Blue Collar Tactics in White Collar Cases

When sophisticated business people begin to adopt the methods of common criminals, we have no choice but to treat them as such.[1]

BY ELLEN C. BROTMAN AND ERIN C. DOUGHERTY

Criminal defense lawyers are familiar with law enforcement's use of confidential informants and cooperating witnesses in the prosecution of organized crime, drug trafficking, and other "blue collar" offenses. In the past few years, however, the use of these tools has been broadly expanded to investigations of securities fraud, tax fraud, and other traditional white collar crimes. It is clear that the prosecutorial successes achieved through the expanded use of these tools mean they are going to become the norm, not the exception. Lawyers can expect white collar cases to be less about the paper and more about the snitches and their tape recordings.

This article examines recent uses of confidential informants, whistleblowers, and cooperating witnesses. It outlines potential dangers and opportunities, as this emerging trend becomes an ongoing reality.

Snitches: Confidential Informants, Whistleblowers, And Cooperating Witnesses

The expansion of the government's use of Title III warrants authorizing wiretaps in financial crimes has been widely noted.[2] However, electronic eavesdropping is not the only undercover technique that law enforcement will be using with increasing frequency in white collar cases. The Department of Justice (DOJ), Securities and Exchange Commission (SEC), and the Internal Revenue Service (IRS) have demonstrated, through statements and action, that they will be turning to the use of undercover operatives to assist their investigative efforts.[3] These operatives come in three basic flavors: confidential informants, whistleblowers, and cooperating witnesses. The most troubling of these is the confidential informant, cited in search warrant affidavits and indictments simply as the "CI."

Confidential Informants: Hidden From View and Inherently Unreliable

According to the FBI's Manual of Investigative Operations and Guidelines (MIOG), CIs are classified in each of the following categories: organized crime, general criminal, domestic terrorism, white collar crime, confidential source, drugs, international terrorism, civil rights, national infrastructure protection/computer intrusion program, cyber crime, and major theft and violent gangs.[4] A CI is "any individual who provides useful and credible information to a law enforcement agent regarding felo-

nious criminal activities and from whom the agent expects or intends to obtain additional useful and credible information regarding such activities in the future."[5] CIs pose a special problem because their identities may never be revealed and have frequently been protected from disclosure by the courts.

In *Roviaro v. United States*,[6] the Court held that disclosure of the informant's identity may be required if it is "relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause."[7] The determination requires the court to balance "the public interest in protecting the flow of information against the individual's right to prepare his defense."[8] In conducting this balance, the Court stated that courts should consider "the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors."[9] However, in cases where the CI is not testifying, disclosure of the CI's identity has been difficult to obtain.[10]

The inherently secretive nature of the relationship between the confidential informant and the law enforcement agency for which he works serves as a significant barrier to obtaining helpful information for the defense.[11] Without court supervision or public scrutiny the informant's deal is negotiated, often on an ad hoc basis, to serve immediate investigative needs rather than systemic goals of fairness and justice.[12] It is no surprise that the DOJ's Office of the Inspector General (OIG) found significant and troubling deficiencies in the FBI's management of confidential informants.[13] In 104 of the 120 confidential informant files examined, the OIG found "failure to document the agent's evaluation of one or more suitability factors in the initial or continuing suitability evaluations, failure to give the required instructions to CIs or to do so at the required intervals, failure to obtain proper authority to permit CIs to engage in otherwise illegal activity, issuance of retroactive approvals of otherwise illegal activities, failure to report unauthorized illegal activity in accordance with the Guidelines, and failure to document deactivation of CIs." [14] As the DOJ itself acknowledges, these failures provide opportunities for the defense to argue that it has failed to preserve or provide exculpatory or impeachment information, in violation of a defendant's constitutional rights.[15]

Despite the inherent problems of reliability, credibility and transparency, the use of confidential informants in white collar cases has increased dramatically as demonstrated by these recent examples:

- ❖ In conjunction with a Medicare fraud investigation, which ultimately resulted in the arrest of three men for allegedly bribing assisted-living facilities, home healthcare agencies, patient recruiters and patients for referrals, the FBI had a confidential informant (a.k.a. "Fancy") pose as a patient recruiter. She wore a video camera in a button on her blouse and carried another in her purse. Fancy, who knew the defendant's family from Cuba and South Florida, had a cocaine-trafficking record in her past and was introduced to the FBI by a former Drug Enforcement Administration agent who worked with the state Attorney General's Office on health care fraud.[16]

- ❖ A confidential informant served as a check runner in a wide-scale bank fraud/aggravated identity theft conspiracy in New York.[17]

- ❖ Acting on instructions from the Office of the Inspector General of New York City's School Construction Authority, an informant bought false OSHA training certification cards from defendant on two occasions.[18]

- ❖ At trial, a co-conspirator testified she connected defendant with an FBI confidential informant who sold co-conspirator and defendant fraudulent invoices to support fraudulent bills they submitted to Medicare. The defendant was found guilty on one count of conspiracy to commit health care fraud and six counts of health care fraud.[19]

