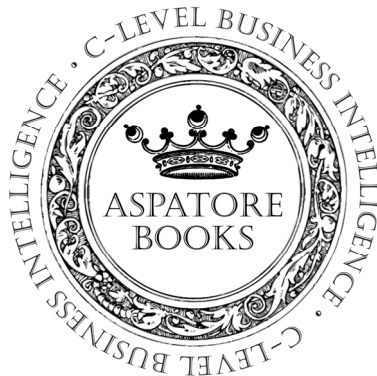


I N S I D E   T H E   M I N D S

# White Collar Law Defense Strategies

*Leading Lawyers on Preparing for Trial,  
Offering Evidence, and Overcoming the Challenges  
of a White Collar Crime Case*



## **BOOK & ARTICLE IDEA SUBMISSIONS**

If you are a C-Level executive, senior lawyer, or venture capitalist interested in submitting a book or article idea to the Aspatore editorial board for review, please email [Hauthors@aspatore.com](mailto:Hauthors@aspatore.com)H. Aspatore is especially looking for highly specific ideas that would have a direct financial impact on behalf of a reader. Completed publications can range from 2 to 2,000 pages. Include your book/article idea, biography, and any additional pertinent information.

## **WRITING & EDITORIAL ASSISTANCE**

In select instances Aspatore will assist in helping our authors generate the content for their publication via phone interviews. Aspatore editors create interview questions that help generate the main content for the book or article. The content from the phone interviews is then transcribed and edited for review and enhancement by the author. If this method could be of assistance in helping you find the time to write an article or book, please email [Heditorial@aspatore.com](mailto:Heditorial@aspatore.com)H for more information, along with your biography and your publication idea.

Copyright © 2007 by Aspatore, Inc.

All rights reserved. Printed in the United States of America.

No part of this publication may be reproduced or distributed in any form or by any means, or stored in a database or retrieval system, except as permitted under Sections 107 or 108 of the U.S. Copyright Act, without prior written permission of the publisher. This book is printed on acid free paper.

Material in this book is for educational purposes only. This book is sold with the understanding that neither any of the authors or the publisher is engaged in rendering legal, accounting, investment, or any other professional service. Neither the publisher nor the authors assume any liability for any errors or omissions or for how this book or its contents are used or interpreted or for any consequences resulting directly or indirectly from the use of this book. For legal advice or any other, please consult your personal lawyer or the appropriate professional.

The views expressed by the individuals in this book (or the individuals on the cover) do not necessarily reflect the views shared by the companies they are employed by (or the companies mentioned in this book). The employment status and affiliations of authors with the companies referenced are subject to change.

Aspatore books may be purchased for educational, business, or sales promotional use. For information, please email [store@aspatore.com](mailto:store@aspatore.com) or call 1-866-Aspatore.

---

ISBN 978-1-59622-756-9

Library of Congress Control Number: 2007928921

For corrections, updates, comments or any other inquiries please email [editorial@aspatore.com](mailto:editorial@aspatore.com).

First Printing, 2007

10 9 8 7 6 5 4 3 2 1

---

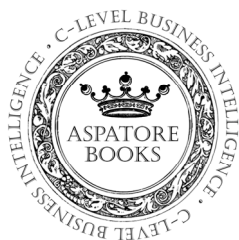
**If you are interested in purchasing the book this chapter was originally included in, please call 1-866-Aspatore (277-2867) or visit [www.Aspatore.com](http://www.Aspatore.com).**

Strategic and Tactical  
Considerations for  
Defending a White Collar  
Criminal Investigation

Joseph A. DeMaria

*Partner*

Tew Cardenas LLP



## **Our Role in the Criminal Justice System**

A white collar criminal defense lawyer is a specialty within the more general work of a business litigator. All business litigators work on solving the legal problems of their business clients, including matters involving contracts, tort exposure, and intellectual property. The law of torts includes exposure for acts of fraud or other intentional misconduct. It is in those areas of fraud and intentional misconduct that a business client can face exposure to civil liability and the threat of prosecution for criminal conduct.

As a white collar criminal defense attorney, one must understand the business activity of the client that led to the allegations of fraud or intentional misconduct. This understanding is needed to place the allegations of misconduct into a proper context and to be able to advocate on behalf of a client. There is a close line between lawful business activity that may constitute a civil claim for a breach of contract, or civil tort exposure, and fraudulent or intentional misconduct that may constitute a crime. Understanding the business activity related to the allegations of misconduct is crucial to being able to present the facts in a manner that either avoids a finding of criminal liability or reduces the exposure to the client if criminal activity is established.

One of the most important issues to identify early in the representation is who the client is. If the company itself is the subject or target of a criminal investigation, the work will be different than if an individual is the subject or target. A company will only have criminal liability based on the acts of its directors, officers, and employees. Therefore, if the company is the subject or target of an investigation, it is important to identify those directors, officers, or employees who were personally involved in the business activity under investigation. In representing the company, a criminal defense attorney will need to be careful in how he or she deals with those director, officer, and employee witnesses. But contacting those persons early in the investigation is crucial to presenting a successful defense. Once a preliminary understanding of the client's business and the activity that led to the allegations of misconduct is obtained, and once the potential witnesses are identified, the defense attorney begins to analyze the applicable legal principles in an effort to design a comprehensive defense strategy to solve the client's legal problem.

