved in the fraud scheme, lower level defendants will often question their significance and identify others as the true criminals involved, while higher level defendants will deny knowledge of dirty work done by others in the scheme. Meanwhile, all may try to characterize the case as an example of government overreaching. These are all standard and predictable tactics for both trial and negotiation, but

they also seek to advance the unspoken assumption that wherever discretion has been used, something must be amiss.

The court may also develop its opinions about who should have been charged in a case. The charging decision is, of course, the province of the executive, with only certain constitutional limitations reviewable by courts. *See, e.g., Heckler v. Chaney*, 470 U.S. 821, 832 (1985); *United States v. Arenas-Ortiz*, 339 F.3d 1066, 1068 (9th Cir. 2003); *United States v. Cox*, 342 F.2d 167, 171 (5th Cir. 1965). Yet, at the sentencing stage, the court is called upon to gauge the “seriousness of the offense,” what constitutes “just punishment,” what sentence will sufficiently “afford adequate deterrence” and “promote respect for the law,” and what is needed to “protect the public from further crimes of the defendant.” 18 U.S.C. § 3553(a) (2012). In a broader fraud case, it is natural for the court to look at the relative culpability of the various defendants when weighing these factors to determine where the criminal justice system needs to apply a heavier sanction and where something less is appropriate. The sentences meted out as a result can sometimes send a message to the government about the perceived worth of a case, and even criticize (either implicitly or explicitly) the government’s charging decisions.

The most rigid responses to such criticism—to charge every single person criminally liable in the case under coconspirator and co-schemer principles, or to charge no one at all—are rarely, if ever, reasonable options to pursue. Charging no one is an abdication of prosecutorial responsibility, has no deterrent value, and fails to protect the public from fraud. Charging every person with liability in the scheme or conspiracy could sweep in defendants who did not originate the scheme, did not profit, had limited knowledge as to its scope, were truthful with law enforcement, and who may not otherwise merit prosecution under the factors set forth in the United States Attorneys’ Manual. Neither course would magically immunize the government from criticism from the defense bar, defendants, courts, or other engaged outside observers. Elimination of such criticism is not the main concern, or even attainable. When the decisions being made involve charging individuals with federal felonies, not everyone will be content.

In the Vera Kuzmenko related cases in Sacramento, the defendants at the hot center of the case, like Vera Kuzmenko herself, have received significant sentences, ranging from 8 to 22 years. The sentences are reflective of their leadership roles and their major contribution to the organization and execution of the scheme. Sergiy Blizenko and Leah Isom, both of whom cooperated, received 29 months and 12 months and one day, respectively. Meanwhile, some straw buyers in the scheme had guideline ranges of 30 to 37 months or 37 to 46 months, but were only sentenced to six months of home confinement.

One might ask whether lower-level participants in a fraud scheme should be charged at all if their sentences will be negligible relative to their higher-level co-schemers. There is no simple uniform answer, and despite preliminary guideline calculations, the actual sentence cannot always be foreseen. Charging decisions have to be considered on a case-by-case basis, including consideration of the non-exhaustive list of factors set forth in the United States Attorneys’ Manual, with the likely sentence being just one such factor. [USAM 9-27.230\(B\)\(8\)](#).

V. Circumstances that can favor a broader charging approach— Federal priorities, cumulative effects, and cover-ups instead of cooperation

In the cases related to Vera Kuzmenko’s scheme, several factors were at play. One factor was the federal law enforcement prioritization of mortgage fraud. By 2008, the effects of the mortgage fraud crisis were becoming clear, and the May 2009 signing of the Fraud Enforcement and Recovery Act of 2009 made criminal enforcement of federal fraud laws against mortgage fraud a clear federal law enforcement

priority, as did the November 2009 Executive Order creating the Financial Fraud Enforcement Task Force. [Exec. Order No. 13519, 74 Fed. Reg. 60,123 \(Nov. 17, 2009\)](#) and in [123 Stat. 1617 \(2009\)](#). “In weighing the Federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.” [USAM 9-27.230\(B\)\(1\)](#).

