

# White-Collar Defense

*By Robert L. Echols and  
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**A former  
federal judge  
and former  
federal  
prosecutor  
tell you what  
to do ... and  
what not to do**

Defending white-collar criminal cases is not for the faint of heart. It involves unique challenges that require patience, diligence, judgment, experience and subject-matter expertise. When one or more of these is lacking to some degree, the quality of counsel's representation is impaired and mistakes are made.

Tennessee has many fine white-collar defense attorneys, and we cannot presume to tell them how to do their jobs. We can, however, offer some suggestions from the perspective of a former federal judge and former federal prosecutor, respectively. From our vantage points, we have been able to observe best practices but also to identify common mistakes made by counsel defending white-collar federal criminal cases.

Accordingly, we set forth a number of practices that should be employed in white-collar cases but often are not, as well as some that are sometimes employed but never should be. These are our

version of the do's and don'ts of white-collar defense. If there is a primary theme that runs through them collectively, it is simply this: find relative strong points and take advantage of those, rather than trying to squeeze some advantage out of weak points. Some of our recommendations seem so self-evident that they are hardly worth even mentioning, but experience has shown us that they need to be repeated and emphasized. So here goes.

## DO'S

### 1. Grasp the legal theory of the prosecution's case early on.

Not all criminal cases deemed "white collar" are legally complex. Many are, however. In such cases, counsel must prioritize the task of thoroughly understanding the charges and the prosecution's case-specific theory of liability under those charges. Thus, for example, if counsel's client is a public official charged under a broad anti-corruption statute, counsel must determine whether the prosecution's theory, as set forth in the indictment, is premised upon receipt of a bribe or kickback, profiting from a concealed conflict of interest, or some other corrupt conduct covered by the statute.

In complex white-collar cases, the theory of criminal liability often is not clear merely from the statute charged, and attention must be devoted to ascertaining the prosecution's theory with certainty. We have occasionally been surprised to see that counsel has not grasped the theory even as trial is about to begin. By then, it is too late.

Having identified the prosecution's theory of liability, counsel should consider how that theory relates to the elements of the crime(s) alleged in the indictment or information. Different theories may portend different elements and/or different prosecutorial strategies for proving the elements. It is worth writing down the elements of the proof required under each count. These, of course, are what the government focused upon before the grand jury if the defendant was indicted and what it must

prove at trial beyond a reasonable doubt. The government's theory of liability, and the associated elements of the crime(s), should frame counsel's efforts as he or she begins the defense. This early attention to the government's required proof will help guide conversations with the client and the defense investigation in general. It also will help in assessing the strengths and weaknesses of the government's case and aid in the development of defenses and plea negotiation strategy.

### 2. Focus early on sentencing issues, including, in federal cases, the U.S. Sentencing Guidelines.

Counsel is well advised to think early about sentencing issues, in preparation for a possible conviction. In our sphere of observation, federal cases, this means focusing on the applicable United States Sentencing Guidelines. Under the sentencing guidelines, in each case an advisory sentencing range is determined via a specific method based on the combination of the total "offense level" and the defendant's "criminal history category." Specifically, the court arrives at a recommended sentence by determining a final offense level (stated as a number) and the defendant's numerical criminal history category, which in turn is determined from the total number of criminal history "points" attributed to the defendant. Both offense level and criminal history category turn on numerous factors that are often quite debatable. Once offense level and criminal history category are determined, the court essentially plugs them in to the guidelines' sentencing table to obtain a non-mandatory guideline range for sentencing, stated from a minimum to a maximum number of months of incarceration.

Counsel should look carefully at the guideline factors that increase or decrease the offense level for the offense(s) at issue and the number of criminal history points, and note the factors whose applicability is debatable under the facts of the case. We have occasionally been surprised when defense counsel did not assert particular factors that arguably supported

decreases or failed to contest shaky government claims that particular factors supported increases.

