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## COMMENT

# COOL HAND LAWYERS: WHITE COLLAR CRIME AND TACTICS OF THE PROSECUTION AND DEFENSE

### I. INTRODUCTION

The players all folded. One said, "Nothing! Hand full of nothing. You won all that with nothing?" Luke grinned and replied, "Yeah . . . well sometimes nothing can be a real cool hand." Occasionally, the actions of government prosecutors resemble Paul Newman in *Cool Hand Luke*. Therefore, it is imperative for white collar defense lawyers, who wish to have a full arsenal of tactics, to possess the ability to recognize a bluff. Kenneth Mann, in his study of white collar criminal defense techniques, suggests that:

[t]he criminal justice system is improperly characterized by the plea bargaining literature, to the extent that the literature claims to provide a whole picture. In part of the system plea bargaining dominates, and administrative efficiency and organizational equilibrium are preferred values. But there is another part, one which is not as open to public view, characterized by a carefully planned clash of positions and contest of sophisticated tactics and strategies; there, adversariness is the preferred value.<sup>1</sup>

This Comment is designed to facilitate the understanding of the white collar criminal plea bargaining process "which is not as open to the public view" and illuminate the actors' "carefully planned clash of positions." There is more to this process than a plea of guilty to reduced charges. The order of ideas in this Comment should be considered as both chronological and at times interactive depending on the facts and law of each case.

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1. K. MANN, DEFENDING WHITE COLLAR CRIME 231 (1985).

## II. WHITE COLLAR CRIME IS DISTINCT FROM STREET CRIME

It is important to understand the distinction between street crime and white collar crime in the context of this Comment as the process with which a defense lawyer negotiates with the government is so disparate. Street crime is defined by Kenneth Mann in his work *Defending White Collar Crime*, as "all crimes involving threat and use of physical violence against persons, drug violations, theft involving use of physical force, and other related crimes."<sup>2</sup> Sociologist Edwin Sutherland first coined the phrase "white collar crime" in 1940 while studying corporate illegalities.<sup>3</sup> He defines it as a crime committed by persons of "respectability and high social status."<sup>4</sup> The Justice Department today defines white collar crime with the focus on the act not the actor. White collar crime includes "nonviolent crime for financial gain committed by means of deception by persons . . . having professional status or specialized technical skills."<sup>5</sup> Lowell Jensen, then Deputy Attorney General, U.S. Department of Justice, in 1986 defines white collar crime as:

[s]uch offenses as bribery and corruption of officials at all levels of government; procurement fraud; tax fraud and fraud against government programs; bank fraud and embezzlement; consumer fraud and antitrust violations; securities, commodities, and other investment fraud; misuse of union funds and labor bribery; and environmental crimes and food and drug law violations.<sup>6</sup>

Society views white collar crime as seriously as many conventional property and violent crimes according to the Bureau of Justice Statistics report of March 1988.<sup>7</sup> In 1986, Lowell Jensen testified before the U.S.

2. *Id.* at 4.

3. *Id.* at 19.

4. M. PICKHOLZ, S. HORN & J. SIMON, *GUIDE TO WHITE COLLAR CRIME* 3 (1986).

5. U.S. Dep't Of Justice, NCJ-106876, Bureau Of Justice Statistics, Special Report White Collar Crime 1 (Sept. 1987), [hereinafter, *DOJ Special Report*], citing, U.S. Dep't Of Justice, NCJ-76939, Bureau Of Justice Statistics, Dictionary Of Criminal Justice Data Terminology, at 215 (2d ed. 1981).

6. *Oversight Of The Problem Of White Collar Crime: Part I Hearings Before The Senate Committee On The Judiciary*, 99th Cong. 2d Sess. 26, 27 (1986). [hereinafter *Hearings Part I*].

7. U.S. Dep't Of Justice, Bureau Of Justice Statistics, Report To The Nation On Crime And Justice 16 (2d ed. March 1988). The National Survey of Crime Severity was conducted in 1977. Severity scores were developed from responses to the survey and mathematical techniques were used to formulate comparisons. The report found that the score (of severity) "for a doctor cheating on claims he or she makes to a Federal health insurance plan for patient services is almost three times as high as the score for forcefully robbing a victim of \$10 when no injury

Senate Judiciary Committee that "[i]n 1974 the National Chamber of Commerce estimated the annual loss through white collar crime at \$40 billion."<sup>8</sup> Jensen, in his testimony, stated a study funded by the accounting firm of Peat, Marwick and Mitchell in 1982 suggests that the loss has ballooned to \$200 billion.<sup>9</sup> Mr. Jensen also added that "fraud or other criminal conduct in fact was a factor in about half of the bank failures that occurred [from 1981-1986]."<sup>10</sup>

The difference between street crime and white collar crime is also manifest in the plea bargaining process. Defense attorneys handling street crimes, argues Kenneth Mann, are usually "restricted to helping their clients arrange a plea of guilty, and they bargain over facts already known to the government."<sup>11</sup> He asserts that when handling street crimes "[t]he defense function is weakened and distorted because [defense] attorneys do not have the opportunity to do more than negotiate a compromise."<sup>12</sup> The white collar defense counsel does not assume that the government has the facts which would support a conviction.<sup>13</sup> Unlike the street crime attorney, the white collar defense attorney starts with the assumption that although his client may be guilty "he may be able to keep the government from knowing this. . . ."<sup>14</sup> Mann's thesis is that a white collar defense counsel may ultimately have to advise his client to plead guilty "but the compromise that leads to a plea agreement is the result of a carefully managed process of adversary interaction. . . ."<sup>15</sup> The assertion is that the white collar defense attorney might have some influence in the contours of the ultimate plea agreement.

### III. HISTORY OF PLEA BARGAINING

According to Professor Albert Alschuler in his article "Plea Bargaining And Its History," the judicial practice of dissuading guilty pleas continued into the late second half of the nineteenth century.<sup>16</sup> It was at this time

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occurs."

8. *Hearings Part I, supra* note 6, at 45, (testimony of Deputy Attorney General Lowell Jensen).

9. *Id.*

10. *Id.*

11. K. MANN, *supra* note 1, at 4.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. Alschuler, *Plea Bargaining And Its History*, 79 COLUM. L. REV. 1, 5 (1979).

that prosecutorial plea bargaining surfaced.<sup>17</sup> In 1892, the U.S. Supreme Court for the first time in *Hallinger v. Davis*<sup>18</sup> upheld a guilty plea conviction.<sup>19</sup> By 1925, the percentage of total cases that resulted in guilty pleas had reached approximately 90 percent, the same level of guilty pleas that occur today.<sup>20</sup>

During 1985, 10,733 defendants were convicted of federal white collar crimes.<sup>21</sup> This figure represents an 18 percent increase from 1980.<sup>22</sup> The conviction rate for white collar offenders was 85 percent, [78 percent by plea and 7 percent by trial] contrasted with a 78 percent conviction rate for all other federal offenders.<sup>23</sup> Of the 15 percent not convicted of a white collar offense, only 2 percent of the defendants were acquitted in either a judge or jury trial in 1985 and 12 percent of these cases were dismissed.<sup>24</sup> Accordingly, white collar defense counsel should perceive the importance of swiftly developing strategy to offset the odds of conviction.

The Justice Department also reports that white collar offenders are more likely to be sentenced to probation than non-white collar offenders.<sup>25</sup> Of the white collar offenders convicted in 1985, 40 percent were sentenced to prison while 54 percent of the non-white collar offenders were sentenced to prison.<sup>26</sup> The report states that one reason for the lower incarceration rates for white collar offender is their general lack of prior criminal history.<sup>27</sup> The average length of sentences for white collar offenders was twenty-nine months compared to an average of fifty months for non-white collar offenders.<sup>28</sup>

It is notable that the United States Sentencing Commission<sup>29</sup>, in its

17. *Id.* at 5.

18. *Id.* at 10 (citing, *Hallings v. Davis*, 146 U.S. 314 (1892)).

19. Alschuler, *supra* note 16, at 10.

20. *Id.*

21. DOJ *Special Report*, *supra* note 5, at 1.

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. *Id.* at 5.