The Eastern District of California, which covers the state’s interior from the Oregon border all the way down to the Kern County-Los Angeles County line over 500 miles to the south, was hit particularly hard in the 2007 to 2008 mortgage fraud crisis. California was among the leaders in home price declines in 2008, with several cities in the Eastern District of California, in particular, being among the country’s most affected in this category, reaching nearly a 30 percent decline. See [FEDERAL BUREAU OF INVESTIGATION, MORTGAGE FRAUD REPORT 2008 \(2008\)](#). The prevalence and cumulative impact of mortgage fraud crimes on the Eastern District of California pointed to a need for significant deterrence. The United States Attorneys’ Manual instructs that deterrence should be considered, especially when a single offense may not look as significant in isolation, but is part of a larger picture, because “some offenses, although seemingly not of great importance by themselves, if commonly committed, would have a substantial cumulative impact on the community.” [USAM 9-27.230\(B\)\(2\) and \(3\)](#). The false demand, inflated prices, and rampant foreclosures occasioned by large fraud schemes, like Vera Kuzmenko’s in Sacramento and Crisp & Cole in Bakersfield (a \$29 million, 15 defendant mortgage fraud case prosecuted by the district’s Fresno office), wreaked havoc on home prices in California’s Central Valley. Charges were eventually filed against over 350 individuals for crimes related to mortgage fraud in the district.

Additionally, Vera Kuzmenko’s orchestrated cover-up, where she instructed participants to deflect blame to a dead woman who had recently been murdered in Ukraine, made developing evidence against those at the center of the scheme more difficult. Lower-level participants repeated this lie to law enforcement or otherwise lied or declined to cooperate. In other investigations, lower-level fraud participants will often cooperate from the outset in the hopes of avoiding prosecution in favor of more culpable targets. Cooperation was the rare exception in the Vera Kuzmenko cases. The United States Attorneys’ Manual states that although the cooperation factor should not alone be determinative, “[t]here may be some cases . . . in which the value of a person’s cooperation clearly outweighs the federal interest in prosecuting him/her.” [USAM 9-27.230\(B\)\(6\)](#). For many participants who lied or refused to cooperate, the government simply never had a pre-indictment chance to apply this balancing test. After indictments, however, several defendants did agree to plead guilty and cooperate, and some cooperator testimony was featured in the trials of Vera Kuzmenko and others.

VI. Conclusion

The investigation of the Vera Kuzmenko cases took place under a unique set of circumstances. It was in the wake of a significant recession connected directly to mortgage fraud, in a district hit harder by that fraud than most, and featured an unusually recalcitrant group of participants for a white-collar fraud scheme. The pursuit of charges against a larger number of participants in the scheme not only furthered the objective of deterrence against conduct that contributed to the crisis, but also helped to secure the convictions of those most culpable in the face of an orchestrated cover-up attempt.

From a defense perspective, the cases illustrate that an obstructive, unified front by lower-level participants in a large fraud scheme has the potential to backfire and could lead to charges and convictions against more individuals than might have occurred had truthful cooperation been their first move. From a government perspective, the cases illustrate that, at times, a broader charging approach is

consistent with the charging factors in the United States Attorneys' Manual and may be needed to successfully prosecute a large fraud scheme as a whole and to hold those most culpable accountable.

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The author would like to thank AUSA Lee Bickley for her insights and recognize her role in charging and trying multiple cases discussed in this article.

Individual Accountability for Corporate Wrongdoing: The Prosecution of OtisMed Corp. CEO Charlie Chi

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I. Introduction

In September 2009, 40-year-old Dr. Charlie Chi was a computer science and electrical engineer, inventor, and an entrepreneur at the pinnacle of his career. Wielding a Ph.D. in electrical engineering, Chi had amassed nearly 15 years of experience as a medical device industry executive who touted his special expertise in product development and regulatory strategy. His latest technological invention—a patient-specific, MRI-generated cutting guide for use in knee replacement surgeries—had attracted millions of dollars in venture capital funding to his medical technology start-up, which had blossomed under his leadership into an enterprise boasting 80 employees. He had generated acquisition interest from some of the world’s largest medical device manufacturers. He was on the precipice of closing a sale to one of those suitors for more than \$100 million, of which more than \$11 million would have gone to Chi himself as the company’s principal individual shareholder.

Six years later, Chi reported to a United States penitentiary in California to begin serving a 24-month sentence for distributing unapproved medical devices in interstate commerce, the very same devices that had driven the rise of his company and had made him millions of dollars.

