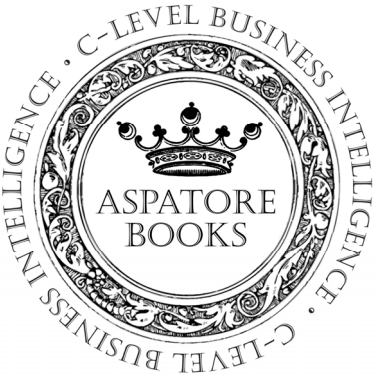
INSIDE THE MINDS

White Collar Law Client Strategies

Leading Lawyers on Representing Corporations and Individuals in White Collar Criminal Matters



BOOK & ARTICLE IDEA SUBMISSIONS

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

WRITING & EDITORIAL ASSISTANCE

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

ISBN 978-1-59622-761-3
Library of Congress Control Number: 2007929555

For corrections, updates, comments or any other inquiries please email editorial@aspatore.com.

First Printing, 2007
10 9 8 7 6 5 4 3 2 1

Client Relations in White Collar Crime Investigations

Raymond M. Brown

Partner

Greenbaum, Rowe, Smith & Davis LLP

I have been practicing criminal law for more than three decades. During that time, I have defended charges ranging from municipal court trespasses to crimes against humanity in international courts. Today, my practice consists almost exclusively of representing persons or corporations facing white collar crime[1] allegations and/or civil fraud claims that threaten to slip over the cliff into the realm of criminal charges. The special challenge posed by white collar criminal cases involves persuading business clients and clients with leadership experience to realistically face the legal challenges that confront them.

People facing white collar crime investigations often perceive themselves as different from those facing charges of "ordinary"[2] crime. For many potential subjects or targets of white collar investigations, the word "crime" conjures images of guns, bank robberies, drugs, and assault. These potential clients perceive themselves (and are often seen by others) as honest and respectable businesspeople or public servants. They can be very slow to understand that there are legal violations consisting of a culpable mental state combined with a wrongful act that can lead to a criminal conviction even for a person with a hitherto blameless life.

Consequently, when the subject or target of a white collar criminal investigation recognizes the need for legal services, the lawyer's first task is to invade that cocoon-like state of denial into which the client has retreated. That invasion is more difficult if there is no prior attorney-client relationship. It means that at an early stage of a relationship which should ideally be characterized by gentle confidence-building discourse, there is a painful effort to explore issues that the client has been unable or unwilling to confront. However daunting or unpleasant this early interaction might be, it is the *sine qua non* of successful representation since no strategy can be effective if it is not based on a sophisticated assessment of unpleasant facts.

[1] This is not the place for an extended discourse on the definition of white collar crime. For purposes of this article, it consists of crimes stemming from business, professional, governmental, or public sphere activities.

[2] "Ordinary" crime is distinguished from violations of international humanitarian law or human rights violations. It can include, however, transnational crimes.

Adding Financial Value through Compliance

The idyllic solution to this difficult task of assertively challenging a client in the early stages of a relationship is to get to know them before any investigation has begun. This is not as unrealistic as it as it might seem. Educating clients about prophylactic measures, which can be taken before investigations begin, provides opportunities for the lawyer to build a relationship with the client and for the client to minimize the consequences of compliance errors.

The Department of Justice has issued a number of formal documents over the last several years announcing guidelines for dealing with the prosecution of "business organizations."[3] These DOJ guidelines, as well as those from other agencies,[4] have articulated a government policy to determine fines and penalties as well as assess the decision to prosecute or not prosecute based in part on the overall compliance record of the business. [5]

---

[3] The most recent of these is the McNulty Memorandum (Memorandum from Paul J. McNulty, Deputy Attorney General (Dec. 12, 2006), available at http://www.usdog.gov/dag/speech/2006/mcnulty_memo.pdf), the most controversial was the Thompson Memorandum (Memorandum from Larry D. Thompson, Deputy Attorney general, to Heads of Department Components and United States Attorneys (Jan. 20, 2003), available at http://www.usdog.gov/dag/cftf/corporate_guidelines.htm). See also the predecessor Holder Memorandum (Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to All Component Heads and United States Attorneys (June 16, 1999), available at http://www.usdog.gov/criminal/fraud/policy/Chargingcorps.html) and the McCallum Memorandum which succeeded it (Memorandum from Acting Deputy Attorney General Robert D. McCallum, Jr. to Heads of Department Components and United States Attorneys 1 (Oct. 21, 2005) available at http://www.usdog.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm.)