## **Federal and State Interests in Prosecuting White Collar Crimes**

Under our federal republic system of government, the business client will potentially be subject to liability for criminal conduct under federal laws as well as the laws of the states where the business is located or conducted. Also, for regulated businesses, a finding of criminal liability by either the federal or state government can lead to negative ongoing consequences.

With respect to potential federal criminal liability, under our federal republic system of government, the criminal law is generally within the provinces of each state, and the federal government does not set forth a general body of criminal law. For the federal government to have an interest in the misconduct of a business client, there must be a connection to a federal interest, such as criminal conduct that uses the mail or interstate telecommunications or that involves federal monies or activity regulated by the federal government. In light of the ever-expanding reach of the federal government in the day-to-day activities of most business activity in the United States, it will be rare to identify a client whose business has no activity that would be subject to a federal interest. However, even if a federal interest is possibly implicated, federal and state prosecutors are somewhat in competition with each other. Especially in a potentially high-profile case, a client may face joint or even competing investigations by the federal and state authorities. In assisting the client, it is necessary to identify which federal criminal laws may have been violated if the misconduct can be proven to have risen to the level of criminal conduct. Identifying those potential federal crimes will lead to an analysis of the penalties that can be imposed if a violation is proven and the negative collateral consequences that could follow a federal criminal conviction.

A similar analysis must be conducted with respect to potential state criminal liability. Under the American system of separate governmental powers, the states enforce the general body of criminal law. Therefore, as a starting point, state criminal statutes will include penalties for a wide variety of misconduct that are not contained within the federal criminal code. In addition to the general body of state criminal law, over the years state legislatures have passed a variety of laws to address individual and business activity that is deemed criminal. Therefore, the white collar lawyer must analyze the range of potential criminal sanctions that can be imposed by

state law enforcement authorities. As with the analysis of federal criminal exposure, the white collar lawyer must understand state regulations and license laws that may affect the business of the client and may be negatively affected by a conviction of a state crime. An effective lawyer does not simply focus on addressing the criminal sanctions that may be imposed on the client if liability is established. The lawyer must be keenly aware of the related consequences that can cause a lasting negative effect on the client's business if not handled properly.

### **Areas of Focus in a White Collar Investigation**

Generally, there are three issues I focus on when assisting my clients. The first is to understand which federal, state, or local government agencies have jurisdiction over the client's business. For example, a client that is a public company will be subject to federal and state securities regulations. A client that is involved in government procurements will be affected by the federal, state, or local agency that contracts with the client in that business. By identifying the applicable regulators of the client's business, I can focus on whether the legal problem will more likely be investigated by the federal government, through the Department of Justice or the local U.S. attorney's office, or by the state or local government, through the state attorney general or the local district or state attorney's office.

The second issue that is crucial to analyze at the commencement of a white collar matter is to understand the stage of the criminal investigation. Investigations can be commenced in a number of ways. A civil regulator such as the Securities and Exchange Commission or a federal or state banking regulator, or a government agency involved in contracts with the client, may refer a matter to criminal law enforcement authorities to commence an investigation. A national or local newspaper or television news show may raise allegations that can lead to a criminal investigation. Private attorneys representing adversaries or competitors of the client or other businesspeople may also complain to law enforcement to commence an investigation. Finally, due to the prevalence of federal and state whistleblower statutes, employees of the client may report wrongful or criminal conduct to the authorities. The strategy of the white collar criminal defense lawyer will be affected by the stage of the investigation. The earlier the stage of the investigation, the more positive effect the lawyer can have

on explaining the conduct in a manner that may prevent criminal exposure to the client or at least reduce the negative consequences if criminal liability will result from the misconduct.

The third issue to analyze at the beginning of a white collar matter is the possible consequences the client will face if the allegations of misconduct lead to criminal liability. Other than the imposition of a fine, restitution, or term of imprisonment, negative consequences may include the loss of existing government contracts, debarment from seeking future government contracts, the loss of a license to continue to engage in the business activity, and exposure to civil liability for the acts of misconduct. The white collar defense attorney must understand these related potential negative consequences when designing a strategy for defending against the allegations of criminal conduct.

The most important assistance a white collar criminal lawyer can provide to a business client at the outset of a matter is to make the client aware of the serious nature of the matter while immediately designing a defense strategy that will seek to protect the client's business from the negative consequences of the allegations of misconduct. Successful businesspeople will be used to working with colleagues and subordinates who solve the business's problems. They should be prepared to understand the very real consequences that may face their business if a criminal conviction occurs, and at the same time they will expect the lawyer to provide them with a detailed game plan on how the problem will be analyzed and defended. White collar criminal investigations can last for many years before law enforcement authorities take any formal action. And, once formal action is taken, it may take months, if not years, to finally resolve the matter. Therefore, an effective white collar criminal defense attorney will provide the business client with a strategy that will handle the investigation and possible prosecution over a long period of time while allowing the client to return to running the business. While the investigation will likely change over time and while the client will be confronted with new challenges based upon the developments in the investigation, providing the client with a detailed strategy for handling the criminal legal problem at the outset of the case is important work that will lead to a strong foundation for the continued defense of the investigation.