Dr. Chi’s June 2015 sentencing in District Court in Newark, New Jersey, followed the December 2014 guilty plea on related charges of Chi’s former company, OtisMed Corporation. The OtisMed plea agreement was part of a global criminal and civil resolution that included a recovery of more than \$80 million (criminal fine of \$34.4 million, criminal forfeiture of \$5.16 million, and civil settlement of \$41.2 million).

This article focuses on the four-year investigation and prosecution of Charlie Chi. It describes the investigative steps that led to Chi’s conviction for distributing adulterated medical devices in interstate commerce, the obstacles that the prosecution team confronted in bringing a criminal case against a corporate executive, and the tools utilized to obtain the conviction and imprisonment of a corporate CEO. Many of the challenges and opportunities that presented themselves illustrate the “six key steps to strengthen our pursuit of individual corporate wrongdoing” identified by Deputy Attorney General Sally Yates in her memorandum, “Individual Accountability for Corporate Wrongdoing,” issued on September 9, 2015, coincidentally just days after Chi reported to prison. [Memorandum from Deputy Att’y. Gen. Sally](#)

Yates to all U. S. Att'ys (Sept. 9, 2015), <https://www.justice.gov/dag/file/769036/download> (Individual Accountability Policy).

II. The investigation

A. *U.S. ex rel. Adrian v. OtisMed Corp.* and assembling a team

Like many other corporate health care fraud cases, the investigation into OtisMed Corporation began with the filing of a *qui tam* action. Here, however, the specific conduct that formed the basis of Chi's conviction was notably absent from the initial investigation. The relator's *qui tam* complaint, not surprisingly, focused on the potential financial recovery, advancing theories that would lead to the greatest potential civil damages. In fact, not only did the complaint not name Chi or any other individuals as defendants, but the 30-page complaint was silent with regard to the conduct of any individuals at all, either by name or by title.

As has been the practice in the District of New Jersey, the *qui tam* complaint was first reviewed by the Chief of the Health Care & Government Fraud Unit from both a criminal and a civil perspective, and both a criminal Assistant United States Attorney (AUSA) and a civil AUSA were then assigned to the investigation. Similarly, Department trial attorneys were assigned from the Civil Division's Consumer Protection Branch (which is responsible for criminal and civil litigation and related matters arising under the Federal Food, Drug, and Cosmetic Act) and the Commercial Litigation Branch to join the criminal and civil investigations, respectively. Agents from the Food and Drug Administration's (FDA), Office of Criminal Investigations and from Health and Human Services Office of Inspector General were also assigned to the case. From the very beginning of the investigation, the team (including the authors of this article, as well as District of New Jersey Civil AUSA Charles Graybow and Commercial Litigation Branch Trial Attorney Charles Biro, along with FDA Associate Chief Counsel Beth Weinman) made a conscious effort to seek evidence that would support criminal and civil remedies, not just against the corporate defendants named in the *qui tam*, but also against any culpable individuals. Effective and timely communication and cooperation between criminal and civil attorneys, as well as focusing on individuals from the outset of an investigation, have been critical aspects of the District of New Jersey's health care fraud practice and are two steps highlighted in Individual Accountability Policy. *Id.* (Coordination and cooperation between civil, criminal, and agency attorneys to the fullest extent appropriate to the case and permissible by law is also the policy of the Department, as expressed in the Holder memorandum of January 30, 2012.); [Memorandum from the Att'y. Gen. Eric Holder for all U. S. Att'ys et al.](https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings), (Jan. 30, 2012), <https://www.justice.gov/usam/organization-and-functions-manual-27-parallel-proceedings> (Holder Memo).

Between May 2006 and November 2009, OtisMed distributed more than 18,000 OtisKnee devices—the cutting guide Chi had designed—while taking the position that the OtisKnee was classified as a Class I device (a template for clinical use) and exempt by regulation from FDA premarket approval and clearance requirements. However, OtisMed never received from FDA confirmation that the agency agreed with that classification. For the relator, the story ended there.

