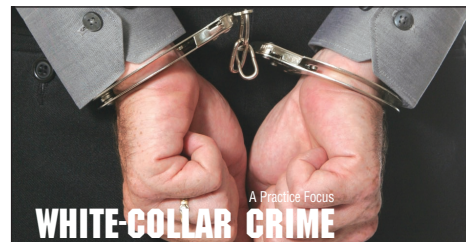


## Start Talking—Or Else

Putting the wrong pressure on witnesses can distort the case.



**BY STEVAN E. BUNNELL  
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**F**ederal prosecutors have many powerful ways of getting witnesses to talk. Sometimes, these tactics help bring violent criminals to justice, but used the wrong way, they can distort the fact-finding process and even lead to suspect convictions and plea deals.

Prosecutorial tools during a criminal investigation include grand jury subpoena power, the threat of prosecution—for both the underlying crime and for lying during the investigation—and the power to immunize or otherwise offer leniency in exchange for a witness's cooperation.

The government also has many other, more subtle methods to induce cooperation, ranging from exploitation of the reputation of federal law enforcement (which often inspires mixed feelings of trust, fear, and awe), to more targeted coercion, such as threatening to investigate the witness or his or her family, friends, or colleagues.

Of course, many of the most dangerous criminals have been successfully prosecuted because witnesses who were initially recalcitrant, fearful, or just flat-out lying were “flipped” by police and prosecutors or deterred from committing perjury.

But the same tools that sometimes help ferret out the truth from hardened, dishonest witnesses in violent crime cases can very easily lead to substantial distortions in white-collar cases, where the existence of criminal activity might be uncertain, witnesses may be more susceptible to pressure, and the nuances of intent crimes often magnify the significance of small embellishments in a witness's recollection.

### **ABOUT YOUR KIDS...**

Consider the following scenario: Two federal prosecutors and two FBI agents show up unannounced at the new workplace of a woman formerly employed by a corporation now under investigation for possible procurement fraud. The

employee is a foreign national with a green card, a single mother who has been living and working in the United States for five years. She speaks limited English, has very modest financial resources, and has had no prior encounters with the U.S. justice system.

Speaking without an interpreter, the prosecutors tell her that they have sworn testimony from cooperating witnesses that four years ago, while working for her former company, she knowingly did work on a transaction designed to conceal the source of ill-gained funds. One prosecutor tells her that money laundering carries a 20-year penalty under federal law. They also remind her that when asked a general question in a previous FBI interview, she denied any knowledge of wrongdoing. The prosecutor tells her that lying to an FBI agent is a serious federal felony.

One of the agents then asks about her immigration status and about the citizenship of her kids. He also asks her if there is anybody who would be able to take care of her kids if she goes to jail.

One prosecutor presents her with a subpoena requiring her to travel to Washington, D.C., in 10 days to testify before the grand jury. The prosecutor also shows her a letter immunity agreement in her name. He tells her that if she admits to what the government already knows, confesses to money laundering, and tells them who else in the company knew about it, she will get immunity. They tell her that her former boss is their real target, not her. With the witness now thoroughly terrified, the prosecutors and agents begin the interview.

Has the government approached this witness in a way designed to uncover reliable and balanced information? Or have they brought to bear such a powerful mix of intimidation and inducement that any information provided by the witness should be highly suspect?

Some prosecutors may be tempted to react to this situation with a shrug: Lots of witnesses have credibility issues; that's what cross-examination is for.

But even assuming cross-examination is a sufficient

check on abusive methods in cases that go to trial—itsself a dubious assumption—it’s no check at all in the 96 percent of federal criminal cases that never make it to trial. And in the white-collar area, the vast majority of cases are resolved not just pre-trial, but pre-indictment, often long before a defendant has any legal right to discovery, much less cross-examination.