## **Defense Strategies**

The most commonly prosecuted white collar crimes are fraud-based misconduct affecting multiple victims and where the prosecutor can prove what is commonly known as “badges of fraud,” or personal gain by the defendant. Prosecutors know the United States has a well-established civil justice system that can competently handle disputes between individuals or businesses. There is no need to criminalize the common variety of business disputes, and prosecutors are sensitive to the fact that one party (if not both) in a civil dispute may try to initiate a criminal investigation to use as leverage against the opponent. By focusing on clear cases of fraud-based misconduct affecting multiple victims, the prosecutor can weed out disputes that can be adequately handled in the civil justice system. The conviction rate in federal white collar prosecutions is historically more than 85 percent. The reason for this high conviction rate is that prosecutors have the luxury of carefully selecting their cases, taking the time to investigate and build the case before formal charges are filed, and assigning experienced lawyers to prosecute the cases. State prosecutions do not have as high a conviction rate, primarily because state prosecutors do not have the same resources and experience as federal prosecutors, nor do they have the same type of experienced white collar investigators as federal prosecutors do, who can use the Federal Bureau of Investigation, the Internal Revenue Service, and other agencies that have experience handling complex business matters.

The biggest difference in the type of white collar crime case that can affect the defense is whether the case is high-profile with allegations that the defendant has victimized many people or the public purse. Cases that are not notorious and do not include allegations of mass victimization present the defense with an opportunity to tell its side of the case in a less passionate environment. When the public has been outraged by the allegations of misconduct, the defense will have a much more difficult time selecting a non-prejudiced jury and obtaining an open-minded hearing of the evidence by the jury, the court, and the public.

## **Important Preliminary Information**

When meeting with a new client on a white collar crime matter, the first question I ask is how the client learned of the misconduct that may

constitute criminal behavior. This question is important because the answer will tell me the stage of the criminal investigation, which is very important to designing a strategy to defend the matter. For example, if the client calls me after he or she has been arrested, I will know that means the investigation is complete and law enforcement is prepared to move forward with formal charges. If, at the other extreme, the client calls me upon receiving purely internal information from the business that misconduct has occurred, I will know that means the investigation, if any, is at a very early stage. In the middle, if the client contacts me after receiving an inquiry from federal or state law enforcement or a subpoena for documents, I will know the investigation has begun but may be at a preliminary stage. The earlier in the investigation that a white collar defense attorney can become involved, the more the attorney can do to affect the outcome of the investigation and protect the client's interests.

The next issue to discuss with the client is whether the client wishes to mount a defense to the criminal allegations or seek to engage the law enforcement authorities in immediate discussions to resolve the investigation. Most business clients are familiar with the dynamics of civil litigation, including understanding the cost of litigating a case and the potential cost if the case is lost. Most business clients, therefore, will engage in a cost/benefit analysis when dealing with normal civil litigation. Unless a larger overriding principle is involved, a business client involved in civil litigation will analyze the value and cost of continuing the litigation versus the possibility of settling the dispute. Criminal litigation poses different concerns for a business client, especially at the commencement of an investigation. In light of the severity of penalties that can be imposed upon a criminal conviction, as well as the negative collateral consequences to the business, it is unlikely that the first reaction of the business client will be to seek a quick settlement of the investigation. A business client can settle a civil litigation without admitting liability. However, a criminal case cannot usually be resolved with a plea without an admission of guilt. Therefore, unless the business client is prepared at the outset of the case to admit criminal liability and immediately engage in plea discussions, the discussion will turn to the strategy for the defense of the case.

## **Producing Documents and Preparing Witnesses for Interviews**

Once the business client decides upon a strategy of defending the criminal investigation, I will discuss how an investigation is conducted from the government's point of view. It is important for the client to understand how the prosecutor will think and act in conducting the investigation. This awareness helps the client work with counsel in designing the most effective strategy for responding to the investigation. For example, experienced white collar prosecutors will usually commence an investigation by issuing broad grand jury subpoenas for documents both from the target or subject of the investigation and from third-party persons and entities who do business with the target or subject. Unless there is a need for immediate action, the initial stage of a criminal investigation may include a laborious review and production of documents. Business clients will be familiar with the production of documents from their experience in civil litigation. The production of documents in a criminal investigation requires the same type of organization skills. I will ask the client about their document management practices in the business, and I will seek to identify the employees I can work with directly during the document production stage.

