

# The Basics of White Collar Criminal Defense

By Daniel M. Purdom  
Hinshaw & Culbertson  
Lisle, Illinois

The headline blares, "Local Politician Found Not Guilty!" Although you may see an occasional headline like this, most federal prosecutions result in conviction and under the new federal sentencing guidelines, a jail sentence.<sup>1</sup> Not-guilty verdicts grab headlines, but the real victories in criminal defense work are the ones that no one but your client knows about. These victories are obtained by avoiding indictment and the resulting publicity. Once a case becomes public knowledge or an indictment is returned, even a not-guilty verdict cannot "unring the bell." Substantial damage is done to your client's reputation, and his life has been altered forever.

This article focuses on the important initial stages of white collar criminal defense to alert the practitioner to some of the problems and pitfalls that may confront a long-time client or corporation who becomes the subject of a federal grand jury investigation.

As a former federal prosecutor, it was the author's experience that non-federal practitioners who tried to "help out a friend" who had been subpoenaed or who had become the target of a grand jury investigation did much more harm than good. Once apprised of a federal investigation, attorneys who are unfamiliar with the federal prosecutor's office often delude themselves into thinking that the investigation will just go away. They believe that no news is good

news. However, nothing could be further from the truth. The time to take decisive action is at the initiation of an investigation.

## INITIATION OF THE INVESTIGATION

Your client's first contact may be a Federal Bureau of Investigation (FBI) agent serving a subpoena for handwriting exemplars and testimony. Or it may be a letter from the bank of a prominent corporate client informing your client that a grand jury has subpoenaed certain of his records. This moment when you first learn of the investigation can be the most significant point in any federal criminal prosecution. There are a number of important considerations which should be made by any attorney whose client has become the target of a federal grand jury investigation.

Start by learning as much as you can about the investigation and making sure your client is not creating more evidence. Immediately contact the prosecutor. This serves two purposes: (1) obtaining information; and (2) short circuiting any attempts by the prosecution team to contact your client. Oftentimes, inexperienced prosecutors may be coy and provide very little information. However, more experienced prosecutors, more comfortable with the facts of their investigation, will provide information to

either scare you or to begin conditioning you to encourage your client to plead guilty.

In sizing up your opponent it is important to learn who is conducting the investigation as well as the role of your client within the investigation. Your client can be identified in one of three ways. A *target* is a person about whom the govern-



ment has substantial evidence linking that person to the commission of a crime. This person is viewed by the prosecutor as a putative defendant. A *subject* is one whose conduct is within the scope of the grand jury investigation.<sup>2</sup> A *witness* is a person with relevant information concerning the criminal activity which is the subject of

the investigation.

Identification of your client as either a target or a subject requires the same approach. Prosecutors often use the two terms interchangeably. If your client is identified as a witness, obtain written assurances of such status from the prosecutor. This letter will usually emphasize that such status is conditional on truthful testimony from your client. Obviously, the client should be encouraged in the strongest terms to be completely candid. The client must be instructed that once he had been identified as a witness, he must do everything in his power to be truthful. No prosecutor can offer non-subject status or immunity for perjury or obstruction of justice. Once you have obtained witness status for your client, you should make sure the client does not undo this tremendous victory by hiding facts or

misleading the prosecutor. Clients often attempt to shade the truth to protect a friend or to avoid some embarrassing detail.

## INVESTIGATING AGENCIES

The U.S. Attorney's office works with a number of federal agencies. The focus of an investigation and the techniques employed can vary greatly depending on whether the FBI, Postal Inspectors, or some other agency is conducting the investigation. For that reason it is important to quickly determine who is conducting the investigation.

FBI investigations often employ confidential informants. A weak case can quickly become a strong one when an informant is "wired" with a tape recorder and approaches the subject to obtain admission of facts or verification of the alleged wrongdoing. Your client must understand that any associate, competitor or friend could be a cooperating informant. The client should be instructed to completely avoid conversations concerning the investigation with anyone other than his attorney. At worst, the client may be the victim of a "wired" informant. At best, he may unnecessarily be involving a friend or associate who later may be compelled to testify in the grand jury or at trial against the client.

Internal Revenue Service (IRS) investigations often involve detailed analysis of voluminous documents. In an IRS investigation, inform a client who has not received a records subpoena that any information he places in his garbage may be reviewed by an IRS agent.<sup>3</sup> Garbage-raiding techniques employed by the IRS have unearthed probative information which individuals attempted to discard upon learning they were being investigated.