- ❖ An indictment alleged that a stock promoter paid kickbacks to a confidential informant in return for the CI's persuading purported investors to buy promoter's stock at inflated prices.[20]

Early last year, the government also used this traditional "blue collar" technique for the first time in a Foreign Corrupt Practices Act (FCPA) prosecution of 22 individuals: consensual tape recordings made through the assistance of undercover confidential informants.[21] DOJ issued a press release when it filed the indictments:

> This ongoing investigation is the first large-scale use of undercover law enforcement techniques to uncover FCPA violations and the largest action ever undertaken by the Justice Department against individuals for FCPA violations. … The fight to erase foreign bribery from the corporate playbook will not be won overnight, but these actions are a turning point. From now on, would-be FCPA violators should stop and ponder whether the person they are trying to bribe might really be a federal agent.[22]

In this case, the defendants have moved to dismiss the indictment, arguing that the FCPA requires proof of the involvement in the alleged scheme of an actual "foreign official" and that bribing an undercover agent posing as a foreign official does not fulfill the element of the offense.[23] The U.S. District Court for the District of Columbia has rejected that argument, but it will be interesting, in the event of a conviction, to see how the appellate courts view this issue.

Whistleblowers: The "Rats" Who Reap the Rewards

Another confidential source utilized by the government during both civil and criminal investigations of white collar crimes is the whistleblower. A whistleblower is typically an employee in a private enterprise who confidentially provides information to law enforcement regarding his employer's or colleague's mismanagement, corruption, or other wrongdoing. The whistleblower provides this information with the hope of receiving a percentage of the money ultimately recovered as a result of his or her disclosure.[24] The whistleblower may or may not be directly involved in the underlying illegal activity.[25]

The government's use of cash to award confidential sources for their information and assistance, a practice that dates back to the Civil War,[26] is explicitly authorized in the False Claims Act[27] and the Federal Whistleblower Act.[28] Public opinion regarding this controversial system is naturally varied — with some deriding it as the "Award for Rats Program"[29] and others touting it as a way for "folk heroes" to expose corporate wrongdoing.[30] Regardless of public opinion, one thing is certain: whistleblowers have been effective and lucrative for the government, especially when it comes to white collar cases.[31]

Over the past few years, whistleblowers have been especially prevalent in the area of health care fraud.[32] As a result of

qui tam suits filed under seal by relators, the Food and Drug Administration and the Department of Justice have collected huge civil recoveries.[33] The government's success in the health care context has led both the IRS and SEC to follow suit.

Though the IRS has been authorized to pay awards to individuals who blow the whistle on delinquent taxpayers for over 140 years,[34] the program was long "criticized for offering inadequate incentives and protections for would-be whistleblowers to come forward."[35] In 2006, however, Congress modified the program to boost the IRS's authority to pay cash awards to tax whistleblowers. The Tax Relief and Health Care Act of 2006 increased the maximum potential award to 30 percent of the recovery, removed the $10 million cap,[36] and established a separate "Whistleblower Office." These changes increased both the quantity and quality of claims[37] and resulted in some of the largest fines ever reported.[38]

In 2010, the Dodd-Frank Wall Street Reform and Consumer Protection Act provided the SEC with these tools. The Act provides that the SEC shall pay awards to eligible whistleblowers who voluntarily provide the SEC with original information that leads to a successful enforcement action yielding monetary sanctions over $1 million. The award amount is required to be between 10 percent and 30 percent of the total monetary sanctions collected in the Commission's action or any related action, including a criminal case.[39] The new program is expected to begin in August 2011.

It is important to note that these whistleblower programs do not require that employees report through their employers' internal compliance system before or at the same time they report to the government. Without this mandatory internal reporting, these programs undermine the ability of an entity to detect, investigate, and remediate violations and create an unhealthy atmosphere of distrust in an organization.[40] In response to this challenge, companies must strengthen their compliance programs by creating substantial incentives for internal, rather than external, reporting. They will also need to create a corporate culture that fosters loyalty, collaboration, and commitment to the success of the organization.

Cooperating Witnesses: The Irresistible 5K Incentive

Some defense clients choose to become cooperating witnesses in order to mitigate the harshness of the sentences they face. In 2010, the national rate of downward departures granted based on government motions due to a defendant's cooperation was 11.5 percent and varied by district from 40.7 percent to 1.7 percent.[41]

Unlike confidential informants, cooperating witnesses agree to testify in legal proceedings and typically have written plea agreements with the Department of Justice that spell out their obligations and their expectations of future judicial or prosecutorial consideration.[42] White collar cooperation in federal court usually follows the same or similar pattern: an attorney will "proffer" to government counsel the information his client would hypothetically provide. If this proffer is well-received, the defendant and his counsel attend a proffer session with the prosecutor and at least one law enforcement agent. The cooperator will have to disclose his own criminal conduct, and any other conduct of which he has knowledge. If all goes smoothly, the parties enter into a cooperation plea agreement. These plea agreements reference the familiar language of U.S.S.G. § 5K1.1.[43] The agreements are intentionally worded to weaken the defense cross-examination of the cooperator by making it seem that the benefit of cooperation is up to the judge, not the prosecutor, and that it is not result-dependent.[44] In practice, however, the prosecutor's downward departure motion is rarely denied, and the "success" of a witness is a factor in the extent of the departure.