One of the first tasks in a white collar criminal investigation is to secure access to the client's own documents. Usually, by the time the client seeks white collar criminal counsel, there have been requests for documents from civil litigation or a subpoena issued by a grand jury or prosecutor. Therefore, I will become directly involved in the review and production of those documents. By carefully reviewing the request for documents or subpoena, the lawyer will gain an understanding of the issues the prosecutor is focusing on. Many times, the document request or subpoena will be very broad and the attorney will have an opportunity to discuss the document production with the prosecutor. Those discussions will provide additional insight into the issues the investigation is focusing upon. In reviewing the documents that are sought by the prosecutor, I will be able to gain an historical understanding of the facts that are not varnished by the motives or faulty recollections of witnesses. Documents are always the crucial component, and many times they are the "smoking guns" of a criminal investigation. Especially in the age of e-communication, those documents that were created at the very time the conduct under investigation occurred can be the best evidence of whether a crime was committed by the client.

At some point during the criminal investigation, the prosecutor will begin interviewing witnesses and taking testimony in a formal proceeding. In federal practice, the prosecutor will use the grand jury to take formal testimony. Among the states, some use a similar grand jury process, but most empower the prosecutor to take sworn testimony directly from the witness. Therefore, anticipating the witness interview stage of the investigation, I will discuss with the client the identity of potential witnesses who may be favorable as well as unfavorable to the client's position. I seek to identify those witnesses who are employees of the client and who can be most easily accessed, as well as friendly and unfriendly witnesses outside of the client's business. The list of potential witnesses will expand during the investigation. However, it is important even during the initial stages of the investigation to have an understanding of how many important witnesses will need to be interviewed, as well as the location of the witnesses.

### **How the Investigation Began**

During the initial interview, I will ask the client what he or she believes is the cause of the criminal investigation as well as what is known about those who may have initiated the investigation. I have found that the client usually has at least a general idea of why the criminal investigation has been initiated. The client may have been involved in a dispute with a competitor that included allegations of misconduct that could rise to the level of criminal activity. A disgruntled employee may have made claims that could also lead to criminal allegations. Or the national or local media may have focused an investigative report on the client's business. Discussing with the client what is already known about the potential causes of the criminal investigation is an important discussion in establishing a defense strategy.

### **The Cost of the Investigation**

Finally, it is important to discuss with the client the expected cost of defending the criminal investigation and the components of the cost. In most white collar criminal matters, the cost of defending the investigation will include attorney and paralegal time, as well as the work of consultants and experts. If the investigation focuses on specific issues that are unique to the business or industry of the client, a specialist consultant may need to be employed to help explain the issue from the client's point of view. In any

financial criminal investigation, a forensic accountant or financial analyst will be useful if not imperative. Many white collar prosecutors do not have the experience in business litigation to have a commanding knowledge of the issues that are crucial to an understanding of the client's business, and they will rely on their investigators or agents to provide that knowledge. The defense lawyer does not want to leave it to the federal or state agent who is looking to gain a conviction of the client to educate the prosecutor. The defense lawyer's eventual presentation to the prosecutor will include the presentation of expert consultants and accountants/financial advisers. The defense lawyer will seek to add those experts to the defense team early in the process of designing a defense strategy.

### **Developing a Defense Strategy**

The problem in developing an effective defense strategy in a white collar criminal matter is the fact that the criminal investigators who are conducting the case under the auspices of the prosecutor will have determined very early in the investigation that a crime has occurred, and they will be seeking a conviction of some defendant for that crime. It is the rare circumstance that by the time the criminal investigation has become public and the white collar defense attorney has been hired that the attorney will be able to easily persuade the investigator or prosecutor that no crime occurred. Therefore, in developing an effective defense strategy, I will be looking for provisions or defenses in the applicable law that will protect my client, and I will be looking for weaknesses in the prosecutor's proof that I can expose. A criminal defense attorney always keeps in mind that the burden of proof will be on the prosecutor to prove that a crime has been committed and that it was the client that committed the crime. That standard is known as "beyond a reasonable doubt." Therefore, I will be constantly exploring ways to undercut the prosecutor's confidence in his or her case and to establish reasonable doubt. A prosecutor who sees too much evidence of reasonable doubt during an investigation will hesitate before seeking to bring formal charges.

For the most part, my clients are extensively involved in the defense of the criminal investigation. However, the defense attorney must always control the involvement of the client, and the client must be permitted to focus on conducting his or her business in as normal a manner as possible during an

investigation that can last months or years. I will discuss the defense strategy with the client at the commencement of the matter and as the strategy is developed or changed over time. I will discuss with the client important events that occur during the investigation. And, to the extent that the client individually is the target of the criminal investigation and not simply the representative of an organization, I will explain in lay terms what I am seeing during the investigation and how I am reacting to it. It is the client's liberty that is at stake during a criminal investigation, and a close working relationship with the client is a necessity.

