

Wrap it Up

Packaging Your Case for Prosecution

When you decide to prosecute a fraud suspect, don't expect a prosecutor to accept your case unless you bring a professional package to the referral meeting.

By Bruce A. Dean, J.D., CFE, CPP

You've detected fraud in your company, conducted interviews, gathered incriminating evidence, and have one strong suspect. Now here comes the big question: Do you prosecute?

Egregious cases of fraud and theft, replete with persuasive evidence, warrant a referral for possible prosecution. However, evidence in other cases may fall short of the elevated threshold of proof required for criminal proceedings. Some cases just don't belong in the criminal justice system at all because criminal prosecution isn't appropriate. Certain cases may be processed more effectively within the civil legal system or, in some instances, an irregularity may *look* like a crime but it may not really *be* a crime.

If you submit a case, a prosecuting attorney will review it carefully and methodically to decide after reviewing the evidence and circumstances if it can be prosecuted successfully under applicable law. But don't expect the prosecutor to accept the case unless you present a professional package containing detailed investigative reports, sufficient evidence, exhibits, and other items.

Prosecuting attorneys are experienced in criminal law and procedure, and also may be adept at handling complex fraud and theft cases. They often are assisted by staff investigators and financial analysts with experience in economic crime cases. However, all prosecutors count

on *you* to tell them what you've discovered and to assist them in the development of a strong criminal case.

Before we describe the components of a successful prosecution package and how to prepare for the first referral meeting with the prosecutor, let's look at a short primer on the American criminal justice system.

Criminal Case

A criminal case is begun "in the name of the state"; it isn't a private case such as a lawsuit for money damages. A crime is an act that is disdained by society as a whole. Legislatures create laws (statutes or codes) to prohibit conduct that society deems illegal. Criminal statutes also specifically provide for the punishment of offenders, thereby hopefully deterring criminal activity.

The highest burden of proof of any system of American justice, "guilt beyond a reasonable doubt," is applicable in criminal cases. This is a much higher standard of proof than civil proceedings in which a mere "preponderance of the evidence" is sufficient.

If a criminal case proceeds to trial, all jurors must be convinced of a defendant's guilt or innocence. No "abstentions" are permitted. If the jurors cannot agree, the judge must declare a mistrial. Contrast this with civil cases in which only a majority of the jurors must agree.

If you are seeking only restitution, you may wish to consider other, more efficient, legal remedies. Criminal law doesn't provide for such measures as attachment of an individual's property or the withholding of wages ("garnishment") to satisfy a judgment. If you do decide to pursue legal options in addition to prosecution, be certain to notify the prosecutor at once.

Important: It's improper for a private attorney to threaten or to commence a criminal case to obtain an advantage in a civil case.

Preparation for Referral

Generally, you may send your case to any prosecutor having jurisdiction over the geographic area in which the crime occurred but it's best to start locally at the county or state level. If you choose to present your case to more than one prosecutor's office, be sure to notify each office.

Before you refer a case make sure that you have the commitment of your company's decision-makers but inform only those who need to know. Understand that once a case has been referred and accepted for prosecution, generally there's no turning back even if someone later senses that a public prosecution might alarm customers or investors or otherwise "look bad for the company."

Find out if your local prosecutor's office has an economic, financial, or white-collar crime bureau, unit, division, or department. The members of these groups will be particularly experienced in handling fraud cases.

In your planning, designate one individual in your company as the "point person" or "case officer" who will be the principal spokesperson for the investigators at the referral meeting and will coordinate input. This person should also be able to promptly and effectively arrange employee interviews and other meetings. Every meeting participant should have a defined and necessary role. Before the referral meeting, the group members may wish to informally review their proposed contributions with each other, offer constructive criticism, and identify possible questions from the prosecutor.

Next, call the prosecutor, agree on a date and time for the first meeting, and tell him or her who'll be attending. The prosecutor may require you to notify the police before you attend the first meeting so they can conduct an initial investigation. Of course, if anyone's safety is at risk call the police at once.

Initial Referral Meeting

Introduce the participants (including the point person) and exchange business cards with current 24/7 contact information.

Before you start telling your story, understand that the prosecutor will be evaluating you as a potential witness in a criminal case. Don't be surprised or offended if you're asked for your date of birth and other personal information. The prosecutor also will check the criminal history of every prospective witness as well.

The prosecutor also may ask you questions that seem unrelated to the investigation. Answer the questions and ask later why he or she asked them.

Tell your story slowly and surely and stick to the facts. If you use the following words in any form, you're stating your opinion or, worse, your conclusion: *illegal, intentional, willfully, feloniously, stealthily, surreptitious, stole, embezzled, deliberate, lying, nervous, apprehensive, suspicious, anxious, furtive, unwillingly, reluctant.*

If you catch yourself reciting your opinion, stop and ask yourself: Upon what facts am I basing my opinion? Then, stick to those facts.

Use plain language and avoid "copspeak," which confuses and bores everyone and impresses no one. Avoid industry jargon. Translate all technical information into understandable words. If the meeting participants can't understand you neither will a jury.

Always remember that you represent a business victim. Businesses are functional and legal entities. Present to the prosecutor any documents defining the legal status of your business.

The exact legal status of your business (corporation, partnership, trust, sole proprietorship, etc.) may influence a prosecutor's decision to accept the case. If possible, obtain a certificate of good standing, attesting to the legal organization of your company, from your secretary of state.

