

# *SOME KEYS TO WHITE COLLAR CRIME*

- Defendants tend to be smart, smart, smart
- They make good liars
- Sooooo.... If you want to succeed in this specialized area, you'd better....

# *TIPS FROM BUCY'S PREFACE*

- Know the paper. “White collar criminal cases are document cases.”
- Develop a theory of the case. You need to see the big picture.
- Make the case interesting and comprehensible
- Know how to deal with crucial evidence

# *WHAT CRUCIAL EVIDENCE?*

- Co-conspirators' statements 801(d)(2)(E)
- Admissibility of evidence of other crimes, wrongs or acts (“admissible [to show] motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”) Rule 404(b)

# *STREET CRIME vs. WHITE COLLAR CRIME*

- With street crime, it's usually easy to figure out what happened. Not so white collar crime.
- With street crime, criminality lines are fairly clear. Not so in many white collar crime cases.
- Street crime—little grand jury action; there may be months of proceedings before a white collar crime prosecution

# *WHITE COLLAR CRIME vs. CIVIL WRONGS*

- Often inter-related
- RICO
- Qui tam
- Complications can ensue, such as problems related to Fifth Amendment claims
- Sentencing guidelines are huge these days
- An unfortunate new development: civility is being eroded

# *ONE OTHER PRELIMINARY THING ABOUT THIS COURSE*

- You learn some really interesting stuff about how people are scamming each other out in real life.
- From killing race horses for insurance, to cheating the phone company, to beating up utility rate-payers, you need it.
- All very interesting
- Note also the focus on lawyer wrongs

# *A FINAL PRELIMINARY OBSERVATION*

- Go to the government's web site, [usdoj.gov](http://usdoj.gov)
- It will look something like this

Accessibility  
Information



# United States Department of JUSTICE

Attorney General  
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July 28, 2003

### Attorney General Discusses Lessons Learned from September 11 Attacks

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# *CONSPIRACY – OVERVIEW*

- It's an inchoate offense, meaning the scheme need not reach fruition.
- In other words it's the contract, stupid.
- “Conspiracy is an agreement between two or more persons to commit an unlawful act.”
- Where the object is a tort, and the conspiracy injures the plaintiff, you may have a “civil conspiracy.”

# *SOME THOUGHTS ON THE SOCIOLOGY OF CONSPIRACIES*

- Concepts that follow are from Neal Kumar Katyal, *Conspiracy Theory*, 112 *Yale L.J.* 1307 (2003).

**Imagine that Joe and Sandra agree to rob a bank.**

**From the moment of agreement, they can be found guilty of conspiracy even if they never commit the robbery (it's called "inchoate liability").**

**Even if the bank goes out of business, they can still be liable for the conspiracy ("impossibility" is not a defense).**

**Joe can be liable for other crimes that Sandra commits to further the conspiracy's objective, like hot-wiring a getaway car (it's called "*Pinkerton*" liability, after a 1946 Supreme Court case involving tax offenses). (Think agency law.)**

**Joe can't evade liability by staying home on the day of the robbery (a conspirator has to take an affirmative step to "withdraw").**

**And if the bank heist takes place, both Joe and Sandra can be charged with bank robbery and with the separate crime of conspiracy, each of which carries its own punishment (the**

**Why should conspiracy liability begin at the moment of "agreement," before any crime is committed?**

**Why can a conspirator be charged with both the inchoate offense of conspiracy and the robbery?**

**Why should the law punish conspirators even if it's impossible for them to commit the crime they planned?**

**Why is withdrawal from a conspiracy so difficult?**

**And what about that oddball *Pinkerton***

## *FAST FORWARD TO pp. 24-25*

- Note the hearsay requirement of Fed. R. Evid. 602, the exception for co-conspirators' statements, and the logic underlying the Rule (at 25).
- What's the logic?
- Conspiracies are powerful, scary, and hard to crack....

