

## **SURPRISE GOVERNMENT INTERVIEWS -- AN OVERVIEW AND TWO CASE STUDIES**

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## **INTRODUCTION**

When conducting criminal or regulatory investigations of corporate wrongdoing, government agents at times seek to interview company employees “by ambush” either at an employee’s home or at the office. Such surprise interviews are legal and can be a very effective investigative technique. Nevertheless, both employees and companies should know their legal rights, and should understand the risks employees take if they choose to submit to a surprise interrogation.

### **I. WHAT YOU NEED TO KNOW ABOUT SURPRISE GOVERNMENT INTERVIEWS**

#### **A. The Purpose of the Surprise Interview**

1. Valuable tool designed to obtain critical evidence
  - a. May catch employee in a lie – employee is unprepared and facts may either be inculpatory or embarrassing
2. Simultaneous surprise interviews prevent employees from “getting their stories straight”
3. Minimizes the likelihood that the company can intervene and stop the interview

#### **B. What to Expect in a Surprise Interview**

1. Carried out by either criminal investigators (FBI agents) or regulators (securities, banking)
2. Location of Surprise Interviews
  - a. Usually at employee’s home.
    - i. Embarrassment factor may tempt employee to just get it over with
  - b. If by phone, may seem less confrontational
  - c. Likely to also be attempted at the office during the execution of a search warrant or during a surprise regulatory examination
3. Anyone from the Chairman of the Board to a mail clerk can be the subject of a surprise interview
  - a. In October 2007, when the FBI raided the Tampa headquarters of WellCare Health Plans, a large insurance benefits manager, “several agents interrupted a quarterly board meeting and held directors there for hours of interviews.” “3 Leading Executives Resign at Insurer Under Inquiry,” *The New York Times*, January 26, 2008.

4. No *Miranda* warning required because not a custodial interrogation
  - a. *Miranda* warning not triggered simply because an individual being questioned is either a suspect or the focus of a criminal investigation. *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)
5. Normally two agents; notes are taken
  - a. No witness to support employee's recollection of interview if it differs from agents' recollection
  - b. Report will be prepared
6. If no search warrant, agents may seek voluntary consent to search premises and/or computer
7. Agents may attempt to convince employee to sign a statement or affidavit. *See United States v. Hocking*, 860 F.2d 769 (7th Cir. 1988)
8. Subpoena may be served whether or not the employee submits to the interview

### **C. Critical Legal Rights and Legal Concerns**

1. Employees are not legally required to participate in the interview
  - a. Unlike a subpoena where testimony is compelled, unless the witness takes the 5th
  - b. But some regulators can impose sanctions for failure to cooperate
2. Employee is entitled to retain personal counsel or speak to a supervisor or company attorney
3. Any statements made are not "off the record," and can later be used against the company and/or the employee
4. Lying to a federal agent is a crime
  - a. 18 U.S.C. §1001 prohibits lying to or concealing material information from a federal official. Its purpose is to "punish those who render false positive statements designed to pervert or undermine the functions of governmental departments or agencies." *United States v. Harrison*, 20 M.J. 710, 711 (A.C.M.R. 1985)
  - b. Federal obstruction of justice statutes may also apply
    - i. 18 U.S.C. § 1505 prohibits obstructing or attempting to

obstruct “the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States,” or before any Congressional committee

ii. 18 U.S.C. § 1512(c)(2) prohibits obstructing or attempting to obstruct “any official proceeding,” and provides for a 20 year prison term

5. It is very difficult to have any statements made to agents during a surprise interview suppressed at a later trial

a. In *Beckwith v. United States*, 425 U.S. 341 (1976), the Supreme Court held that statements made by the defendant to IRS agents during a noncustodial interview at his home were admissible against him even though he had not been given *Miranda* warnings and even though he was the “focus” of a tax evasion investigation at the time of the interview

i. The Supreme Court upheld the district court’s denial of the defendant’s pretrial motion to suppress his statements

ii. The Supreme Court specifically held that no *Miranda* warning had been necessary because the interrogation was noncustodial, and further stated that,

We recognize, of course, that noncustodial interrogation might possibly in some situations, by virtue of some special circumstances, be characterized as one where “the behavior of . . . law enforcement officials was such as to overbear petitioner’s will to resist and bring about confessions not freely self-determined. . . .”

