# Where To Self-Report A White Collar Offense

By Marjorie J. Peerce and Nathaniel Z. Marmur

Imagine the CFO of a large public company seeks your advice, presenting the following facts: He has been participating in a revenue recognition scheme intended to "smooth" the company's earnings over several years. He engaged in the scheme at the urging of the CEO of the company, and created false documents such as invoices and contracts. The client did not profit from the crime, his income is not dependent on the company's stock, and his bonus is not tied to the company's earnings. The CEO, however, exercised options, resulting in $100,000 in illicit gains through stock sales. Finally, the client tells you that he has been using his company's credit card for personal expenses totaling $60,000.

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Certain employees have begun to suspect that something is amiss, and the scheme is poised to unravel. You are unaware of any prosecutorial knowledge of the problem, but you believe it inevitable that criminal charges will result. You advise the client that unless he intends to try the case his best hope is to "get ahead" of the problem by self-reporting. The threshold question, then, becomes, to whom? To the federal authorities, or to the state?

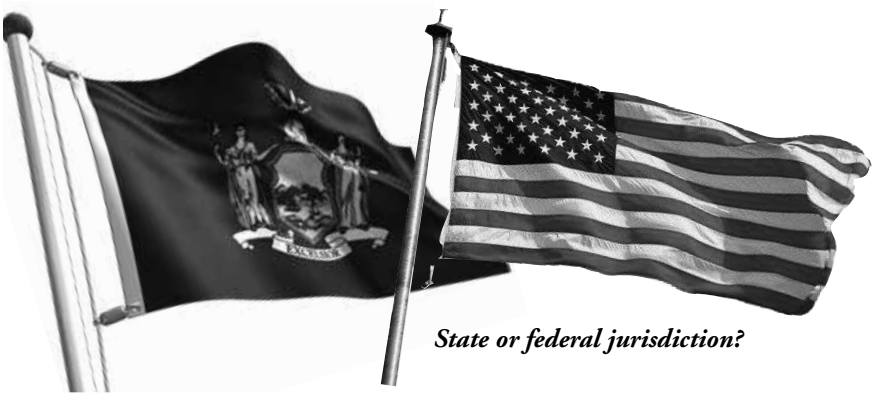
This decision can have serious implications for your client's ultimate sentence. Among other things, you will want to consider the values and costs of cooperation in each jurisdiction; the potential application of the sentencing guidelines and the state sentencing scheme as well as post-sentencing considerations; the relationship between the competing jurisdictions, and the state's double jeopardy law (does it bar prosecution following a federal case?).

This article highlights these and other considerations to help you make this important decision.

You recognize, based on the above facts, that your client has potentially committed federal crimes, such as mail and wire fraud and securities fraud. Using New York as an example, he has also likely committed state crimes such as violations of the Martin Act (securities fraud), larceny, scheme to defraud, and creating and maintaining false business records.

**Continued from** previous page

Let's begin with cooperation. Assuming your client is willing to help the authorities, where will his information and assistance yield the greatest benefit at the time of sentencing? Under the policies of the U.S. Attorneys' Offices in the Southern and Eastern Districts of New York (and likely in most other federal jurisdictions), a cooperating defendant is generally required to admit to all criminal wrongdoing and any knowledge of wrongdoing by others, and to plead guilty to the top possible charge. After the cooperation is complete, the government writes a Section 5K1.1 letter, allowing the judge to depart below the applicable sentencing guidelines range.



*State or federal jurisdiction?*

In New York State, and in particular in New York County, where many white collar prosecutions take place, a cooperating defendant is generally required to plead to the top count. If the cooperation is successful, he is permitted to withdraw the plea to the top count and enter a plea to a lower felony or a misdemeanor. New policies in the New York County District Attorney's Office are beginning to mirror the policies of the local U.S. Attorney's Offices, requiring full disclosure of the client's wrongdoing and any wrongdoing by others.[1]

To provide your client competent advice, you should be familiar with the policies of the respective offices in your jurisdiction. For example, will your client have to admit additional wrongdoing in only one of the jurisdictions, and will that carry significant sentencing consequences? Is there information about others (say a relative) that he wishes not to disclose, and will he be able to withhold that information in one jurisdiction but not another? Will only one of the jurisdictions require him to file amended tax returns as a condition of cooperation? How do the federal judges in your districts sentence cooperators? Do they only depart a set amount of levels, no matter how valuable the cooperation was, or will they consider a significant reduction? Is there flexibility in sentencing cooperators in your state? These are all considerations at this stage.