**Conspiracies are harmful (and feared) for various reasons.**

**For one, there is a specialization of labor/economies of scale and the development of a pernicious group identity.**

**The former is easily understood by thinking about how difficult it is for an individual to rob a bank alone. Several individuals are needed to carry weapons and provide firepower (economies of scale).**

**Someone needs to be the "brains behind the operation" (a form of specialization of labor). Another should serve as a lookout (specialization again). Conspiracy creates obvious efficiencies.**

**Advances in psychology over the past thirty years have demonstrated that groups cultivate a special social identity.**

**This identity often encourages risky behavior, leads individuals to behave against their self-interest, solidifies loyalty, and facilitates harm against nonmembers.**

**The psychological and economic studies explain why law treats conspiracy in a distinctive way.**

**The law focuses on "agreement" because that decision has drastic consequences.**

With this NASA test, what you do is study a list of 15 items and arrange them in order of importance. The reason is that your craft just crash-landed on the moon and everything else got busted. You must rendezvous with the mother ship parked way over in another crater 200 miles from your crash site, so you need to rank the items according to how useful they would be to you in covering that distance afoot. Put a 1 by the most important, a 2 by second most, and on like that.

Food concentrate. 50 feet of nylon rope. Parachute silk. Solar-powered portable heating unit. Two .45-caliber pistols. One case dehydrated milk. Box of matches. Two 100-pound tanks of oxygen. Stellar map (of the moon's constellation). Self-inflating life raft. Magnetic compass. Five gallons of water. Signal flares. First aid kit containing injection needles. Solar-powered FM receiver-transmitter.

Earlier this year, in *United States v. Recio*, 123 S. Ct. 819, 822 (2003), the U.S. Supreme Court held that a criminal agreement is "'a distinct evil,' which 'may exist and be punished whether or not the substantive crime ensues.'" In reaching this conclusion, the Justices drew upon their holding in a 1961 case, explaining that a conspiracy

poses "a threat to the public" over and above the threat of the commission of the relevant substantive crime--both because the "[c]ombination in crime makes more likely the commission of [other] crimes" and because it "decreases the probability that the individuals involved will depart from their path of criminality."

**•GROUPS ARE MORE LIKELY TO HAVE EXTREME ATTITUDES AND BEHAVIOR.**

•For example, French students who already liked de Gaulle liked him even more after discussing him in a group, and those who did not like Americans liked them even less after discussing Americans in a group.

**•GROUPS ENCOURAGE INDIVIDUALS TO SUBMERGE THEIR SELF-INTEREST TO THAT OF THE GROUP.**

•In a series of famous experiments, Sherif studied group dynamics in a boys' summer camp. Upon arrival, the boys were free to form spontaneous friendships, but after a few days they were split into two groups. Under isolation, the groups "developed a cohesive structure and they came to strongly prefer the members of their own group." When the groups were brought together for a tournament, "overt group hostility . . . [and] minor acts of discrimination and aggression" were found, and "in-group loyalty, solidarity and cooperation" were at their height.

• Contracts scholars have spoken of a moral obligation to fulfill contracts--an obligation that increases the probability of performance. When A agrees to engage in a crime with B, the agreement thus makes the crime more likely. What is now understood about groups is that, apart from this obligation, **GROUPS ARE FAR MORE DIFFICULT TO DISSUADE THAN ARE INDIVIDUALS** because they develop self-serving inferences. Such inferences permit members of groups to justify their conduct as furthering either social or group goals.

• One common inference is for group members to believe that other members are more likely to be correct and that nonmembers are more likely to be wrong.

# *WHY DO PROSECUTORS LOVE CONSPIRACY?*

- Evidentiary advantages (co-conspirators' statements come in so long as the government can prove conspiracy by a preponderance  $\leq$  Do you see why this is huge?
- Venue advantages
- Why do prosecutors get these advantages? Because conspiracies are SCARY....