Cooperation in drug prosecutions and violent street crimes such as Hobbs Act robberies became commonplace as soon as the Sentencing Guidelines went into effect, as defendants had no other way to avoid draconian mandatory minimum sentences.[45] Similarly, the bonds of loyalty and collaboration that white collar defendants enjoyed in the executive suites of their corporate offices quickly melted away in the face of multi-year, multi-decade and even multi-century sentences for financial crimes.[46]

While both blue collar and white collar defendants are similarly motivated to avoid incarceration, their cooperation can present some interesting differences. For instance, it is likely that the white collar cooperators will differ from their blue collar counterparts in terms of their apparent reliability and credibility: often, they will not have criminal histories that might be helpful for purposes of cross-examination. White collar cooperators will likely be more at ease testifying and appear more credible. Indeed, as one commentator pointed out, "It is of course conceivable that white collar cooperators may prove to be more sophisticated and more presentable in a courtroom, adding credence to deceptive testimony."[47] This presents an additional and interesting challenge to the white collar crime practitioner and may require more focused investigation of the cooperating witness, for instance, in bankruptcy or matrimonial court filings.

Notwithstanding a defense lawyer's familiarity with the cooperating witness, it may come as a surprise that, pre-indictment, the government can use these witnesses to reach out to the defense lawyer's white collar clients, despite the prosecutor's knowledge that she is contacting a represented party in apparent contravention of the ethics rules.[48] In a recent securities fraud case, the government's use of a cooperating witness as a proxy to elicit information was held not to violate professional conduct rules because this conduct is "authorized by law."[49] Counsel representing an individual during the course of an ongoing investigation should repeatedly advise the client to refrain from speaking or corresponding about the investigation — even with friends and colleagues.

Cooperators and the Parallel Civil Investigation

Another important difference between white collar and blue collar cases is the fact that, almost always, corporations and individuals will be subject to parallel regulatory and criminal investigations. Recent cases demonstrate that this trend is likely to continue.[50] In October 2009, the DOJ was joined by the U.S. Department of the Treasury (Treasury), and the U.S. Department of Housing and Urban Development (HUD) in announcing President Barack Obama's newly established interagency Financial Fraud Enforcement Task Force.[51] The task force has increased coordination and cooperation among the different federal and state authorities involved in the regulation of the financial markets.[52] As SEC Enforcement Chief Robert Khuzami explained, "One of the vital aspects of the task force will be to better coordinate criminal and civil enforcement efforts."[53] The efficacy of this coordination was evident in recent successful insider trading prosecutions of the Galleon Hedge Funds.[54]

Part of this coordination has been the result of the SEC's Cooperation Initiative. Described by Khuzami as a "game changer," the initiative mimics the use of cooperating witnesses in criminal prosecutions by promising rewards in

civil prosecutions.[55] The SEC described the initiative on its website:

> The Cooperation Initiative is a series of measures designed to encourage greater cooperation by individuals and companies in SEC investigations and related enforcement actions. The SEC has set forth, for the first time, the analytical framework it will use to evaluate whether, how much, and in what manner to credit cooperation by individuals in its investigations and enforcement actions.
>
> In addition, the Commission has streamlined the process for submitting witness immunity requests to the Department of Justice for witnesses who have the capacity to assist in its investigations and related enforcement actions.
>
> Finally, the Division of Enforcement authorized its staff to use new tools and to expand the use of existing tools to encourage individuals and companies to report securities law violations and provide assistance in connection with investigations and related enforcement actions.[56]

The streamlining referred to on the website includes a very recent amendment to 17 C.F.R. § 200.30-4(a)(14), which in its original form provided for the Director of Enforcement to obtain witness immunity through the following procedure:

> To submit witness immunity requests to the U.S. Attorney General for approval to seek an order compelling an individual to give testimony or provide other information pursuant to a subpoena that may be necessary to the public interest in connection with investigations and related enforcement actions. …

The amendment to the rule permits the Director of Enforcement *himself* to issue an order of immunity, after consulting with DOJ:

> To submit witness immunity requests to the U.S. Attorney General pursuant to 18 U.S.C. §§ 6002-6004, and, upon approval by the U.S. Attorney General, to seek or, for the period from June 17, 2011, through December 19, 2012, to issue orders compelling an individual to give testimony or provide other information pursuant to subpoenas that may be necessary to the public interest in connection with investigations and related enforcement actions. …
>
> 17 C.F.R. § 200.30-4(14)

As explained in the "Supplementary Information" section of the rule change, the new rule "authorizes the Division Director to issue orders to compel individuals to give testimony or provide other information pursuant to 18 U.S.C. §§ 6002-6004."[57] The Commission justifies this grant of power, which bypasses Commission approval, as "intended to further conserve Commission resources, enhance the Division's ability to detect violations of the federal securities laws, increase the effectiveness and efficiency of the Division's investigations, and improve the success of the Commission's enforcement actions."[58] In recognition of the potential for abuse of this power, the Commission "adopt(ed) this amendment for a period of 18 months, and, at the end of that period, will evaluate whether to extend the delegation to issue immunity orders."[59] It is interesting to note the Commission found that the "revision relates solely to agency organization, procedures, or practices. It is therefore not subject to the provisions of the APA requiring notice and opportunity for comment."[60]