What the relator did not know was that OtisMed submitted a 510(k) notification to FDA seeking clearance to market the OtisKnee. On September 2, 2009, the FDA sent OtisMed a notice that its 510(k) submission had been denied. In its letter denying OtisMed permission to market the device (known as an “NSE Letter”—i.e., “not substantially equivalent” to a device already lawfully marketed), the agency told OtisMed that the company had failed to demonstrate that the OtisKnee was sufficiently “safe and effective” to be marketed in the United States. FDA's letter to OtisMed went on to make clear that the OtisKnee device was part of a “significant risk device system,” that is, one that “presents a potential for serious risk to the health, safety, or welfare of a subject.” 21 C.F.R. § 812.3(m) (2016). Accordingly, FDA

explicitly warned OtisMed that “any commercial distribution of this device . . . would be a violation of the Act [*i.e.*, the Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 *et seq.* (the “FDCA”).”

The relator was also unaware that on September 10, 2009, OtisMed’s president and CEO personally ordered the shipment of 218 medical devices to surgeons around the country, a week *after* the FDA had explicitly rejected his company’s request for clearance to market the devices. That fact, which ultimately led to Chi’s conviction, would be uncovered only after the investigation had progressed significantly.

B. Mastering the facts

There is simply no way to sugar-coat it—the intersection of science, technology, medicine, and arcane regulations make medical device cases particularly challenging, even intimidating. This unfamiliar landscape, combined with the mounting of a vigorous defense (typically led by some of the most venerable and highly paid legal talent in the country) by a corporation or corporate executive, can easily discourage even the most seasoned prosecutor. Because nobody knows more about a particular medical device than its manufacturer, defense counsel naturally try to exploit the information imbalance to their client’s advantage. Compounding this gap in knowledge, the company, more often than not, has the benefit of information uncovered during its own internal investigation, likely conducted by the very same attorneys sitting across the table from the prosecutor. For a prosecutor laboring under these asymmetrical conditions, there is really only one remedy: to become a master of the facts, to know the most about what happened.

Of course, before the facts can be mastered, they must be collected. And that requires consistent and effective management of the investigative activities in a way that adds as few layers of insulation as possible between the team and the facts. For this prosecution team, that meant going beyond the standard techniques like issuing subpoenas and running computer searches across hundreds of thousands of digitized documents (though those techniques were, of course, also utilized). It meant delving into the science behind the OtisMed device and what it was supposed to do—pouring over the abstruse scientific literature and reading medical journal articles—rather than merely relying on the interpretation of agency experts. It meant actively conducting scores of witness interviews with surgeons, regulatory experts, patients, and OtisMed officers and employees rather than merely relying on reports of agent interviews.

It also meant taking advantage of the knowledge and expertise of agency partners across the government. This included consulting with a Department of Defense orthopedic surgeon who insisted that the only way to really understand the role the OtisMed device played in arthroplasty (*i.e.*, knee replacement surgery) was to see the procedure up close and in person. Consequently, mastering the OtisMed facts also meant government attorneys trading our suits and ties for scrubs and masks, and spending a day in the operating room at Walter Reed National Military Medical Center in Bethesda, Maryland, personally observing an arthroplasty procedure with that surgeon.

The extra work to thoroughly grasp the medicine and the scientific data paid off. By not following the typical white-collar investigation script, the prosecution team was able to develop a command of both the facts and the science. This mastery was a resource that the prosecution team was able to repeatedly draw upon throughout the case. It enabled the team to conduct effective interviews of surgeons and scientists, and it became incredibly helpful in persuading OtisMed employees to cooperate with the government. And such mastery was particularly useful in demonstrating to Chi that, despite being the company’s founder, president, and CEO, he no longer could rely upon a superior understanding of the facts and science to outmaneuver the prosecution team.

In addition, fully appreciating the state of the science led the team to reject potential arguments about the functioning of the device that were attractive but that ultimately would not have been provable and would have left the prosecution team vulnerable to accusations of overreaching. Instead, the

Government resolved to focus on what could be proven beyond a reasonable doubt and present the case as important and necessary to defend the statutory scheme established by Congress that was “intended to assure that medical devices . . . meet the requirements of safety and effectiveness *before* they are put in widespread use throughout the United States.” S. REP. No. 94-33, at 2 (1975) (emphasis added). That is, even if this particular device was not demonstrably dangerous (whether by design or sheer luck), there is nevertheless substantial harm in permitting device manufacturers to circumvent the safeguards Congress put in place to prevent the American public from being exposed to dangerous devices.

