BUCKING CONVENTIONAL WISDOM: DISCLOSING DEFENSE ARGUMENTS TO THE GOVERNMENT BEFORE TRIAL

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Between 2006 and 2008, federal prosecutors reportedly dismissed indictments against 42 defendants charged with securities fraud—more than twice as many dismissals as in the prior three years.[3] The question for criminal defense attorneys is how to achieve this result in a complex case in which counsel believes that a client was wrongly indicted.

Conventionally, defense attorneys representing individuals under investigation or indictment do not disclose to the government their clients' defense strategies or theories. Rather, criminal defense attorneys generally share as little information as possible with the government. The ability to withhold information from the prosecution until the defense theory is certain—which often is only after the government has presented its case at trial—is one of the few advantages enjoyed by criminal defendants in a process that favors the government. This strategy is appropriate in many straightforward criminal cases. However, because the concepts of "mail fraud" and "conspiracy" are expansive, an increasing number of white-collar criminal charges are premised on debatable esoteric legal and accounting principles. In some cases, prosecutors' lack of expertise with the complex accounting and other issues faced by some industries results in individuals who are not culpable being charged with crimes. In those cases, educating the prosecution often can result in the best result for a client—a dismissal.

In January 2009, the U.S. Attorney's Office for the Southern District of New York dismissed a fraud indictment against David Stockman, a former Congressman and Director of the Office of Management and Budget under President Ronald Reagan.[4] The same day, the government issued a statement saying that "[a]fter a renewed assessment of the evidence…including evidence and information obtained after the filing of the Indictment, the Government has concluded that further prosecution of this case would not be in the interests of justice."

The government's "renewed assessment" likely was prompted by the presentation by Mr. Stockman's attorneys in October 2008 of an extremely detailed 221-page submission, which presented documentary evidence establishing Mr. Stockman's innocence.

In July 2008, the U.S. Attorney's Office for the Southern District of New York dismissed charges against David Pinkerton, a former AIG executive, 31 months after he was indicted for his alleged involvement in a plot to bribe foreign officials in connection with an oil deal in Azerbaijan. Mr. Pinkerton's attorneys reportedly engaged in discussions with the government for nearly a year before the government dropped the charges.[5]

Mr. Stockman's and Mr. Pinkerton's victories illustrate that when a defense attorney believes that the conduct for which a defendant was indicted does not actually constitute a crime, the attorney should undertake the risk of educating the prosecution about the defense to obtain a dismissal. There are factors, however, that attorneys should consider before making such disclosures.

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[2] The views expressed herein are solely those of the author and not necessarily those of the Center on the Administration of Criminal Law.

[3] David Glovin, "Reputations Don't Return When Prosecutors Drop Charges," BLOOMBERG, June 23, 2010.

[4] The author of this article represented Mr. Stockman in connection with the criminal case.

[5] Glovin, *supra* note 3.

Can the defect in the government's case be corrected? If the government can correct a legal defect in its case, defense counsel should not educate the government about the defect in advance of trial. The same is true if the government can simply adjust the charges to account for a defendant's version of the facts. But if the defense can account for the worst possible facts that cooperators could disclose to the government, it may be advantageous to present the defense to the government before trial.

Is the defendant's account of the facts likely to change? In a case where the government does not have access to the defendant's account of the facts, a defendant may avoid telling his story to the government because it is tactically advantageous to have the government attempt to prove its case without knowing the defendant's account. However, if a defendant has proffered, or has testified in a civil deposition, before a grand jury, or before the SEC or another regulator, not only is the defendant's account of the facts unlikely to change, but also the defendant is not bestowing an advantage upon the government by offering his account and explaining why those facts do not constitute a crime.

Will the essence of the defense be disclosed in advance of trial? Many defendants make motions in advance of trial, such as motions to dismiss, discovery motions, and motions to exclude witnesses and evidence. In complex cases, such as financial and accounting fraud cases, defendants also often retain expert witnesses who will submit detailed reports in advance of trial. Because pretrial motions and expert reports will educate the government about the defense, the defendant has little to lose by attempting to convince the government of his innocence before trial.

Does defense counsel have access to the government's documentary evidence and to cooperators' statements? A defendant who has access to the documents upon which the government relies and information about cooperators' and other witnesses' statements is far better positioned to explain to the government why that evidence does not prove his guilt. Knowing what cooperators and other witnesses are reporting to the government allows a defendant to address the information that likely is driving the prosecution and explain why his actions did not constitute a crime. Where there are parallel civil proceedings, a defendant should attempt to obtain transcripts of witnesses' deposition testimony and documents through civil discovery. And although a defendant is unlikely to obtain assistance from attorneys for cooperators, defense counsel should approach the attorneys for other witnesses to obtain information about those witnesses' statements to the government. Without knowing what witnesses are saying to the government and

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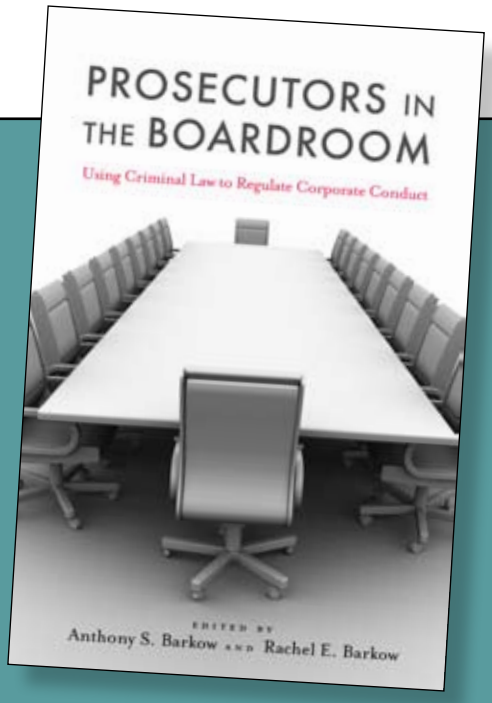

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what evidence is in the documentary record, a defendant cannot refute problematic facts.

What is the defendant's tolerance for risk? Educating the government about the defense is a gamble that requires that the defendant have a high tolerance for risk. Even where the client insists on explaining his side of the story to the government, counsel must impress upon the client that although a positive outcome is possible, it is more probable that it still will be necessary to present the defense to a jury. And by presenting the case to the government before trial, the defendant may sacrifice some of the advantage of surprise.

Assuming an attorney and client decide to make pretrial disclosures in an effort to convince the government not to proceed to trial, how is the defendant's account best presented to the government? Often, defense counsel first will meet with the prosecutors to give an "attorney's proffer," during which defense counsel will report the defendant's version of the facts and explain why the defendant's conduct was not a crime or why the government cannot prove its case. If the government is receptive, defense counsel may invite the government to interview the defendant. Such proffers often are conducted pursuant to "Queen for a Day" letters, which protect witnesses from having their own statements used against them at trial in the government's case. Sometimes, it is preferable to have a defendant speak to the prosecutor without a "Queen for a Day" letter because it supports the defendant's claim of innocence and because counsel can argue to the jury that the client was interviewed voluntarily with no protection. If defense counsel is not concerned that a defendant's statements may be introduced at trial by the government—because, for example, the defendant will likely testify—it may also be advantageous to offer to allow the government to interview the defendant on the record. This is so unusual that the government may react positively to the defendant's claim of innocence.

No two criminal cases can be treated alike and there is no certain way—even when a defense attorney is convinced of a client's innocence or that the government cannot prove its case—to ensure that the government will dismiss an indictment in advance of trial. However, when criminal defense attorneys think creatively, the results often are better for their clients.