New York Law Journal
WHITE-COLLAR CRIME
Monday, July 23, 2007
ALM

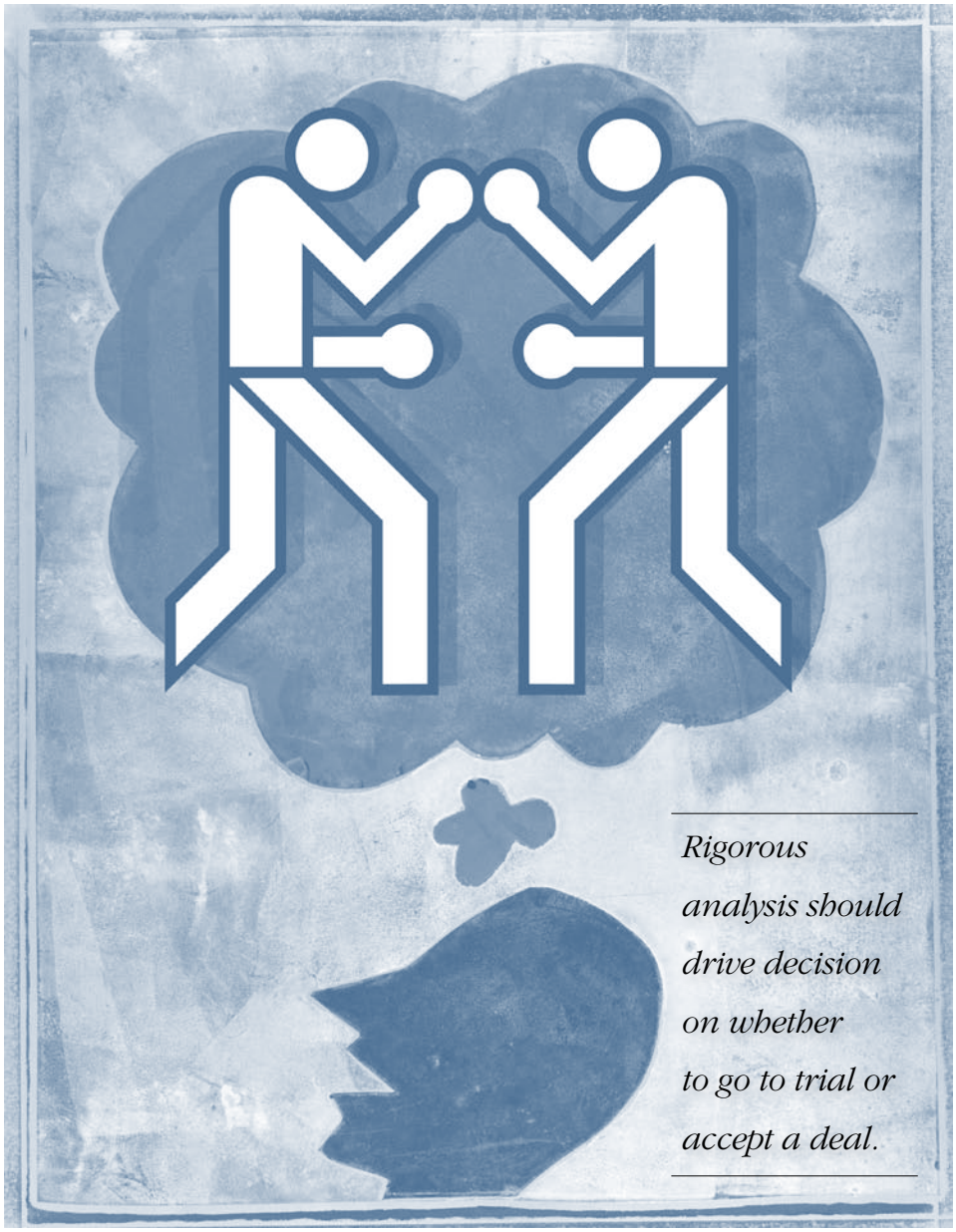
To Fight or Not to Fight?

BY STEVEN F. MOLO

TRIAL by jury. It is the right of every American accused of a crime but one that is rarely exercised in white-collar cases. Last year, over 87 percent of defendants charged with federal fraud offenses pled guilty.[1] Maybe the ultimate outcome for defendants facing criminal charges would be better if that changed.