*Id.* at 347-48. (citation omitted)

b. In *United States v. Bailin*, 736 F. Supp. 1479, 1481 (N.D. Ill. 1990), defendant Bailin filed a motion to suppress statements he had made to government agents during two interviews, the first of which was a surprise interview at his home. The district court noted that,

Bailin’s primary contention is that the agents prompted him to make his statements by means of “deceit, trickery, and false promises of leniency.” In *United States v. Serlin*, the Seventh Circuit held that in order to suppress on the basis of such a

claim, the evidence must reveal that the Government agents (1) affirmatively mislead the defendant as to the true nature of their investigation, and (2) the misinformation was material to the defendant's decision to speak with the agents. *United States v. Serlin*, 707 F.2d 953, 956 (7th Cir. 1983).

*Id.* at 1483.

After a thorough analysis of Bailin's claim, the district court denied his motion to suppress. *Id.* at 1483-85.

#### **D. Five Key Rules to Follow**

1. Be respectful, but do not be intimidated
2. Consider postponing the interview
3. Don't talk, listen – listen carefully
4. Obtain business cards of agents
5. Immediately advise supervisor, corporate counsel or personal attorney

#### **E. Advantages to Postponing the Interview**

1. Affords the employee time to review the facts and prepare with an attorney
2. Gives employee time to decide whether to talk to government at all
3. Later interview will be held at a government office, not at home
4. Presence of an attorney should protect against a potentially unfair or deceptive interrogation
5. Probably not sacrificing leniency

#### **F. Leniency Issues**

1. It is likely that any leniency considerations (*i.e.*, immunity, reduced charges) available at the time of the surprise interview will still be available if the interview occurs a short time later in the presence of an attorney
  - a. But remember, sometimes it is necessary to be the first cooperator in the door. *See* Case Study #1 herein

2. Agents and investigators do not have the authority to grant leniency
3. Submitting to a surprise interview rarely terminates an investigation, and may very well enhance it
4. Incorrect, incomplete or false answers severely compromise leniency prospects

#### **G. Corporate Internal Investigations & Surprise Interviews**

1. What the government can do, so can a company
2. Surprise interviews are sometimes used by a company's corporate security department or by external investigators retained by the company
  - a. Corporate Codes of Conduct and Employee Handbooks usually require employees to cooperate during an internal investigation or face dismissal
3. If conducted outside the U.S. must address foreign privacy/legal issues

### **II. CASE STUDY #1 - FBI PRICE-FIXING INVESTIGATION OF INDIANA READY-MIXED CONCRETE COMPANIES**

#### **A. Background<sup>1</sup>**

1. Beginning in July 2000 and continuing until May 2004, five of the largest ready-mixed concrete companies in Central Indiana, an area including Indianapolis, entered into an illegal price-fixing conspiracy
  - a. The five companies controlled the Indianapolis market and sold at least \$400 million in ready-mixed concrete during the period of the conspiracy
2. Between July 2000 and October 2003, secret meetings took place (including two inside a horse barn owned by Gus B. ("Butch") Nuckols, one of the conspirators) at which company representatives agreed to fix prices by, among other things, implementing coordinated price increases and limiting price discounts to customers
  - a. Ricky Beaver of Beaver Materials Corp. attended two of the meetings and his cousin Chris Beaver attended a third meeting at the horse barn

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<sup>1</sup> The facts concerning this case were obtained from various sources, including newspaper articles, plea agreements, informations, an indictment and the government's appellate brief in U.S. v. Chris Beaver, No. 07-1381 (7th Cir. 2007).