My job as the criminal defense attorney is to uncover the facts I believe will most likely be presented to the jury by the prosecution, as well as facts I can present for the defense, and to provide my best judgment as to how that combined evidence will be received. My job is to advise my client of how I believe a reasonable jury will decide the case based on the presentation of the anticipated evidence and how the court will treat the defendant if he or she is convicted. It is ultimately up to the defendant to decide how to respond to the investigation and whether to fight the case at trial or try to resolve the case with a guilty plea. Even if I view the case as being very strong against the defendant, if my client chooses to fight the case at trial, my duty will be to present the defense in a strong and effective manner. However, the presentation must always be within the proper bounds of law and ethics. If the goal of the client is to "do what it takes" to achieve a victory at trial, including acts that are not within the law or proper ethics, that goal will be irreconcilable. If the client insists on such conduct, I would need to withdraw from the defense of the case. However, it would be the rare circumstance with sophisticated business clients that they would insist on a course of action that would lead to the withdrawal of their attorney. Even if a client does not have a realistic view of his or her own innocence, once the anticipated evidence is reviewed and carefully considered during pre-trial preparation, it is my experience that the client's views and goals become very realistic.

### **Client Testimony**

The decision on whether a client testifies at trial in a white collar case is one of the most important decisions, and it can be the most perilous for a variety of reasons. On the positive side, a jury will always want to hear the

defendant tell his or her story and will expect in a white collar matter that the business client can take the stand and provide that explanation. If the client is able to make that presentation and withstand cross-examination, that decision to testify can be the most important reason for achieving a victory. However, the defense attorney does not simply have the right to present the client's unvarnished testimony—the prosecutor has the right to cross-examine the client, and that cross-examination can quickly turn a winning hand into defeat. Assuming the client has no prior criminal record (which would most probably keep the client off the stand), the defense attorney must explore all statements the client has made relating to the issues at trial to determine if the client has made statements that are inconsistent with their trial testimony. I will review all of a client's written and reported statements, because the prosecutor will do that. I will also want to know if the client has discussed these issues with others in the business or in public forums. If the client has made inconsistent statements on material issues in the case, those will be negative facts that may keep the client off the stand. Even if the client has been consistent in his or her statements about the material facts, I will need to evaluate how the client will withstand cross-examination. That evaluation will include cross-examining the client myself on the material issues of the case. The results of that analysis will be important to the eventual decision as to whether the client will testify. Finally, since the prosecutor has the ultimate burden of proof of my client's guilt beyond a reasonable doubt, I will be able to wait until the end of the prosecution's case, and even until the end of the trial, to make the final evaluation as to whether to place the client on the stand.

Generally, if I have an unfavorable opinion about having my client testify, there will not be many developments that will change that opinion. However, if I begin with a favorable opinion to have my client testify, the types of circumstances that will change my general opinion will be evidence presented by the prosecutor at trial that was not known before. In federal criminal cases especially, there is limited pre-trial discovery and no right to question government witnesses under oath before trial. Therefore, a federal criminal trial will always include the presentation of evidence that was not previously disclosed. That evidence may have an effect on the decision to have the client testify. Also, I will be evaluating the judge's and jury's reactions to my client during the trial. If I conclude that the evidence presented at trial has caused a reaction to my client more unfavorable than

anticipated, that would be a reason to change my position. I would adamantly counsel a client not to testify if I believed the cross-examination would be more detrimental to the case than the direct examination. For example, if the prosecutor would be able to bring out material inconsistent statements by the client or if the court intended to permit the prosecutor to bring out bad acts of my client that place them in a negative light, I would be very concerned that those inconsistencies or evidence of bad acts would overwhelm any positive testimony the client could present.

### **Identifying Weaknesses in the Prosecutor's Case**

In criminal cases, especially federal criminal cases, the defense attorney does not have the right to broad discovery and access to witnesses for formal depositions as in civil cases. Therefore, it is much more difficult for a criminal defense attorney to analyze the weaknesses in the prosecutor's case. The defense attorney has to conduct a parallel investigation to that of the prosecutor. Once I identify the allegations of criminal conduct that are under investigation and the subjects of the investigation, I conduct the same type of investigation and analysis as I would as a prosecutor. I start first with evidence that is most easily available to me, from my client's own documents and available witnesses who are favorable to them. Next, I search for public information related to the case. There may have been related civil litigation that developed discovery, or a government agency may possess information that is available through a public records or Freedom of Information Act request. As for hostile witnesses, I will try to interview them, understanding that they are likely to refuse a pre-trial interview. At trial, I can then show the unwillingness of that witness to discuss the case, which may seem unfair to a jury under the right circumstances. I will also use a good private investigator to develop facts that may be useful on cross-examination of the prosecutor's witnesses.

By identifying the potential witnesses and trying to determine what they know and can testify to, I will begin to identify the portions of the prosecutor's case that are the weakest. Also, I will watch for plea agreements that the prosecutor reaches with cooperating witnesses to determine how close the prosecutor has come to identifying witnesses who are close to my client and who can provide damaging testimony against my client. As the prosecutor obtains the cooperation of witnesses who worked

closely with my client, I will know the case is becoming stronger. Equally, if those witnesses do not develop, I will know the case is weaker. I will try to exploit those weaknesses as the prosecutor completes the investigation and a charging decision is imminent. At that time, establishing that the prosecutor has not identified a witness in close proximity to my client who can provide damaging testimony provides me with an opportunity to persuade the prosecutor that the case does not exist against my client.