Because the offense level and criminal history points often are debatable, counsel has work to do here. Spotting the debatable issues is crucial in order to provide the client with something the client will want to know from the very beginning: best case and worst case scenarios under the sentencing guidelines. Identification of these issues also obviously is crucial not just to determining the best-case result, but also to obtaining the best-case result by prevailing on these issues. Thus, to provide the client with the most accurate possible estimate early on, and to prepare for possible sentencing litigation, counsel needs to compute the minimum and maximum offense levels possible based on the facts underlying the alleged crimes. Likewise, counsel needs to investigate the client's criminal history carefully and compute the minimum and maximum total criminal history points. Then, having identified the minimum guideline range, counsel should craft the best legal and factual argument for obtaining the minimum. Moreover, during this process, counsel should check to see whether there have been any recent applicable amendments to the sentencing guidelines; this is an important step that can easily be overlooked.

Thinking early about these important matters will make counsel's defense efforts more productive even prior to reaching any sentencing litigation. For example, if counsel understands the sentencing guidelines and how they apply in the case, counsel will be positioned to try to convince the federal prosecutor, in pre-trial plea negotiations, to lower the prosecutor's original view of the advisory sentencing range so that the parties can jointly recommend that the court adopt the lower advisory sentencing range. Failing that, if the parties are unable to reach an agreement as to what advisory sentencing range to recommend and litigation does ensue regarding the

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sentence to be imposed, counsel will be equipped to urge the court to adopt a lower advisory sentencing range when considering the sentence.

The judge is permitted to “depart” downward from the advisory sentencing guidelines — i.e., determine an advisory sentencing range lower than it presumptively appears to be — so long as the judge gives explicit reasons for doing so. Any downward departure tends to result in the pronouncement of a sentence lower than what would have been pronounced absent the downward departure. In addition, since the sentencing guidelines are no longer mandatory and merely advisory, judges now have much discretion in fashioning a proper sentence in criminal cases; the judge is not bound by the guideline sentencing range and can sentence above or below this range as long as he or she adequately justifies this “variance” by explaining the reasons for the sentence imposed.

When the time comes, counsel should be prepared to persuade the judge that there are good and sufficient reasons under the guidelines to depart downward under the guidelines and/or vary from the guidelines: for example, defendant’s lack of criminal history, rehabilitation efforts, hardships, health, or family considerations. The difficult task of so doing is not a science. It involves reasoned judgment. To a judge seeking a sentence that is fair and just under the law and all the facts and circumstances of the case, counsel’s efforts may supply the reasons needed to justify a departure from the presumptive sentencing range, and/or a variance from the final sentencing range or at least a sentence at the low end of that range.

### 3. Attack the prosecution’s case at its weakest point.

White collar cases present a variety of defensive options, some of which are better than others depending upon the particular case involved. At some time before judgment is entered in the trial court, the prosecution’s case can be

attacked in several ways: as evidentially insufficient (i.e., the evidence fails to prove the prosecution’s version of events); jurisdictionally flawed (i.e., the prosecution cannot establish one or more jurisdictional elements); flawed in terms of mens rea (i.e., the prosecution establishes its version of events, including what the defendant did or did not do, but fails to prove that the defendant had the required criminal intent); and/or otherwise legally insufficient (i.e., the prosecution’s version of events, though established at trial, fails as a matter of law to prove that the crime charged was committed and/or that the defendant committed it). Typically, counsel should and in fact do prioritize one of these areas at trial. Unfortunately, sometimes questionable choices are made; instead of prioritizing an attack on the prosecution’s weakest area, counsel may pick a fight as to an aspect where the prosecution is much stronger.

A classic example involves a case where there is little doubt either as to what the defendant did or that what the defendant did was wrong, unethical, sleazy — whatever term you want to use for morally troubling conduct. Not infrequently, we have seen counsel nevertheless pick a fight over whether the defendant’s conduct was in fact troubling. This may be understandable if counsel has no other option, but we have seen counsel prioritize this fight when a far more promising attack was available — specifically, the argument that, unsavory though it may have been, the conduct simply did not fall within the scope of the federal criminal statute(s) charged. Far better for counsel to concede that the defendant may not be a poster child for ethics — thus earning counsel credibility with the jury — and then convince the jury that the conduct nevertheless did not amount to the crime(s) charged in the indictment. Counsel is well advised to lock in early on the weakest part of the prosecution’s case and focus the defense there, rather than reflexively attack whatever aspect of the prosecution’s case seems to be front and center at a given time.

