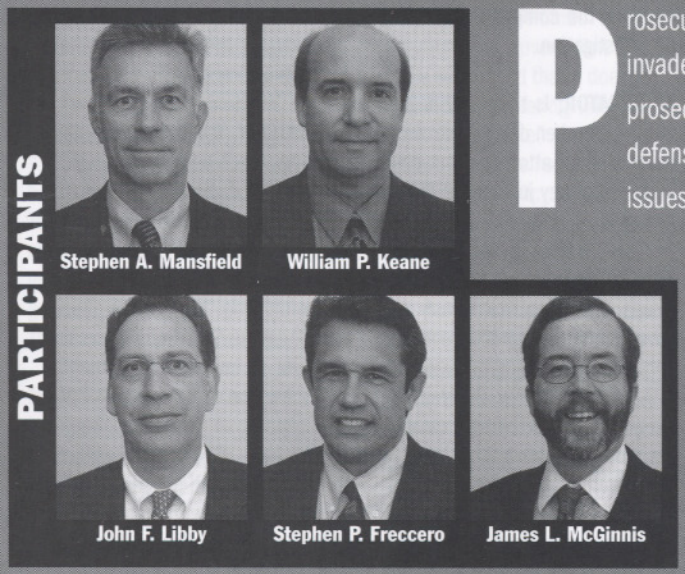
# White-Collar Defense




Prosecutors are criminalizing regulatory offenses and continuing to invade attorney-client privilege. What happens when state and federal prosecutors move into highly regulated industries? Five white-collar defense practitioners delve into the dilemmas and discuss privilege issues, internal investigations, U.S. Sentencing Guidelines, and cooperating with the government. They are Stephen A. Mansfield of Akin, Gump, Strauss, Hauer & Feld; William P. Keane of Farella, Braun & Martel; John F. Libby of Manatt, Phelps & Phillips; Stephen P. Freccero of Morrison & Foerster; and James L. McGinnis of Sheppard, Mullin, Richter & Hampton. Our roundtable was moderated by Custom Publishing Editor Chuleenan Svetvilas and reported for Barkley Court Reporters by Monica Lepe-Georg.

**MODERATOR:** Prosecutors are criminalizing violations that were formerly handled through civil or regulatory administrative proceedings. How has this shift affected your practice?

**LIBBY:** In highly regulated industries, like healthcare and financial services, prosecutors are bringing the blunt instrument of criminal prosecution to bear on very complicated regulatory schemes, which are usually administered by expert agencies. Prosecutors are criminalizing what, in the past, would have been regulatory or civil offenses. I think it's a dangerous development because they often don't have the same expertise as administrative agencies to deal with the conduct at hand, which results in over-criminalizing of that conduct.

**MCGINNIS:** In the environmental area, they're much more likely to go after record keeping or notice violations than they might have been a few years ago. It's an easy way to hang a felony on somebody because it's very difficult to defend those cases. If you include the SEC in your regulatory grouping, the SEC is far more likely to do a criminal referral than they would have six or seven years ago.

**KEANE:** I don't know if the government agencies have necessarily beefed up the staff and the resources to handle the extra work when criminal prosecutions go forward. There's a real strain on the system.

**FRECCERO:** From the defense side, I've also seen a lot of blunders by agencies that aren't used to being involved in a criminal investigation. They are not as familiar with legal procedures or perhaps don't have the experience to qualitatively weigh evidence. Sometimes that inexperience works to the government's detriment.

**MANSFIELD:** In the area of state prosecutions, I'm particularly concerned when prosecutors move into highly regulated areas. For example, in the area of OSHA violations—workplace accidents—I've seen a trend in California where the district attorney's office hears about an accident resulting in a workplace death and immediately presumes it should be charged as a felony under a willfulness standard. The district attorney initiates a press release and files a complaint without fully investigating or understanding what the facts are.