This issue really concerns individual defendants. With the tremendous increase in the government's use of deferred prosecution agreements, indictments—or at least the actual prosecution of indictments—of companies are rare. Some of the most notable corporate frauds of the past few years did not result in criminal convictions of the companies. On the other hand, as part of these agreements, companies are encouraged to investigate thoroughly and identify—some would say "offer up"—employees who purportedly participated in the wrongdoing.[2] Therefore, it is the corporate executive, who usually has never come close to experiencing anything like this in his or her life, who faces the decision to fight or surrender.

Most individuals facing indictment in a white-collar criminal case fall into one of two camps. One is that group of outright fraudsters and cheats who embezzle from their employers, steal from their customers, or make blatant misrepresentations to the government. Their conduct does more than cross the line, it smashes through it. The only defense they may have is the presumption of innocence and the hope that a jury might be confused or dislike the prosecutors so much that it will disregard the law and ignore the facts. Usually, a guilty plea with some sort of deal is the sensible resolution. The second camp is that group of people whose conduct may be caught up in some overall corporate activity that may have strayed into a gray area or who may be on the periphery of a more nefarious corporate enterprise. Those people face a decision far more difficult when they are told the government intends to indict them.



Rigorous analysis should drive decision on whether to go to trial or accept a deal.

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Individuals in the second group often believe that they did what they did without any intent of breaking the law. Frequently, their conduct is the sort of thing that in the past might have been addressed through some type of enforcement action, perhaps not even criminal, against the company without any attempt to punish individuals. Often, they have led not just law-abiding, but exemplary, lives up to that point.

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Too often, individuals in the second group are intimidated into pleading guilty and going to jail without fairly considering whether they may be better off by going to trial and putting the government to its proof. The prospect of a stiff sentence from a judge following the sentencing guidelines, advice from a defense lawyer who may understand the letter of the law but has little feel for the courtroom, and an overwhelming sense of "if all of this effort and money has been spent identifying and maybe correcting 'the problem,' I must have done something wrong," can combine to push someone over the edge.

Analysis of Factors

Frequently, the decision to accept a "plea bargain" is motived, in part, by logic and, in part, by emotion in an environment of significant uncertainty. Too few defendants and their counsel engage in a rigorous analysis of the factors that really should drive the decision. Those factors include: a thorough analysis of the admissible evidence; credible jury research; the realistic assessment of how much worse a sentence may be following a conviction at trial; an informed and candid assessment of the court, and to the extent it can be known, the judge; a fair assessment of the prosecution team; and the individual's personality to endure a trial (often greater than they may acknowledge at first).

With the proper team in place fairly considering the appropriate factors, more individuals might opt for trial and find the outcome more favorable than the "deal" offered by the government.

Assessing the Evidence

Assessing the evidence against a particular individual is not the same as assessing the evidence against the company—to which the acts of all individuals will be attributed. Things may look awful for a corporation without necessarily being so for every individual who worked in, or even was responsible for, an area in which the problem arose. Jurors do display the ability to understand individual culpability and distinguish among defendants.

Once a case has been indicted, in most complex prosecutions, a defendant will have access to *Brady* material,[3] most of the government's documents, and sometimes, even Jencks Act[4] material in fairly short order. If the government intends to call experts, their reports summarizing their testimony must be produced upon a defendant's request.[5] No preliminary decision on the strength of the government's case should be made until all of this evidence is weighed carefully.

This sounds fundamental but it is amazing how often—particularly in highly technical, complex white-collar cases—it is not done in earnest before the decision to plead guilty is made. Frequently, the decision is made without the benefit of analyzing the actual evidence because the defendant and his lawyer do not really see it. The deal is cut before indictment and the benefit of full discovery. The defendant is left to make a life-altering decision based upon the government's version of what other key individuals are saying about him and its own spin on documents that may not be particularly favorable. That is not evidence.

Trials are won or lost by evidence presented to a jury, not some "gestalt" of what is right or wrong in a particular context. Defense counsel owe it to their clients to parse through the evidence as it will likely be admitted at trial. In an age in which indictments are written as sensational press releases to be excerpted in The Wall Street Journal, there is often a disconnect between what the government is saying happened and what it might be able to prove through competent evidence.