Another critical factor is the difference between the federal and state sentencing schemes. Loss (or gain) is the key driver for sentencing the federal white collar defendant. In this case, the government likely will claim that the gain of $100,000 from the CEO's stock sales and the $60,000 from the credit card theft should be counted as the loss for purposes of calculating your client's guidelines range. You will need to consider whether the government will insist on counting the drop in market capitalization (i.e., harm to the shareholders) that you believe will occur when the fraud is revealed, which you estimate will be about $100 million. If you think so (based on your knowledge of office policy toward relevant conduct), that factor alone could drive you seek a state prosecution.

The dispute over the loss amount is at the beginning of the guidelines conundrum, but is of significant importance because of the outsized role loss plays in sentencing. Other guideline factors to consider include potential role adjustment, the number of victims, and enhancements relating to fraud involving a public company. That your client did not personally gain from the scheme is something the court should consider in assessing whether the loss overstates the seriousness of the offense. After the range and departures and variances have been determined, the court has near absolute discretion to impose any sentence it deems appropriate, considering the nature and circumstances of the offense and the history and characteristics of the defendant (absent mandatory minimums not addressed with a cooperation agreement).

[1] A related consideration is the prosecutor's policy regarding proffers, particularly if you are unsure whether your client's information will result in a cooperation agreement. Although most "Queen for a Day" agreements begin with the general promise that your client's statements says cannot be used against him in the direct case, the exceptions to that rule vary among jurisdictions. The current Southern and Eastern District proffer agreements, for example, allows the government to use a defendant's statement for leads, for impeachment if he takes the stand, and even to rebut factual assertions (Eastern) or arguments (Southern) made by counsel at trial or testimony by defense witnesses. If you are still considering trying the case, then think about whether bringing the client to a particular jurisdiction might, as a practical matter, limit that option.

Again, knowing your district's practice is important. Can you estimate the value a judge will give you for self-reporting? Do the judges in your district exercise their broad authority to impose a below-guidelines sentence, or do they adhere tightly to the range?

Next, what is your client's potential state sentence? In New York, the seriousness of the offense, and therefore the sentencing range, is often based on the value of the money or property involved but more rigidly than the guidelines. For example (assuming a nonviolent first offense), a larceny where the property value exceeds $3,000 is a Class D felony, which carries a possible sentence of 2 1/3 to 7 years. A larceny where the value of the property exceeds $50,000 is a Class C felony with a possible sentence of 5 to 15 years. When the loss exceeds $1 million, it is a Class B felony with a possible sentence of 8 1/3 to 25 years. Defendants can receive probationary sentences for Class C, D, and E felonies, but a minimum sentence on a Class B felony is 1-3 years' incarceration.

False business records offenses are low-level (either a misdemeanor or an E felony), as are Martin Act violations. This last fact may be surprising: in New York, a securities fraud, no matter how big, is at most an E felony punishable by a maximum of 1 1/3 to 4 years in prison. The same is true of a scheme to defraud. So, depending on your state, it is possible that your client—who engaged in a large securities fraud, but did not personally benefit or direct significant proceeds to another—would do better in state court.

Another consideration is whether the criminal plan succeeded. This makes little difference on the federal side, because intended loss is currently part of the guidelines scheme for loss purposes. But in New York, an attempt generally lowers the offense level by one grade, for example, making a Class B felony a Class C felony.

Another key difference is that sentencing in the federal system is subject to great discretion by the judge, guided by—but generally not bound by—any plea agreement. Your state may, like New York, have a practice of entering plea agreements that provide for agreed-upon sentences, whereby the defendant can withdraw his plea if the court will not impose the sentence. This certainly may be of great value to your client.