28. *Id.*

29. The United States Sentencing Commission [hereinafter *Commission*] is an independent agency in the judicial branch whose primary purpose is to establish sentencing guidelines, policies and practices for the federal criminal justice system pursuant to 28 U.S.C. § 994. See United States Sentencing Commission, *Guidelines Manual* [hereinafter *Guidelines*]. The United States Supreme Court heard oral argument on October 5, 1988, questioning the constitutionality of the Commission. On January 18, 1989, the Court held eight to one that the Sentencing

analysis of past practices, shows that defendants who pled guilty received a sentence "[t]hat averaged between 30 to 40 percent lower than a sentence which would have been imposed had the defendant pled not guilty and been subsequently convicted."<sup>30</sup>

#### IV. NEGOTIATIONS PRIOR TO THE DECISION TO PLEAD GUILTY: A CONTEST OF INFORMATION GATHERING AND CONTROL

##### A. *Client Contacts Defense Counsel*

##### 1. The Client

It is critical to determine who the client is for the purposes of the attorney-client relationship.<sup>31</sup> This determination can be especially significant in the area of white collar crime where the corporation may be the client and not the individuals who comprise it. The boundaries of the attorney-client relationship are set forth in the Model Rules of Professional Conduct (Model Rule) and the Model Code of Professional Responsibility (Model Code).<sup>32</sup> The concept is that representation is carried out by agency: "A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."<sup>33</sup> The Model Rules require that defense counsel who represent a corporation and its officers, directors, employees, members, or shareholders may only do so if such representation will not violate the conflict of interest rules.<sup>34</sup> If a corporation and an employee of the corporation seek the same defense counsel with respect to the same transaction the potential for conflict exists. Defense counsel under the Model Rules must make sure not represent a client that will adversely affect the relationship with another client and each client must consent after consultation.<sup>35</sup>

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Guidelines are constitutional in an opinion delivered by Justice Blackmun. *Mistretta v. United States*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

30. Wilkens, *Plea Negotiations, Acceptance of Responsibility, Role of the Offender, and Departures: Policy Decisions in the Promulgation of Federal Sentencing Guidelines*, 23 WAKE FORREST L. REV. 181, 191 (1988). [hereinafter *Plea Negotiations*]. William W. Wilkens Jr., the author, is Circuit Judge, the United States Court of Appeals for the Fourth Circuit and Chairman, U.S. Sentencing Commission.

31. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 90.

32. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (West 1987); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-18 (West 1987).

33. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.13 (West 1987).

34. *Id.*

35. MODEL RULES OF PROFESSIONAL CONDUCT RULE 1.7 (West 1987).

Defense counsel in a white collar case may be asked to represent more than one party. For example, parallel litigation of the same matter in a civil, administrative, or criminal context may often involve the same attorney.<sup>36</sup> Multiple representation is not prohibited by the Model Rules or the Model Code.<sup>37</sup> Marvin Pickholz, in *Guide To White Collar Crime*, cites several advantages to multiple representation in the setting of a grand jury investigation.<sup>38</sup> Some of the prominent advantages are that "clients are better able to maintain a united front; it may contribute to the termination of the investigation; a single lawyer can act as a funnel for all information. . . ."<sup>39</sup>

## 2. Client Disclosures to His Attorney

Kenneth Mann, in *Defending WHITE COLLAR CRIME*, depicts a strategy of "information control" embraced by some which includes limiting the information a client reveals to his attorney.<sup>40</sup> Mann says some attorneys desire to know everything that could relate to the investigation.<sup>41</sup> But many lawyers have dual goals; extract certain facts and discourage the disclosure of others that might harm a good defense.<sup>42</sup> For instance, some lawyers do not want to know facts that would tend to prove knowledge.<sup>43</sup> Mann states, "[t]hey would not want to find out that a client actually had knowledge of a fact that would prove criminal intent--knowledge of a report or the action of another person--if the government was not going to find this out".<sup>44</sup> The point is that the lack of knowledge is easier to argue to the prosecutor if the defense attorney is not aware of his client's knowledge. In this context, information control is also a form of self-preservation. As Mann notes, "[t]he deeper moral dilemma for the white collar crime defense attorneys is the question of what it means to devote oneself to defending persons who

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36. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 91.

37. *Id.* (citing, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.7 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 5-105 (1981).

38. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 92.

39. *Id.* See McNeil, *Banks Under Attack-Revisited*, 1989 A.B.A. SECTION OF LITIGATION at 341, for discussion of multiple representation and possible pitfalls.

40. K. MANN, *supra* note 1, at 103.

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

commit white collar crimes . . . Tension concerning this question . . . can be significantly reduced by controlling information. . . .<sup>45</sup>

Mann labels the techniques of information control as "avoidance."<sup>46</sup> One technique is to not ask, "Would you please tell me everything that happened?"<sup>47</sup> One attorney explained the usefulness of non-disclosure as follows:

Let me put the dilemma to you this way. We are representing a company being investigated for [Foreign Corrupt Practices Act violations]. We have decided to cooperate fully [with the government]. So lets say I'm briefed thoroughly by the vice-president and others. I think there are some "questionable" activities, but they are not so serious that there will be a criminal recommendation [for prosecution by the investigator]. . . . But let's say I've been told about one big payoff that looks ugly. Then I'm in trouble, I can't enter into a free-wheeling conversation with the agent as if being forthcoming. If your strategy is to imply that your client's actions were *de minimis*, you can't very well stop in the middle of the conversation and say, I can't answer that question. . . .<sup>48</sup>

Some attorneys control information by limiting the time frame of their questions. If the client is being investigated for tax violations during particular years, then some attorneys would consider that their representation of the client only includes those years.<sup>49</sup> Still others control the client's dialogue with a "Stop, I don't want to hear that."<sup>50</sup> Of the attorneys Mann studied, most admit they sometimes choose not to probe for certain facts.<sup>51</sup>

#### B. *Defense Counsel Assesses Client Status*

Defense counsel should immediately try to determine the status of the client. The client may be a *witness* needed to provide only factual information for the investigation.<sup>52</sup> The client could be a *target* to be

45. *Id.* at 104.

46. *Id.*

47. *Id.* at 105.

48. *Id.* at 106.

49. *Id.* at 107.

50. *Id.* at 108.

51. *Id.* at 103.

52. Connelly & Fahner, *Unconventional Strategies in White Collar Criminal Investigations*, 14 LITIGATION 17 (1988).



indicted as result of the investigation.<sup>53</sup> A target is someone whom the investigation centers on for the purposes of ultimate indictment. The client may be in an uncertain or *subject* status.<sup>54</sup> If the government will not disclose the status of the client, assume he is a target.<sup>55</sup>

Defense counsel should then determine the conduct under investigation.<sup>56</sup> Often this can be determined from observation of the documents listed in the subpoena.<sup>57</sup> Sometimes attorneys can ascertain information by calling the prosecutor.<sup>58</sup> Next, the attorney must seek to gain a "[g]eneral understanding of the conduct *and* the business context in which it occurred."<sup>59</sup> Then, once a basic factual investigation has commenced, he should assess the potential exposure of the client. This includes analysis of civil, criminal, and administrative issues.<sup>60</sup> The applicable statutes and regulations should be researched to help determine the scope of representation necessary.<sup>61</sup>

The idea is that by the time negotiations begin (if they do), defense counsel will already have a command of the facts and the law. Kenneth Mann suggests that "[t]he strength of [defense counsel's] position at the bargaining table vis-a-vis the government is often the result of steps [he] takes early in an investigation. . . ."<sup>62</sup> This command is critical as "[n]othing undermines a defense lawyer's credibility so much as the making of factual or legal assertions that the prosecutor knows are wrong."<sup>63</sup>

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53. *Id.*

54. *Id.*

55. Mukasey, *Dealing With The Prosecutor*, in BUSINESS CRIMES 233 238-239 (J. Glekel ed. 1982).

56. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 15.

57. *Id.*

58. *Id.* Pickholz warns that this should only be done by counsel and not an employee of the company. If the attorney was involved in some way in the conduct under investigation "outside counsel should be used to avoid any inadvertent admissions." *Id.* Pickholz states that the more experienced the prosecutor the more likely one will be able to gain information from him. *Id.*

59. *Id.* at 16.

