INSIDE THE MINDS

Managing White Collar Legal Issues

Leading Lawyers on Understanding Recent Notable Cases, Establishing Key Defense Strategies, and Developing Client Relationships

2011 EDITION

ASPATORE

First Printing, 2010
10 9 8 7 6 5 4 3 2 1

Staying on Top of the Issues: New Developments for White Collar Lawyers and Their Clients

Alan J. Sobol
Member
Pullman & Comley LLC

ASPATORE

Health Care, Securities, and Mortgage Fraud Issues

The overriding trend in white collar law at the present time is the government's swift reaction to financial fraud and abuse crimes linked to the state of the economy. Current legislative initiatives and funding in certain enforcement areas are clearly in reaction to the economic downturn and, at least in part, reflect what our government thinks are the current abuses in the white collar law area. I believe the government is seeking to continue its longstanding tradition of deterring the public from committing white collar crimes by bringing prosecutions against high-profile individuals—although the crimes it focuses on shift from area to area, depending on the hot-button issues of the day.

With respect to changes in my practice, I have seen an uptick in health care law cases. Back in 1996 when the Health Insurance Portability and Accountability Act[1] and the Health Care Fraud and Abuse Control Program came into being, a great deal of funding was made available to combat fraud and abuse in the health care area. Now, with the recent passage of the Patient Protection and Affordable Care Act (PPACA),[2] as amended by the Health Care and Education Reconciliation Act of 2010[3] (Health Care Reform Law) and the Fraud Enforcement and Recovery Act of 2009 (FERA)[4], we are seeing new initiatives, such as the creation of the Healthcare Fraud Prevention and Enforcement Action Team. In addition, the Department of Justice (DOJ), the Federal Bureau of Investigation, the Center for Medicare and Medicaid Services, and the Department of Health and Human Services acting through the Office of Inspector General (HHS-OIG) have all received, and likely will continue to receive, more funding to combat healthcare fraud, particularly Medicare and Medicaid fraud, under

[1] Health Insurance Portability and Accountability Act of 1996, Pub. L. No. 104-191, 100 Stat. 1936 (Aug. 21, 1996).
[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 109 (Mar. 23, 2010).
[3] The Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (Mar. 30, 2010).
[4] Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (May 20, 2009).

the new legislation.[5] This will surely trigger a spate of prosecutions under the criminal False Claims Act (FCA),[6] the Health Care Fraud statute,[7] the Anti-Kickback Statute,[8] mail[9] and wire[10] fraud statutes, as well as civil enforcement actions.[11] For example, under this new regime, the PPACA now provides that a violation of the Anti-Kickback Statute, which criminalizes soliciting or receiving monies or things of value in exchange for referrals related to medical services or items payable under Medicare or Medicaid, can now constitute a violation of the civil FCA.[12] While the PPACA only references the civil FCA, federal prosecutors will no doubt extend this reach to criminal FCA prosecutions as well.[13] Furthermore, the PPACA lowered the healthcare fraud statute's specific intent element down to a general intent element, which means it no longer requires actual knowledge of or specific intent to violate the fraud statute.[14] The PPACA also added the same language to the Anti-Kickback Statute.[15] These changes signal Congress's intent to make it easier for the government to bring criminal prosecutions and civil enforcement actions and, therefore, set deterrents.

Along this prosecutive path of least (or lesser) resistance is the trend that I have seen in the health care field (and other white collar areas as well) to use the "conscious avoidance" jury instruction to establish the "knowledge"

---

[5] Kirk Ogrosky and Daniel A. Kracov, "The Impact of the Patient Protection and Affordable Care Act on Fraud and Abuse Issues," address at the ABA's 20th Annual National Institute on Health Care Fraud (May 5, 2010), www.arnoldporter.com/professionals.cfm?u=KirkOgrosky&action=view&id=5529&viewpage=publications.

[6] 18 U.S.C. § 287 (2010).

[7] 18 U.S.C. § 1347 (2010).

[8] 42 U.S.C. § 1320a-7b(b) (2010).

[9] 18 U.S.C. § 1341 (2010).

[10] 18 U.S.C. §1343 (2010).

[11] See also Kathleen McDermott, Katie C. Pawlitz, Tisha Bai Schestopol, Michele Buenafe, Meredith S. Auten, and Coleen M. Meehan, "New Health Care Fraud and Abuse and Program Integrity Provisions: Let's Fasten Our Seat Belts for the Bumpy Ride," AHLA *Connections*, May 2010, www.healthlawyers.org/News/Connections/CurrentIssue/Documents/2010%20Features/Feature_May10.pdf.

[12] 31 U.S.C. §§ 3729 – 3733 (2010).

[13] *Supra* notes 5, 11.

[14] Id.

[15] Id.

element necessary for a criminal conviction. In a recent case I litigated,[16] involving the prosecution of a pharmacist under, 21 U.S.C. § 841 (2010), for illegally filling paid management prescriptions written by a physician, the government successfully convinced the court to give the instruction, which provides essentially that turning a blind eye or a deaf ear to (that is to say, consciously avoiding or deliberately ignoring) material facts that would otherwise be obvious, satisfies the criminal knowledge element.

The use of this often-fatal instruction has significant ramifications in healthcare law, including to the white collar defendant, in view of the recent amendments to the federal civil FCA contained in the FERA. Prior to the FERA, in a civil FCA suit for failing to repay Medicare and Medicaid overpayments, the government needed to establish some kind of affirmative act or statement on the part of the provider to show that the defendant knew they had received, but did not return, the overpayment. Under the FERA, it is now unlawful if a provider "knowingly conceals, or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government." Because the term "obligation" now includes the "retention of any overpayment," by providers retaining known overpayments, even if they were unintentionally received, it will likely trigger civil FCA liability. Simply put, in a "reverse false claims" suit, the failure to repay can constitute a violation of the civil FCA if there is a knowing concealment or avoidance to repay.[17]

While the FERA amendments only refer to the civil FCA, not the criminal FCA, its new language strikingly mirrors the conscious avoidance instruction routinely used in criminal cases, including criminal FCA cases. Thus, today, aggressive assistant U.S. attorneys are far more likely to "co-

[16] *United States v. Funaro*, 22 F.R.D. 41 (D. Conn. 2004).

[17] See Bryan Cave Bulletin, White Collar Defense and Investigations Client Service Group, "Federal False Claims Act Amended Significantly Expanded Liability" (May 27, 2009): www.bryancave.com/files/Publication/549806d1-72e4-40a5-97f4-a1e20f4e4fd8/Presentation/PublicationAttachment/919b0799-6de4-49c8-b9df-08a7fa4fd302/White%20Collar%20Bulletin5-27-09.pdf; see also Summary of Wiggin & Dana's Second Annual Health Care Compliance and Enforcement Roundtable (Nov. 4, 2009), www.wiggin.com/ showadvisory.aspx?show=12344&PrintPage=True; see also supra note 4, New Health Care Fraud and Abuse and Program Integrity Provisions.

opt" the conscious avoidance instruction not only in a civil FCA case, but also in a criminal FCA prosecution.[18]

I also had a number of cases that deal with securities and mortgage fraud, and this is, I believe, reflective of a growing trend. Congress is currently funding prosecutors and investigators in these areas, and we are seeing innovative uses of existing statutes. For example, in the securities field, we are seeing an increase in cases brought under the Foreign Corrupt Practices Act (FCPA).[19] Section 78 of the FCPA prohibits, *inter alia*, unlawful payments of money or gifts to foreign officials to influence them in their official capacity. The Securities and Exchange Commission (SEC) recently announced the creation of an enforcement unit focused on violations of the FCPA.[20] This followed on the heels of the DOJ and SEC $1.6 billion settlement in the *Siemens* case.[21] Another novel development is the DOJ's FCPA unit and the health care fraud unit's use of the FCPA to investigate pharmaceutical companies that do business overseas.[22] Given the ever-expanding use of the FCPA, lawyers who practice in these areas now need to take the FCPA into consideration when they are advising and counseling their clients.[23]

These developments coincide with the Internal Revenue Service's recent announcement of obtaining a settlement with the Swiss bank UBS whereby UBS agreed to disclose the names of persons who had foreign accounts overseas and allegedly did not pay U.S. taxes on those accounts. "The IRS