Moreover, unlike the federal system, where your client would be sentenced to a set amount of months, subject only to limited reduction for "good time" or perhaps the completion of a drug or alcohol treatment program, white collar defendants in New York are sentenced to indeterminate terms of imprisonment for a nonviolent offense, with a range of years. The ultimate time served depends largely on the determination of a parole board. This may also influence your advice. Is your client likely to engage in good behavior and get early parole? Will he qualify for an early release program such as work release or boot camp? State policies, some official and some not, may effectively prevent him from taking advantage of these benefits. A "high-profile" defendant may be less likely to get parole on his first attempt. On the other hand, a cooperating defendant may get a promise from the prosecutor to support a parole application. The federal system, by contrast, gives much more discretion to the judge at the sentencing phase, but affords less flexibility about release once a sentence is imposed.

It may also be worth considering where will your client serve his sentence. Many New York State prisons are hours away from New York City and do not have "camp" type facilities that the federal system has for low-risk offenders. You will need to assess whether your client will qualify for a camp and whether the judge is likely to recommend the facility you request.

It is also possible that the state's double jeopardy law may affect your decision. If the state has codified an exception to the dual sovereignty doctrine, as New York has, then it may not be able to prosecute your client after a federal prosecution for the same offense. The converse is not true: the federal government may bring charges notwithstanding a prior state action (although the Petite policy in the U.S. Department of Justice manual provides you some discretionary relief). Though somewhat

**Continued on** next page

## Self-Reporting

**Continued from** previous page

rare (particularly in the cooperation contexts), if you believe that the federal government has sufficient interest in the matter that it will insist on its proverbial pound of flesh from your client even after a state prosecution, you may well consider approaching the federal government first.

Likewise, if the state will have a worse take on your client—or you believe a state sentence may be harsher there—you may want to take the case federally, particularly if that will "double jeopardy out" the state. On the other hand, if the state sentence could be more lenient, and you do not fear a subsequent federal case, going to the state could ultimately be in your client's interest. All of this should be viewed through the lens of the relationship between your state and federal prosecutors so you can assess the likelihood of both seeking to prosecute.

Two other quick considerations. First, a defendant is "convicted" upon plea in New York, but upon sentence in federal court. This may make a difference if a professional license requires reporting or if rights (e.g., indemnification) may be terminated or obligations triggered by the formality of a conviction. You will need to check each licensing authorities rules as well as whether they have issued guidance about when a federal conviction needs to be reported. Second, for non-citizens, immigration consequences should be considered. The federal government may have more sway in advocating for a visa or exemption for a cooperator. On the other hand, the state may be more willing to allow a cooperator to plead to a particular misdemeanor, which may make all the difference when it comes to keeping a defendant in the country, depending on the offense of conviction

The level at which a case is handled, whether it be in state or federal court, can make a great difference to a defendant. Knowing the differences between those jurisdictions is critical to rendering effective counsel.

> *"They can't change the law, they can't change the facts, and they can't change the subject."*
>
> *– David Boies*

## Thirteen Not Unlucky

**Continued from** page 36

the Department of Corrections and the Prosecutor would eventually figure it out, and told Anderson to wait for the inevitable order to surrender. That day never came.

From 2000 until 2013, Mike Anderson lived a completely normal life. He married, had a child, divorced, re-married, cared for a stepson and had two more children with his wife. He learned a trade as a master carpenter, worked as a union carpenter, built a house in St. Louis with his own hands, incorporated and ran his own licensed construction business, coached youth football, and volunteered at his church. He never left St. Louis, updated his driver's license, and even received two traffic tickets in thirteen years – his only contact with the criminal justice system. He never attempted to change his identity or hide from the public, filing for business licenses, corporations, registering vehicles in his name, and paying state, federal, and local taxes.

Throughout the entire time, the Department of Corrections had him listed as a prisoner, until July, 2013, after a computer alerted that it was time to release Anderson. This was when someone realized that there was no body to match the name in the computer system.

On July 25, 2013, eight U.S. Marshals executed an arrest warrant, issued days earlier, forcibly entered the Anderson home while he was getting his two-year old ready for the day, and told him that he now owed the State of Missouri thirteen years – starting that day. His wife was out of state on a business trip, and had no idea of his past. She came home immediately to find herself alone with four children, a mortgage, and her partner whisked away to prison to begin serving a thirteen-year sentence.