The rule change is more than procedural: it signals an intention to continue to use the civil investigation more aggressively and identify cooperators even earlier in the process. This creates an opportunity for defense lawyers to gather intelligence about the client's position early and insulate their clients from criminal exposure sooner, rather than later. Also, a decision not to provide immunity will be a clear indication of where the client stands with the SEC and with the DOJ; counsel and client can prepare accordingly. Further, the grants of immunity will mean that more cooperators will be giving testimony under oath in civil proceedings, and this testimony should be produced as *Jencks* material. Of course, to the extent this testimony conflicts with later grand jury testimony or with other witness testimony or statements, these statements should all be provided as *Brady* evidence immediately upon indictment.

Confidential Informants, Whistleblowers, and Cooperating Witnesses: The Potential for Abuse

The use of informants and witnesses that are motivated to lie to avoid prison or gain big paydays is inherently risky. These problems are exacerbated by the fact that, in federal court, cooperators and informants provide information behind closed doors in sessions that are not recorded. Instead, the sessions are memorialized only by an agent's notes. Often, after multiple proffer sessions, the agent combines these notes into a consolidated memorandum of the various sessions, making the witness and the agent harder to impeach.

Cooperation in white collar cases is especially problematic because an organization's employees may have gathered information from a second-hand source, through the grapevine, or through unauthorized access to documents or computers. This "information" can be tested beforehand by an attorney proffer, which is more typically used in white collar cases. The exchange of information between the defense attorney and the prosecutor during this proffer is similarly hidden and creates a danger that, either inadvertently or purposely, the prosecutor may provide direction to the cooperating witness that is neither memorialized nor revealed.

Practice Points

The hidden nature of these negotiations and contacts requires a defense lawyer's best effort to bring them to light. Detailed discovery requests should be made early and often pretrial. The Department of Justice's recent Ogden Memorandum can assist defense counsel.[61] This memorandum recommends that prosecutors access the agency files for each testifying confidential source and review the entire informant/source file, not just the portion relating to the current case, including all proffer, immunity and other agreements, validation assessments, payment information, and other potential witness impeachment information. In a white collar case, this would require accessing the files of each of the multiple regulatory agencies involved in the investigation. It is important to note that as to non-testifying witnesses, the prosecutor's review is discretionary. Also, the memorandum advises prosecutors to take steps to protect *sensitive* information and authorizes the provision of a "summary letter to

defense counsel rather than producing the record in its entirety."

Frequently, these discovery battles will have to be resolved by the court through a defense motion to compel *Brady* or *Giglio* materials. When filing these motions defense lawyers must be sure to argue, that pretrial, materiality is *not* an issue. The materiality determination requires an evaluation of confidence in the verdict that is not possible at the pretrial stage.[62] Therefore, as many district courts have concluded, in the context of a pretrial motion for *Brady* evidence, the question of whether information is favorable is the key inquiry, and an attempt to prospectively assess whether the information would be material at trial is not necessary.[63] Moreover, while the Supreme Court has said that pleading defendants have no Fifth or Sixth Amendment right to have federal prosecutors provide "impeachment information relating to any informants or other witnesses," this may not apply to *Brady* material.[64] At least one court has held that prosecutors cannot include a waiver of a defendant's discovery rights to exculpatory evidence as part of a plea agreement.[65]

Conclusion

Undoubtedly, the next few years will see an increase in the use of these "blue collar" tactics. U.S. District Court Judge Lewis Kaplan of the Southern District of New York cogently summed up the situation when he addressed a defendant who had worn a wire and cooperated in the investigation and prosecution of an insider trading ring:

> Our criminal justice system works in part because of bargaining with people like yourself. It isn't pretty. It just serves a utilitarian purpose without which other people couldn't have been brought to justice. You happen to have the goods and get the goods on them. And so, frankly, in the words of the street, you get to walk.[66]

The defendant was sentenced to five years probation, a $10,000 fine, and was ordered to forfeit $2,751,366.[67]

Notes

1. Preet Bharara, U.S. Attorney for the Southern District of New York, quoted in George Packer, *A Dirty Business*, New Yorker Magazine, June 27, 2011, *available at* http://www.newyorker.com/reporting/2011/06/27/110627fa_fact_packer?printable=true¤tPage=all.

2. *See, e.g.,* Kenneth Breen & Sean Haran, *Securities Fraud: The Rise of Wiretaps and Government Eavesdropping in Securities Fraud Cases,* The Champion, May 2011 at 43; Peter J. Henning, *The Pitfalls of Wiretaps in White Collar Cases*, NYTimes.com (Mar. 25, 2011); Peter Lattman, *The Newest Wiretaps in the Galleon Investigation*, NYTimes.com (Mar. 22, 2011); Hilary Russ, *DOJ Promises More Wiretaps in White Collar Cases*, Law360.com (Nov. 4, 2010); Gail Shifman, *Wall Street Meets 'The Wire,'* White Collar Crime Prof. Blog (Oct. 19, 2009).