## **Preparing the Defense**

The first main step in a white collar proceeding is to gain a complete understanding of the case from the client's point of view. That work is accomplished with extensive debriefings of the client, a review of the crucial documents possessed by the client, and a discussion of the case with those people who are closest to the client.

The second main step is to gain an understanding of the case from the prosecutor's point of view. I will gain that understanding by discussing the case with the prosecutor and agents when such a discussion is available to me, by reviewing the subpoenas for documents that will reveal the type of information the prosecutor is seeking, and by reviewing related reports about the matter from public sources, including civil audits or news articles. A criminal defense attorney has to think about the case as the prosecutor would, following the evidence that is available and making an honest evaluation of that evidence.

The third main step is to make an objective view of all the evidence that can be obtained, both favorable and unfavorable to the client. The criminal defense attorney must put aside the client's protestations of innocence and look at the facts dispassionately and as a jury would. Through that analysis, I will gain a more accurate view of the case than by simply relying on my client's view of the facts.

The fourth main step is to apply the facts I have objectively determined to be provable facts to the legal principles in the case. Many times, bad facts about a client will be uncovered but those facts will not necessarily support the elements of the crime that is being investigated. I begin my legal analysis by considering the elements of the crime that is being investigated. But even if I

conclude that the prosecution does not have sufficient evidence to prove each of the required elements of the crime that is currently under investigation, I consider whether the provable facts will meet the elements of any other crime within the prosecutor's jurisdiction. It has been my experience that if the prosecutor is either intent on charging my client with some crime because my client has been targeted for prosecution by law enforcement or if the investigation has revealed misconduct by my client, even if unrelated to the original investigation, the prosecutor will seek to make a case based on the facts they have uncovered. Therefore, it is crucial that the defense attorney have a broad view of the type of crimes that may be established by the provable facts.

The fifth main step is to discuss with the client the options for resolving the case based on my analysis of the provable facts and the potential crimes that can be established by those facts. My discussion will include an analysis of likelihood of success or defeat if the case proceeds to trial, the possibility of resolving the case by a guilty plea, and the range of punishment that will be imposed either after a loss at trial or with a guilty plea. Ultimately, it is the client who will have to either stand before a jury at trial or before a court to plead guilty, and he or she needs to know all the ramifications of either decision.

## **Evidence**

It is very important in a white collar trial that the defendant present evidence and not simply rest on a cross-examination of the prosecutor's case. The defense needs to get its side of the story out, especially in a complex case. The defense needs to use documents, witnesses from the business, and third-party witnesses who can present the defendant in a favorable light and establish evidence of proper business practices to contrast the evidence of criminal conduct that the prosecutor is presenting. One of the most important rules in a white collar criminal case is the instruction that will be read to the jury that if the defendant presents evidence of good character and that evidence is believed by the jury, that positive character evidence can, in and of itself, present a reasonable doubt that would lead to an acquittal. Therefore, presenting positive character evidence about the defendant is very important. Even if the defendant does not take the stand to testify, a

presentation by the defense of other witnesses from the business and positive character evidence can be an effective rebuttal to the prosecution.

## **Benefits of a Jury Trial**

I prefer a jury trial to a bench trial almost all of the time in a white collar case. The first reason is the difference between convincing one fact finder, a judge, or six or twelve fact finders, the jury. To convict the defendant, the decision must be unanimous. The plain fact that the case must be decided by six or twelve jurors instead of one judge provides the defendant with an advantage in trying to prevent the prosecutor from reaching unanimity of a guilty verdict. The second reason I prefer a jury trial is that judges, especially after many years on the bench, can become cynical or jaded in criminal cases. Day after day, a judge has guilty defendants before the court, most of whom are pleading guilty and some of whom are convicted in trials the court witnesses. Human nature will lead a judge to become more than numb to the prospect of hearing yet another defendant claim his or her innocence only to find the evidence of guilt to be overwhelming. Jurors, on the other hand, may sit on one or two trials in all of their adult lives. Lay jurors do not tend to view the jury system as an important protection that is to be taken seriously. That attitude may provide the difference in achieving an acquittal in a close case.

On the other hand, proceeding to a jury trial may also have its challenges. The biggest hurdle every criminal defense attorney encounters in a white collar criminal proceeding is the fact that if the prosecutor files formal charges against your client, the public and prospective jurors will believe your client must be guilty of some act despite the presumption of innocence. It is an uphill fight from the day formal charges are filed until the end of the case.

Therefore, the best strategy to overcome this hurdle is to prevent those formal charges from being filed against your client. Unlike other types of criminal cases that are prosecutions that react to a violent or property or drug crime, white collar cases are the subject of proactive investigations. As a result, the defense attorney in a white collar case will usually have the opportunity to make a presentation to the prosecutor and his or her superiors in an effort to prevent the filing of criminal charges. And, if the filing of formal charges cannot be prevented, many times a resolution can be reached with a plea agreement.

