

GARDEN STATE CLE LESSON PLAN

A 1.5 credit course

**FREE DOWNLOAD
LESSON PLAN AND EVALUATION**

DEFENDING WHITE COLLAR CRIMES

With

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And

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Program description

When you get an unexpected knock on your door at 7 AM, it is almost always bad news... especially when the people doing the knocking is from the federal government. This 1.5 credit CLE will show you how to advise your client when the knocking starts.

I. Introduction

- **Runs litigation department of Scarinci Hollenbeck 201-896-4100**
- **Labor and employment litigation**
- **Constitutional litigation because represent municipalities and government entities – 1st amendment issues, 1983 actions and labor and employment**
- **Child pornography case – better hope that it is state authorities investigating than feds – more flexibility in state sentencing guidelines v. federal**
- **Most of criminal work in white collar defense**

II. Representing the White Collar Crime suspect

- **Identify who you are representing – cannot represent business partners**
- **May want to represent company as opposed to individuals**
- **If representing corporation not representing president or CFO of company**
- **Depends on what the clients want**
- **Knowing when and how to make selection of client (corporation v. individual) is important**
- **Triggering mechanism for AUSA to prosecute tax fraud**
 - **1st analysis done by IRS – civil or criminal case – CID (Criminal investigations division)**
 - **When CID determines whether the case is worthy of prosecution that is when AUSA gets involved**
 - **Size of tax liability**
 - **Deterrent factor of other cases (if tax issues are one that the tax payer was acting covertly, that will influence decision to prosecute more than someone who is merely misreporting – deterrent factor)**
 - **Tax protestors are prosecuted from issue of deterrence issue – whether to prosecute or not – deter others from the same type of act**
 - **Celebrity tax evaders – depends on amount of tax liability as to whether the person will be prosecuted – deterrence – no deterrence if no publicity**
- **White collar cases at the beginning law enforcement does not know there is a crime and then need to uncover the crime and**

prosecute – find someone who has lied to them, charge them, and then ask the person to cooperate

III. Basic knowledge of white collar cases

- **If client calls and says an FBI agent wants to talk to client, tell them no and provide attorney's name and number**
- **Client has absolute right to have a lawyer**
- **Attorney tells agent that need to speak with client and will get in touch with agent**
- **Agents showing up early in the morning provides FBI an advantage**
- **Oftentimes people are not aware of the ins and outs of the law – not aware or don't believe they did something wrong – so inclination is to talk**
- **If there is a subpoena, will know there is an AUSA involved and can call that person**
- **1st person to talk to is the agent – USA office may not be involved at that point**
- **FBI is autonomous**
- **Is it useful to have client speak with FBI?**
 - **Depends on the case**
 - **If FBI comes to client's house early in the morning, then most likely that client has information to provide**
- **3 levels of federal investigation: target (based on evidence likely to be indicted), subject (focus of GJ investigation but insufficient evidence to indict), witness**
- **Person of interest = subject**
- **When try to explain your way out of something – don't know who FBI has already spoken to – it can be determined that you have lied to the FBI if others have come forward and stated the opposite**
- **Tell client that it is likely they know more than what they are saying**
- **5th amendment protects the innocent as well as the guilty**
- **Congress has made it very easy for the US attorney to prosecute wire fraud – stacked deck against the defendant – penalized under guidelines for going to trial**
- **Mortgage fraud – some little mis-statement on mortgage application – must demonstrate intentional misrepresentation and one that was relied upon**

- **Choices of prosecution – state v. federal prosecution – current US Attorney encourages a good relationship between state and federal authorities**
- **Unlikely when convicted at state level that feds would then prosecute for the same offense federally**

IV. RICO Act cases

- **Designed to accomplish 2 things – provide prosecutors with greater degree of ability to prosecute even when traditionally statute of limitations may lapse, enables prosecutors to indict and prosecute those in a criminal enterprise with a lesser type of culpability than in a traditional conspiracy**
- **If individuals are part of the enterprise, then culpable for all activities of the enterprise**
- **18 USC 96**
- **Fraud, gambling, narcotics, assaultive conduct, violent crimes, bribery, homicides**
- **Need 2 predicate acts in order to fall within statute**
- **Statute of limitations is 7 years – need 2 predicate acts within 7 years but can demonstrate other predicate acts that occurred before that in order to establish the enterprise**
- **RICO act itself does not contain a statute of limitations but the Supreme Court has held that civil RICO claims are subject to a four year statute of limitations. Agency Holding Corp. v. Malley Duff & Associates, Inc., 483 US 143 (1987).**
- **The statute of limitations begins running on a RICO claim according to the “injury discovery accrual rule” which ties accrual to the time when a plaintiff first knew or should have known of this injury.**
- **RICO is its own offense**
- **Even if you are acquitted of a murder prior to racketeering indictment, then can bring in that murder to establish the enterprise**
- **Allows to bring in evidence that may otherwise be prejudicial – can bring in all predicate felonies committed by everyone that is part of the enterprise because all predicate felonies are part of the same crime of racketeering**
- **Can go to prison for RICO as well as predicate acts**
- **What would be prejudicial in a criminal case would be admissible in a racketeering case**