C. Securing company cooperation

The NSE letter from FDA threatened to derail what Chi had worked for years to achieve—the acquisition of OtisMed by Stryker Corporation—one of the world’s largest medical device companies. FDA’s rejection of the OtisKnee device meant, at the very least, that the terms of the deal would have to be renegotiated with Stryker. Meanwhile, Chi believed that canceling orders and suddenly stopping shipment of the devices would threaten his company’s reputation and his relationships with surgeons. Weighing those problems against the FDA’s mandate, eight days later Chi made what he referred to at his sentencing as a “business decision”: he ordered the shipment of 218 OtisKnee devices to surgeons throughout the United States.

Months later, the renegotiated deal with Stryker had closed, OtisMed has been absorbed as a subsidiary of Stryker, and Chi was settling into his new role as a Stryker executive, all before the Government’s investigation began. As a result, by the time the *qui tam* was filed and the government began investigating, it was Stryker—which had no role in Chi’s misconduct—that would be left, from a corporate perspective, to address the crimes OtisMed had committed at Chi’s direction. Notably, beyond the financial responsibility Stryker was left to face (OtisMed ultimately paid more than \$80 million as part of the global resolution), both the District of New Jersey and the Consumer Protection Branch have regularly imposed forward-looking compliance obligations on corporate defendants engaged in misconduct—from independent corporate monitors to executive certifications. With Chi’s company now operating as a subsidiary of Stryker, it was OtisMed’s new corporate parent that would have to bear the brunt of any financial consequences and abide by any compliance obligations.

Initially, the Government’s investigation focused not on the post-NSE shipments, of which the Government was not yet fully aware, but rather on the years of pre-NSE shipments of the uncleared device. Seeing an opportunity to obtain some consideration from the Government, Stryker quickly acknowledged Chi’s post-NSE shipments to the prosecution team and began discussing potential cooperation. The scope and level of that cooperation, however, would be dependent on the level of trust the company and its counsel had in the prosecution team, trust that they and their client would be treated fairly, and that fulsome and honest cooperation would be appropriately rewarded.

The prosecution team worked hard to develop that trust both before and after cooperation began, so the company and its attorneys believed it when they were told cooperation would inure to their benefit. Separate and apart from the credit it would receive, Stryker recognized the seriousness of Chi’s misconduct, as demonstrated by a letter sent to the court by Stryker’s deputy general counsel at the time of Chi’s sentencing, requesting that the court take into account “the significant economic and non-economic consequences Chi’s actions had on innocent employees, shareholders, and other stakeholders of OtisMed and Stryker.” As a result, Stryker cooperated, and on its own initiative, voluntarily provided a limited privilege waiver, resulting in a critical piece of evidence—the testimony of OtisMed’s outside regulatory counsel. OtisMed’s lawyer would testify from the witness stand that immediately after the company received the NSE letter, she explicitly and unequivocally informed Chi (and the rest of the OtisMed Board of Directors) that any further distribution of OtisKnee devices would be illegal.

D. Developing cooperators

Chi's ordering his subordinates to distribute 218 OtisKnee devices in interstate commerce after the NSE letter was enough to establish a baseline FDCA violation. If Chi's offense involved fraud, however, the court would likely consider his misconduct to be significantly more serious. See [U.S. SENTENCING GUIDELINES MANUAL § 2N2.1\(c\)\(1\) \(2015\)](#) (requiring application of §2B1.1 Fraud Guidelines where FDCA offense involves fraud, and otherwise applying a Base Offense Level of 6). OtisMed's former lawyer could not establish that Chi's illegal shipment, brazen as it was, involved fraud. Evidence would thus have to be developed from some other source that could establish Chi's mental state when he decided to defy both the FDA and his company's own lawyers.

When Chi ordered the illegal shipments, he depended upon subordinates to carry out his directive. OtisMed employees not only packaged and physically shipped the devices, but two OtisMed executives, who also were aware of the NSE letter and its implications, personally coordinated those logistics after communicating directly with Chi about his plans to ship the devices, notwithstanding FDA's decision to disallow their distribution. This set of facts left the Government with delicate decisions to make about how to regard these executives. On the one hand, they had engaged in wrongdoing themselves, and in doing so, exposed themselves to similar criminal liability. On the other hand, their roles within the company and level of responsibility differed substantially from Chi's.