## **Plea Bargaining**

I recommend that a client take a plea bargain when I believe it is more likely than not that the prosecutor will secure a conviction at trial and the punishment that would be imposed will be much more severe than the punishment that will be imposed through a guilty plea. The federal system in particular is a very harsh system with severe punishments for white collar criminals. The only way to avoid those severe punishments is to prevail at trial or to make a deal with the prosecutor to reduce the client's exposure. If I am representing the lead target of an investigation, it may be very difficult to significantly reduce a client's sentence through a guilty plea, and therefore proceeding to trial may be the only alternative. However, with defendants other than the lead target, the offer of cooperation in an appropriate circumstance, or simply the offer to save the government the time and expense of a trial, as well as the acceptance of responsibility for one's criminal acts, will lead to a significant reduction in the sentence. The negative consequences of a guilty plea are that your client will become a convicted felon and will lose his or her civil rights in addition to being fined and likely imprisoned. And, if the client's business is licensed or involved with government contracts, that business may be negatively affected by the client's guilty plea. In those cases, other colleagues or family members may need to be moved into a leadership role to protect the business in the event that a guilty plea is entered.

## **How White Collar Criminal Proceedings Are Unique**

The actual rules of how a white collar criminal proceeding is handled are exactly the same as any other type of criminal proceeding. There are several differences in the manner in which white collar proceedings are usually reacted to by the public and how they are handled at trial. Until recent years, the public would not have a great deal of interest in the typical white collar proceeding. News of the trial would be handled by the business media and not the mainstream press. Since the Enron/WorldCom financial scandals of 2002, the mainstream media has covered white collar proceedings in a more dramatic fashion. That will have an effect on the prospective jurors' views of the case, and it can be a negative factor for the defendant. As for how a trial is conducted, the white collar case tends to be document-intensive and takes longer to try. That aspect of a white collar

case can cause problems in attracting a jury that would be able to understand the complexities of a business case. In long trials, jurors who run their own businesses or who have other work commitments are often excused, leaving a jury pool of retirees or government workers who can take long periods of time off from work without penalty. That factor can also be negative for the defendant.

I am not usually surprised by the outcomes in white collar criminal trials. By the time a white collar case proceeds to trial, it has usually been investigated for a long period of time, and experienced prosecutors will usually only bring their strongest cases to trial. Needless to say, the results of the vast majority of the trials are convictions. In the cases where an acquittal is achieved, I can usually see the weaknesses in the government's presentation as the case proceeds. Lay jurors are really very accurate and fair in assessing whether the government has presented sufficient evidence to convict a businessperson of criminal activity. While there are unusual results in unusual cases, the vast majority of verdicts in white collar cases are accepted by the public without much difficulty either because the evidence of guilt was so overwhelming or because the prosecution overreached with a weak case, which led to an acquittal.

I will usually have a senior attorney work with me closely on the case and a junior attorney to assist both of us with research and writing tasks. The benefits of having a second pair of experienced eyes on the case are significant. Also, at trial, I believe it is positive for the jury to hear the case presented by more than one voice for the defendant. Attorneys have different advocacy styles, and jurors react differently to those differing styles. By partnering at trial with an attorney who has a style that is different than my style of advocacy, I can reach more jurors by expanding the advocacy presentation. One consequence is the additional cost. However, on a cost/benefit analysis, I believe the cost is far outweighed by the benefit of having a second experienced trial lawyer on the team.

### **The Financial Implications of a White Collar Criminal Proceeding**

The financial implications of defending a white collar matter come into play in two areas: client costs and the possibility of penalties at the outcome of a trial. The cost of defending a white collar matter is high. The investigative

phase of a criminal investigation is much like a civil litigation. I normally bill that work on an hourly basis, as I would in a civil litigation. The cost of the investigation will depend on the number of documents to review and produce, the number of witnesses to interview, and the cost of consultants or experts. The client should anticipate a six-figure cost for the normal white collar matter. If formal charges are filed, most criminal defense attorneys will charge a flat fee to cover the cost of the pre-trial and trial work. Courts will not allow a defense attorney to withdraw from the case for lack of payment. Therefore, the client will need to be prepared to make a substantial payment up front. The cost will be based on the anticipated length of the trial multiplied by the number of attorneys and paralegals assigned to the case, plus one day's cost of preparation for each day in trial plus the cost of the testifying experts. The cost of preparing for and trying the case will likely be a multiple six-figure price in a white collar trial that lasts for one to two weeks.

As discussed earlier, the negative consequences of an unfavorable white collar crime result are a conviction for the defendant that will lead to the imposition of a fine or an order of restitution and a likely term of imprisonment. Additionally, the convicted defendant will lose his or her civil rights, including the right to vote or hold public office. And, if the defendant is licensed, a felony conviction can jeopardize that license. If the defendant's business is involved with public work, that can be jeopardized as well. These potential negative consequences need to be addressed with the client at the early part of the investigation. And, in plea discussions, these issues will need to be addressed with the prosecutor in an effort to avoid some of the negative consequences if the case can be resolved.