Defense counsel may well learn that a witness is not as strong or as solidly locked in as the government may be contending in its pre-indictment posturing, or there are admissibility issues relating to a particular document or statement, or the legal theories the government is pursuing as pled in the indictment are flawed. Defense experts may provide a contrary viewpoint that can create reasonable doubt on complex issues like appropriate accounting treatments.

While it is impossible to anticipate precisely how the evidence will play out in any trial, particularly a criminal trial, experienced defense counsel should be able to provide a client with a good understanding of what the jury will hear. Only after that occurs can the defense team realistically assess "how good or bad the government's case is." Establishing a defendant's good faith and creating reasonable doubt where complex facts and legal issues may be present is not like the hopeless task of defending a drug bust case caught on tape. Jurors understand that the world—particularly in white-collar criminal cases—is not black and white, and defense counsel must account for that in assessing the strength of the case.

The argument against waiting to get the evidence and analyzing it is that the deal being offered by the government may go away or get worse. However, experience shows that generally, unless you were going to be able to offer substantial cooperation early in the investigation, that is not the case.

Jury Research

Unless a white-collar criminal case is a dead bang loser, deciding whether to plead or go to trial without the benefit of jury research is foolish. Done properly, research almost always reveals nuances, strengths, and weaknesses of a case that defense counsel and the client—often immersed in details and historical thinking developed throughout the investigation—may not have perceived.

Not all jury research or jury researchers are alike. Lawyers who try cases tend to have their favorite methods of research and people with whom they prefer to work. While there is some debate on this question, it is usually a good idea to have someone on the jury research team who is familiar with the venue. The social science involved in the research may be the same wherever a case may be pending. Yet, there are sometimes subtle differences from venue to venue which can be illuminating and known only as a result of prior work with that jury pool. The most beneficial jury research does the following:

- Provides a reasonably balanced view of the case—neither overlooking nor giving undue emphasis to either side's strengths or weaknesses;
- Accounts for the precise charges in the indictment and not on whether there has simply been "wrongdoing";
- Uses mock jurors who are truly representative of the people likely to serve on the jury;
- Accounts for the dynamics and spill-over effect that might be present in a multiple defendant trial;
- Factors in the potential of the defendant testifying or not testifying.

Assuming the budget is there, complex cases merit multiple research exercises to refine trial themes, develop graphics, and assist in witness preparation. All of that may be done once a decision is made to go to trial. Nonetheless, that decision should not be made without the benefit of at least some basic focus group analysis of potential juror reaction to the admissible evidence.

The Likely Sentence

In almost all cases, the fundamental question for a client in deciding whether to plead guilty is "how much worse will things be if I am convicted at trial?" There are many variables that impact the answer to that question. The first, of course, is what the government is offering in exchange for a plea. If it refuses to move off a heavy

sentence, the decision may be easy.

The circumstances peculiar to the defendant also play a role. Age, health, and family obligations all are fair considerations.

While the sentencing guidelines are no longer mandatory, most courts tend to follow them and there is generally a presumption in the courts of appeal that sentences within an appropriately derived guideline range will be upheld. Yet, there is now some degree of flexibility not present before the U.S. Supreme Court's decision in *Booker*.[6] Moreover, many courts, seemingly put off by the harsh penalties imposed under strict application of the guidelines, have taken a closer look at issues such as loss calculation which can drastically impact punishment.[7]

Defense counsel must make as realistic an assessment as possible of the downside risk of conviction. The trial judge's sentencing practices must be researched, and a detailed guidelines analysis must be performed.

Another significant factor to consider is the likelihood of the defendant being convicted on some counts and acquitted on others. Aggressive charging decisions by prosecutors tend to increase the possibility of that outcome. The sentencing consideration must weigh this factor. For example, a defendant may be charged in a two-count indictment with money laundering, carrying a 20-year maximum, and conspiracy, carrying a 5-year maximum. Obviously, the potential sentencing outcome, and therefore downside risk, is far different if it is believed that the government's evidence on the 20-year count is weak. The guidelines analysis should not be limited to a consideration of the indictment as a whole but must analyze the various potential outcomes in light of the other factors in the overall assessment of the case.

