Pandemic Preparation: 72-Hour Response Plan to Government Inquiry

A Practical Guidance® Article by
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Introduction

This First Analysis article provides guidance covering key questions that your organization may face as a result of a regulatory and enforcement inquiry during COVID-19, including a checklist to aid your response. Considering and approving these best practices is good; mastering and implementing them so that you may reflexively employ them is ideal. And a critical component of this is identifying outside counsel that you trust, that knows you and your business, and that can respond quickly to assist you in this high-stakes and fast-moving context.

For additional updates regarding COVID-19, see Market Trends 2019/20: COVID-19 from a Securities Law Perspective, COVID-19 Update: SEC and Nasdaq Response and Updated SEC C&DIs, SEC's Conditional Reporting Relief and COVID-19 Disclosure Guidance: First Analysis, SEC Reporting Companies: Considering the Impact of the Coronavirus on Public Disclosure and Other Obligations: First Analysis, and COVID-19 Ramifications for Public Companies—SEC Disclosures, SEC Filings and Shareholder Meeting Logistics: First Analysis. For an overview of practical guidance on COVID-19 covering various practice areas, including securities, see Coronavirus (COVID-19) Resource Kit.

As the financial industry continues to adjust to the effects of COVID-19, market participants should remain vigilant and prepared from a regulatory and enforcement perspective. If history is any indication, the extreme market volatility over the past several months will lead to a flurry of enforcement activity. The current volatility lends itself to the potential for regulatory and enforcement inquiries on a variety of topics, including participation in government-sponsored programs and the receipt of government funds, business continuity plans, redemption procedures, and valuation processes, not to mention the increased possibility of inquiries into potential fraud (including insider trading and accounting and disclosure failures). Now, more than ever, all market participants—be they public companies, private funds, financial institutions, or other regulated entities—need to be prepared to respond appropriately and effectively if confronted by an enforcement authority. Two weeks from now, it may be you sitting at your desk (wherever that may be these days) when an email attaching a subpoena or information request from the U.S. Securities & Exchange Commission (SEC) or Department of Justice (DOJ) hits your inbox, or worse, the Federal Bureau of Investigation (FBI) acting on behalf of the DOJ shows

up with a search warrant. The first 72 hours are critical to putting your organization on a path to success.

Action Items

Determining the Source and the Nature of the Inquiry

Multiple authorities have investigative powers and a request could come from any of them. In addition to the DOJ and the Enforcement Division of the SEC, the state attorneys general and local prosecutors retain broad authority to police the securities and financial services industry. Other regulators can also conduct investigations or examinations, including the Commodity Futures Trading Commission (CFTC), the Financial Industry Regulatory Authority (FINRA), and the SEC's Office of Compliance Inspections and Examinations (OCIE), which more and more frequently works in close tandem with the SEC's Enforcement Division. Although the information in this article is generally applicable to requests from any regulator, we will focus on investigations that originate with the SEC or DOJ.

In the early stages of an investigation, the SEC and DOJ typically have the same goal: They both want to gather documentary and testimonial evidence to determine whether a violation has been committed and whether there is sufficient evidence to pursue formal charges against an entity or associated individuals. At this stage, the SEC and DOJ often work together to conduct parallel investigations into the same underlying conduct. After the evidence has been gathered, each agency will determine independently whether the underlying conduct merits criminal charges, which only the DOJ has jurisdiction to bring, or civil charges, which the SEC can bring, or both. Importantly, receiving an initial request from the SEC does not preclude the possibility that the DOJ is lurking in the background to see how the evidence unfolds.

Evaluating the Request and Early Considerations

After taking a deep breath, you should read and evaluate the request. Consider the following things:

- **What information can be gleaned about the inquiry and your firm's role in it?**
    - The nature of the investigation and your firm's role in it are best learned from the language of the requests themselves. The requests will be directed at the issues or circumstances that are of greatest concern to the policing authority, and you should carefully scrutinize the requests for an indication of the conduct that the government believes is potentially problematic and any legal theory that it is possibly pursuing.
    - Neither the SEC nor the DOJ are required to describe the nature of their investigations to entities or individuals being asked to provide documents or related information. But there are a couple ways to learn more information to inform your immediate response.
        - If the SEC's Enforcement Division has issued a subpoena for documents, then it did so pursuant to a Formal Order of Investigation issued by the Commission itself, which describes in very general terms the basis for the investigation and the statutory provisions that the SEC suspects may have been violated. You are entitled to see the Formal Order upon request.
        - In the case of a grand jury subpoena, the prosecutor may be asked whether the DOJ classifies the company (or any individual employees who may have been subpoenaed) as a "witness," a "subject," or a "target." A witness is someone who is not suspected of wrongdoing and merely is believed to possess relevant evidence. A subject is someone "whose conduct is within the scope of the grand jury's investigation" and therefore could face charges. A target is someone against whom there is already "substantial evidence" of criminality and is a "putative defendant" (a rarely-used designation at the outset of an investigation). The DOJ often uses the "subject" classification liberally, not wanting to show its hand or commit to a classification on either end of the spectrum. The SEC on the other hand does not use these designations, and until charges are filed, considers everyone a witness.
        - On occasion, some United States Attorney's Offices will include in the grand jury subpoena the provisions of the U.S. Code of which the conduct being investigated may be in violation. As with the SEC's Formal Order, the information provided is not binding on the government, but often is a good indication of what conduct is being investigated.
    - The speed at which the government is demanding you produce the requested documents also can be an important indication of your role in the investigation. The greater the urgency of the government's demand, the more likely it is they view you as playing an active and possibly ongoing role in the potentially suspect conduct. Both the SEC and DOJ are known to issue "forthwith" subpoenas that require the production of documents or information immediately. Such a

demand both accelerates the timing of your response and heightens the importance of getting it right consistent with your strategic interests.

- You need to think beyond the most obvious sources of documents and information and identify the right subject matter experts within your organization that can possibly shed light on the nature of the government's concerns and who will need to be involved to insure a complete and accurate response. This, of course, requires balancing the need for information from others within your organization against the desire to limit disclosure of the investigation's existence.

- **Should you retain outside counsel?**
  - Outside counsel plays a critical role in protecting your interests in this context. You must be prepared to respond quickly in a manner that is consistent with your longer-term strategic goals. And identifying the right counsel in advance, and talking through these issues now, will equip you with the necessary tools for a prompt, careful, and informed response. Involving outside counsel from the start can have significant advantages in terms of information gathering, document preservation, document collection, and narrowing the scope of the government's request.
  - Often, the best resource for understanding the nature of the government's inquiry is experienced counsel that has the expertise to have a meaningful conversation with the investigating entity and learn as much as they can about the nature of the investigation.
  - As will be discussed further below, experienced counsel also serves as a buffer between your organization and the investigating entity and avoids putting you in the position of having to answer tough questions that may be avoided initially by experienced counsel.
- **Is disclosure required?**
  - Early and often, you need to consider—and then reassess over time—whether any disclosure obligations are triggered, either by the initial request, or by subsequent developments.
  - The decision to disclose the existence of an investigation must be balanced against what can be said given the early stage of the investigation. Until you know more, it can be difficult to assess accurately when to say something and what to say. Premature disclosure can make things worse, thus the need to constantly assess at various stages whether an obligation to disclose is triggered.
  - As a separate matter, the government also may request, or even order, you not to disclose the existence of the investigation or information request. Assuming that it is in your interests to comply with such a request—and it is hard to imagine it would not be at this early stage—you will need to balance this request against any competing disclosure obligations.
  - If materiality is the standard by which disclosure must be measured, it has to be assessed in light of all circumstances including existing legal obligations, governing documents, client and investor relationships, and other considerations. You must also review any agreements or side letters that you may have with clients, suppliers, or investors. Such side agreements may contain broader disclosure obligations and may also contain "most-favored-nation" clauses that require the application of broader disclosure provisions to other investors.
  - Once a decision has been made that disclosure of an investigation is necessary, always consider retaining a public relations adviser. Such an adviser can be a vital resource in terms of delivering the best message possible. Working through outside counsel is often the best route for retaining and directing a public relations adviser.
- **Notify your insurance carrier.**
  - Early in the process, consider whether to notify your insurance carrier of the inquiry. Responding to requests for information or subpoenas is often not covered, but depending on the inquiry, your company's status in the inquiry, and your insurance policy, any legal fees you incur may be covered.