### **Challenges of Defending a White Collar Criminal Proceeding**

The most common pitfall in defending a white collar matter is being told facts by the client that later prove to be untrue. When you base your defense strategy on the facts as presented to you by the client and those facts are proven false, you lose all credibility with the prosecutor, judge, and jury. The best way to avoid this pitfall is to counsel the client up front about how important it is to present accurate facts. The defense will only have one opportunity to tell its version of the facts. If the facts change, the inconsistency will totally undermine the defense strategy. Therefore, the

client has to know he or she must be up-front and honest about the facts of the case, no matter how difficult those facts may be to accept. Also, the defense attorney cannot simply accept the facts as related by the client. Those facts must be tested by a review of documents and interview of witnesses. The defense attorney must keep an objective view of the facts at all times and be willing to confront the client when the facts presented prove to be false. If a client mistakenly falls into this pitfall, the defense attorney must make every effort to show the prosecutor, judge, and jury that the false facts were a mistake and not intentional. If the false facts are determined to have been intentional, the defense strategy will be totally undermined.

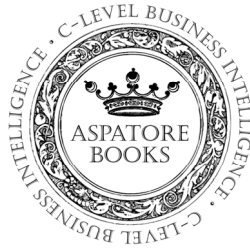
In addition to false facts, handling simultaneous federal and state investigations for the same client is a rare challenge, but it is not to be unexpected. The most difficult white collar case I handled involved a federal investigation of a client and a separate state prosecution of the same client at the same time. The federal investigation started first, and it was my job to persuade the U.S. attorney not to file criminal charges against the client. With the use of a defense strategy that presented the facts with supporting expert testimony and attacking the weaknesses of the prosecutor's case, I made substantial progress in resolving the case. Then the state authorities threatened to file criminal charges on an unrelated incident. I had to turn my attention to fighting those charges while preventing the U.S. attorney from filing charges. I was able to defeat the most serious charges the state threatened to file, but some charges were eventually filed. The case was high-profile, and the public had a negative view of the client. Fortunately, I was able to identify legal defenses to the filed charges that led to the dismissal of the case. Then I turned my attention back to the federal investigation and was able to persuade the U.S. attorney not to file any criminal charges.

This case taught me a great deal about defense strategy. I was responsible for defending simultaneous federal and state investigations on unrelated matters in a high-profile case in which the public had a negative view of the client. The prosecutors had threatened to file serious charges in each case, which included substantial penalties and could have destroyed the client's business. The defense strategy required presenting provable facts to the prosecutors to show they would fail if criminal charges were filed,

combined with a public relations campaign used to persuade the public and potential jurors that the negative views of the client were not true. The strategy was ultimately successful. I learned that patience and perseverance are required to succeed in this type of case.

*Joseph A. DeMaria has twenty-five years of experience representing business clients in complex civil and white collar criminal litigation. He graduated, cum laude, from the State University of New York at Buffalo School of Law, where he served as the managing editor of the Buffalo Law Review. He began his career in New York at the international law firm Kelley Drye & Warren. He was subsequently appointed as a special attorney for the U.S. Department of Justice's organized crime and racketeering section, Miami strike force, where he prosecuted complex organized crime and white collar matters. He received a special commendation from the Department of Justice for outstanding service to the criminal division. He returned to private practice in Miami, Florida, and he is now a partner at the firm of Tew Cardenas LLP. He is Florida Bar certified as a business litigation specialist, and he is an adjunct professor in business litigation trial techniques at the University of Miami School of Law. He was recently appointed by Governor Jeb Bush to serve as a Florida commissioner to the National Conference of Commissioners of Uniform State Laws. He has also been a legal commentator on various national broadcasts in connection with white collar criminal issues.*

***Dedication:*** *I dedicate this chapter to my father, who has practiced law for more than fifty years and who taught me the importance of using our criminal justice system to protect the rights of all accused persons.*



[www.Aspatore.com](http://www.Aspatore.com)

Aspatore Books is the largest and most exclusive publisher of C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Aspatore annually publishes a select group of C-Level executives from the Global 1,000, top 250 law firms (Partners & Chairs), and other leading companies of all sizes. 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 – need-to-read as opposed to nice-to-read books – for all business professionals.

## **Inside the Minds**

The critically acclaimed *Inside the Minds* series provides readers of all levels with proven business intelligence from C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies. Each chapter is comparable to a white paper or essay and is a future-oriented look at where an industry/profession/topic is heading and the most important issues for future success. Each author has been carefully chosen through an exhaustive selection process by the *Inside the Minds* editorial board to write a chapter for this book. *Inside the Minds* was conceived in order to give readers actual insights into the leading minds of business executives worldwide. Because so few books or other publications are actually written by executives in industry, *Inside the Minds* presents an unprecedented look at various industries and professions never before available.

