



Ep. 01: Do I need a lawyer? Government employees under investigation

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Government employees can find themselves in the middle of investigations that present them with an opportunity to either help the cause or hurt it, if the matter is not handled properly. There's no need to make the road any rougher than it has to be.

Bob Driscoll:

Hi, I'm **Bob Driscoll**, partner and co-chair of McGlinchey's White Collar and Government Investigations group, based in our Washington DC office. I'm joined today by my colleague, **Dan Plunkett**, a partner in McGlinchey's New Orleans office and also a co-chair of the White Collar group. Dan and I have worked with numerous government employee clients to help manage government investigations, including criminal, civil, and Congressional. Today, we're going to talk about what government employees should do when they come under investigation. If not handled correctly, the headaches are many. Let's talk about a few steps you can take to minimize those headaches.

The first word in any investigation is "stop."

Dan Plunkett:

Bob, I think the first thing that anyone served with a Congressional subpoena request for information from any level of government is stop. Stop. You've got to stop all of the normal practices that govern what you do day in, day out. You've got to stop deleting emails. You've got to stop throwing notes in the garbage. You've got to stop the normal file destruction that governs how you keep your desk neat and orderly. The first word in any investigation is "stop."

Bob Driscoll:

That's such an important point, Dan. And I think that while it seems obvious, particularly in retrospect, I think it's important to recognize that it's something we do all the time. We start to type something, we delete it, or we see a draft, we don't like it and we get rid of it. And there's nothing nefarious about it. But all those kinds of things, when they come after you have notice of an investigation, can be looked on in a negative light and can be used by the government or by the investigating body to infer guilt. And so, I think

a lot of people think, "well, I would never do that because I'm not a bad person," but I think, you know, it's important to recognize that these are the kinds of activities we do every day. But in this context, the first thing to do is to stop.

Dan Plunkett:

And then Bob, I think that the next step is to coordinate. If you're, for example, a mid-level agency employee in Washington, DC, working your job, trying to serve your country with your expertise. And you are the recipient of some investigatory request -- maybe it's a Congressional subpoena from the House oversight committee. You've got to coordinate with your supervisor, your agency chair, the head of your department -- with someone. This not something you want to go alone on. Coordinate with your office. It may be that your office can help you respond. Maybe they've already got a coordinated response. Maybe you're just the 15th domino in this chain. So after you've stopped, the next thing is to go to your boss and assess the situation.

You want to get your antenna up a little bit if the request is something where there's been a bit of conflict

Bob Driscoll:

Right. And I think that's, again, important. And this is where you begin to figure out if something is unusual, because by the nature of the request you get, you know, hopefully it's something that's straight forward. The agency has a lawyer, hopefully a government attorney that's coordinating it. No one really has any exposure. You want to get your antenna up a little bit if the request is something where there's been a bit of conflict, either between your agency and another branch of government, or between you and your boss, or between you and someone in your office, and this is what someone is asking about. You still want to talk to your boss and let them know what you know. But that's the point where you want to start thinking about whether or not your interests are going to be adequately represented by whatever your department or your group of employees are doing, particularly by your boss. Which leads to the next point we can talk about, which is insurance, Dan.

Dan Plunkett:


Yeah. Thanks Bob. That's an interesting point because when you say insurance, I think most people are thinking, "okay, I've done something wrong, potentially I've hit someone with my car, and I'm insured for that. What is this insurance that might be useful to a federal government employee in dealing with Congress?"

Bob Driscoll:

Well, I mean, this is something that I think most government employees -- certainly when I served in government, I wasn't aware of it, and I wish I had been. There are insurance policies one can buy as a government employee that cover both your legal fees, and your exposure up to certain policy limits, if you can be held individually liable, if you're sued in your personal capacity, or if you have something that's not covered by your agency. These policies are very reasonable. We can attach a link to the podcast somewhere if we can, as an example of one.

