Los Angeles lawyers Jan L. Handzlik and Stephen J. Connolly examine the ethical quandaries facing in-house counsel in the new law enforcement climate.

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Jan L. Handzlik (left), a partner at Kirkland & Ellis in Los Angeles, specializes in white collar criminal defense and business fraud litigation. Stephen J. Connolly is a lawyer with the Office of Independent Review, which monitors the Los Angeles County Sheriff’s Department. In “Playing a Dual Role,” they describe the added duties of in-house counsel as a result of recent corporate scandals. Their article begins on page 30.

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any of us who attended law school in the late twentieth century were led to believe that the realms of civil and criminal practice existed in unalterably separate spheres. While our civil procedure and contracts casebooks recited relatively colorless dramatizations of the rules governing joinder of claims, offer and acceptance, and the like, our criminal law professors led us on a tour through the darker sides of human behavior worthy of a Mary Shelley novel. From the seminal cannibalism/homicide case, Regina v. Dudley and Stevens, to the nineteenth-century invention of the M’Naghten Rule of insanity, the world of criminal law was as different from that of civil practice as Frankenstein’s monster from Oliver Wendell Holmes—or so it seemed. And to the vast majority of us who entered the ranks of law firm associates and civil attorneys in the public sector, our classmates pursuing careers in the criminal justice system appeared headed down paths as distant from ours as those taken by our undergraduate classmates who sought their destinies in remote corners of the globe while we awaited our LSAT scores.

Today, an unprecedented confluence of events—a wave of corporate scandal of unfathomable scale and the previously unimaginable threats to our national and personal security—has forever altered the dividing lines between civil and criminal law. To take but one example, the antiterrorism legislation known as the USA PATRIOT Act imposes affirmative obligations on banks and financial institutions while granting law enforcement the expanded powers that have recently been the subject of extensive comment. Similarly, the Sarbanes-Oxley legislation prompted by the epidemic of business and accounting fraud has dramatically changed the complexion of corporate law practice by, among other things, requiring in-house counsel to disclose criminal misfeasance by corporate executives (the very individuals from whom in-house counsel historically have taken—and still take—their marching orders and whose communications traditionally have been inviolable).

The current climate also is challenging core assumptions about the profession itself. As we go to press, the ABA House of Delegates has just concluded its Annual Meeting in San Francisco, during which it approved, by a razor-thin margin of 218 to 201, changes to the Model Rules of Professional Conduct. Under a new model rule, an attorney is permitted, but not required, to disclose client confidences to prevent “injury to the financial interests or property of another” when the attorney’s services were used to facilitate a client’s crime. While the proposal was endorsed by the chief justices of all 50 states, one can hardly imagine its creation at all in the absence of the extraordinary mix of events in recent years.

In preparing this special issue, we have been reminded that criminal cases can and do have an impact on the full spectrum of legal matters, from child custody disputes to corporate tax inquiries, and that many of the most pressing criminal justice questions of today present challenges to society as well as our profession. We are aware that a special issue devoted to those criminal law topics most likely to have an impact on civil practice cannot possibly address them all, nor can we begin to address all of the moral and ethical ramifications of current criminal justice concerns. We are hopeful, however, that by examining some of these subjects, we will help to demystify the criminal justice system and better understand its increasing relevance to us all.
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TAP Into Trial Experience

The Trial Advocacy Project offers attorneys valuable real-world trial experience

In the first three years that Jeannie Park practiced law, she never tried a case, but a few hours into her first day on the job as a TAP volunteer attorney in the Los Angeles City Attorney’s Office at the Van Nuys Courthouse, Jeannie became a trial attorney. “I was watching a trial when the bailiff motioned me over for a telephone call. It was the supervisor telling me to go to a courtroom and start a trial. As I got off the elevator, I saw a panel of 50 prospective jurors waiting in the hallway, waiting for me to come and start voir dire!”

Armed with her trial notebook, which she had prepared as part of her TAP class work and training, Jeannie prosecuted her first trial—a hit-and-run case. Next was a drag racing case. “It amazed me how much easier the second trial was compared to the first one. Things flowed much smoother, and I felt pretty comfortable. TAP was a great learning experience,” she recounts.

TAP (Trial Advocacy Project) began in 1978, when John Carson (who later served as president of the Association) approached Los Angeles City Attorney Burt Pines with an idea to use the city attorney’s trial training program to teach civil attorneys to prosecute cases. The program would give civil attorneys trial experience and provide the city attorney’s office with volunteer attorneys.

The TAP program was designed for attorneys who have at least one year of litigation experience. The course provides intensive instruction in trial advocacy skills in four mock trials. Criminal fact patterns are used, but attorneys learn to try criminal and civil cases. Participants learn case preparation, voir dire, opening statements, closing arguments, direct and cross examination, expert witness examination, jury instructions, and witness interviews. Traditional TAP is offered once a year and is a six-week course taught over seven weeks, beginning in the first week of October. All attorneys who successfully complete the TAP course are certified to serve as pro bono prosecutors throughout the state. TAP attorneys typically serve a month as prosecutors; the minimum commitment is three weeks.

The traditional TAP program has received numerous awards, including an award for excellence from the American Bar Association’s Young Lawyer Division. Over 1,000 attorneys have graduated from the traditional TAP program. Program graduates include partners at major law firms and members of the judiciary, such as superior court judges Lee Edmond, Patricia Schnegg, and Dale Fischer. TAP volunteers serve the district attorney’s offices in Alameda, Los Angeles, Orange, Ventura, and San Francisco Counties; the Los Angeles City Attorney’s Office; the Anaheim City Attorney’s Office, and the Long Beach City Prosecutor’s Office.

One proof of the success of the traditional TAP can be claimed in the testimonials of participating attorneys. After I completed my TAP classroom training in October 2002, I volunteered for the Long Beach City Prosecutor’s Office, where the supportive staff assisted me in the successful prosecution of two cases. My experience with TAP was entirely positive and beneficial to my professional skills.

A TAP classmate of mine, Chris Carico, volunteered at the Anaheim City Attorney’s office. He notes: “The office gave me a priority on trials and actually took cases away from other attorneys to make certain that the TAP attorney had the best possible experience…. After each trial, I spoke with the judge in chambers and got great lessons on what I should have done differently.” In addition to receiving extensive trial experience, volunteer attorneys are assigned to other matters. Andy Dunbar, an attorney at the Securities and Exchange Commission, volunteered at the San Francisco District Attorney’s Office, prosecuting two jury trials, arguing a motion to suppress, and conducting a competency hearing on a man who insisted he was Osama bin Laden.

The success of the traditional TAP program has lead to the creation of three additional TAP courses: Introductory TAP, TAP—the Seminar Series, and the TAP Workshops. According to Rhea Lamia, who is associate director of professional services for the Association, “All the programs have the same hallmark. They’re not just lectures; they’re ‘on-your-feet’ learning programs.”

“The TAP programs are in a continuing state of expansion,” explains Chris Thalman, TAP administrator. “I’m excited about TAP because it is helping attorneys. They don’t talk about something for two hours and go home. They actually practice it. Attorneys become confident because their skills get better.”

The Los Angeles City Attorney’s Office also created a fellowship program designed to provide qualified TAP alumni with an opportunity to serve additional time as pro bono prosecutors. Phillip Maltin, a partner at Davis Maltin, has returned to the city attorney’s office four times to prosecute cases. “Each time I prosecuted a case, I got closer to understanding the subtleties of trial, and each time I got that much better, but then I realized how much more complicated trials were and how much further I needed to go.”

The TAP programs are a proven means to successful trial experience for the new attorney or attorneys seeking greater trial exposure. By building on skills through on-your-feet practice and volunteering hundreds of hours of pro bono time, TAP provides much-needed opportunities for prospective trial attorneys.
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ONLINE SHIPPING. SYNCHRONIZED.
**How the IRS Distinguishes Civil and Criminal Tax Fraud**

In more recent years, the *Internal Revenue Manual* itself has observed the “fine distinction” between tax avoidance and evasion. Nonetheless, after highlighting this delicate distinction, the current manual paints a fairly black-and-white picture distinguishing the two concepts:

One who avoids tax does not conceal or misrepresent. He shapes events to reduce or eliminate tax liability and, upon the happening of the events, makes a complete disclosure. Evasion, on the other hand, involves deceit, subterfuge, camouflage, concealment, some attempt to color or obscure events, or make things seem other than they are.2

The IRS concedes that “any attempt to reduce, avoid, minimize or alleviate taxes by legitimate means is permissible.” But it has also established two tracks to determine if what a taxpayer believes is tax avoidance fits the government’s definition of tax evasion. These two tracks—civil fraud audit and criminal investigation—do not operate on strictly parallel courses and, indeed, intersect at various junctures. In the current enforcement climate, born of corporate scandals and increased scrutiny of financial transactions, general practitioners are particularly well advised to familiarize themselves with the IRS’s civil fraud and criminal treatment of cases and the process by which an audit can transform itself into a criminal investigation.

The three elements of tax evasion are set forth in IRC Section 7201:1 the existence of a tax deficiency, an affirmative act constituting an evasion or attempted evasion of the tax, and willfulness.4 It is well settled that the state-of-mind requirement for imposing the civil fraud penalty is identical to what must be proven in a criminal prosecution for tax evasion under Section 7201.5

“Willfulness” is defined for criminal purposes as a “voluntary, intentional violation of a known legal duty,”6 and in the civil fraud arena, as an “intentional wrong-doing on the part of the taxpayer with the specific purpose to evade a tax believed to be owing.”7

While a conviction under Section 7201 requires an affirmative act evidencing an intent to conceal income from the imposition of tax,8 assessing a civil fraud penalty does not technically require such an overt act.9 The better view, however, is that some affirmative act is also required to impose the civil fraud penalty.10 Thus, for all practical purposes, the government may establish civil and criminal tax fraud through virtually the same elements.

A key distinction, however, between civil and criminal fraud is the burden of proof. In a criminal prosecution, fraud must, of course, be proven beyond a reasonable doubt.11 Civil fraud, however, requires only clear and convincing evidence.12 However, if the government establishes that any portion of an underpayment of tax is attributable to fraud, the entire underpayment is treated as attributable to fraud, potentially triggering fraud penalties on the full amount of the tax liability. The taxpayer, however, may establish by a preponderance of the evidence that all or a portion of the tax liability is not attributable to fraud.13

Whether the government first pursues a criminal or civil case can be crucial. If the criminal case proceeds first, a conviction under Section 7201 precludes the defendant from litigating the issue of civil fraud in any subsequent civil tax proceeding.14 The defendant, however, may still litigate the amount of tax deficiency in the civil proceeding.15 The collateral estoppel doctrine that results in a finding of civil fraud applies because the willfulness requirement of Section 7201 includes the specific intent to evade or defeat the payment of tax, which is the same intent requirement for a civil fraud penalty.16 If the government proves willfulness beyond a reasonable doubt in the criminal case, that finding necessarily meets the clear and convincing standard of the civil fraud case. On the other hand, a criminal felony conviction for subscribing to a false return under IRC Section 7206 does not collaterally estop a taxpayer from contesting the civil fraud penalty, since the elements for this offense do not mirror those for the civil fraud penalty.17

**Fraud Referral Specialists**

A case works its way from a civil audit to a criminal investigation through the IRS’s long-standing fraud referral program. When a revenue agent or rev-

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**Fraud referral specialists play the key role in identifying what cases to prosecute**

Since the earliest days of the Internal Revenue Code almost 90 years ago, the government and taxpayers have waged an ongoing battle over the assessment and collection of taxes. As courts began refereeing this fight, the terms “tax avoidance” and “tax evasion” emerged. Tax avoidance generally describes legally permissible conduct, while tax evasion connotes intentionally fraudulent designs. A classic description of tax avoidance was penned by Judge Learned Hand:

> Anyone may arrange his affairs that his taxes shall be as low as possible. He is not bound to choose the pattern which best pays the Treasury, there is not even a patriotic duty to increase one’s taxes. Over and over again courts have said that there is nothing sinister in so arranging [one’s] affairs....Everyone does it, rich and poor alike, and all do right, for nobody owes a public duty to pay more than the law demands.

Dennis L. Perez is a principal and Nathan J. Hochman is counsel to Hochman, Salkin, Retting, Toscher & Perez, P.C., a Beverly Hills firm that specializes in civil and criminal tax litigation and controversy matters.
enue officer investigates a case and determines that there are “firm indications of fraud,” the agent or officer is required to transfer or refer the case to the IRS Criminal Investigation Division (CI). The number of criminal cases referred from examination and collection to CI has declined over the last 20 years. The percentage of CI criminal tax investigations originating in a civil audit declined from 30 percent in 1979 to less than 20 percent in 1988, while the percentage of criminal tax prosecutions that began as civil audits declined from nearly 30 percent to 14 percent during the same period.

Moreover, the report of the Webster Commission, an internal IRS review of the Criminal Investigation Division, cited systemic disincentives in the civil audit process for making CI referrals. For example, the civil revenue agent was responsible for ensuring that no civil statute of limitations expired without written notification to the taxpayer, but once CI had accepted a referral for investigation, the civil agent lost control over this significant legal issue. As a result, a civil agent was more likely simply to keep the case, finish the audit, and settle it with the taxpayer to avoid any possible expiration of the statute of limitations.

It became clear after the Webster Commission’s review of the fraud referral program that the program needed to be improved. As a result, within the IRS’s Small Business/Self-Employed Division, fraud referral specialists (FRS), both on the civil audit side and the collection side, have been selected to identify civil fraud cases that have civil fraud penalty and criminal referral potential. Those agents designated as FRS are generally experienced and have special training in detecting and developing fraud cases. There are now approximately 64 fraud referral specialists, who act as consultants to revenue agents as they conduct civil audits. It is the job of the FRS to help the examining agent identify badges of fraud and develop fraud cases through the gathering of documentation and the interviewing of witnesses, including the taxpayer.

Determining whether a taxpayer/client should submit to an interview request by a civil agent has become an increasingly sensitive question, since an FRS might well be consulting on the audit if it has criminal potential. The taxpayer may be forced to submit to an interview if it has criminal potential. The taxpayer may be forced to submit to an interview request by a civil agent or officer is but one of the warnings signs that the civil agent has consulted an FRS and is contemplating a fraud referral. Civil agents almost always remain silent about this step, so experienced practitioners have learned to identify certain activities by the agent, even prior to the period of silence, as

**Badges of Fraud**

The Internal Revenue Manual now provides a lengthy list of “badges of fraud” that may trigger scrutiny by the FRS. As described in the Fraud Handbook, the badges fall into six categories: 1) income, 2) expenses or deductions, 3) books and records, 4) allocations of income, 5) conduct of taxpayer, and 6) methods of concealment.

Badges of fraud involving income include unreported sources of income, unexplained increases in net worth over a period of years, unusually high personal expenditures, and unexplained bank deposits that substantially exceed reported income. Badges of fraud involving expenses or deductions include substantial deductions for personal expenditures claimed as business expenses, lack of substantiation for unusually large deductions, or making a claim for dependency exemptions for nonexistent, deceased, or self-supporting persons.

The FRS is also sure to scrutinize taxpayers who keep the classic two sets of books—one for their bank that inflates their net income, and one for the IRS deflating the same income—or engage in similar mischief with invoices, purchase orders, gift receipts, and the like. Taxpayers whose business books and tax returns do not reconcile, who move income or deductions out of the correct account and into a more taxpayer-friendly line item, or who issue checks to third parties that are then returned and endorsed back to the taxpayer will likewise draw the attention of the FRS. The FRS’s fraud spotlight will also shine on distributions of profits to fictitious parties or inclusions of income or deductions in the tax return of a related person whose tax rate is substantially different.

The taxpayer’s own conduct is one of the more important variables that can transform a civil inquiry into a criminal investigation. These badges of fraud include hindering examinations by failing or refusing to answer important questions, repeatedly cancelling appointments, refusing to provide records or consistently omitting key records, and attempting to threaten or corruptly influence witnesses. When taxpayers assert that they completed their returns on the basis of a good faith reliance on an accountant or lawyer, the FRS will analyze whether the taxpayer actually followed the advice or fully disclosed the relevant facts to the professional in question. The FRS will also consider the tax sophistication, education, training, and experience of the taxpayer.

If any of the badges of fraud concerning concealment emerge, the likelihood of a criminal referral looms large. Red flags include placing assets in others’ names, transferring assets in anticipation of a tax assessment or during an investigation, use of secret bank accounts or entities (particularly offshore entities) to disguise the source and destination of a financial transaction, and use of nominees for property or banking transactions.

A taxpayer’s tax counsel should thoroughly investigate the situation for the presence of badges of fraud, both before and during the civil audit. That will provide an opportunity to formulate a strategy for dealing with these sensitive issues, hoping that the audit can be concluded without a referral to CI or the assertion of civil fraud penalties. The tax lawyer may also be well advised to consult criminal counsel to help prevent issues from emerging during the civil audit that could contribute to a CI referral.

**IRS Criminal Referrals**

If a civil audit unearths a “firm indication” of fraud, the civil revenue agent is directed to suspend the civil audit without informing the taxpayer of the reason and prepare a Form 2797 (Referral Report of Potential Criminal Fraud Cases). The FRS is available to assist the agent in preparing this report, which must specify factors that support the fraud referral, including but not limited to the affirmative acts of fraud, the taxpayer’s explanation of the affirmative acts, the estimated criminal tax liability, and the method of proof used for income verification.

The fraud referral report is then transmitted to a CI Lead Development Center, and within 10 days of receipt a “referral evaluation” conference must take place among the referring civil agent, IRS management, and the FRS. Within 30 workdays thereafter, the same parties, possibly accompanied by IRS Counsel, meet again at a “disposition conference” to discuss CI’s decision to accept or decline the criminal referral. A final decision on whether the referral meets criminal criteria should be made no later than 30 workdays after the disposition conference. This period of time during which the fraud referral is being considered is usually marked by a long, unexplained silence on the part of the civil agent, which may indicate that a referral has been made to CI.

This long, unexplained period of silence after much investigative activity by the revenue agent or officer is but one of the warning signs that the civil agent has consulted an FRS and is contemplating a fraud referral. Criminal agents almost always remain silent about this step, so experienced practitioners have learned to identify certain activities by the agent, even prior to the period of silence, as
indicators of a potential referral to CI.

- In cases involving allegations of unreported income, the agent’s request, summoning, and photocopying of all bank account information could raise the specter of a criminal referral, especially if the agent has stumbled upon a side account that was not accounted for in determining the taxpayer’s income. By summoning the information, the agent ensures that the file will include copies of all bank documents and deposit items that could provide evidence of unreported income.
- A civil agent’s questions about the taxpayer’s lifestyle, expenditures, and other information may indicate that the agent is undertaking a financial status audit to determine whether the income reported on the return supports the taxpayer’s lifestyle.
- Requests for information about assets and liabilities at the beginning and end of a given year may suggest that the agent has determined that the taxpayer’s books and records do not adequately reflect income and that an “indirect method of proof of income,” such as the net worth method, is being considered.
- Requests by the civil agent for supplier invoices, price lists, customer ledger cards, and the like could ultimately be used as circumstantial evidence to prove unreported gross receipts.