---

[18] Supra note 17, summary of Wiggin & Dana's Second Annual Health Care Compliance and Enforcement Roundtable.
[19] 15 U.S.C. § 78dd-1, *et seq*. (2010).
[20] See Press Release, U.S. Securities and Exchange Commission, "SEC Names New Specialized Unit Chiefs and Head of New Office of Market Intelligence" (Jan. 13, 2010), www.sec.gov/news/press/2010/2010-5.htm.
[21] *Securities and Exchange Commission v. Siemens Aktiengesellschaft*, Case No. 1:08 CV 02167 (D.D.C.); Litigation Release No. 20829, U.S. Securities and Exchange Commission, "SEC Files Settled Foreign Corrupt Practices Act Charges Against Siemens AG for Engaging in Worldwide Bribery With Total Disgorgement and Criminal Fines of Over $1.6 Billion" (Dec. 15, 2008), www.sec.gov/litigation/litreleases/2008/lr20829.htm; see generally ABA Seminar, the Third Annual FCPA Update: Current SEC and DOJ Enforcement Initiatives, Law Office of Pepper Hamilton LLP (Dec. 9, 2010), www.abanet.org/cle/programs/t10fpa1.html.
[22] Supra note 11.
[23] See supra note 21, ABA Seminar.

will also recommend criminal prosecution in those cases where the facts warrant such an action."[24]

Additionally, the DOJ is now targeting financial institutions and private investment (hedge) funds suspected of fraud. For example, in Connecticut, whose Fairfield County "gold coast" is the headquarters of many financial institutions and hedge funds, the new U.S. attorney, David B. Fein, is creating a securities fraud task force to "investigate and prosecute sophisticated financial fraud that has caused so much harm to investors and the financial market."[25]

In the area of mortgage fraud, the Department of Housing and Urban Development's Office of Inspector General task forces are teaming with the DOJ to set up enforcement efforts culminating in prosecutions. Two primary initiatives are Operation Bad Deeds and Operation Stolen Dreams. Operation Bad Deeds occurred in October 2009 when federal prosecutors in New York charged forty-one individuals with participating in a scam to fraudulently obtain more than $64 million in loans connected to more than one hundred residential properties.[26] Operation Stolen Dreams was a nationwide crackdown on mortgage fraud, which has led to the arrest of more than 500 people.[27]

---

[24] Press Release, Internal Revenue Services, "IRS to Receive Unprecedented Amount of Information in UBS Agreement" (Aug. 19, 2009), www.irs.gov/newsroom/article/0,,id=212124,00.html; see also David Voreacos, Mort Lucoff, and Carlyn Kolker, "UBS Tax Settlement Delayed on U.S., Switzerland Talks (Update4)," Bloomberg, Aug. 7, 2004, www.bloomberg.com/apps/news?pid=newsarchive&sid=a4b7n_puxpDQ.

[25] Michael P. Mayko, "New U.S. Attorney Vows Crackdown on Hedge Funds," *Connecticut Post*, July 12, 2010, www.ctpost.com/local/article/New-U-S-attorney-vows-crackdown-on-hedge-funds-574030.php.

[26] Press Release, Department of Justice, "Operation Bad Deeds S.D.N.Y. U.S. Attorney Bahara Remarks" (Oct. 15, 2009), www.justice.gov/usao/nys/pressreleases/October09/operationbaddeedsremarks.pdf; see also Press Release, Department of Justice, "Manhattan U.S. Attorney Charges 41 Defendants in Coordinated Mortgage Fraud Take Down Across New York State" (Oct. 15, 2009), www.justice.gov/usao/nys/pressreleases/ October09/operationbaddeedspr.pdf.

[27] Press Release, Department of Justice, "Attorney General Eric Holder Speaks at the Operation Stolen Dreams Press Conference" (June 17, 2010), www.justice.gov/ag/speeches/2010/ag-speech-100617.html.

Even more interesting from my perspective is the government's expansive use of the honest services fraud statute.[28] The honest services fraud statute is considered an expansion of the mail and wire fraud statutes. The statutory language of the mail and wire fraud statutes criminalize a scheme that deprives a person or entity of money or property. In 1987 in *McNally v. U.S.*, the Supreme Court interpreted the mail fraud statute to be only applicable to the deprivation of "tangible" property.[29] In response, in 1988, Congress enacted the honest services fraud statute, which broadened the traditional and *McNally* definition of a "scheme or artifice defraud" to include thefts of the "intangible right to honest services." Federal prosecutors used the new statute not only in public corruption cases, its original purpose, where lawmakers took bribes and kickbacks, but also in an expansive range of other private bank, securities, and health care fraud cases where executives breached their duty to render honest services to their corporations and shareholders.[30] By way of analogy, when I was a young federal prosecutor in Washington, D.C., we first saw an expansion of the use of the RICO[31] statutes, which were originally enacted to deal with organized crime. RICO, of course, is now being used to prosecute many other kinds of criminal conduct ranging from Hell's Angels' financial activities[32] to high-heeled escort services.[33] Prosecutors pushed the proverbial envelop in their use of the honest services statute as well.

However, the recent case of *Skilling v. U.S.* [34] represented a setback for the DOJ in regards to the statute. In *Skilling*, the Supreme Court reviewed the conviction of former Enron chief executive officer Jeffrey K. Skilling, who had been convicted by a jury in the U.S. District Court for the Southern District of Texas of a conspiracy to commit fraud based on a claim that he had denied his company his honest services. Skilling and two other Enron executives were charged with engaging in a scheme to deceive investors

[28] 18 U.S.C. § 1346 (2010).
[29] See generally *McNally v. United States*, 483 U.S. 350 (1987).
[30] ABA Seminar, "The Supreme Court's Ruling on Honest Services Fraud: Where Do We Go From Here?" (Sept. 14, 2010), www.abanet.org/cle/programs/ t10hsf1.html.
[31] 18 U.S.C. §§ 1961-1968 (2010).
[32] See generally Andrew E. Serwer, "The Hells Angels' Devilish Business: While Many Angels and Other Outlaw Bikers are Just Rowdies, a Disturbing Number are Involved in Crime. Police say They make Big Money in the Drug Trade," CNN (Nov. 30, 1992) money.cnn.com/magazines/fortune/fortune_ archive/1992/11/30/77184/index.htm.
[33] See generally *United States v. Stern*, 858 F.2d 1241 (7th Cir. 1988).
[34] *Skilling v. United States*, 130 S. Ct. 2896 (June 24, 2010).

about Enron's true financial performance by manipulating its publicly reported financial results and making false and misleading statements. Count one of the indictment charged Skilling with conspiracy to commit honest services wire fraud, 18 U.S.C. § 1346, by depriving Enron and its shareholders of the intangible right of its honest services.

In overturning Skilling's conviction under the honest services count, the Supreme Court held that § 1346 is properly confined to cover only bribery and kickback schemes. Under this limited interpretation of the statute, Skilling did not violate § 1346 because Skilling's alleged misconduct entailed no bribe or kickback. In so tightly narrowing the application of the honest services statute, the government can no longer use it in prosecuting public officials and private citizens for undisclosed conflicts of interest and self-dealing.[35]

One would have thought that the securities fraud statute,[36] under which Skilling was also indicted, or that Section 302 of Sarbanes-Oxley,[37] which among other things makes it unlawful for a chief executive officer like Skilling to certify financial statements inaccurately and to misrepresent the financial condition and operation of its company, which he was not indicted for, would have been sufficient for the government to use in bringing a prosecution in that vein. But the government took it one step further by using the "headline grabbing"[38] honest services statute.

The *Skilling* prosecution represented the DOJ's continuing trend to expand its reach in enforcement cases. At least in terms of the honest services

---

[35] Randall D. Eliason, "The Future of Honest Services Fraud: In Light of Skilling, Congress Should Enact a More Specific Statutory Definition That Includes not Only Bribery and Kickbacks but Also Self-Dealing," *The National Law Journal* (July 5, 2010), www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202463238255&slreturn=1&hbxlogin=1.

[36] 18 U.S.C. § 3551 *et seq.* (2010).

[37] 15 U.S.C.A. § 7241 (2010).

