INSIDE THE MINDS

White Collar Case Strategies

Leading Lawyers on Developing Winning Strategies, Communicating with Clients, and Navigating High-Profile Cases

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White Collar Case Strategies in the Public and Non-Public Spheres

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Developing Strategies for Public and Non-Public Cases

So-called "white collar" cases differ from other cases in at least one primary respect: the stakes are higher for the individual or company that is the target of the case. In a criminal white collar case, a tarnished reputation, incarceration, high fines, and/or loss of the ability to conduct business may result. To most readers, the notion of a white collar case will mean a criminal case. But in fact, regulatory and other civil matters can have consequences that implicate the white collar arena, particularly if "parallel proceedings"—that is, concurrent proceedings in the civil and criminal context arising from the same set of operative facts—are involved. In the context of international antitrust and Foreign Corrupt Practices Act investigations, parallel regulatory and criminal proceedings may span multiple countries and jurisdictions. In these cases, an in-depth understanding of the cooperation mechanisms between various government bodies is necessary, as the white collar defense attorney must represent the client's interests in multiple competing and cooperating forums across the globe.

In the typical U.S. white collar case, for example, a company that learns of possible wrongdoing by its officers, directors, or employees, or is the target of a government investigation of some sort, may have to conduct an internal investigation and determine whether and how to cooperate with government authorities as the results of the investigation emerge. The individual, if asked for an interview by investigators for the company, or if subpoenaed to testify in a civil case or as part of a regulatory or criminal investigation, will have to weigh the consequences of asserting their Fifth Amendment rights. Invoking these rights may result in individuals being fired from their jobs, losing professional licenses, and even having certain presumptions applied against them, increasing the likelihood of negative results in the parallel civil and enforcement proceedings. On the flip side, in some cases where parallel proceedings are underway, white collar defense counsel may wish to use the civil matters as a means of obtaining discovery that might not otherwise be readily available in the criminal matter, such as documents

underlying the transaction at issue and/or the statements of key fact witnesses.

These considerations mean that the white collar lawyer must be facile in working strategically within multiple subject and procedural areas at once. In addition, he or she must be able to communicate effectively with the client and with opposing counsel in sometimes competing arenas (e.g., Department of Justice, Securities and Exchange Commission, civil class action plaintiffs' counsel) at the same time. We regularly work in this minefield of conflicting issues. And in many cases we find that although a civil resolution is possible, a satisfactory criminal resolution is not, which means we must—and will—try the case in the criminal courts.

Against this backdrop, it is self-evident that many of our biggest successes occur where we can win a case early on, or convince a prosecutor or regulator not to pursue charges at all. Where an early win is obtained in court, the victory is publicly known. But where the "win" is a non-public event, it usually is known only to a very few—making this type of resolution even more desirable to clients in many instances. This chapter talks briefly about each kind of event.

Public

One example of a public development was a dismissal we obtained for a former director in a shareholder derivative suit arising out of a stock option backdating investigation. A parallel criminal trial resulted in the convictions of two individuals who were also co-defendants in the derivative action. Our strategic processes in that case generally mirrored the process we use in our other white collar matters:

1. Evaluate the client's interests, goals, and possible "exposure."
2. Review potential legal and factual arguments, analyzing the strengths and weaknesses of each.
3. Where possible, identify other, similarly situated parties and forge appropriate working relationships with their counsel in

order to share the workload and efficiently brainstorm strategic ideas.
4. Work to establish credibility with decision-makers (in some cases a special litigation committee, in others a prosecutor, regulator, or, where ultimately necessary, a trial judge).