Document Preservation

A very early consideration must be what steps need to be taken to preserve documents that are potentially responsive to the request. The goal is to take reasonable steps to preserve any and all potentially responsive documents. Being investigated is bad enough; you don't want to make things worse by accidently destroying documents that you are now under an obligation to maintain—regardless of whether you ever have to produce them. Your response at this very early stage of the investigation will be subject to scrutiny in hindsight as the investigation progresses.

- **Issue a legal hold notice.**
  - Draft and circulate a legal hold notice to any employees who might have responsive documents in their possession. It is a good idea for outside counsel to at least review, if not draft, your legal hold notice.

- The obligation to issue a legal hold notice may impact your decision as to how broadly you disclose the existence of the investigation inside or outside of your organization. There are advantages and disadvantages to referencing the inquiry in the legal hold notice versus asking employees to retain documents without reference to the specific inquiry. For example, stating that your company has received a subpoena may increase the seriousness with which employees take the legal hold notice, but it also increases the circle of people who know about the investigation.
- Even if the subpoena or request for information seems overbroad, the legal hold should cover all documents potentially responsive to the request. Work with counsel to make a good faith assessment of what may potentially be responsive.
- Make clear that employees in possession of responsive, or potentially responsive documents, should not destroy any of those documents, from deleting emails or electronic documents to throwing away hard copy documents or notes.
- At this stage, you just need to maintain and preserve—not identify and collect.

- **Ensure that the hold notice is sufficiently broad in scope.**
  - Hold notices should cover any potentially responsive business-related communications, regardless of the location or format in which these communications are maintained. This includes business-related communications to and from personal email addresses, text messages to and from personal mobile devices, and alternative communications platforms such as WhatsApp, Slack, and Telegram. As a regular practice, employees should be told to conduct business on appropriate communication platforms and should be forewarned that personal devices and channels may need to be searched to satisfy your company's obligation to produce business-related communications.
  - The government has become very savvy in demanding production of business communications located on personal devices and platforms, and you must ensure that the company's hold order puts employees on notice that these items must be maintained. Moreover, courts have become increasingly aggressive in requiring organizations to maintain, review, and produce such items.
- **Override any automatic document destruction protocols.**
  - Even if your general policy is to dispose of documents on a regular schedule (often true with emails), the requirement to maintain documents that are potentially responsive to the government request takes precedence over your normal document destruction policy.
  - Auto-delete functionality must also be turned off for individuals' personal devices if they contain potentially responsive or relevant business-related communications. Auto-delete functionality does not preempt your organization's obligation to maintain potentially responsive communications, and failure to affirmatively disable such functionality upon receiving a subpoena or other document request will be subject to close scrutiny.
  - *Remember:* Document hold orders may stay in place for a long time and will have to withstand employee attrition, office relocation, and any offsite work arrangements.
  - Regulators consider destruction of documents incredibly problematic regardless of the intent. Ensuring that potentially relevant documents aren't destroyed is of the utmost importance.

Contacting the Government

Once you have a handle on the request and have taken the necessary steps to preserve any potentially responsive documents, it is time to contact the requesting entity. Your initial relationship with the government should be one of collaboration and cooperation, even if this changes as the investigation progresses. Keep in mind that at this stage the government holds all the cards and you need to establish credibility with the government that they can rely on you—and your counsel—to act appropriately under the circumstances. There are several considerations when contacting the government.

- **Decide whether outside counsel should contact the government on your behalf.**
  - Outside counsel offers the greatest degree of protection, a valuable layer of insulation, and can draw on experiences at or with the relevant investigative bodies.
  - Outside counsel can help convey the sense that the request is being treated with the utmost importance.

- In limited circumstances, for example in an examination by OCIE, it may be best for in-house counsel or the chief compliance officer to contact the government, even if outside counsel is operating in the background. Such an outreach can set a more relaxed tone, whereas the appearance of outside counsel may unnecessarily raise the temperature at the start of what may be a routine inquiry.