### 4. File valid motions *in limine*.

Complex white-collar cases tend to create a variety of evidentiary headaches for prosecutors. Under various rules of evidence as well as Supreme Court rulings regarding the Confrontation Clause and other constitutional protections for defendants, the admissibility of specific key prosecution evidence may be very much in doubt. In these cases, sometimes prosecutors themselves seek a pretrial resolution by filing a motion *in limine* to admit the evidence.

What we rarely saw, however, was a written pretrial motion by defense counsel to exclude such evidence. In particular cases, there may be good tactical reasons for refraining from raising such issues pretrial, and instead addressing them at a sidebar at trial when they arise. However, failure to spot these evidentiary issues before trial is not a good reason. Counsel must identify specific significant evidence possibly subject to exclusion, decide whether exclusion should be sought pretrial and, if so, file an appropriate motion *in limine*. A pretrial ruling will simplify and focus counsel’s pretrial preparation, as well as please any judge who prefers advance streamlining of trials even if it imposes the burden of a little extra pretrial reading of motions.

In addition, a motion *in limine* can be an excellent vehicle for introducing the court to the defense theory of the case. Although such a motion is not the place to try the case, it is an appropriate means of sensitizing the court to the key evidence and issues from the defendant’s perspective. It may also increase the prosecution’s willingness to negotiate a lower sentencing recommendation.

### 5. Push for favorable jury instructions.

As noted above, often in white-collar cases the provable facts are not very good for the defendant, and the jurors simply will not believe that what the defendant did was okay or that the defendant is a model citizen. Nevertheless, the jurors can be persuaded that the defendant should be acquitted because the conduct proved did not amount to the crime(s)

charged. One key to such persuasion is jury instructions favorable to the defense. We have been surprised at how frequently defense counsel does not fight for advantageous jury instructions but instead, by and large, acquiesces in whatever jury instructions the prosecution offers. Even if the prosecution's version of the key jury instructions is defensible, that does not necessarily mean that it is on balance correct or that the judge should use it, or that the instructions should not include the defendant's request. Particularly in complex and cutting-edge white-collar cases, there likely exists considerable uncertainty as to the applicable law, and defense counsel must seek to have the uncertainty resolved in the defense's favor. If successful, counsel can dovetail the instructions with his or her closing argument, which can effect an acquittal even from jurors deeply troubled by the defendant's actions.

## DON'TS

### 1. Do not file unnecessary motions.

Appropriate pretrial motions are the sign of engaged, strategic counsel. Unnecessary motions, however, are another matter. Occasionally we have seen motions filed that can serve little purpose other than the inappropriate goal of diverting the prosecutor's attention to trivial matters. For instance, it is not uncommon for defense counsel to file a motion asking only that the prosecutor be ordered to provide discovery that the prosecutor is already legally obligated to provide. As another example, we have often seen motions asking the court to do something it quite clearly cannot do under federal law: order the prosecution to provide prior written statements of its witnesses in advance of trial.

To be sure, counsel should press for such discovery and witness statements, but should go about it some other way. Instead of relying on a written motion that cannot possibly succeed in adding to the prosecution's existing duties of disclosure, counsel should focus on ensuring that the prosecution is carrying out those duties and on coaxing the prosecution

into going beyond its duties by providing information more expansive or earlier than is required. Counsel can do so, for example, by raising in a written letter to the prosecutor — or with the court orally at a pretrial hearing — any concerns about potential missing or late discovery. Counsel can also seek (with the court's encouragement if possible) the prose-

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cutor's voluntary agreement to disclose witness statements at an early juncture or to provide information not technically subject to discovery.