Finally, if the civil agent requests the taxpayer either to submit to an interview or answer in writing questions concerning the taxpayer’s knowledge or intent about the facts and circumstances surrounding the alleged unreported income or false deductions, or the agent refuses to discuss in detail the status of the audit and the possibility of concluding the audit in the near future, a criminal referral may be under consideration.

In considering a fraud referral report, the question of willfulness will heavily influence a decision to proceed with a criminal investigation. Willfulness, a necessary element of every criminal tax felony, including tax evasion, is usually proven through evidence of the taxpayer’s conduct. The more egregious the conduct, the more likely it is that the prosecution will be successful. Thus, CI looks for understatements of income or nonfiling over a period of years (usually three or more) as evidence of willfulness.31

In contrast, when a taxpayer understates income for a single year and claims it was a result of a miscommunication with a bookkeeper or gives some other plausible explanation for the income understatement, the government would find it more difficult to prove willfulness. A mere understatement of income by itself, even if it occurs in a pattern over several years, is generally not enough to justify a CI investigation. To buttress the argument for willfulness, therefore, the government often looks for other badges of fraud, such as acts of concealment, destruction of records, altered documents, and other conduct from which willful behavior may be inferred.

CI also recognizes that the taxpayer’s level of education and sophistication could tip the scales. For example, lawyers educated or experienced in tax law and accountants and business owners familiar with the financial details of their business are better prospects for criminal prosecution than persons who do not have tax or financial training or who operate outside the financial realm of the business under investigation.

### Crime and Punishment

Another prominent factor CI considers in assessing whether to accept a criminal referral is the amount of the tax loss involved. The primary mission of CI is the prosecution, conviction, and incarceration of individuals who violate criminal tax laws and related offenses.32 Because the U.S. Sentencing Guidelines (USSG) tie the period of incarceration to the monetary value of a tax violation, the IRS Manual instructs persons reviewing a criminal referral to determine whether, based on the tax loss, the taxpayer is likely to be incarcerated if convicted.33

Under the USSG, the threshold amount mandating incarceration is surprisingly low. For tax crimes committed from November 1, 1993, through October 31, 2001, a tax loss (generally defined as 28 percent of the amount of unreported income or false deduction)34 of $40,000 to $70,000 results in a sentencing offense level that would require the defendant to serve at least four months of incarceration and an additional four months in home detention and/or at a community correction facility.35

The November 2001 amendments to the USSG significantly increased the penalties for financial crimes—and the guidelines for tax offenses were no exception. Thus, for defendants convicted of tax crimes committed on or after November 1, 2001, a tax loss of $30,000 to $80,000 would result in a sentence of at least five months in custody and five months in home detention and/or at a community correction facility.36 With CI primarily investigating cases of multiple-year tax fraud, one could safely conclude that practically all cases investigated for criminal tax violations would probably land the targeted individual in jail if convicted. Since the amount of tax loss is the primary factor in determining the amount of jail time, it is easy to see why the amount of tax loss figures prominently in a determination to initiate a criminal investigation of a taxpayer.

Special CI enforcement initiatives also play a large role in determining whether a civil fraud referral is accepted for criminal investigation. CI’s first enforcement priorities relate to “legal source” tax crimes—the traditional garden variety criminal tax cases that involve legitimate businesses involved in allegations of illegal conduct to divert income. This tax compliance program actively focuses on abusive trust schemes,37 which are elaborate tax evasion stratagems that give the appearance of legitimacy by using a series of trusts, diversion of unreported income to offshore banks, and other foreign financial institutions;38 healthcare fraud;39 employment tax fraud;40 nonfiler cases;41 and tax return preparer cases.42

A second general CI enforcement program is referred to as the “illegal source” financial crimes program. It includes narcotics-related investigations,43 money laundering investigations,44 and task forces aimed at investigating the use and movement of funds to support terrorist activities.45 In addition, over the years certain industries have been the focal point of significant CI activity, including the restaurant industry,46 the construction industry,47 and insurance and Medicare fraud in the medical profession.48 Although not currently stated as an enforcement priority, CI has historically investigated a number of cases involving the garment industry, attorneys and doctors involved in handling personal injury cases, and others.

All the factors that make up a taxpayer’s identity may also play a role in determining whether CI accepts a criminal referral. The government’s objective in criminal tax prosecutions is to get the maximum deterrent value from every case that is prosecuted, and this is accomplished, in part, by targeting individuals who are perceived as being highly visible. Thus, the decision to accept a case for criminal investigation may be influenced by the taxpayer’s occupation, level of education, visibility within a particular community, standing in a particular industry, either perceived or actual financial success, notoriety in both tax and nontax fields or occupations, previous criminal background, and other factors that could cause the government to make an example of a particular defendant.

Criminal tax jurisprudence is replete with individuals who may have been prosecuted for tax fraud more for who they were rather than for what they did. The most famous example is Al Capone.49 The prosecution of others in Capone’s crime syndicate also offers an example of how CI may look to one’s associates in determining whether to initiate a criminal investigation. For example, in the 1990s, CI investigated a number of National Basketball Association referees for criminal tax violations relating to their exchange of first-class
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The government achieved significant publicity from these cases when an article concerning the investigations appeared in Sports Illustrated. Other sports figures who have made the headlines for criminal tax prosecutions include former professional baseball players Darryl Strawberry, Pete Rose, and Brooklyn Dodger great Duke Snider.

Persons who are highly visible in particular industries at critical junctures have also found themselves under criminal tax scrutiny. Many of the figures in the savings and loan debacle became targets of criminal tax investigations, and leading figures in various public corruption scandals over the years have also encountered criminal tax problems. Thus, the government’s goal of creating a deterrent effect has been served by pursuing persons in highly visible positions and obtaining publicity in these cases to achieve the broadest possible impact on general compliance by the public.

Determining whether a client under civil examination will end up the target of a criminal investigation is like predicting where lightning will strike or when a tornado will hit ground. One can master the meteorological data or, in the tax field, the facts of a case, and study the trends and patterns involved, but divining precisely where the lightning bolt will hit, when the twister will touch down, or which civil audit will get numbered for criminal investigation are difficult, if not impossible, questions to answer.

It is, however, crucial that tax practitioners understand the process by which a civil tax case works its way through the system, who the decision makers are, and what factors they consider. There is no substitute for mastering the facts of each individual case and anticipating which, if any, badges of fraud may emerge in order to have at hand a cogent response should these issues arise during the civil agent’s examination. Of equal importance, forcefully counselling clients not to accumulate even more badges of fraud during the investigation—including activities such as falsifying, destroying, or altering records; continuing questionable practices into the present and future years; or transferring or concealing assets under investigation—may stave off the final badge that would have tipped the balance toward a criminal referral.

1 Helvering v. Gregory, 69 F. 2d 809, 810 (2d Cir. 1934), aff’d, 290 U.S. 465 (1935).
2 INTERNAL REVENUE MANUAL 9781 §412 (Jan. 18, 1980) [hereinafter I.R.M].
3 All references to the Internal Revenue Code are to the Internal Revenue Code of 1986, as amended.
5 Kahr v. Commissioner, 414 F. 2d 621, 627 (2d Cir. 1969).
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resulting in a total offense level of 11 in Zone C of the federal sentencing table. A defendant who was convicted after trial and/or had a criminal history would face a higher sentence. It should also be noted that pursuant to a change in Bureau of Prison policy announced Dec. 20, 2002, defendants sentenced in Zone C (including offense levels 11 and 12) must serve at least half of their sentence in jail regardless of whether the federal district sentencing judge recommends a lesser sentence of home detention or community correction center.

36 The U.S.S.G. in effect beginning November 1, 2001, for defendants having a tax loss in the $30,000 to $80,000 range would result in a sentence at an offense level 12, Zone C, after taking into account the 2-level decrease for acceptance of responsibility.

37 I.R.M. 9.5.3.2.4 (Apr. 9, 1999) (Foreign and Domestic Trusts).

38 See Rev. Proc. 2003-11 (Jan. 27, 2003), which provided for an amnesty period for the reporting of credit cards and debit cards tied to offshore bank accounts and other foreign arrangements used to evade income tax. See Charles P. Rettig & Steven Toscher, Deadline Looms to Come Clean on Offshore Credit Card Tax Schemes, LOS ANGELES LAWYER, Apr. 2003, at 12. Since the amnesty program expired on Apr. 15, 2003, the I.R.S. Civil and Criminal Divisions have been focused on taxpayers who did not come forward during the amnesty period to voluntarily disclose their unreported income maintained in offshore banks.

39 I.R.M. 9.5.3.2.7 (July 16, 2002) (Health Care Fraud).

40 I.R.M. 9.5.3.3.1 et seq. (Apr. 9, 1999) (Employment Tax Initiative). Criminal employment tax investigations are focused on employee leasing companies that failed to pay taxes withheld from employees, the pyramiding of employment taxes by businesses that use multiple corporate and other entities to stay at least one step ahead of the taxing authorities, and failure to withhold social security taxes and other employment taxes based on time-worn tax protester arguments.

41 I.R.M. 9.5.3.3.1.2 (July 16, 2002) (Nonfiler Initiative).


43 I.R.M. 9.5.3.5.1 (July 16, 2002) (Terrorism).


These programs generally offer a carrot to those who self-report wrongdoing before an investigation begins or becomes imminent. For some offenses, like antitrust violations, the Department of Justice may grant total amnesty. For others, like environmental offenses, the Justice Department does little more than represent that it will consider the voluntary disclosure in its charging decisions and sentencing recommendations. For government contractor and tax offenses, the disclosure programs fall somewhere in between.

Federal sentencing guidelines allow courts to exercise greater leniency when there is a voluntary disclosure.

Also, the federal government is using a stick to force the regulated communities to police themselves. The EPA, for example, requires businesses to give notice of emissions— and, in some instances, offers immunity to those who truthfully report exceeding established standards.

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Under the Sarbanes-Oxley Act of 2002, corporate executives are required to certify financial reports. Companies doing business with the government face loss of government contracts if convicted of an offense, but debarment can often be avoided by voluntary disclosure. Public companies fear loss of investor confidence and the prospect of new penalties under the USA PATRIOT Act of 2001 and the Sarbanes-Oxley Act if they fail to come clean. These laws encourage corporate employees to come forward to assist in investigating securities fraud by prohibiting a corporation, its officers, and employees from discriminating against a cooperating employee.

Fewer voluntary disclosure programs are tailored for individual wrongdoers, however. In fact, some of the existing voluntary disclosure programs may not have much appeal to individual clients. Nevertheless, now more than ever counsel will likely be faced with the decision of whether an individual client’s best interests are served by turning himself or herself in. Counsel must analyze a number of issues before advising the client to take the step of voluntary disclosure. Also, counsel must be creative in fashioning a voluntary disclosure that will result in the most beneficial outcome for the client.

When deciding whether to self-report, multiple concerns may flash through the mind of a client: Will I go to prison? How will this action affect my family? My employment? My reputation? My future earnings capacity? Will a plea of guilty lead to a civil suit against me or have other collateral consequences, such as the loss of child custody or the loss of a professional license? Am I willing to incriminate friends and coworkers? Do I feel guilty about what I have done? Do I feel that, even if technically a crime, what I have done should not be criminally prosecuted—or not prose-
cuted with severity?

Individuals will likely think about what will happen if there is no voluntary disclosure: Will I be found guilty if I go to trial? How much will it cost to defend the case? Will I serve less time in prison if I self-report than if I go to trial and am found guilty? What are the chances that I will get caught if I do not self-report?

The current focus on certain white collar offenses, such as financial crimes, has increased the risk of exposure for white collar wrongdoers, especially for those working in otherwise legitimate businesses. Even if a corporate executive does not want to disclose wrongdoing, the individual’s company is more likely to disclose—and less likely to be protective of its employees when it does so.

Complicating these concerns for individuals contemplating self-reporting of federal offenses are the U.S. Sentencing Guidelines (USSG). While they contain provisions for “downward departures”—reductions in the points used to calculate the final sentence—over the past 15 years the guidelines steadily have grown tougher. Indeed, the November 2001 guidelines significantly increased the sentences for convicted white collar offenders, particularly those found guilty of financial crimes. Congress recently showed its propensity to reduce the availability of downward departures. In short, the hope of probation for those charged with federal white collar crimes—particularly those charged in jurisdictions where prosecutions typically involve large-scale financial loss—is diminishing.

Still, while the consequences stemming from white-collar wrongdoing may be dire, there are some considerations favoring self-reporting. It affords an opportunity for the individual to make a deal resulting in a more lenient sentence. Acceptance of responsibility, cooperation against other wrongdoers, and voluntary disclosure often are the only viable avenues for reducing a sentence (particularly for a federal crime), so it may be more palatable for a client to settle a criminal case by self-reporting. A prosecutor should look favorably upon self-reporting, because it will conserve prosecutorial resources and make the government’s work much easier. Demonstrating remorse by self-reporting will likely engender some sympathy from the prosecutor.

**Determining Exposure and Penalties**

The essential initial query is whether the individual client in fact actually committed any criminal offense. Counsel must first ascertain the facts about the client’s potential criminal exposure. The client should be cautioned to tell counsel everything; failure of the client to reveal everything about the situation at issue is a portent of disaster. At this stage in the process of determining whether or not to self-report, it is also critical that counsel consult with experienced criminal defense practitioners. The assessment of a client’s potential criminal exposure will, in the white collar area, often involve the consideration of multiple issues, including technical defenses, applicable sentencing guidelines, and the client’s value as a potential government witness.

Counsel must examine all relevant documents. These materials may fill in any gaps in the client’s presentation and may be critical to substantiating the client’s story.

Practitioners must also review and analyze all statutes under which criminal liability may be imposed. Indeed, the identification of the relevant criminal offenses is crucial to determining potential penalties—probably the most important factor in considering whether a client should self-report.

The client will certainly want to know what sentence the court could impose if the client admits wrongdoing. Perhaps the most difficult challenge is determining the potential sentencing range applicable to the client’s offenses if the client were to self-report. In the federal courts, the U.S. Sentencing Guidelines are controlling. Although there may be a number of sentencing guidelines to be considered, there are three guidelines, in particular, that merit attention in the context of a voluntary disclosure.

The first of these is USSG Section 5K2.16: If the defendant voluntary discloses to authorities the existence of, and accepts responsibility for, the offense prior to discovery of such offense, and if such offense was unlikely to have been discovered otherwise, a departure below the applicable guideline range for that offense may be warranted. For example, a downward departure under this section might be considered where a defendant, motivated by remorse, discloses an offense that otherwise would have remained undiscovered. This provision does not apply if the motivating factor is the defendant’s knowledge that discovery of the offense is likely or imminent, or where the defendant’s disclosure occurs in connection with the investigation or prosecution of the defendant for related conduct.

Some courts have applied this language literally, while others have upheld a downward departure for voluntary disclosure even if the offense would ultimately have been discovered.

Second, pursuant to USSG Section 3E1.1, “acceptance of responsibility”—that is, simply pleading guilty to, rather than contesting, a charge—results in a reduced sentence. The credit for acceptance of responsibility is not subject to the same limitations as the voluntary disclosure sentencing guideline and is available to a defendant who provides no information to the government beyond a factual basis for his or her guilty plea. USSG Section 3E1.1 authorizes a downward adjustment for acceptance of responsibility for a number of events, including the truthful admission of criminal conduct and voluntarily assisting the prosecution in recovering any fruits of a criminal act.

Third, under USSG Section 5K1.1, providing “substantial assistance” to the government (in the vernacular, “turning state’s evidence”) could lead to a downward departure that could further reduce the client’s sentence beyond the reductions available for self-surrender and acceptance of responsibility. If the client’s assistance would aid the government in prosecuting other offenders, particularly the individual’s superiors and others higher up in the individual’s organization or industry, a greater benefit is likely.

Because the downward departure for assisting authorities is only available via a motion by the prosecutor, it is critical for counsel for the client to engage in negotiations and discussions with the U.S. Attorney’s Office if the client possesses knowledge that could aid in the prosecution of others.

If the offense involves a large monetary loss, such as a financial crime, the amount of loss will be the single most significant factor in determining the range of imprisonment. Counsel should carefully analyze the range of loss in the federal sentencing guidelines, because the higher the loss the greater the incentive may be to self-report. Subjective aspects of the loss computation should also be explored. For example, losses suffered by victims after a client withdrew from a conspiracy or fraud scheme may in some instances be excluded from the loss computation.

California has no sentencing guidelines that are comparable to the federal sentencing guidelines. While some of the same factors considered under federal sentencing guidelines may be relevant to sentencing in a California state court, state judges have far more discretion in affording leniency for self-reporting.

Once a determination is made regarding potential criminal liability and the range of potential penalties, counsel needs to assess the likelihood of discovery of the client’s wrongdoing. The greater the number of potential witnesses who are aware of and troubled by the client’s wrongdoing, the greater the chance of the client’s getting caught. Counsel needs to assess whether there are victims, employees, family, friends,
or anyone else who knows of the client’s wrongdoing or is likely to learn of it, and what any of these persons is likely to do with this knowledge. If the client is involved in a Ponzi scheme or another type of investment scam affecting multiple victims, the likelihood increases that at least one victim will discover and report the misfeasance.

Similarly, if the individual is employed by a corporation and its lawyers have been advised of wrongdoing or are conducting an internal investigation, there is a significant chance the wrongdoing will be revealed to the board of directors, and a greater likelihood it will thereafter be divulged to public authorities. Companies that do internal investigations increasingly are agreeing to waive their privileges when they are being investigated by the government. In settling a government investigation, these companies are cooperating with the government in providing information for the investigation of individuals working in the company. Even when companies do not waive their privileges, prosecutors may challenge the validity of an assertion of the attorney-client privilege, using waiver and crime-fraud exceptions to pierce it.

An exploration of the client’s criminal liability and the risks involved if the client does not self-report is crucial. Among the various factors to be considered are the strength of the potential case against the client, the danger of discovery, the client’s willingness to cooperate, and the client’s ability to help the government apprehend others.

During this process, counsel must ensure compliance with ethical duties. A client’s authorization to counsel to make a voluntary disclosure requires the client’s informed consent. Before any voluntary disclosure can be made, counsel must inform the client of any risks and benefits that would result from a voluntary disclosure. Any other factors or facts relevant to the client’s decision to proceed with the voluntary disclosure should be discussed with the client. Failure to obtain the client’s consent before disclosing information to the government may subject counsel to sanctions for failing to comply with Section 6068(e) of the California Business and Professions Code.

A client with a guilty conscience may be in a state of panic, afraid of the unknown, and often is not thinking clearly. Clients may not fully appreciate what the criminal justice system has in store for them. Moreover, clients may change their minds. Unless unusual circumstances exist, it will take at least several meetings with a client, as well as independent analysis, for counsel to assess and inform the client of the benefits and risks of voluntary disclosure.