# *IN GENERAL, THERE ARE THREE ELEMENTS*

- The agreement to commit a wrong (civil or criminal)
- The intent (scienter) to commit the wrongful act
- The commission of an overt act by a co-conspirator in furtherance of the conspiracy

# *THE AGREEMENT*

- Need not be express or formal; can be established by inference
- Co-conspirator does not need to know . . .
- Entire scope
- All participants
- Participant's role
- Just needs to buy into the deal

# *A SAMPLE INSTRUCTION*

- The first element of this offense, conspiracy, requires proof that:
- the alleged conspiracy existed, and
- the defendant knowingly and intentionally became a member of the conspiracy.
- A conspiracy is a combination or agreement of two or more persons to accomplish some unlawful purpose. Thus, a conspiracy might be called a kind of partnership for criminal purposes in which each member becomes the agent of every other member. The essence of the offense is the agreement to violate or disregard the law.

# *INSTRUCTION (cont'd)*

- What the evidence must show to establish that a conspiracy existed is that the members in some way or manner, positively or tacitly came to a mutual understanding to try to accomplish a common and unlawful plan.
- However, the evidence need not show that the members of an alleged conspiracy entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or purpose was to be achieved. Ordinarily only the results of a conspiracy, rather than the agreement, are observable.

# *INSTRUCTION (cont'd)*

- The evidence need not establish that all the means or methods set forth in the indictment were agreed upon; nor that those means or methods which were agreed upon were actually used or put into operation; nor that all of the persons alleged to have been members of the conspiracy were such. What the evidence must establish beyond a reasonable doubt is that the alleged conspiracy was knowingly formed, and that one or more of the means or methods described in the Indictment were agreed upon to be used, in an effort to accomplish some plan or purpose of the conspiracy, as charged in the Indictment; and that two or more persons, including one or more of the accused, were knowingly members of the conspiracy, as charged in the Indictment.

# *PROVING A CONSPIRACY*

- Brown, p. 7. Who is he? What did he do or fail to do? How about . . . .
- Learning that pension funds were being diverted and doing nothing?
- How about 3/87, Brown offers records to trustee; 5/19/87 Court orders Levine to show up at depo with documents; 5/27/87 Brown deep 6's records at a landfill; 5/27 Brown seeks to vacate inspection order; 6/87 Privilege claimed as to records; 2/88 Brown claims records have disappeared into the hands of “numerous attorneys and banks”

# *BROWN HANGS BECAUSE. . . .*

- He was aware of the pension fund diversion and the hiding of assets, including in the firm's trust account
- “The jury could infer” Brown knew of Levine's hiding of assets and counseled Levine about same
- Destruction of records: a smoking gun

# *ETHICS RULES*

- 3.4—Notice how narrow it is. It says obey the law.
- When does document destruction lead to obstruction? When you start to hear footsteps. What did Brown know before he destroyed documents? That a court had ordered Levine to show up with his documents. This is a very bad fact.

# *AS FOR THE “FOLLOWING ORDERS” DEFENSE*

- It is out the window in light of Rule 5.2
- There is no “arguable” question of professional duty when an agent of the federal government has demanded documents or when such a demand is imminent

To: David B. Duncan  
Cc: Michael C. Odom@ANDERSEN WO; Richard Corgci@ANDERSEN  
WO  
BCC:  
Date: 10/16/2001 08:39 PM  
From: Nancy A. Temple  
Subject: Re: Press Release draft  
Attachments: ATT&ICIQ; 3rd qtr press release memo.doc

Dave - Here are a few suggested comments for consideration.

-I recommend deleting reference to consultation with the legal group and deleting my name on the memo. Reference to the legal group consultation arguably is a waiver of attorney-client privileged advice and if my name is mentioned it increases the chances that I might be a witness, which I prefer to avoid.

-I suggested deleting some language that might suggest we have concluded the release is misleading.

-In light of the "non-recurring" characterization, the lack of any suggestion that this characterization is not in accordance with GAAP, and the lack of income statements in accordance with GAAP. I will consult further within the legal group as to whether we should do anything more to protect ourselves from potential Section 10A issues.