- **Make a good first impression.**
  - Strike the appropriate tone. Be polite and respectful. Establish that the company is responsible and committed to compliance, taking the request seriously, and cooperating with the requesting entity.
  - In very rare circumstances, particularly at this very initial stage of an inquiry, it may be in your strategic best interests not to cooperate, and there may be steps that you can take to quash a request for information or documents. This is a very significant decision that will have significant impact on your relationship with the government throughout the investigation and should be taken only after careful consideration with experienced counsel to ensure that it is consistent with your overall response and long-term interests. Moreover, taking steps to challenge a request may result in public court filings that disclose the existence of the investigation and your involvement in it. It is hard to imagine a circumstance in which such early-stage disclosure would be consistent with your interests.
  - As discussed below, there are a number of interim steps that can be taken at this stage that are well-short of an outright refusal to cooperate, and you should take advantage of these incremental steps to shape the investigation and learn more about what role you—and your employees—play in the investigation and any potential exposure you might have.
  - *Remember:* You are being judged in every interaction with the government, particularly at the beginning. Each communication should be well thought out and calibrated to be consistent with your strategic approach. Don't underestimate the importance of establishing a good working relationship with the government—it can make all the difference.

- **Narrow the request and talk about timing.**

Requests are frequently overbroad and drafted on tight deadlines, so government agencies are often receptive to reasonable efforts to narrow. Consider the following approaches:

  - Limit or prioritize particular subject matter, and within this subject matter, prioritize the "rolling" production of information responsive to certain requests. This also will help you understand the nature of the investigation and the initial focus of the government's interest. The more you can learn about what the government is concerned about, the better you can assess your potential exposure and how you want to respond to the inquiry.
  - Establish reasonable and achievable timeframes or deadlines for providing responsive documents or information. Requests often come with a two-week deadline for production, but typically the government is amenable to extending the time for production. Of course, at this initial stage, you may not be able to accurately predict the time or effort necessary to fully respond. But having this conversation will help you assess the urgency of the investigation and will avoid misunderstandings later if you and the government are operating on different schedules.
  - Consider offering responsive information that can be easily gathered and presented effectively in lieu of providing the requested documents. Often providing such information in a list, chart, or table can avoid the production of voluminous documents that may be hard to decipher and may reflect information that goes beyond what is sought.
  - In limited circumstances, consider whether providing a narrative answer can substitute for production of requested documents. This requires a level of confidence that you understand fully the underlying circumstances and is often best reserved for later in the investigation when you have a better handle on the facts.
  - *Remember:* Stay focused on overall strategy. Your approach may depend on whether you are the subject of an investigation, a victim of the fraud, or a neutral third party. Regardless, a well-calculated initial provision of information may cut off the need for a broader inquiry.

- **Tell the truth under all circumstances and implore employees to do the same.**
  - Not telling the truth is the quickest and most direct path to an adverse outcome. There are criminal sanctions for not telling the truth to government officials, and if the government feels you are not being forthright, it will pursue the investigation even more aggressively. Therefore, it is often best to defer or qualify any response to government questions until such time as the underlying facts are fully established.

- When speaking to government officials, telling the truth is paramount regardless of whether you or your employees are under oath. Emphasize to your employees the importance of always telling the truth to the government, regardless of the setting. As is often noted, one provable lie—even as to a non-material fact—can turn a mediocre investigation into a case worth pursuing aggressively. And a provable lie as to a material fact can lead to criminal prosecution.
- *Exception:* When an individual invokes the constitutional right against self-incrimination, he or she opts not to speak with the government at all. Indeed, the inability to tell the truth without incriminating oneself is often a critical factor in the decision as to whether your employees should speak to the government. This is an important and complicated decision with broad-ranging consequences that should only be made by the potentially invoking witness after consulting with counsel.
- The government can, and may, contact employees for an interview or testimony prior to contacting the company. The government may also reach out to former employees, and you should be mindful about whether and how to alert current and former employees that they may be contacted by the government. Encouraging unrepresented witnesses not to speak to the government could be seen as obstructing the government's investigation. While the government is not permitted to contact directly individuals that it knows are represented by counsel, the SEC and the DOJ may not operate under the assumption that current or former employees are represented by company counsel.