Unlike some areas of the law, there are no hard and fast rules that govern what the client should do. The risks of investigation, prosecution, and conviction involve multiple subjective considerations. Extraneous factors are extremely difficult to calculate, such as a law enforcement agency’s resources, the personality of the agent or prosecutor, and the strengths and weaknesses (and, in some instances, sheer availability) of potential witnesses against the client.

Strategies for Making a Voluntary Disclosure

If, after full consultation with counsel, the client wants to confess, counsel must then determine to whom that confession should first be made in order to maximize the potential benefit to the client. A perpetrator of an investment scheme, for example, could confess first to his or her investors, to state authorities, or to federal authorities. Determining how to proceed may be the most important decision counsel and the client make.

Clients may feel safest revealing their wrongdoing to their victims, because the victims are one step removed from law enforcement and may agree to work things out. Clients who have decided to self-surrender may, for emotional reasons, want to contact their victims or former colleagues simply to unburden their consciences. However, such informal confessions to individuals other than the client or the prosecutor may have severe adverse consequences.

Individuals may misunderstand or intentionally distort a client’s admissions. If a client starts telling investors that he or she has been deceiving them for years and has lost their savings, the investors will be furious. Some may push the client to pay them off with whatever assets remain, even if other investors suffer as a result. Some may immediately contact the local police or federal law enforcement, which could result in the immediate arrest of the client. The client’s office might be searched, and the client might lose control over his or her financial records. If that happens, the client’s ability to assist counsel in defending the case would then be compromised. Also, a voluntary disclosure to a victim is not a disclosure to “the authorities” and thus may not qualify under the federal sentencing guidelines as a factor for leniency.

Going to state rather than federal authorities may be appealing because there are fewer sentencing requirements. In California, the client who confesses may have a better chance of being sentenced to probation. However, before choosing to confess to state officials, counsel needs to have a good feel for the practices and policies of the local district attorney’s office. If the client lives in a county with an aggressive district attorney’s office, and if many victims live in that county, there is a high risk that the district attorney will feel pressure to come down hard on the client. And with a confession in hand, the district attorney may see the potential for a newsworthy conviction without a heavy expenditure of resources.

Still, for most large cases in California, it is becoming relatively more advantageous to self-report. While each case must be judged on its own, it is now more likely that a client exploring self-surrender will receive greater leniency in state court. California state judges, unlike their federal counterparts, still enjoy wide discretion. Also, not only are the resources of district attorneys’ offices being stretched thin, but a district attorney may be satisfied simply by having a voluntary disclosure, especially since it seems that more voluntary disclosures are made to the federal government than to the local prosecutor. Even though both federal and state restitution statutes can be strict, the state generally will spend less time combing through all the details of an offense. Moreover, in the state system, concerns about overcrowded prisons may reduce the time a client may actually spend in prison.

Contacting federal authorities has risks and rewards as well. A prosecutor may feel constrained from showing any leniency toward the client by the sentencing guidelines and by rigid office policies. The high profile nature of a client’s offenses, such as financial crimes in today’s law enforcement climate, and public pressure may make a deal with a light sentence unlikely. The FBI and the U.S. attorney also may have considerable resources to devote to the case because of the nature of the offense.

Federal prosecutors are more likely to make an individual disclose everything before offering anything. Also, the federal sentencing guidelines, particularly regarding financial crimes, are extremely harsh. In addition, federal judges have less and less discretion to impose alternatives to incarceration, such as probation, home detention, or confinement in a community correctional center.

However, the federal sentencing guidelines explicitly give credit for extraordinary acceptance of responsibility, voluntary disclosure of wrongdoing, and for disclosing information that may assist in prosecuting others. Also, in the federal system, a white collar offender may be incarcerated in a prison camp or a minimum security facility.

Counsel must determine whether the client’s interests are best served by self-reporting a federal crime or a state crime. After that, counsel must decide which official to approach. Identifying particular prosecutors or law enforcement agents who will...
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The issue of timing—that is, deciding when to approach the authorities with a confession—is crucial. Several factors must be addressed. First, a voluntary disclosure should be made, if at all possible, before the government discovers the client’s criminal offenses. Indeed, the downward departure afforded by federal sentencing guidelines for self-surrender explicitly requires that the government not otherwise be informed of the individual’s criminal responsibility. Moreover, if there are other individuals involved in the criminal offenses, the first person who walks in the door and exposes the criminal acts to the government may get the best deal.

Second, the client must stop all illegal activities as soon as possible. Prosecutors most likely will not be sympathetic to wrongdoers who, after turning themselves in, fail to cease the offending activities and continue to profit from them.

Third, counsel must evaluate the impact of self-surrender on victims. For example, if a client has defrauded many individuals, the self-surrender may trigger civil litigation. Further problems may arise if the client apologizes to some but not all of the victims. Some victims may assert a priority over the rights of other victims. If the client has been running a Ponzi scheme or some other type of extensive fraud, the client likely will not be able to repay everything to the victims and may wish to consider filing for bankruptcy protection in connection with his or her self-reporting, so that a neutral trustee takes over the role of dividing up the client’s assets.

Finally, the client’s personal obligations must be considered. The timing of a voluntary disclosure may be affected by the necessity of caring for a relative or an upcoming graduation or wedding. Still, counsel should remember that early self-surrender will be to the client’s advantage. Thus, counsel may decide that the client’s personal issues may be better handled in the context of negotiating a date for the client to begin his or her prison service rather than in considering when to self-surrender.

Building trust between a prosecutor and defense counsel is a gradual process. Counsel
should begin by determining what type of leniency will be requested for the client. For example, if warranted by the facts, counsel should consider seeking full immunity if the client can provide valuable assistance to the government in pursuing bigger fish. Counsel should discuss this request with the prosecutor in the context of a general discussion of the facts of the case.

The prosecutor will likely want as many details as possible. However, it may be advisable for counsel to enter into discussions with the prosecutor without disclosing the name of the client—and, at a minimum, with a commitment from the prosecutor that the discussions do not constitute any waiver of the attorney-client privilege by the client. Counsel should make sure any understanding regarding the attorney-client privilege is in writing. While there are times that verbal agreements will ensure more flexibility on the part of the prosecutor, without any written record, misunderstandings may occur.

The prosecutor most likely will require a meeting with the client before reaching a final agreement. Generally, prosecutors will agree to grant the client a limited form of immunity during this interview. If negotiations break down, and the case proceeds to trial, the limited immunity bars the prosecutor from using any of the client’s statements in the government’s case-in-chief but may permit the government to make derivative use of the information provided by the client and to use the client’s statements to cross-examine the client if he or she takes the witness stand.

Counsel should plan to spend long sessions with the client before meeting with the government. The client’s records may be in disarray, the client no doubt will not remember details that some victims will view as important, and the prosecutor and law enforcement agents will be scrupulously judging the client to determine whether he or she is intentionally holding back in any way. Failure to tell the truth during the interview with the prosecutors may subject the client to prosecution for making a false statement during the interview itself and may also destroy the prospects for a favorable disposition.

A prosecutor’s agreement to grant immunity is the best possible result for the client. But immunity is only rarely granted and if the client is indeed responsible for criminal conduct causing significant harm, it is more than likely that the government will require that the client plead guilty to a felony. Even if the government agrees to credit the client for self-reporting in connection with a plea, that is not the end of the negotiations. Counsel still has work to do. Counsel must push for the best possible terms in connection with making a plea agreement. Cooperation is required to obtain the benefit of the downward departure for “substantial assistance” under federal sentencing guidelines; in fact, it has become so important that the Ninth Circuit recently held that a defendant had a claim for the ineffective assistance of counsel due to “an attorney’s failure to properly assist the defendant in cooperating with the government” to obtain a reduced sentence. Resolving the guideline issues with the prosecutor in a federal court or reaching agreement on sentencing in a California state court may take far longer than the process for making the voluntary disclosure.

The current emphasis upon self-policing, along with more aggressive prosecution of white collar crime, makes it increasingly likely that civil practitioners as well as criminal defense attorneys will encounter clients who would be well served by self-reporting their crimes to authorities. Representing such individuals requires consideration of myriad criminal law issues as well as collateral consequences to the client.

There are no easy answers as to whether a client should self-report. Devising the best

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approach for a voluntary disclosure is difficult as well. For counsel, determining what steps are in the client’s best interests ultimately will require the careful analysis of a number of complex and subjective issues.

2. U.S. Department of Justice, Factors in Decisions on Criminal Prosecutions for Environmental Violations in the Context of Significant Voluntary Compliance or Disclosure Efforts by the Violators, available at www.usdoj.gov/enrd/factors.htm (“The attorney for the Department should consider whether the person made a voluntary, timely and complete disclosure of the matter under investigation.”).
7. 18 U.S.C. §1515(c).
8. See, e.g., United States v. Tenzer, 312 F. 3d 34 (2d Cir. 2000). In Tenzer, a prosecution was initiated while the defendant was negotiating an arrangement with the IRS to pay outstanding taxes arising from a failure to file tax returns. The court held that the IRS voluntary disclosure policy was not satisfied until there was a final agreement for the payment of taxes.
10. Federal sentencing guidelines that may be pertinent to white collar offenses include adjustments for use of a special skill, violating a preexisting administrative order (e.g., a consent decree), and perpetrating a scheme that affects multiple victims. See U.S.S.G §§1B1.1(b)(2), 2B1.1(b)(7), 3B1.3.
11. Compare United States v. Lovas, 241 F. 3d 900 (7th Cir. 2001) (A guideline should be read literally.) with United States v. Jones, 158 F. 3d 492 (10th Cir. 1998) (Departure under U.S.S.G. §5K2.16 may be warranted for voluntary disclosure even if the offense would inevitably have been discovered.).
14. People v. Scott, 9 Cal. 4th 331, 349 (1994) (“The trial court often has broad discretion to tailor the sentence to the particular case.”).
15. California law imposes a duty on an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets of his or her client.” Bus. & Proc. Code §6068(e). A “confidence” includes “any information obtained by the lawyer during a professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.” State Bar of Cal. Formal Op. No. 1993-133. Essentially, an attorney must protect the confidentiality of any information obtained from a client. This requirement applies to every member of the State Bar of California, whether the attorney is practicing in a California state court or in a federal court. Section 6068(e) is relevant in the context of a voluntary disclosure because such a disclosure could reveal client confidences and secrets. See Mark L. Tuft, “For Your Eyes Only,” Los Angeles Lawyer, Dec. 2002, at 26.
19. Under the U.S. Department of Justice’s “Petite Policy,” in certain circumstances a federal prosecution may be based on the same transactions or acts underlying a plea of guilty in state court. U.S. ATTORNEY’S MANUAL 9.2.031. Determining whether prosecutorial discretion warrants instituting this type of prosecution in a federal court involves an evaluation of various criteria. Counsel should consider the likelihood of a dual prosecution in determining whether a client should self-report to the state. See U.S.S.G. §5K2.16 (The downward departure is not available if the individual is motivated by imminent discovery.).
20. The client’s counsel should consult with bankruptcy counsel for this option. It is axiomatic that debts incurred by fraud are not dischargeable in bankruptcy. See 11 U.S.C. §523. Thus, a bankruptcy filing would only ensure that creditors similarly situated are treated fairly. It also might relieve the client of the obligation and stress of responding to multiple creditors.
22. See, e.g., Crystal v. United States, 172 F. 3d 1141 (1999). In Crystal, defense counsel was orally assured by the chief of the IRS Criminal Investigation Division that the client qualified for the IRS voluntary disclosure policy, but the IRS backed away from its assurance after the chief learned that a field agent had opened an investigation.
23. United States v. Leonof, 326 F. 3d 1111, 1117-18 (9th Cir. 2003).
Criminal Histories and Parental Custody and Visitation Rights

Family courts have broad discretion in balancing the rights of parents and children

As a result of a multitude of California marriages ending in divorce, it should come as no surprise that the family law courts are constantly being called upon to resolve disputes over child custody and visitation rights. Given the emotional nature of these disputes, it is unfortunately common for highly charged accusations of unfit parenting and collateral wrongdoing to be made. When these accusations have evidentiary support—for example, if one of the parents has been charged with or convicted of a crime—the family law courts are entrusted with the delicate task of balancing two basic, yet often competing, interests: the child’s right to “health, safety, and welfare,” and the parent’s right to take part in the care and custody of his or her child.

In recent years, in the wake of several highly publicized cases of child abuse and endangerment committed by convicted felons who had been awarded custody or visitation rights, the California Legislature enacted a series of statutes designed to address the problem. Generally, these statutes sought to limit the discretion of family law judges in awarding custody or visitation rights to convicted felons. Yet, with only one rarely encountered exception, the courts still retain broad discretion to make “any order” for the custody of a minor child “that seems necessary or proper.” Thus, even after enactment of these statutes, it is not a foregone conclusion that a convicted felon will be denied custody or visitation rights. Indeed, although the recently enacted statutes create certain presumptions against custody and visitation, the principal test remains what it has long been in California: Custody and visitation arrangements are to be determined according to what is in the best interest of the child.

The Best Interest Analysis

From the late 1980s to the late 1990s, the California Legislature enacted several statutes that provide that if a parent is convicted of certain crimes, a rebuttable presumption exists that custody or unsupervised visitation with that parent is not in the child’s best interest. A history of this legislation illuminates the intent and effects of these laws.

First, under one circumstance, the legislature has determined what is in the best interest of the child, leaving no room for judicial discretion. Family Code Section 3030(b) provides that “no person shall be granted custody of, or visitation with, a child,” if the person has been convicted of rape, and “the child was conceived as a result of that violation.” This section provides a conclusive presumption that an award of custody or visitation to a convicted rapist, when the child was born as a result of the rape, is not in the best interest of that child. The obvious goal of the legislation was to “reduce any further trauma a mother must endure when dealing with the custody and visitation issues of a child conceived as a result of rape.”

One commentator has suggested that the logic underlying statutes such as this one is that parental rights cannot arise from a criminal act and “criminals should not—quite literally—enjoy the fruits of their crime.”

In every other situation, however, the courts retain some level of discretion to award custody and visitation rights to accused or convicted felons. However, as a practical matter, these statutes make it extremely difficult for a parent convicted of the enumerated crimes to gain custody or visitation rights.

The first of the recent statutes limiting the custody and visitation rights of felons was enacted in 1989. As the legislature originally worded Civil Code Section 4610, it provided that “no parent shall be awarded custody of, or unsupervised visitation with, any child” if the parent has been convicted of child abuse, child endangerment, or molestation, “unless the court finds that there is no significant risk to the child.” The bill was introduced in direct response to a specific incident involving a seven-year-old girl who had been abducted by her father during an unsupervised visit. The father had an extensive criminal history, including convictions for kidnapping and child sexual abuse. The legislation was intended to prevent parents who have been convicted of serious child abuse from being awarded custody or unsupervised visitation of their children.

The call for an amendment to this legislation came when a county court in the state of Nevada interpreted a statute similar to California Family Code Section 3030 awarded joint custody and unsupervised visitation to a father who had been convicted of committing lewd and lascivious acts with his niece only nine years prior to the child custody proceeding. The father’s attorney had successfully argued that the Nevada statute did not apply because the crime his client was convicted of was not specifically enumerated in the statute.

The California Legislature swiftly reacted to what it viewed as an overly strict reading of the Nevada statute. The author of Section 3030 had initially specified, on the basis of research indicating which crimes were most commonly committed against children, that child abuse, child endangerment, or molestation would be the basis for denial of custody and visitation rights. It was assumed that similar offenses would be automatically covered by the statute. When the bill’s author learned of the Nevada court battle, he denounced the judge’s argument that “since the crime is not listed it does not count,” and further...
stated that “if it’s necessary, we can clean up the statute—but I'm surprised it is even coming up.”

The amendment prohibited the award of custody or unsupervised visitation to a parent who is required to register as a sex offender in cases in which the victim was a minor or has been convicted of child abuse, child endangerment, or molestation. However, under the statute, the court need not deny custody or visitation rights if it “finds that there is no significant risk to the child and states its reasons in writing or on the record.” This is a high hurdle for a parent who has been convicted of a sex crime.

A similar statutory presumption was enacted to restrict custody and visitation of persons convicted of killing the child’s other parent. Family Code Section 3030(c) provides that “no person shall be granted custody of, or unsupervised visitation with, a child if the person has been convicted of murder in the first degree, as defined in Section 189 of the Penal Code, and the victim of the murder was the other parent of the child who is the subject of the order, unless the court finds that there is no risk to the child’s health, safety and welfare, and states the reasons for its finding in writing or on the record.” This legislation was motivated by a 1995 incident in Massachusetts in which a three-year-old girl witnessed her father murder her mother. The father was duly convicted; and, while in prison, he sued for visitation rights. The Massachusetts Legislature promptly enacted what became known as Lizzie’s Law, specifically to prevent the convicted father from exercising visitation rights.

In California, a version of Lizzie’s Law was introduced to ensure that if a similar case were to arise in California, there would be a statutory presumption against visitation, unless the convicted parent was able to rebut the presumption that custody or visitation under such circumstances would be detrimental to the child’s best interest. One California Assembly member commented that the bill was “merely an extension of existing law to its logical conclusion.” The law as it existed in 1998 allowed a parent to terminate the parental rights of the other parent convicted of a felony if the facts of the crime proved the unfitness of the parent to have future custody. During the same period, a law existed that prohibited the award of custody or unsupervised visitation to a parent who had been convicted of certain sex offenses against a minor. In support of the enactment of Lizzie’s Law in California, the same Assembly member pointed out, “[I]t is only common sense to add murder of a child’s parent to this list of crimes that the law regards as so dangerous to the interests of children that a denial of, or serious restriction on, a parent’s right to custody or visitation is warranted.”

Family Code Section 3030(c) creates a rebuttable presumption that a parent convicted of first degree murder of the other parent is unfit to have custody or unsupervised visitation with the minor child. Again, the presumption may be rebutted if the court finds that there is no risk to the child’s health, safety, and welfare and custody or visitation would otherwise be in the child’s best interest. Under Section 3030(c)(1), the statute provides that in making its finding, the court may consider, among other things: 1) the wishes of the child, 2) credible evidence that the convicted parent was a victim of abuse, and 3) the testimony of an expert witness that the convicted parent suffers from the effects of battered women’s syndrome.

The Simpson Case

The O. J. Simpson custody battle provides an interesting case study. During Simpson’s criminal trial for the murders of Nicole Brown Simpson and Ronald Goldman, the children of his marriage to Nicole stayed with Nicole’s parents, the Browns. Simpson had nominated the Browns as the children’s guardians until he was able to resume custody. Simpson and the Browns agreed that Simpson’s release from prison would trigger his right to seek a termination of the guardianship.

