



Defending White Collar Crime in State Court

Challenges and Solutions

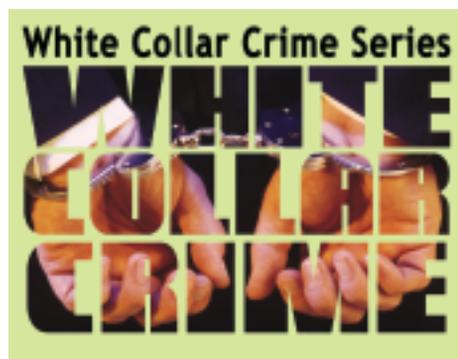
It appears that since the post-Enron scandal, prosecutors have become more sensitive to financial crimes. Many of the district attorney's offices may not necessarily handle white collar crime cases that involve the same level of complexity as the Enron case, but even straightforward employee embezzlement cases that a typical district attorney's office may handle can be a challenge to defense counsel. Although public defenders and the private defense bar handle a full range of crimes, the experience of defending white collar criminals can be dramatically different from non-white collar crimes.

Defense counsel may be overwhelmed with the quantity of financial paperwork that the prosecution might produce, especially if counsel deals more in the narcotics, violent and property crime genre. There is a lack of state statutory and case law guidance on white collar crime issues concerning discovery matters assisting both the defense and the prosecution in understanding their respective duties. Thus, researched federal case law relating to white collar crime discovery issues may give judges

guidance at the state level. Although it would be preferable to have state case law, if defense counsel is willing to educate the judiciary on unique white collar discovery issues that may plague defense counsel, the judiciary might be willing to adopt federal case law in their decisions supporting defense counsel's pretrial motions compelling prosecutors to disclose the documents they intend to use at trial. One of the challenges in white collar cases is the phenomenon commonly referred to as the *document dump*. A document dump occurs when, for example, a prosecutor produces 1,000 documents when he or she knows that only 10 of those documents are relevant. Due to inadequate resources, in many instances it takes a major effort by the defense to analyze all the documents to find the few that are pertinent.

This article has been written to offer solutions to challenges faced when dealing with a judiciary that was not adept at understanding white collar crime issues when the author was appointed to a fraud-related homicide case. By the end of the pretrial stage, however, the judge had a working knowledge of fraud principles, how white collar crime investigations differ from other types of criminal investigations, and how the law imposes certain legal requirements on the parties that would normally not exist in non-fraud cases. In the end, the up-front work increased the efficiency and soundness of the court's legal rulings and ensured that the defendant received a fair trial.

It is critical for defense attorneys to: (1) understand business internal controls and their role in defending an individual accused of fraud; (2) know what type of expert the defense should consider hiring; (3) educate the judiciary on impor-



BY FRANK S. PERRI

tant discovery issues that are unique to white collar crime cases and motions to compel disclosure of evidence; and (4) use technology in the courtroom to persuade the jury.

Common Misconception

Many white collar crime cases at the state level involve bookkeeping fraud rather than the intentional misapplication of accounting rules, known as Generally Accepted Accounting Principles (GAAP). For example, a violation of GAAP would be a business intentionally overstating revenue by claiming sales that were never earned. An example of bookkeeping fraud would be an employee who has been charged with embezzlement from a business where the prosecution claims that the employee channeled business funds into his or her own personal account. This means the prosecution is impliedly alleging that the client may have circumvented an internal control procedure that is used to protect the organization's assets in order to receive a monetary gain.

It is important to recognize that understanding intricate accounting rules is not necessarily required when defending various white collar charges. Instead, it is more important to understand an organization's internal control procedures, if they even exist, and understand whether the client manipulated the procedures for his or her benefit.

Expert Assistance

Normal criminal case discovery, even in homicide cases, may not begin to match the volume of discovery that a white collar crime case can generate. Defense counsel may not possess the time or the knowledge to understand the financial documents that have been provided as discovery. Yet, even though there may be a knowledge gap, there are expert services available for counsel that can demystify the complexity of white collar crime cases. Understanding the alleged fraud goes to the heart of the prosecution's case. If counsel does not understand what the prosecution is introducing as evidence, counsel may face meritorious ineffective-assistance of counsel claims.