### 2. Do not have clients cooperate with the government unless they are thoroughly prepared to do so.

In many white-collar cases, an important option for resolving the matter optimally for the client is to have him or her fully cooperate with the government in return for a reduction in charges and/or the prosecutor's recommendation for a lower sentence. To accomplish this option, it is vital to show the government early on that the client is capable and sincere when it comes to providing relevant information and otherwise providing assistance to the government's investigation. The major first step in that process typically is to have the client submit to a thorough, no-holds-barred debriefing by government investigators — known colloquially as a "proffer" when the defendant, as is typical, is granted some protection

against the use of his or her own statements made during the debriefing.

Counsel must prepare the client thoroughly before such a debriefing. First, counsel must explain the pros and cons of cooperating and determine whether the client truly desires to cooperate. If so, counsel must ensure that the client understands the process of cooperation and is prepared to tell a complete and truthful version of events without qualification. This typically involves considerable effort, including a candid and thorough discussion with the client regarding his or her version of all relevant circumstances, and a joint review of all key documents. Regrettably, however, not infrequently the client arrives at the initial debriefing unprepared. This can be a disaster for clients charged with — or at least suspected of — white-collar crimes; just ask Martha Stewart.

It is not, however, just the client who must be prepared for this process. Counsel must prepare himself or herself as well. Counsel must become familiar with both the key legal issues in the case and the personality of the prosecutor who will conduct the debriefing. Counsel also must be ready to interject quickly during the debriefing as necessary, for example, by anticipating those unfortunate moments where the client may start to blurt out the content of privileged communications. Basic as it sounds, counsel also must ensure that he or she is physically ready for what may be a demanding debriefing; one of us has seen counsel fall asleep repeatedly during a proffer of a major target (who was subsequently convicted) in a high-profile white-collar investigation.

### 3. Do not request discovery unless you are prepared to provide any required reciprocal discovery and to fight for fairness in the discovery process.

A criminal case can turn on when and how discovery is conducted. These matters are governed, in federal cases, by Rule 16 of the Federal Rules of Criminal Procedure.

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Importantly, disclosure is not automatic under Rule 16.<sup>1</sup> Instead, both the defendant's and the government's obligation to disclose discoverable items is initially triggered by a defense request for those items. Only in the event of a proper defense request must the government comply, and only if the government complies and then makes its own request must the defendant provide any discovery.

Rule 16(a)(1) provides that “[u]pon a defendant's request,”<sup>2</sup> the government must disclose to the defendant particular categories of items, including certain statements of the defendant, the defendant's criminal record, reports of examination and tests, and a summary of contemplated expert testimony. The government's obligation arises category by category; for example, a defendant's request for his or her criminal record triggers the government's obligation to produce the criminal record but not any obligation to produce anything else, such as a summary of expert testimony. With respect to three categories of evidence, if a defendant requests disclosure and the government complies, then the defendant must reciprocate — that is, permit the government to inspect and copy the same type of evidence. Specifically, if the government complies with the defendant's requests under Rule 16(a)(1)(E), (F), or (G), then the defendant must reciprocate and produce certain documents and objects, reports of examinations and tests, or expert witness summaries, respectively.<sup>3</sup>

A complex white collar case hardly can be defended without the benefit of considerable discovery. Ideally, counsel for white-collar clients would have a head start on the government and could plan and execute its investigation and research applicable law before having to make tough decisions, including discovery choices. Suffice it to say, however, that in most white-collar cases the government has been investigating for many months and has amassed a large volume of evidence against the

client before defense counsel has even been retained.

On the surface, Rule 16 levels the playing field by allowing the defendant to discover key evidence gathered by the government. This right to discovery is triggered merely by the defendant's request; the government then must comply and produce all information falling within the scope of a proper request.

However, is the defendant's right to discovery as good as it first appears? Does Rule 16 prescribe a fair deal for defendants?