Simpson was acquitted after a lengthy and extraordinarily well-publicized criminal trial. After his acquittal, he filed a petition to terminate the Browns’ guardianship over his children, under Section 1601 of the Probate Code. In deciding the case, the trial court applied the legal standard set forth in Family Code Section 3041, which provides: “Before making an order granting custody to a person or persons other than a parent, over the objection of a parent, the court shall make a finding that granting custody to a parent would be detrimental to the child....” The court put the burden on the Browns to prove by clear and convincing evidence that it would be detrimental to the children to be returned to their father.

When the court applied this standard, the psychological testing, clinical observations, and review of Simpson’s history with the children did not, in the court’s opinion, present a picture of a man who had emotionally or physically harmed his children in the past, nor did it present a picture of a man who was likely to do so in the future. The evidence presented to the court primarily centered on the issue of whether Simpson fit the profile of a batterer and whether he had character flaws likely to endanger the physical and emotional well-being of the children. The court was presented with the history of Simpson’s relationship with his ex-wife, which included evidence of verbal and physical abuse. Critically, there was no evidence presented that the children were ever exposed to the alleged domestic violence.

The court relied upon evaluations of the child psychiatric and psychological witnesses who had evaluated the children for the child custody proceeding. The court considered the extensive documentation regarding the two-year psychological treatment of the children and agreed with the findings of expert evaluators that there was no evidence, clinical or psychological, that “Simpson had[ed] ever emotionally or psychologically abused the children.” Experts and eyewitnesses testified that the children exhibited “no covert signs of fear or intimidation around their father and that they express affection for him (and) are comforted in his presence.” The court found that Simpson never physically abused the children.

At the time of the child custody proceeding, Simpson was simultaneously defending the wrongful death actions brought by the families of the two murder victims. The judge in the custody case contemplated the effect, if any, of the impending civil case verdict. Ultimately, the court found that the civil case verdict would not be binding in the child custody proceeding, since the civil burden of “preponderance of the evidence” is a lesser burden than the “clear and convincing” standard that applied in the custody proceeding.

Consequently, the court did not receive any evidence regarding the allegations of homicide against Simpson. In fact, the court denied a midtrial request by the Browns that the court, by whatever procedure possible, allow the homicide case to be considered in the custody trial. The court denied the request, ruling that it was untimely and would cause further delay in the child custody proceeding. Such delay and the “considerable risk to the children of further damaging publicity that would accompany an unprecedented third ‘homicide trial’ of Mr. Simpson” were found by the court to be not in the children’s best interests.

The court granted Simpson’s petition to terminate the guardianship, holding that the Browns had failed to demonstrate by clear and convincing evidence that custody of the children by Simpson would be clearly detrimental to the children’s well-being. The Browns appealed, and the court of appeal reversed the judgment, holding that the trial court had erred in several ways. First, the trial court erred by refusing to consider evidence regarding the circumstances of Nicole Brown Simpson’s murder. Although conceding that
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consideration of the murder evidence would have necessitated a longer trial, the court of appeal emphasized: “Judges cannot avoid the single most important and relevant issue in a case—particularly a case involving children and the possibility of violence—just because trying that issue will take time.” It added, “As a matter of case law, as well as common sense, the question of whether one parent has actually murdered the other is about as relevant as it is possible to imagine in any case involving whether the surviving parent should be allowed any form of child custody.”

The court of appeal further held that by applying Family Code Section 3041, which deals with an initial loss of custody against parental wishes, the trial court had applied the wrong statute and, consequently, the wrong legal standards. The appellate court held that Section 1601 of the Probate Code should have been employed, because the proceedings involved the termination of a voluntary guardianship. According to the court of appeal, the trial court erred by putting the burden on the guardians to prove by clear and convincing evidence that it was detrimental to the children to be returned to their father; the trial court should have examined the totality of evidence bearing on the father’s fitness, with the burden on the father. For these and other errors, the court of appeal reversed the ruling of the trial court and remanded the case for another hearing “to consider all the relevant evidence.” Ultimately, a settlement was reached, giving the Browns visitation rights.

Cases in which a parent has been convicted of child abuse or of killing the mother of a child normally do not present close calls under the new statutory scheme, and the convicted parent faces a steep uphill battle to gain custody or visitation rights. But what of less serious crimes or crimes that do not directly affect the parent-child relationship? White collar crimes, drug offenses, and petty recidivism present more challenging cases for family law courts.

The starting point is the realization that the natural parents of a child have a fundamental liberty interest in the care, custody, and management of their children. This fundamental interest does not vanish simply because the natural parents have been less than model parents, have committed a felony, or have lost temporary custody of their children to the state. When a court moves to free a child from parental custody and control, it must provide the parent with fundamentally fair procedures. California requires that a finding to terminate parental rights be supported by clear and convincing evidence.

The termination of parental rights is governed by the policy of serving the child’s “welfare and best interest.” In addition, Family Code Section 7285(a)(2) provides that the termination of parental rights for a felony conviction is limited to a subcategory of felonies for which “the facts of the crime...are of such a nature so as to prove the unfitness of the parent or parents to have the future custody and control of the child.”

The statute’s guidelines leave the California courts with the discretion to interpret which felonies prove the unfitness of a parent for future control and custody. Most courts define “unfitness” to mean “a probability that the parent will fail in a substantial degree to discharge parental duties toward the child.” However, the courts have at times been inconsistent and unpredictable in the application of what constitutes unfitness.

For example, in In re Terry E., the court of appeal held that a mother’s conviction for various sex crimes committed with her boyfriend against her boyfriend’s former wife, in the presence of her children, was insufficient to terminate her parental rights four years later. The court of appeal found that the factors that contributed to her cruelty and neglect at the time of her felony convictions were no longer present at the time the trial court terminated her parental rights. In addition, the court of appeal concluded that the mother had taken appropriate action to be reunited with her children during her three years and eight months of incarceration by receiving parenting and psychological counseling to improve her fitness as a parent.

In another case, In re James M., the court held as a general matter that the seriousness of the crime alone does not support the termination of parental rights. In this case, the father’s conviction for second-degree murder of the children’s mother was considered not to be a crime that proved his unfitness as a parent, as it was a crime of passion and not the product of a violent and vicious character. The court noted that if the second-degree murder had been committed in the presence of the children, the crime would likely have proven his unfitness as a parent.

A contrasting case is In re Geoffrey G., in which the court found that a father’s manslaughter conviction for killing his child’s mother sufficed to prove his unfitness as a parent. The court examined the violent nature of the crime, the father’s prior use of alcohol, and his prior criminal record, finding those factors indicated serious personality flaws and emotional instability.

In In re Arthur C., a father’s parental rights were terminated after he was convicted of assault with a deadly weapon for stabbing his children’s mother. His children were not present when he committed the felony. The court held that the circumstances of the felony need only show the unfitness of the parent to have future custody and control. The court noted that there is no requirement that the children be present when the felony occurs or that they be in current danger. The courts consider the circumstances surrounding the felony to determine whether it is likely that future harm may result to the children if the parent’s rights are not terminated.

In re Arthur C., the court found that the inferences drawn by the trial court were sufficient to “establish a reasonable relationship between the father’s crime and the likelihood that his continuing to parent would be detrimental to the children.” These cases all involved violent crimes. The inconsistent results demonstrate that there is no uniform approach in custody cases involving felony convictions, even for crimes of violence, when the crimes are not specifically addressed in the Family Code. However, it does seem clear that if the felony does not involve a child victim, it must be a crime that unambiguously establishes the depravity of the perpetrator in a manner sufficient to support a conclusion that he or she will fail at discharging his or her parental duties.

When the crimes at issue are nonviolent, it becomes even more difficult to predict a result. Attorneys should be aware that the statutory guidelines are vague, and judges are afforded considerable latitude in deciding the issue of unfitness. Some white-collar felonies are an easy win for the parent seeking custody, because the crimes are not injurious to children, while felonies involving sexual molestation of children are a likely loss. But most cases fall somewhere in the middle. Attorneys representing parents seeking custody must convince the judge presiding over the case, by clear and convincing evidence, that the felony in question does not prove a parent’s unfitness.

Domestic Violence and Child Sexual Abuse

California has enacted additional statutory presumptions to limit custody and visitation to parents and other persons who have committed domestic violence or child sexual abuse. When domestic violence or child abuse is alleged, the court making a custody determination will take into consideration evidence of prior abuse against any child with whom the adult seeking custody has a blood, affinity, or caretaking relationship, “no matter how temporary,” as well as abuse against the other parent or against a current spouse, cohabitant, or someone the person seeking custody has dated. Upon a finding that a person seeking custody has perpetrated domestic violence within the past five years, there is a rebuttable presumption that an
award of custody to that person would be detrimental to the child’s best interest. The presumption does not apply if both parents are perpetrators of domestic violence.

When determining whether or not the perpetrator has overcome the presumption, the court must consider whether the person: 1) has shown that it would be in the child’s best interest for the person to have some form of custody, 2) has completed a batterer’s treatment program, 3) has completed drug or alcohol abuse counseling, if appropriate, 4) is on probation or parole, is subject to a restraining order and has complied with its terms, and 5) has committed any further domestic violence.

Unfortunately, the ultimate weapon in a child custody fight is to accuse the other parent of being a child molester. Every year, approximately three million children are reported as victims of abuse and neglect by parents or other caregivers. When faced with allegations of child sexual abuse, trial courts have the authority to make temporary orders regarding child custody and visitation. However, trial courts are faced with the daunting task of determining whether the allegations of child abuse are true. Courts may react to allegations of child sexual abuse by being overly cautious or by treating the allegations with extreme skepticism. Until a court makes its findings on the allegations, the parental rights of the parent accused will be curtailed during the proceeding.

The political intent behind recent laws affecting the custodial rights of persons convicted of domestic violence and sexual abuse derives from a variety of sources, including feminism and the get-tough-on-crime movement. In addition, publicity surrounding the O. J. Simpson case focused national attention on domestic violence and inspired a flurry of action. Currently, there are several Family Code sections that grant trial courts authority to make custody and visitation orders based solely upon allegations of child sexual abuse, child abuse, or neglect.

Family Code Section 3027 provides that if allegations of child sexual abuse are made during a child custody proceeding and the court has concerns regarding the child’s safety, the court may take reasonable temporary steps, as the court deems appropriate under the circumstances, to protect the child’s safety until an investigation can be completed.

Conversely, under Family Code Section 3027.5(b), a court may also order supervised visitation, or even limit custody or visitation, if it finds substantial evidence that the parent, with intent to interfere with the other parent’s lawful contact with the child, made a report of child sexual abuse that he or she knew was false at the time it was made. However, any such limitation can only be made after the court determines that it is necessary to protect the health, safety, and welfare of the child and considers the state’s policy of assuring that children have frequent and continuing contact with both parents.

In the event the court finds that the allegation of child sexual abuse was false and that the parent making the allegation knew it to be false at the time the allegation was made, the court has further authority to grant sanctions against that parent. Family Code Section 3027.1 allows for the imposition of monetary sanctions if the court makes this determination. This section, formerly California Civil Code Section 4611, was enacted to address the growing problem of false accusations of child abuse. The bill’s author expressed the hope that this provision would “discourage a parent from making or repeating the accusation if they know that a fine would be imposed.”

Although the law creates presumptions for certain crimes, a child’s natural parents have a fundamental interest in the care and custody of their children, and it is rare for even a serious crime to serve as an absolute test for suitability for parenthood. Apart from cases in which a father convicted of rape seeks custody or visitation with a child conceived by that rape, courts have broad discretion to determine what custody and visitation arrangements are in a child’s best interest. Courts seek to protect the health, safety, and welfare of a child while attempting to provide a child with continuing contact with both parents. No matter what the nature of a parent’s criminal convictions are, custody or visitation may be ordered if the parent can establish that the arrangement will not pose any danger to the child’s health, safety, or welfare, and would otherwise be in the child’s best interest.

1 The authors thank associate attorney Anne Nakornratana and law clerk Gina Castillo, both of Lisa Hellend Meyer & Associates, for their invaluable research assistance.
5 Id.
6 Id.
8 Id. at 2.
9 Id. at 3.
10 Id. at 4.
11 Id.

12 FAM. CODE §3030(a).
14 Id.
15 Id.
16 Id. at 3.
17 Id.
18 Id.
19 Id.
20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
25 Id.
26 Id.
27 Id.
29 Id. at 925-26.
30 Id. at 921.
31 Id. (citing Guardianship of Kassandra H., 64 Cal. App. 4th 1228, 1233 (1998)).
32 Id. at 922.
34 Id.
36 FAM. CODE §7821.
37 Id.
38 Micek, supra note 33.
39 Id.
41 Id. at 950-51.
43 Id. at 259.
44 Id. at 266.
46 Id. at 421.
48 Id. at 445.
49 Id.
50 Id. at 446.
51 Micek, supra note 33, at 568.
52 Id.
53 Id. at 569.
54 FAM. CODE §3011.
55 FAM. CODE §3044.
56 FAM. CODE §3044(c).
57 FAM. CODE §3044(b).
60 See Deborah Ahrens, supra note 3.
62 FAM. CODE §3027.5(b).
63 Id.
65 Id.
Some time ago, The New Yorker printed a cartoon featuring a corporate CEO seated behind a massive desk in a huge office with a magnificent view. Handing a just-signed document to a subordinate, the CEO says, “Run this up Legal’s ass.”

Those days of cavalier attitudes by business leaders toward their legal departments, if indeed they ever really existed, are gone. Billion-dollar business collapses and waves of corporate scandal have changed the corporate landscape for the foreseeable future. In the aftermath of the Enron debacle, postmortems revealed a number of troubling realities. Many observers concluded that, for Enron and other scandal-ridden companies, the wrongdoing was wide in scope and long in duration. This suggests that the traditional system of corporate checks and balances had failed miserably in those companies. Personal integrity, codes of conduct, and legal compliance programs apparently were no match for a culture of greed.¹

Congress and the regulatory agencies moved swiftly to enact new protections for the investing public, and integrity issues have new prominence among shareholder concerns. The government has demanded that corporations more effectively govern themselves and promptly self-report improprieties. Effective corporate governance has never been a more important priority than it is right now, both legally and as a cornerstone of a company’s reputation. Moreover, the new provisions seek to enlist in-house counsel as soldiers in the war on corporate corruption.

Indeed, the life of a post-Enron in-house lawyer is one filled with new power, new responsibility, and new ethical tensions—far from the passive, paper-shuffling irrelevance satirized in The New Yorker cartoon.

On August 5, 2003, the SEC’s “up-the-ladder” reporting requirements for attorneys went into effect. The requirements are part of the SEC’s Final Rule: Implementation of Standards of Professional Conduct for Attorneys, which implements Section 307 of the Sarbanes-Oxley Act of 2002. The rule applies to all attorneys who “appear and practice before the Commission” in the representation of an issuer of publicly traded securities,² but it is having its greatest impact on corporate in-house attorneys. The rule requires in-house as well as outside attorneys to report certain matters to the SEC. This puts additional pressure on in-house counsel to be proactive in managing their company’s legal and ethical obligations.

In the current regulatory climate, legal departments must assume a more proactive role in corporate management. Jan L. Handzlik is a partner in the Los Angeles office of Kirkland & Ellis, where he specializes in white collar criminal defense and business fraud litigation. He is a former federal prosecutor and immediate past chair of the ABA’s national White Collar Crime Committee. Stephen J. Connolly is a lawyer with the Office of Independent Review, which provides civilian oversight for the Los Angeles County Sheriff’s Department.
neous to report evidence of a material violation by the company up the ladder to the company’s chief executive officer and the board of directors. This is one of a series of enactments and policy statements designed to compel corporate counsel to ensure greater accountability on the part of publicly traded companies.

The most recent developments on this front have come from the American Bar Association. On August 12, 2003, delegates to the ABA Annual Meeting voted to amend Rule 1.13 of the ABA’s Model Rules of Professional Conduct to require in-house counsel to report fraud up the chain of command. If company officers and the board of directors fail to appropriately address the wrongdoing, counsel now have the option, but not the obligation, to disclose the fraud to regulators and prosecutors. A day before the ABA delegates passed this amendment to Rule 1.13, they also approved changes to Rule 1.6, which now allows, but does not mandate, in-house counsel to disclose their client’s otherwise privileged information to prevent fraud.

In effect, good corporate governance is now the law. Sarbanes-Oxley contains detailed provisions on how corporations should police themselves. Among other things, Sarbanes-Oxley requires CFOs and CEOs to certify that any fraud involving key officers and employees has been disclosed to the company’s auditors. Coupled with the reporting requirements placed on in-house counsel, this provision seeks to ensure that corporate wrongdoing will be revealed and addressed.

In addition, an updated Department of Justice memorandum regarding the investigation and prosecution of organizations, issued earlier this year by Deputy Attorney General Larry Thompson, presents companies with a stark choice: Cooperate in a candid and complete way by revealing the results of internal investigations and possibly waiving attorney-client and work product protections, or face the full might of the DOJ.

Prior to the Thompson memorandum, the SEC had issued a policy statement in October 2001 concerning corporate cooperation. This release outlines the factors that the SEC will take into consideration in evaluating a company’s response to allegations of misconduct. Those companies providing complete cooperation, including the disclosure of the results of internal investigations and the waiver of privileges, may avoid SEC enforcement proceedings.

Further increasing the pressure to identify and eradicate corporate corruption are the U.S. Sentencing Guidelines, which demand self-reporting and cooperation by companies as the price of favorable consideration at the time of the imposition of a sentence. These guidelines, which federal judges must follow in evaluating the conduct of corporate defendants, leave no doubt that, to gain any advantage, companies must promptly reveal their own wrongdoing and that of their employees by providing information to investigators.

The clear message is that prosecutors and regulators are demanding to learn the who, what, when, and how of incidents of misconduct almost as soon as the corporate in-house lawyer does. The new requirements regarding corporate governance have focused special attention on, and considerable reevaluation of, the proper place of in-house counsel in the corporate hierarchy. All the skills that have traditionally characterized effective general counsel are still in demand, but in today’s corporate climate, counsel’s expertise must include a special emphasis on strong and independent stewardship over the company’s regulatory compliance programs and internal codes of conduct.

The balancing act is a challenging one. The revised role of the in-house lawyer has the potential to strain the lawyer’s traditional relations with interested parties within and outside the company. Internally, in-house counsel might find themselves at odds with a management team accustomed to deference regarding executive decisions. Externally, counsel must contend with the expectations of a government that in many ways has attempted to “deputize” corporate law departments as part of demanding new standards. Some in-house counsel may feel conflicted and unsure of how to discharge their ethical and professional duties while pursuing good corporate governance.

Some growing pains are inevitable, and some ambiguities have yet to be resolved. What is apparent, however, is that the need for skilled and influential general counsel has never been greater, and that all the relevant institutional actors have a part to play in promoting the effective execution of counsel’s new role.