[4] See for example The Seaboard Report, Securities Exchange Act Of 1934 Release No. 44969 / October 23, 2001 Accounting And Auditing Enforcement Release No. 1470 / October 23, 2001 Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions.

[5] See Exhibit attached which depicts the "investigative continuum" which has evolved since "Enron." In determining the outcome of any investigation, the government has articulated certain criteria, which will affect its decisions. The government has, however, generated enormous controversy with its demands, pursuant to the Thompson and McNulty Memoranda, that corporate defendants waive lawyer-client, work product and other privileges as a condition of lenient treatment. The literature on this subject is vast but for starters see the observations of Judge Kaplan in US v Stein, 435 F. Supp 2, 330 (SDNY 2006) known as Stein I and US v Stein 2006 WL 2060430 (SDNY 2006), Stein II. For the evolving Congressional response see Senator Specter's Attorney-client Privilege Protection Act of 2006.

It is therefore extremely important for businesses and their owners, officers and directors to recognize their regulatory responsibilities, and to comply with the best of their ability. Compliance is often difficult and may be seen by businesspersons as enmeshing them in red tape, but when the government becomes dissatisfied with a company for a history of non-compliance, the consequences can be serious.

It is important to note that highly regulated businesses are extremely likely to confront challenges of this kind. For example, in industries subject to OSHA requirements, the government has been known to take a hard stance against companies with a history of even minor workplace violations. EPA[6] regulations represent another arena in which the government is growing increasingly aggressive about regulatory policing and where there is a reward for business and professional people who work with counsel to anticipate problems and form relationships that can withstand the pressure of full-blown criminal investigations.

This aggressive regulatory environment emphasizes the desirability of having an early lawyer-client relationship. As a result, the best way to add direct financial value for a company is to convince its executives and/or directors of the importance of preparedness. Spending money on compliance today means they will have a huge advantage should a major investigation take place. As former Judge and SEC Enforcement Chief Stanley Sporkin noted, "The cost of an investigation and prosecution will buy you a lot of compliance."[7]

Building Rapport with Your Client

An ongoing relationship with a client (or at least one that begins before the government announces its intention to investigate) has other advantages. It facilitates a more aggressive approach to other non-legal considerations that require attention even before strategy is fully developed. While a criminal

[6] See "Environmental Law: A Non-toxic Ounce of Prevention, Notes on Handling Enron Era Environmental Investigations," Raymond M. Brown and David Roth 186 NJLJ 924 December 6, 2006. Note that this article was published one week before the promulgation of the McNulty memorandum. The compliance principle remains the same however.

[7] "The Hot Seat," Stephanie Martz, Column, 29-AUG Champion 36 2005

investigation is looming, the client still needs to maintain a business. Thus, it is counsel's duty to help the client develop a sound legal strategy while maintaining the business whenever possible. Counsel may strive to accommodate the business needs of the company, but the client must be prepared to make difficult choices. How, for example, should a client decide whether to terminate an employee who might have made a mistake in judgment or even committed a civil wrong or criminal violation, causing the investigation? This is a judgment that must often be made before a complete strategy can be formulated. It is essential that the client recognize that such judgments can only be made after conferring with counsel. This can be a difficult lesson for businesspersons and public officials who have long been accustomed to making decisions for and by themselves.

A similar principle applies to making public statements.[8] There may be times when a client is allowed to make a public statement or otherwise address the media, but at other times, the client should not be allowed to respond no matter what criticisms appear in the press. Successfully negotiating the press issue involves knowing when it is appropriate to accommodate the client's inclination to respond and when the client must be educated about the value of silence.

