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Defending White Collar Crimes*

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There are basic differences between white collar crime and routine street crime that require the special attention of the defense attorney. After giving several examples of cases which I classify as white collar crimes, I will discuss dealing with the client, with co-counsel, with the grand jury and with the press in defense of white collar defendants.

White collar crime involves allegations such as mail fraud, securities violations and violations of regulatory statutes. It includes, for example, the businessman or - woman charged with making false statements under the Small Business Administration regulations and the insurance company president charged with an insurance fraud scheme. These are crimes dealing with OPM — Other Peoples' Money. Other examples include securities law violations involving allegations that someone either was not registered as a dealer in securities or did not register securities as the law requires, doctors charged with Medicare or Medicaid fraud, allegations of bribery of public officials and violations of the Environmental Protection Act and/or the Toxic Substance Control Act. Recent white collar crimes in the news have included allegations of election and voting fraud and the illegal exportation of tanks and anti-tank weapons.

One of the differences between white collar crime and routine street crime is that ordinarily, white collar crime involves no victim who bleeds or cries out in pain, except the kind of pain one

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feels when someone steals from the wallet. It usually involves an allegation of a scheme that characteristically entails someone who is more intelligent or more thoughtful than the person who holds up a convenience store. There is almost always a financial gain aspect. The passion factor present in crimes of violence is usually lacking.

The major difference, however, is that the law is much more complex. It is much more difficult to get a jury, or even a judge, to understand, for example, complicated securities law and the exceptions applicable to registration under the law, than to understand the definition of murder. My firm recently represented a developer who was changing apartments into condominiums. He was charged with several violations of the Securities Act. There was a genuine question whether what he sold was in fact a security, and if it was a security whether it was required to be registered. If it was a security required to be registered, was the developer required to be registered? The state court judge had never tried a case like it. Briefs were prepared to educate the judge. All the jury charges that we requested were granted because we had briefed the judge on the issues beforehand and alerted him to the potential and expected problems of the case.

These basic differences in the nature of the crimes alleged demands handling the defense of white collar crime charges differently than the defense of routine street crime allegations. Each aspect of the defense presents special problems to be considered and solved.

Dealing With the Client

Dealing with your client in a white collar situation usually presents client control problems. You have a different clientele than the people you deal with in cases of ordinary street crime charges. Your client is probably a professional or a businessperson. Because he or she is likely to be more intelligent than the average street crime defendant, he or she wants to participate in the events. You have to utilize this as best you can and still maintain control. Your client ordinarily will not be quiet. He will talk to his friends; he will talk to the press; he will talk to anyone who will listen. He will tell everyone that the system set up is really not illegal; it is just creative. He will tell everyone that because the computer made a mistake, it billed premiums for a person who is already dead. It is difficult, but you must maintain control over your client.

An advantage with the white collar defendant is often the opportunity to present numerous very good character witnesses. If your case comes down to an issue of credibility, whether the jury believes the little old lady who claims to have been defrauded by this terrible person, your client, you have an advantage if bank presidents or other respected people have testified on behalf of your client. This is an advantage that you do not have if you represent someone accused of rape, for example, as few people are inclined to take the stand and say good things on his behalf.

A white collar case is often accompanied by a companion civil case filed by the "victim." You should use the existence of that civil case for impeachment purposes. Let the jury know that the witness testifying against your client has a financial interest in the result of the criminal case because successful criminal prosecution will materially enhance the probability of that witness' recovery in the civil case. In many jurisdictions with crowded dockets, criminal cases will be heard in half the time it takes to reach the civil action. Therefore, use the pending civil action for money damages against the witness claiming to be there impartially telling only the truth.

The pending civil action also creates problems. Normally, there will be a different lawyer representing your client in the civil case, either as in-house counsel or on a retainer. As a routine matter, your client will have an already existing relationship with a lawyer specializing in corporate litigation or business law. You must have proper coordination between the criminal defense lawyer and the lawyer handling the civil action. The criminal defense lawyer's judgment must prevail. You must be very careful with the pleadings in the civil case. Any discovery in the civil case has to be coordinated through you. You must maintain control to assure that actions or positions taken in the civil case do not hurt the criminal case. Civil lawyers use different discovery procedures. They usually do not deal with criminal law. They are accustomed to interrogatories and depositions. They have such complete discovery that they know the entire case before they go into the courtroom. This is certainly not the situation in criminal defense law. Do well to remember that it is possible to acquiesce in discovery requests in the civil case to the point of causing severe harm to the criminal case. Civil lawyers may also make recommendations to your client that may conflict with your recommendations. You need to be cognizant of the potential conflicts and stay on top of the situation at all times if you are to serve your client.

Your client is technically and legally the absolute boss. He must tell the civil lawyer that your judgment must prevail.

Dealing With the Grand Jury

Dealing with the grand jury in defense of your client in the white collar criminal case is similar to any other criminal case. One rule is the same. Your client does not testify. You should advise the U.S. Attorney, the District Attorney or State's Attorney there is no requirement that the accused person or target suspect must testify before the grand jury.

However, there are some differences in dealing with the grand jury in white collar crime. In these cases, voluminous records are almost always subpoenaed. This is dangerous because grand juries are using the grand jury subpoena to circumvent the requirements of not only the fourth amendment protection against illegal search and seizure, but also the fifth amendment and this is often overlooked. Some lawyers who do not deal with criminal cases believe that upon receipt of an official U.S. grand jury subpoena from the U.S. Marshall, they must drop to their knees and comply. That is not true. Motions to Quash can be filed in almost every case because the subpoenas are invariably overbroad. They may ask for documents that are not pertinent and/or they may ask for documents that are privileged. Your client has the right not to bow to a grand jury subpoena and submit personal documents that might be incriminating if taken out of context. The fourth and fifth amendments always apply.