Fact Gathering

In the early stages, it is also important to conduct sufficient investigation into the underlying circumstances to satisfy your good faith obligation to maintain potentially responsive documents and to begin to formulate an approach to responding to the investigation. In addition to identifying responsive material as discussed above, you will likely want to speak with at least some of the involved employees. You may also want, or need, to conduct more formal interviews, and, if so, you should begin to formulate a plan for those interviews. In preparing for and conducting employee interviews as part of an investigation, keep the following things in mind:

- **Employees have an obligation to cooperate with the company and can be terminated for refusing to do so.**
  - Cooperation is typically the best option for the company and the employee so companies should strive to warn employees about the potential consequences, including termination, and encourage cooperation with the company's investigation.
- **Employee interviews should be conducted by counsel (either outside or in-house) in order to create and maintain the attorney-client privilege.**
  - At some point, the company may decide to disclose the information gathered in such initial interviews. But at this initial stage, you should take appropriate steps to preserve the confidentiality of information gathered in such interviews.
- **Counsel needs to provide the employee with notice that any information provided will be used by the entity in its best interest.**
  - As highlighted by the Supreme Court in *Upjohn Co. v. United States*, employees should be warned that the interviewer is an attorney for the company—not his or her individual counsel—and that any attorney-client privilege associated with the interview belongs to the company.
  - The *Upjohn* warning cuts off any later claim by an employee that he or she believed company counsel was acting as his or her counsel and that the witness (rather than the company) controls the decision as to whether information gathered or statements made in the interview can be disclosed to the government.
- **Encourage the employee to keep the interview and its substance confidential with one significant exception.**
  - Employees should not discuss the investigation amongst themselves. Doing so can lead to employees influencing (either intentionally or unintentionally) each other's recollections and statements regarding the underlying facts. Such "water-cooler talk" can create a confused record of what happened and could lead to premature disclosure.
  - *Exception:* Employees should not feel like their cooperation with the company or its counsel prevents them from speaking to the government about the same underlying facts. However, if the government already knows that the company is represented by counsel, it should not reach out to employees directly and employees should be encouraged to contact company counsel immediately and refer the inquiring agent or attorney to company counsel.
- **Identify any additional potentially responsive documents, including documents existing on company-issued devices and even home or personal devices.**
  - Employees have no right to privacy or grounds to object due to personal information existing on

company-issued devices, including company cell phones that also are used for personal purposes.

- The company may be obligated to search employees' personal devices if they potentially contain responsive business communications or documents. The company also must inform employees that those documents must be maintained.

Voluntary Versus Compelled Production

The SEC and the DOJ both have means by which they can *require* production of documents and testimony by force of law, just as they can seek such information on a *voluntary* basis.

- It would be very rare for anyone, at such an early stage, to refuse outright to cooperate with a government request for information until they had a better understanding of the request and the nature of the underlying circumstances.
- Refusal to comply with a voluntary request will be the first fact cited to explain why a subpoena requiring production should be issued. At this stage, it is most important to learn what you can about the investigation and, if possible, establish a productive relationship with the investigating authority in order to influence the ultimate outcome.
- While there may well come a point when you decide to challenge an overbroad or overly burdensome request for information—either through a motion to quash or otherwise—the immediate aftermath of having received such a request is not such a time, except in the most extraordinary of circumstances and only with the advice of experienced counsel.

FBI/Search Warrant

The information above is generally applicable, but if, instead of receiving a voluntary request or a subpoena for documents, the FBI shows up with a search warrant, you must be prepared to take specific steps to appropriately protect you and the company. In that situation, the government has already established probable cause of a crime with a judge. If faced with a warrant, you should immediately call counsel and should not do anything that could be viewed as interfering with the search. Interfering with a properly executed search warrant is prohibited and comes at the risk of criminal prosecution. Prior to the arrival of counsel, you should cooperate fully with any requests for documents or information, while at the same time monitoring the search to keep track of what it being taken and protecting the confidentiality of documents that may be covered by the attorney-client privilege. Once counsel arrives, counsel can examine the search warrant, take over responsibility for monitoring the search and protecting the privilege, and otherwise assist in responding appropriately to the search warrant.

Looking Ahead

The initial response to a request for information sets the tone for the whole process—good or bad. Being fully prepared to respond appropriately at the outset is vital. Preserving and collecting documents efficiently and effectively minimizes the burden on the company and prevents future production issues. Establishing a respectful, professional, and cooperative relationship and rapport with the government can lead to a quick and favorable outcome and reduce the potential for and the severity of an adverse outcome. Conducting a thorough fact-gathering investigation at the beginning creates an immediate knowledge advantage and limits surprises down the road. Given the recent COVID-19-induced market volatility, participants in the financial industry should prepare to respond to regulators and enforcement authorities because the likelihood of such interactions is only increasing.

