

## Criminal Law

### Help Guide the Guilty Client Through the Legal Process

Serve the societal interest in reaching a just result

By John Lacey

In so-called white collar criminal matters, the conduct of corporations and corporate executives is called into question. Many of those cases involve business judgments where the corporate activities may have been questionable, but not criminal. In other cases, the individuals clearly violated the law. One of the questions we most often hear is, "How can you represent someone who you know is guilty?" This article deals with that question.

First, the question about representing a guilty client, while understandable, is flawed. Our legal system is built upon the principle that every person is presumed innocent until proven guilty beyond a reasonable doubt. Thus, while a client may confide to us that he did something wrong, in the eyes of the law he is not guilty of any crime unless a jury finds him guilty, or he decides to waive his right to trial and to plead guilty to an offense.

Before the client decides to go to

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trial or to enter a guilty plea, skilled counsel will advise him of his options. For example, in many instances, our client has no prior criminal record. In such cases, a sentencing judge is more likely to be lenient at sentencing, with a term of probation often being the result. In contrast, if the defendant decides to go to trial, fails to accept responsibility for his actions and expresses a lack of remorse, the court likely will sentence the client to jail. Thus, before deciding whether to test the prosecution's evidence by taking the matter to trial, both the client and defense counsel must critically analyze the relevant facts.

Because our client had admitted to us that he committed the acts alleged by the government, we cannot ethically allow him to testify at trial and deny his involvement. Instead, we analyze the surrounding facts and circumstances to determine the strengths and weaknesses of the prosecution's case. In state cases, this is relatively easy because the prosecutor is required to provide the defense with all relevant investigative reports, witness statements and the transcript of the grand jury proceedings. In federal cases, discovery is far more limited, so we often have to conduct our own investigation to uncover the strengths and weaknesses of the prosecu-

tion's case.

Even in cases where the evidence appears to be strong, we will look to see whether there is a legal basis to have some of the evidence excluded or to have the entire indictment dismissed. For example, we will examine (1) whether statements given by our client were coerced, or were obtained before the investigating officers read our client his *Miranda* rights; (2) was there an illegal motor vehicle stop or a warrantless search in violation of the state or federal constitution; and (3) did the prosecutor properly instruct the grand jury on all elements of the offenses charged and provide the grand jurors with definitions of complex legal terminology used in those instructions? If there is a problem in any of these areas, we can move to suppress the evidence. Alternatively, we can use the potential legal issues to convince the prosecutor to dismiss the case or to agree to a plea deal that would be far less onerous to our client.

In reality, most clients accused of a crime do not wish to take the matter to trial if they truly did commit the offense. In these cases, we seek to facilitate a guilty plea and to minimize the penalties which will be imposed by a judge. This has been extraordinarily successful, with most clients receiving probation and a fine and a small percentage receiving relatively short jail sentences even where millions of dollars in ill-gotten gains may be involved.

The secret to these results is to speak with the prosecutor as early in the case as possible. Generally speaking, prosecutors, state investigators and federal

agents do not want to waste many months or years investigating a single complex case. Similarly, judges do not want their dockets clogged by lengthy trials in cases that can be disposed of summarily through a proper plea bargain. In order to avoid the waste of time and effort in going to trial, prosecutors often will offer very favorable plea terms to defendants who wish to plead guilty to an offense early in the process. These benefits include not only explicit concessions, such as a reduced charge with a lower maximum sentence, but also the unspoken benefit of stopping the prosecutor's investigation before it uncovers more substantial evidence or, in some cases, evidence of other crimes that the client committed. This is especially important in federal fraud and theft cases, where the amount stolen will determine the length of the sentence under the Sentencing Guidelines. The government often will stipulate to a loss amount that is far lower than the actual amount because the investigation was ended before all of

the victims could be located.

In appropriate cases, defense counsel may also seek favorable treatment for his or her client by offering the client's cooperation against others. Prosecutors will often see one defendant as the leader of the criminal conspiracy and will determine that this defendant is more culpable, and thus more deserving of significant punishment. In order to ensure a conviction, prosecutors will offer co-conspirators favorable treatment in exchange for cooperating against the target. There are two potential problems for the client who chooses this course: (1) such cooperation could subject the client to threats or physical harm; and (2) if the client is not 100 percent truthful with the prosecutors, the latter reserves the right to cancel the plea agreement. It is thus imperative that defense counsel explain to the client that a cooperation agreement mandates that he disclose not only wrongdoing by the target defendant, but also the wrongdoing by the client himself, or by the client's friends

or loved ones. In some cases, clients will reject a cooperating plea agreement that would require them to implicate others in a crime. In cases where the client does cooperate, however, the sentencing judge, with the prosecutor's recommendation, will routinely grant leniency at sentencing.

In sum, most persons who have committed criminal offenses wish to take responsibility for their actions by admitting what they did wrong. Under these circumstances, defense counsel can help guide the guilty client through the legal process, negotiate a favorable plea agreement and appropriately argue for leniency for the client at sentencing. If handled properly, the client can confess to his wrongdoing while defense counsel can help minimize the penalties imposed on the client. This process serves not only the client's best interests, but also serves the societal interest in reaching a just result while avoiding the waste of prosecutorial and judicial resources. ■