Non-Public

For an example of a non-public development, consider our clients who are top foreign executives accused of participation in criminal antitrust conspiracies in sophisticated international product markets (including the United States). In many of our recent cases, we have been able to ensure that our clients did not appear on the Justice Department's "carve-out" list (the list of individuals who are not covered by the company's criminal plea agreement with the government, and who are thus subject to possible prosecution). Avoiding being placed on the list as a target for prosecution meant avoiding criminal charges and permitting the individuals to continue to travel freely without fear of being detained at a foreign port of entry or departure. In these cases, the four factors listed above were important. But in addition—and ultimately perhaps even more important—was our ability to work with clients (occasionally in their home countries via interpreters) over several months in order to:

1. Help the individuals understand the U.S. government's potential ability to affect them—whether through a possible extradition effort in the event that they were prosecuted or through listing them on the so-called Interpol "red list," which would hamper their ability to travel even to non-U.S. countries
2. Assess what really happened in a factual scenario that often involves a mix of explicit and implicit discussions and communications, including e-mail strings, written in two or more languages
3. Help the individuals understand the legal import of the events at issue

4. Muster our ultimate knowledge of the facts and the law in order to make credible and convincing "proffers" (attorney representations, not involving client participation) to the government to lead them toward our desired result
5. And where necessary (and subject to adequate assurance based upon our earlier representation in the process that the client's words would not be used against them in a criminal prosecution) assist the client in face-to-face meetings with prosecutors

Each case involves identifying and ranking the strongest arguments, then building them into a coherent theme from which we create arguments designed to advance the client's position, keeping in mind the audience. (It should not be presumed that these approaches always work. Although we have enjoyed recent successes in several of the antitrust investigations, for example, in another we were introduced to our client too late to make a difference, and he was ultimately prosecuted.)

The Initial Client Interview

No initial client interview is the same. In the case of a Foreign Corrupt Practices Act investigation, or an investigation by the Department of Justice's Antitrust Division involving alleged price fixing by foreign nationals, the interview is often conducted on foreign soil. Even if the interview is conducted in the United States, or remotely via videoconferencing technology, it often involves the use of an interpreter. However, there are certain characteristics that are common: (1) since most targets of white collar investigations and prosecutions are not repeat offenders, their involvement in the criminal or regulatory enforcement processes is new and confusing, and (2) especially for executive individuals, many of whom are successful in their fields and used to "running the show," the inability to control the pace or direction in which the cases proceed is frustrating and sometimes frightening. For clients who are current or former executives, we often face challenges in overcoming the client's initial reactions, which usually involve difficulty

in accepting the situation or an impulse to take a hard line, rather than a conciliatory approach to government investigations and prosecutions. By focusing on the difficulties the client faces, we risk being seen as aligned with the forces negatively challenging the client, whether it be the company or the government investigators. However, if we avoid focusing on the difficulties, we risk underplaying the challenges the client faces. Before we can effectively manage the client's expectations, we must establish a counseling role with the client and become a trusted advisor to the client. This can initially involve discussion of "safe" subjects such as background facts, expressing sympathy and empathy for the client's position, and even reaching out to and including the client's spouses and families in the counseling role. Once a sufficient degree of rapport has been achieved, we work to ensure that the client has an objective view of the situation, including the worst case scenarios.

We find it necessary, therefore, to take several steps in the initial interview, most of which must be repeated in multiple follow-up interviews over time as trust is built and a relationship and rapport evolve:

1. Learn the client's background.
    a. For an individual, this means learning as much as possible about the client's history, including education, family background, medical history, and other information that may explain the facts surrounding the client's role in any relevant events.
    b. For a company, this means learning about its history, its market, its organization and decision-making structure, key decision-makers, and key sources of documents and information.
2. Explain the legal context against which the facts affecting the client will be judged, including issues of procedure and timing, where those can be determined.
3. Explore possible outcomes by explaining how the Federal Sentencing Guidelines may apply, or in some cases what regulatory penalties might be imposed. (We often defer these

issues to a subsequent meeting, after we have gotten to know the client better and have earned the client's trust and respect.)
4. Determine the client's goals given the realistic range of possible outcomes.
5. Explore possible means for achieving those goals and the client's comfort with potential approaches and the risks involved.
6. Determine where relevant documents and information might be found, and who might be important witnesses for and against the client, and explore the best means of accessing these two important sources of information.