3. In October 2003, a manager of another concrete company who had been pressured to participate in the price-fixing conspiracy notified the FBI, and then cooperated by taping his meetings and conversations with conspiracy participants
4. This case became the Justice Department's largest domestic price-fixing investigation in history, and as a result ten executives were sent to prison and fines totaling \$35 million were levied
  - a. Additionally, a massive class action complaint was filed seeking treble damages and injunctive relief under U.S. antitrust laws; the case is still pending

## **B. The Raids and the Surprise Interviews**

1. On May 25, 2004, FBI and other law enforcement agents simultaneously executed search warrants at the offices of the five concrete companies, and conducted surprise interviews of about 20 individuals
  - a. As the lead FBI agent later testified at trial, the interviews were conducted simultaneously so that the conspirators could not "get together and either destroy evidence and/or concoct a story to protect their culpability"
2. Many conspirators lied to FBI agents and one even destroyed evidence
  - a. Scott Hughey, President of Carmel Concrete Products, was at breakfast with a competitor when he received a call from an FBI agent wanting to talk; as Hughey drove to meet the agent, he stopped by his office and destroyed notes taken during price-fixing meetings; Hughey then lied to FBI agents during his interview, drove home, and destroyed more incriminating notes
  - b. As John Blatzheim of Builder's Concrete & Supply returned home from a morning run, agents were waiting; Blatzheim invited the agents in, carefully shutting the sliding-glass door to a screened-in porch to avoid alarming his wife; Blatzheim then lied to the agents about his knowledge of price-fixing meetings
  - c. Butch Nuckles of Builder's Concrete, interviewed in his home, also lied to investigators, denying knowledge of the meetings in his horse barn and elsewhere to fix prices
  - d. Chris Beaver of Beaver Materials also lied to the FBI:

In Noblesville [Indiana], Chris Beaver, operations manager at Beaver Materials, invited investigators in and offered them refreshments. He was calm and

talkative, but he repeatedly denied any involvement. His wife was getting their children ready for school. Beaver, who was being groomed by his father to lead the company, later said he had hoped authorities would leave without hauling him away in handcuffs as his children watched from atop the staircase.

Kevin Corcoran, “The Big Fix,” *The Indianapolis Star*, May 6, 2007.

- e. Ricky Beaver also lied to the FBI during his interview at Beaver Materials’ offices as the FBI executed a search warrant; Beaver later recalled that “there were a lot of things racing through my mind – everything but the truth”

### **C. The Deals, Pleas and Fines**

- 1. Following the raids came the race to the Chicago offices of the Department of Justice’s Antitrust Division, as the first company in the door was to receive amnesty under the Antitrust Division’s Corporate Leniency Policy
  - a. Section B of the Corporate Leniency Policy, which was issued on August 10, 1993, provides, in pertinent part, as follows:

If a corporation comes forward to report illegal antitrust activity ... the corporation, whether it comes forward before or after an investigation has begun, will be granted leniency if the following seven conditions are met:

- 1. The corporation is the first one to come forward and qualify for leniency with respect to the illegal activity being reported.

The other six conditions relate to, among other things, the amount of evidence the Antitrust Division has against the company when it comes in, whether the corporation provides full and complete cooperation “that advances the Division in its investigation,” and a determination by the Division that “granting leniency would not be unfair to others.”

- 2. Shelby Materials won the race and received full amnesty for itself and two of its officers

- a. Shelby was sued in the class action, however, and recently settled for \$4.7 million
3. The largest company that participated in the conspiracy, Irving Materials, Inc., which was close behind Shelby in the race to cooperate, was given amnesty in markets other than Indianapolis
  - a. As a result of its actions in Indianapolis, however, Irving Materials pled guilty on June 29, 2005, to a price-fixing conspiracy, and agreed to cooperate and to pay a record fine of \$29.2 million; additionally, 4 Irving executives pled guilty, agreed to cooperate and to pay fines of \$100,000 to \$200,000 each, and received 5 month prison terms followed by 5 months home detention
4. The remaining companies and individuals each had to either plead guilty to criminal conduct or face a criminal trial
  - a. Scott Hughey, for example, pled guilty to a price-fixing violation and received a 14-month prison term, which would have been much longer but for his full cooperation
  - b. Hughey's company, Carmel Concrete Products, pled guilty to a price-fixing violation
  - c. Butch Nuckols and his company Builder's Concrete also pled guilty to a price-fixing violation; Nuckols, like Hughey, cooperated and received a 14-month prison sentence
  - d. Company counsel need to recognize the potential consequences a company faces from a guilty plea, including, for example, a possible bar from bidding on government contracts (mfg. co.) or from providing professional services for a public company (acctng. firm)