3. *See* Shawn J. Chen, *Coordination and Leverage Make It Happen: How the SEC Handles Complex Cases*, Thomson Reuters, Securities Law (May 2, 2011) (SEC "is coordinating with the Department of Justice and trying to 'leverage third parties where [it] can' by introducing cooperation tools like the non-prosecution agreements and the SEC's whistleblower program. The SEC is not bluffing about the[se] new tools in its kit. …"); Peter J. Henning, *Going Undercover for a White Collar Sting*, NYTimes.com (Jan. 21, 2010) (FCPA charges filed against 22 arms industry executives for paying bribes to undercover FBI agents posing as foreign government officials); *see also* Bernard W. Bell, *Theatrical Investigation: White Collar Crime, Undercover Operations, and Privacy*, 11 Wm. & Mary Bill Rts. J. 151, 152 (2002). (undercover techniques "are arguably also essential in investigating certain white collar offenses. White collar crime may be virtually impossible to uncover by non-deceptive means because many white collar offenses involve deception and abuse of legitimate authority.").

4. *See* U.S. DOJ OIG, *The Federal Bureau of Investigation's Compliance With the Attorney General's Investigative Guidelines*, at 64 (Sept. 2005) (hereinafter "FBI's Compliance") (citing MIOG § 137-3).

5. *Department of Justice Guidelines Regarding the Use of Confidential Informants* (Jan. 8, 2001), *available at* http://www.justice.gov/ag/readingroom/ciguidelines.htm (hereinafter "DOJ Guidelines").

6. 353 U.S. 53, 59 (1957).

7. *Id.* at 60-61.

8. *Id.* at 62.

9. In *McCray v. Illinois*, 386 U.S. 300 (1967), the Court held that disclosure was not required at the preliminary hearing stage.

10. Zathrina Zasell Gutierrez Perez, *Piercing the Veil of Informant Confidentiality: The Role of In Camera Hearings in the* Rovario *Determination*, 46 Am. Crim. L. Rev. 179, 199 (2009) (Courts have imposed a heavy burden on defendants, requiring them to show that the informant's testimony would be material to the defense.); *see also United States v. Buras*, 633 F.2d 1356 (9th Cir. 1980) (in prosecution for willful failure to file income tax returns, trial court properly denied defendant's motion to discover identity of informant who had told IRS that defendant had not filed tax returns where defendant did not make any showing that disclosure of informant's identity or contents of his communication would be relevant or helpful to defense or essential to fair determination of case); *United States v. Hanna*, 198 F. Supp. 2d 236 (E.D.N.Y. 2002) (district court denied defendants' motion for disclosure of confidential informants where government contended that it would, prior to trial, identify any co-conspirators whose statements were to be offered against defendants; defendants failed to show their need for identity of confidential informants).

11. Alexandra Natapoff, *Snitching: The Institutional and Communal Consequences*, 73 Univ. Cin. L. Rev. 645, 652 (2004).

12. *Id.* at 670.

13. *See FBI's Compliance*, *supra* note 4, at 93.

14. *Id.*

15. *Id.* at 74.

16. Jay Weaver, *FBI Nabs Man Accused in Medicare Fraud Case*, Miami Herald (Mar. 29, 2011).

17. Tom Gilroy, *Prosecutors Accuse More Than 70 in Massive $163 Million Billing Scheme*, 5 WCR 722 (Oct. 22, 2010).

18. John Herzfeld, *Prosecutors Charge New York Trainer With Selling False OSHA Certifications*, 5 WCR 495 (July 16, 2010).

19. *Miami DME Firm Owner Found Guilty in $3.8 Million Bogus Billing Scheme*, 4 WCR 552 (Aug. 14, 2009).

20. *Canadian-Based Stock Promoter Will Serve Nearly Two Years in Prison for Kickbacks*, 3 WCR 770 (Nov. 7, 2008); *see also FBI's Compliance*, *supra* note 4, at 80 (Tier 1 criminal activity — which includes violent crimes committed by someone other than the informant, official corruption, theft, and the manufacture or distribution of drugs — must be authorized in writing in advance by a Special Agent or prosecutor; Tier 2 criminal activity — which encompasses all other criminal activity — must be authorized in writing in advance by a Senior Field Manager.).

21. *United States v. Goncalves, et al.,* 09-cr-335 (D.D.C.), Doc. 22, Superseding Indictment, at ¶¶ 25, 26 (filed Apr. 16, 2011) (indicating that there was an undercover Special Agent with the FBI posing as a representative of the Minister of Defense of this country and another Agent posing as a procurement officer for the Ministry).

22. Press Release, DOJ, Twenty-Two Executives and Employees of Military Law Enforcement Products Companies Charged in Foreign Bribery Scheme (Jan. 19, 2010), *available at* http://www.justice.gov/opa/pr/2010/January/10-crm-048.html.

