

15 AUGUST 2024 • 9 MINUTE READ

A photograph of the US Capitol building, showing its iconic neoclassical architecture with white columns and a curved balcony. The image is partially obscured by a white text box at the bottom.

The Menendez conviction and attorney proffers: Key takeaways for corporate defendants and counsel

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Introduction

On July 16, 2024, US Senator Robert Menendez was **convicted** of 16 counts of bribery, extortion, fraud, and obstruction of justice after a two-month trial in the US District Court for the Southern District of New York (SDNY). In a surprise turn, prosecutors from the US Attorney’s Office for the SDNY (USAO-SDNY) secured a conviction for conspiracy to commit obstruction of justice and obstruction of justice based on alleged falsehoods Menendez’s former counsel made at his direction during a pre-indictment meeting. Menendez has since resigned from the US Senate.

Menendez’s obstruction conviction is a game-changer for criminal defendants and defense counsel, with significant implications for corporate defendants too. Over the course of a criminal representation, defense counsel commonly meet with prosecutors in an effort to cooperate with the government’s investigation and to try to persuade them not to bring criminal charges against their client. This is particularly true in light of recent pronouncements made by the Criminal Division of the US Department of Justice (DOJ) which expects, more than ever, companies to proactively and promptly disclose corporate misconduct and to engage in “extraordinary” cooperation throughout the investigation to earn the benefits outlined in the

DOJ's Corporate Enforcement and Voluntary Self Disclosure Policy (VSD Policy), which we have described in [prior client alerts](#).

In this alert, we analyze the implications of Menendez's recent conviction for corporate defendants and their counsel and share a few best practices to prepare for government meetings so that they serve their intended purpose – *cooperation and deterrence of criminal charges* – rather than lead to additional criminal charges.

Overview of Menendez's pre-indictment presentation and how it led to additional charges

In around 2023, SDNY prosecutors began investigating Menendez on suspicion of corruption. Ultimately, the [SDNY indictment filed](#) would allege that Menendez and his now-wife accepted hundreds of thousands of dollars in bribes, including gold, cash, and an automobile from three New Jersey businessmen in exchange for political favors for the three New Jersey businessmen and the Egyptian government.

Menendez retained outside counsel to represent him while the investigation was ongoing and before an indictment was filed. In preparing for Menendez's defense, Menendez's now-former counsel met with SDNY prosecutors and sought to deter them from bringing criminal charges against his client. On two occasions, Menendez's former counsel urged the SDNY prosecutors not to charge his client and, in doing so, relied on a PowerPoint presentation that displayed the timing of the alleged corrupt payments and Menendez's knowledge of these payments. According to a draft stipulation of the former counsel's trial testimony, the attorney and his client discussed the purpose and the substance of the pre-indictment presentations, the topics to be covered, and what the attorney would say on Menendez's behalf.^[1] During both pre-indictment meetings, Menendez's former counsel made several statements to SDNY prosecutors about his client's conduct including his knowledge about certain payments received, based on what Menendez told him, which were reflected in the PowerPoint presentation.

Less than two weeks after the last pre-indictment presentation in September 2023, Menendez was [indicted](#) on bribery and corruption charges. A few months later in March 2024, SDNY prosecutors filed a superseding indictment against Menendez that added obstruction and related conspiracy charges for causing his former counsel to make statements in the pre-indictment presentation that Menendez knew to be false so as to interfere with the government's investigation.^[2]

At trial, over Menendez's objections, SDNY prosecutors introduced a portion of Menendez's former counsel's pre-indictment PowerPoint presentation to SDNY prosecutors through a non-attorney employee of the USAO-SDNY who was present for the presentation.^[3] The specific slides included information about: (1) payments made to Menendez's now-wife; (2) Menendez's knowledge of payments made; and (3) Menendez's actions to repay certain payments his now-wife received.^[4] With respect to Menendez's actions, according to the PowerPoint slides, after becoming aware of the federal investigation: (1) Menendez learned that one of the New Jersey businessmen had paid his now-wife's mortgage; (2) Menendez

gave his now-wife the money to repay the New Jersey businessman; and (3) Menendez's now-wife repaid the New Jersey businessman, classifying the repayment as one for a "loan."^[5]

As Menendez had been charged with obstruction of justice for causing his former counsel to make statements in the pre-indictment presentation that Menendez knew to be false, the introduction of this PowerPoint served as evidence of that offense.