Of course, there is nothing remarkable about an individual offering to cooperate in the investigation or prosecution of others as a counterweight to balance against their own exposure. The value of these executives' testimony lay in their ability to testify about their conversations with Chi as he was deciding whether to ship the devices. Their testimony would advance the prosecution of Chi in two important ways. First, by establishing that the decision to ship the devices was made by Chi personally (and over objections raised by these two employees), their testimony would remove an obstacle to such prosecutions recognized in the Individual Accountability Policy: "In large corporations . . . responsibility can be diffuse and decisions are made at various levels [H]igh-level executives . . . may be insulated from the day-to-day activity in which the misconduct occurs." [Individual Accountability Policy, at 2](#). Second, these employees could testify that during their conversations, Chi proposed several methods to hide the illegal shipments from the FDA (for example, by backdating the shipping records to make it appear the shipments occurred before FDA issued the NSE Letter). This last detail provided crucial evidence establishing Chi's fraudulent intent and greatly strengthened the government's position that Chi's offense did, in fact, involve fraud.

In balancing the value of these employees' potential contributions to the case against the federal interest in prosecuting them for their participation in the crime, the prosecution team engaged in an exhaustive investigation to understand the full context surrounding these employees' unlawful acts. This involved not only examination of the misconduct itself, but also the relationships between the individuals involved, in order to try to discern their individual motivations. To accomplish this, the investigation included not only a review of "hot" documents and witness interviews, but attorney review of every single email the key individuals had sent or received over a six-month period. With that base of knowledge, the prosecution team interviewed the two executives. Both employees contended that they were merely following Chi's orders as CEO of the company, they had done what they thought they could to stop him, and were anxious to do whatever they could to make things right. Ultimately, their honest contrition combined with the documentary evidence corroborating their recitation of the events led the team to conclude that no substantial federal interest would be served by prosecuting them for their participation in the crime.

III. Charging and sentencing

Having developed substantial evidence against Chi, the prosecution team entered into plea discussions with his counsel. As is the case with many white collar defendants, Chi's counsel took the position that Chi would not agree to a plea that would lead to a jail sentence or jeopardize his plans for continuing his career in the healthcare field. Chi's counsel pointed to the lack of clarity in FDA regulations, and they confidently claimed that he was optimistic he would be able to capitalize on that ambiguity in front of a jury to argue that Chi's conduct should not be dealt with criminally. It appeared that no pre-trial resolution could be reached.

Still, while preparing to seek an indictment, the prosecution team made sure to keep lines of communication with defense counsel open. In doing so, the prosecution team sought to accomplish two things. The first was to help Chi's counsel understand that the government was prepared to present a case to a jury that would not be dependent on ambiguous FDA regulations or complex arguments regarding the state of the science behind the device. Where Chi's counsel made claims about the science, the prosecution team resisted the urge to argue the points and demonstrate their mastery, instead focusing defense counsel on the theory the government had worked hard to develop: disputes about the science would not matter at trial, nor would any regulatory ambiguities, as the government's case would be focused and direct. Eventually, Chi's counsel came to understand that it was a trial that the defendant was unlikely to win.

Once Chi's counsel expressed a willingness to entertain a plea, the prosecution team focused on its second goal: identifying areas of common ground and determining whether a plea could be crafted around those facts. Through this dialogue, the prosecution team learned that while it was crucial to Chi that a plea not trigger mandatory exclusion from federal healthcare programs under Health and Human Services Office of Inspector General rules, he was willing to consider a plea that he believed would leave only the potential for permissive exclusion, which he would have the opportunity to contest. Similarly, while Chi was insistent that he be allowed to seek a non-custodial sentence and dispute certain facts and legal issues, he was willing to admit to other facts that would eliminate the need for a full-scale evidentiary hearing at sentencing.

After months of negotiation, Chi agreed to enter a guilty plea to three counts of distributing adulterated medical devices in interstate commerce, which exposed him to three years in prison. From the government's perspective, however, the guilty plea would be of little deterrent value if it was not accompanied by a meaningful sentence of imprisonment. It was clear that Chi intended to downplay the seriousness of his misconduct and seek a sentence of probation. Chi's counsel met with reporters outside the courtroom following the plea, and was later quoted minimizing the crime:

What they're doing is criminalizing a regulatory violation. It's unfortunate, but that's the world we live in today, where certain regulatory agencies are taking what should be handled civilly as a cease-and-desist letter followed by maybe a fine, and they're turning it into criminal conduct.