V. Sentencing issues with white collar crime cases

- **Most cases plead out – the jeopardy that a white collar defendant faces increases likelihood that someone will plead as opposed to going to trial – defendant must make a business decision as to how long willing to risk going to trial v. plea**
- **Difficulty negotiating location of sentence – ultimately up to Bureau of Prisons – courts and prosecutor can recommend but not the final decision maker**
- **More flexibility for federal judges to give downward departure since the guidelines are not advisory as opposed to requirements**
- **Probation may be negotiated in:**
 - **tax cases (amount of tax fraud – if less than \$100K tax liability unlikely to go to trial) – IRS does not discriminate depending on what type of tax (income, payroll, excise, etc) – getting information from foreign countries regarding tax evasion**
- **at state level – prosecutors are not trying cases – sentencing plays a strong part how cases resolve short of trial**
- **federal system – no real parole; may go to halfway house; may get some time off – different from state parole system**
- **in federal system serve at least 80%**
- **if don't plead guilty then don't get reduction in points for taking responsibility – increase sentencing liability**
- **there are consultants who do an analysis of a defendant's case – former probation officers – do risk analysis – will go through entire history and then make a proposal of an appropriate sentence – sentencing proposal – establish level of risk of recidivism**
- **paint a picture of the client that is different from the view painted by the government**
- **sentencing guidelines are not being followed like they were when they were mandatory**
- **“downward departure”**
- **Most advocacy on federal level is geared toward sentencing**
- **Get in a consultant to describe to the court the client and communicate who the client is and factors that may be considered with respect to plea negotiations or sentencing**

- **Show client is trying to make victim whole – shows remorse – not compelled – can assist at sentencing – tell prosecutor client is making amends not to get a better offer**
- **Defense is what the appropriate sentence may be under the circumstances**
- **Downward departure: plead guilty, going to try to right the wrongs, no prior record, value of the crime (theft - \$\$ of theft, amount of tax liability), age (maybe)**
- **Evaluate each factor to see how the client can highlight those areas**
- **Aggravating: prior record, aggravation of crime, nature of crime, injury? Public injury? Firearms? Large amounts of money**
- **Can negotiate what the government and defendant can agree on as it relates to the amount of a theft**
- **US attorney does not get involved in the case if it is not strong**
- **Quantum of evidence and how it is being proved**

VI. Political corruption cases

- **Can avoid GJ by agreeing to have the witness provide a statement outside the presence of the GJ**
- **Not a good idea for the client to appear before the GJ**
- **Better to have witnesses that the government may not be aware of testify before the GJ as opposed to defendant testifying**
- **Different types of GJ:**
 - **County GJ – deal with violent crimes or investigatory GJ**
 - **State GJ – investigatory GJs (documents, records, testimony)**
- **Question why client is being called before a GJ – target or victim**
- **Don't have client testify if he is a target before the GJ – many things can go wrong**

VII. Advice for young attorneys

- **Good idea to collaborate with more experienced criminal trial lawyers – experienced attorneys are willing to collaborate – no one has a monopoly on ideas**
- **Develop a mentor**
- **State courts are more relaxed with respect to trials; judges are more flexible as to various issues**

- **Federal court judges are more rigid in the way their trials proceed; less concerned with being reversed than state court judges**
- **Fear of reversal is a factor in the judiciary**
- **Deck is stacked in any case in favor of the prosecutor**
- **Defense has less time to prepare compared to the prosecution who has as long as the statute of limitations**
- **Know your case! Don't think you know it based on what the client says – evaluate and meet witnesses and determine credibility**
- **Must do the work that is necessary to get the job done**
- **Discovery may be provided days before trial or long before trial – if possibility of plea the prosecutor may give discovery early on**
- **Discovery process is different in federal level v. state level**
- **You may not know you have holes in your case until the government turns over discovery**
- **Know elements of each offense charged and then know summation – consider what you don't have yet and what you want to include in your summation**
- **Inadvertence does not = knowing...for tax fraud cases**
- **Since there is a shortage of CID investigators, picking and choosing what cases to prosecute**
- **Understanding jury process is very important to a trial attorney and developing trial strategy**
- **Make a jury understand what you think is important for them to know and understand**
- **If someone is trying to get off a jury, then let them because they won't be focused on the case**
- **No matter what strategy you have, much rather understand what jurors consider a problem with the case – then you can be sure to hit home those issues**
- **Mock trials are beneficiary to see how juries are going to react to a case and how the witnesses will testify and to give witnesses experience testifying**
- **Jury selection on state v. federal is pretty much the same**
- **Federal court has broader base of jurors**
- **Removal from state court to federal court – analyze jury pool**
- **It is a mistake to believe that one juror is going to be more influential over another – a dominant juror may not be accepted by other jurors, so difficult to speak to one particular juror**

- **Know your case! There should not be anything that comes as a surprise – evaluate witnesses and your client**
- **There are contrary arguments to each of your arguments – analyze the contrary argument**
- **You must tell client that you are going to perform your job and that the one thing the client can count on is that you will be truthful – look at evidence against client and in favor of client and evaluate the case**
- **Client must trust you – let them rely upon you in terms of your advice**
- **Hardest job is telling client extent of potential sentence**
- **Federal trial schedule is more predictable than state trial schedule**
- **Learn how to try a case as a prosecutor**