60. *Id.*

61. *Id.*

62. K. MANN, *supra* note 1, at 14.

63. Glanzer & Taskier, *The Fine Art of Plea Bargaining*, 2 CRIM. JUST. 7, 8 (1987).

C. *Defense Counsel's First Contact With The Government:  
Information Gathering*

Frequently, it is the first contact with the prosecutor where the status of the client is discovered. The defense attorney and prosecutor must speak the same language. "Target" and "subject" must mean the same thing to all involved. One expert relates an account where a lawyer who was told his client was not a target "[a]llowed his client to testify without immunity before the grand jury. The client was not only indicted for the substantive crime at issue, but for perjury in denying it."<sup>64</sup> It appears the prosecutor "[h]ad in mind a particular definition of 'target' as someone whom it had definitely been determined would be indicted."<sup>65</sup> Some defense counsel experts believe in contacting the government before they have contacted the client.<sup>66</sup>

If the lawyer is aware of a criminal investigation that may involve contact with the client, the lawyer should take the initiative and ask the prosecutor to make contact through the lawyer. Arguably, the request may alert the prosecutor to the existence of the client. Still, if a newspaper has announced that a law enforcement agency [is] examining the Department of Defense contract awarded to OverCharge, Inc., and the client is the executive responsible for cost accounting at OverCharge, there is no reason to pretend coyly that the client may luck out and avoid being contacted.<sup>67</sup>

Yet, Michael Mukasey, former Assistant United States Attorney for the Southern District of New York, expresses the advantages of playing ignorant at the beginning.<sup>68</sup> "There are two advantages [says the former prosecutor]: first, it is often true, whether you know it at the time or not; and second, it is bound to generate some information."<sup>69</sup> Mukasey also suggests that defense counsel should consider bringing a colleague to any meeting with the government.<sup>70</sup> The person should be one who understands what the defense attorney is trying to accomplish.<sup>71</sup> The colleague can take notes, be

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64. Mukasey, *supra* note 55, at 238.

65. *Id.* at 238-39.

66. Connelly, *supra* note 52, at 21.

67. *Id.*

68. Mukasey, *supra* note 55, at 239.

69. *Id.*

70. *Id.* at 239-40.

71. *Id.* at 240.

a witness (if necessary), and provide input as to the success of the defense strategy.<sup>72</sup>

The first discussion with the prosecutor can provide insight into the "legal underpinnings" of the government's case.<sup>73</sup> The objective of the investigation may be telegraphed by the disclosure of certain information. For example, the assignment of a special agent to the case "identifies an external constituency to which the prosecutor will be held accountable; and defines . . . the statutory predisposition of the investigation."<sup>74</sup> The significance of understanding the legal theories of the government's case will be a recurrent theme in this Comment.

Both the prosecutor and defense attorney see the first meeting as a fact gathering opportunity.<sup>75</sup> The prosecutor wants to know "what happened when, what the target will say about events, where documents are . . . and [learn the strategic approach of the defense]."<sup>76</sup> Kenneth Mann states that as a result of these goals of the prosecutor, the defense attorney will often approach the meeting with the opposite goal of prevention; avoiding disclosure of the facts that are potentially damaging.<sup>77</sup> Accordingly, Mann states that the government has a second goal; "to conceal what it knows and the legal positions it is considering."<sup>78</sup>

The three styles observed by Mann that defense attorneys exhibit in the initial meetings with the government are passive listening, adversarial argument, and assistance.<sup>79</sup> The *passive listening* approach assumes the agent or prosecutor will be cooperative.<sup>80</sup> Sometimes the government will only reveal a general area of investigative interest.<sup>81</sup> This can be immensely helpful because now the defense attorney can intelligently question his client.<sup>82</sup> At other times the government will disclose "a detailed account of

72. *Id.*

73. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 17.

74. *Id.*

75. K. MANN, *supra* note 1, at 79.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 80.

82. *Id.*

the inculpatory information held by the government."<sup>83</sup> If this occurs, the prosecutor is usually near the end of the investigation.

Another style is the *adversarial encounter* which centers on starting an argument with the investigator in an effort to compel him to defend his position.<sup>84</sup> One attorney used this method by not allowing his client to take a "blanket Fifth" in which the person states that he will not answer any question in an interview with an investigator.<sup>85</sup> One attorney observed that "[w]hen the client refuses to take a blanket Fifth but takes the Fifth on each individual question, the inexperienced investigator then reviews for the defense attorney much of his case by asking a long series of questions."<sup>86</sup>

A third approach is *assisting the investigator*, which assumes defense counsel can convince the government they need the assistance.<sup>87</sup> This approach shows the agent or prosecutor that the defense attorney can gather facts more efficiently than the government.<sup>88</sup> The defense attorney and government are simultaneously benefitted if the defense attorney is able to produce documents and testimony that explain the conduct under investigation.<sup>89</sup> This will hopefully lead to a termination of the investigation and a reallocation of government resources to the next case.

There are also indirect methods of information gathering such as tracking the movement of criminal investigators.<sup>90</sup> This method of information gathering includes monitoring the grand jury investigation by keeping in close contact with potential witnesses and their counsel.<sup>91</sup> Defense counsel at this phase (and in all aspects of an investigation) should be

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83. *Id.* at 80-81. The details disclosed early can sometimes benefit the government. A commercial lawyer hired a white collar expert in one of Mann's examples and described the scene this way:

ATTY: As I said before, I was more sure of myself with this hotshot helping me avoid pitfalls. [For example] there were five defendants. I was representing one, the only one who wasn't willing to cooperate. I went down to the U.S. Attorney's office with [the defense specialist, a former Assistant], and there at the meeting the [prosecutor] showed us films--tapes of my client taking a bribe. He said to me, 'If you want to go to trial, it's up to you.' So, we had another meeting with the client . . . I told him he was lucky they showed us the tapes. *Id.* at 81.

84. *Id.* at 81.

85. *Id.* at 83.

86. *Id.*

87. *Id.* at 83-4.

88. *Id.*

89. *Id.* at 85.

90. *Id.* at 86-88.

91. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 18.

aware of the federal Victim and Witness Protection Act of 1982<sup>92</sup> and deal with third party witnesses through counsel, not directly.

D. *The Power of the Prosecutor:  
Strengths and Weaknesses of His Position.*

1. The Effect on the Client and Negotiating Process

Prosecutors regularly overcharge in both number of counts and the severity of offenses in the indictment.<sup>93</sup> The Department of Justice's stated policy is to recommend the grand jury charge be "the most serious offense consistent with a defendant's conduct."<sup>94</sup> Department of Justice stated policy on *Additional Charges* is that the government bring "as few charges as are necessary to ensure that justice is done."<sup>95</sup> The *United States Attorney's Manual* (USAM) additionally states that "the bringing of unnecessary charges . . . constitutes an excessive -- and potentially unfair -- exercise of power."<sup>96</sup> However, a former Assistant United States Attorney and Chief of the Fraud Unit of the United States Attorney's Office in the District of Columbia, Seymour Glanzer states, "[t]he policy is, of course, honored more in the breach than in the observance."<sup>97</sup> Prosecutors, say Glanzer, frequently "pyramid" counts in the indictment, overstate criminal conduct, and stack counts upon one another.<sup>98</sup> The net effect is the necessity to plea bargain to "alleviate the unfairness." <sup>99</sup>

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92. 18 U.S.C. §1512 (Supp. IV 1986).

93. Glanzer, *supra* note 63, at 7.

94. *Id.* (citing, *Charging Most Serious Offenses*, UNITED STATES ATTORNEY'S MANUAL § 9-27.310 (1980)). [hereinafter USAM].

95. Glanzer, *supra* note 63, at 7 (citing, USAM § 9-27.320 (1980)).

96. *Id.*

97. Glanzer, *supra* note 63, at 7.

98. *Id.*, Glanzer Notes: For example, if a defendant-government official received or solicited cash from someone doing business with the official's government agency, a prosecutor could charge him with illegally obtaining a gratuity, 18 U.S.C. §201(f)-(i), which carries a two year potential term of imprisonment and/or a fine. This same defendant could be charged with conspiracy to defraud the United States, 18 U.S.C. §371, with a potential five year term of imprisonment and/or fine; or with bribery, 18 U.S.C. §201(b)-(e), with a potential 15 year term of imprisonment and/or fine; or with a Hobbs Act violation, 18 U.S.C. §1951, with a 20 year term of imprisonment and/or fine. The prosecutor could, finally, by pyramiding counts charge all of those crimes together. *Id.*

99. Glanzer, *supra* note 63, at 7.

## 2. The Government Assesses the Risks of Trial and Probability of Conviction

The most elusive element of the government's case against a white collar defendant is proof of intent.<sup>100</sup> Professor Stan Wheeler of Yale Law School testified before the *United States Senate Judiciary Committee On Oversight of the Problem of White Collar Crime* about a six year study at the Yale Law School of white collar crime.<sup>101</sup> The hearings before the Judiciary Committee were in the wake of a massive plea bargain with E.F. Hutton in 1986.<sup>102</sup> Professor Wheeler addressed the question of intent and stated:

[o]ur criminal law requires criminal intent; that's one of the most difficult things to find in many of the complex frauds that characterize white-collar crime. That's undoubtedly one of the reasons why in the *E.F. Hutton* case you find the prosecution of the corporation, but not of the individuals.<sup>103</sup>

Wheeler spoke of the problem of "diffusion of intent."<sup>104</sup> He characterized the circumstances this way:

Oftentimes, in the offenses one looks at, you have a pattern in which A does something, C does something and D does something, no one of them is able to show to have had the requisite criminal intent when they did it, but the end result is an illegal transfer. . .