#### **D. The Indictment against Chris & Ricky Beaver and Beaver Materials**

1. On April 11, 2006, an Indictment was returned against Beaver Materials, Chris and Ricky Beaver and John Blatzheim
  - a. Each defendant was charged with conspiracy to violate Section 1 of the Sherman Act (15 U.S.C. §1) by engaging in "a combination and conspiracy to suppress and eliminate competition by fixing the prices at which ready mixed concrete was sold"
    - i. Among the means and methods allegedly used to carry out the conspiracy was "attempting to conceal the conspiracy and conspiratorial contacts through various means," presumably including lying to the FBI during the May 25,

## 2004 interviews

- b. Blatzheim and the Beavers were each also charged with having made materially false statements to agents on May 25, 2004, in violation of 18 U.S.C. §1001, in that each had “falsely stated that he was unaware of any representative of a ready mixed concrete company being involved in pricing discussions with competitors”
2. On November 2, 2006, Blatzheim entered into a plea agreement with the government, thereby avoiding a trial
  - a. Blatzheim pled guilty to the Sherman Act price-fixing charge against him, and the false statements charge was dismissed
  - b. Blatzheim was sentenced to nine months in prison

## **E. The Trial, Sentencing & Appeal of Chris & Rick Beavers and Beaver Materials**

1. After a three-day trial that began on November 13, 2006, the jury found the defendants guilty on all counts
  - a. An FBI agent testified that false statements in an interview “can lead you down wrong paths, waste time in the investigation, waste time on resources”
  - b. Neither Chris nor Ricky Beaver testified; such testimony could have exposed them to perjury charges
2. On February 9, 2007, the district court sentenced Chris and Ricky Beaver to identical 27 month prison terms and \$5,000 fines
  - a. Beaver Materials was fined \$1.75 million
3. Chris Beaver appealed to the 7th Circuit Court of Appeals, but in an opinion issued February 4, 2008, the appeal was denied. *United States v. Chris Beaver*, 2008 WL 281773 (7th Cir. 2008)

## **F. Key Issues in Chris Beaver’s Appeal of his False Statements Conviction**

1. Chris Beaver argued that the government had failed to establish that his statements were “material” as required under §1001
  - a. The 7th Circuit held that to be material Beaver’s statements must have “had the tendency to influence, or were capable of influencing, the FBI’s investigation of the price-fixing conspiracy.” *Beaver, supra*, 2008 WL 281773 at \*8

2. Beaver's primary argument was that his false statements did not influence the FBI's investigation because his attorney had sent a letter to the government allegedly correcting Beaver's misstatements before the FBI could actually have been influenced by them
3. The 7th Circuit emphatically shot down that argument and upheld the jury's determination that Beaver's false statements were material:
  - a. The attorney's letter, sent 3 days after the interview, stated that one of Beaver Materials' employees had "misstated" that he was not at one of the secret meetings; the "letter's vague language perpetuated Christopher's lies by implying that someone else [at Beaver Materials] had misled the FBI," on May 25, 2004. *Id.* at \*10.
  - b. Chris Beaver could not avoid a §1001 conviction by correcting his false statements several days after making them, as opposed to correcting them "almost immediately;" the 7th Circuit noted that, "contrary to Christopher's suggestion, §1001 contains no recantation defense. . . [Beaver] essentially asks us to interpolate a recantation defense into § 1001. But given Congress's silence on the issue, we decline his invitation to do so." *Id.*
  - c. Because § 1001 does not include a recantation defense, the materiality of Chris Beaver's false statements had to be assessed as of the time he made them. *Id.* The 7th Circuit cited *United States v. Sarihfard*, 155 F.3d 301, 307 (4th Cir. 1998), which stated that not measuring the materiality of a false statement at the time it was made would "allow witnesses who lie under oath to escape prosecution if their statements before a grand jury are obviously false." *Id.*
  - d. An FBI agent testified that Beaver not only denied meeting with competitors to fix prices, but went so far as to say that the only time he saw competitors was at Indiana Ready-Mix Association meetings, and the 7th Circuit focused upon these misleading statements in its opinion:

Because Christopher's statements concealed his actual role in the conspiracy, they could have hindered the FBI's investigation by directing its attention away from the October 2003 meeting at Nuckols's horse barn, away from Beaver Materials as a company involved in the cartel, and away from himself as an individual participant in the conspiracy. Thus, we see no fault with the jury's

determination that Christopher's false statements were material.