**LIBBY:** I've seen turf wars between the federal and state governments but also between state agencies and between prosecutors and the agency that supposedly regulates the business activity at issue. While that sometimes presents opportunities for clients and their counsel, it can also lead to the client and defense counsel getting caught in the middle.

**MCGINNIS:** Of the state agencies coming to the forefront, particularly in the antitrust area, are the state attorneys general. In the past, we might not have been so concerned about them, but for a variety of reasons they have now jumped into these fights with both feet. They began to get a taste for it in the *Microsoft* civil case in Washington. Then the energy cases came along, and now they have developed a great deal of momentum. If you don't pay close attention to the state attorneys general, you will have left one very important base uncovered.

**FRECCERO:** One of the very practical consequences of criminalizing regulatory offenses is that it makes defending or dealing with the investigations much more expensive. For example, with the energy cases, you had to make a number of presentations, perhaps make witnesses available, and produce multiple sets of documents for attorneys general from different states as well as for the federal agencies. I have not seen a lot of effective coordination of efforts between these various agencies. For the most part, a number of states and the

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various federal authorities take the position, "We have our own interests to vindicate and we don't care what you gave to this other group. We want the documents. We want to be able to interview those people."

**MANSFIELD:** I saw it in the energy cases in which there were numerous agencies involved and then agency after agency piling on. I remember one proffer where I brought a client in to meet with what I thought would be a couple of prosecutors and an agent. It ended up being my client sitting on one side of the table and ten government representatives from the various agencies on the other side. It was an awful setting to conduct an interview, but that was the way they had coordinated it—or failed to coordinate it.

**KEANE:** When you have multiple agencies involved in parallel investigations, the defense of any potential criminal prosecution takes priority, which makes it much more difficult to resolve the civil or administrative cases. If there is a potential criminal prosecution on the horizon, that's what we have to focus our defense on.

**MODERATOR:** Attorney-client privilege has been under the gun. What are the challenges for you and your clients when it comes to this issue?

**MANSFIELD:** I think the rules are the same as they have been for many years. What has changed is the approach by prosecutors. In aggressively seeking to invade attorney-client privilege, there has been an increase in efforts by government lawyers to pierce privilege. The law allows federal prosecutors to make an in-camera, under-seal showing to a judge that there is prima facie evidence of a fraud. If they get the ruling from the judge, as prosecutors frequently do, they are permitted to monitor what were believed to be confidential communications between a client and an attorney. It's very important to understand this dynamic when you represent your clients in light of the way the rules are structured and this new approach by prosecutors.

**MCGINNIS:** Privilege issues pervade everything that you do when you are trying to do an internal investigation or defend a corporation that has been placed on the government radar screen. From the very first time you or anybody else puts their pen to paper, there may be a request that you produce that piece of paper and hand it over to the U.S. Attorney's Office.

As soon as you explain these issues to employees that you are interviewing and give them the necessary warnings, their desire to cooperate fully and truthfully, may well diminish greatly. So not only is the defense compromised, but perhaps the company can't even find out what truly happened. It has a chilling effect on the whole process.

**LIBBY:** Even in those situations where you want to cooperate and follow what the Thompson memo says, now you have the *McKesson* case in California, which basically says, "If you try to avoid waiving privilege and turn over the results for the internal investigation to prosecutors under a confidentiality agreement, you're still waiving the privilege as to third parties." That law is obviously developing, but at least in California as of now, that's the rule, which is going to make entering into those types of confidentiality agreements very difficult and complicated.

**FRECCERO:** We are writing the rules as we go along. At least at the federal level, it is almost standard operating procedure to "deputize" the internal counsel for the company—getting them not only to turn over the results of an internal investigation, but also to investigate proactively and then report those results to the government. In recent high-profile prosecutions, the key witnesses are often the company's lawyers who participated in the investigation.

In the *Computer Associates* case, individuals actually pleaded guilty to obstructing justice for statements they gave to lawyers hired by the company to conduct an investigation.

**MODERATOR:** Is there any negotiating room when dealing with prosecutors about attorney-client privilege or are they just saying, "Hand it over"?