Independent Internal Investigations

To whom is the in-house lawyer now responsible? Or, more basically, whom does the lawyer represent? The answer, at least theoretically, is straightforward. According to the ABA Model Rules, “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” This same principle is expressed in Rule 3-600(A) of the California Rules of Professional Conduct, which states, “In representing an organization, a member shall conform his or her representation to the concept that the client is the organization itself…”

The real-world applications of this concept are, of course, quite complex. Even when corporate matters are proceeding smoothly, in-house counsel have the potential to be tugged in several directions. Working with management on a daily basis, in-house counsel must receive support from and maintain the confidence of management in order to be an effective participant in company affairs. General counsel also must be responsive to the company’s board of directors, which has a vested interest in running a profitable business. Ultimately, in-house counsel are responsible to the shareholders, who expect a fair return on their investment. These different factions can and do fall out of harmony, leaving in-house counsel with difficult decisions to make about what is best for the company as a whole.

What should in-house counsel do when faced with evidence of an improperity involving the corporate CEO, CFO, chairman, or other influential official? These may be the persons responsible for hiring, paying, and advancing counsel’s career at the company. The new rules reinforce the idea that in-house counsel must set aside allegiances and friendships while ensuring that matters involving possible wrongdoing are resolved by uninvol ved decision makers.

The audit committee of the board of directors has an enhanced role to play in investigating corporate wrongdoing. Upon learning of a significant impropriety, in-house counsel must immediately inform the audit committee or a group of disinterested directors constituted for this purpose. This group will act as a special committee for the company regarding the internal investigation and should be free from conflicts.

In addition to ensuring that the officers purportedly involved in the wrongdoing have no influence over the investigation, in-house counsel and the special committee must promptly select an independent outside counsel to represent the company. Here again, the traditional loyalties of in-house counsel may be tested. An in-house lawyer should not hire the law firm that has historically handled the company’s business and with which the in-house lawyer has a working relationship. Instead, the in-house lawyer must select a firm with which the company does not work on a regular basis to be the independent outside counsel.

If juggling loyalties can be challenging in even the best of circumstances, that task is only compounded when problems emerge. Even before the furor generated by the high-profile corporate scandals, the discovery of internal misconduct created unique ethical tensions for corporate counsel. It has always
been difficult for in-house counsel to maintain ultimate loyalty to the corporate entity while at the same time dealing fairly and effectively with the company's personnel, many of whom may not realize where privileges begin or whose expectations of confidentiality may be misplaced. These tensions have increased in the new climate of reform.

How must the in-house lawyer fulfill the obligation of investigating wrongdoing while maintaining the role of trusted corporate counselor? The relationship between in-house counsel and company personnel should be based on trust as well as a spirit of collaboration. However, the new laws as well as the SEC and DOJ pronouncements may have the unintended consequence of making this relationship more adversarial. In-house counsel must consider how their investigations of suspected misconduct may conflict with the personal interests of company employees.

In looking into suspected wrongdoing, in-house counsel seeks to uncover facts and identify those responsible. In the course of counsel's investigation, counsel will interview company officers and employees regarding their knowledge of and participation in any questionable transactions. The in-house lawyer seeks to discover the truth, even if the eventual findings result in employee discipline and termination.

Since the DOJ has taken the position that corporations must promptly disclose wrongdoing, identify the "culprits," and reveal the results of internal investigations, in-house counsel are faced with the greater prospect of having to disclose privileged information. In questioning company employees concerning a suspected transgression, in-house lawyers now know there is a good chance their work product will be revealed to regulators and prosecutors.

The Thompson memorandum states that an important factor to be considered in charging a corporation with criminal wrongdoing is "the willingness [of the corporation] to cooperate in the investigation of its [officers, employees and] agents, including, if necessary, the waiver of corporate attorney-client and work product protection." The memorandum further notes that the extent of a corporation's cooperation may be determined by, among other things, "the corporation's willingness to identify the culprits within the corporation, including senior executives...." Another factor that prosecutors can weigh, according to the memorandum, is whether the corporation is protecting culpable employees by, among other things, promising support "through the advancing of attorney's fees...." The issues presented in the memorandum raise concerns that may be professionally and personally troubling for in-house counsel.

What, then, does an in-house lawyer tell an employee at the time of an investigative interview? The California Rules of Professional Conduct require certain disclosures when the company's interests are or may become adverse to the interests of the employee. In-house lawyers must explain that their client is the company, and that they do not represent the employee. The employee must be informed that the results of the interview constitute privileged information, but the company, not the employee, possesses the privilege accorded to clients. The employee should also be told that the company may disclose the information from the interview depending on the company's interests.

With companies now encouraged to cooperate and self-report, should the in-house lawyer also inform the employee that the contents of the interview may be divulged to the FBI, the SEC, and the DOJ? Should employees be informed that the statements they make might well be used against them in a subsequent action filed by a government agency or initiated by a grand jury? Should an employee be informed if, before the interview, the company has already contacted government prosecutors or regulators to let them know that a problem may exist? Does this increase the obligation of in-house counsel to let the employee know that the employee's statements will probably be provided to the government and possibly used against the employee in the future?

When the in-house lawyer has already determined that the employee's interests are or may be adverse to those of the company, the lawyer should notify the employee of the conflict or potential conflict and also should advise the employee that he or she may want to seek independent representation.

The more difficult question arises when the issue of adverse interests is not apparent. In-house counsel must conduct a thorough investigation and question the relevant employees. Ideally, in-house counsel will be able to accomplish this task while showing due respect for the rights of the employees. The best practice would, in many ways, comport with the requirements attorneys already face in the more extreme situations.

When in-house counsel have already had contact with the regulators, they should inform employees that interviews with them are being conducted as part of a corporate internal investigation into specified conduct and that the results of the investigation may be disclosed to prosecutors and regulators as dictated by the company's interests. This advice has the virtue of being truthful and lets employees know the possible consequences of participating in an interview. It should also alert employees to the possible dangers of proceeding, decrease the possibility that the
employees will later feel that they were tricked into providing statements that may not be in their best interests, and possibly lead employees threatened by the investigation to retain independent counsel.

**Responsibilities and Liabilities**

Before the SEC’s Final Rule was adopted, the proposals for it raised concerns among many, including former American Bar Association President Alfred E. Carlton Jr., who observed, “Some of these proposals raise fundamental issues regarding the role of lawyers and the attorney-client relationship.” By seeking to make in-house counsel the eyes and ears of the regulators, the new standards essentially increase in-house counsel’s responsibility to members of the investing public, who rely on the accuracy of a company’s claims and disclosures. This is true even if the exercise of that responsibility comes at the expense of existing shareholders who might suffer financial loss when damaging internal information comes to light.

The landscape of corporate governance also has been changed by the increasing criminalization of improper corporate practices. In-house counsel and other officers face a greater possibility of prosecution and imprisonment for failure to properly correct and disclose material improprieties. Criminal sanctions are now applied more frequently to disclose wrongdoing before the facts are fully known and the issue of materiality has been determined runs the risk of damaging company’s reputation and hurt its shareholders.

The dynamism and creativity that are common to thriving businesses may also suffer. In the same way that the most effective tennis players must be able to hit to the lines without going over them, aggressive and competitive companies must also sometimes push at the regulatory boundaries to keep ahead of their rivals. In tennis, umpires are not affiliated with one side or the other but are instead independent third parties. Their lack of affiliation makes it easier to decide the close calls objectively and to take the heat when self-interested players and their supporters see things in a different way.

Comparatively, in-house counsel have more difficulties and dilemmas with their role as it has been redefined. In-house counsel traditionally and understandably hope that their client—their employer—will “win,” but now counsel have more responsibility than ever to emphasize the rules of the game and monitor compliance. Corporate attorneys are now expected to speak up when they detect—or think they detect—actions that are out of bounds, even over the strong disagreement of upper management. The obvious calls can be stressful enough in such situations. However, the discovery of a flagrant fraud is likely to be less common than the emergence of ambiguous suspicions of unethical conduct—some of which may have a direct impact on the company’s short-term performance or competitive edge. The line between integrity and profitability is often as difficult to judge as the placement of a powerful serve.

In-house counsel with an overabundance of caution, a sincere belief in the rightness of their approach, a concern over personal liability, or some combination of these factors, could easily opt for prompt condemnation and early disclosure to regulators in almost any situation. However, a premature decision to disclose wrongdoing before the facts are fully known and the issue of materiality has been determined runs the risk of damaging the corporation and alienating management and the board of directors.

The determination of the materiality of an event to the company’s profit and loss statement is traditionally a function of management working together with outside auditors. The new enactments may blur responsibilities in this area and possibly shift inordinate responsibility to the general counsel. After all, the SEC now requires in-house lawyers to investigate internal misconduct and seek to correct it by reporting to upper management and, if necessary, the board of directors. And Sarbanes-Oxley requires upper management to report any fraud, whether material or not, to company auditors.

Thus, in-house counsel must determine if a fraud has taken place and report the findings up the ladder more quickly and perhaps with less factual support than ever before. Additionally, in-house counsel also must decide with rapidity how important the misconduct is to the corporation and seek appropriate remedial action from management and possibly the board of directors. If an in-house lawyer determines that the company has not responded properly to the reporting of misconduct, the lawyer is faced with unenviable choices: stay with the company—and face possible accusations of complicity and participation in a cover-up—or quit, perhaps in a noisy manner. A resignation could bring public attention to the problem and may itself be a reportable event.

Pitfalls also exist at the other end of the spectrum, in which in-house counsel risk a determination that they have failed to create and enforce a law compliance program with sufficient rigor. While the umpire in the tennis match is, right or wrong, the last word on what happens on the court, in-house lawyers in the post-Enron era must contend with the possibility of being second-guessed. If internal problems achieve critical mass and misconduct goes unchecked by the internal monitors, regulators and prosecutors are likely to take a dim view of the conduct of in-house counsel. Amid the wreckage of a corporate scandal, the in-house lawyer may be called to account for the company’s failure to discover wrongdoing and to take appropriate corrective action. The failure to disclose a problem promptly also may be placed at the feet of the in-house lawyer.

**An Advocate for Law Compliance**

In-house lawyers now have several critical roles to play. These range from creating and implementing a workable governance program to monitoring the company’s compliance and then responding wisely and decisively when problems develop. Accordingly, boards of directors and executives at all levels of management must encourage and facilitate the effectiveness of corporate in-house counsel.

In-house counsel with the independence to make impartial decisions and the ability to carry them out are key to proper corporate governance. Indeed, without highly regarded, responsible, and skilled in-house counsel, even the best program of law compliance and
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effective corporate governance is not likely to succeed. Moreover, the life of in-house counsel under the new rules need not be unremittingly grim for counsel and for the companies they represent. Instead, there are several potential advantages.

The increasing importance and greater authority of in-house counsel may lead to less, not more, friction in corporate ranks. Clearly defined priorities and roles may reduce, not increase, ethical dilemmas. A carefully crafted internal code of conduct implemented in an even-handed, predictable manner may give employees more, not less, confidence in the commitment of the company to good governance.

In-house counsel’s watchdog and whistle-blower functions are also more than indicators of corporate integrity in the new era. They also can make good business sense. For example, while regulatory disclosure and publicity regarding misconduct can certainly be painful in the short term, companies may attain long-term benefits. These include the possibility of faster and more effective correction of problems as well as a more favorable response from regulators and prosecutors who are deciding what sort of remediation or penalty to impose. When companies are forthright with their shareholders and the public, management may appear to be decisive, candid, and committed to good governance. A setback that is handled well ultimately can result in a healthier company in which the markets and the public have greater confidence.

While companies must adapt to the new reality, government regulators must do the same when they seek to enlist the aid of in-house counsel in the crusade for better corporate governance. They must recognize that putting corporate lawyers in an untenable, no-win situation does not ultimately serve the regulators’ cause. Reporting requirements and other new monitoring obligations have validity, but their reasonableness depends on recognition of the in-house counsel’s need to serve their clients with impartiality and confidence and to maintain the trust and support of company personnel.

For example, in-house counsel may uncover fraudulent conduct that violates the company’s internal code of conduct in a relatively minor way. In this circumstance, it is entirely possible that an effective in-house lawyer and audit committee may honestly and in good faith believe that the company is best served by a strong but quiet dose of internal medicine while remaining appropriately committed to standards of integrity and legal compliance. Counsel may work with management and the company’s auditors to address the problem and provide appropriate
redress for misconduct—but they may do so in a manner that never reaches the attention of the public or the regulators. How can such a solution defy the spirit of the new model of corporate governance?

Equally important is the willingness of government to maintain the proper measure of respect for the attorney-client relationship and the customary privileges and loyalties arising from it. The Thompson memorandum puts a premium on the disclosure of corporate internal investigation reports and appears to make the possible waiver of attorney-client and work product protections a crucial factor in evaluating corporate cooperation. This may impede the willingness and ability of company officials and employees to discuss business issues and limit the information that they record in internal investigation documents, for fear of providing a road map for potential civil litigants. If the reforms are truly to succeed as intended, the government should weigh the negative consequences carefully in shaping its approach.

Government initiatives in the post-Enron era have given added responsibility to in-house counsel. Ironically, at the same time, the triple threat of increased exposure to civil liability, diminishing insurance coverage, and the greater possibility of criminal sanctions may be discouraging many qualified candidates from entering corporate law departments. Nevertheless, companies and regulators must recognize that the potential pitfalls of life as a general counsel in the new era of corporate governance must not be allowed to deter strong and talented lawyers from choosing to work in house. Companies will derive substantial benefits if they are willing to empower in-house counsel in every aspect of their increasingly powerful role and if management maintains an appreciation of counsel’s responsibility in ensuring ethical corporate practices. Without effective and talented people as in-house counsel, able to withstand the heavy pressures that may be brought to bear from within and outside the company, advancements in corporate governance may not succeed.

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1 See D.C. Denison, Shaping Up Fraud and Accounting Abuses Are Prompting Rapid Changes in Corporate Behavior and Financial Procedures, BOSTON GLOBE, July 28, 2002, at F1 (“A common denominator in the corporate scandals at Enron Corp., WorldCom Inc., Global Crossing Ltd., Tyco Ltd., and other companies is that the CEO allegedly participated in accounting abuses or knew about—or should have known about—them. And in each case, the CEO enjoyed an immense pay package supplemented by thousands of stock options, which allowed him to buy shares at preset prices and profit handsomely when the stock rose.”).

2 SEC, Final Rule: Implementation of Standards of

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Professional Conduct for Attorneys, 17 C.F.R. pt. 205. To “appear and practice before the Commission” essentially means to communicate with or transact any business with the SEC, represent an issuer in an SEC matter, or provide advice regarding U.S. securities laws in connection with possible filings with the SEC. See 17 C.F.R. §205.2(a) (2003).

Outside counsel are required to first report a violation to the company’s chief legal officer. See 17 C.F.R. §205.3(b) (2003).


See id.


Model Rules of Prof’l Conduct R. 1.13(a) (1998). See, e.g., Waggoner v. Snow, Becker, Roll, Klaris & Kraus, 991 F. 2d 1301 (9th Cir. 1993) (chief executive not in attorney-client relationship with corporation’s counsel when counsel informed officer he was present at board meeting only as counsel for corporation and counsel when counsel informed officer he was present). See supra note 5.

The corporation may be legally obligated to advance fees and expenses to the employee. See Corp. Code §317. The Thompson memorandum recognizes that this is required by law in some states. See supra note 5.


SEC commissioner Harvey J. Goldschmid recently explained in his view the focus on lawyers is appropriate because “lawyers are critical gatekeepers, and asking them to bear certain burdens to protect shareholders and investors, and separate themselves from loyalty to managers in appropriate circumstances, just makes sense.” Jonathan Glatzer, Lawyers Pressed to Give Up Ground on Client Secrets, N.Y. TIMES, Aug. 11, 2003, at A12.


See 17 C.F.R. §205.3(b) (2003).


See Thompson memorandum, supra note 5.


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THE CIVIL ASSET FORFEITURE REFORM ACT
of 2000 (CAFRA)—signed into law on April 25, 2000,
by President Clinton and effective on August 23 of that
year—was characterized by a leading commentator
as “the first significant reform of civil forfeiture pro-
cedure since the dawn of the Republic.” This dra-
matic language is not surprising: Civil asset forfeiture
is an area of the law that engenders considerable
controversy. Indeed, the very concept of civil asset for-
feiture evokes heated debate, which was on display
during the consideration of CAFRA by Congress
before its enactment. At a hearing on CAFRA,
Congressman Henry J. Hyde, the chairman of the
House Judiciary Committee, noted:

Civil asset forfeiture is a relic of a medieval
English practice whereby an object responsi-
ble for an accidental death was forfeited to
the king, who would provide the proceeds for
masses to be said for the good of the dead
man’s soul. It is the inanimate object itself that
is “guilty” of wrongdoing. Thus, you never
have to be convicted of a crime to lose your
property. You never have to be charged with
any crime. In fact, even if you are acquitted by
a jury of criminal charges, your property can
be seized.

Although CAFRA increased the due process safe-
guards for owners whose property has been seized
and imposed limitations on the government’s forfei-
ture power, it also significantly increased the number
of statutes under which the government can seek civil

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forfeiture and enhanced the government’s ability to add forfeiture claims to criminal indictments. With CAFRA’s expansion of the government’s authority to seek forfeiture, it is naive to think that only the traditional forfeiture targets—for example, money launderers and drug dealers—need worry about the forfeiture statutes.

Federal civil forfeiture is an unusual area of law, requiring application of the special rules for admiralty and maritime claims, the rules of civil procedure, and substantive criminal law. Moreover, until recently, the “claimant” fighting for return of his or her property always bore the burden of proving the property was not subject to forfeiture—and, under CAFRA, that burden remains on the claimant today in an important minority of substantive law areas.

Federal civil forfeiture is big business. It is a lucrative profit center for government, which recovers about one-half billion dollars annually in cash and property. The vast majority of forfeitures are not contested, for a variety of reasons: 1) the frequency and perils of parallel criminal investigations or prosecutions (which divert the claimant’s attention and resources), 2) the modest amount of property involved in many forfeitures (which may allow for only Pyrrhic victories after protracted litigation), 3) the high percentage of contraband—particularly narcotics—fees (the proceeds of which can never be retained even if the claimant avoids conviction), and 4) the daunting prospect of litigation itself (which involves federal issues and procedures unfamiliar to many lawyers).

Practitioners should not be deterred, however, by the novel federal civil forfeiture procedures. When a client has a significant asset seized by the federal government for forfeiture—whether that asset is a bank account, an automobile, a parcel of real property, or any other item of personal or real property—counsel should navigate through the process of seeking release and return of the asset. A forfeiture claimant cannot afford for his or her counsel to remain a stranger in this strange land. Many procedural deadlines are strict, and the consequences of missing those deadlines can be severe.