Moreover, defense counsel can have trouble correcting any governmental errors because one frequent consequence of an intimidating encounter with the government is that the witness no longer feels comfortable talking to the defense—especially after the government reminds witnesses that they have no obligation to talk to defense lawyers. (Somehow, they rarely advise the witness that the same is true for government lawyers and agents.) And a defendant unable to conduct a meaningful investigation of the case is obviously at a considerable disadvantage in negotiating a fair and reasonable resolution.

### THE PERJURY TALK

So what assurance does the target of a white-collar investigation have that the government’s view of the case during pre-indictment plea negotiations is not based on information that has come from intimidated or confused witnesses?

The government is to some extent constrained by the Sixth Amendment in its ability to gather evidence through intimidation. When a case goes to trial, prosecutors risk reversal when they have been too aggressive in giving potential defense witnesses “the perjury talk”—that is, the standard lecture given to witnesses believed prone to lying on the stand.

In *United States v. Vavages* (1998), for example, the U.S. Court of Appeals for the 9th Circuit reversed a conviction when the prosecutor’s perjury talk crossed the line in several respects—by suggesting with doubtful basis that the witness’s alibi testimony would be false and by threatening to withdraw the witness’s own plea agreement if she testified for the defense.

Likewise, in *United States v. Morrison* (1976), the 3rd Circuit reversed a conviction where the prosecutor battered a potential witness with a “barrage” of perjury warnings during an interview and withheld immunity, causing the witness to circumscribe her testimony.

*Vavages* and *Morrison* built on the Supreme Court’s decision in *Webb v. Texas* (1972), where it was the trial court itself that “gratuitously singled out ... one witness for a lengthy admonition on the dangers of perjury,” implying that it considered the witness a liar. In all these examples, the exercise of governmental power simply went too far, typically by laying on too thick the coercive techniques in the government’s arsenal.

### COUNSEL AND BALANCE

As a general matter, these cases encourage prosecutors to pay close attention to small factors that in the aggregate could create a situation in which the fact-finding process is misguided and the defendant’s right to defend himself is compromised.

But the Sixth Amendment right in these cases does not

attach until after charges have been filed, and if a case doesn’t go to trial, undue pressure won’t be checked by Sixth Amendment witness intimidation challenges.

That makes counsel for a vulnerable witness all the more important. Filtering potentially intimidating government communications through a witness’s attorney can do much to mitigate undue governmental influence on a witness’s testimony.

Even more important, our criminal justice system relies largely on the Justice Department to regulate itself pre-indictment, with the courts providing only high-level guidance. Only the most extreme abuses at that stage are likely to trigger judicial intervention. And yet it is the fact-finding during this pre-indictment investigative stage, not the trial stage, that really matters in most white-collar cases.

The mission for federal prosecutors was eloquently stated by Justice George Sutherland in *Berger v. United States* (1935), where he observed that although a prosecutor may “strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.”

Sutherland’s admonitions apply to all aspects of a prosecutor’s work. Even at the earliest stages of a criminal investigation, a prosecutor must strike the proper balance between both duties owed to the public: that of vigorous prosecution, and that of fairness.

Taking *Berger* seriously means that prosecutors and those who supervise them must be ever mindful of the intimidating effects of interview techniques and the potential for gross distortion of the perceived facts when prosecutors and agents approach a vulnerable witness with a strong preconception of what they should (or want to) hear.

And the government also needs to recognize that only with a fair understanding of the information prosecutors are working from can counsel for a target intelligently challenge or accept the evidence of guilt (including evidence from suspect sources) and provide informed advice to their client about the decision to plead guilty.

Prosecutors thus need to stop thinking of pre-indictment discovery as something that a putative defendant needs to earn through cooperation or other concession. It should be standard procedure in white-collar cases that the prosecutor provide a target with a detailed pre-indictment reverse proffer of the government’s evidence.

Indeed, such a reverse proffer—or so-called “Mae West meeting”—is a routine step in white-collar cases prosecuted by the Fraud and Public Corruption Section of the U.S. Attorney’s Office in the District of Columbia. There is no reason that the entire Justice Department shouldn’t be doing the same.

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