<sup>105</sup>

The lack of individual intent is the reason individuals were not indicted in the *E.F. Hutton* case.<sup>106</sup> Stephen S. Trott, then Assistant Attorney

100. *Hearings Part I, supra* note 6, at 104.

101. *Id.*

102. *Id.* United States v. The E.F. Hutton Group, Inc., E.F. Hutton & Co., Inc., No. 85-0601, (M.D. Pa. May 2, 1985).

103. *Hearings Part I, supra* note 6, at 104.

104. *Id.*

105. *Id.* at 104, 105.

106. *Oversight of the Problem of White Collar Crime, Hearings Before the Committee on the Judiciary United States Senate, Part III, 99th Cong., 2d Sess. 110-111 (1986)* (testimony of Stephen S. Trott, Assistant Attorney General, Criminal Division and Assistant U.S. Attorney Albert Murray). [hereinafter *Hearings Part III*].

Mr. Trott. All right, and we did not find that the evidence, and this is the collective judgment of the investigative team and the investigators, we did not find that type of

General, Criminal Division, testified before the *Senate Judiciary Committee* regarding the "Assessment of Risks of Trial" in E.F. Hutton.<sup>107</sup> Mr. Trott stated that the case basically (although very complicated) was about check abuses by the company.<sup>108</sup> He conveyed the Department's concern with the scope of trial:

[7],000,000 documents subpoenaed by the grand jury, our estimate is that several hundred thousand would have been needed at trial. The number of authenticating witnesses alone would have exceeded 200. . . . over 100 fact witnesses and a number of experts [would have been presented]. Pretrial discovery in this case would have taken months. . . .<sup>109</sup>

E.F. Hutton finally came to the bargaining table because if they did not, they would be charged with a felony and feared loss of their license from the Securities & Exchange Commission.<sup>110</sup>

evidence against Mr. Ball [then CEO of E.F. Hutton], Mr. Foman, [then Chairman] . . . And so, therefore we did not prosecute them. We will never prosecute anybody if in the judgment of the prosecutors and in the Department of Justice is that the evidence does not establish guilt, and we did not have the quantity of evidence against people at higher levels. . .

Mr. Metzenbaum. Of course it emanated from there.

Mr. Trott. But we cannot indict on the basis of must have, could not have happened unless, or anything else. We have to have hard evidence. *Id.* at 110.

107. *Id.* at 31.

108. *Id.*

109. *Id.* Mr. Trott expressed a "number of serious practical problems" such as; (1) The prospective individuals did not gain personally from their offenses and this defense has been effective in the recent past; (2) The banks (victims of this crime) should have uncovered the fraud and it may be that they turned their heads in which case fraud is not provable; (3) The jury might say "to hell with the banks" and or "there but for the grace of God go I" reflecting the notion that most jurors have overdrawn their accounts at some time; (4) It was likely that one defendant might have successfully severed the case forcing the case to be tried twice; and (5) The facts are very complex and few people understand the facts even after weeks of briefings and news reports. *Id.* at 32.

110. *Id.* at 103.

Mr. Murray. The fact of the matter that they were going to be charged with a felony, and if in fact they were charged with a felony, it might mean the revocation of their license.

Senator Biden. Now, would not the charging of a felony and the application of RICO [the Racketeering Influenced Corrupt Organization Act] have made your case stronger?

Mr. Murray. Not really. . . . Hutton was afraid of being charged with a felony because they were afraid of losing their license. . . . What they wanted was a civil disposition and we took the attitude . . . that in the event they did not want this plea agreement, we were going to trial in a week. *Id.*

The evaluation of these risks is not uncommon and defense counsel should strive to understand the risks the government will face should they go to trial.

According to Deputy Attorney General Lowell Jensen, the government proceeds against an individual or corporation as a matter of law "when the evidence establishes the existence of each element of the offense and the necessary mental state to establish that a person has committed an offense."<sup>111</sup> The Department of Justice adheres to an additional standard of going forward with prosecution only "when we believe that the admissible evidence is of such convincing weight that it will persuade the reasonable factfinder that we have met our burden of proof such that the defendant will be convicted at trial."<sup>112</sup>

*E. Defense Counsel Evaluates the Case:  
A Strategic Task in the Pre-charge Stage*

The question is whether to enter plea negotiations. Defense counsel should wield his information and understanding of the government's case to win early in the negotiation phase and avoid the embarrassment of indictment with strategic pre-charge defense.<sup>113</sup> While this is the optimal situation, it is not always achievable.

1. If Innocence of a Target Must be Maintained

Defense counsel should be aware that maintaining innocence could be very costly. A recent example of maintenance of innocence is the battle between the securities firm of Drexel Burnham Lambert and the United States Attorney for the Southern District of New York. Drexel maintained their innocence through two years of government investigation by the Securities and Exchange Commission and United States Attorney's office.<sup>114</sup> On December 21, 1988, the Drexel Board of Directors agreed to United States Attorney Rudolph Guiliani's demands.<sup>115</sup> The company agreed to plead guilty to six felony counts involving mail, wire, and securities fraud and pay a record \$650 million in penalties.<sup>116</sup> The company estimated that

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111. *Hearings Part I, supra* note 6, at 31.

112. *Id.*

113. K. MANN, *supra* note 1, at 14.

114. Greenwald, *Let's Make a Deal*, TIME, January, 2, 1989 at 84.

115. *Id.* at 85.

116. *Id.*



the investigation cost Drexel \$1.5 billion in lost revenues and another \$175 million in legal and advertising fees.<sup>117</sup>

If the defense forgoes plea negotiations they elevate the possibility that they can convince the government not to charge in a marginal case.<sup>118</sup> If the facts make this approach realistic, beware not to disclose prejudicial facts to the prosecutor that will provide later ammunition in the event an indictment is issued.<sup>119</sup> Michael Mukasey, former government prosecutor, suggests that the defense should narrow the prosecutor's focus on a few relevant issues that are sure winners for the client.<sup>120</sup>

If the defense attorney decides to make a presentation, it should be made to the prosecutor not the grand jury.<sup>121</sup> A presentation is an opportunity to convince the government not to charge or indict. A white collar defense expert and former prosecutor says the legal advice is simple if the client wants to testify before the grand jury: "The client should never testify. Never under any circumstances."<sup>122</sup> He continues, "The most important decision is whether to allow the prosecutor to interview the target at all. That is the legal equivalent of radical, experimental surgery."<sup>123</sup> Only do this if the interview may persuade the prosecutor to drop the indictment.<sup>124</sup>

Consider the possibility of going over the head of the line prosecutor to his supervisors; the U.S. Attorney, or those responsible at the Department of Justice.<sup>125</sup> Often, the organization of the Department is such that most top positions are political appointments. Depending on the political volatility of the charged offense, the more senior appointees may be more sympathetic than a line prosecutor.<sup>126</sup>

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117. *Id.* at 85.

118. K. MANN, *supra* note 1, at 14.

119. Mukasey, *supra* note 55, at 242.

120. *Id.* at 244.

121. Connelly, *supra* note 52, at 20.

122. *Id.*

123. *Id.*

124. *Id.* Cf. Kansas City Times, Nov. 18, 1988, at A-1 where after six hours of interrogation a Kansas City Missouri grand jury cleared a former banker of conspiracy to make a false statement and returned a no true bill. The banker was given an opportunity to present his story to the grand jury and accepted. The United States Attorney Robert Ulrich noted the rarity of a no true bill.