There is a difference when you are dealing with corporate records. Nonetheless, the overbreadth doctrine could still apply. For example, you may represent a corporation charged with illegal disposal of PCB's, which are cancer-causing chemicals found in electric transformers. They were commonplace to every single transformer in the country for years, until there was a spillage of PCB's into the fish canning process in Japan. Some who ate the fish developed cancer. As a result, controls were established on the disposal of PCB's. Your client is charged with violating those controls. This is a typical white collar crime allegation. The grand jury subpoena may request the company's records for a period of ten years. This subpoena is overbroad. A successful Motion to Quash can narrow the time span in question and narrow the types of documents which are legitimately the concern of the grand jury.

When he receives a grand jury subpoena, the competent lawyer will do several things. He must screen everything that goes to the grand jury and take an inventory of it. He must make copies of all the documents to be submitted and keep a complete file in his office in the event that some of those documents should mysteriously disappear.

There exists a slightly different situation when there is no targeted person who has been subpoenaed. Suppose you represent the president of a corporation. There has been no indictment. At this point, it is really the corporation that is the focus of investigation. Can you represent the individual and the corporation? The law states that you can at this stage, until and unless some conflict of interest does develop. If the corporation is indicted and the grand jury also indicts everyone from the president to the treasurer, there may be antagonistic defenses. You then may have a conflict of interest and, at that point, you will need to re-evaluate the situation. However, at the investigative stage, you can usually represent them both.

You may find, for example, that the president and vice-president of a corporation are targets. They can rely upon their fifth amendment privilege not to testify. They may not be called. However, the comptroller can be subpoenaed to testify and bring the corporation's financial records. The law says that the comptroller must appear and correctly testify. He has been called to prove the financial records. However, he does have the right to have counsel accompany him to that grand jury session. He needs to be properly instructed to cope with the type of questions he must answer and he should be advised that he has the right to step outside the grand jury room and seek advice of counsel, even if it is for every question. You must err on the side of caution. If he has any doubts regarding the propriety of the question, or whether to answer it, he should seek permission from the foreman of the grand jury to step outside and confer with counsel. The foreman will allow that, or should allow it. If the grand jury knows that counsel is sitting outside, they are much more careful. When a witness is sent to the grand jury alone, he is unprotected.

Dealing With the Press

Dealing with the press in a white collar criminal case is different from the average criminal case. You can often tell how your case is going by watching and talking to the press. You can almost hear

how it is going at times. When you think something significant is happening and you can hear pads and paper being utilized behind you, you know the press has recognized significance also and that they are taking notes. You can feel significance from the type of questions asked at the end of the day. You can really tell what is significant if the newspaper the next morning states that "the third prosecution witness testified today for the defense." This will give you some idea that your cross-examination has been effective.

A white collar defense lawyer should talk to the press and be willing to discuss anything that is a matter of public record. There are events that happened in the courtroom about which you should not talk. You should not discuss what will happen the next day nor should you reveal your future tactics or strategy.

The press is a powerful force in a criminal case. Many white collar cases are prosecuted because of stories in the press. The PCB case was investigated singularly and solely because an investigative reporter continued to author pieces that a company had allegedly violated the toxic substances laws. There is no question that the Iranian-Iraqi exportation of munitions case was prosecuted because of press coverage. A presentation by a local station after the fashion of "60 Minutes" was broadcast and two days later the case was presented to the grand jury by the U.S. Attorney. This was after the Justice Department and Customs Department had announced the case would not be prosecuted. It was prosecuted because of the outcry following copy by journalists. Be careful with the press.

Publicity is usually a major feature of the white collar criminal case because of the prominence of the defendant. Counsel must blunt the effect of that publicity. When a vice-president of a bank or the president of an insurance company does something, whatever it is, it is newsworthy and is more newsworthy when there is an allegation of wrongdoing. Follow this rule very carefully: no interviews of the client are permitted with the news media ever! It is a very hard rule to follow in white collar criminal cases. When a man is charged with robbery, it is not hard to tell him not to talk to the press because they will not seek to talk to him. However, when the president of a major corporation is charged with wrongdoing, the press will want to talk to him. They want him to deny his culpability as a thief and to put it on the "6 O'Clock News." It is hard for this person to resist and refuse to talk on advice of his lawyer. You must maintain control of your

client. As soon as you become involved in the case, you should notify the press to direct all inquiries to you.

Of course, lawyers need to make certain that a victory is reported in the press. Your client will return to the business world. Frequently there will be a big story on the indictment of a prominent businessman or businesswoman on the front page of the newspaper. A year or two later, when the case is dismissed or the businessman or businesswoman is acquitted, there is only a little one inch story on the last page reporting the result. Make sure that your client's future activities in the business world are made easier by the proper and prominent reporting of the successful result in the press.

Conclusion

Thus, while the defense of a white collar case bears similarities to the defense of any criminal case, the differences are such that the prudent defense lawyer will prepare for them. With forethought and a good plan, the differences can be turned to the client's advantage. False allegations of white collar crime can be levelled just as easily as any other accusation. Our task remains the same: to protect those falsely accused, including the so-called white collar defendant.