Martin Bricketto, *OtisMed, Ex-CEO Cop to Distributing Device After FDA Denial*, Law360 (Dec. 8, 2014), <http://www.law360.com/articles/602454/otismed-ex-ceo-cop-to-distributing-device-after-fda-denial>.

This, like other statements Chi's counsel's made to the press, left little doubt of his strategy at sentencing, which would mirror the positions he had taken during plea negotiations.

In the voluminous briefing preceding sentencing and the full day sentencing hearing, Chi's counsel attempted to downplay the seriousness of the offense. His counsel argued that he should be given a non-custodial sentence as his crime was his first offense and was, therefore, aberrant, whether under the Sentencing Guidelines definition or in the everyday meaning of the word:

Dr. Chi is a well-educated man who built a company, along with others, from scratch. He is a significant fixture in the biomedical field. People respect his innovation. People respect his work ethic. People respect him as a human being. So, there is nothing that can be pointed to in his life that would suggest that this is a pattern. That would suggest that this is common conduct. That would suggest that this is a habit.

Transcript of Sentencing Hearing at 37, *United States v. Chi*, 2:14-CR-687 (Dist. N.J.) (2015).

Chi's counsel also sought to capitalize on the Department of Justice's Smart on Crime initiative, hoping to sweep white collar criminals in with others:

We continue to believe that what is fair is a probationary sentence for Dr. Chi and at worst home confinement. As we open our brief to the Court, what we said is our country leads the world in incarceration . . . Federal prison should be reserved for serious violent felons. People who engage in narcotics conspiracies. People who engage in murder. People who engage in organized crime. People who engage in human trafficking. That's where the modern trend is going.

Id. at 75-76.

In response, the prosecution team focused the court on the importance of the sentencing to create general deterrence and avoid weakening the regulatory framework at the core of our nation's healthcare system:

For virtually all of us, Your Honor, there comes a point where we or a loved one, a son or a daughter or a parent, is faced with having to undergo a medical procedure. And those are necessarily and unfortunately some of the most difficult and stressful times in all of our lives. We are fortunate here, though, that because of our regulatory system, it's a little bit less stressful than it otherwise would be. Because we don't, and our doctors don't, have to wonder whether the products that are being used in those medical procedures have been proven safe and effective. We are able to trust that medical devices and pharmaceuticals are only going to be sold after they have been proven safe and effective. Charlie Chi knew that. He understood that. And when he made a calculated, deliberate decision, a business decision, to commit a crime and violate the integrity of a system that has made him a very wealthy man, he understood exactly what he was doing. He not only violated the law, but he took advantage of the trust that is a pillar of our healthcare system. . . .

That confidence and that trust that we all have that medical products are not put into commerce until they are proven safe and effective, the very integrity of that system, Your Honor, is dependent on moments like these. The very integrity of that system is dependent on there being substantial penalties for violations. . . . It is Your Honor's sentence that is necessary to demonstrate for Charlie Chi, and necessary to demonstrate for those corporate executives in the healthcare industry and beyond who are considering making the same sort of business decisions, that such deliberate violations of the law are not going to be tolerated."

Id. at 87-88, 93-94.

Chi was sentenced to 24 months' imprisonment, followed by one year of supervised release. [Press Release, U. S. Dep't of Justice, Former OtisMed CEO sentenced to Two Years in Prison for Selling Unapproved Surgical Devices](https://www.justice.gov/usao-nj/pr/former-otismed-ceo-sentenced-two-years-prison-selling-unapproved-surgical-devices) (June 26, 2015), <https://www.justice.gov/usao-nj/pr/former-otismed-ceo-sentenced-two-years-prison-selling-unapproved-surgical-devices>.

The facts of this investigation and prosecution demonstrate both the substantial hurdles that must be overcome to secure a conviction and appropriate sentence of an individual corporate officer, and some of the tools prosecutors have at their disposal to give effect to the Department's stated commitment to hold individuals accountable, where appropriate, for corporate misconduct.

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