In white collar criminal investigations the U.S. Attorney's office also works with a number of traditionally non-criminal investigating agencies. Health and Human Services (HHS, formerly HEW) and other federal agencies have Inspector General offices to investigate fraud within specific federal programs. The quality of investigators in these offices varies greatly. Less sophisticated or inexperienced agents are

more likely to attempt to directly contact a represented individual. Contact should be made with these agents early in the investigation to assess the individual investigator and to avoid any improper attempts to contact your client.

These agencies usually have formidable civil and administrative remedies. In the current Savings and Loan bailout setting, the Resolution Trust Corporation (RTC) is investigating various aspects of the savings and loan industry.<sup>4</sup> These investigations can lead to civil proceedings and in some cases, criminal referrals.<sup>5</sup>

### THE GRAND JURY

A grand jury subpoena for records often accompanies the initial contact by the investigating agent. It is imperative to advise the client that destruction or concealment of records will not only result in more serious charges, but the act of destruction will also be compelling evidence of guilty knowledge. This becomes more significant for white collar crimes because the key issue is usually the intent of the individual. In state court criminal cases, the focus is usually upon the physical act and identification of the criminal actor. Most white collar prosecutions involve long term transactions in which the actor's intent is the critical element. Complicated financial dealings which can be viewed in several ways become very suspect when records are destroyed or concealed. In addition to violating other federal statutes by destroying records, the client may also be performing certain predicate acts under the Racketeer Influenced and Corrupt Organizations Act (RICO).<sup>6</sup>

A client should be advised that destruction of records, in addition to being illegal, is usually strategically foolhardy. Most business documents are available from several sources. Often subpoenas are served on a subject in the hopes that the subject will take some action to conceal a document, a copy of which the prosecutor already has in his possession.

In most cases, the best advice for a non-federal practitioner to his client is to obtain an experienced federal criminal defense attorney. However, one rule can

almost be universally followed: NEVER allow your client to testify before the grand jury in the absence of immunity or non-subject status. If your client is completely innocent and wants to impress the grand jurors with his innocence, there are more effective ways of accomplishing that goal. In an ideal world, grand jurors are not necessarily a complete rubber stamp of the prosecutor's office. However, in the real world, odds are that if a prosecutor believes a case should be indicted, he will be able to convince a majority of 23 disinterested grand jurors that a crime has "probably" been committed. This lesser standard of proof makes rejection of a proposed indictment by a grand jury a very rare event. Therefore, if your client has been wrongly accused or believes that information should be brought to the attention of the grand jurors, the more effective way to make that presentation is through information from the attorney to the prosecutor.

Any wise prosecutor would welcome the target of a criminal investigation into the grand jury room. A lawyer cannot accompany a witness into the grand jury room. The prosecutor is in a virtual no lose situation. He has the target of an investigation under oath without his attorney. The prosecutor can nail down small details or obtain damaging admissions or even more significantly, obtain false exculpatory information which will later haunt the client or lead to further charges or perjury or false statements to the government.

Most federal prosecutors will offer an individual the opportunity to cooperate or offer information relevant to the investigation. The usual vehicle is to have the witness or target "proffer" information to the U.S. Attorney's office. Although the U.S. Attorney's office will tell you that there is only one standard proffer position, it can sometimes be subject to negotiations. Most prosecutors will invite a witness or target to subject themselves to questioning by the U.S. Attorney's office with the promise that no words which come out of the individual's mouth will be used directly against him in a later criminal prosecution. The prosecutor will attempt to reserve the right to use the information in cross-examination or impeachment and also will seek the use of leads provided by the witness so that the

prosecutor can check out the story and see if it "washes."<sup>7</sup>

In certain circumstances the prosecutor is aware of the weakness of his case and the tremendous need for the information your client can provide. By conducting your own investigation and determining what



information is available against your client, you may be able to negotiate more favorable terms for the proffer and avoid locking your client in on certain facts which may later prove to be damaging. One alternative is for the attorney to informal-

ly provide the substance of the client's proposed testimony in an off-the-record proffer. In this way, you can minimize statements by your client. This is also a good opportunity to obtain a feel for the government's case against your client.

Generally speaking, if your client is the target or subject of an investigation and it does not appear he will be able to avoid prosecution, a proffer does not serve any function for your client. It merely gives the prosecutor a preview of your client's testimony should he testify at trial. It also gives the prosecutor an opportunity to run down any information your client provides and to exclude those areas of possible "reasonable doubt."