**FRECCERO:** There are two different issues here. Can you satisfy the government that your client, the corporation, is willing to cooperate without waiving? No. But you can likely protect yourself from some of the more aggressive techniques of the government. In an investigation, you can make a written proffer of why you believe that the regulatory scheme or the known facts should not result in a criminal prosecution. If you do that properly, some court decisions suggest that the government can either accept that proffer or reject it, but you probably have not waived privilege by doing so.

However, if you become actively involved in making witnesses available to the government or interviewing witnesses and then making reports available to the government, it's going to turn on you. Currently, companies have limited leverage to work out an agreement.

**KEANE:** There's some middle ground. I've seen a couple situations in which the corporation is cooperating with the government and verbally briefing the government on the results of the internal investigation. They are not turning over any written work-product, which is one thing we've seen recently in response to the *McKesson* case.

**MCGINNIS:** That's been the practice in the antitrust division amnesty program for some years now. Because of the fear of having this information get to class plaintiff's counsel, the presentations are done orally and there probably will not be a single piece of paper that will be exchanged with DOJ—other than their letter that says that you have conditional amnesty, for the very reason that we all talked about.

**MANSFIELD:** You don't see the same approach being taken by DOJ in the sort of garden-variety business case because they're going to be pushing for documents and internal investigation reports. You're often in this difficult situation where the SEC is willing to sign all sorts of favorable agreements on limited waiver or keeping certain aspects of reports confidential. However, DOJ is less inclined to do so and often pushes for producing every piece of paper, which puts the defense lawyer in a very difficult situation.

Practitioners are forced to have a serious conversation with the company's principals at the very beginning about whether a full internal investigation will be conducted, how it's going to be done, and in what subject areas. In years past, lawyers wanted to know all the facts to advise clients and generally recommended conducting full-scope internal investigations. Now the calculus has changed.

**MCGINNIS:** It's essential to try to get in-house counsel some education about this process before an internal investigation happens. If they make several decisions within hours of a problem surfacing, they can eliminate many of the potential options available. You can imagine somebody hearing of an issue, grabbing their notepad, running down the hall, interviewing people, taking extensive notes, not giving them warnings about who the client is, and also forgetting to give a document-retention warning. So within a matter of hours, they could be putting the fire out with gasoline.

**LIBBY:** The issue also has to be dealt with in compliance programs. Oftentimes you're in a position where you have to do an internal investigation, whether or not there's a government investigation. For example, you've got an employee hotline complaint, and then you're really caught. You have to find out what's going on pursuant to the compliance program. But how you conduct that investigation and how you document it could have consequences down the road. You really don't know how far to go and how far to document or what's going to happen in the future if the government does an investigation. That's a really tough problem.

**MODERATOR:** Are companies being a little more wary about what they say to their attorneys because they realize that what they say could be turned over to government prosecutors?

**KEANE:** I think what you're seeing as a trend is company counsel suggesting that individuals get their own attorney earlier. So we're getting calls earlier in the process. Previously, the last thing you wanted to hear is that your client had already talked to the government. Now the last thing you want to hear is that your client has already talked to the company's lawyers. The other challenge is how quickly the internal investigations move. The audit committee wants answers as quickly as possible. If the client is a current employee, it's often a very difficult decision for that person not to talk, whereas we have a little more flexibility with clients who are former employees.

**MCGINNIS:** If you represent the corporation, as I commonly do, you find that the effect of all of this is that you don't have nearly as much access to the witnesses as you did before. They now have their own counsel who might have been a lot more cooperative several years ago but now are forced to advise witnesses to refuse to talk to you, to talk to you on a very limited basis, or to talk to you only after it's too late to find out what happened. We're playing six dimensional chess here.

**MANSFIELD:** On top of it, the DOJ policies create dilemmas about cooperation. The government has basically announced that it doesn't want companies sharing information with "culpable" employees under joint-defense agreements. That's a very odd policy. Who knows who's culpable in the beginning of an investigation? In fact, the government is not always right about who is culpable. This policy can substantially interfere with appropriate, legally recognized communications that must occur in the ethical representation of a corporate client.

