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## The Fine Line Between Cooperation and Incrimination: Knowing Your Rights and Obligations When Interviewing with Investigators

White Collar, Compliance and Investigations Practice Group

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Every day trained investigators are able to move their investigation from the realm of speculation to prosecutable facts through the skill of interviewing cooperative, unassuming witnesses. The number of prosecutions that turn into certain convictions as a result of incriminating statements or confessions during a simple interview is staggering. While individual liability resulting from an incriminating interview is undesirable, corporate liability as a result of an uninformed "cooperative" witness can likewise be problematic. The scenario for these types of interviews is often the same: an investigator approaches a target or potential target at their residence or job or, in some instances, asks the individual if they would be "willing" to meet at a neutral location.

Due to the fact that the interviewee is not in "custody" and the circumstances would arguably suggest that the interviewee is not being interrogated, the law does not mandate that the investigator provide the interviewee with Miranda warnings (i.e. the right to remain silent, the right to an attorney, etc.). The uninformed interviewee, in the spirit of cooperation, and assuming they understand the gravity of the situation, decides to become an open book. However, this is very dangerous as the interviewee could be walking themselves into a trap. The good news is that an informed interviewee, who is aware of their rights and obligations, has the ability to prevent potential trouble. Likewise, a corporate plan that implements the following tips when training its employees on responding to requests for interview by investigators can minimize the risk of corporate liability.

### **1. Determine up front whether you are a target or a witness.**

When asked to give an interview, your first words should be "Am I a target of your investigation?" If you are in fact a target, the investigator has to inform you of such upon being asked this question. There is a significant difference between being a witness and a target and it will have a serious effect on your decision of whether to give an interview. No investigator can compel you to give an interview, however investigators may use several tactics to elicit your cooperation including telling you that they want to get "your side of the story" or threatening that they believe you have something to hide because you choose not to talk. No matter what tactic is used, your choice to cooperate by being interviewed is completely voluntary.

### **2. Take notes or record the interview.**

It is important to take notes because the interviewers are certainly doing so. If possible, record the interview with your cellphone, iPad or any other recording device. To the extent you are misquoted, misreferenced, or your comment is taken out of context, having your own record of the interview will give you the opportunity to clarify the record.

### **3. Once you start talking, you can stop at any time.**

While the investigators may inform you at the beginning of the interview that you are not a target, that characterization may shift during the course of the interview. And, to the extent you start sliding into the potential target category, investigators are not required to halt the conversation to inform you as such. You should be cognizant of the types of questions you're being asked and their reaction to your responses. Those who are being interviewed often make the mistake of thinking that once they have started the interview, they have journeyed down the road of no return. This is not true. If at any time you feel uncomfortable, you have the right to request that the interview be terminated. You also have the option of choosing to briefly pause or completely terminate the interview to call your attorney at any time. Stay alert to this tool because using it a bit too late may be the difference between finding yourself in the target, rather than witness category.

### **4. Answer only the question asked.**

Those being interviewed often think that they get extra cooperation points for going above and beyond the call of duty in answering a question. This is not the case. Rather, failing to answer the question directly and providing additional information only serves to beg more questions. The best practice for responding to questions in an interview is to discern exactly what the question is asking and answer it directly. In addition, there is nothing wrong with responding to a question with the phrase "I don't know." Don't let an investigator force you to answer a question by posing a hypothetical or trying to pin you down with a leading question. Answer only that which is within your knowledge.

### **5. Call your lawyer.**

Lastly, and most importantly, call your lawyer. Even if you are not a target, sometimes it helps to speak to your lawyer to remind you, in the moment, of your rights and obligations when going into an interview or even during the course of an interview. If the investigators are turned off by the fact that you wish to speak with your lawyer or want your lawyer present, then you may have saved yourself from impending danger.

It is imperative that the reader understand this article is not intended to advocate against cooperating with law enforcement. Rather, cooperation is encouraged because oftentimes the interviewee is not a target or the target can diminish their liability by identifying those more culpable. Regardless of whether you fall into the witness or target category, knowing your rights and obligations in an interview can help you clearly demarcate the line between cooperation and incrimination.

If you have any questions about the interview process during the course of an investigation or need assistance with other compliance issues, contact Andre' Caldwell, Libby Scott or any other member of Crowe & Dunlevy's White Collar, Compliance and Investigations practice group.

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