23. *Goncalves, et al.*, 09-cr-335 (D.D.C.), Doc. 270, Joint Motion to Dismiss Superseding Indictment, at 6-7 (filed Mar. 9, 2011).

24. *See* Michelle M. Kwon, *Whistling Dixie About the IRS Whistleblower Program Thanks to the IRC Confidentiality Restrictions*, 29 Va. Tax Rev. 447 (2009-10) ("Although the whistleblower must reveal her true identity in her reward request, the Whistleblower Office promises to protect the whistleblower's identity using its common law informer privilege."); *see also* Internal Revenue Manual — 25.2.2.11 (06-18-2010), Confidentiality of the Whistleblower (indicating that the IRS will protect the identity of the whistleblower to the fullest extent permitted by the law); Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. 11-203, H.R. 4173, Section 922 (July 21, 2010) ("[T]he Commission and any officer or employee of the Commission shall not disclose any information, including information provided by a whistleblower to the Commission, which could reasonably be expected to reveal the identity of a whistleblower."); Whistleblower Law Blog, *Dodd-Frank Bill Provides Robust Whistleblower Protections* (July 15, 2010), *available at* http://employmentlawgroupblog.com/2010/07/15/dodd-frank-bill-provides-robust-whistleblower-protections/.

25. It should be noted that Section 922 of the Dodd-Frank Act prohibits the SEC from providing an award to a whistleblower who is convicted of a criminal violation related to the judicial or administrative action for which the whistleblower provided information. There is no similar provision under the IRS program.

26. The False Claims Act was enacted in 1863 to ferret out unscrupulous contractors and fraud. *See* Larry D. Lahman, *Bad Mules: A Primer on the Federal False Claims Act*, Okla. Bar J., *available at* http://www.okbar.org/obj/articles_05/040905lahman.htm.

27. 31 U.S.C. §§ 3729 *et seq.* (2005).

28. 5 U.S.C. §§ 1201 *et seq.* (2005).

29. During debate of the 1998 IRS Restructuring and Reform Act, Harry Reid proposed to eliminate the IRS whistleblower program, labeling it the "Award for Rats Program" and "Snitch Program," and characterizing it as "unseemly, distasteful, and just wrong." *See* Kwon, *supra* note 24, at 449.

30. SmartMoney, *Rat Out Your Boss, Get Paid by the IRS*, MSN.com (Dec. 14, 2009), *available at* http://articles.moneycentral.msn.com/Taxes/Advice/RatOutYourNeighborsGetPaidByTheIRS.aspx ("Ratting on your boss or ex-husband might sound sleazy, but whistleblowers have taken on a more venerable image in recent years. That's especially true since the Enron era, when the few

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employees who spoke up about the company's misconduct were seen as folk heroes after the full extent of wrongdoing came to light.").

31. U.S. DOJ, Civil Division, Fraud Statistics — Overview, October 1, 1987 — September 30, 2010, *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Statistics.pdf (indicating that the office recovered approximately $2.5 billion from *qui tam* actions in 2010).

32. *See, e.g., Tennessee-Based Dialysis Company Ordered to Repay More than $82 Million*, 6 WCR 453 (June 3, 2011) (United States intervened in whistleblower suit and, upon court's finding that dialysis service company "recklessly disregarded federal law" when billing the Medicare program, recovered $86.2 million); *Mylan Laboratories to Pay $65 Million to Resolve Alleged Rx Price Reporting Fraud*, 6 WCR 21 (Jan 14, 2011) ($65 million settlement reached with generic manufacturer Mylan Laboratories Inc. to settle charges that it inaccurately reported drug prices to the Texas Medicaid program, a scheme brought by a whistleblowing pharmacy); *GlaxoSmithKline to Pay $750 Million to Resolve Adulterated-Drug Allegations*, 5 WCR 756 (Nov. 5, 2010) (GSK agreed to pay $750 million in criminal and civil penalties to settle charges of manufacturing and distributing adulterated drugs from 2000 to 2005; an attorney for the whistleblower, a former quality control inspector at GSK's Puerto Rican plant, received 22 percent of the civil settlement — or about $96 million).

33. 31 U.S.C. § 3730(d); *see Woods v. Empire Health Choice Inc.*, 574 F.3d 92, 98 n.1 (2d Cir. 2009) (*qui tam* is short for "*qui domino rege quam pro se ipso in hac parte sequitur*," which means "who pursues this action on our Lord the King's behalf as well as his own").

34. *See* Kwon, *Whistling Dixie*, *supra* note 24, at 448.

35. SmartMoney, *Rat Out Your Boss*, *supra* note 30.

36. *See* 16 U.S.C. § 7623.

37. *See* Kwon, *Whistling Dixie*, *supra* note 24, at 449.

38. Joann M. Weiner, *Brad Birkenfeld: Tax Cheat and UBS Informant Doesn't Deserve Pardon*, Politicsdaily.com, *available at* http://www.politicsdaily.com/2010/04/26/brad-birkenfeld-tax-cheat-and-ubs-informant-doesnt-deserve-par/ (noting that Birkenfeld, "a world-class tax cheat" who will sit in prison for three-and-a-half years for his crime, was one of the whistleblowers responsible for helping the IRS crack the biggest U.S. tax evasion case in history); William P. Barrett, *Whistleblowers: IRS Ordered to Surrender Informant Documents* (Dec. 1, 2009) (Vincent Spondello, longtime Monex accounting employee, files a claim with the IRS Whistleblower Office for what could amount to $57 million or more for himself).