[38] Thomas A. Hagemann, "The Sea and the Mirror: Some Reflections on Corporate Honest Services Fraud and the (Hypothetically) Innocent Corporation," Berkeley Center for Law, Business and the Economy, 8-9 (Jan. 2010), www.law.berkeley.edu/files/bclbe/Hagemann_The_Sea_and_the_Mirror_Honest_Services_1.2010.pdf (...[w]ithout some coherent limiting principle…this expansive phrase invite[d] abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEO's who engage in any manner of unappealing or ethically questionable conduct.") citing to *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J. dissention from denial of certiorari).

statute, I do believe the Supreme Court has correctly dialed back that reach. Ultimately, we have seen recognition, first by the DOJ and now by Congress, that Sarbanes-Oxley did not do what it was envisioned to do—deter financial fraud. As such, we have the recent passage of the Dodd-Frank Wall Street Reform-Consumer Protection Act[39]; it is yet to be seen how the DOJ will interpret and use this legislation in its overall financial crime-fighting effort.[40]

The Impact of the Economy on White Collar Law Issues

With respect to the economy's impact on white collar law, what we just discussed is not really anything new, just some reinvention of what we have seen in the past. For instance, Ponzi schemes[41] are nothing new, but the Madoff case[42] put them back on the public radar. Indeed, typically in a down economy, you will see a Ponzi scheme collapse fairly quickly, whereas in a bullish economy, a Ponzi scheme will often go unnoticed for years. The current economic downturn is shining a bright light on such fraud, because the money coming into the fund in a Ponzi scheme will dry up quickly in this type of market climate. Thus, the recent initiatives by the DOJ discussed above are a reaction to the financial fraud and abuse uncovered in a bad economy.

In the current economy, we are seeing more professionals—whether they are doctors, pharmacists, or others in the health care field, investment bankers, financial advisers, brokers, insurance agents, accountants, or lawyers—do things they would not ordinarily do in a good economy.

---

[39] Dodd-Frank Wall Street Reform-Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (July 21, 2010).

[40] Peter J. Henning, "A New World Begins for Wall Street Oversight," *New York Times* (July 19, 2010), dealbook.blogs.nytimes.com/2010/07/19/a-new-world-begins-for-wall-street-oversight/.

[41] "A Ponzi scheme is an investment fraud that involves the payment of purported returns to existing investors from funds contributed by new investors. Ponzi scheme organizers often solicit new investors by promising to invest funds in opportunities claimed to generate high returns with little or no risk. In many Ponzi schemes, the fraudsters focus on attracting new money to make promised payments to earlier-stage investors and to use for personal expenses, instead of engaging in any legitimate investment activity." Ponzi Scheme, Frequently Asked Question, U.S. Securities and Exchange Commission, www.sec.gov/answers/ponzi.htm (last visited Sept. 17, 2010).

[42] *U.S. v. Madoff*, No. 09 CR 213(DC), 2009 WL 3347945 (S.D.N.Y. Oct. 13, 2009).

Usually, the professionals feel compelled to engage in these actions because they have run into cash flow problems. Also, in a bad economy, you may lay off or have a disgruntled employee who may be more inclined to become a cooperator, an informant, or a whistleblower[43] who is behind a complaint, investigation, *qui tam* lawsuit,[44] or grievance filed with a licensing entity. In Connecticut, we have a number of licensing entities that frequently receive anonymous calls or written complaints, and then the government starts to connect the dots—and we see more of this in a bad economy than in a good economy. Additionally, the government may go so far as to foster the relationship with the cooperators/whistleblowers, especially since the SEC director of the Division of Enforcement recently emphasized three primary investigative tools: cooperation agreements, deferred prosecution agreements, and non-prosecution agreements.[45]

Finally, many of the enforcement trends I have discussed are reflective and indicative of a bad economy. In such times, the government increasingly wants to use its power to deter others from engaging in such illegal conduct; and, therefore, we see an increase in high-profile white collar cases such as the Martha Stewart case, [46] the Jeffrey Skilling case,[47] and the former governor of Illinois Rod Blagojevich case.[48] These cases are

---

[43] The FERA amendments extended the civil FCA protection of whistleblowers to a company's contractors and agents, in addition to just their employees. The PPACA also narrowed the civil FCA's bar to whistleblower suits. See *supra* note 17, Bryan Cave Bulletin; see also *supra* note 21, ABA Seminar.

[44] 31 U.S.C. § 3730 (2010); *Black's Law Dictionary* 1368 (9th ed. 2009) ("An action brought under a statute that allows a private person to sue for a penalty, part of which the government or some specified public institution will receive."); see generally Linda J. Stengle, "Rewarding Integrity: The Struggle to Protect Decentralized Fraud Enforcement Through the Public Disclosure Bar of the False Claims Act," 33 *Del. J. Corp. L.* 471 (2008).

[45] Robert S. Khuzami, director of the Division of Enforcement of the U.S. Securities and Exchange Commission, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Jan. 13, 2010), www.sec.gov/news/speech/2010/spch011310rsk.htm.

[46] *U.S. v. Stewart*, No. 03 CR 717(MGC), 2003 WL 23024461 (S.D.N.Y. Dec. 29, 2003); see also Press Release, Department of Justice, "Martha Stewart and her Broker Indicted by U.S. Grand Jury; Stewart Charged Separately with Securities Fraud" (June 4, 2003) www.justice.gov/usao/nys/pressreleases/June03/stewartprR222indict.pdf.

[47] Supra note 34.

[48] *U.S. v. Blagojevich, et al.*, No. 08 CR 888-1, 6, 2010 WL 2934476 (N.D. Ill. July 26, 2010); see also Press Release, Department of Justice, "Illinois Gov. Rod R. Blagojevich

brought, in part, to prosecute the individual, but even more so to set an example to others not to do certain things in a bad economy—in essence, the government's message is, "Do not lie to government agents, do not commit financial fraud, and do not commit political corruption."

Dealing with Individual versus Corporate White Collar Clients

Individual white collar clients are most concerned about first, not going to jail, and second, not having felony records, because a convicted felon finds it difficult to keep or obtain employment. Additionally, professionals fear losing their licenses because that is, in effect, a loss of their professional livelihood. Though they are less concerned with paying restitution and fines, if the amounts are substantial, it can result in significant financial hardship down stream. If available, the client would want to be indemnified by his or her employer for attorneys' fees. A key driver for the individual is the financial toll of litigation—in many instances, the individual client cannot afford to defend a white collar case through trial. An individual client also suffers from the psychological and emotional toll the case takes on them and their families.

I also have some white collar clients who are former or present state employees, and one of their main concerns is that they do not want to lose their pension. Somewhat surprisingly, some state employees are saying, in effect, "I might be willing to plead to a felony or I might even be willing to go to jail for a period of time, but I do not want to lose my pension." Connecticut recently passed a statute to the effect that the state may revoke or reduce state employees' pensions if convicted of a crime related to former state or municipal office.[49] This was a result of former Connecticut Governor John Rowland pleading guilty to one count of conspiracy to commit honest services mail and tax fraud, 18 U.S.C. § 371 (2010), but, notwithstanding, still holding onto his lucrative state pension.[50]

---

and His Chief of Staff John Harris Arrested on Federal Corruption Charges" (Dec. 9, 2008), chicago.fbi.gov/dojpressrel/pressrel08/dec09_08.htm.

[49] Conn. Gen Stat § 1-110, *et seq.* (2010).

[50] *U.S. v. Rowland*, No. 3:04 CR 00367 (PCD)(D. Conn); see also Plea Agreement of John G. Rowland, Department of Justice, (Dec. 23 2004) www.justice.gov/usao/ct/Documents/ROWLAND%20Plea%20Agreement.pdf.

You typically do not have these aforementioned individual concerns with corporate clients. They are more interested in making the case go away, whether through a settlement or corporate integrity agreement with an agency, hopefully without any admission of liability or wrongdoing, or setting up a compliance program. On the economic side, what corporate clients are most concerned about, especially in the health care or government contracts fields, is being debarred or excluded. If that happens, the company (and/or its executives) can no longer participate in federal health care programs like Medicare and Medicaid, or participate in government contracting.

Debarment is what is typically referred to as the "death penalty."[51] For example, exclusion from participation in Medicare, Medicaid, and state healthcare programs is mandatory for (1) conviction of program-related crimes, (2) conviction relating to patient abuse, (3) felony conviction relating to healthcare fraud, or (4) felony conviction relating to controlled substances.[52] The act also provides for permissive exclusion for misdemeanor, other convictions, and license enforcements as well as for civil FCA penalties. Exclusion from participation in federal government contracting is permissive when a conviction or civil judgment has occurred.[53] Specifically, "under the Federal Acquisition Regulations, a government contractor *may* be debarred for any one of a number of reasons, including for the conviction of or civil judgment for fraud, violation of the antitrust laws, embezzlement, theft, forgery, bribery, making false statements, or the commission of any other offense demonstrating a lack of business integrity or business honesty that affects the present responsibility of the government contractor. 48 C.F.R. § 9-406-2(a). The Federal Acquisition Regulations expressly provide that in the case of a conviction or civil judgment, debarment is effectively automatic; because another fact-finder (a judge or jury) has already found one of the bases for debarment beyond a reasonable doubt or by a preponderance of the

[51] See generally Allison V. Feierabend and Jennifer A. Short, "New Regulations Require Government Contractors to Investigate and Self-Report Criminal Violations," Spring 2009 *A.B.A. Criminal Justice Section, White Collar Crime Committee Newsletter* 12, www.abanet.org/crimjust/wcc/ march09feierabend.doc.