Should you confront a situation where you are convinced that your client is either wrongly accused or that the government has a very weak case, you may wish to proffer in an effort to demonstrate that either some other person is responsible for the criminal activity or that your client's actions have been misunderstood. These decisions must be made on a case by case basis. The more information you have derived from your own investigation and your assessment of the government's case, the better equipped you are to make these determinations. Obviously, it is important to conduct a very thorough investigation before approaching the prosecutor. If witnesses are to be interviewed, a private investigator

should be employed to act as an independent prover should the witness later attempt to recant information provided to you. An unwitnessed interview of a witness who later "flips" is a great way to remove yourself from the case as your client's attorney and make yourself a witness in the investigation. It is important to act quickly to identify witnesses before they are approached by the government. Witnesses oftentimes become much less willing to cooperate in your investigation after they have been visited by federal agents. For that reason, it is important to obtain statements or affidavits from favorable witnesses at an early stage. The presence of an investigator is very significant at this stage to avoid any later suggestion of improper influence, intimidation or other misunderstandings.

### MULTIPLE REPRESENTATION

In an investigation arising out of the affairs of a business, the attorney will often be confronted with a number of co-workers, employees or associates who need to be interviewed. The attorney should be very careful in advising non-clients whether to cooperate with the government. An attorney can certainly advise his client to assert his Fifth Amendment privilege. However, a lawyer who counsels a non-client to assert his Fifth Amendment privilege—even if validly asserted—to corruptly prevent the witness from disclosing information damaging to the attorney's client commits an obstruction of justice.<sup>8</sup>

The attorney must always be sensitive to the problems of multiple representation of individuals in a grand jury investigation. An attorney should not represent multiple clients "if the exercise of his independent professional judgment on behalf of a client will be or is likely to be adversely affected" or if it would be likely to involve the attorney in representing different interests.<sup>9</sup>

Bear in mind that an individual's position within an investigation can change. A witness may become a target and vice versa. A lawyer should never represent a witness and a target. Not only is it an ethical violation, but it will also assure a motion by

the prosecutor to disqualify the attorney from representation of any individuals in the investigation.

In the corporate setting, it may be advisable to provide written instructions to non-clients who may be approached by federal investigators. Inform the individual that he or she can deal directly with the government or confer with counsel. Stress also that if the individual speaks with the government, he must be truthful in answering all questions. This written instruction will demonstrate that no impropriety has occurred. The instructions obviously must be tailored to the facts on a case-by-case basis.

### PLEA NEGOTIATIONS

The new federal sentencing guidelines have changed the ground rules in federal criminal defense cases. Gone are the days where eloquent sentencing pleas resulted in leniency (it is questionable that those days ever existed outside of Perry Mason). The new sentencing guidelines were enacted in an effort to minimize inconsistent sentences for similar fact situations. As a result, the sentencing process becomes much less subjective and emotional. The sentencing judge is constrained to sentence within strict guidelines depending on the application of certain factors.

The probation department compiles a worksheet rating such factors as the type and severity of the offense, the defendant's criminal background and other criteria concerning the crime, the defendant and the victim. The defendant receives points for each factor resulting in a final score. This score establishes the range of sentence the judge must impose unless the judge can set forth specific justification to depart from the guidelines. Such a departure is rare and is subject to government appeal.<sup>10</sup>

Obviously, the factors which are used to calculate the specific guidelines score become very significant in any plea discussions. It would be malpractice for any attorney to attempt to negotiate a plea on behalf of a client without knowing the guideline factors and the government's position with respect to each one of those factors. For example, one of the factors is the amount of

money involved in the crime. If the government has weaknesses with respect to this amount or if there are different ways to view the amount involved, the attorney should negotiate to obtain the government's agreement that for guideline purposes a specific amount of money will be used in the court's calculations.

### FEDERAL STATUTES

It is also important to determine what statutes are available to the prosecutor. The underlying facts which you will learn from your client will be a good starting point. However, be aware that often the same criminal conduct can result in different charges. Many cases involving false statements to federal agencies can be prosecuted under a general catch-all false statement statute<sup>11</sup> or can be prosecuted under a specific agency statute. The prosecutor can and usually will choose the statute with the more serious penalty. A point of negotiation should always be what statute is to be used. Reference should be made to the sentencing guidelines to determine which statute is viewed more or less seriously. A client's reputation may be less sullied by pleading guilty to an obscure regulatory statute rather than "mail fraud" or some other ominous-sounding criminal statute.