The lawyer is, however, frequently called upon to represent persons with whom there is no preexisting relationship. When that first meeting occurs, it is critical to take time to explain to the client the principle that will govern future interactions: the attorney-client relationship. In a formal sense, the attorney-client relationship is a powerful tool, as it involves an oath of confidentiality by which a client's secrets and confidences must be respected. In an informal sense, it should involve a bond, which opens the client to candid and necessary exploration of uncomfortable issues. I always take time, even with my most educated clients, to remind them of the meaning (and limits) of the privilege and to explain how I intend to protect whatever information I am given.

[8] See Gentile v State Bar of Nevada, 501 US 1030, 1043 (1991) for Justice Kennedy's suggestion that defense attorneys may need to defend their clients in the "court of public opinion." This idea, however, comes with too many caveats and cautions to address here. For some of my earlier thoughts on the subject see my note, "A Proposed Code of Ethics for Legal Commentators: a Symposium A Ransom Note From The Opposition To The Proposed Rules Of Ethics For Legal Commentators," 50 Mercer L. Rev. 767 (1999)

A Strategic Approach to White Collar Cases: Key Considerations

In meeting with a client for the first time, I try to glean as much information as possible about the current predicament. Are there charges pending? Is an investigation underway? Has there been a parallel proceeding? Answering these questions helps me get a handle on the core of the problem.

I am extremely interested in information that is critical of the client. For example, there may have been a complaint filed in a civil action or an internal memorandum criticizing the client's actions. There are two reasons for this interest. First, I want the client to take the criticism seriously in order to inspire his willingness to attack the problem. Second, I want to begin to encourage awareness on the client's part of the need to formulate a strategy.

Even if there are realistic hopes that an investigation can terminate favorably short of trial, everything that is done in this phase must be measured against its possible impact at a trial. Consequently these steps must be followed: Determine the facts that are beyond dispute; determine which of those facts are inculpatory or otherwise harmful to the client; spend time mentally marrying these harmful and immutable facts to other available facts in a manner that rebuts any possible charges; select a theory that effectively summarizes the result of this mental process; and then develop themes supporting this theory which would be understandable to a jury if the matter went to trial. This entire process, of course, is dependent on thorough accumulation of relevant facts.

Finding the Facts

I rarely begin to formulate a strategy based on my first meeting with the client, simply because not enough information is yet known about the case. Strategy should be rooted in knowing the people involved and knowing the facts surrounding the case. The ultimate strategic objective is to find a way to explain those harmful and irrefutable facts with a theory that is exculpatory or mitigating.

The process of gathering the relevant facts in any case should start early. The first step is to find all relevant documents. In modern cases, managing documents requires an efficient system, often requiring skilled paralegals, effective software, or both. Many cases involve large numbers of documents, and it quickly becomes critical to separate the wheat from the chaff.

Since documents may continue to arrive up to and even after the eve of trial, it is important to begin interviewing knowledgeable individuals at the same time that documents are being organized. People are unpredictable, and it is the rare case that unfolds in a courtroom precisely as it did on paper. The objective is to analyze information obtained from individuals using the same standard that was applied to documents, i.e., to isolate the bad facts that are unchangeable and find exculpatory or mitigating explanations. From a defense point of view, it is essential that the strategy yield a theory that would effectively rebut the prosecutor's anticipated allegations. It must also answer the "question" which may one day be raised in a potential juror's mind, to wit: "Why is the prosecution making this allegation?" This process, if carried out thoroughly and with maximum client participation, has the advantage of enhancing the client's position during negotiations with the prosecuting authorities while also facilitating trial preparation.

Qualifying Success

Some end results constitute obvious victories. A decision by a prosecuting authority not to indict is an undisputed success. Frequently, the negotiation of a deferred prosecution agreement by a corporation is a victory. In some instances, success in the investigatory phase of a white collar investigation consists of approaching trial with a winning theory of the case and a client prepared for the rigors of trial. A lawyer and a client will only achieve a common understanding of "success" if they have established an effective relationship and worked together to evolve a strategy.