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But we're talking between \$290 and \$390 a year is a recent quote I got for a client for between a \$1 million and \$2 million of coverage for you know, both damages and attorney's fees (and the attorney's fees can be \$100,000 or \$200,000.) That cost is covered 100% by the government if you're in the intelligence community, and the government picks up about half the tab for a lot of senior positions across the government. So you're really looking at, you know, the cost of a nice dinner out could save you a big headache. And so that makes that call to, you know, an insurer or a private lawyer a lot less worrisome, because you're not digging into your own pocket. But of course not everyone has insurance. So in that case, you still may want to talk to your own lawyer. But that's something you want to look at as well as other things, Dan, I think you can discuss about union and other representation that law enforcement frequently has.

Dan Plunkett: Well, that's right, Bob. Certainly, if you think about groups like the FBI agents have an association, it may be that through their associations or if the employees are unionized, they may also have another source of counsel, literally, as in "attorney" counsel, but also someone to guide them through the process. But how would somebody know whether or not they need their own counsel? Don't all these agencies have lawyers in house who respond to these subpoenas?

Bob Driscoll: They do. And most of the time, in most instances, that will cover an employee in question. But there are occasions when the interest of the agency diverge from the individual. And in those instances, in addition to insurance, another form of payment you can get is an opinion from your agency that you are both entitled to counsel, because your conduct that's in question is within the scope of your duties. But you're also entitled to separate counsel from the government because your interests are different. You and I, Dan have worked on a matter like this, where a federal government employee got an opinion from the office he worked in that said he was both entitled to counsel, but entitled to separate counsel than the government had. The circumstances in question, without giving away any confidential information, had to do with a subpoena and the possibility of being held in contempt. In that instance, the agency had one perspective on the matter and was going to advocate that seriously. But the individual was the one who was going to be held in contempt if the documents weren't turned over. So notwithstanding a friendly relationship between the employee and his agency, the agency was willing to pay for separate counsel for him. And so that's what you want to look at, essentially, are your interests at all different from your department or from your supervisor? And that's something you will want to talk over with an attorney, if you have any questions about that -- with your own attorney, not just the government's attorney. But you might want to start with the government's attorney and see what their view on the matter is.

Dan Plunkett: Bob, I think we would do well here to speak, not just to government employees and what they might do, but also to speak to our fellow members of the bar. I have found that many Congressional investigation matters are really counterintuitive, and that some of the very practices that have served me well for decades as a civil lawyer, would actually get me and/or my client in some difficulty, or make the road harder for them, if I employ the same tactics. And one of the things I'm thinking of, for example, is that in

civil litigation, if I were to go to the other side and say, "I'm going to produce this witness, but he really doesn't want to talk about Topic A," that would be like blood in the water for a shark. And the other side would want to ask him about nothing other than Topic A. But in Congress, that's sometimes different. What's your experience with, "Hey, can we do this without touching Topic A?"

Bob Driscoll:

Right. I think you've highlighted one of the ways that a Congressional investigation is very different, Dan. And I think that example you gave is a good one. When you get a Congressional subpoena or your client gets a Congressional subpoena, what you want to look at is what is Congress trying to achieve through the hearing in question? Are they looking to essentially do a parallel investigation and make some type of referral to law enforcement -- where even though they are supposedly engaging in legislation, what they're really doing is essentially a law enforcement function, looking for violations of law? Are they looking for circumstances that will justify changing the law? And oftentimes if you talk to the counsel who sent the subpoena, you can find out what they want. And if that's something you can give them, which does not harm the interest of your client, they are more than amenable to restricting the types of testimony or documents you have to produce. If you say, "I'm more than happy to talk about this issue, or have my client talk about this issue before the committee, but we'd limit his testimony to X." Or possibly because there's another investigation going on, to say "we can't prejudice his position in that investigation, so we'll have to arrange something." And those types of negotiations are typical. Similarly, one thing you CANNOT do is take the kind of hard line approach that we often take in civil litigation, the kind of "drop dead letter," questioning the authority of the committee, unless there's a real jurisdictional problem. That is generally not a fight you can win. And the old saying goes, "don't fight the people that buy ink by the barrel." That goes triple with Congress, who's got access to cable TV and the newspapers whenever they want. And so a non-cooperative witness before Congress can be made to look very bad in the media very quickly. And so the key is to retain experienced counsel who has some relationships with the people involved, and try to negotiate something to make the process as painless as possible, presuming you don't have exposure which would otherwise prevent you from testifying.

