TEXAS LAWYER

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NOVEMBER 17, 2008 VOL. 24 • NO. 33 An incisivemedia publication

[LETTER to a young trial lawyer]

Agency Investigations Require Shift in Approach

by DAVID K. BISSINGER

Government investigations have become a major component of many commercial trial lawyers' work. While regulatory enforcement actions in securities, commodities and other areas of the law have increased over the past decade, leading trial-skills teachers have written little about advocacy before government agencies. Budding trial lawyers must hone their abilities in this area if they are to reach their potential.

Successful advocacy in investigations has at least three characteristics: contextualizing arguments for the culture of the regulatory authority, mellowing one's tone while preserving aggressive trial preparation, and adjusting the timing and method of pretrial negotiations.

> **THE ASSERTION OF FIFTH AMENDMENT PRIVILEGE WILL LIKELY DOOM ANY DEFENSE IN A REGULATORY PROCEEDING OR CIVIL DAMAGES ACTION.**

• *Contextualizing arguments*: Law professors Arthur Rosett and Donald Cressey observed in their 1976 book, "Justice By Consent," that government agencies have a "subculture of justice" that differs from that of a civil courtroom. This subculture reflects shared belief patterns and agency-specific social expression derived from a history of "occupational and professional attitudes and procedures essential to getting the work done." This shared culture becomes the de facto law, regardless of what the statutory or common law might be.

Although these authors wrote mostly about criminal prosecutors, their observations apply with even greater force to regulatory investigations, which end with a settlement far more often than criminal cases.

Attorneys must be mindful of the policy directives motivating regulators. For example, the Securities and Exchange Commission's *Enforcement Manual* outlines the SEC's considerations for deciding what types of alleged misconduct to investigate by "ranking allocations and allocating resources" depending on factors such as "size, complexity, and programmatic importance." To be effective, attorneys should understand the subculture of justice in which a government enforcement attorney is operating and target their message to that audience.

• *Same tactics, mellower tone*: Lawyers defending investigations must also use a far less combative tone than in civil court but without sacrificing the aggressive use of trial tactics. The lawyer must develop a story made of up core themes supported by documents and a timeline.

For example, in responding to an investigatory subpoena, little room exists for objections, other than those of privilege. In fact, some regulators, such as the Financial Industry Regulatory Authority in FINRA Rule 8210, make failure to cooperate with an investigation a separate violation of their rules. Moreover, as widely reported, until recently the U.S. Department of Justice considered a corporation's willingness to waive attorney-client privilege as a factor in determining whether to extend credit for cooperating. Although that position has softened recently, the issue reveals government investigators' power.

As in all pretrial work, it is impossible to overstress the importance of witness preparation. With the documents assembled, the next step often involves preparing the key witnesses to testify in an investigatory deposition or an on-the-record interview. The lawyer should spend hours preparing a cross-examination of his or her own client by assembling and

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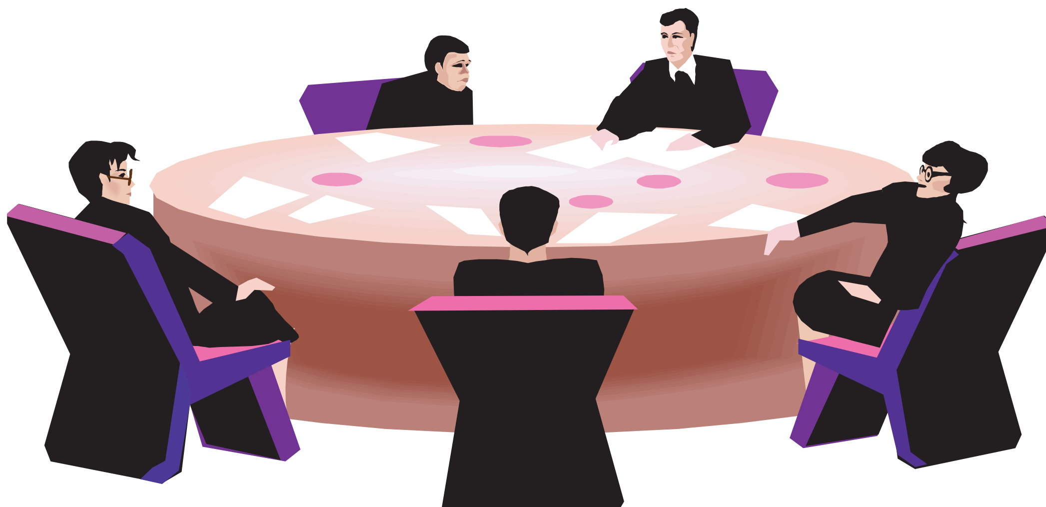


addressing every piece of the agency's proof. After that, the lawyer should conduct a mock cross-examination to ensure the witness understands the many directions in which the agency's lawyers will inquire.

There are two additional issues regarding this testimony. First, the government agency will often have several lawyers in the examination room, creating an environment more like a police examination than a traditional one-to-one deposition or examination in trial court. A good mock cross-examination should replicate this dynamic.

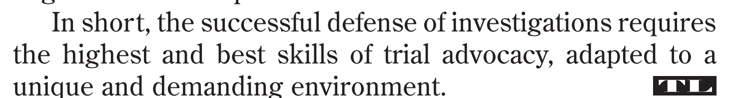
Second, the defending lawyer must also consider potential Fifth Amendment issues. Some enforcement investigations lead to criminal prosecutions. But asserting Fifth Amendment privilege likely will doom any defense in a regulatory proceeding or civil damages action. Because of the conflicting risks, in cases involving a significant possibility of criminal prosecution the lawyer defending the civil investigation may well advise his or her client to retain criminal counsel.

• *Adjusting negotiation*: With the documents submitted and the witnesses interviewed, the government agency will often give the party under investigation an opportunity to persuade the agency not to bring charges or to bring charges less severe than those contemplated. As famed criminal-defense lawyer Jim Neal observed in Emily Couric's book "The Trial Lawyers," the attorney's job is to try to convince the government that "this is a case that, for whatever reason, should not be brought — either because it doesn't serve any good public policy," it doesn't involved sufficient admissible evidence to support the charge, or the government has missed witnesses fatal to its case.

The lawyer defending a civil regulatory inquiry typically has more opportunity to persuade than the criminal-defense lawyer. In regulatory investigations, many agencies have formal procedures for pre-suit negotiations. At the heart of these negotiations lies a written statement — known in securities and commodities investigations as a "Wells submission," after John Wells, the New York lawyer who advocated its use — in which the party defending the investigation explains weaknesses in the government's case and so forth.

In addition to the Wells submission, the lawyer defending the investigation should have engaged in extensive informal discussions with the agency lawyer from the inception of the investigation. As F. Lee Bailey observed in his treatise, "Successful Techniques in Criminal Trials," these discussions are "repartee" similar to "initial light sparring in a boxing match as each fighter tries to feel out the other," with each side loosely inquiring the other about possible outcomes. Again, in these discussions, the lawyer's familiarity with the investigating agency's subculture of justice can help make negotiations more productive.

In short, the successful defense of investigations requires the highest and best skills of trial advocacy, adapted to a unique and demanding environment. TL



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