The prosecutor may have heard of your business but may not really know what it does. Bring along some annual reports. Talk about the number of people employed by your firm and personalize the business. Describe your firm's community service. The prosecutor will want to share this kind of information with the jury if the case should proceed to trial. Finally, tell the prosecutor how the criminal offense has harmed society, the company, and individuals.

Referral Package

Following is a suggested order of presentation for the written referral package.

- description of the business;
- explanation of how the affected processes of the business normally work and how the fraud defeated those processes;
- an invitation for a tour of the area in which the offense occurred;
- discussion on when and how the offense was first detected;
- an investigative summary with an index to exhibits and a "statement of perceived relevance" for each exhibit;
- the investigative reports and exhibits;

- potential witnesses including full name, date of birth, Social Security Numbers and contact information; and
- a description of current and anticipated investigative activity.

Tell your story chronologically. Be careful with all exhibits because they *are* evidence. Leave them in the form in which you found them. Don't handle them unnecessarily. Don't fold them, punch them, or write on them. Originals are always preferred but if you have to provide copies make sure they reveal everything that appears on the originals. Document the chain of custody. Consider using an evidence control log.

Bring a computer disc containing spreadsheets or other graphic summaries you may have prepared so the prosecutor can revise and reformat them. Tell the prosecutor who prepared the document.

We're Going to Court

If you're subpoenaed to court for a particular date and time, you may not actually be called until days and weeks later. Stay in touch with the prosecutor and he or she will try to pin down the time you should actually report. Most courts will permit witnesses to be placed "on call." In busy courtrooms, trials are often "stacked up" by the court clerk's office much like airplanes waiting to fly. The prosecutor has little control over the speed or order of the cases.

Ask the prosecutor to show you the courtroom in advance. Find out where you'll enter, where you'll sit, and the location of the witness stand. When you're called as a witness, obviously, think through each question before answering. Look directly at the jurors and answer the question in a clear voice. Don't answer questions that you haven't been asked. Simply listen

for each question and answer it carefully and professionally. If you hear the word “objection!” don’t take it personally; simply stop and wait for instructions before proceeding.

Remember that “walls have ears.” When in a courthouse – or in the immediate vicinity – you may never know who may be listening to your conversations. Defense attorneys, family and friends of the defendant, private investigators working for the defense, judges, jurors, media representatives, and court personnel may all be within earshot in a hallway, elevator, or local coffee shop. Don’t jeopardize all your hard work by discussing an investigation or the court proceedings in public.

If you’re subpoenaed as a witness before a grand jury, know that the grand jurors are entitled to ask questions and some of them may be embarrassing. Be polite and answer questions truthfully. In grand jury proceedings, you may be asked to sign a formal confidentiality agreement, particularly if you’ll be involved in the further investigation of persons or documents to be subpoenaed in connection with the investigation.

The defendant in a criminal case, via his or her attorney, generally is entitled to examine or receive every police report, investigative report, document or shred of evidence in “the possession, custody or control” of the prosecutor. Sometimes, defense attorneys will ask for records, which a business may not wish to divulge, such as documents containing proprietary information or “company secrets.” If this occurs, the business may be required to retain its own attorney to oppose the request.

Ask your prosecutor if you have the right to prepare a “victim impact statement” for filing with the court at the sentencing stage. You may also have the right to testify before the court concerning the impact the crime has had on the business.

Communicate with the prosecutor during the investigation and prosecution. If you don't understand something, say so. If you have a question, ask. We count on your cooperation.

As a prosecutor, I've seen presentation packages and endured referral meetings that made me wonder about the resolve of the company seeking a guilty verdict. If you believe you have the evidence to convict a fraudster then show your convictions through a strong presentation. You'll have a much better chance of convincing a prosecutor and winning your case.

Disclaimer

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SIDEBAR

Typical Laws and Statutes in Fraud Cases

Criminal laws vary from state to state. Ask your prosecutor which state laws are applicable to your case. Some of the following may apply.

- Larceny is “the trespassory taking and carrying away of the personal property of another with the intent to steal.” (Common Law)
- Grand larceny – If the value of the item(s) stolen surpasses a statutory sum, the larceny may be classified as a felony, thereby exposing the defendant to a greater penalty upon conviction.
- Petit larceny – If the value of the item(s) stolen is less than the statutory sum, the larceny is generally classified as a misdemeanor, for which a defendant will usually not be punished as severely as for a felony.
- Embezzlement – “To willfully take, or convert to one’s own use, another’s money or property, of which the wrongdoer acquired possession lawfully, by reason of some office or employment or position of trust.” (Black’s Law Dictionary)
- False pretenses – “False representation of a material present or past fact which causes the victim to pass title to [the] property to the wrongdoer. The defendant must know that his statement is false and he/she must intend to defraud the victim.” (Black’s Law Dictionary)
- Larceny by scheme – Where this statute is available, it permits the prosecutor to charge as grand larceny a series of petit larcenies occurring within a given time frame, provided that the “continuing” criminal intent of the defendant can be proven.

- Falsification of corporate books – Where this statute is available, it’s usually punished more severely than larceny, although both offenses usually may be charged. This law may require official proof of corporate status. Some statutes also provide that the intentional failure to make a required entry on corporate books may constitute a violation.
- Conspiracy – Two or more individuals sharing the same criminal intent to commit a criminal offense. Some states do not actually require an “overt act” in furtherance of the conspiracy; all that’s required is the shared intent to commit the offense. If the intended crime is actually committed, it may be generally charged *in addition to* the conspiracy charge.

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THE WHITE PAPER - JAN/FEB 2002

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