In answering these questions, it is important to note that after a request by the defendant to inspect and copy documents and objects under Rule 16(a)(1)(E), the government is obligated to allow the defendant to copy, inspect and photograph a specific item if the item is within the government's possession **and**: (i) the item is material to preparing the defense, (ii) the government intends to use the item in its case-in-chief at trial, **or** (iii) the item was obtained from or belongs to the defendant.<sup>4</sup> However, although the government must produce any item that falls within any one of these three categories, it does not, according to many courts, have to specify the category into which the item falls.<sup>5</sup> Thus, the government does not have to identify which items produced during discovery are the ones it intends to use in its case-in-chief.

What if the government has voluminous evidence falling into one or more of these three categories? Suppose that it has collected many wiretapped conversations, photographs, videos, et al., stored in numerous boxes, but actually intends to use only a few of these items — and defense counsel does not know which ones. Defense counsel by rights should not have to spend hours and hours reviewing all of them to search for incriminating evidence the prosecution may use in its case-in-chief; counsel's focus should be on specific items — or portions thereof — that will be used at trial as part of the government's case-in-chief. Unfortunately, Rule 16, as inter-

preted by courts, does not require the government to direct counsel to the specific items to be used in the government's case-in-chief.

The defendant does not enjoy this favorable position; in producing reciprocal discovery, the defendant necessarily identifies the items to be used in the defendant's case-in-chief. After the government complies with the defendant's requests for disclosure, and makes a reciprocal discovery request, the defendant must permit the government to inspect and copy specified kinds of documents and items listed if the items are within defendant's possession and the defendant intends to use the item in the defendant's case-in-chief at trial.<sup>6</sup> Thus, if the defense produces an item, it is because it intends to use it in its case-in-chief; there are no other categories of items producible by a defendant. By making a Rule 16(a) discovery request, therefore, the defense starts a process that culminates with its identification of the evidence it intends to use in its case-in-chief.

The phrase “case-in-chief” is not defined in Rule 16, but is generally understood to mean any part of a trial in which a party introduces evidence to support a claim or defense.<sup>7</sup> With respect to defendants, this would include any affirmative defenses of a defendant, such as alibi, entrapment, consent, self defense, and insanity — arguably, everything except material used for impeaching a government witness. By identifying pretrial its evidence regarding any of these matters, the defense might be at a significant tactical disadvantage; early disclosure may diminish a defendant's bargaining power in trying to negotiate a lesser charge or reduced sentence recommendation by the government. To compound matters, the defendant may not know for certain what evidence will be a part of his case-in-chief until the government has rested its case. Until then, defense counsel may not have decided whether his client will testify or whether to present other proof at trial.

Defense counsel has a Hobson's

choice. If she has to select and disclose the evidence for her case-in-chief before the government presents its evidence at trial, that may prematurely tip the defendant's hand and otherwise interfere with defendant's trial strategy. However, if she fails to make the required disclosures, she may be prevented from introducing such evidence at the trial – a high price to pay. In short, simply by requesting discovery, counsel may put herself in a Catch 22.

Accordingly, it is imperative that requests for discovery not be made casually or routinely, but rather thoughtfully, with the potential ramifications of the request squarely in mind. Moreover, defense counsel should also seek to delay the disclosure of defendant's case-in-chief until after the government has made all its required disclosures, the defendant has examined the evidence disclosed, and a decision is made to proceed to trial.

In sum, counsel must consider carefully whether and how to invoke the right to discovery under Rule 16. As mentioned earlier, it would be very difficult to prepare defenses to a complex white-collar crime without discovering as much as possible of the evidence to be used by the government in its prosecution. However, it is important to understand the imbalance and possible pitfalls under the Rule. Our recommendation is for defense counsel to appeal to the trial judge for fairness in implementing the discovery requirements of Rule 16 and any local rule of reciprocity, by pointing out the disparity, imbalance, and unfairness in requiring defendant to allow the government to inspect its case-in-chief without a specific requirement for the government to do the same. Some judges will understand the inherent imbalance in the reciprocal discovery under the Rule and require fairness from the government in its application in specific cases — as for example by at least requiring the government to specify documents, tapes, photographs, and other evidence in a manner that will readily make it accessible and understandable to the defendant.