39. *See* SEC Division of Enforcement, *Enforcement Manual* (Feb. 8, 2011), Section 2.2.1.2 Whistleblower Award Program.

40. Robert Khuzami, Remarks at Open Meeting — Whistleblower Program (Washington, D.C. May 25, 2011), *available at* http://www.sec.gov/news/speech/2011/spch052511rk.htm.

41. United States Sentencing Commission, 2010 Annual Report, *available at* http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2010/2010_Annual_Report_Chap5.pdat p. 34.

42. The "[r]ewards [for cooperating in this manner] range from considerable — outright forgiveness, in which the suspect escapes all charges — to the conditional — a non-binding recommendation by the prosecutor to impose a lower sentence — to nothing at all if the government decides the informant has been insufficiently useful." Natapoff, *Snitching, supra* note 11, at 652. *But see United States v. Flemmi*, 225 F.3d 78, 91 (1st Cir. 2000) (rejecting district court's holding that FBI agents possessed authority to make promises of use immunity to informants).

43. Section 5K1.1 provides as follows:

> Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines.
>
> (a) The appropriate reduction shall be determined by the court for reasons stated that may include, but are not limited to, consideration of the following:
>
> (1) the court's evaluation of the significance and usefulness of the defendant's assistance, taking into consideration the government's evaluation of the assistance rendered;
>
> (2) the truthfulness, completeness, and reliability of any information or testimony provided by the defendant;
>
> (3) the nature and extent of the defendant's assistance;
>
> (4) any injury suffered, or any danger or risk of injury to the defendant or his family resulting from his assistance;
>
> (5) the timeliness of the defendant's assistance.

44. Michael Vick's cooperation plea agreement contained this typical language: "This plea agreement is not conditioned upon charges being brought against any other individual. This plea agreement is not conditioned upon any outcome in any pending investigation. This plea agreement is not conditioned upon any result in any future prosecution that may occur because of the defendant's cooperation. This plea agreement is not conditioned upon any result in any future grand jury presentation or trial involving charges resulting from this investigation. This plea agreement is conditioned upon the defendant providing full, complete, and truthful cooperation." *United States v. Vick*, No. 07-Cr-274 (E.D. Va.), Doc. 45, Plea Agreement (filed Aug. 24, 2007).

45. *See* 18 U.S.C. § 3553(e) ("Upon motion of the government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense. Such sentence shall be imposed in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of Title 28, United States Code.").

46. *See United States v. Shalom Weiss,* No. 98-Cr-00099 (M.D. Fla.) (835-year sentence for insurance fraud of $450 million); *United States v. Keith Pound,* 98-Cr-00099 (M.D. Fla.) (740-year sentence for participation in the same fraud); *United States v. Norman Schmidt*, No. 04-Cr-00103 (D. Colo.) (330-year sentence for $38 million Ponzi scheme); *United States v. Thomas Petters*, No. 08-Cr-00364 (D. Minn.) (50-year sentence for $3.5 billion investment fraud scheme.). *But see United States v. Adelson* 441 F. Supp. 2d 506, 506 (S.D.N.Y. 2006) (rejecting a guidelines sentence of life imprisonment and imposing a sentence of 42 months).

47. Ellen S. Podgor, *White Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 796, 803 (2002).

48. *See* Model Rule of Professional Conduct 4.2 ("In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order."); *see also* Model Rule of Professional Conduct 4.1(a) ("In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.").

49. *See United States v. Brown*, 595 F.3d 498, 515 (3d Cir. 2010) (Pre-indictment investigation by prosecutors is "precisely the type of contact exempted from the Rule as 'authorized by law.' To conclude otherwise would serve to insulate certain classes of suspects — i.e., those who retained counsel — from ordinary pre-indictment investiga-

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tion and would significantly hamper legitimate law enforcement operations.”).

50. Robin M. Bergen & Shawn J. Chen, *Coordination and Leverage Make It Happen: How the SEC Handles Complex Cases*, Thomson Reuters, Securities Law (May 2, 2011) (“Recent cases in the areas of insider trading, international fraud and the mortgage industry also show that the Enforcement Division is coordinating with the Department of Justice and trying to ‘leverage third parties where [it] can’ by introducing cooperation tools like the non-prosecution agreements and the SEC’s whistleblower program. The SEC is not bluffing about the[se] new tools in its kit. . . .”).

51. *See* George J. Terwillger III, Darryl S. Levin & G. William Currier, *President Barack Obama Establishes Interagency Financial Fraud Task Force* (Nov. 19, 2009), *available at* http://www.whitecase.com/alert_11192009/.