Who should assist defense attorneys in deciphering the facts? A natural and common response by many attorneys is to hire a certified public accountant (CPA). Although this is a good place to start, it may or may not be appropriate. First of all, CPAs may not understand fraud schemes because their training and practice may not involve fraud detection.

Question the CPA as to whether he or she has specific training in fraud detection and experience in criminal investigations. Another option is to consider a certified forensic accountant (CFA). Often people confuse forensic accounting as per se fraud detection services, but this is not the case. However, if the CFA does have extensive experience in fraud detection matters, he or she may be a viable option. Counsel also might consider a certified fraud examiner (CFE).

One of the unique aspects about hiring CFEs is that their training requires them to consider whether fraud *did not occur* if there are allegations that it did occur. Moreover, a CFE can analyze and reduce hundreds of pages of discovery into flow charts and timelines. This will enable the attorney to visually grasp the facts of the case without having to spend hours pouring over documents.

Also, CFEs have an understanding of courtroom proceedings, evidentiary issues, criminal law and procedure, and interviewing strategies because it is part of their training. With the assistance of a CFE to guide counsel in the knowledge and logistical aspect of the case, representation of one's client becomes more effective and less stressful.¹

Importance of Understanding Internal Controls in a Fraud Case

Internal controls mean different things to different people. It is important that people who are not familiar with accounting and auditing terminology have some common understanding of what they are and why they can be extremely important in understanding a client's case. Internal controls are procedures put in place, usually by the management of an organization, to provide some reasonable assurance that its assets are safeguarded. Some business internal controls, for example, segregate employee duties to reduce the probability of fraud.

That said, fraud symptoms may become apparent from a bypassing of the organization's internal controls. A violation of internal control policies can be devastating proof of culpability. Do not assume, however, that understanding internal controls is only for the benefit of the prosecution. It can be equally or more important to the defense to understand the organization's internal controls due to the possibility that the defendant did follow procedure. It may have been someone else who bypassed the internal controls to commit fraud.

Often it is management itself that overrides procedure for various reasons that may not be criminal in nature.

Educating the Judiciary

Little attention is given to members of the judiciary and their ability to digest how white collar crimes unfold before and during a trial. Judges may not have the benefit of experience or the knowledge to understand what dynamics are necessary for a fraud case to be properly proven, and conversely, how to ensure that a defendant receives a fair trial given that traditional rules of discovery may not apply. Offering guidance to the court (with the assistance of the defense expert) is extremely important because judges may not understand the fraud examination principles behind white collar crimes. As a result, they might erroneously disallow relevant and material evidence or allow prejudicial evidence to be admitted.

Educating the court is especially important when a case involves chain of custody issues. Non-white collar crime cases rely heavily on physical evidence that is easier to legally and intuitively digest. There is an inherent tangible quality to physical evidence appealing to human senses that allows judges to more easily anticipate how proof and chain of custody issues play themselves out during the duration of a case. This aspect is not necessarily true with white collar crime cases that carry with it an intangible quality. The judge may be able to better grasp certain accounting and fraud investigation techniques if a CFE explains the relevance of certain evidence and how it fits into the overall understanding of the case coupled with issues of motive and state of mind.

In essence, the CFE has to connect the evidentiary dots for the judge in the event the judge is unclear as to fraud principles. The "connecting of the dots" is extremely important because often fraud cases are circumstantial in nature. This is especially true if the CFE states that the circumstantial evidence does not infer fraud, and there is no evidence indicating who committed the fraud because the business has no internal controls or weak internal controls, thus reducing the certainty as to who committed the crime. The issue of chain of custody becomes critical when motions for disclosure of specific documentation and witnesses are discussed.

Another problem counsel may encounter is that the judge may not understand what business internal controls are and what relevance and importance they play as to proof issues. Defense counsel may encounter resistance from

the prosecution and the judge when demanding that the organization's internal controls be disclosed. It will behoove counsel to have the expert testify regarding the importance of getting a copy of the internal control manual when arguing for a motion for disclosure of evidence.