Nancy

# MORROW

- Issue is conspiracy's scope.
- Note that both Nevcherlian and Morrow are parties to conspiracies
- Just not with each other as members of a multi-crime conspiracy
- To be such, the members must have knowledge or foresight of the conspiracy's multiplicity of objectives
- Think partnership (going into a business) not joint venture (one shot deal)

# LINDEMANN INFO....

An investigation of the long unsolved murder of an heiress ultimately led to the conclusion that she had been done away with because she knew too much about an ongoing scheme to kill show horses for insurance money. Surveillance then led to the arrest of the alleged horse hit man, one Tommy Burns a/k/a Timmy Ray, known in his circle as "The Sandman." On his arrest, Burns, complaining that his "clients" had failed to rally to his support, named several prominent riders and horse owners as the persons for whom he had performed these nefarious jobs. Those named included persons of considerable wealth and prominence in the equestrian world.

# *MORE ON LINDEMANN*

- In the late Summer of 1994, a Federal Grand Jury in Illinois, acting largely on the information supplied by Tommy Burns, indicted 23 horse owners, trainers and riders for conspiracy to collect insurance proceeds by arranging for the killing of their horses. Among those indicted, on the basis of the information provided by Burns, was horse owner George Lindemann, Jr., a leading national and international rider in jumping and dressage competitions, and an aspirant for the U.S. Olympic team. Mr. Lindemann was, according to press reports, the son of one of the wealthiest men in America, his father being the developer of cellular telephone technology. He had established a stable and training facilities in Armonk, New York and Greenwich, Connecticut, appropriately named "Cellular Farms." Also indicted with him was Marion Hulick, Lindemann's trainer and manager of operations. They were both accused of conspiring to arrange with Burns for the electrocution of his prize jumper named Charisma, to collect insurance Proceeds of \$ 250,000.

# *CO-CONSPIRATORS' STATEMENTS*

- Gov't need only prove a conspiracy existed by a preponderance to get co-conspirators' statements in
- Statements need to be made in by a co-conspirator in the course of the conspiracy
- Effect: Hearsay can be offered against someone other than the declarant (Hulick's and Burns' statements against Lindemann)

# *WHAT STATEMENTS CAME IN?*

- Hulick: Lindemann had a horse “which needed to be killed”
- “George wanted it done” and done while he was in Asia; “George would pay whatever it took.”
- Arlie testified Burns told him about horse killing for a “man in NY who owned a phone corp.”
- Lindemann told Reed and another to lie about who had ridden Charisma
- Also, Hulick took Reed off premises on the night of 12/15; Hulick locked up the dogs

# *OTHER THINGS ABOUT LINDEMANN....*

- Note the *Pinkerton* mention at 24.
- Do you grasp the importance of this concept. What concept?
- “The hand of one is the hand of all.”

# DUTTON

- *Dutton* requires that co-conspirators' statements have a "sufficient indicia of reliability" in order to satisfy the 6<sup>th</sup> Amendment right to confront and cross-examine
- Factors: witness' knowledge, accuracy of recollection, likelihood declarant told the truth to the witness, likelihood witness is telling the truth (are statement's against witnesses' interests?), whether the statements are "crucial" or "devastating" pp. 27-28

# BRUTON

- Admissions in a confession that implicate another on trial are not admissible against the other
- You must “Brutonize” the confession to use it (delete references to others)
- Admissions in a *confession* are not admissible because they are not “in furtherance of the conspiracy” as required by Rule 802(d)(2)(e)

# *BOURJAILY*



- Co-conspirators' extra-judicial statements are not just admissible to convict a member, they are admissible to prove the existence of the conspiracy in the first place

# *BOURJAILY CODIFIED*

- A statement is not hearsay if--
- (2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy. The contents of the statement shall be considered but are not alone sufficient to establish . . . the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered under subdivision (E).

# *KRULEWICH*

- It ain't over until it's over, but when it's over, it is OVER, and co-conspirators' statements made at that time are not admissible (since not made in furtherance)
- Williams is very liberal (ongoing illegality; conspiracy continuing to function when Pension made statements (even though statements were made after his arrest))

# *PINKERTON*



- Note the joint venture/partnership-style analysis
- Note the opinion's author
- Note that Douglas was a former SEC chairman and an expert in the business associations area