[52] 42 U.S.C. § 1320a-7 (2010).

[53] See 48 C.F.R. 9-406-2; see also Kate M. Manuel, "CRS Report for Congress: Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments" (Nov. 19, 2008), www.fas.org/sgp/crs/misc/RL34753.pdf.

evidence, there is no statutory, regulatory, or due process requirement of an additional hearing to establish the underlying facts."[54] Essentially, corporate clients are more concerned with the big picture of financial survivorship.

One of the best things a defense lawyer can do for a corporate (or, for that matter, an individual) client is to keep the matter in the hands of a government civil attorney, and not a criminal prosecutor. By being proactive early in advising the client as to the harm in making false statements, destroying documents, or obstructing justice, and, at times, extending the proverbial olive branch to the government, you can mitigate the situation and keep it on the civil and/or administrative side. For example, as harsh as penalties may be for civil violations (including civil monetary penalties,[55] treble damages, and permissive exclusions), a criminal prosecution and conviction is worse, because the exposure is far greater in terms of potential imprisonment, fines, and exclusion/debarment. Even for corporate clients now with the PPACA, the U.S. Sentencing Guidelines, although permissive, will likely be higher where the loss or intended loss exceeds $1 million.[56]

The interconnection between the individual and the corporate client arises when the corporation provides the employee/officer/director with indemnification and/or legal representation. Corporations are often inclined to have their employees represented by counsel of their choosing because it may allow the corporation to maintain some sense of oversight over the employee's case and acquire as much real-time knowledge of the investigation as it can. Therefore, you frequently get involved in third-party payor issues with respect to representation of a company's officers, directors, and employees.[57] In that context, you typically deal with joint defense agreements and indemnification statutes. In Connecticut, these issues are dealt with either by statute or by certificates of incorporation and company bylaws.[58]

---

[54] *Waterhouse v. U.S.*, 874 F. Supp. 5, 8 (D.D.C. 1994) (emphasis added) (internal citation omitted).
[55] 42 U.S.C. § 1320a-7a (2010).
[56] See supra note 5.
[57] Michael Hayes and Ellen Brotman, "New Guidance for Employers Concerning the Ethical Implications of Government Investigations, Criminal Litigation," Spring 2010 *A.B.A. Section of Litigation, Criminal Litigation Newsletter* 12.
[58] Conn. Gen. Stat. §§ 33-1116-1124. (2010) (concerning Nonstock Corporations); Conn. Gen. Stat. §§ 33-770-777 (2010) (concerning Business Corporations).

Overall, a corporation wants to know what actions to take if it is faced with a government investigation, a grand jury subpoena, or a search warrant, whereas an individual client is more concerned with what they perceive as their personal survival. Aside from the exclusion/debarment issue, the corporate client can typically pass on the costs of litigation to their shareholders or customers.

Key White Collar Law Issues for Corporate Clients

Currently, I am seeing a big upsurge in two white collar law areas in particular. The first is the healthcare field. I have worked on over a half-dozen cases in the past few months, representing several doctors, a physician's assistant, a pharmacist, and a social worker. This is, in part, because Connecticut recently passed a state civil FCA,[59] whose application is limited to healthcare spending programs administered by the state's Department of Social Services. When coupled with the federal civil FCA upon which it was modeled, the federal criminal FCA, and Anti-Kickback and Health Fraud and Abuse Statutes, these statutes can trigger heightened governmental scrutiny, investigations, and prosecutions discussed previously, which can also trigger related state license enforcement proceedings. When prosecutions of physicians and pharmacists under controlled substance statutes and regulations are thrown into this mix, and when prosecutors use the creative tools like the "conscious avoidance" instruction and the reverse-false claims provision, the complex interplay among these various healthcare components provides fertile ground for a new onslaught of aggressive enforcement actions on the federal and state level.

Prosecutors have also, in the past, used the traditional mail and wire fraud statutes as a vehicle to bring healthcare-related criminal charges. When they were brought, they were often charged in the context of the criminal FCA or the honest services statutes discussed above. The *Skilling* case notwithstanding, these new weapons in the prosecutor's arsenal, mentioned above, are a portent of a new wave of prosecutions looming on the horizon of the healthcare fraud and compliance landscape. Increased enforcement is an inevitable outcome of the public's condemnation and prosecutors' scrutiny.

[59] Conn. Gen. Stat. § 17b-301(2010).

The second trend we are seeing is a very creative use of the money laundering statutes. For example, in a recently indicted white collar case I am involved in,[60] the defendants allegedly conducted and concealed financial transactions that involved the proceeds of specified unlawful activity, including mail and wire fraud—and so today, if you are engaged in any type of financial activity or transactions the government believes is unlawful that involves the use of the mail or wire, the government may go that one step farther and claim you are engaged in money laundering[61] and/or structuring.[62] When the government charges that a defendant was concealing his or her crime through money laundering and/or structuring,[63] the government often also tries to have the court give the jury a "consciousness of guilt" instruction.[64] These "piggyback" theories have a cumulative impact and can sway a jury. It is the proverbial expression "the cover-up is worse than the crime" mindset. This creative grouping of federal statutes and legal principles is on the rise. It is often difficult to explain to a client that not only are they being charged with fraud, but they are also being charged with engaging in money laundering or structuring because the latter has such a negative connotation.

---

[60] *U.S. v. Ruocco, et al.*, Case No. 3:09 CR 210 (AWT)(D.Conn.).

[61] 18 U.S.C. §§ 1956-1957 (2010). See generally *U.S. v. Lake*, 472 F.3d 1247, 1250 (10th Cir. 2007); *U.S. v. Pierce*, 224 F.3d 158, 160 (2nd Cir. 2000).

[62] "The term 'structuring' refers to the breaking up of a single transaction into two or more separate transactions, each transaction below a set dollar threshold, for the purpose of evading the BSA's recordkeeping or reporting requirements." Courtney J. Linn, "Redefining the Bank Secrecy Act: Currency Reporting and the Crime of Structuring," 50 Santa Clara L. Rev. 407, 513 n.2 (2010) citing *Ratzlaf v. U.S.*, 510 U.S. 135, 136 (1994).

[63] See e.g. *U.S. v. Botti*, Case No. 3:08 CR 230 (CSH), (D. Conn).

[64] An example of a "consciousness of guilt instruction" is as follows: "When a defendant voluntarily and intentionally offers an explanation, or makes some statement tending to show his innocence, and this explanation or statement is later shown to be false, the jury may consider whether this circumstantial evidence points to a consciousness of guilt. Ordinarily, it is reasonable to infer that an innocent person does not usually find it necessary to invent or fabricate an explanation or statement tending to establish his innocence. The questions of whether the evidence shows that a defendant actually made a voluntary explanation or statement and whether or not evidence as to such voluntary explanation or statement points to a consciousness of guilt, and the significance to be attached to any such evidence, are matters exclusively within the province of the jury." See e.g. *U.S. v. Minshew*, 686 F.2d 250, 252 (5th Cir. 1982) (upholding jury instruction arising out of the District Court case).

Developing the Client-Attorney Relationship

To develop a solid client-attorney relationship, you have to be yourself. The relationship between the criminal defendant and the attorney is very personal; the client wants to know that you are invested in their case. Therefore, I always tell my clients I am not going to take their case unless I can devote as much attention to it as if I was the defendant—just as I would want my lawyer attending to and devoting his or her attention to my own case (though recognizing there are often inherent financial constraints to be taken into consideration).