Assessing Prosecution Team

There is an old saying that, "good facts make great lawyers." In all of our system of justice, no group of lawyers generally experiences the benefits enjoyed by assistant U.S. attorneys. They usually walk into the courtroom with not only the facts, but also the law, public opinion, and sometimes the judge on their side. And they have the tremendous resources of the federal government at their disposal. As an objective matter, the prosecution is a formidable force to be reckoned with.

Yet, trials are inherently human, personality-driven experiences. The quality of lawyering does make a difference in the outcome of trials. Too often, the decision about whether to hold the government's feet to the fire is made without really considering whose feet will be feeling the heat.

Despite the significant advantages they may possess, the truth is that not all prosecutors perform well as trial lawyers. The government sometimes loses cases because of the performances of its trial team. Defense counsel must learn everything they can about the abilities of the trial team and consider this factor, without giving it undue weight.

In the assessment of the government's trial team, one particular factor to consider is whether there will likely be much of a defense case requiring the prosecutors to actually cross-examine defense witnesses. The reality is that most prosecutors do not have to cross-examine many witnesses so they do not get much practice. Also, many prosecutors are comparatively less experienced lawyers who never tried cases as a defense lawyer and never developed the nuance, timing, and instinct to successfully attack theories advanced by an opponent's witnesses.

It is a good rule to never underestimate nor overestimate an opponent. Yet, fair consideration should be given to the players in what will unfold in the courtroom.

Willingness to Fight

The most amorphous—but perhaps important—factor in the entire process is the client's stomach for taking on his or her accusers. Some individuals proceed through an investigation, endure an indictment, and go through a trial with the sincere conviction that they are truly innocent and nothing the government can say, do, or offer will ever move them from that position. Those individuals are rare.

Most defendants caught up in a corporate criminal scandal go through significant emotional swings. They alternate between feelings of defiance, remorse, embarrassment, and persecution. Those tend to be layered over an overriding sense of confusion and anxiety. The defense lawyer is as much a psychological counselor as advocate through much of the process.

Reminding the client to get neither too elated nor too distraught over the small victories and defeats that occur throughout the process helps. More importantly, defense counsel must focus the client on maintaining perspective that his life as he knew it has changed forever and he is now facing an opponent seeking his virtual destruction. Decisions about how to proceed must—as much as humanly possible—be made with a clear sense of the objective factors and potential outcomes. However much a client may want to get a matter behind him or sense that the odds may be slim because others are caving in, a cool head is called for and defense counsel's approach can promote the calmness and clarity the client truly needs to find.

Most successful individuals—and most individuals charged in white-collar criminal cases have been by some objective measure successful—can summon the strength to undertake this analysis rationally and endure a trial if it is concluded that trial is the best course of action. However, defense counsel must stay attuned to the client's often substantial needs in this area.

Conclusion

Like most good lawyering, advising a client whether his or her best interests are served by going to trial or pleading guilty is an art and not a science. However, by applying a rigorous approach, clients may learn that the "deal" being dangled before them is not such a bargain. If they can summon the fortitude to go through a trial, they may be acquitted or may not face a sentence as severe as that being offered by the government as the alternative to the deal—or perhaps even the sentence under the deal itself.

1. 2006 Annual Report of the Director of the Administrative Office of the U.S. Courts, Table D-1. "Defendants, U.S. District Courts—Criminal Defendants Commenced, Terminated, and Pending During the 12-month Period Ending September 30, 2006," www.uscourts.gov/judbus2006/appendices/dld.pdf.

2. A fair criticism of the current dynamic is that companies are incentivized to be as aggressive as possible in pointing fingers at people who, often for many years, were considered loyal corporate warriors who drove the business forward and whose integrity may never have been questioned.

3. Exculpatory or impeaching material, *Brady v. Maryland*, 373 US 83 (1963).

4. 18 USC §3500. Essentially, statements of government witnesses including interview reports and grand jury minutes.

5. Fed. R. Crim. Proc. 16 (G).

6. *United States v. Booker*, 543 US 220 (2005); See United States Sentencing Commission, "Final Report on the Impact of *United States v. Booker* on Federal Sentencing" (March 2006), www.USSC.gov/Booker_Report.pdf.

7. See *United States v. Olis*, 450 F3d 583 (5th Cir. 2006).

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