When arguing before a judge whose experience is mostly with non-white collar crimes and the accompanying tangible evidence, use non-white collar examples to show the importance of the defense obtaining information regarding business internal controls. For example, many states require that the prosecution disclose the internal control procedures that are used to process DNA results. The state has an obligation to produce copies of DNA laboratory procedures, manuals, DNA testing protocols (which is another term for internal controls), and copies of chain of custody documents for each item of evidence subjected to DNA testing. Internal control manuals go to impeachment, rebuttal, witness preparation, uncovering admissible evidence, and corroborating testimony. Thus, if a certain procedure for DNA was overlooked, defense counsel can challenge the DNA results for reliability. Similarly, in fraud cases, defense counsel must understand whether the client truly bypassed a procedure that produced a prima facie case of fraud leading to the client's arrest.

Motions to Compel Disclosure

Faced with the prospects of document dumping, counsel should file a motion to compel prosecutors to disclose which documents they plan to use in their case-in-chief. The common prosecution answer to defendant's motion to reveal what documents the prosecution intends to use is that the documents have "been made available" or that "the documents are available for inspection." This shows a belief among prosecutors that they have no obligation to reveal specific documents being used against a defendant. Absent state case law, it is necessary to include federal case law for court guidance to support one's motion.

Document Specification: Mitigating the Impact of The 'Document Dump'

What can defense counsel do to counter the prosecution's document dump? Several courts — faced with the problem of a governmental document dump in cases involving white collar crime issues — have required the government to designate well in advance of trial

which of the documents produced it intends to use in its case-in-chief.

In *United States v. Turkish*, the district court stated that it was improper for the government to "bury the defendant in paper" by making all documents generally available.² The defendant in *Turkish* received approximately 25,000 pages of documentation. The court ordered the government to identify those documents it intended to offer, use, or refer to in connection with the testimony of any witness in the government's case-in-chief.³

Similarly, in *United States v. Poindexter* and *United States v. Upton*, courts ordered the government to specify which, of the thousands of documents produced, the government intended to use at trial.⁴ In so holding, the trial courts emphasized fundamental notions of fairness, and made clear "the purpose of requiring the government to identify which documents it will rely upon at trial is to allow the defendant to adequately prepare his defense."⁵

Overall, it is important to emphasize to the presiding judge that a lack of differentiation among the potentially thousands of pages of documentation impedes the preparation process rather than expedites the process. The success of having a motion to compel disclosure granted generates several benefits. First, the expert that was hired will not have to review thousands of pages of irrelevant documents with a client to determine what, if any, relevancy they may contain. In essence, the motion serves as an efficient starting point to begin the fraud investigation.

Second, identification of the government's documents to be used in the government's case-in-chief also allows the defense an opportunity to object to the government's introduction prior to trial, and it also avoids the necessity of moving to suppress evidence the government does not intend to use.⁶ Conversely, the defendant must identify the documents on which he or she intends to rely.⁷ In order to avoid the disclosure, some prosecutors will state that they will use their entire discovery. But as the court in *Anderson* noted, for the government to state that it will use all of its material is "simply not credible."⁸ In *United States v. Marshall*, the court cautioned against government "gamesmanship in discovery matters."⁹

Document Request: Brady Material Applies To White Collar Crimes

If, for example, defense counsel requested a copy of an organization's internal controls, the prosecution may argue that what the defense is requesting is

not material. The materiality standard, however, is not a heavy burden for the defense to meet. Evidence is material if there is an indication that it may play an important role in uncovering admissible evidence, aiding witness preparation, corroborating testimony, or assisting in impeachment or rebuttal.¹⁰ Materiality is not simply about whether the outcome would have been different at trial. The Supreme Court clarified in *Kyles v. Whitley* that a violation of non-disclosure does not evolve around the issue of whether the outcome would have resulted in the defendant's acquittal.¹¹ Rather, the questions are: Did the defendant receive a fair trial? Is there confidence in the resulting verdict?¹²

In addition, even with white collar crime, it is not the prosecution's authority to determine what is material and what is not material for disclosure purposes under *Brady v. Maryland*.¹³ Under *Brady*, the prosecution has an affirmative duty to search for and reveal possible sources of exculpatory information, including a duty to learn of favorable evidence known to others acting on the prosecution's behalf.¹⁴ One of the common prosecutorial misconceptions about *Brady* the author has encountered is the belief that if the prosecution does not take notes during a witness interview, witness statements do not have to be disclosed because nothing was memorialized in writing. Oral statements that are exculpatory must be disclosed to the defense regardless of whether it was memorialized in writing by the prosecution. The government also has the duty to disclose exculpatory impeachment material.¹⁵

Possession, Custody, and Control

One of the common prosecutorial arguments for not disclosing evidence the defense requests is that the evidence is not in the prosecution's possession, custody, or control. *SEC v. Credit Bancorp* stated that control is not defined only by possession, but as the legal right, authority, or practical ability to obtain the documents requested upon demand.¹⁶ So often when prosecutors are preparing white collar crime indictments, they frequently make requests from the alleged victims in order to build a case against the defendants. As a result, they cannot claim that they have no access to documents or internal control manuals when they themselves can make requests.