#### 4. Do not engage in *ad hominem* attacks on the prosecutor.

We have been gratified by our experience of generally cordial relations between prosecutors and defense counsel. The resulting benefits — to the lawyers, the court and even the defendants — can be enormous. Occasionally, however, we have seen sniping occur between opposing counsel. The temptation to do so may be especially strong for defense counsel, which — unlike prosecutors — can pick on only an adverse attorney and not a living adverse party.


Counsel should resist this temptation. Certainly, counsel should seek to hold prosecutors to high standards of professionalism and should not refrain from assertions of misconduct where well-grounded and in the client's best interests. Otherwise, however, personal attacks on the prosecutor achieve little more than diverting counsel's — not to mention the court's — attention from the complicated factual and legal issues that require everyone's full attention.

Counsel also should bear in mind that the presiding judge might have long been acquainted with the prosecutor and formed a favorable opinion of the prosecutor; if so, convincing the judge that the prosecutor is a scoundrel may be an uphill battle that ultimately damages counsel's credibility.

#### 5. Do not conduct unduly long cross examinations.

This principle is well known even to law students completing their first trial advocacy course. However, it has particular application to complex white-collar cases, which have complicated factual scenarios that superficially may seem to cry out for long cross examinations. In some cases this appearance is accurate; sometimes counsel has good fodder for a long cross examination and may wish to use all of it. Indeed, we have seen cases where the material for cross examination was so compelling that it likely would

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keep the jury's attention for hours.

Too often, however, we have seen counsel engage in a long cross examination despite having only a couple of compelling avenues of exploration. Instead of conducting a crisp and poignant cross examination regarding the compelling matters, counsel instead engage in an unfocused and meandering back and forth with the witness. The former would have left a sharp impression on the jury, while the latter surely left them confused and perhaps bored. Unwarranted marathon questioning is especially counterproductive in complex white-collar cases, where the jury has voluminous other important evidence to examine.

## Conclusion

In defending complex white-collar criminal cases, there are a variety of options, in terms of both case strategy as a whole

and particular pretrial and trial tactics. These choices should be made deliberately and not by happenstance or whim. They also should be made as early as practicable, subject to revisiting as appropriate. Counsel should choose strategy and tactics to maximize the likelihood of success on the strongest avenues, and avoid or at least de-emphasize the rest. Counsel may thus avoid the frustration of fruitless efforts to fit a square peg in a round hole, while advancing the interests of both the client and the criminal justice system. ⚖️



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## Notes

1. Unlike Rule 16, local rules or standing discovery orders of particular courts may effectively make discovery mandatory even in the absence of a defense request; practitioners will need to consult these authorities in districts where their cases are pending.
2. Fed. R. Crim. P. 16(a)(1)(A)-(F). The rule's provision relating to discovery concerning government expert witnesses, for some reason, instead uses the phrase, "At the defendant's request." Fed. R. Crim. P. 16(a)(G).
3. Fed. R. Crim. P. 16(b)(1).
4. Fed. R. Crim. P. 16(a)(1)(E).
5. *United States v. Roman*, 2011 WL 1168261, at \*2 (M.D. La. March 29, 2011); *United States v. Vilar*, 530 F. Supp. 2d 616, 636-37 (S.D.N.Y. 2008); *United States v. Carranza*, 2007 WL 2422033, at \*3 (N.D. Ga. Aug. 21, 2007); *United States v. Causey*, 356 F. Supp. 2d 681, 686-687 (S.D. Tex 2005); *United States v. Pearson*, 340 F. 3d 459, 468 (7th Cir 2003), vacated on other grounds sub nom. *Hawkins v. U.S.*, 543 U.S. 1097 (2005); *United States v. Nachamie*, 91 F. Supp. 2d 565, 569-70 (S.D.N.Y. 2000).
6. Fed. R. Crim. P. 16(b)(1)(A).
7. *Black's Law Dictionary* 244 (9th ed. 2009).

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