

## Teaching the Art of Defending a White Collar Criminal Case

Katrice Bridges Copeland\*

I never had the pleasure of taking a white collar crime course in law school, but when I joined a large law firm in Washington, D.C., the bulk of my practice was white collar criminal defense. I spent a good portion of my billable time conducting internal investigations of large corporate clients and my non-billable time learning the corresponding black letter law. I found it useful to have a deeper understanding of the laws my clients were accused of violating. It seemed that no matter what the potential legal violations were in a given case, however, the internal investigation inevitably proceeded in the same manner. Thus, to be a valuable associate I had to master the steps of an internal investigation and the strategic and ethical decisions that arose along the way. When I left the firm to become a professor at Penn State, I struggled with how to balance teaching the black letter law and procedural aspects of white collar crime. I was especially concerned about teaching the art of defending a white collar criminal case. I compounded my task by choosing a casebook that only devoted a quarter of the book to procedural issues such as grand jury investigations, discovery, and the attorney-client privilege.

After my first semester teaching white collar crime, I read my student reviews. One of the reviews said that I was biased toward the prosecution and needed to be more open-minded. As a former defense lawyer, I knew that I was not biased toward the prosecution. But, it made me think about how easy it is to get caught up in the prosecution side of every case. When studying cases in the casebook, the wrongs of the defendant are clearly laid out and it rarely appears as if the defendant had any potential defense to liability. Even though I repeatedly told my students that most white collar crime cases are won or lost pre-indictment, the message was lost as we studied case after case that went to trial. I decided to revamp my class for the following semester. In addition to devoting more time to procedure and less time to specific crimes, I decided to use problems to bring out the potential defenses to various crimes and to use hot topics to talk about the strategy of defending alleged white collar criminals. I will focus here on the use of real life cases to teach defense technique and strategy.

On the first day of class, I give students an overview of the course and introduce them to recurring themes. On the second day, designated a hot topic

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\* Associate Professor of Law, Pennsylvania State University Dickinson School of Law. B.S., University of Illinois; J.D., University of Michigan Law School. I would like to thank Ellen Podgor for inviting me to participate in the 2013 Southeastern Association of Law Schools roundtable on white collar criminal law pedagogy.

day, I present my students with an ongoing or recently concluded white collar case. For the past couple of years, I have used the case of Lauren Stevens on the second day of class. Stevens was the former general counsel at GlaxoSmithKline [GSK], one of the largest pharmaceutical companies in the world. The Food and Drug Administration [FDA] investigated GSK for promoting its FDA-approved depression drug, Wellbutrin, for weight loss, which was an unapproved use.<sup>1</sup> Stevens was responsible for responding to the FDA's inquiries concerning the promotion of Wellbutrin.

After an eight-year investigation, the government charged Stevens with obstruction of justice and false statements for how she responded to the FDA's voluntary request for information.<sup>2</sup> At trial, the government presented evidence that Stevens did not turn over all the documents that the FDA requested and that she stated that the production of documents was complete.<sup>3</sup> They also put forth evidence that Stevens said that GSK had not engaged in wrongdoing.<sup>4</sup> Stevens intended to rely upon the advice of counsel defense but was granted a judgment of acquittal after the close of the prosecution's case. The assigned reading for the day includes Stevens' indictment and the district court's decision granting a judgment of acquittal at the conclusion of the prosecution's case.

I start class by giving a short lecture on internal investigations. I explain how the investigations are triggered and how they normally are conducted. I explain to my students that the defense attorney's goal is to avoid indictment of her client. I then turn to the Stevens case and raise whether Stevens went too far to prevent an indictment. I ask my students to raise their hands if, after reading the indictment, they believed that Stevens had violated the law. Ordinarily, the overwhelming majority of the students in the class raise their hands. When I question them about it, most students say that Stevens had an obligation to turn over all the documents that the government requested. They also say that she should not have lied and said that the production of documents was complete. Nor should she have said that her clients did not violate the law. Typically, I press them on whether Stevens had a legal obligation to turn over the documents and about her duty to zealously represent her client. I focus in on the difference between a voluntary request for information and a subpoena. I also ask them to think about whether Stevens' statements that GSK did not violate the law were advocacy or factual statements.

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<sup>1</sup> Katrice Bridges Copeland, *In-House Counsel Beware!*, 39 FORDHAM URB. L.J. 391, 396 (2011).

<sup>2</sup> Indictment, *United States v. Stevens*, No. RWT-10-694 (D. Md. Apr. 13, 2011) [hereinafter *Stevens Indictment*].

<sup>3</sup> Copeland, *supra* note 1, at 396–97 (explaining that after consulting with outside counsel Stevens withheld documents demonstrating that some of the doctors who promoted Wellbutrin on behalf of GSK were promoting it for weight loss).

<sup>4</sup> *Stevens Indictment*, *supra* note 2, at 12. Stevens stated that “[a]lthough there were isolated deficiencies, the objective evidence clearly demonstrates that GSK has not developed, maintained, or encouraged promotional plans or activities to promote, directly or indirectly, Wellbutrin SR for weight loss . . .”

This usually turns into a robust discussion about the ethical obligations of the defense attorney to both the government and her client.

As you might expect, the discussion also leads to questions about the propriety of prosecutors charging opposing counsel with obstruction of justice. We debate whether a defense lawyer can zealously represent her client if she is constantly worried that every action she takes to defend her client, which somehow hinders the government's investigation, will subject her to obstruction of justice charges. We also discuss the fact that lawyers are not above the law and that there need to be some constraints on their behavior even if they are acting to defend their clients. In the end, there is some agreement that there should be a defense to obstruction of justice for attorneys. Because the students are not yet familiar with the obstruction of justice statute, however, we do not explore the contours of the potential defense in depth. Finally, we discuss the prosecutor's strategy in bringing the case against Stevens before bringing a case against GSK. We question whether it would have been easier to prove that Stevens was working to cover up GSK's misconduct if there was a criminal conviction of GSK.

By the end of class, we tend to come to a consensus that Stevens did not violate the law. We also agree that some of the things she did, like promising but not delivering documents to the government, are not advisable. I think that it is important that the first case that we study involves the prosecution of a lawyer. Students can empathize with a lawyer who becomes a defendant in a criminal case due to her defense of her client. The Stevens case also gives students some early insight into the pre-indictment investigative process. It reminds them that there is a lot that goes on before cases go to trial and decisions end up in the casebook. It also puts the ethical issues inherent in an internal investigation front and center. Students question how much the defense should cooperate with the government's investigation, if and when the defense should turn over documents, and what level of advocacy is appropriate during an internal investigation. These are critical questions that we come back to throughout the semester.

Although we have other hot topic days during the semester, we tend to return to Stevens' case the most because it involves so many different potential crimes and procedural issues. The Stevens case becomes a thread that runs through the entire semester and the students love to reexamine it. By the end of the semester, the students are not just thinking about the black letter law of white collar crime; they are envisioning what it would be like to be involved in a white collar criminal investigation. And, hopefully, they understand and appreciate the art of defending a white collar criminal case.