On July 16, 2024, a jury **found Menendez guilty** of all charges in the indictment, including the obstruction and related conspiracy charges, effectively using Menendez's former counsel's statements to SDNY against Menendez at trial.

Implications for corporate defendants and their counsel

While Menendez's conviction did not involve a corporate defendant, it has implications for organizations under federal investigation, which typically retain outside counsel to represent them before the government. Over the course of the representation, it is not only common, but expected, that defense counsel meet regularly with the government to advocate through factual and legal analyses.

In recent years, the DOJ has **emphasized** that it expects "full" and "extraordinary" cooperation from corporate defendants in any plea for leniency. Specifically, the **DOJ expects** that companies will timely disclose all non-privileged facts relevant to the wrongdoing at issue. This includes: (1) facts gathered during the company's internal investigation; (2) attribution of facts to specific sources where such attribution does not violate the attorney-client privilege; (3) timely updates on a company's internal investigation; and (4) identification of all individuals involved in the misconduct at issue.

In gathering all "non-privileged facts," and preparing for government meetings, defense counsel meet with and often rely on information provided by their client. As such, defense counsel should ensure the information they receive is accurate, and also, in light of Menendez's conviction, exercise caution in the way they share that information with the government in order to maximize cooperation credit for their client and not open the door to additional criminal charges. Additionally, as always, defense counsel should be mindful of the possibility that statements made by a client directly to the government could be the basis for subsequent charges.

Best practices to prepare for government meetings and maximize cooperation credit

Defense counsel who engage with federal prosecutors on behalf of their corporate clients may consider a few key steps to prepare for those meetings so that they meet their intended purpose – maximizing cooperation credit – as well as mitigate against potential risks leading to criminal charges and/or defense counsel becoming a witness against their clients.

- **Collect information about the client's status in the matter.** Defense counsel are encouraged to understand their client's status as a witness, Subject, or Target. The **DOJ Justice Manual** defines Subject as one "whose conduct is within the scope of the grand jury's investigation" and Target as one who the "prosecutor or the grand jury

has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant.” Understanding a client’s status may help defense counsel ascertain whether a presentation is in the client’s best interest and will help inform the objectives of the presentation. For example, if a client is a Target, the objectives may be to gain cooperation credit to reduce sentencing exposure. Conversely, if a client is a Subject, the objective may be to persuade the government, through factual and legal analyses, that the client did not commit a crime.

- **Collect information about posture of the matter.** Defense counsel may attempt to learn from conversations with prosecutors whether an indictment is inevitable or forthcoming. If that is the case, there may not be any value in engaging in further meetings with prosecutors. If an indictment is not inevitable or forthcoming, because, for example, additional investigation is needed, defense counsel may consider engaging in further meetings with federal prosecutors, provided that they can supply truthful information about the client’s facts and circumstances.
- **Determine sources of information and best format to deliver information.** Defense counsel should evaluate the information available for a presentation and determine whether to utilize a PowerPoint presentation or talking points, or simply rely on corporate records. Defense counsel should also pressure test the information received from their client, to ensure that it is complete, truthful, and accurate. Defense counsel are encouraged to assess whether there are additional steps they could take to confirm the information presented or independently corroborate it without attributing it to a statement they received from their client. For example, assuming a client relays a piece of information to counsel that is independently reflected in an email, counsel should consider using that email instead of the client’s statements, which not only ensures accuracy, but also protects against inadvertent waiver of the attorney-client privilege.
- **Provide appropriate disclaimers.** This situation should also remind defense counsel to make appropriate disclaimers at the inception and conclusion of a government meeting, such as, for example, caveating that the facts provided reflect information as defense counsel currently understand them, which can be further investigated should the government have any information that differs from, or contradicts, the facts presented by defense counsel.

Learn more about the implications of the Menendez conviction by contacting any of the authors or your usual DLA Piper relationship attorney.

[1] Stipulation, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Jun. 23, 2024), ECF. No. 480-2.

[2] Superseding Indictment, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Mar. 5, 2024), ECF No. 239-1.

[3] Letter, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Jun. 23, 2024), ECF No. 480, Letter, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Jun. 14, 2024), ECF No. 468, and Order, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Jun. 17, 2024), ECF No. 473.

[4] Exhibit, *United States of America v. Robert Menendez, et al.*, 1:23-cr-00490-SHS (S.D.N.Y. Jun. 14, 2024), ECF No. 468-1.

[5] *Id.*

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