The Basic Steps in a Case

While no two cases are the same, we find that most of our cases have the following steps in common:

1. Initiation: Generally, a white collar matter will begin with a whistleblower of some kind raising concerns about a company's or individual's actions.
2. Factual investigation:
    a. For an individual client, this can take the form of client meetings, witness interviews, or retention of investigators and experts depending on the client's resources and the gravity of the situation.
    b. For a corporate client, this can take the form of an investigation conducted by company employees or a full-blown investigation involving the retention of counsel by a special committee of the board of directors. These investigations also often result in restatements of financial statements filed with the Securities and Exchange Commission.
3. Retention of counsel: This can take place before, during, or after the factual investigation, depending on the severity of the events in question.

4. Attorney proffer: Attorneys for the client provide information to the investigating agents, be they government investigators or attorneys in private practice acting on behalf of a corporation or its board of directors.
5. Interview or grand jury testimony: In an interview, the client answers the investigator's questions with the protection of an agreement limiting the government's ability to use what is said against the client. In the grand jury setting, counsel is not allowed to be present, the client is under oath, and there are no protective agreements available. Deciding whether to allow questioning is one of the most difficult decisions in a case. Doing so exposes the individual client to substantial liability, not just because they might implicate themselves in the underlying investigation, but also because they face additional potential liability for making false statements to government agents. But declining to answer questions, including by invoking Fifth Amendment rights, may cause the client to be fired from a job, lose a professional license, or have certain presumptions applied against them. We find increasingly that it is necessary to counsel in favor of seeking protection under the Fifth Amendment, notwithstanding the collateral consequences that may follow.
6. Indictment: The client is formally charged with a criminal infraction. In some cases, the client may be charged initially by information, which the prosecutors may file directly with the court rather than seeking grand jury approval.
7. Plea or trial: The client may decide to go to trial and seek acquittal, or plead guilty to an offense and seek to receive a lesser sentence. Presenting to the prosecuting agency a credible threat of success at trial greatly increases one's position when negotiating a plea bargain.
8. Sentencing: After a trial or guilty plea, persuading the court to impose a lenient penalty on the client by providing context for the offense and compiling testimonials from friends, family, and colleagues.

Throughout each of these steps, we use technological tools such as Casemap (a case organizational tool used to organize documents and witness statements, and which also can produce graphical chronologies), videoconference technology, PowerPoint presentations, analysis of the metadata in documents (data relating to an electronic document's history, including when and by whom it was created, edited, or deleted, and what changes were made during editing), and e-mailed analysis and explanations, to aid in our defense of clients. Where clients are not native English speakers, written e-mail analysis is sometimes preferable, as this form of communication provides the client unlimited time in which to grasp the concepts being communicated. In some cases for non-English speakers it is helpful to engage the assistance of a translator in helping the client understand the concepts included in the written works. We also try to avoid handwritten note-taking to the extent possible, as electronic memoranda of both client and government meetings can be more easily accessed, revised, and utilized in the development of the client's defense. As explained in greater detail below, we often try to conceive of graphical and tabular forms of presenting complex data to clients, the government, and decision-makers to make our defenses more accessible and persuasive.

Modifying Strategies as Cases Unfold

The evolution of our defense strategies in white collar cases involves responding quickly and strategically to changing circumstances.

In the back-dating case, we had begun as "shadow counsel" in a state derivative case involving allegations of stock option back-dating at the same company. The company's main outside law firm was formally representing numerous individual defendants in that case as "pool counsel," and our initial role was only to monitor their work on behalf of our client. At that time, there were ongoing Securities and Exchange Commission and Department of Justice investigations into alleged back-dating at the company, so there was vast potential federal-level liability in addition to issues in the pending state court civil case. We kept an eye

to minimizing our client's exposure on a global level, but mostly stayed quiet.[1]

When a new special litigation committee took over representation of the company and notified us by letter of their intent to assert claims against our client in a federal action, we faced a significant strategy change as our client had suddenly (and without prior warning) been specifically targeted by the company. It was evident at that point that the client could no longer rely on company counsel, who ultimately withdrew from the case entirely because of conflict issues. We now assumed the lead for our client, and per the steps outlined above, reassessed his potential exposure in light of the legal and factual issues. We also coordinated with counsel for other defendants where we could (although the issues among the defendants were not universally identical).