With the first consultation, I always pull the relevant criminal statutes and potential jury instructions. I do this for several reasons. It is always beneficial to demonstrate to a prospective client that you are prepared and experienced with respect to the field of law involved. But more importantly, I want to convey to the client the seriousness of what is involved and that they need to be invested in their case, treat it like their job, and make it a very high priority. They should not approach a criminal prosecution casually. The stakes are too high for them, their families, and their business, profession, and livelihood. At bottom, their freedom and liberty are at stake. Prosecutors, even in white collar cases, believe the defendants are bad people and want to put them in jail as convicted felons. I have an expression I often use: "I tell clients what they need to hear, not what they want to hear." Most clients appreciate that candor. On the other hand, I try to temper that by also telling the client that the criminal process can be a heavy personal, emotional, and financial weight to bear, and that they should try to let me take the laboring oar of maneuvering through (and worrying about) it.

I also believe you develop an effective relationship with a client by establishing a good rapport—a good line of communication. It is always important to return phone calls and keep the client apprised as to what is going on with their case. Too often, as a federal prosecutor, I would see defendants begin to walk out of the courtroom, turn to their lawyer, and ask, "What just happened?" So I do my best to try to explain to my client the complexities of the legal process as well. I want the client to recognize that we are a team, and, if we are also using investigators, forensic accountants, or expert witnesses, they too are part of the team effort.

While I love to go into the arena, I always remember that it is the client's case, not mine. Ethically, defense lawyers, like all lawyers, must advise and counsel their clients as to what is in the client's best interests. You must also be adequately prepared in defending your client and give him or her your zealous and undivided attention. Communication is a key in developing a positive client-attorney relationship. Ultimately, I take direction from my client, and as long as they do not ask me to do anything illegal or unethical, we will go down their road of choosing.

Gathering Information

To represent the client effectively, it is important to learn all you can about their case. Initially, I learn about a case through the information the client gives me, and thereafter through what the government discloses, and finally through what our team develops. Therefore, keeping in contact with your client and other team members is very important because often defending a criminal case is like trying to hit a moving target. Government discovery disclosures, cooperating witnesses, pleading co-defendants, and superseding indictments are the normal practice, even in white collar cases. It is essential not to be "locked in" to a particular defense or strategy at the outset. Rather, it is crucial to be open to changing strategies and tactics, and having fall-back positions, in the face of new developments. Chipping away at the foundation of the government's case, breaking links in its chain of evidence, casting doubt as to the credibility of certain witnesses, and narrowing or eliminating issues through an aggressive motions practice are all useful implements in the defense attorney's toolbox in positioning a defendant, even in a "damage control" mode.

In addition, I try to get a sense from the client at the outset as to what their goals and objectives are, recognizing that they can change over time. In other words, do they want to try their case? Do they want to plead guilty, but not cooperate, or do they want to cooperate with the government? I try to get that information from the client as early as possible so we can develop the best tactics and strategies to achieve their goal. As noted, however, it is important to obtain discovery and other information from your team because that can affect the client's decision-making. A corollary to this is that the tactics and strategies you adopt at the beginning of the

case can drive the case. For example, under the U.S. Sentencing Guidelines, if you are last in the door in a federal case, you are not likely to receive a U.S.S.G. 5K1.1[65] "substantial assistance" motion from the government. Conversely, if you are the first in the door, you are better positioned to obtain a 5K motion, if not letter[66] or judicial[67] immunity. The reason is that the "longer a defendant waits to cooperate, the less likely he is to have information that is still useful to the government," which is why the process is sometimes referred to as a "race to the station house."[68] Therefore, it is important to establish clear lines of communications with the client up front.

Developing a White Collar Defense Strategy

On the individual side, in some cases, the client is initially overwhelmed with their case to the extent that they can become paralyzed figuratively in terms of taking action. Therefore, as discussed, I try to say to them, "Let me take the weight of this off your shoulders and put it on mine," while recognizing that they must still be focused on their case.

As noted, generally speaking, there are three roads you can go down in a white collar case, with some permutations. First, you can go to trial; second, you can plead, without cooperating; and third, you can plead with cooperating. Of course, non-prosecution and deferred prosecution and

---

[65] 18 U.S.C. § 3553(e) (2010); U.S.S.G. 5K1.1 (2010); "A Judge can grant a federal criminal defendant a sentence below the prescribed range only if the government—ordinarily the prosecutor—makes a formal section 5K1.1 ("5K") motion to the court requesting a downward departure based on substantial assistance. 5K motions are an important tool used by prosecutors to induce and reward both guilty pleas and cooperation by one criminal defendant in the prosecution of another." Ross Galin, "Above the Law: The Prosecutor's Duty to Seek Justice and the Performance of Substantial Assistance Agreements," 68 Fordham L. Rev. 1245, 1245-46 (2000). Prior to *U.S. v. Booker*, 543 U.S. 220 (2005), a 5K1 motion was indispensible. In the post-B*ooker* regime, it is still extremely valuable in militating in favor of the court awarding a downward departure and/or a non-guidelines sentence under 18 U.S.C. 3553, *et seq.* (2010); see also *U.S. v. Huerta*, 878 F.2d 89 (2d Cir. 1989) *cert. denied*, 493 U.S. 1046 (1990).

[66] See generally Letter of Informal Immunity, 21 Sec. Crimes § 2.8 (West 2010).

[67] 18 U.S.C. § 6002 *et seq.* (2010); see also Attorney General's Approval, 33A Fed. Proc. L. Ed. § 80:328 (West 2010).

[68] Ellen Yaroshefsky, "Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment," 68 Fordham L. Rev. 917, 929 (1999).

cooperation agreements and letter and judicial immunity are often in the mix. While a defendant can take a wait-and-see approach to see how an investigation or indicted case evolves, as stated above, there are inherent risks to that approach. Some clients get lulled into a false sense that a protracted passage of time during the investigative stage without formal charges bespeaks a weakness in the government's case. While this can be so, it is usually not the case. A white collar investigation is often like an iceberg in the sea approaching a ship (the "putative" defendant) and moves slowly, but, if and when it hits, its force is powerful and usually sinks the vessel.

If the client does not want to have a felony record, but also does not want to try their case—because they have done something wrong, they cannot afford a trial, or the emotional and physical toll is too great—you need to approach the government, probably sooner rather than later.

Ultimately, depending on what road the client wants to travel down, you are likely going to be dealing with negotiating cooperation, settlement, corporate integrity, and compliance agreements and programs and/or plea agreements with regulators and prosecutors. If the client is involved in the subject matter of the investigation, but they are not a target, I generally try to hold out for immunity—preferably judicial, rather than letter, immunity. The former is statutorily binding on the government, whereas the latter is not. While letter immunity is stronger than a mere proffer letter "queen for a day"[69] agreement, it nonetheless does not have the same force as judicial immunity, and has enough qualifiers that a prosecutor, acting in good faith, can argue that the client subsequently breached the informal immunity. If that happens, the client is not only back to square one, but also worse since the client may have made a false statement or obstructed justice, at least in the view of the prosecutor. Again, much depends on what the client wants to do with the case, and whether the client is the ultimate target of the investigation.

Therefore, in terms of developing successful tactics and strategy, you need

[69] "Proffer agreements, commonly called 'Queen for a Day' agreements, are used routinely in federal criminal practice. In a typical proffer agreement, an individual agrees to provide information to the prosecution at an informal debriefing. In return, the government promises to refrain from offering the proffer statements at any subsequent trial." Richard B. Zabel and James J. Benjamin Jr., "Are 'Queens for a Day' Pacts Courtesans?" 225.113 New York Law Journal 1 (col. 1) (2001).

to know both the client's goals and where the client sits on the ladder the government is climbing. For instance, is he or she at the bottom, in the middle, or at the top? Is the client a witness, subject, or target? Can you get him or her immunity? Will the government agree to a misdemeanor plea? Does the client possess information that would qualify as substantial assistance warranting a U.S.S.G. 5K1.1 motion? If so, this should be considered sooner rather than later. Timing is important. As alluded to above, there is a Second Circuit case that talks about "breaking the logjam"[70] of defendants; if you are the first or second defendant to plea and if you allow the government to make it known that you are cooperating or even that you would be a testifying witness, and others then plead as a result, you are more likely to get a significant sentence guidelines downward departure based on the government's 5K motion. By way of illustration, "WorldCom's CFO, Scott Sullivan, pled guilty to charges of conspiracy, securities fraud, and making false financial filings, while agreeing to cooperate with the government against CEO Bernie Ebbers."[71] The assistant U.S. attorney explained to the court that Mr. Sullivan's cooperation was "exceptional" and without Mr. Sullivan's assistance Mr. Ebbers would not have been convicted.[72] While Mr. Sullivan faced between 262 and 327 months imprisonment according to the guidelines range, the court sentenced him to sixty months.[73] Basically, a defense strategy is fact- and client-driven; the defense needs to be fluid.