125. Connelly, *supra* note 52, at 20.

126. See generally J. STEWART, THE PROSECUTORS (1987).

## 2. Pre-charge Substantive Defense

The pre-charge defense, if possible, should include substantive argument (aside from procedural) to the government that will eventually lead the government to realize they can not successfully prosecute the client. Kenneth Mann, in his study *Defending White Collar Crime*, states that "[t]he main concern of the substantive defense is to take a given set of facts and derive factual and legal conclusions favorable to one's client."<sup>127</sup> At this phase, the defense attorney should attack the strongest legal theories of the government.<sup>128</sup> *The Guide To White Collar Crime* argues:

Where there are two alternative theories of prosecution being considered by the prosecution . . . it is ill-advised to attack the weaker theory or even flag the issue, [instead attack the strongest theory] in hope of avoiding its use . . . In like regard one should focus only on the provisions which one knows the prosecutor is actively considering. This is no time to "impress" the prosecutor by suggesting statutory patterns he/she may not have uncovered. . . .<sup>129</sup>

In a persuasive mode of presentation, defense counsel may appear to blur the difference between legal and factual particulars. In reality, each element is a distinct objective of the substantive defense.<sup>130</sup> The attorney should draw on sources such as the Constitution, statutes, regulations, and their judicial interpretations to form the substantive perimeter of proof that a provable offense does not exist.<sup>131</sup> This phase of the defense, depending on the case, could last for a year or more.<sup>132</sup> The major reason for this, and one of the significant differences between street and white collar crime, is the length of investigation.<sup>133</sup>

The pre-charge period presents sort of a precharge "adversarial review" of the case against the client.<sup>134</sup> Mann continues, "[t]he more attorneys press the rights of their clients before administrative agencies, the more

127. K. MANN, *supra* note 1, at 183. Mann observes that "During the period of investigation of a potential criminal case, before a decision to charge is made, there may be opportunities for a defense attorney to present substantive legal argument on the issue of the culpability of his client." *Id.*

128. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 20, 21.

129. *Id.*

130. K. MANN, *supra* note 1, at 183.

131. *Id.*

132. *Id.* at 185.

133. *Id.* at 184.

134. *Id.* at 185.

those agencies are forced to apply principles of due process.<sup>135</sup> Some defense attorneys submit written briefs of their legal argument and factual analysis to prosecutors much as one would present to a court.<sup>136</sup> Attorneys treat the prosecutors as if they are the judge in the case.<sup>137</sup> Often the substantive pre-charge brief is devoted to the ambiguities of offense definitions in the statutes making up white collar crimes.<sup>138</sup> The focus on ambiguities may persuade the prosecutor that the facts of the case do not apply to the law. Many of the attorneys in Mann's study cited as examples, "tax fraud, mail fraud, conspiracy to defraud the United States and bribery".<sup>139</sup>

Another factor in the precharge period is the decision not to enter plea negotiations. This is critical because there are "countervailing reasons to negotiate early."<sup>140</sup> The government will be more ready to grant concessions before it completes its investigation.<sup>141</sup> The more the investigation advances the stronger the case becomes.<sup>142</sup> Early in the investigation the government may falsely assume that necessary evidence is inaccessible.<sup>143</sup> (The need to negotiate early will be discussed in greater detail with regard to Cooperation, Pleas, and Immunity.)

The decision of whether to negotiate a plea should be made upon thorough evaluation of the case without waste of time. Mann comments "[The defense attorney] is continually weighing the advantages in holding out against the advantages in conducting early negotiations."<sup>144</sup> As the investigation continues to progress against a client the defense counsel may likely refine his decision of whether to enter plea negotiations.<sup>145</sup> "As the defense attorney receives new information about what the government is likely to discover, he will have to reconsider [the decision to negotiate or not] throughout the pre-charge period."<sup>146</sup>

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135. *Id.*

136. *Id.* at 194.

137. *Id.*

138. *Id.* at 185.

139. *Id.*

140. *Id.* at 14.

141. *Id.*

142. *Id.* at 15.

143. *Id.* at 14.

144. *Id.* at 16.

145. *Id.* at 15.

146. *Id.*

F. *The Risks and Rewards of Negotiating Immunity, Proffers, and Other Such Agreements*

1. Negotiated Immunity and Other Agreements

In cases where there is potentially more than one defendant immunity may be preferred.<sup>147</sup> The defense counsel should consider the ramifications of immunity before the request.<sup>148</sup> The client may have had a low level participation in the crime being investigated.<sup>149</sup> The examination at trial and media attention to statements made by an immunized client may be too great a risk.<sup>150</sup> There is a high probability that the client's reputation in the community will be impinged.<sup>151</sup> The client may be immunized but a professional license may be revoked once the client's conduct is revealed.<sup>152</sup> One defense attorney declares, "The cloak of immunity will forever convince many that [the immunized client] was as much a crook as was [the defendant], but that his slick lawyer kept him out of jail."<sup>153</sup>

There are two kinds of immunity; transactional (immunity from prosecution) and use (guarantee against the use of immunized testimony).<sup>154</sup> Use immunity may be granted formally pursuant to 18 U.S.C. §§ 6001-05 or informally by letter agreement.<sup>155</sup> Use immunity, says Michael Mukasey, "assures that neither a witness's testimony nor the evidentiary fruits of such testimony may be used against him. . . ."<sup>156</sup> The client must understand that he is not protected from a perjury prosecution once granted any kind of immunity.<sup>157</sup> If the client breaches the use immunity agreement by giving false testimony, he can be prosecuted not only for perjury and contempt, but also his truthful immunized testimony may be used against him in a perjury prosecution.<sup>158</sup> In the case of a transactional immunity agreement breach, the client may find his immunized testimony used against him in a

147. Mukasey, *supra* note 55, at 244.

148. Connelly, *supra* note 52, at 22.

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.*

154. Mukasey, *supra* note 55, at 247.

155. *Id.* at 246. See generally, *Principles of Federal Prosecution*, USAM § 9-27.00.

156. MuKasey, *supra* note 55, at 246.

157. Glanzer, *supra* note 63, at 8.

158. Mukasey, *supra* note 55, at 247 (citing, *United States v. Apfelbaum*, 445 U.S. 115 (1980)).

prosecution for the substantive crimes disclosed in the testimony.<sup>159</sup> This depends on the form of the agreement.<sup>160</sup>

In *United States v. E.F. Hutton*, fifty seven people out of a possible 2,500 were granted non-prosecution agreements.<sup>161</sup> The following exchange between Senator Metzenbaum and Assistant U.S. Attorney Murray are illustrative of a prosecutor's thought process:

Senator Metzenbaum. Under what circumstances was it necessary that you grant them immunity?

Mr. Murray. Because they were attorneys and they exercised their fifth amendment privilege against self-incrimination. They would not have testified, they would not have given us the evidence regarding the actual transaction occurring. There was no alternative. There was either granting them letter immunity or not having their testimony.<sup>162</sup>

The government prosecutors are obligated to follow Department of Justice policies concerning cooperation and immunity.<sup>163</sup> A government attorney, with supervisory approval, may enter into a non-prosecution agreement in exchange for the person's cooperation when that cooperation appears to be necessary to the public interest, and there is no other method of gaining cooperation.<sup>164</sup> The *United States Attorney's Manual (USAM)*

159. Mukasey, *supra* note 55, at 247.

160. *Id.*

161. *Hearings Part III, supra* note 106, at 106.

162. *Id.* at 106. Senator Biden also questioned Mr. Murray about immunity.

Senator Biden. Why did you immunize Bacon before you got testimony?

Mr. Murray. We did not do that. We had proffers from Bacon. We knew what the activity was--

Mr. Biden. Would you submit that for the record?

...

Mr. Murray. We did not have any written testimony. We knew--

Senator Biden. Did you have any oral testimony from him?

Mr. Murray. I believe we had a proffer from Peter Driscole, I believe who was his attorney.

Senator Biden. It must be written down somewhere, right?

Mr. Murray. No

Senator Biden. In your records? You did not keep a record of that?

Mr. Murray. No; the way we do things is that we may get an oral proffer that we do not keep a record of, and then what happens, when we formalize that in the immunity agreement, we put all that in writing . . .

*Id.*

163. See *Principles of Federal Prosecution, USAM* §9-27.600 *et. seq.*

164. *Id.* at §9-27.610.

further states that cooperation may be necessary to an investigation and because of the person's involvement, they may refuse to cooperate based on their Fifth Amendment right not to incriminate themselves.<sup>165</sup> The prosecutor, according to USAM, has four approaches available to "render the privilege inapplicable or to induce its waiver."<sup>166</sup>

First, if time permits, the person may be charged, tried, and convicted before cooperation is sought. Once convicted, the person will often no longer have a valid privilege to refuse to testify, and will have strong incentive to tell the truth to reduce the severity of his own sentence.<sup>167</sup> Second, the person may be willing to cooperate if the charges or potential charges are reduced in number or degree.<sup>168</sup> This will be discussed in detail below. Third, use immunity: this method of securing the persons cooperation is by court order to testify notwithstanding their invocation of the Fifth Amendment.<sup>169</sup> The final method of securing cooperation is by non-prosecution agreement.<sup>170</sup> It should be recognized that the agreement sometimes applies only to the jurisdiction of the particular U.S. Attorney who made the agreement.<sup>171</sup>

## 2. Proffer Negotiations: The Ritualistic Dance Between Defense Counsel and the Prosecutor.

A proffer is simply an offer of proof. An offer of proof, however, by a client to the government can often be complicated. The "dance" is described by Vincent J. Connelly and Tyrone C. Fahner, white collar defense experts and former prosecutors.<sup>172</sup> The lawyer requests assurance that his client is only a witness.<sup>173</sup> The prosecutor replies that no such commitment is possible at the present stage of the investigation.<sup>174</sup> The lawyer requests immunity for his client, whereupon he will cooperate fully and divulge his

165. *Id.*

166. *Id.*

167. *Id.* This method is referred to as "flipping" and was extensively used in Watergate. See *Hearings Part III, supra* note 105, at 103, 104.