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Charles J. Clark is a nationally acclaimed securities lawyer. Initially recognized for his work leading the investigation of Enron Corporation while serving as a senior member of the SEC's Division of Enforcement, Charles continues to represent his clients in their most important matters, drawing from his unique combination of government, in-house and private practice experience. Charles represents financial institutions, public companies and accounting firms, and their senior executives, in securities-related enforcement proceedings before the SEC, DOJ, FINRA, PCAOB, and other federal and state law enforcement and regulatory authorities. In particular, he counsels hedge funds, private equity firms, venture capital funds and other asset managers through regulatory scrutiny, including in routine and risk-based inspections and examinations and in enforcement proceedings. He defends investigations involving a broad spectrum of issues, including accounting and disclosure fraud, insider trading, foreign corruption, offering fraud, market manipulation, breach of fiduciary duty and conflicts of interest. In addition, Charles represents boards of directors and associated committees in internal investigations, and he provides guidance on corporate governance and trading practices for public companies and private funds. Prior to entering private practice, Charles served for nine years in the SEC's Division of Enforcement, most recently as assistant director supervising the investigation and prosecution of some of the SEC's most significant matters.

Charles has been recognized as a leading litigator by *Chambers USA*, *The Legal 500 US* and *Benchmark Litigation*. A frequent speaker and panelist, Charles has addressed a wide variety of topics of interest to the white collar defense community, including, most recently, the Wells and settlement process at the SEC and responding to the DOJ and SEC's focus on individual accountability. He also serves as a resource for numerous media publications, including *Bloomberg News*, *Financial Times*, *The Wall Street Journal* and *The Washington Post*.

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Barry A. Bohrer is co-chair of the firm's White Collar Defense & Government Investigations Group. Barry has extensive litigation experience handling white collar criminal and complex civil matters in federal and state courts for individual and corporate clients. He also has an active trial and appellate practice. Barry has successfully defended clients, including major corporations, financial institutions, political figures, corporate executives and individuals, professionals and prominent law firms, in a wide variety of high-profile and complex cases, jury trials, regulatory actions and investigations. He represents clients in matters pertaining to securities and commodities litigation and regulatory enforcement; other forms of financial fraud; antitrust litigation; and allegations of environmental offenses. Barry frequently represents clients in parallel enforcement proceedings involving the U.S. Department of Justice, the Securities and Exchange Commission and the Commodity Futures Trading Commission. He also conducts corporate internal investigations and counsels the individuals involved in them. Barry has won appeals at all levels of the federal and state court systems nationwide, and is often brought in by other legal teams specifically for his expertise in high-stakes appellate cases.

Barry has been named a leading litigation, white collar criminal defense and investigations lawyer by *Benchmark Litigation: The Definitive Guide to America's Leading Litigation Firms and Attorneys*, *The Best Lawyers in America*, *Chambers USA*, *Expert Guide to the Best of the Best USA*, *Expert Guide to the World's Leading White Collar Crime Lawyers*, *The Legal 500 US*, *New York's Best Lawyers*, *New York Super Lawyers*, *Who's Who Legal: Business Crime Defence* and *Who's Who Legal: Investigations*. In 2014, Barry received The Norman S. Ostrow Award from the New York Council of Defense Lawyers in recognition of his outstanding contributions as a defense lawyer. He authored the "White Collar Crime" column in the *New York Law Journal* from 2002-2013, is a co-author of *White Collar Crime: Business and Regulatory Offenses* (ALM Law Journal Press) and serves on the advisory boards of Bloomberg BNA's *The Criminal Law Reporter* and *White Collar Crime Report*. He speaks frequently on various topics, including issues relating to trial and appellate practice, securities enforcement and arbitration, internal investigations and insider trading. Barry is a fellow of the American College of Trial Lawyers, former President of the New York Council of Defense Lawyers, and Chair of the Board of Directors of the Fund for Modern Courts and Committee for Modern Courts, non-profit organizations dedicated to judicial reform in New York State. He is a member of the Board of Directors of the Legal Aid Society (former chairman of the Audit Committee) and received awards in 2005 and 2006 for Outstanding Pro Bono Service for his advocacy. He is also a member of the New York City Bar Association (former member of the Criminal Law Committee) and the New York State and American Bar Associations (Criminal Justice and Litigation Sections).

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