On the corporate side, in the final analysis, if it is likely that the client is not going to be debarred or excluded from doing business with the government, the concern shifts to how much money the client is going to pay and how exacting the settlement, corporate integrity, or compliance agreement will be prospectively. Consequently, the initial thrust on the corporate side (and this applies on the individual representation side as well, especially with professionals and licensees) is to try to keep the case out of the criminal forum. In other words, even if government agents show up at the door (with an administrative, or worse yet, criminal search warrant) or they issue a criminal grand jury subpoena for records, documents,

---

[70] See *U.S. v. Garcia*, 926 F.2d 125, 128 (2d Cir. 1991).
[71] S. Patrick Morin, Jr., "Wherefore Art Thou Guidelines? An Empirical Study of White-Collar Criminal Sentencing and How the Gall Decision Effectively Eliminated the Sentencing Guidelines," 7.1 Pierce Law Review 151, 165 (2008).
[72] Id. at 165 n. 80 (citation omitted).
[73] Id. at 165.

witnesses, etc., it does not mean they are conducting a widespread criminal investigation targeted at your client, and it does not necessarily mean your client will be criminally charged. One of the best things a criminal defense lawyer can do for a client is to steer its case off the desk of a criminal prosecutor and onto the desk of the government civil attorney. As noted above, if I can keep the case in the civil and administrative realm, and just deal with, for example, civil monetary penalties and damages, settlement and corporate integrity agreements, and compliance programs, I think I have done a good job for my client.

A key to convincing a prosecutor to allow the case to be resolved civilly and/or administratively is, as we discussed, to be proactive from day one. Do not be shy in asking for an attorneys-only meeting with an assistant U.S. attorney and/or his or her civil counterpart. Try to posture or frame the case as one of an unintentional oversight or misstep, one of a lack of some administrative control or check and balance—as opposed to arising out of intentional, willful, or reckless misconduct. Try to demonstrate that the problem arose out of an isolated or limited practice as opposed to an ongoing pattern or practice. Most importantly, as emphasized earlier, where the defense lawyer can point to no false statements or destruction or concealment of documents/records by the client and no obstructive conduct *during* the investigation, and a willingness to create or strengthen a compliance program, a prosecutor will be more inclined to exercise his or her "prosecutorial discretion" and decline prosecution in favor of a civil/administrative resolution. Again, do not be shy in asking the assistant U.S. attorney to use their discretion. We are fortunate here in Connecticut to have a very professional U.S. Attorney's Office and the assistant U.S. attorneys, historically, have been receptive to attorneys-only meetings and attorney proffers. And, depending on who is currently running the DOJ in Washington, appeals can be requested and heard at the chief or deputy levels at the Criminal Division in Washington, D.C.

However, if the matter stays on the criminal side, you can still effectively negotiate with the government, with your client's consent. You may be able to avoid an indictment and plead to an information. Again, these types of strategies are driven by the facts of the case, your client's goals, and where your client fits in the prospective puzzle.

Key Differences between Civil and Criminal Suits

The foremost difference between civil and criminal suits is your client's exposure. In a criminal prosecution, the individual client has exposure to jail time. The client also faces the prospect of paying a fine, restitution, and possibly even being excluded and debarred from doing business with or related to the government and/or government funding.

Additionally, the client will be subject to a period of supervised probation. Felony convictions often trigger license suspensions or revocations. Essentially, a felony white collar conviction can result in the often-referenced death penalty. For the corporate white collar defendant, most of these apply too, with the obvious exception of jail. As noted, the U.S. Sentencing Guidelines, although now permissive, can provide for substantial fines based on the intended loss.

On the civil side, it is more about the money. The client is not worried about going to jail and/or being placed under court-supervised probation. Civil monetary penalties, civil damages, even if treble, settlement and corporate integrity agreements, no matter how exacting, do not carry the same stigma as a criminal conviction. One commonality between the two is the potential for the death penalty in terms of potential exclusion related to government contracting and program participation where government funding is involved.

Also, the entire procedural process is different in civil and criminal suits. In civil litigation, which can go on for many years, you are going to go through protracted civil discovery, which involves interrogatories, requests for production, and depositions, where parties and witnesses must participate, and a likely lengthy motions practice, long before a trial. In contrast, on the criminal side, speedy trial considerations accelerate the process. It is not uncommon for white collar criminal litigation to go from indictment through trial and sentencing in a year or less. Also, you may have a grand jury subpoena to which you must respond immediately. The client may have an agent showing up at their door with a search warrant. You may receive a letter from a prosecutor informing you that your client is a target of a grand jury investigation. In contrast to civil matters, there is an immediacy to criminal cases, and you need to respond timely.

As discussed previously, the strategies and decision-making at the onset of a criminal investigation can often drive the outcome. Although often the water is murky, determining early whether the client is a witness, subject, or target is essential. Agents are trained to say you are not a subject or target of the investigation "at this time." It is not uncommon for a client to become a subject or target during or after the interview. Therefore, Fifth Amendment[74] considerations are paramount.

There is another notable difference between civil and criminal discovery. On the civil side, parties routinely oppose disclosure whether by, for example, filing objections, motions to quash, or seeking protective orders, especially in terms of trade secrets and other proprietary and confidential business information. On the criminal side, most prosecution offices have an "open file" policy and most federal districts have a standing order on discovery[75] requiring immediate disclosure to the defense of, *inter alia*, the defendant's statements, criminal record, FBI 302 reports, search warrants, affidavits, Title III wiretap applications, *Giglio*[76] material, which is impeachment evidence, and *Brady*[77] material, which is evidence that is materially favorable to the defense. The standing order is designed to allow the defendant an adequate opportunity to prepare their defense. However, federal prosecutors often hold back Jencks Act[78] and cooperating witness or informant grand jury testimony and statements until shortly before trial. In Connecticut, the practice is generally not to disclose these materials until approximately two weeks or less before jury selection. The rationale for the statutory and practical basis for this is to protect the safety of the witnesses and safeguard against witness tampering and obstruction of justice. Thus, unlike a civil litigant who will see the most crucial discovery well in advance of trial, a criminal defense attorney and his or her client almost gets ambushed by not generally obtaining these materials until shortly before jury selection.

Civil and criminal cases overlap somewhat on document preservation. For instance, if you do not follow civil discovery rules, you may face sanctions

[74] U.S. Const. amend. V.
[75] D. Conn. L. Cr. R. App., Standing Order on Discovery (2010).
[76] *U.S. v. Giglio*, 405 U.S. 150 (1972).
[77] *Brady v. Maryland*, 373 U.S. 83 (1963).
[78] 18 U.S.C. § 3500 (2010).

resulting in losing out on a motion for summary judgment or having an expert disqualified based on spoliation issues. However, in a criminal case, concealing or destroying documents usually results in obstruction of justice charges.[79] Also, as noted, if a client lies to an agent or prosecutor during the investigative or discovery phase, it usually results in a false statement prosecution.[80] This happened in two very high-profile cases. Martha Stewart was convicted, not of financial fraud, but for making false statements to investigators. The former governor of Illinois, Rod Blagojevich, recently faced multiple criminal counts for corruption, but he was only convicted on one count of making false statements to government investigators. Hence, the criminal discovery process can be as perilous as the trial process itself.

As noted, the timeline is also dramatically different in terms of civil and criminal cases. Again, we do not have a right to a speedy trial in civil litigation, and the case docket backlog is often high, resulting in lengthy delays (often years) between the time of filing the lawsuit until trial. Conversely, the Speedy Trial Act [81] guarantees a criminal defendant (and the public) the right to a speedy trial. The act is designed, in part, to avoid having a defendant being detained pre-trial under the Bail Reform Act[82] for a lengthy period of time, or just having the criminal trial (with all its attendant stress) delayed excessively, notwithstanding the Fifth Amendment presumption of innocence and the Sixth Amendment[83] right to a jury trial.

Working with Government Authorities or Organizations

As a former federal prosecutor and now a white collar law defense attorney, I do not think clients can or should try to align themselves with government authorities or organizations with the notion that that relationship, in and of itself, will influence or be a factor favorably in a criminal investigation or prosecution. For example, a client should not think that, if he or she presents a seminar or participates on a panel with government regulators, agents, or prosecutors, law enforcement will then look the other way if the client does something wrong.