Summarizing Evidence

Be careful of the prosecution publishing summarized evidence to a jury. According to an Illinois case, *People v. Wiesneske*, summary of voluminous documents may be admitted in trial if underlying data is admissible under the busi-

ness records exception and voluminous writings cannot conveniently be examined in court by the trier of fact.¹⁷ Summarizing data is not an exception to hearsay; the prosecution must lay a proper foundation for the documents used in summarizing evidence.

The importance of the *Wiesneske* case is that the state court uses federal case law to support its position; this aspect can be beneficial to the defense. Thus, if the prosecution uses this case, point out that other federal cases such as *Turkish*, *Poindexter*, and *Safavian* can and should also be used by the court when considering issues of disclosure.

Witness List Disclosure

A motion to compel the prosecution to disclose a witness list as it relates to the documents is extremely important. Unlike other types of evidence where it is clear what the chain of custody is, clear that the evidence is relevant, and clear who will testify as to their particular involvement, the same does not hold true for financial documents. Defense counsel should point out that not only must the material be reviewed, but equally as important, the chain of custody as to the documents must be mapped out so that if the CFE has to interview someone, it is understood how the documents are used in the investigation.

Consider using a narcotics case scenario to educate the presiding judge regarding chain of custody. For example, the reporting officer collects and tags the evidence, the evidence technician preserves and then transports the alleged drugs to a lab for analysis, and a lab technician analyzes the substance to determine whether it is a controlled substance. Through these three steps, the people involved in the chain of custody are easy to trace without any guesswork. This is not always an option with a fraud case if there is confusion over chain of custody issues.

It is important that the prosecution disclose what documents witnesses are relying upon at trial.¹⁸ In fact, the court in *Poindexter* ordered the government to identify which documents witnesses would refer to and rely upon at trial.¹⁹ Sometimes a document will not indicate who prepared it, when it was prepared, and for what purpose it was prepared. Without disclosure, defense counsel cannot properly investigate an alleged crime. Courts have agreed that trial judges have the authority and discretion to order the government to disclose witness lists in advance of trial.²⁰ Point out to the judge that not only is witness disclosure to spe-

cific documentation fair and logical, but it also allows defense counsel to be effective.

Counsel can further argue in defense of disclosure that in *United States v. Opager* the court stated it was important in criminal cases for the defendant to interview prospective witnesses: “The importance to a litigant of interviewing potential witnesses is undeniable. In particular, in criminal cases, where a defendant’s very liberty is at stake, such interviews are especially crucial. Thus it is that one of the first things responsible counsel does in preparing a case is to seek to interview those witnesses involved in the litigation.”²¹ It is important to get the court to force the prosecution to disclose what witnesses are testifying as to which documents so that counsel can impeach and rebut if necessary. When arguing for disclosure, defense attorneys should consider using civil cases as an analogy. In a civil case, the parties know in advance which witnesses will testify regarding particular documents. Money is often at stake in a civil case. In a criminal case, however, a person’s freedom is at stake.

Keep in mind that the defense may have to show that it is necessary and material to have the identity of a particular witness disclosed. The prosecution might claim that it is worried about witness intimidation. The prosecution should be forced to tell the judge what the real risk is and not make vague statements as to intimidation risks. In *United States v. Madeoy*, the court said that “preparation for trial, effective cross-examination, expediency of trial, possible intimidation of witnesses, and intrinsic reasonableness of the request are among the factors a court may consider in deciding whether to exercise its discretion to allow discovery of the [government’s] witness list.”²² The court concluded that due to the large quantity of discovery and witnesses, there was an “extreme lack of likelihood of witness intimidation.”²³

Jury Trials — Voir Dire

Research has shown that people perceive certain types of white collar crime equally or more serious than some traditional street level crime.²⁴ Times have changed and the number of people being affected by white collar crime has increased over the last decade. As a result, there is an inherent need to ask questions during jury selection that relate to how potential jurors perceive these types of crimes. Statistically, people are more apt to have been victims of white collar crime as compared to street level crimes. Thus, it is important to get their views.