THE HISTORICAL ROOTS

Federal civil forfeiture is based on the legal fiction that an inanimate object can itself be guilty of wrongdoing.1 In the early nineteenth century, federal forfeiture statutes were used to permit the government to seize maritime vessels that were engaged in piracy. Ships and cargo in violation of the customs laws were also the frequent subject of federal civil forfeitures.2 During Prohibition, the forfeiture statutes were used to confiscate the equipment and automobiles used for the manufacture and transportation of alcoholic beverages.3 Beginning in 1970, Congress passed a series of statutes that made civil and criminal forfeiture increasingly potent and commonly used law enforcement tools.4 These statutes were intended to impose economic sanctions on criminals and to remove the profit incentive from crime.5

Unlike criminal forfeitures—which require a prior criminal conviction6—a civil forfeiture does not even require that anyone be charged with a crime. Pre-CAFRA civil forfeiture turned traditional notions of due process upside down. To seize an asset, the government needed only “probable cause”—that is, reasonable grounds to believe the property was connected to illegal activity and subject to forfeiture. Probable cause could be established through hearsay and was typically supported by the affidavit of a law enforcement agent. The property was forfeited unless the owner, by a preponderance of admissible evidence, either showed that the connection to criminal activity did not exist or established a defense. Claimants fighting for return of their property bore the burden of proving their property was not subject to forfeiture7 and were required to post a “cost bond” to preserve the right to contest the forfeiture.8

Although civil forfeiture seemed to run counter to traditional notions of due process, the U.S. Supreme Court repeatedly rejected constitutional challenges to state and federal forfeiture statutes. In Calero-Toledo v. Pearson Yacht Leasing Company,9 a 1974 case, the Supreme Court upheld the forfeiture of a yacht owned by a leasing company after an apparently minuscule amount of marijuana—perhaps as little as one cigarette—was found onboard. The Court rejected the argument that the forfeiture was a taking without just compensation. The decision traced the history and application of forfeiture statutes and noted that “the innocence of the owner of property subject to forfeiture has almost uniformly been rejected as a defense.” The Court acknowledged that a constitutional claim might have been raised if the owner was not only unaware of the wrongful conduct regarding its property but also had done all that could be expected to prevent the proscribed use of its property. Nevertheless, in this case, although the Court found that the yacht’s owner was unwitting, the forfeiture was upheld because the owner had not shown it had done all it reasonably could to avoid having its property put to an unlawful use.

Twenty-two years later, in Bennis v. Michigan, the Supreme Court again rejected a due process challenge to a forfeiture scheme.10 Police arrested John Bennis after they observed him engaged in a sexual act with a prostitute while parked in an automobile he coowned with his wife. Bennis’s wife argued against the forfeiture of her interest in the vehicle by asserting that she was unaware her husband would use their car to violate Michigan’s indecency law. The U.S. Supreme Court granted certiorari to review whether Michigan’s forfeiture scheme deprived Bennis’s wife of due process and whether the forfeiture was an unconstitutional taking. The Court reviewed the “long and unbroken line of cases [that] hold an owner’s interest in property may be forfeited by reason of the use to which the property is put even though the owner did not know that it was to be put to such use.”11 It then rejected the constitutional challenges, stating “the cases authorizing actions of the kind at issue are too firmly fixed in the punitive and remedial jurisprudence of the country to be now displaced.”12

In a concurring opinion, Justice Thomas wrote, “‘[E]vasion of the normal requirement of proof before punishment might well seem ‘unfair’…One unaware of the history of forfeiture laws and 200 years of this Court’s precedent regarding such laws might well assume that such a scheme is lawless—a violation of due process…’”13 He also observed that “[i]mproperly used, forfeiture could become more like a roulette wheel employed to raise revenue from innocent but hapless owners whose property is unforeseeably misused, or a tool wielded to punish those who associate with criminals, than a component of a system of justice.”14

However, in 1998, only two years after Bennis, Justice Thomas wrote the majority opinion in United States v. Bajakajian,15 which held that a criminal forfeiture violated the Eighth Amendment’s prohibition of excessive fines. In Bajakajian, U.S. Customs inspectors arrested Hosep Bajakajian as he was about to board an international flight while carrying $357,144 in cash that he failed to report.16 Bajakajian pleaded guilty, and the district court then held a bench trial on the forfeiture count of the indictment, which sought the forfeiture of “any property, real or personal, involved in such offense, or any property traceable to such property.”17

The district court found that the entire $357,144 was “involved in” the offense of failing to report the cash but also found the money was not connected to any other criminal offense and Bajakajian was transporting it to repay a lawful debt. The district court found that a full rather than partial forfeiture would be “grossly disproportionate to the offense in question” and would therefore violate the excessive fines clause of the Eighth Amendment. As a result, the district court
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- Tehama Superior Court
- Trinity County Superior Court
- Tulare County Superior Court
- Tuolumne Superior Court
- Yuba County Superior Court

**FLORIDA**
- Fifth Judicial Circuit (Ocala)
- First Judicial Circuit (DeFuniak Springs, Okaloosa, Santa Rosa Beach)

**GEORGIA**
- Atlanta Superior Court
- Marion County Superior Court (Indianapolis)

**LOUISIANA**
- Fourth Judicial Dist. (Monroe)
- Twenty-Sixth Judicial Dist. (Benton, Minden)

**MARYLAND**
- Second Circuit Court (Centreville)
- Talbot County Circuit Court

**MICHIGAN**
- 36th District Court (Detroit)*
- Washtenaw County Trial Court
- 18th Judicial Circuit

**MISSISSIPPI**
- 4th Circuit Court
- Newport
- USDC-New Jersey
- Newark
- New York

**NEW MEXICO**
- Dona Ana County (Las Cruces)
- First Judicial Circuit (Santa Fe)

**NEW YORK**
- Southern District of New York
- Eastern District of California
- Northern District of California
- Western District of Oklahoma
- Eastern District of California
- Central District of California
- Southern District of California

**UTAH**
- 4th District Court (Provo)

**WEST VIRGINIA**
- Fourth Judicial Circuit

**UNITED STATES DISTRICT COURT**
- Eastern District of California
- Los Angeles
- Riverside
- Santa Ana
- Woodland Hills

**UNITED STATES BANKRUPTCY COURT**
- Central District of California
- Los Angeles
- Riverside
- Santa Ana
- Woodland Hills

**HAWAI**
- Hawaii
- District of Hawaii
- Honolulu

**ILLINOIS**
- Northern District of Illinois
- Chicago

**NEW JERSEY**
- USDC-New Jersey
- Newark

**OREGON**
- District of Oregon
- Portland
ordered a forfeiture of only $15,000.

The Supreme Court reached the same conclusion, finding Bajakajian’s crime was solely a “reporting offense” that deprived the government only of information.25 However, Bajakajian was a criminal case, so the decision left unanswered the question of whether the same Eighth Amendment analysis could apply in a civil forfeiture action.

While the federal courts wrestled with the constitutional limits to forfeitures and, on occasion, rebuked the government’s overreaching use of civil forfeiture statutes,26 a number of legislators, led by Congressman Henry Hyde, believed that the federal civil asset forfeiture scheme was too harsh and too unfair to innocent property owners in certain instances. During a series of hearings before the House Judiciary Committee, many innocent victims of civil forfeiture schemes told their horror stories.21 CAFRA—the culmination of the efforts and concerns of Hyde and others—was intended “to make federal civil forfeiture procedures fair to property owners and to give owners innocent of any wrongdoing the means to recover their property and make themselves whole after wrongful government seizures.”

CAFRA added new statutes,24 amended certain other forfeiture statutes,25 left many others untouched, and superimposed itself on many of the existing procedures.26 Whatever one’s views on the merits of its changes, there is no denying that CAFRA has dramatically changed the nature of federal civil asset forfeiture.

**PROPERTY SUBJECT TO CIVIL FORFEITURE**

CAFRA subjects different classes of property to civil forfeiture. Some sections of the act look backward (seizing property that is the proceeds of past crimes),27 some look forward (seizing property intended to be used to commit or finance future crimes),28 and some look at the present (seizing property involved in or furthering ongoing crimes).29 “Proceeds” forfeitures are now extremely broad, because the list of crimes of which the tainted fruits can be seized includes virtually every serious federal crime.30 Thus, although CAFRA was a response to what certain legislators saw as an overreaching and abusive use of the civil forfeiture statutes, it has vastly expanded the number of cases in which the government can exercise civil forfeiture authority.

Consider, for example, an individual who operates a successful business that regularly imports clothing and textiles. A customs and border protection inspector intensively examines one of the many regularly scheduled shipments and makes a determination that the valuation of the goods on the entry documents is understated. The business owner assumes that, at worst, he will be notified that he owes additional duty on his goods.

One year later, federal agents appear at his home and business and seize his personal cars and the trucks used in his business as well as his business records. Later that day he discovers both his personal and business bank accounts have been frozen, and a notice is nailed to the door of his house notifying him of a lis pendens. Several days later he receives a certified letter from the U.S. Bureau of Customs and Border Protection notifying him that his seized property is subject to forfeiture because it constitutes or is derived from proceeds traceable to a violation of federal statutes prohibiting the entry of goods into the United States by means of false statements31 as well as the money laundering statutes.32 Ten days later, the U.S. Attorney’s Office notifies him that he is the “target” of a criminal investigation and his wife, the bookkeeper for the business, is the “subject” of a criminal investigation. The reforms enacted under CAFRA touch nearly every aspect of his case.

To avoid joining the uncontested majority of civil forfeitures33 and to preserve his home and the chance of reclaiming any portion of his frozen accounts or seized vehicles, the business owner in the example must file a claim with “an appropriate official” within 35 days of the mailing of the certified letter.34 The claim must identify the specific property, state the nature of the claimant’s interest, and be made under oath.35 It is important that all persons who have cognizable interests in a seized property file claims. Some claimants—for example, a spouse—may have defenses that are not available to other claimants and will thereby preserve some interest in a property. Fortunately, CAFRA eliminated the “pay to play” provision in prior forfeiture law, so claimants need not file a cost bond to contest a forfeiture.36

Once a claim is filed, the government has 90 days to file a civil forfeiture complaint.37 However, that complaint also must be filed within five years after the discovery of the offense giving rise to forfeiture or two years after the discovery that particular property was involved in the offense—whichever is later.38 The limitations period begins to run when the government learns of facts that should trigger an investigation leading to discovery of the property’s involvement in the offense giving rise to forfeiture.39

A one-year limitations period applies when the government seizes fungible assets—that is, “cash, monetary instruments in bearer form, funds deposited in an account in a financial institution...or precious metals”—that do not constitute direct proceeds of a crime.40 These types of forfeitures are addressed in 18

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**1.** The Civil Asset Forfeiture Reform Act of 2000 (CAFRA) authorizes the district court to appoint counsel for indigent claimants in all federal civil forfeiture actions.

**True.**

**False.**

**2.** Civil forfeiture actions are quasi-criminal and therefore claimants have a Sixth Amendment right to counsel.

**True.**

**False.**

**3.** Civil forfeiture claimants may obtain a pretrial release of seized property if they can show that there is a likelihood that they will prevail at trial.

**True.**

**False.**

**4.** The Fifth Amendment’s double jeopardy clause does not apply to federal civil forfeiture actions.

**True.**

**False.**

**5.** In a federal civil forfeiture action in which the property at issue consists of money in a bank account, the government need not prove that the money in the account is exactly the same money involved in the offense that is the basis for the forfeiture.

**True.**

**False.**
6. A one-year statute of limitations applies if the property to be seized in a federal civil forfeiture action is cash that is not directly traceable to the offense that is the basis for the forfeiture.
   True. False.

7. Claimants must file a cost bond if they seek to contest a federal civil forfeiture action.
   True. False.

8. If the government's theory in a federal civil forfeiture action is that the seized property facilitated a criminal offense, the government must show that there is a substantial connection between the property and the offense in order to prevail in a federal civil forfeiture action.
   True. False.

9. Once a claim for seized property is filed, the government has 90 days within which to file a federal civil forfeiture action.
   True. False.

10. Before CAFRA, claimants had to prove that their property was not subject to forfeiture in order to prevail in a federal civil forfeiture action.
    True. False.

11. In some cases, property that is intended to be used in future crimes may be subject to forfeiture in a federal civil forfeiture action.
    True. False.

12. CAFRA permits an attorney for the government to use grand jury information without a court order.
    True. False.

13. The district court must stay a civil forfeiture proceeding if it determines that civil discovery will adversely affect the government's ability to conduct a related criminal investigation.
    True. False.

14. The district court may require claimants to post a bond in order to obtain a pretrial hardship release of their property.
    True. False.

15. A claimant who substantially prevails in a forfeiture action may recover the attorney's fees incurred in litigating the action.
    True. False.

16. CAFRA codifies the Eight Amendment's prohibition against excessive fines.
    True. False.

17. Whether a forfeiture is grossly disproportional to the gravity of the underlying offense is a factual issue that can be determined by a jury.
    True. False.

18. In order for claimants to successfully assert an “innocent owner” defense, claimants bear the burden of proving they did not know about the conduct giving rise to the forfeiture.
    True. False.

19. In a suit brought under any civil forfeiture statute, the government has the burden to establish, by a preponderance of the evidence, that the property at issue is subject to forfeiture.
    True. False.

20. A federal civil forfeiture complaint must include facts about the crime giving rise to the forfeiture and describe with reasonable particularity the property to be forfeited.
    True. False.
USC Section 984. In Section 984 forfeitures, the government need not prove the seized property was the “identical” property involved in an offense; the government need only show the seized property was “found in the same place or account as the property involved in the offense that is the basis for the forfeiture.”

The shorter one-year limitations period in Section 984 was a tradeoff for eliminating the traditional link between the property seized and criminal activity, which must be proven in an action for proceeds forfeitures under 18 USC Section 981.42

The power to forfeit fungible property—typically cash—under Section 984 can have surprising consequences. Assume the business owner in the example retired six months before his bank accounts were frozen and had spent whatever funds remained in his accounts, yet later deposited new “clean” money into the accounts from the sale of stock that he and his wife purchased 30 years ago. Although the funds might not be the proceeds of criminal activity, Section 984 allows the government to seize some or all of the cash in the accounts, up to the amount of any “dirty” money that passed through the accounts within the year preceding the filing of the forfeiture complaint.

**LITIGATION PROCEDURES**

When the government decides to file a forfeiture complaint, it must comply with the Supplemental Rules for Certain Admiralty and Maritime Claims.43 As one court noted, the “standard for the particularity of [forfeiture] complaints is more stringent than the pleading requirements of the [Federal Rules of Civil Procedure].”44 The required pleading must include the facts about the crime that is giving rise to forfeiture and describe the property to be forfeited “with reasonable particularity.”45

When the government’s theory is that the seized property constitutes criminal proceeds, the government must prove the underlying crime and the seized property’s status as a tainted fruit of that crime. If the theory is that the seized property was used to commit a criminal offense, or facilitated or was involved in the commission of a criminal offense, the government also must prove “a substantial connection between the property and the offense.”

Thus, post-CAFRA federal forfeiture statutes are less likely to generate a Calero-Toledo scenario in which a leased yacht was forfeited because of one marijuana cigarette.47 This new standard is submitting to a deposition may provide the criminal prosecutor with discovery and statements that the prosecutor would not otherwise be able to obtain.

Civil discovery is theoretically a two-way street, and a claimant may use all the civil discovery devices to learn the basis of the government’s position in the civil forfeiture action and a parallel criminal action. But CAFRA requires the district court to stay the civil forfeiture action if the government shows

With or without a stay, parallel proceedings can result in a devastating blow for the claimant, because the Fifth Amendment’s double jeopardy clause does not apply to civil forfeitures.

A civil forfeiture action is litigated under the Federal Rules of Civil Procedure, like any other federal civil litigation, with the exception of compliance with the Supplemental Rules for Certain Admiralty and Maritime Claims.48 However, a claimant is often faced with a parallel criminal investigation or prosecution. By the time a civil forfeiture case is filed, the government may have assembled a substantial amount of evidence for a criminal action, including grand jury testimony. CAFRA permits an attorney for the government in a civil forfeiture action to use any information obtained through a grand jury without first obtaining a court order.49

Discovery is frequently problematic when a claimant faces parallel civil forfeiture and criminal proceedings. It is nearly certain that a claimant in a civil forfeiture action will have to respond to interrogatories, document requests, and deposition questions. But submitting to such discovery while a target of a potential criminal indictment can be hazardous. If a claimant asserts the Fifth Amendment privilege against self-incrimination at a deposition in the civil forfeiture action, the government may obtain an order preventing the claimant from testifying in the forfeiture action, effectively making it impossible to defend the case.50 Also, the Ninth Circuit has held that “it is even permissible for the trier of fact to draw adverse inferences from the invocation of the Fifth Amendment in a civil proceeding.”51

On the other hand, the civil discovery process “will adversely affect the ability of the Government to conduct a related criminal investigation or the prosecution of a related criminal case.”52 Thus claimants may find themselves in the unenviable position of having their property seized and their bank accounts frozen, yet be unable to litigate a civil forfeiture action because the government has obtained a stay while it develops a related criminal case.

Fortunately, there is symmetry to CAFRA’s stay provisions. A claimant can move to stay a forfeiture action if “continuation of the forfeiture proceeding will burden the right of the claimant against self incrimination.”53 It remains to be seen just how much protection this will afford claimants in actual practice.

With or without a stay, parallel proceedings can result in a devastating blow for the claimant, because the Fifth Amendment’s double jeopardy clause does not apply to civil forfeitures.54 A claimant could be convicted in a criminal action and then face resumption of the stayed civil forfeiture action. But the probability of a civil forfeiture action following a related criminal case may be remote, if only because CAFRA permits criminal forfeiture wherever civil forfeiture is authorized.55 In other words, CAFRA will likely lead to a greater number of criminal indictments that include forfeiture counts.

CAFRA does contain some unalloyed good news for claimants. One of CAFRA’s most significant changes is a uniform “innocent owner” defense. The statute provides that
[a]n innocent owner’s interest in property shall not be forfeited under any civil forfeiture statute. This is an affirmative defense that the claimant must prove by a preponderance of the evidence. To qualify to use the defense, a claimant who had an interest in the property before the alleged offense must show that the claimant did not know of the unlawful conduct and upon learning of the conduct did all that could reasonably be expected to stop it. A claimant with an interest in the property acquired after the alleged offense must be able to show that the claimant is a bona fide purchaser for value and “did not know and was reasonably without cause to believe that the property was subject to forfeiture.”

CAFRA explicitly provides that if an innocent owner has a partial interest in an otherwise forfeitable property, or a joint tenancy or tenancy by the entirety interest, the court may sever or liquidate the property so the government may gain possession of its forfeitable interest.

At a minimum, the innocent owner defense may serve to protect a leasing company’s interest in a Calero-Toledo scenario and allow a future spouse like Bennis’s wife and the spouse of the business owner in the example to preserve marital interests in seized property.

CAFRA also aids claimants by codifying the constitutional “excessive fines” defense that Bajakajian recognized in criminal forfeiture actions. The claimant has the burden of proving to the judge (not a jury) by a preponderance of evidence that the extent of the forfeiture is “grossly disproportional” to the gravity of the offense. If that proof is established, the trial court “shall reduce or eliminate the forfeiture as necessary to avoid a violation of the Excessive Fines Clause of the Eighth Amendment of the Constitution.”