---

[79] 18 U.S.C. §§ 1501-1521 (2010).
[80] 18 U.S.C. § 1001 (2010).
[81] 18 U.S.C. § 3161 *et seq.* (2010).
[82] 18 U.S.C. § 3141 *et seq*. (2010).
[83] U.S. Const. amend. VI.

Having said that, attending or participating in continuing legal education and trade programs, workshops, and roundtables informs clients of statutory changes and new trends in their fields. And hearing the government's interpretation of and guidance on them, as well as learning about new enforcement initiatives or emphases, is invaluable to the client. It offers them a "teaching experience," hopefully, to avoid ever coming within the sights of the scope of a criminal investigation. Also, many government agencies have so-called "help desks" or "information centers" clients can utilize to communicate directly with agencies. Utilizing all of these tools helps your client adopt a proactive compliance program before something happens, so that you, as their lawyer, do not have to negotiate a settlement or corporate integrity agreement *after* things go wrong.

For example, here in Connecticut, a nursing home client of mine[84] ran afoul of the HHS-OIG Exclusions Database.[85] By way of background, if a business employs an officer, director, or employee or contracts with a vendor who is on the exclusions list, the company can lose all of its Medicare and Medicaid reimbursements related directly or indirectly to the excluded person's or entity's employment for the entire time the person or entity was employed or providing services.[86] And, under the civil FCA, the business can be subject to a penalty up to $50,000 per violation and a civil monetary penalty of $10,000 for each item or service furnished during the period the person or entity was excluded, in addition to treble damages, and possible healthcare program exclusion, including Medicare and Medicaid. And, under the criminal FCA, the business and/or its employees can be subject to prosecution as well.

In the Connecticut nursing home case, Walnut Hill Care Center failed to check the HHS-OIG online exclusion database. It hired and employed for a

---

[84] See Press Release, "U.S. Attorney's Office District of Connecticut, New Britain Nursing Facility Pays $222,419 to Settle Allegations Under the False Claims Act" (Nov. 7, 2008), www.justice.gov/usao/ct/Press2008/ 20081107.html; see also Christian Nolan, "Nursing Home Settles with Feds for $222K," Connecticut Law Tribune, Nov. 17, 2008 at 14.

[85] HHS-OIG Exclusion Program, oig.hhs.gov/fraud/exclusions.asp (last visited Sept. 26 2010).

[86] See generally Special Advisory Bulletin, Office of Inspector General-Department of Health and Human Services, "The Effect of Exclusion From Participation in Federal Health Care Programs" (Sept. 1999), oig.hhs.gov/ fraud/docs/alertsandbulletins/effected.htm.

year a nursing supervisor who had been excluded from Medicare and Medicaid. However, by taking the approach of being very cooperative with the government regulators, stressing the unintentional administrative oversight on its part, and putting in place a proactive compliance plan for the future, Walnut Hill entered into a somewhat creative, but fair, civil settlement agreement with the U.S. Attorneys Office in which it paid double damages on the portion of the nursing supervisor's salary attributable to federal healthcare programs in the amount of $224,419, but it did not admit liability.[87]

Of course, had Walnut Hill gleaned from educational programs on and materials about the HHS-OIG exclusions listing[88] before it hired the excluded supervisor, it might have been better versed on the database and HHS-OIG special advisory bulletin guidance and, hopefully, would have checked the exclusions list and therefore not hired the excluded person.

In sum, this type of contact and communication with government agencies and their personnel benefits the client. It also performs valuable services for the government because, in theory, it should lessen its enforcement case loads and attendant costs, and allow agencies to better render constituent services in the form of educating, not prosecuting, their constituency. Nevertheless, the expressions "forewarned is forearmed" and "ignorance of law is no defense" are alive and well today. Prosecutors will continue to bring enforcement actions to punish illegal conduct and to deter defendants and the public.

Therefore, my advice to clients is to stay on top of these issues and trends. Clients need to build relationships and stay in touch with lawyers who are well versed in these topics. By staying informed as to current developments and adopting proactive compliance programs, they can avoid the minefields that can be precursor to a prosecution. Moreover, communicating with regulators is advisable because it is helpful in formulating and updating effective compliance programs. Again, if you can demonstrate that you are doing everything you possibly can in the compliance area, but nevertheless you made a mistake—and there was not a deliberate concealment or a

[87] Supra note 84.
[88] Wiggin & Dana LLP Seminar, "Wiggin and Dana Invites CANPFA Members: Health Care Enforcement Priorities for 2009 and the Future" (Nov. 19, 2008).

conscious avoidance on your part, or a case of affirmatively doing something wrong—you are more likely to keep your case out of the criminal forum and in the civil administrative forum.

Mistakes to Avoid

One of the first questions I ask a client who is facing white collar charges is what, if anything, did they say or do when they became aware that they might be the subject or target of an investigation. Unfortunately, one of the biggest mistakes a client can make in this area is that he or she does not call their lawyer right away. For example, if an agent starts questioning the client, they may be unaware of 18 U.S.C. § 1001, which provides that if you make a false statement to a law enforcement officer, you can be prosecuted for that alone; and they may be unaware of 18 U.S.C. §§ 1501-1521, which provides that if you destroy or hide evidence, you can be prosecuted for obstruction of justice. At the onset of an investigation, agents typically do not tell a client that they do not have to talk to them, or let alone advise them that they have a Fifth Amendment right against self-incrimination. Therefore, most clients share the common belief that if they do not talk to agents when they knock on their door at night or when they show up at their workplace, the agents will be mad at them or think they did something wrong. The client usually wants the investigator to like them, and talks for that reason, and/or believes they can talk their way out of the problem. Of course, investigators are well trained in these techniques and, invariably, one of the biggest mistakes clients make is to talk. Also, clients should not talk to agents and investigators, because often what the agent writes down in a report afterwards is not necessarily what the client will say they said. Yet, once that statement is written up in an FBI 302 report, it is as much as set in concrete and the government is cemented to it.

In some cases, I can do damage control to mitigate the harm that was done, and try to show that whatever the client said initially was not tantamount to a confession. I may or may not be successful. Again, you need only to consider the Martha Stewart and Rod Blagojevich cases—they were convicted for what they said to investigators, not for what the investigators were investigating.

Another mistake clients make is destroying or concealing evidence. That type of mistake is difficult to explain as an innocent act and is therefore very problematic. Once the agent knows the client is aware of the investigation and will be taking a close look at the client's records, any subsequent document destruction or disappearance usually leads to obstruction of justice consideration. Clients and other targets, subjects, or witnesses may also mistakenly believe that by talking among themselves they are merely refreshing their recollections. Prosecutors, however, may have a different view: that the client is, among other things, tampering with witnesses, suborning perjury, hindering a prosecution, or obstructing justice.

Finally, as discussed earlier, clients can get overwhelmed when faced with an investigation and possible prosecution. They can lose their focus early—no matter how many times their lawyer may be saying to them, for example, "This is a federal case, you are trying to get a 5K1.1 motion, it is important that you are first in the prosecutor's door to better position yourself for guidelines downward departure or a non-guidelines sentence." This initial intransigence can lessen the client's options later. Also, if you have a client that waits too long because they are more concerned with the perception or principle of being a cooperator, or they just want to take a wait-and-see approach, they need to keep in mind that the prosecutor's door can close in front of them.

Looking to the Future

Looking ahead, the current focus on healthcare, mortgage, and securities fraud will remain at the forefront. As long as the economy is not doing well, I think we are going to see more enforcement actions in these areas, especially in anti-kickback, healthcare fraud and abuse, and FCA prosecutions, simply because it is now easier for the government to obtain convictions under these statutes, especially when prosecutors use the conscious avoidance jury instruction. Therefore, corporate clients will need to be increasingly proactive in terms of setting up compliance programs, as the government is going to take a harder look at settlement and corporate integrity agreements and exclusion/debarment sanctions. Additionally, because of likely new U.S. Sentencing Guidelines requirements for effective

compliance programs,[89] this presents another area the government may focus its attention on.

There will probably be even more use of the FCPA in white collar litigation, and not limited to just traditional financial or securities fraud. For instance, as noted, the Securities and Exchange Commission is planning to use the FCPA to ferret out healthcare fraud with respect to pharmaceutical companies in the medical device industry.