168. USAM, *supra* note 163, at §9-27.610.

169. *Id.*

170. *Id.* See USAM § 9-27.610 to describe the conditions that must be met before such an agreement is made.

171. Mukasey, *supra* note 55, at 248.

172. Connelly, *supra* note 52, at 21.

173. *Id.*

174. *Id.*

knowledge about the activity in question.<sup>175</sup> The prosecutor will then suggest a written proffer (offer of proof) (some U.S. Attorney's offices only accept oral proffers) by the defense so the government can attempt to verify the client's information.<sup>176</sup>

Connelly and Fahner say the attorney and client face a dilemma; failure to make a proffer risks others cooperating first making the clients "valuable" information less valuable.<sup>177</sup> On the other hand, the client's conduct may not withstand careful scrutiny.<sup>178</sup> Another possibility is that the co-perpetrators may not cooperate in which case the government may not have the information necessary to indict the client.<sup>179</sup>

Kenneth Mann maintains, "The art in making a proffer is to convince the government of the value of the information without actually divulging the information."<sup>180</sup> Connelly and Fahner suggest creating a "Chinese wall" around the proffered testimony.<sup>181</sup> It is unlikely the prosecutor will agree to an interview completely off the record unless the prosecutor is "inexperienced, foolish or needy."<sup>182</sup> Defense counsel should request that another assistant prosecutor, one detached from the investigation, evaluate the proffered information.<sup>183</sup> The argument is that the assistant in charge of the investigation cannot evaluate the proffer of a witness in uncertain status without its affecting the direction of the investigation.<sup>184</sup> The detached assistant can evaluate the proffer without revealing the contents to those in charge of the investigation.<sup>185</sup> The attorney get a written commitment that if the proffered information is valuable the client will cooperate and receive immunity or some other concession by the government.<sup>186</sup> Should the proffered information reveal that the client's conduct is "too egregious to ignore," the proffer is rejected.<sup>187</sup> The prosecutor will not have the benefit of the client's testimony.<sup>188</sup>

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175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.* at 22.

179. K. MANN, *supra* note 1, at 16.

180. *Id.* at 139.

181. Connelly, *supra* note 52, at 22.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

If the prosecutors act honorably, the client cannot lose. At best, he will receive a concession such as immunity.<sup>189</sup> At worst, he retains the same status prior to the proffer without the prosecutor benefiting from the information.<sup>190</sup>

## V. THE DEFENSE STRATEGY OF PLEA NEGOTIATIONS IS DAMAGE CONTAINMENT

After plea negotiations, the prosecutor will know the defense attorney thinks his client is guilty of at least something.<sup>191</sup> Together, counsel and client should discuss the minimally acceptable boundaries of the negotiated plea.<sup>192</sup> In *Santobello v. New York*,<sup>193</sup> the Supreme Court recognized the significant role plea bargaining plays in the administration of justice. In 1977 the U.S. Supreme Court reaffirmed that position in *Blackledge v. Allison*,<sup>194</sup> and stated "Whatever might be the situation in an ideal world, the fact is that the guilty plea and often the concomitant plea bargain are important components of this country's criminal justice system. Properly administered, they can benefit all concerned."<sup>195</sup>

### A. Prosecutorial Discretion and Plea Agreements Under the Sentencing Reform Act of 1984 and Federal Sentencing Guidelines

This Comment is not a discussion of "how to" apply the Guidelines. However, in light of the recent Supreme Court decision upholding the constitutionality of the Guidelines<sup>196</sup> and their appearance of permanence, a cursory discussion is appropriate. The Guidelines were promulgated by the U.S. Sentencing Commission pursuant to the Sentencing Reform Act of 1984.<sup>197</sup> The reform is a move to a more determinate form of sentencing. Judge William W. Wilkens Jr., Chairman of the U.S. Sentencing Commission and Circuit Judge of the United States Court of Appeals for the

189. *Id.*

190. *Id.*

191. K. MANN, *supra* note 1, at 14.

192. Glanzer, *supra* note 63, at 8.

193. 404 U.S. 257, 260 (1971).

194. 431 U.S. 63, 71 (1977)

195. *Id.*

196. *Mistretta v. U.S.*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

197. 18 U.S.C. §3551 (1982 & Supp. 1988).



Fourth Circuit, states that the process of Guideline application involves an average of nine steps.<sup>198</sup>

Judge Wilkens states that "[p]lea bargaining [under the guidelines] remains an essential component of the criminal justice system."<sup>199</sup> The Commission did not suggest "radical changes" in the plea bargaining process because of the possibility of "undermining the effective administration of the system. . . ."<sup>200</sup> Under Fed. R. Crim. P. 11(e),<sup>201</sup> [hereinafter Rule 11] the prosecution and defense may agree to recommend a particular sentence to the court or agree that a prison sentence will not exceed a certain duration. Rule 11(e) also allows the prosecutor and defense to agree on a particular charge the defendant will plead in return for other charges being dismissed or not pursued. The three types of bargains as reflected in Rule 11(e)A, B, and C are not mutually exclusive and can be used together in any combination. Charge bargaining is more common than sentence bargaining according to Judge Wilkens.<sup>202</sup> While the Guidelines Policy Statements generally track Rule 11<sup>203</sup> they also go further than "a reaffirmation of the existing law and practices."<sup>204</sup> For example, the policy statements suggest that a judge, in accepting an agreement for the dismissal of charges or an agreement not to pursue potential charges, should not accept the agreement unless the court determines on record that the remaining charges "adequately reflect the seriousness of the actual offense behavior and that [they] . .

198. Wilkens, *supra* note 30, at 185.

First, the judge determines the offense in Chapter Two [of the Guidelines] most applicable to the statute of conviction . . . Next, the judge determines the base offense level in addition to any appropriate specific offense characteristics listed under the guideline. Third, if appropriate, the judge makes adjustments for special victim circumstances, the defendant's role in the offense, and obstruction of justice. If there are multiple counts of conviction, the preceding steps are repeated, the counts are grouped and the offense level is accordingly adjusted. If appropriate, the judge makes an adjustment for the defendant's acceptance of responsibility for his conduct, resulting in a total adjusted offense level. Next, the judge determines the defendant's criminal history category and any related adjustments under Chapter Four [of the Guidelines]. The judge then uses the sentencing table to determine a guideline range that corresponds to the total offense level and criminal history category. Except in atypical cases, sentences should be within the guideline range.

*Id.*

199. Wilkens, *supra* note 30, at 186.

200. *Id.* at 188.

201. FED. R. CRIM. P. 11 embodies the rules of federal criminal plea procedure by which the courts, government prosecutors, and defense counsel function.

202. Wilkens, *supra* note 30, at 186.

203. *Id.* at 189. See GUIDELINES at §§ 6B1.1-6B1.4.

204. Wilkens, *supra* note 30, at 189.

will not undermine the statutory purposes of sentencing.<sup>205</sup> The court may not accept a plea agreement that departs from the guideline sentencing range unless it has justifiable reasons.<sup>206</sup> The Department of Justice, Criminal Division promulgated the *Prosecutors Handbook on Sentencing Guidelines* as direction for government prosecutors to observe.<sup>207</sup> The Department of Justice has attempted to advise their prosecutors how to apply these Guidelines in the day to day operation of criminal law enforcement. The *Prosecutors Handbook* lends insight as to the perceptions of the Department and the manner in which they plan to apply the Guidelines. The *Prosecutors Handbook* addresses the issues of sentence and charge bargains.<sup>208</sup>

205. *Id.* See GUIDELINES at § 6B1.2.

