


“Knock, Knock: What To Do When The Government Comes Calling”

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Characteristics Of An Ambush Interview

- Unannounced and a surprise.
- Often at home.
- Often timed to occur when counsel is less likely to be available.
- Two agents, often a “good cop” and “bad cop.”
- One agent takes copious notes.
- Starts cordial and becomes hostile.
- Moves from general to specific.
- May involve a request to sign a statement.

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Why Does The Government Use These Tactics?

- They work
 - no opportunity for preparation.
 - people are often disarmed by agents (“we just want your help in understanding your industry”) and not prepared to be attacked.
 - people trust the government and want to be helpful.
 - no counsel present.

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Why Does The Government Use These Tactics? (continued)

- no one recording the interview except the government.
- sets up claim later that witness lied to federal agent (18 U.S.C. § 1001).
- use of coercion and threats (“what do you have to hide?”) (“if its true, why not sign a statement?”)

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Can The Government Do This?

Most courts have held that the right to counsel does not apply until an “adversary judicial proceeding” has been commenced. The government has broad latitude to seek information from people in investigating whether criminal conduct occurred.

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What Are The Rights Of The Individual When Faced With An Ambush Interview?

- An individual can decline the interview, it is voluntary.
- An individual can terminate the interview at any time.
- There is no obligation to sign anything or affirm the accuracy of anything.
- You can ask to have your counsel present.
- Ask to see the credentials of the agents and to get their business cards.

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What Are Your Obligations?

- Any information provided must be truthful and accurate.
- Don't guess or speculate (even if agents ask you to).
- Don't let the agents put words in your mouth.
- Once aware of investigation, don't destroy or alter evidence.

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What Can The Government Agents Do And Not Do?

- Cannot use subpoenas to compel interviews.
- Cannot use search warrants to compel interviews.
- The agents cannot make a binding promise that the interview is "off the record" despite what they may say.
- The agents do not have the authority to bind the government with promises of immunity or leniency ("if you answer these questions, things will go a lot easier for you").

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What Is The Role Of In-house Counsel?

- Educate your executives in advance about their rights and obligations.
- Have a plan.
 - Identify who to notify within your organization with at least two people identified.
 - Have a protocol to handle search warrants and grand jury subpoenas.
 - Have ability to preserve electronic information and suspend document destruction practices.
 - Have outside counsel identified who can assist on short notice.

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Your Executive Has Been Approached For An Interview Or Actually Interviewed: Now What Do You Do?

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Step 1 – Retain Criminal Counsel Who Can:

- De-brief the employee interviewed.
- Find out from the agent or prosecutor the status of the investigation and the status of your employee (target, subject, witness).
- Help investigate and assess whether criminal conduct has occurred and how to respond.
- Insulate you from the investigators.

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Step 2 – Take Steps To Avoid Self-inflicted Wounds

- It is not uncommon for damaging documents to be generated after an investigation commences.
- The most incriminating documents in the DOJ's antitrust investigation of Microsoft occurred after the investigation commenced.

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Avoiding Self-Inflicted Wounds

- Send out a litigation hold memo that informs employees about the investigation and the need to retain all documents and information, whether hard copy or electronic.
- Explain to employees that destruction of evidence once you are aware of an ongoing criminal investigation is a criminal offense.
- Explain to employees that emails or memos they generate about the case are subject to investigation and should not be created or sent.

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Avoiding Self-Inflicted Wounds (continued)

- No CYA memos or jokes.
- Appoint a single spokesperson to deal with outside inquiries and keep your message consistent if you say anything at all.
- Have all statements to the public reviewed by counsel.
- Educate your employees about their rights if any agent shows up at their door.

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Ethical Issues

- During interviews, corporate counsel represent the company and not the individual employee. Employees need to be told this clearly.
- Disclose to employees interviewed that there is not necessarily an attorney-client privilege between them and the interviewer and that the interview may be disclosed to the government.
- Tell the employee that he or she has the right to retain their own counsel.

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Other Considerations

- If you are a public company, do you have an obligation to disclose the investigation? This is necessarily a judgment call.
- If you are a public company, do you institute a blackout on trading by insiders if the investigation is not disclosed publicly?
- Do you have indemnification obligations if certain officers elect to retain their own counsel?

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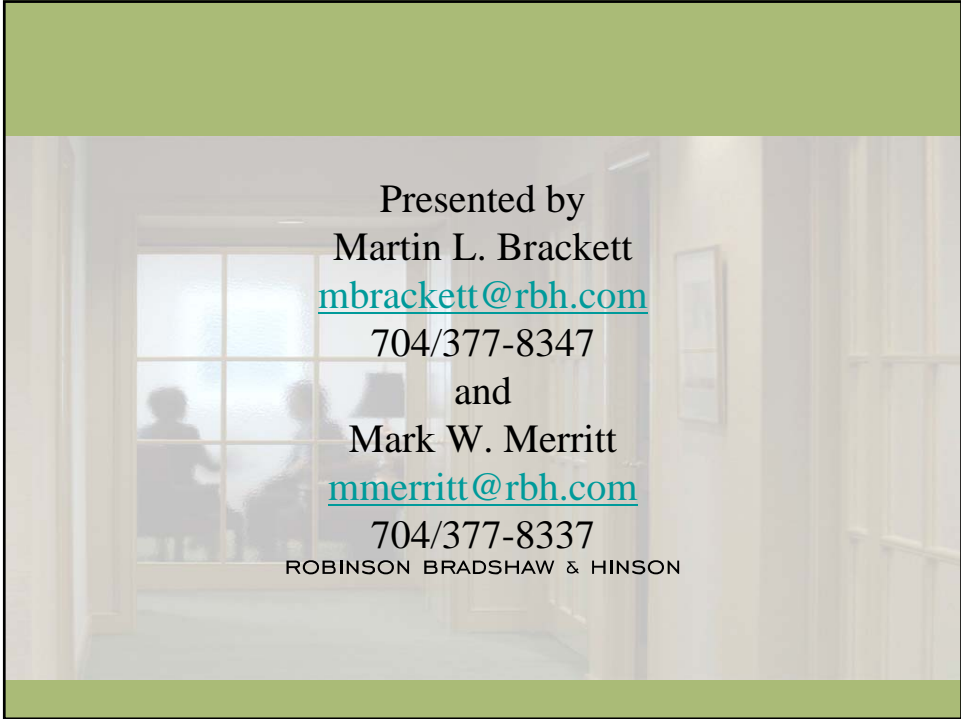
The Importance Of Credibility

- Our experience has been that the key to dealing with prosecutors is to maintain your credibility.
- Tell the truth and be prepared to back up what you say with documents and facts.
- Don't mislead by way of omission.
- If you don't know something, tell them.
- Advocate aggressively, but fairly within the facts and law.

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QUESTIONS?

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