**MODERATOR:** Under the U.S. Sentencing Guidelines, the severity of punishment has increased tremendously. Jamie Olis, the Dynegy mid-level executive, was sentenced to 24 years in prison and Lea Fastow, Enron's former assistant treasurer and wife of Enron's former CFO, received a year. Will these cases make people more willing to make a deal?

**KEANE:** It may be a little early to tell, but I think one of the things you might see is more pressure for mid-level and lower-level executives to cooperate. The pressure on them will be greater than ever. The senior executives, such as the CEO and CFO, might be going to trial more often because of fewer opportunities for them to cooperate and reduce their sentencing exposure.

A CEO looking at 10 years in jail is not going to have a lot of options. Unfortunately, politics and Congress are attempting to limit the courts' ability to grant downward departures. Cooperation remains the one "safe harbor" for downward departures. I don't think taking away more discretion from the judges is a positive development in federal sentencing. The media is often focused on the higher sentences, but even on the lower end of the Sentencing Guidelines—a client whose exposure is 6 to 12, maybe 8 to 16 months—we're seeing more judges insisting on prison time.

**LIBBY:** What you're seeing is Congress and the DOJ really trying to handcuff judges and prosecutors by trying to limit discretion. The bad news is that it's getting much harder to resolve white-collar cases. But with the more complex white-collar cases, prosecutors have more opportunities and flexibility. I think there are some opportunities available for defense counsel as well.

**MANSFIELD:** There are huge opportunities in terms of persuading the government and prosecutors to redefine the scope of what they initially identified as the matter under investigation. As you reduce the dollar value substantially, the opportunity to resolve it favorably increases. What was interesting in the Lea Fastow case is the role the judge played. After he rejected the prosecutors' deal of five months' prison time, the prosecutors came back with a misdemeanor plea deal with a twelve-month cap, which allowed the government to get the lower sentencing range it wanted. So sometimes the prosecutors do work with defense lawyers and you can achieve good results.

**FRECCERO:** From the prosecutor's standpoint, having these ad terrorem penalties make plea deals more likely. Unlike violent crimes, most prosecutors have a certain amount of time to investigate and handle these cases, so they will approach you and you will have an opportunity to work out some deal. The sentencing of the Dynegy executive and Ms. Fastow's plea show two different aspects of the Guidelines. It's as if we have taken a page from the war on drugs and brought it over to the white-collar context.

The other Dynegy mid-level executives who participated in the scheme all entered plea agreements and received much less severe sentences. Olis chose to go to trial, was convicted, and was assessed an onerous penalty. Yet even the government realizes that these Guidelines are out of whack, because when they have a goal to accomplish, as in the case of Ms. Fastow, they will go back and find the charge that allows them to get the sentence they want. The overall effect of the Guidelines is that it has strengthened the government's hand to get plea agreements and cooperation.

**MCGINNIS:** This is yet another reason why you have to figure out a case much, much earlier than you did before. You have an opportunity to shape the investigation and what the charge might be. If you don't do that right away, your client is going to be in a lot of trouble. Folks who may have had an immunity deal before are going to be forced to plead to felonies. Prosecutors know very well the power they have. I'm not quite sure whether the cause of justice is served because intent isn't always a black-and-white thing. If the client has no choice but to plead to a felony and spend some jail time, I don't think that's necessarily the fair result.

**KEANE:** We have initial meetings with clients and they're very aware of the current environment, including the fact that more executives are going to jail and the difficulties of picking a fair jury. I can think of one case in which during sentencing, the judge specifically mentioned his concern about how this particular sentence would read in the papers. Most of the public are happy that more executives are going to prison. We're obviously not making the point that executives should never go to prison, but I think it's a shame that a lot of the discretion for the judges to assess individuals on a case-by-case basis is being chipped away. ■

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