*Id.*

### **III. CASE STUDY #2 - FBI INVESTIGATION OF ALLEGED FRAUDULENT COMMODITY TRADING PRACTICES IN CHICAGO**

#### **A. Background**

1. In 1988 FBI conducted undercover investigation of foreign currency traders at Chicago commodity exchanges
2. FBI undercover agent posed as trader and tape-recorded conversations of allegedly improper trades
3. In January 1989, the investigation surfaced publicly as teams of FBI agents and Assistant U.S. Attorneys visited the traders' homes to conduct simultaneous surprise interviews
4. Many of the traders submitted to the interviews without consulting with an attorney, and made admissions and provided valuable evidence to the government
5. During testimony at a later federal criminal trial the wife of one trader testified that, as a result of the interview, her husband was "white as a ghost," "very agitated" and told her that "by the time we get through the only thing we will have left is the kids." William Crawford, Jr., "Trader's wife tells of FBI visit," *Chicago Tribune*, January 17, 1991.

#### **B. Defendant John Baker's Motion to Suppress Statements made during his Surprise Interview**

1. The Indictment and the Motions to Suppress
  - a. The government indicted 12 commodity traders on charges of RICO, wire fraud and mail fraud
  - b. Several of the defendants, including John Baker, filed motions to suppress the statements they had made during the surprise interviews
2. Key Facts Relevant to Baker's Motion<sup>2</sup>

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<sup>2</sup> These facts are set forth in *United States v. Bailin*, 736 F. Supp. 1479, 1485-86 (N.D. Ill. 1990).

- a. Two FBI agents and two Assistant U.S. Attorneys (“AUSAs”) conducted a surprise interview of Baker at his home at about 7:30 p.m. on January 18, 1989
- b. When Baker and his wife answered the door undercover agent Volk told Baker, “John you know who I am. You know you are on tape. I think it would be a good idea if you listened to what we had to say.”
- c. Baker invited them in. Before the interview began one of the agents allegedly told Baker’s wife that she had a nice house and it would be too bad if she lost it
- d. One AUSA told Baker that if he wanted them to leave they would, and also advised Baker that he was facing criminal charges, including RICO charges, and the potential sentences and forfeitures he faced
- e. Baker said he wanted to cooperate, but first wanted to reach an agreement “to protect his family”
  - i. An AUSA told Baker that his office was not in a position to enter into a cooperation agreement, but that “any cooperation would be considered in the charging decision and would be made known to the sentencing judge”
- f. Baker made various admissions to the agents, including that he had entered into a series of trades with agent Volk for tax purposes
- g. When Baker asked an AUSA whether he had been entrapped, the AUSA “chuckled” and told Baker that he hoped that would be Baker’s defense

3. Basis for the Court’s Decision Denying Baker’s Motion

- a. Baker argued that his statements should be suppressed because the government’s conduct, as noted below, “robbed him of his free will and caused him to make his statements involuntarily.” *Bailin, supra*, 736 F. Supp. at 1486.
  - i. The decision to interview him after an especially tiring and stressful trading day
  - ii. The government’s use of sarcasm during the interview
  - iii. The government’s references to Baker’s potential sentence and forfeitures under RICO

- b. The Court denied Baker's motion for the following reasons:
  - i. Baker was not "subjected to the type of debilitating coercion necessary to render a confession or statement involuntary," *i.e.*, threats, deceit, false promises of leniency
  - ii. The agents' conduct was appropriate and was nothing more than "vigorous persistent questioning"
  - iii. The evidence established that Baker "freely chose to make his statements," in that he invited the agents into his home, answered their questions and sought protection for his family in exchange for his cooperation

*Id.* at 1486-87.

## **CONCLUSION**

As the overview and the two case studies demonstrate, the decision by a company employee as to whether or not to submit to a surprise interview during a criminal or regulatory investigation is a critical one for both the employee and the company. Declining to do so, so that the employee has a chance to carefully review the facts and speak to an attorney, is usually the best choice.