Because forfeiture of the fruits of criminal activity can never be unconstitutionally “excessive,” it is likely this defense is viable only in cases seeking forfeiture of property “involved in” or “facilitating” an offense (for example, a car, boat, or structure that is used in smuggling or narcotics trafficking). Since this type of forfeiture requires the government to prove a “substantial” connection between the seized property and the offense giving rise to forfeiture, claimants may find it beneficial to scrutinize the specific facts of their cases and identify extenuating and attenuating circumstances.

DEFENSE ECONOMICS

Given the complicated nature of many civil forfeiture cases, the economics involved in contesting a civil forfeiture can be daunting. Depending on the nature and amount of the seized property, the attorney’s fees incurred to litigate a forfeiture action may be significant and could exceed any benefit that might be gained. Moreover, claimants may be hard pressed to pay their attorney’s fees, particularly when their bank accounts have been frozen and the property they use to operate their businesses has been seized. Claimants may be equally wary of spending their money on defending a civil forfeiture action when they are concerned with a looming criminal indictment.

Although a civil forfeiture action is often punitive and thus quasi-criminal, there is no Sixth Amendment right to counsel. CAFRA provides some—but not much—relief. It authorizes a district court to appoint counsel to represent a claimant in a civil forfeiture proceeding if the claimant is unable to afford counsel and if the claimant has appointed counsel in a related criminal case.

A claimant also may obtain pretrial release of the claimant’s seized property if the claimant can demonstrate that 1) the property will be available at the time of trial, 2) the government’s continued possession of the property will result in hardship to the claimant (such as preventing the functioning of a business or preventing the claimant from working), and 3) the hardship outweighs the risk...
that the property will be "destroyed, damaged, lost, concealed, or transferred if it is returned to the claimant during the pendency of the proceeding."46 However, currency is excluded from a hardship release unless it "constitutes the assets of a legitimate business which has been seized."46

If the business owner in the example has the financial ability to contest the forfeiture, litigate the action to conclusion, and the good fortune to "substantially prevail," CAFRA permits the claimant to recover "reasonable attorney fees and other litigation costs reasonably incurred."47 In cases involving seized currency, the government also is obligated to reimburse a successful claimant with interest from the date of seizure.48

Of course, claimants may recover their seized property if the government fails to prevail on its forfeiture claim. Still, property in federal storage facilities for lengthy periods of time tends to deteriorate. Although it may be cold comfort, CAFRA amends the Federal Tort Claims Act to permit vindicated claimants to recover damages for injury to their property.49

For those facing a looming civil forfeiture proceeding, a "take the money and run" approach is not the answer. CAFRA expands an obstruction of justice statute to make it a crime to take any action to impair the court's in rem jurisdiction over any property that is subject to civil forfeiture.50 Nor can a claimant defend a civil forfeiture action from abroad; CAFRA codifies the fugitive disentitlement doctrine.51

Although CAFRA represents a substantial and overdue overhaul of federal civil forfeiture law, its provisions, while providing a measure of relief for claimants, will benefit prosecutors as well. Some of the harsher aspects of forfeiture procedure have been ameliorated, but the types of crimes and properties to which forfeiture applies have been significantly expanded. Because of that expansion, because law enforcement has a direct financial interest in the forfeiture of property, and because the government need only link that property to criminal activity by a preponderance of the evidence, more people and companies than ever before will likely find themselves in that strange area of the law in which civil proceedings address criminal offenses, "guilty" properties, and "innocent" owners.

2 David B. Smith, An Insider's View of the Civil Asset Forfeiture Reform Act of 2000, 24 COMMISSION 28 (June 2000).
5 Id.
7 See generally David B Smith, Prosecution and Defense of Forfeiture Cases ¶1.01 (2002); United States v. Daccarett, 6 F. 3d 45 (2d Cir. 1993).
8 Daccarett, 6 F. 3d at 46.
10 See, e.g., 19 U.S.C. §1615; United States v. $129,727.00 in U.S. Currency, 129 F. 3d 486 (9th Cir. 1997); Daccarett, 6 F. 3d at 57.
14 Id.; at 446.
15 Id. at 453 (citing J. W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921)).
16 Id. at 454 (citation omitted).
17 Id. at 456.
19 Federal law requires the filing of a report by anyone who is about to transport more than $10,000 in "monetary instruments" outside the United States. 31 U.S.C. §5316(a)(1)(A).
21 Bajakajian, 524 U.S. at 337.
22 See, e.g., United States v. $906,231 in U.S. Currency, 125 F. 3d 442 (7th Cir. 1997).
23 Note 4, supra.
26 Almost none of the pre-CAFRA civil forfeiture statutes were repealed. CAFRA includes "civil forfeiture statute" as a defined term and excludes certain types of forfeiture proceedings. 18 U.S.C. §983(a)(1)(A), (2). Indeed, a few significant areas of the law are unaffected by CAFRA. The claimant continues to bear the burden of proof in forfeitures based on violations of the Internal Revenue Code of 1986; the Trading with the Enemy Act, 50 U.S.C. App. §§1 et seq.; and the International Emergency Economic Powers Act, 50 U.S.C. §§1701 et seq. See 18 U.S.C. §983(e)(2).
27 18 U.S.C. §981(a)(1)(C) (reaching the "proceeds" of "specified unlawful activity").
28 18 U.S.C. §981(a)(1)(G) (addressing "planning, conducting, or concealing an act of domestic or international terrorism").
33 146 CONG REC. H2040-01 (Apr. 11, 2000).
36 Before CAFRA, a bond "in the penal sum of $5,000 or not less than $250" had to be posted with a claim in order to contest a civil forfeiture. See 19 U.S.C. §1604. CAFRA eliminated this requirement. 18 U.S.C. §983(a)(2)(E).
39 Id.
42 See United States v. All Funds Presently on Deposit or Attempted to Be Deposited in Any Accounts Maintained at American Express Bank, 832 F. Supp. 542, 558 (E.D.N.Y. 1993) (§984 “tempers the additional power given the government by means of a statute of limitations…”).
44 United States v. Premises and Real Property at 4492 S. Livonia Rd., 889 F. 2d 1258, 1266 (2d Cir. 1989).
45 SUPP. R. FOR CERTAIN ADMIRALTY AND MARITIME CLAIMS C(2), E (hereinafter SUPP. R.).
48 In a civil forfeiture action, a claimant must file a second claim within 30 days after service of the government’s verified forfeiture complaint. SUPP. R. C(6)(a).
49 The government is permitted to serve interrogatories with the complaint. Answers to the interrogatories must be served with the answer to the forfeiture complaint. SUPP. R. C(6)(c).
50 See, e.g., Gutierrez-Rodriguez v. Cartagena, 882 F. 2d 553, 576 (1st Cir. 1989).
51 Keating v. Office of Thrift Supervision, 45 F. 3d 322, 326 (9th Cir. 1995).
52 18 U.S.C. §981(g)(1).
57 Id.
62 In comparing the civil forfeiture to the gravity of the offense, the trial court should consider at least four factors identified by the Bajakajian Court in its ruling on a criminal forfeiture: 1) whether the violation involved funds derived from “other illegal activities,” 2) whether the claimant/defendant is a “money launderer, a drug trafficker or a tax evader” or otherwise fits into a class of persons for whom the forfeiture statute was “principally designed,” 3) the maximum sentence and fine that could be imposed on the claimant/defendant under the particular circumstances of the case, and 4) the harm that the claimant/defendant caused through his or her crime. United States v. Bajakajian, 524 U.S. 321, 338-39 (1998).
63 United States v. Sardone, 94 F. 3d 1233, 1236 (9th Cir. 1996).
64 18 U.S.C. §983(f).
65 As a condition of permitting the pre-trial release of seized property, the court may order the claimant to obtain a bond or insurance on the property. 18 U.S.C. §983(f)(7).
67 28 U.S.C. §2465(b)(1)(A). Cf. the Equal Access to Justice Act (EAJA), 28 U.S.C. §2412. EAJA caps attorney’s fees at $125 per hour. Even if a claimant prevailed in a civil forfeiture case, EAJA permitted the court not to award attorney’s fees if it found the government’s position to be substantially justified. See, e.g., United States v. Marolf, 277 F. 3d 1156 (9th Cir. 2002).
Federal law enforcement officials have an expanding arsenal of weapons with which they can investigate and prosecute criminal activity. These weapons range from commonplace grand jury subpoenas and informal witness interviews to the more sophisticated wiretaps and other forms of electronic eavesdropping. One of the most effective weapons, though, is also one of the oldest—the execution of search warrants to obtain incriminating evidence.

The execution of a search warrant achieves at least two results for law enforcement. First and foremost, the search warrant provides the government with the authority to search and seize evidence directly, without having to rely on the prospective defendant’s willingness to provide copies of that evidence. When the government serves a grand jury subpoena for documents, the government is forced to rely on the good faith of the party producing the records; with a search warrant, the government obtains the right to enter the premises, conduct its review of documents, and seize the responsive materials itself. Second, the execution of a search warrant sends a direct message to the party whose premises are being searched: There is no location that is safe from the reach of legitimate law enforcement activities. As a result of that message, the targets of investigations frequently begin to lose confidence in their own ability to withstand law enforcement scrutiny. Moreover, witnesses who may have otherwise aligned themselves with the prospective targets begin cooperating with the law enforcement officials conducting the search.

In a typical situation involving the execution of a search warrant, there will be 10 to 15 law enforcement officials descending on a business office, wearing raid jackets that identify the wearer as being with the FBI or IRS or other government agency. When there is a concern for public or private safety, the

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agents will display their guns at the ready. In fact, even when the agents are not holding their firearms, they will have the weapons visibly holstered during the entire search. When the agents arrive at the search site, the predictable result is that the individuals at the site are thrown into panic as they watch armed men and women seize their possessions. Those individuals will telephone the only attorney they know—and that attorney typically practices in the civil law arena.

The attorney who fields a frantic phone call from a individual at a business being searched by government agents is called upon to render advice in a uniquely stressful situation. Of course, the attorney must first identify who is, in fact, the client. This determination is not as simple as it may seem. Most frequently in this scenario, the parties to the phone call will agree that the attorney represents the corporate entity.

Usually the client has no warning of the search; the agents typically arrive unannounced at the client’s place of business. The client’s interaction with the law enforcement agents is taking place before the attorney has had a chance to assess the client’s predicament or provide guidance to the client about dealing with the law enforcement officers. Further, there is a strong probability that the investigation will conclude in a criminal prosecution of the client.

Attorneys who provide advice under these circumstances must consider constitutional implications as well as other legal issues. A general understanding of the constitutional and procedural safeguards related to search warrants should be the foundation of the advice given to clients. This knowledge is essential to determining how to respond to the search—in the future and as the search is being conducted. Attorneys need to provide immediate guidance to their clients in the midst of a search with an eye toward the possibility of later challenges to the validity of the warrant.

CONSTITUTIONAL AND PROCEDURAL SAFEGUARDS

The Fourth Amendment controls and restricts the execution of all searches and seizures conducted by law enforcement agents. It protects the “right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures” and provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.” Searches conducted without a warrant, according to the Supreme Court, are “per se unreasonable under the Fourth Amendment subject only to a few specifically established and well-delineated exceptions.” The common relief against an unlawful search, whether by state or federal officials, is suppression of the evidence seized.

Rule 41 of the Federal Rules of Criminal Procedure contains the procedural requirements that must be met by government agents seeking to obtain a search warrant and establishes the general conditions for the execution of the search under the warrant. In practice, federal agents usually obtain a search warrant by first conducting an investigation—under the nominal supervision of a federal prosecutor—of a possible federal crime. That investigation may uncover evidence of criminal misconduct, which normally leads to the request for a search warrant. The agents will then meet to discuss the investigation with the federal prosecutor, who will then work with the agents to obtain a federal search warrant.

Almost all search warrants are obtained on the basis of an agent’s sworn affidavit—known as the Affidavit in Support of the Warrant—that is presented to a federal magistrate. By the time the affidavit is submitted to the magistrate, it has been reviewed at length with the federal prosecutor. In most federal white collar cases, the government requests that the affidavit be filed under seal, and the request is usually granted. Frequently, the government argues that disclosure to defense attorneys of the material in the Affidavit in Support of the Warrant may jeopardize the investigation or the safety of informants.

The magistrate issues the search warrant after a finding of probable cause that the search will yield:

• Property that constitutes evidence of a crime.
• Contraband, the fruits of a crime, or things that are criminally possessed.
• Property designed or intended for use in a crime.
• A person for whom there is probable cause for an arrest.

The right to search under the warrant is limited to the place specified in the warrant, for a period not to exceed 10 days after the warrant is issued. Further, unless specifically allowed in the warrant, the search is required to take place in daytime hours.

During the execution of the warrant, a large contingent of law enforcement officers will be present at the search site. Before the search is begun, those agents will usually meet as a group at a location close to the search site and discuss the various responsibilities of the individual agents during the search. Generally, the lead agent will seek out the individual or individuals who are the targets of the investigation, with the plan of interviewing those individuals at the commencement of the search. As a show of law enforcement power, the remaining agents will arrive at the search location at the same time as the lead agent, with the purpose of helping to ensure that the goals of the search are accomplished.

As the search begins, agents must give a copy of the search warrant to the person whose property is being taken. When agents leave a search site, they are required to leave a receipt that includes a written inventory of the seized property.

A few inferences may be drawn about the state of mind of law enforcement from a review of the process of obtaining and executing a search warrant. By the time a search warrant is executed, the agents have invested a significant amount of time and effort in the investigation of the case. The agents will not likely be dissuaded from proceeding in that investigation by anything that the potential targets say to them on the date of the search. Also, the lead agent at the search location will be fairly well versed in the facts regarding the company and the individual targets. Thus, the agents will know if corporate employees are providing false exculpatory statements to the agents during the search—and the government will later use those statements against those employees. Moreover, since a law enforcement agency can obtain documents easily from a business with a grand jury subpoena as opposed to a search warrant, the fact that the agents opted to pursue a warrant indicates that they believe the business could not be trusted to turn over the documents in a timely manner. In other words, the agents have tentatively concluded that the business and various officers of the business have engaged in criminal activity.

ADVANCE PLANNING

In an ideal world, a corporate client would have a plan in place to deal with the arrival of agents executing a search warrant. Of course, such a plan is antithetical to the way in which most legitimate businesses operate. Indeed, the notion that new employees would receive training on what to do when the FBI executes a search warrant on the business site would likely cause new employees to rethink their choice of employment. Nevertheless, corporate counsel should advise business clients to take a few steps to safeguard their companies from the disruptive effects of a search.

First, business clients should be advised to maintain a backup data retrieval center offsite. One of the major problems that clients face after a search is the difficulty in reopening their companies, because all business records are now in the possession of the gov
ernment. That problem is avoided by maintaining an off-premises backup document center. For a backup center to be truly effective, clients must regularly update their document retrieval system so that they can resume operations as soon as the search is completed.

Second, corporate employees should be educated regarding their rights and obligations in the event of a law enforcement search. During the execution of a search warrant, federal agents routinely seek to conduct detailed interviews of key business employees at the search site. Those interviews, if they do in fact take place, occur in a stressful, frenzied environment in which the law enforcement agents are displaying their badges and weapons. In that environment, many employees mistakenly believe that they are obligated to submit to interviews by the agents conducting the search. To correct that mistaken belief, a company should advise employees that they all are entitled to legal representation at any interview with law enforcement, that the business will pay for the cost of the representation (assuming that the interview addresses the employees’ activities on behalf of the business), and that employees have the right to refuse to consent to an interview. The company should communicate this information in its employee handbook and its law compliance seminars.

Finally, attorneys should remind their clients to adopt and maintain an effective document retention program. The purpose of such a program is to maintain only those documents that are necessary for the operation of the business. An effective document retention program will provide an organized, systematic approach to eliminating outdated, nonessential documents that could create legal issues if discovered in a search. Needless to say, the client should not destroy documents for the sole purpose of frustrating a criminal investigation.11

THE DATE OF THE SEARCH

Planning is advisable, but frequently the frantic clients calling for advice from corporate counsel have had no prior discussion with their employees or with counsel about what to do when law enforcement agents arrive at their company’s offices to execute a search warrant. Ideally, corporate counsel should have immediate access to an attorney who specializes in white collar criminal defense. Defense counsel can advise clients precisely on how to respond. If defense counsel is unavailable, corporate counsel can also provide necessary advice. After advising the client, counsel—whether corporate or criminal defense—should next contact the lead agent at the search site and the prosecutor overseeing the investigation to establish basic ground rules while the search is underway.

Clients must be told not to attempt to limit or obstruct the search by the investigating agents in any way. This is critical advice, if only to preempt later accusations of professional negligence. Clients likely will believe that the search is unjustified and, therefore, they should be able to direct the activity of the law enforcement agents to limit the scope of the search prescribed by the warrant. Clients should be advised unequivocally that they cannot do so. By contrast, the agents believe that the search is fully justified, and they are strengthened in their belief by the court order that gives them permission to conduct the search. Indeed, any attempt to limit or hinder the search will not only be ineffective but may be the basis for a criminal charge (such as obstruction of justice)12 and may also be used as evidence of a “guilty mind” if the matter proceeds to trial.

Still, clients should be advised not to consent to any additional searches and not to sign any consent forms provided by the government. A search warrant specifies a location to be searched and the items that can be properly seized. While conducting the search, the agents may discover some additional sites that are not covered by the warrant, such as an adjoining office building, the trunk of the car in front of the building, or the home of the chief executive officer. Similarly, agents may discover additional categories of documents or physical objects that they want to seize but are not covered by the search warrant. These other areas and other items are outside the scope of the warrant.13 The federal agents may seek to search these off-limit areas, or seize the additional items, by obtaining the consent of a business owner.14 However, there is no legal requirement to consent to searches beyond those that are authorized by the court. Moreover, clients later may be hard-pressed to explain to a court how their right of privacy was violated by the execution of a search warrant if the clients have executed documents on the day of the search in which they waive their right of privacy and consent to additional searches.

Counsel should instruct clients not to agree to be interviewed by the agents and not to volunteer information during the search. Clients should be fully informed about the fact that by the time the agents are executing a search warrant, they have conducted
a lengthy investigation, discussed the matter with the federal prosecutor on several occasions, and have convinced a federal magistrate that there is probable cause to believe a crime has been committed and that evidence of the crime (or its fruits) are at the search site. There is nothing that a client can say during the search to convince the agents otherwise. Moreover, any statement made by the client during the search will likely come back to haunt the defense.

Of course, counsel should make sure that clients do not misconstrue counsel’s advice not to submit to a detailed interview by the investigating agents. The agents may have a legitimate basis for asking all people at the search site for their names and their relationship to the business, and agents may also request proof of identification. The client and others on site should not withhold responses to questions regarding identification and requests for proof. However, once the agents move into substantive discussions about the business structure or operations, clients should be advised not to answer questions until the appropriate safeguards are put in place—specifically, the presence of counsel.