A client's expectations of success may be influenced by the opinions of those close to him. I believe it is advantageous to get to know a client's family and, where permissible, to involve them in some aspect of strategic planning. If a client has a strong spouse, for example, he or she may

become instrumental in coaching the client through the barrier of denial. (I have seen many cases in which a spouse was suspicious of a friend long before the client was betrayed by the friend.) Furthermore, close family members are often more willing to share embarrassing information with the lawyer that the client is hoping to keep secret.

Ultimately, however, a difficult part of the process of evaluating results is that a realistic success often does not live up to the client's hopes. A public official may be saved from conviction or imprisonment, but will not go on to a long political career. (This may even be the result of the lawyer's advice to not speak publicly or to invoke the privilege against self-incrimination before a grand jury). A business may be forced to implement changes that negatively affect profitability. Sometimes money or careers have to be temporarily sacrificed or curtailed to protect a client's liberty. Clients may never accept these strategic sacrifices, particularly if they believe they should never have been investigated.

The lawyer must be willing to brave a client's ire in order to allow the client to confront difficult choices with an uncluttered mind.

Client Outlook and the Impact on Strategy

The challenge of encouraging a client to carefully weigh strategic options can be greatest when the possibility of settlement is brought to the table. If an opportunity arises to resolve a financial dispute in order to avoid criminal liability, a client with appropriate priorities will be willing to consider the offer. It is always possible to earn money, but a conviction has irreversible consequences. Only if counsel has won a client's confidence can he or she be useful in persuading a client to evaluate such offers realistically.

It is possible for counsel to become seduced by the challenge of outwitting the government. It is important for lawyers to ensure that his or her ego never drives the decision-making process. If the client is to follow the challenging path espoused by counsel, then the lawyer must be equally disciplined to maintain the client's confidence and trust by controlling his own ego. The key to maintaining equilibrium, when media attention or praise threatens to turn a lawyer's head, is to keep in mind Lord Brougham's words in Queen Caroline's case.

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[9]

Educating Yourself as a White Collar Lawyer

In order to keep myself current, I teach criminal procedure and other courses as a visiting professor and research scholar at Seton Hall Law School. This forces me to stay abreast of developments that may not be relevant to cases I am currently handling but are essential to continued professional development. It also causes me to examine systemic questions that working lawyers don't get a chance to fully explore. (During my career as a practicing lawyer, my state adopted much of the Model Penal Code and the Congress Adopted Sentencing Guidelines. Day-to-day practice forced me to address specific aspects of these profound changes in criminal practice. Teaching has enabled me to develop a systemic understanding of these schemes that enhances my practice.) The need to demonstrate to students the evolving nature of criminal procedure has caused me to examine the NSA wiretap controversy. This, in turn, required me to explore the doctrine of "constitutional avoidance"[10] and continue to develop an understanding of "interpretive methodology" which is an essential tool for dealing with sophisticated legal problems.

There are other means of lawyer education that are more traditional such as authoring articles in bar association publications or teaching or attending CLE events. Whatever technique is employed, it is essential to stay abreast of developments in this increasingly sophisticated area of law.

---

[9] For the latest word on the controversy surrounding Lord Broughman and his axiom, see Henry Lord Broughman and Zeal, Monroe H. Freedman, *Hofstra Law Review*, Vol. 34, No. 4, Summer 2006

[10] See Legal Authorities Supporting The Activities of the National Security Agency Described By The President, US Department of Justice January 19, 2006 and Presidential Authority to Conduct Warrantless Electronic Surveillance to Gather Foreign Intelligence Information, Congressional Budget Office, January 5, 2006

Developing a Strategy: Recognizing Risks and Opportunities

Finally, a lawyer's educational process ought to always keep him or her alert to certain boundaries that separate him from the client. Always make it abundantly clear that while you will take any ethical steps necessary to save your client, including those that are difficult or inconvenient, you will not break the law. The attorney-client relationship involves a high level of trust and intimacy, but it is neither a friendship nor a conspiracy and it should not be treated as one. There are definite ethical and professional guidelines that should inform the interactions between client and council at every turn.