In each of the antitrust investigations, our clients have been prominent targets of the prosecutors from the Antitrust Division of the Department of Justice, and each was initially unwilling to acknowledge that what had transpired on their "watches" at the respective companies was potentially problematic under U.S. law. Each client was different, and each had issues unique to his company and his position in the

[1] In recent years, representation of individual defendants has become more difficult due to the increasing public perception—especially problematic with jurors—that corporations and highly paid executives are undeserving, arrogant, and corrupt. High-profile convictions like those of Bernard Madoff, Dennis Kozlowski (Tyco), and Bernard Ebbers (WorldCom) have only fanned the flames of public sentiment. The Enron scandal, which resulted not only in the high-profile convictions of Ken Lay and Jeff Skilling, but also the regulatory burdens of Sarbanes-Oxley, has only increased the difficulty of successful individual representation. We faced many of these issues when in a federal criminal jury trial we represented the former chief executive officer of a publicly traded company who was convicted in a revenue recognition prosecution several years ago. Although we presented a defense in that case to the effect that our client was not the principal wrongful actor, the jury returned a conviction, implicitly lumping the client in with other executives who had been more directly responsible. It can be challenging to persuade the typical jury member to differentiate between top executives where compensation for such clients is usually in the six- and seven-figure range at their former companies. This is especially difficult in the case of a top executive such as a chief executive officer, who is widely viewed as culpable for any actions undertaken at the company, even where direct involvement is attenuated or lacking altogether.

company, as well as with regard to the product markets involved. But for each individual, many meetings over many months were required—both in the United States and often primarily in the country where the individuals lived—in order to begin to understand the products involved, the antitrust issues in play, and the actual facts. We also focused on helping the clients understand what defenses were potentially useful and the problems they would face if the defenses were not successful. We found in each case that working with qualified interpreters and with graphical diagrams (an approach we often use in such cases) were good ways to help us and the clients understand the flow of information that led the government to conclude that price-sensitive information had been improperly shared among decision-makers at competing companies. Qualified interpreters with a good grasp of the issues were in several cases able to help us bridge cultural gaps in understanding, and even clue us in to situations in which the client's proffered interpretation of non-English language e-mails was not consistent with the generally accepted meaning of key words and phrases.

The Keys to These Cases

In the back-dating case, a key factual issue (not including "merits defenses," which we deemed to be very strong but not subject to early presentation to the trial judge) was the length of time that had passed since the events alleged about our client in the complaint. Our client's situation was relatively unique within the defense group—the special litigation committee had amended the federal complaint to add our client over six years after he had left the company's board of directors, while other former board members had been added long before. These procedural circumstances left us with significant statute of limitations arguments on which to base a motion to dismiss. Some, but not all, of the other defendants had similar arguments; others were not able to avail themselves of the statute of limitations argument at all.

The key in most of the antitrust cases was our success in helping the individuals break out of the cultural impasses that in each case blinded

them to the issues they faced under U.S. law, and then to convince Department of Justice prosecutors that, under the circumstances (except in the instance of the individual who unfortunately we could not get to soon enough), the clients should not be carved out for possible prosecution. As noted, the use of interpreters and diagrams (created both by us and in some cases by the clients at our request) helped us in communicating with the clients. Both also were useful in our subsequent presentations to the Department of Justice.

Invaluable Resources

In the back-dating case, we focused on statute of limitation arguments. The complaint we attacked in our motion to dismiss was aggressive, attempting to recover hundreds of millions of dollars from our client and others. Although we worked with counsel for other defendants in producing individual-but-coordinated briefs, our efforts were focused on obtaining a full dismissal of all claims against our client with prejudice. In significant part, we needed to defeat an argument that because of an old state court case in which our client had been named, the new federal complaint could be "related back" so as to defeat our statute of limitations arguments. The issues on this point were complex, factually and legally, and we used, among other things, a case-and-fact chart to distinguish arguments made against us. This chart was a key part of our presentation at oral argument.