206. Wilkens, *supra* note 30, at 189; GUIDELINES, § 6B1.2(b).

207. United States Dep't Of Justice Criminal Division, PROSECUTORS HANDBOOK ON SENTENCING GUIDELINES (1987).

208. *Id.* The PROSECUTORS' HANDBOOK states:

A significant problem with the Commission's policy statements on plea bargains which include a specific sentence under Rule 11(e)(1)(B) and (C), § 6B1.2(b) and (c), is that the standard they set forth for acceptance or rejection of a sentence that departs from the guidelines appears to be of doubtful validity under the [Sentencing Reform Act] . . .

Nevertheless, the Criminal Division has concluded that the apparent authority for a judge to depart from the guidelines pursuant to the Commission's policy statements, § 6B1.2(b) and (c), for plea agreements involving a particular sentence under Rule 11(e)(1)(B) and (C) is at variance with the more restrictive departure language of 18 U.S.C. § 3553(b) and that, consequently, these policy statements should not be used as a basis for recommending a sentence that departs from the guidelines. . . . Although Congress intended that courts exercise "meaningful" review of charge reduction plea agreements, it is our view that moderately greater flexibility legally can and does attach to charge bargains than to sentence bargains. While, as indicated previously, the Commission's quite liberal policy statements on sentence bargaining appear to be inconsistent with the controlling (and stricter) statutory departure standard, the statutory departure standard is not applicable in the charge-bargain context. In the absence of an offense "committed" by the defendant (e.g., where no charge is brought), there is no applicable guideline sentence from which to depart. See 18 U.S.C. § 3553(b) (emphasis added).

Nevertheless, in order to fulfill the objectives of the Sentencing Reform Act prosecutors should conduct charge bargaining in a manner consistent with the direction in the applicable policy statement, § 6B1.2(a) . . . In our view, this translates into a requirement that *readily provable* serious charges should *not* be bargained away. The sole legitimate ground for agreeing not to pursue a charge that is relevant under the guidelines to assure that the sentence will reflect the seriousness of the defendant's "offense behavior" is the existence of real doubt as to the ultimate provability of the charge.

This discussion supports the conclusion that *greater leeway should be accorded the prosecutor in charge bargaining than in sentence bargaining. However, in neither case should the purposes of the Sentencing Reform Act be undermined.*

Guidelines or not, federal government prosecutors must use discretion and adhere to certain principles when making the decision to negotiate a plea with defense counsel.<sup>209</sup> Defense counsel should use the criteria set forth by the Department of Justice and the Sentencing Commission to negotiate the client's sentence exposure downward.

*B. Tactical Strategies Defense Counsel May Employ  
In This Phase Of Negotiation*

The Sentencing Commission decided white collar offenders should be incarcerated more regularly than in the past.<sup>210</sup> Defense counsel should be aware of this decision and attempt to downplay the client's role from the outset of negotiations. As previously discussed, the goal at this stage is damage containment. The applicable statutes have been researched prior to this stage. The purpose at this phase is to "find a lesser offense whose imposition would serve the purpose of a plea, yet whose punishment would result in a less onerous term of imprisonment, or less serious punishment than would be proposed by a prosecutor."<sup>211</sup>

This strategy must conform with the Guidelines in that the charge finally pleaded must adequately reflect the seriousness of the offense conduct.<sup>212</sup> Furthermore, the lowered sentence exposure must be justifiable under Rule 11. In other words, defense counsel should try to give the prosecutor a lesser offense with less possible prison time that includes offense conduct similar to that charged. An example would be avoiding a

*Id.* at 19-24 (emphasis added).

It is possible that the Department of Justice will rethink the above analysis as it interprets *Mistretta v. U.S.*, 57 U.S.L.W. 4102 (U.S. Jan. 18, 1989).

209. USAM at § 9-27.420 must be adhered to in making plea bargain determinations. Considerations to be Weighed; § 9-27.420, are as follows:

The defendant's willingness to cooperate in the investigation or prosecution of others; The defendant's history with respect to criminal activity; The nature and seriousness of the offense or offenses charged; The defendant's remorse or contrition and his/her willingness to assume responsibility for his/her conduct; The desirability of prompt and certain disposition of the case; The likelihood of obtaining a conviction at trial; The probable sentence or other consequences if the defendant is convicted; The public interest in having the case tried rather than disposed of by a guilty plea; The expense of trial and appeal; and The need to avoid delay in the disposition of other pending cases.

*Id.*

210. Wilkens, *supra* note 30, at 188. See GUIDELINES at § 3B1.3 call for an increase of 2 levels if the defendant "abused a position of public or private trust, or used a special skill, in a manner that significantly facilitated the commission or concealment of the offense. . . ."

211. Glanzer, *supra* note 63, at 41.

212. GUIDELINES at § 6B1.2.

plea to tax evasion which carries a five year sentence and or a fine of up to \$100,000.<sup>213</sup> Instead, the prosecutor may agree to accept a guilty charge of filing a false tax return which carries a three year sentence and or a fine of \$100,000.<sup>214</sup> Another example would be instead of a guilty plea to making a false statement to an agency of the United States under section 1001 of title 18 United States Code, the client may be allowed to plead to a misdemeanor count of making a false statement to the appropriate agency under the agency's enabling statute.<sup>215</sup>

Another possible tactic is to persuade the prosecutor to accept administrative sanctions by the appropriate federal agency. This is a remedy that E.F. Hutton sought in 1986 and the government did not accept.<sup>216</sup> Depending on the amount of leverage a client is able to exert upon the government, the client might be able to negotiate non-criminal sanctions or no sanctions at all. The more leverage the defense brings to bear the better the result for the client. A recent example, although not of the white collar variety, was General Manuel Antonio Noriega's rejection of the "deal" offered him by the U.S. government. The proposed "deal" was that Noriega would resign from office and the U.S., in turn, would drop the indictment against him.<sup>217</sup> Another example is former Vice-president Spiro T. Agnew, who held out for the best possible deal before his resignation from office.<sup>218</sup> Resignation is certainly a better alternative than prison. The National Law Journal reports that this leverage is exhibited more often by banking officials accused of currency reporting violations, insider trading, and other securities violations.<sup>219</sup>

Depending on whether a corporation is involved, defense counsel may attempt a "Westinghouse" plea if *both* corporation and individual officers and/or employees are involved as targets. With this type of arrangement, individual innocence is preserved. The "Westinghouse" plea is named after a case in which Westinghouse Electric Corporation agreed to plead guilty to felony charges and pay a fine, and in return the government agreed not to prosecute the individuals who participated in the crime.<sup>220</sup> In 1986, the Justice Department entered into a "Westinghouse" type plea in *United States*

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213. Glanzer, *supra* note 63, at 41; 26 U.S.C. § 7201 (1982 & Supp. 1988).

214. *Id.* 26 U.S.C. § 7206 (1982 & Supp. 1988).

215. Glanzer, *supra* note 63, at 41.

216. *Hearings Part III, supra* note 106, at 108.

217. NATIONAL LAW JOURNAL, June 13, 1988, at 3.

218. *Id.*

219. *Id.*

220. J. STEWART, THE PROSECUTORS 36 (1987).

*v. E.F. Hutton*.<sup>221</sup> Recently, a "Westinghouse" type plea was denied in *United States v. Sunstrand Corp.* which resulted in a \$115 million criminal fine.<sup>222</sup> The company agreed to the plea but certain company officials were still under investigation which indicated the government's rejection of a "Westinghouse" type plea.<sup>223</sup> In a "Westinghouse" situation the defense strategy is to prevent the government from making a case against the individuals, as in *E.F. Hutton*. However, the corporation cannot escape criminal liability in this arrangement.

Defense may consider cooperation with the government at either the pre-charge or post indictment stage (see above). Drexel Burnham Lambert, as part of their plea agreement, must cooperate with the government in their present investigation of Drexel junk bond mastermind Michael Milken.<sup>224</sup> As previously discussed, there are circumstances where the government will be willing to grant concessions in return for the cooperation of the client. The prior discussion concerned the concession of immunity. It is conceivable that the concession will be reduced charges or reduction in the number of counts sought by the prosecutor. The Guidelines and Sentencing Reform Act of 1984 address the importance of cooperation.<sup>225</sup> Congressional intent is expressed in section 994 of title 28 United States Code and directs the sentencing commission as follows:

[a]ssure that the guidelines reflect the general appropriateness of imposing a lower sentence than would otherwise be imposed, including a sentence that is lower than that established by statute as a minimum sentence, to take into account a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense.<sup>226</sup>

The court is not required to accept the plea agreement according to Rule 11(e). Nonetheless, some experts suggest a method that will effectively tie the court's hands. A grant of use immunity is built into the agreement such that the government would immunize the defendant if the court

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221. *Hearings Part III, supra* note 106, at 35; *United States v. The E.F. Hutton Group, Inc., E.F. Hutton Co., Inc.*, No. 85-0601 (M.D. Pa. May 2, 1985). While the plea agreement does not say "this is a Westinghouse plea," the fact that the individuals were not pursued and the corporation pled guilty indicates that type plea.