Dan Plunkett:

So you've caught your flies with honey, and you've talked to the Congressional committee counsel and worked out the deal. Your witness is gonna appear. But now you, as a lawyer are still restrained and the process is very different. Your witness is sworn in, they're being asked questions typically by a staffer, not actually by a Congressman (unless you happen to be in one of the very publicized televised proceedings), and they ask a question that might impinge on attorney client information.

Bob Driscoll:

Exactly. I'm glad you drew the distinction that most Congressional investigations are non-public. We see the ones on TV once in a while, and that's a separate question we can address a little bit later. But when you're in a nonpublic, it looks like a deposition, but it is in fact not a deposition, in that Congress does not inherently recognize any of the privileges we all deal with in civil law all the time. And so things like attorney/client privilege or business confidentiality are not per se protected in a Congressional

proceeding, and Congress or a Congressional committee doesn't have to recognize those things. Now in practical terms, one can get the committees to recognize those privileges, but you have to raise it in advance and discuss how it's going to be handled with the committee in advance. If you just trotted into the committee with your witness without those things arranged, you could be in a very awkward situation, because essentially the lawyer asking could get a ruling from the chairman of the committee that indeed privilege is not recognized, and compel or move to compel testimony from your witness. And then you're in a legal battle none of us want to be in. So I think that it's very important to get those things straightened out.

Dan Plunkett: Yeah, I think that's a classic example of something that's counterintuitive about the Congressional subpoena area, where you might want to lie in the weeds and make your objections during a deposition in a civil matter. There are no objections in a Congressional hearing.

Bob Driscoll: Exactly. And on the public side of that, when you have clients who are testifying publicly before a committee, worst case scenario, in one of the CSPAN or national TV type of hearings, you've got another problem, which is that lawyers really don't have a right to object to those questions. So it ends up being a double-edged sword. I mean, you do not see on TV, somebody jumping in front of the witness and saying "Objection, Senator Grassley, relevance?" There's no judge to go to -- the Senate or the House controls the hearing. And so, you know, you have much less control than you would in a civil deposition. The upside to that is the answers, again, generally can be a little less direct than they would be in a civil deposition. And everyone somewhat understands, in a Congressional hearing, that a lot of this is making a broader point rather than answering specific questions.

So answers that would be viewed as nonresponsive in another context, sometimes you can get away with in Congressional hearing. But that's all to do with prep, and that's the nuts and bolts of, again, hiring a lawyer who has done it before, and working with the client to review prior Congressional testimony of other witnesses that have done a good job, so they can see some of the techniques. I mean, just the other day, I saw an excellent job in a confirmation hearing by a witness who literally answered every question by running 15 seconds off the clock with, "Thank you, Senator X, for your question about Y. Issue X is very important to me, and if I'm confirmed to this position, I'll do everything in my power to make sure issue X is addressed." All that just came out of her mouth before she addressed anything. And it was an example of a well-prepped witness who put everyone at ease and had a great answer.

stop, consult, cooperate if you can

Dan Plunkett: I think the road down a Congressional investigation can be a smooth one, if you just remember some simple words: stop, consult, cooperate if you can. Right? I think that's all for today, Bob. I'm **Dan Plunkett**.

Bob Driscoll: I'm **Bob Driscoll**.

Dan Plunkett: Until next time.

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Robert N. Driscoll
Member, Washington, DC
(202) 802-9950
rdriscoll@mcglinchey.com



Daniel T. Plunkett
Member, New Orleans
(504) 596-2778
dplunkett@mcglinchey.com

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