Also, in light of the *Skilling* case, in private cases, now that prosecutors have lost the undisclosed conflicts of interests/self-dealing prong of the honest services statute, prosecutors will likely make increased use of the Sarbanes-Oxley criminal provisions and, as some commentators have recently noted, "the right to control cases."[90] Additionally, in public corruption cases, prosecutors will likely revert back to the traditional bribery and kickback "*quid pro quo*" statutes and other money and property criminal statutes. Regulators will also look to the Dodd-Frank legislation for enhanced penalties. I also think we are going to see more in the line of money laundering and structuring charges than we have seen before in white collar law cases.

One of the things that is happening in the healthcare field is that doctors and pharmacists are increasingly being charged with a violation of 21 U.S.C. § 841,[91] which is the illegal distribution of controlled substances—mostly in connection with the writing and filling of pain management prescriptions. Professionals in the healthcare field are often shocked to find out they can be charged under the same statutes as drug dealers, and that knowledge of the unlawfulness of their conduct can be imputed through the use of the conscious avoidance jury instruction. There are parts of the Code of Federal Regulations that discuss dispensing controlled substances for legitimate medical purposes by an individual practitioner acting in the usual course of professional practice,[92] and there are examples of indicia of wrongdoing in

[89] Michael A. Dowell, "New Federal Sentencing Guidelines requirements for an effective compliance program," 12.9 Compliance Today 31 (Sept. 2010).
[90] See *supra* note 30 (referencing the right to control cases of *U.S. v. Wallach*, 935 F.2d 445 (2d Cir. 1991) and *Carpenter v. U.S.*, 484 U.S. 19 (1987)); *see also supra* note 35.
[91] 21 U.S.C. § 841 (2010).
[92] 21 C.F.R. § 1306.04 (2010).

this regard that many practitioners are unaware of, but need to be on top of. The U.S. Sentencing Guidelines in these prosecutions are exponentially higher than they are for traditional white collar crime cases. Indeed, the government may not even consider the prosecutions of physicians and pharmacists in this area as white collar crime because the defendants are being charged under the drug statutes.

Final Thoughts

My advice to other attorneys in this practice area is to continually participate in educational programs, including those provided by the American Bar Association, state bar counterparts, and other national professional affiliations such as the National Association of Criminal Defense Lawyers, the American Health Lawyers Association, the Health Care Compliance Association, and other state and regional counterparts. Fortunately, you no longer have to travel to many of these seminars; if you cannot get there in person, you can participate in webinars and through video and audio hookup. Because I am increasingly focused on health care enforcement and compliance issues, in particular, I have joined some of these organizations and I try to attend or answer calls for speakers for their programs. I encourage other practitioners to do the same in their fields. We are fortunate, I believe, that the criminal prosecutors and defense lawyers are highly professional, very collegial, and exceptionally willing to share their experience, knowledge, and insight.

I think the practice of law is too complex these days to be a generalist. It is my belief that you have to have a concentrated practice and be something of a specialist—not in the sense necessarily of having certification, but in terms of being knowledgeable in a particular area of law. Even within the narrow practice area of white collar crime, it may be advisable to be somewhat more limited in terms of areas on which you are going to focus. This is especially so in the criminal area, because someone's freedom and liberty is at stake, and they are entitled to have their lawyer be adequately prepared to defend them against the government. It is important to stay current in the law in order to properly serve your clients, keeping in mind that the law is often changing. There is invariably a new statute, regulation, guidance, or court ruling. Consequently, participating in these types of educational programs is not just helpful—it is a necessity.

For example, I recently read an excellent article in the ABA *Criminal Litigation* magazine entitled "New Guidance for Employers Concerning The Ethical Implications of Government Investigations."[93] White it addressed the ethical aspects of third-party payor and indemnification agreements, it also offered instructive guidance to lawyers. While parties may have indemnification and joint defense agreements, the lawyer needs to be mindful of the rules of professional conduct in these areas. You still have the duty of unfettered and undivided loyalty to your client; you cannot take direction from anyone else; you are not obligated to disclose your legal strategies; and you must be totally independent. Consequently, it is important to focus not just on the criminal case, but also on other ethical considerations arising out of the case.

It is also necessary to keep in mind that lawyers are held to a higher standard. I always tell my clients that we have rules of professional conduct on both a national and state level for reasons, and that they exist to protect both the clients and their lawyers. If you have any questions or concerns in these regards, you can usually request an advisory opinion from your state's attorney general, or you can see guidance elsewhere. In Connecticut, for example, the Federal Public Defenders and Federal Criminal Justice Act Panel have a great listserv, as do the Connecticut Criminal Defense Lawyers Association, and we share information with each other on a regular basis. As noted, one of the nicest things about the criminal defense bar is how collegial it is and how everyone is willing to share information—it is not adversarial. When I made the shift from being a federal prosecutor to a criminal defense lawyer, I was pleasantly surprised at how welcomed I was into the defense bar.

Key Takeaways

- To develop a solid client-attorney relationship, you have to be yourself. The relationship between the attorney and criminal defendant is very personal; the client wants to know you are invested in their case. I also believe you develop an effective relationship with a client by establishing a good rapport. It is important to return phone calls and keep the client involved in what is going on with their case.

[93] Supra note 57.

- To represent the client effectively, it is important to learn all you can about their case. You have to be adequately prepared to defend your client, give them your zealous and undivided attention, and solicit their feedback. In addition, I always ask every client what their goals and objectives are. I try to get that information from the client as early as possible so we can develop the correct tactics and strategies.
- Much depends on what the client wants to do with the case, and whether the client is the ultimate target of the investigation. If the client is involved in the subject matter of the prosecution but they are not a big player and they do not want to go to trial, I generally try to hold out for immunity—preferably judicial immunity.
- My advice to other attorneys in this practice area is to continually participate in educational programs, including those provided by the American Bar Association and its sections. Even within a broad range of white collar crime, you probably need to be a little more specific in terms of the areas you are going to focus on—and you should never practice in the areas you do not have expertise in, especially in the criminal area, because someone's freedom is at stake.

Alan J. Sobol is a partner and a member of Pullman & Comley's Litigation Department and White Collar Defense and Corporate Investigations Practice. He also serves in the firm's Health Care and Construction Practices. He has represented both corporate and individual clients in federal and state healthcare, Medicare, and Medicaid fraud and enforcement, federal fraud and false claims, professional licensing, financial fraud, structuring, tax, antitrust, federal and state racketeering and public corruption cases. His criminal defense practice includes representation in conspiracy and drug trafficking, money laundering, bank robbery, identity theft, computer crimes, larceny, assault, forfeiture, immigration, and domestic cases. In his civil litigation practice, he represents commercial clients in contracts and business disputes. He has national experience in construction and surety litigation representing owners, contractors, design professionals, insurance companies, and sureties on public and private construction projects, with experience in government contract, surety performance, and payment bond cases in federal and state court.

Earlier in his career, Mr. Sobol was a trial attorney, a special assistant U.S. attorney, and a prosecutor for the General Litigation Section of the U.S. Department of Justice in Washington, D.C. He has been a member of the Criminal Justice Section's Executive Committee, Federal Practice, and Construction Law Sections of the Connecticut Bar Association. He also has been a member of the Criminal Law Section, Litigation Section, and the Forum on the Construction Industry of the American Bar Association. He has been listed in Who's Who in American Law. *He is a diplomat in the National Institute of Trial Advocacy and a U.S. Attorney General's Honor Law Graduate Program Attorney.*

Mr. Sobol is a member of the American Bar Association, the Connecticut Bar Association, the Hartford Bar Association, the Connecticut Criminal Defense Lawyers Association, the Connecticut Health Lawyers Association, the Health Care Compliance Association, the National Association of Criminal Defense Lawyers, and the U.S. District Court Criminal Justice Act Panel. He received his J.D. from the University of Akron School of Law and his B.A., with honors, from the University of Maryland.

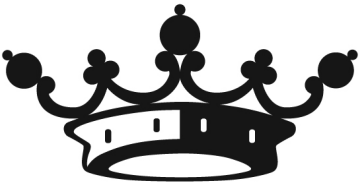
ASPATORE

www.Aspatore.com

Aspatore Books, a Thomson Reuters business, exclusively publishes C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders—direct and unfiltered insight from those who know it best—as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools for all business professionals.

Inside the Minds

The *Inside the Minds* series provides readers of all levels with proven legal and business intelligence from C-Level executives and lawyers (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry, profession, or topic is heading and the most important issues for future success. Each author has been selected based upon their experience and C-Level standing within the professional community. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of top lawyers and business executives worldwide, presenting an unprecedented look at various industries and professions.



ASPATORE