Raymond M. Brown is a partner of the firm in its Litigation Department and chair of the White Collar Defense & Corporate Compliance Practice Group. He concentrates his practice in internal investigations and all other aspects of white collar criminal defense.

Mr. Brown has been a trial lawyer, teacher, and legal journalist since 1974. He is a member of the board of directors of the Association of the Federal Bar of the State of New Jersey and is a Fellow of the American College of Trial Lawyers as well as the American Board of Criminal Lawyers. He is a past president of the Association of Criminal Trial Lawyers of New Jersey and former member of the board of directors of the National Association of Criminal Defense Lawyers.

He has handled a wide variety of U.S. criminal and civil matters representing individuals and corporations. He has appeared in high profile trials such as the nine month trial involving former Labor Secretary Raymond J. Donovan and the successful eight year defense of senior executives of a major multinational corporation charged with environmental violations. Mr. Brown has also represented corporations and government entities in complex commercial litigation. He has appeared in courts in twelve states and conducted investigations throughout the U.S. as well as in Kenya, El Salvador, the Cayman Islands, Switzerland, the Bahamas, Colombia, and Sierra Leone. Mr. Brown is a member of the New Jersey and New York Bars. Mr. Brown also has significant international experience qualifying as counsel before the International Criminal Court in the Hague, and having served as co-lead defense counsel at the Special Court for Sierra Leone.

He is the host of the Emmy Award-winning New Jersey Network Program "Due Process" and has provided legal analysis and coverage for many broadcast venues. Mr.

Brown has taught international criminal law in the Seton Hall/American University Program at Cairo, Egypt, and at Seton Hall University's School of Diplomacy and International Relations. In addition to teaching international criminal law at Seton Hall University School of Law where he is a visiting professor and research scholar, he has taught criminal law, criminal procedure, and professional responsibility. He has spoken on more than 200 occasions to criminal and civil lawyers, law enforcement personnel and judges, students, and a variety of citizen groups. His subjects have included trial advocacy, ethics, race, human rights and international law, the art of persuasion, and educational policy.

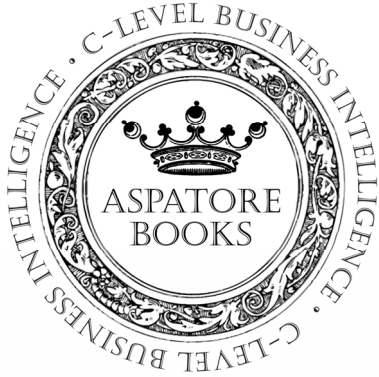
Mr. Brown is a graduate of Columbia University and received his law degree from Boalt Hall School of Law, University of California, Berkeley.

www.Aspatore.com

Aspatore Books is the largest and most exclusive publisher of C-Level executives (CEO, CFO, CTO, CMO, Partner) from the world's most respected companies and law firms. Aspatore annually publishes a select group of C-Level executives from the Global 1,000, top 250 law firms (Partners & Chairs), and other leading companies of all sizes. C-Level Business Intelligence™, as conceptualized and developed by Aspatore Books, provides professionals of all levels with proven business intelligence from industry insiders – direct and unfiltered insight from those who know it best – as opposed to third-party accounts offered by unknown authors and analysts. Aspatore Books is committed to publishing an innovative line of business and legal books, those which lay forth principles and offer insights that when employed, can have a direct financial impact on the reader's business objectives, whatever they may be. In essence, Aspatore publishes critical tools – need-to-read as opposed to nice-to-read books – for all business professionals.

Inside the Minds

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


C-LEVEL BUSINESS INTELLIGENCE •
C-LEVEL BUSINESS INTELLIGENCE •
ASPATORE
BOOKS