52. “[I]n fiscal 2009, more than 150 of the SEC’s enforcement cases were filed in coordination with criminal charges filed by the DOJ and others, an increase of 30 percent over fiscal 2008. Similarly, [the SEC] coordinated with criminal authorities and other regulators in approximately 75 percent of our most recent high priority cases.” Robert Khuzami, Director, Div. of Enforcement, Sec. & Exch. Comm’n, Testimony Concerning Mortgage Fraud, Securities Fraud, and the Financial Meltdown: Prosecuting Those Responsible, Before the U.S. Senate Committee on the Judiciary (Dec. 9, 2009), *available at* http://www.sec.gov/news/testimony/2009/ts120909rk.htm (hereinafter “Senate Judiciary Committee Testimony”); *see also* Robert Khuzami, Remarks at *SEC v. Galleon Management, LP* Press Conference (Oct. 16, 2009), *available at* http://www.sec.gov/news/speech/2009/spch101609rk.htm (“Our law enforcement agencies are together much more than the sum of our parts. That is why coordination, of which today’s actions are a prime example, is critically important to the goal of rooting out fraud and misconduct in our markets.”).

53. Robert Khuzami, Remarks at Financial Fraud Enforcement Task Force Press Conference (November 17, 2009); *see also* Robert Khuzami, Senate Judiciary Committee Testimony, *supra* note 52 (“We are enhancing our historically close working relationship with other law enforcement authorities, including the DOJ, in order to maximize the efficient use of limited resources, as well as to deliver a united and forceful response to those who would violate the federal securities laws.”).

54. *See* George Packer, *A Dirty Business*, New Yorker Magazine, June 27, 2011, *available at* http://www.newyorker.com/reporting/2011/06/27/110627fa_fact_packer?printable=true¤tPage=all.

55. Robert Khuzami, Remarks at News Conference Announcing Enforcement Cooperation Initiative and New Senior Leaders (Washington D.C., Jan. 13, 2010) *available at* http://www.sec.gov/news/speech/2010/spch011310rsk.htm.

56. SEC, *Enforcement Cooperation Initiative*, *available at* http://www.sec.gov/spotlight/enfcoopinitiative.shtml.

57. *See* SEC, Release No. 34-64649, *Delegation of Authority to the Director of Its Division of Enforcement*, Final Rule (effective June 17, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64649.pdf.

58. *Id.*

59. *Id.*

60. *Id.*

61. U.S. DOJ, Memorandum for Department Prosecutors from David W. Ogden, Deputy Att. Gen., *Guidance for Prosecutors Regarding Criminal Discovery* (Jan. 4, 2010), *available at* http://www.justice.gov/dag/discovery-guidance.html.

62. *See Kyles v. Whitley,* 514 U.S. 419, 434, 115 S. Ct. 1555, 1566 (1995) (“The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence.”).

63. *United States v. Naegele,* 468 F. Supp. 2d 150, 153 (D.D.C. 2007) (the duty to disclose evidence pretrial (and during trial) applies “without regard to whether the failure to disclose it likely would affect the outcome of the upcoming trial.”); *United States v. Safavian,* 233 F.R.D. 12 (D.D.C. 2005) (“Because the definition of ‘materiality’ discussed in … appellate cases is a standard articulated in the post-conviction process for appellate review, it is not the appropriate one for prosecutors to apply during the pretrial discovery phase.”); *accord United States v. Acosta,* 357 F. Supp. 2d 1228, 1233 (D. Nev. 2005) (“*Brady* implies that all evidence favorable to an accused must be disclosed.”); *United States v. Carter* 313 F. Supp. 2d 921, 925 (E.D. Wis. 2004) (“the court should require disclosure of favorable evidence under *Brady* and *Giglio* without attempting to analyze its materiality at trial. The judge cannot know what possible effect certain evidence will have on a trial not yet held.”); *United States v. Sudikoff*; 36 F. Supp. 2d 1196, 1199 (C.D. Cal. 1999) (Because the definitions of materiality as applied to appellate review are not appropriate in the pretrial discovery context, the court relies on the plain meaning of “evidence favorable to an accused” as discussed in *Brady*.).

64. *United States v. Ruiz,* 536 U.S. 622, 625 (2002).

65. *See United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (declining to extend *Ruiz* to exculpatory evidence), *cert denied*, 130 S. Ct. 1502 (Feb. 22, 2010); *McCann v. Mangialardi*, 337 F.3d 782, 787-88 (7th Cir. 2003) (extending *Ruiz* to *Brady* disclosures that provide factual innocence); *see also* Ellen S. Podgor, *Pleading Blindly*, 80 Miss. L. J. 1633 (Summer 2011).

66. David Glovin, *Insider-Trading Cooperators at Heart of Prosecutions*, StamfordAdvocate.com (Jan. 14, 2011), *available at* http://www.stamfordadvocate.com/business/article/Insider-trading-cooperators-at-heart-of-958010.php#ixzz1Q9PtAsii.

67. *United States v. Glass*, No. 07-Cr-159 (S.D.N.Y.), Doc. 16 — Order of Forfeiture (filed Dec. 9, 2007).

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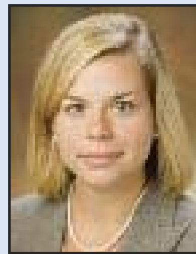

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