We employed a similar effort in most of the antitrust investigations. In one we even had a similar statute of limitations argument to employ for our client as an additional background against which to argue that he not be prosecuted. Our points overall in these cases were either to convince the Department of Justice that our clients were not culpable (or, if culpable, were less culpable than other potential defendants) or in some cases that the clients could be more useful if they were not prosecuted, or that the clients could effectively resist prosecution by challenging extradition. The issues were both legal and factual. We argued that there was no conduct or trade at issue that reached U.S. markets, that the conduct at issue was not conspiratorial, or that the individual involved

had left the company so long ago that he had effectively disassociated himself with any antitrust conspiracy that could be alleged. Since the nature of the markets involved and the size of the losses allegedly suffered by the alleged victims were important to evaluating clients' exposures under the Federal Sentencing Guidelines, on some occasions we used independent financial experts in our analyses and presentations.

Money Matters

In the back-dating case, financial issues actually offered strategic opportunities for us, since our client and others were being indemnified by the company at a cost that exceeded the limits of its indemnification insurance by the time the motion to dismiss came for hearing. The company was also suffering from economic issues facing all companies in its market. This offered a point of leverage against the company (in addition to the force of our statute of limitations arguments) which ultimately decided not to amend the complaint after our motion to dismiss was successful and the client was dismissed.

In the antitrust investigation, financial issues were not important in the sense of client indemnification—in each case, our clients were indemnified by their employers. But financial issues were at play. Each of these cases required an in-depth analysis and understanding of the product markets involved, including the rise and fall of supply and demand, prices, and production over the periods at issue. As mentioned above, the size of each of these markets and the magnitude of the losses allegedly suffered by the alleged victims of the conspiracies (a significant factor in calculating the incarceration exposure to the clients under the Federal Sentencing Guidelines) were also important considerations.

The changing economy has not yet impacted our practice to the degree it has other practice areas. While corporations are facing increased pressure to control costs, the high-stakes nature of the white collar area means that economic pressures for the most part do not outweigh the importance of retaining quality counsel. Where we have seen significant impact is in public perceptions of our clients. The public increasingly

sees our individual clients—especially because of press commentary and statements by public officials—as deserving of distrust and punishment. We therefore invest significant resources—including public relations and communications experts—who help us and our clients shape our message and impact public opinion. These strategies often involve "humanizing" our clients and demonstrating that they—including corporate clients—have the public welfare in mind. Many of our clients have significant community involvement outside of their professional commitments, and highlighting their service to others can substantially alter the public's perception.

Concluding Thoughts

White collar practice is complicated and high-stakes in nature. The clients are continually confronted with strategic decisions impacting not just (for individuals) their finances, but also their freedom, reputation, personal relationships, and self-image. These decisions arise in numerous contexts simultaneously, making flexibility and facility with overlapping civil, regulatory, and criminal proceedings necessary to obtain successful results. We find that, in our practice, success begins by winning the client's trust and respect, and obtaining a thorough and complete understanding of the factual and legal landscape. After doing so, we move forward with an integrated strategy on all fronts to satisfactorily resolve the issues.

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Mr. Young is listed in The Best Lawyers in America *in four categories (appellate law, business litigation, commercial litigation, and white collar criminal defense), is recognized in the* Chambers USA Guide *in two categories (white collar crime and government investigations [band 1] and general commercial litigation [band 2]), and is listed in* Who's Who Legal *(International and California editions) (business crime). Mr. Young is also recognized as one of the "Top 100" lawyers in "Northern California Super Lawyers" by* Law & Politics. *Mr. Young is a co-author of* California Trial Handbook, Second Edition, The Lawyer's Trial Handbook, *and* California Negotiation and Settlement Handbook. *He is admitted to the U.S. Supreme Court, the U.S. Court of Appeals for the Sixth and Ninth Circuits, and the U.S. District Courts for the Northern, Eastern, Central, and Southern Districts of California, and the District of Hawaii. He served as a law clerk to the Honorable Alfonso J. Zirpoli of the U.S. District Court for the Northern District of California.*

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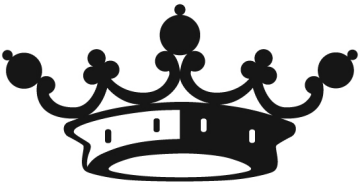

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