222. *N.Y. Times*, Oct. 13, 1988, at 1, col. 6.

223. *Id.*

224. Greenwald, *supra* note 114, at 85.

225. Wilkens, *supra* note 30, at 196.

226. *Id.* at 197. The GUIDELINES approach to cooperation accomplished in GUIDELINES at § 5K1.1.

rejected the agreed upon sentence under Rule 11(e)(1)(C).<sup>227</sup> However, a question does arise as to whether this type of agreement will be feasible under the Guidelines to the extent it undermines the purposes of sentence reform.

Defense counsel should also consider the likelihood of a subsequent state prosecution; often a violation of federal law is at the same time a violation of state law. The defense should include as part of the bargaining process assurances that "the federal prosecutor will act to obviate a subsequent state prosecution, or arrange that a dual plea is entered in both state and federal court in a global settlement on which punishment will be concurrent."<sup>228</sup> If the prosecution is first sought in the state court and a federal penalty could attach, the Petite<sup>229</sup> policy applies "as a self-imposed policy of the Department of Justice, to forbid subsequent federal prosecution on the same substantive offense or offenses without special authority."<sup>230</sup>

Any plea agreement should give careful consideration to parallel civil proceedings.<sup>231</sup> A parallel proceeding is a "simultaneous adjudicative [proceeding] that [arises] out of a single set of transactions and are directed against the same defendant or defendants."<sup>232</sup> The Supreme Court permitted parallel proceedings provided the particular agency and prosecutor are "[p]ursuing independent inquires for legitimate purposes rather than to circumvent the limitations on civil discovery."<sup>233</sup> The Supreme Court has held that if a civil defendant is compelled to testify, such testimony cannot be used later to incriminate him without violating the Fifth Amendment.<sup>234</sup> Several circuits have held that when "a civil plaintiff invokes the Fifth Amendment privilege in response to discovery requests by the defendant, the court should balance the competing interests of the parties."<sup>235</sup> Defense counsel should be aware of this possibility and act accordingly.

227. Glanzer, *supra* note 63, at 42.

228. *Id.*

229. *Petite v. United States*, 361 U.S. 529 (1960). See USAM § 9-2.142. The Department of Justice policy is against duplicative federal/state prosecutions. Specifically, there should not be a federal trial after a state trial for the same act or acts unless there are compelling reasons.

230. Glanzer, *supra* note 63, at 44 (citing, *Petite v. United States*, 361 U.S. 529 (1960)).

231. Glanzer, *supra* at note 63, at 44.

232. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 119.

233. *Id.* (citing, *United States v. LaSalle National Bank*, 437 U.S. 298 (1978)).

234. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 119 (citing, *Pillsbury Co. v. Conboy*, 459 U.S. 248 (1983)).

235. M. PICKHOLZ, S. HORN & J. SIMON, *supra* note 4, at 120 (citing, *Wehling v. Columbia Broadcasting System*, 608 F.2d 1084 (5th Cir. 1979); *Black Panther Party v. Smith*, 661 F.2d 1243 (D.C. Cir. 1981), *vacated with instructions to dismiss*, 458 U.S. 1118 (1982)).

Defense counsel in a white collar case should consider the later civil effect of a guilty plea. Seymore Glanzer, in *Criminal Justice*, cites authority for the proposition that "a guilty plea has collateral estoppel effect in a subsequent litigation that involves a common material fact."<sup>236</sup> This could have a severe impact on an individual or corporate client. It is possible that defense counsel, in the context of a global settlement, could negotiate with other governmental agencies besides the prosecutor; perhaps the Securities and Exchange Commission or Internal Revenue Service will settle actions against the client in return for a criminal plea to prison and/or fines.

Mr. Glanzer observes that disgorging large sums "is becoming counter-productive."<sup>237</sup> The media coverage of such payments does not serve the defense well since the media portrays to the public that the plea agreement was purchased. The perception also prevails that "the greater the dollar amount paid the more money the defendant actually stole."<sup>238</sup> In an attempt at such a strategy Drexel Burnham Lambert, Inc. reportedly offered \$100 million to settle with the government; they were refused.<sup>239</sup> In December 1988, however, Drexel reportedly agreed to plead guilty to criminal wrongdoing and pay a record \$650 million fine of which \$350 million will be set aside for Drexel's alleged victims.<sup>240</sup>

Defense counsel should contemplate a waiver of indictment (of course this assumes that one has yet to issue) and plead to an information carefully drafted by the defense and prosecution.<sup>241</sup> This will give defense counsel an opportunity to paint a picture without the "pejorative language that could have prejudicial effect" states former prosecutor Glanzer.<sup>242</sup> The aim is a reduction of charges in return for the waiver of the right to be indicted.

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236. Glanzer, *supra* note 63, at 44 (citing, *Gray v. Commissioner*, 708 F.2d 243, 246 (6th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984)).

237. Glanzer, *supra* note 63, at 41.

238. *Id.*

239. NATIONAL LAW JOURNAL, Oct. 17, 1988 at 21.

240. Greenwald, *supra* note 114, at 85.

241. Glanzer, *supra* note 63, at 40.

242. *Id.*

VI. THE POWER OF DISCRETION APPROACHED WITH THE SKILL  
OF A NEGOTIATOR AND THE VIGOR OF AN ADVOCATE

Stanley S. Arkin, respected white collar defense expert, comments on the *E.F. Hutton* plea bargain in the *New York Law Journal*.<sup>243</sup> One of Arkin's conclusions is that defense counsel should be wary of calling the prosecutor's bluff. His point is in response to a *Wall Street Journal* article that states "[b]luffs, harried negotiations, and plain luck often determine the outcome of complex white collar crime prosecutions."<sup>244</sup> Mr. Arkin asserts that "[t]here are cases, and more than a few, where a government bluff may, and in my view does, affect the outcome of serious prosecutions."<sup>245</sup> Arkin's interpretation of the *E.F. Hutton* plea agreement is that it is the result of a bluff by the government prosecutors.<sup>246</sup> Arkin continues, "[p]ersonal liberty may be at stake and in any event, what is at issue is usually apt to be far more portent than mere money damages."<sup>247</sup> Mr. Arkin surmises that the reason for the behavior of government prosecutors is that they are in the early stages of their careers "where ambition may affect judgments", there is a desire for publicity among supervising prosecutors, and political aspirations motivate.<sup>248</sup> Arkin notes these aggressive qualities do have a positive influence in that "bad people [are vigorously prosecuted] for bad acts."<sup>249</sup> However, he observes, if the prosecutors are bluffing there exists a "danger of grave injustice."<sup>250</sup> Mr. Arkin offers no solution to the "risks of calling the prosecutors bluff" because in reality "[w]e are left to rely largely upon the decency of individual prosecutors and their chiefs."<sup>251</sup>

Contrasted to Mr. Arkin's opinion is *Wall Street Journal* reporter James B. Stewart's as expressed in his book *The Prosecutors*.<sup>252</sup> Stewart declares:

In popular American literature, it is always the criminal defense lawyer who is the hero. Who remembers the name of the

243. Arkin, *Bluff--An Indefensible Stratagem by a Prosecutor*, N.Y.L.J., May 6, 1986. See also, *Hearings Part III*, *supra* note 105, at 212, 213.

244. *Id.* (citing, *Hutton Overdrafting Case Was Settled Only After Some Miscues On Both Sides*, *Wall St. J.*, April 9, 1986).

245. See generally Arkin, *supra* note 243.

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. See generally J. STEWART, *supra* note 220.



prosecutor in the Perry Mason television series? . . . it is the prosecutor who wields the greater power, undergoes the greater stress, is faced with more intractable dilemmas, and in the end is the keeper of the flame of both justice and order.<sup>253</sup>

Stewart argues that the system of checks and balances affect prosecutors as well. "There are limits to their power--judges, defense lawyers, the Bill of Rights and the scrutiny of the press. Yet they exercise enormous discretion. The decision to prosecute is one of the most solitary and unfettered exercises of power in the American political system."<sup>254</sup>

An able white collar criminal defense attorney will hopefully be able to detect a prosecutor's bluff and utilize one of numerous maneuvers to successfully defend a client. Even though the odds are generally against an acquittal, there is always trial.

M. SHAWN ASKINOSIE

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253. *Id.* at 9.

254. *Id.* at 9-10.