One of the problems an attorney

might face is that the judge may want to do most of the questioning or force the attorney to conduct group questions. When a judge conducts voir dire, people are more apt to answer questions in such a way that is pleasing to the judge, and the ability to read subtle behavioral cues of bias is lost. If this is the case, the attorney should submit jury questions in advance so that at least he or she can observe how members of the jury panel react to sensitive questions involving white collar crimes.

PowerPoint Presentation

Prosecution offices are increasingly using technology as a persuasion tool, especially when it comes to white collar crime. Usually they provide a PowerPoint presentation to summarize the major evidentiary points that show the defendant is guilty. The introduction of technology can be powerful, especially in a circumstantial case where evidence may have a sterile nature void of human qualities. The reality is that members of the jury still need to have a human element attached to cases in order for them to feel confident about their verdict, and the prosecution’s use of technology can give circumstantial evidence that human completeness jurors desire.

Even if the reasons that defense counsel uses technology are not as extensive as the prosecution, the defense has to neutralize the prosecution’s impact on some level. For example, use PowerPoint to present the client’s version of facts, to rebut the state’s version, and offer inconsistencies of state witness testimony. In addition, show how the client may have followed the alleged victim-company’s internal control procedures by actually outlining the procedures on PowerPoint and showing the jury how in fact the client followed protocol and did not circumvent the business procedures to commit fraud.

Conclusion

Expect to see a rise in white collar crime prosecution at the state level. The challenges to defense counsel representing clients charged with such offenses can appear overwhelming. However, with the effort of an expert assisting the defense in understanding the case, and with motion practice to force the prosecution to narrow the focus of its discovery dump, counsel will become more efficient and effective. Moreover, counsel may have to educate a judiciary that is not adept at understanding white collar crime cases as contrasted with other criminal cases that have a more tangible aspect to them

because of the physical evidence. The federal case law mentioned herein may assist counsel in their motions for disclosure of state evidence by appealing to the judge's sense of logic and fairness.

Notes

1. Association of Certified Fraud Examiners (www.acfe.com).
2. 458 F. Supp. 874, 882 (S.D.N.Y. 1978).
3. *Id.*
4. *Poindexter*, 727 F. Supp. 1470, 1484 (D.D.C. 1989); *Upton*, 856 F. Supp. 727, 748 (E.D.N.Y. 1994).
5. *Id.*
6. *United States v. Anderson*, 416 F. Supp. 2d 110, 112 (D.D.C. 2006).
7. *Id.* at 115.
8. *Id.* at 113.
9. 132 F.3d 63, 69 (D.C. Cir. 1998).
10. *United States v. Safavian*, 233 F.R.D. 12 (D.D.C. 2005).
11. 514 U.S. 419, 434 (1995).
12. *Id.*
13. 373 U.S. 83 (1963).
14. See *Poindexter*, 727 F. Supp. at 1485.
15. *Id.*
16. 194 F.R.D. 469, 471 (S.D.N.Y. 2000); see also *Searock v. Stripling*, 736 F.2d 650, 653 (11th Cir. 1984).
17. 234 Ill.App.3d 29 (1st Dist. 1992).
18. *Upton*, at 747.
19. *Id.*
20. *United States v. Bejasa*, 904 F.2d 137, 139 (2d Cir. 1990).
21. 589 F.2d 799, 804 (5th Cir. 1979).
22. 652 F. Supp. 371 (D.D.C. 1987).
23. *Id.*
24. John Kane & April Wall, *The 2005 National Public Survey on White Collar Crime*, National White Collar Crime Center (2006). ■

About the Author

Frank S. Perri is an NACDL member and currently works as a State Public Defender in Illinois. He focuses on white collar criminal defense and violent crimes. He received his law degree from the University of Illinois, and is a licensed Certified Public Accountant and Certified Fraud Examiner.



Frank S. Perri

Winnebago County
Public Defender Office
400 W. State St., Ste. 340
Rockford, IL 61101
815-319-4900
Fax 815-319-4901

E-MAIL fperri@co.winnebago.il.us