A client will likely voice a concern that, if the client is not willing to talk to the agents, they will think that the client has something to hide. Counsel must again remind clients that they cannot convince the agents to stop the investigation. Moreover, a client’s refusal to answer questions is not a declaration that the client will never discuss a substantive matter with the agents. It is a refusal to discuss substantive matters at the time the search is being executed. At a later date, counsel may agree that government agents can interview the client under certain specified conditions.

After discussing these issues with the client, counsel should ask to speak to the agent in charge of the search site. In that call, counsel need to identify themselves to the agent, inform the agent that they represent the company and all of its employees, and instruct the agent that he or she should cease any interviews of corporate employees.15

After speaking to the investigators at the search location, counsel should contact the prosecutor as soon as possible. The prosecutor is seldom, if ever, at the search location, but the prosecutor is always available to the investigative agents in case the agents need legal assistance. The agents will provide the name of the prosecutor and his or her telephone number. In that initial phone call with the prosecutor, counsel need to convey the message that they are representing the corporation and that any interviews or discussions with corporate employees must stop. Additionally, counsel should raise, if applicable, the issue of the privileged nature of materials at the business location and inform the prosecutor that the client does not waive any privilege. These items should be confirmed in writing to the prosecutor immediately after the phone call. In the initial phone call, the prosecutor may provide some description of the underlying case and what is being sought in the search. The defense counsel should request a copy of the Affidavit in Support of the Warrant16 from the prosecutor.

After the phone discussions, counsel should go to the search location to meet with their clients. Usually clients will be overwhelmed by the fact that federal agents are perusing their personal and business papers. Counsel’s presence at the site, even if it does not substantively change the reality that a search is underway, will buoy the spirits of their clients. Further, counsel’s presence at the search site will help ensure their earlier admonitions to their clients to refuse to agree to additional searches or to any interviews. Moreover, at the search location, counsel can often engage the agents in discussions about the investigation, with the hope of obtaining some information about the purpose for the search.

Generally, counsel should attempt to accomplish two goals at the search location on the date of the search. First, counsel must communicate to the employees at the location what their rights are regarding the ongoing search. Specifically, counsel should identify themselves as the attorneys for the corporate entity and then tell the employees present that they have the right to refuse to be interviewed during the search, they have the right to have counsel present at any interview, and that the corporation would prefer that its counsel be present at employee interviews if they occur. This admonition should be presented to the employees in a written statement to preclude any misunderstanding by the employees about the position of the corporation or its counsel. White collar defense counsel often create form statements on these matters that are ready for distribution during this type of emergency.

Second, counsel should begin the process of preparing the defense in the case on the date of the search (if they have not already done so before the search). Generally, at the conclusion of the search, counsel should interview all employees present at the business about the search itself and about the underlying facts. For example, perhaps the federal agents arrived at the office building where the business is located in the early morning and immediately corralled all corporate employees into one area of the building, refusing the request of various employees to leave the premises. According to the Supreme Court in Michigan v. Summers, a leading case, a warrant to search for contra-band “carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.”17 However, the Michigan Court also noted that “special circumstances, or possibly a prolonged detention, might lead to a different conclusion in an unusual case.”18 If the law enforcement agents acted unreasonably with regard to the occupants in the building, the court could consider the suppression of statements made during the search or could deem the entire search as one that was undertaken in bad faith as a ruse to obtain the interviews.

SEEKING REDRESS

Clients aggrieved by an unlawful search and seizure have two different avenues for seeking redress for the government’s conduct. If the party seeks immediate relief, counsel will proceed under Rule 41(g) of the Federal Rules of Criminal Procedure with a motion known as a Motion for Return of Property.19 This motion is filed after the search is completed and before any actual criminal charges are brought against the corporation or the corporate officials. It should be understood, though, that if the client’s real concern is to simply have access to the property taken in the search, generally counsel for the client can reach an agreement with the prosecutor to provide copies of all materials obtained in the search without the need to seek court intervention. A motion under Rule 41(g) is reserved for challenges to the lawfulness of a search.

Alternatively, counsel may seek to suppress the evidence taken during the search—but this is done only after (and if) criminal charges are brought. To accomplish this, counsel would file a motion to suppress evidence obtained in the search pursuant to Rule 12 of the Federal Rules of Criminal Procedure.20

Generally, motions to suppress evidence and for the return of property address either the manner in which the search was conducted or the probable cause for the search in the first place.21 The information collected from the employees on the day of the search will be helpful in formulating potential attacks on the validity of the search.

The execution of a search warrant, by itself, can have a devastating effect on the future operations of a business. The fact that a search is taking place is a clear indication that the government believes that the business is engaged in criminal behavior. Regardless of whether the government’s belief is accurate or mistaken, the client most likely will telephone a civil attorney first for help. If the civil attorney does not have ready access to a criminal attorney, the civil attorney should know how to react immediately to
protect the constitutional rights of the business and its employees.

1 See Katz v. United States, 389 U.S. 347, 357 (1967).
5 Fed. R. Crim. P. 41(c).
10 Federal agents can obtain documents from a third party with a grand jury subpoena, a far less intrusive investigative tool. See Fed. R. Crim. P. 6. Indeed, the U.S. Attorney’s Manual—which is included in the Department of Justice Manual—notes: “The general thrust of these guidelines is that a search warrant should not be used to obtain documentary materials from a non-suspect….”
11 Counsel need to be aware of the recently enacted federal criminal statute prohibiting the destruction of documents with “the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” 18 U.S.C. §1519 (2002).
13 Under the McDade Amendment, an attorney for the government is subject to state laws and rules governing the ethical conduct of attorneys. 28 U.S.C. §530B (2000). In California (as in every other state), there is an ethical rule barring attorneys from communicating “directly or indirectly” with “a party the member knows to be represented.” CAL. RULES OF PROF'L CONDUCT R. 2-100 (2002). Arguably, the McDade Amendment, read in conjunction with the California Rules of Professional Conduct, could be a bar to contact between the prosecutor (and agents working under the prosecutor’s direction) and the employees of the target corporation.
15 The Ninth Circuit has noted that failure to follow the procedural requirements set forth in Rule 41 of the Federal Rules of Criminal Procedure does not necessarily mandate that evidence be suppressed. See United States v. Johns, 948 F. 2d 599, 603-04 (9th Cir. 1991). Nevertheless, the Ninth Circuit has used the procedural requirements of Rule 41 as a yardstick for determining the reasonableness of the execution of a search and suppressed evidence based on material noncompliance with those requirements. See United States v. Gantt, 194 F. 3d 987, 1004 (9th Cir. 1999).
16 The Supreme Court has defined probable cause as a “fair probability that contraband or evidence of a crime will be found in a particular place.” Illinois v. Gates, 462 U.S. 213, 238 (1983). Counsel will need to scour the Affidavit in Support of the Warrant to determine if there is a basis to challenge the finding of probable cause by the magistrate.
By Benjamin Sotelo and David R. Olan

**Firms that make regular security assessments decrease their liability worries**

Network security has many implications. A law firm’s firewall does not guarantee against accidental or intentional intrusion, because no firewall is perfect. A wireless network going to be insecure unless its transmissions are properly encrypted. And even if a law firm’s hardware and software meet security standards, ordinary human error can lead to the disclosure of case information to a third party and the breaking of the attorney-client or work product privilege. Fundamentally, network security involves the protection of the data that, if lost or compromised by any means, would be a cause of significant damage to the law firm.

A starting point of an assessment of a law firm’s data security should involve an examination of the computer system’s vulnerability to intrusion. Begin with the physical security of the computers belonging to the firm. Disgruntled employees are the most common instigators of this level of security breach. Who has access to your offices and computer rooms? Where do cables go, and what is the range of the wireless network? Are passwords written on Post-It notes? Finally, examine the firm’s readiness and capability to cope with acts of God such as fire or earthquake.

Finally, make sure that the firm has a proper off-site data backup procedure included in the security policy.

The next step is to assess the security of the network data, which should be protected by a properly configured folder-permissions structure for network users and up-to-date software and hardware to detect and deter attempts at intrusion. This latter issue is vital because if someone has access to the firm’s critical data and the firm has no knowledge of the intrusion, that person can copy information or corrupt it in small but important ways without the firm’s knowledge. The need for network security is clear in a world in which stolen information can be provided to opposing counsel. It would be quite unnerving, for example, for counsel to appear in court and discover that opposing counsel appear psychic in their preparation against counsel’s case. If the data security of a firm is lacking, the explanation for this unpleasant surprise could be that opposing counsel have seen the firm’s work product.

After the firm assesses the areas that require security, the next issue to consider is the level of security—known as the security factor—to be deployed. Single-factor security, the weakest, is based only on what a user knows. For example, this knowledge can be a user ID, a password, or a combination of the two. Much stronger is two-factor security, which usually involves a combination of what users know and what they have. An ATM card, which is combined with a PIN number, is the most common implementation of two-factor security. The third factor is who the user is and always involves biometrics. In addition to a card (or key or other item) and a password, users are verified by a fingerprint, eye scan, or face recognition. If certain data is critical enough, even a law firm may consider investing in three-factor security.

**Identify the Data**

The next step will include an assessment of what data is critical enough to protect with a particular security factor. Firms often do not match the level of protection with their data’s actual value. Some information may be overprotected and other, highly valuable information unprotected. The loss or corruption of critical data can derail litigation, lose cases, or lead to malpractice. To address this issue, those who are conducting the security assessment should incorporate the following steps into their assessment:

- Create information protection standards that are appropriate for each category.
- Develop a practical security policy for protecting data according to category.
- Create monitoring and management standards for checking that the firm is maintaining compliance with the standards.

Too often, the management of a law firm takes the initial steps toward proper data security and then turns its attention to other matters, leaving the monitoring and execution of security policy to employees. This is acceptable if the employees appreciate the importance of the data, but it should be no surprise to discover that, over time, adherence to security policies begins to lapse.

The implementation and management of an information security plan will only be effective if it is endorsed and communicated by the most senior management of the organization, its implementation leaves no misunderstandings in its wake, and it is maintained without exception. To this end, the necessity, effects, requirements, and benefits resulting from an information security plan need to be openly and regularly communicated to users. If this informational program does not already exist, it should be included in the development of the new information security plan.

As network security personnel perform the security assessment, they should make note of the particulars as well as the generalities of the firm’s data security operations. These notes should be incorporated into a formal, documented security policy, and...
this document should be added to employee training programs.

For example, the server should be secured behind lock and key. Only necessary personnel should have access to the server and its data backup device, among other important pieces of equipment. The specifics of the firm’s use of the lock and keys may be included in the manual or otherwise specified in writing so that employees are aware of what constitutes adequate security, what constitutes a breach, and what should be reported. Once the physical protection of the network is established, the next step is prevention of intrusion via the network. Firewall software is better than no firewall at all, but it is inferior to the network protection provided by a hardware firewall that is properly installed.

On the network, no individual computer should be configured so that it may boot to a floppy disk. As a result, the security policy document should make it clear who may change the boot sequence in the BIOS of an office computer (and under what circumstances). The operating systems of all networked computers should be designed for networks. Windows 98, for example, is not a network program and does not offer proper security features or user-group permission standards. For this reason, firms that are using Windows 98 (or Millennium) operating systems should upgrade to Windows 2000 Pro or XP Pro. The users of the systems should then have their security levels properly configured to suit their needs. This user-permission level will allow or restrict the access levels that employees have to critical data and programs.

Do not overlook employee chat rooms and shareware, two common sources of security breaches. Chat rooms can be a useful tool if they are used for business purposes, but they often serve as breaches in a network’s firewall. Shareware programs also create “pinholes in the firewall” that may allow hackers access to network data. As a result, security-conscious firms often severely restrict the use of shareware and chat rooms on their networks. In this same vein, ordinary users of the network should not have permission to install these programs in the first place.

**Connected to the World**

Network security extends beyond the walls of a law firm. To help employees who are traveling or working at home, firms rely on remote access to their main networks. Virtual private networks and other forms of remote access must be secure. If an employee’s home computer is on the Internet and is compromised, and if that home computer has access to the office network, then the office network
is compromised. As a result, employees who access the firm’s network from remote locations must be aware of how to apply the firm’s security policy when using remote computers.

Remote computers with older operating systems may have security holes that cannot be repaired. In the fast-paced computer world, Windows 95, Windows 98, and Windows NT 4.0 may all be considered somewhat obsolete. Therefore companies should make it a priority to replace aging computer systems within their walls and implement means of preventing the breach of the network by remote computers with older operating systems.

In early 2003, the Slammer virus exploited servers around the globe, causing nearly $1 billion in damage. The virus exploited a known defect in the Windows operating system. Six months before the Slammer attack, Microsoft alerted customers to a flaw in its SQL Server 2000 software and provided the necessary patches. Despite the advance warning and available fixes, thousands of companies around the world suffered catastrophic damage from Slammer. To update a Windows operating system, click on Start and Windows Update. The time it takes to download a patch is well spent.

In addition, the recent proliferation of the Blaster or Lovesan worm has demonstrated that newer versions of Windows are also vulnerable. This bug very quickly infected more than 57,000 systems out of the roughly 160,000 being monitored by Symantec, the maker of the best-known antivirus software, Norton Antivirus. Computers may be infected with the virus even when users do not open attachments to e-mail messages; simply surfing the Net can allow the malicious software to attack a weakness in the Windows operating system for servers and in Windows XP.

Fortunately, these newer versions of Windows have patches available to guard against the virus, and new patches should remain in development for some time. Microsoft had a patch to guard against the Blaster worm available a month before it struck, but it remains the responsibility of system administrators to ensure that their Windows software is fully up-to-date.

Finally, once a firm’s security measures have been implemented, administrators may run an online security check at www.sarc.com. Security breaches cost billions of dollars to repair each year. A law firm is especially vulnerable to data security breaches because of the nature of its work. To avoid liability, a law firm must invest in state-of-the-art security devices and policies, stay up-to-date with patches, and have functional, tested backup procedures in place in case security is compromised.
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The Interplay between Criminal and Immigration Law
ON SATURDAY, OCTOBER 11, the Criminal Law Section and the Immigration Law Section will present a discussion on the interaction between criminal and immigration law. Deportable offenses, aggravated felonies, and crimes that result in later inadmissibility to the United States will be defined. The discussion will also address the sections of the Immigration and Nationality Act and the regulations that relate to criminal charges pursuant to the California Penal Code as applied to admissibility, removability, and citizenship. Those in attendance will learn of the potential for relief from removal for criminal conduct, post-conviction relief through habeas corpus, coram nobis, and statutory postconviction motions pursuant to the California Penal Code. The program will take place at the Omni Los Angeles Hotel (formerly the Hotel Inter-Continental), 251 South Olive Street, Downtown. On-site registration will begin at 8 A.M., and the program will continue (with a lunch break) to 3:30 P.M. The registration code number is 8194J11.
$110—CLE+PLUS members
$135—Criminal law and Immigration Law Section members
$165—LACBA members
$235—all others
5.5 CLE hours

The Los Angeles County Bar Association is a State Bar of California MCLE approved provider. To register for the programs listed on this page, please call the Member Service Department at (213) 896-6560 or visit the Association Web site at http://forums.lacba.org/calendar.cfm. For a full listing of this month’s Association programs, please consult the October County Bar Update.
The Case for Switching Teams

Experience on both sides of the criminal law courtroom would improve the quality of justice

Fifteen years ago, when I was a student in law school, my evidence professor remarked, “Every five years, every prosecutor should be required to move to the public defender’s office, and every public defender should become a prosecutor. The criminal justice system would be much better off.” At the time, I dismissed his proposal as social engineering silliness. Today, though, as a private criminal defense lawyer and former prosecutor, I enthusiastically back his proposal, albeit with slight modification: New public defenders and prosecutors should spend two or three years in their respective offices, then be required to switch to the other side for the same length of time. Only then, if they want to remain in either office, should they make the choice about where to pursue their career.

This modest proposal would markedly improve the quality of our justice system by imbuing its lawyer-participants with perspective and experience that comes only from working both sides of the courtroom. Seeing only one side of the system can lead to rigidity of belief, flawed evaluation of the strengths or weaknesses of a case, and talking past opponents when issues could be resolved by discussion. Mandatory team switching in the formative years of a criminal lawyer’s career would address these problems and even decrease the likelihood of serious ethical transgressions.

The True Believer

In my years as a criminal trial lawyer, I have met plenty of true believers. They include the public defenders who think that every cop is a liar, every defendant an innocent victim, and every prosecutor a fascist. These public defenders rarely do their clients a favor when they allow their own dogmatic beliefs to cloud their legal advice about whether to settle or try a case. True believers also include the prosecutors who subscribe to the (former U.S. Attorney General) Ed Meese school of evidentiary analysis: “If you weren’t guilty you wouldn’t have been arrested.” Almost invariably, the true believers I have met have worked only one side of the courtroom in their careers. Lack of perspective coupled with ideological fervor can be dangerous. As a Los Angeles County deputy district attorney, I considered myself a conservative filer. I was very mindful of the power I had to mess with someone’s life by filing major criminal charges against them, so I sought to exercise my discretion as carefully as I could. But, even though I was not a true believer, viewed in retrospect, I probably believed police officers a little too faithfully and dismissed defendants’ versions of the facts a little too readily. Only after becoming a defense attorney did I realize that, even though as a prosecutor I had tried to look at the facts from both sides, my ability to do so was necessarily limited by having experienced only one side of the system.

Switching teams would also help counsel from both sides in evaluating filings and in settlement negotiations. For example, one prosecuting agency I deal with, and whose lawyers are generally very good, has a basic policy of not talking with defense lawyers prior to the filing of charges or, sometimes, even prior to a court date. This is not a good policy. The defense attorney might really have something to offer, such as exculpatory evidence or a credible defense, which, if disclosed at the early stage of a case, might convince the prosecutor to take a second look before filing. Shouldn’t the prosecutor be willing to take that look before charging someone with a crime and committing public resources to a prosecution?

Ethical Considerations

Perhaps most important, switching teams could lead to stricter adherence to the high ethical standards, which, believe it or not, criminal lawyers have to follow. One of my colleagues in the district attorney’s office, who enjoyed dropping evidentiary bombshells on defendants during trial and without notice (and who is no longer a prosecutor), may have thought twice if he had broader experience. And a former DA who covered up critical alibi evidence in a murder trial (the evidence eventually came out, and the defendant was justifiably acquitted) probably would not have “lost the meaning” if she had the perspective of having someone’s life in her hands, even if it is the life of an accused murderer. Similarly, defense counsel who treat every adversary as an enemy and pick unnecessary fights with judges and prosecutors could realize that zealous advocacy should never be hazardous to a client’s health.

My own personal experience convinces me that switching teams broadens perspective and makes one a better criminal lawyer. But I would never have known that if I had not gone through it myself. It is a good idea; it is good policy. And it should be implemented.

Los Angeles Lawyer invites its readers to submit articles for the Closing Argument column. Topics should be of immediate interest to members of the legal profession and should not exceed 850 words in length. Please send submissions to: Closing Argument Editor, Los Angeles Lawyer, 261 S. Figueroa Street, Los Angeles, CA 90012-2503.
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