The availability of the federal mail fraud statute (18 USC Section 1341) also gives the prosecutor greater latitude in charging defendants. The mail fraud statute basically requires a scheme to defraud be employed by the defendant and that some mailing be made in furtherance of that scheme. The mailing does not have to be made by the defendant or at his direction, it must merely be made in furtherance of the scheme. One can quickly see how any business fraud would necessarily require some document to be sent through the mail.

The RICO statute is also a very valuable weapon for federal prosecutors. This statute not only carries heavy penalties, it also carries the draconian possibility of forfeiture. The RICO statute has been expanded beyond its original target of organized crime. It is now employed in a number of business settings. Long term fraudulent conduct can

result in RICO or RICO conspiracy violations. These prosecutions afford prosecutors the possibility of heavy jail sentences and fines. Significantly, forfeiture of the entire business enterprise is also possible.

Bear in mind the use of RICO and other serious statutes usually require Department of Justice approval. This is an obstacle smaller U.S. Attorney's offices may be less willing to confront. Historically, the larger U.S. Attorney's offices in Chicago, New York and Los Angeles have been on the cutting edge of the expanding use of RICO. If RICO charges are being contemplated, it is incumbent upon counsel to meet with the assistant investigating the case, his supervisor and the U.S. Attorney.

In addition to substantive criminal offenses, the practitioner should be aware of accessory and co-conspirator liability.<sup>12</sup> By understanding your client's conduct and the available federal statutes, an attorney can more effectively counsel a client who becomes entangled in a federal investigation.

### SUMMARY

An attorney whose client becomes the target of a federal grand jury investigation runs the risk of causing his client more harm than good. The attorney must know his limitations and must act quickly to protect his client in this unfamiliar setting. Hopefully, this article has offered some insight into areas of potential difficulties and has provided the practitioner with some suggestions on how these problems can be addressed.

<sup>1</sup> According to the U.S. Attorney's office for the Northern District of Illinois, over 80 percent of indicted cases result in convictions.

<sup>2</sup> See U.S. Attorney's Manual Section 9-11.250.

<sup>3</sup> Obviously, a client who has received a subpoena for documents should be instructed in the strongest terms that destruction of evidence subpoenaed by a grand jury can result in more serious additional charges.

<sup>4</sup> See generally 12 USC Sections 1818, 1821.

<sup>5</sup> The Department of Justice has

made financial crimes concerning the S&L bailout a top priority. The Department of Justice has created a Special Counsel for Financial Institutions to coordinate these prosecutions on a nationwide basis. From December, 1989 to October, 1991, 323 assistant U.S. Attorneys were added across the country to specifically address this financial fiasco.

<sup>6</sup> See 18 USC Section 1961 et seq (RICO) which identifies 18 USC Sections 1503, 1510, 1512, 1513 among numerous predicate racketeering acts. Each of these statutes relates to obstruction of justice.

<sup>7</sup> This use of leads is important to avoid a situation where subsequent prosecution of an individual is foreclosed because the government cannot demonstrate that information was not derived from the individual's proffer.

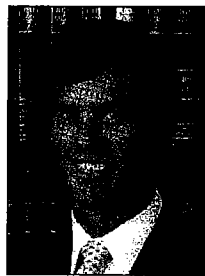
<sup>8</sup> See generally 18 USC Sections 1503, 1510, 1512, 1513 and *Cole v. United States*, 325 F. 2d 437 (4th Cir. 1964). Cert. denied 377 US 954 (1964).

<sup>9</sup> See ABA Code of Professional Responsibility, DR 5-105(A) (B); see also F.R.E.R., page 44.

<sup>10</sup> 18 USC Section 3742 provides for appeal by the government of a sentence (1) imposed in violation of law; (2) imposed as a result of an incorrect application of the sentencing guidelines; (3) if the sentence is less than the sentence specified under the applicable guideline range.

<sup>11</sup> 18 USC Section 1001.

<sup>12</sup> See generally 18 USC Section 2 and 18 USC Section 371.



*Daniel M. Purdom is a partner with Hinshaw & Culbertson.*

*Although he is headquartered in the firm's Lisle office, his practice involves trial work on a national basis. He specializes in civil litigation, white collar*

*criminal defense and related areas.*

*Prior to joining Hinshaw, Mr. Purdom was an Assistant U.S. Attorney for the Northern District of Illinois from 1980 to 1986. He worked with U.S. Attorneys Thomas Sullivan, Dan Webb and Anton Valukas.*