

# Take an Experienced Criminal Lawyer to Lunch

By Andru H. Volinsky and Ron Schneider

This article is a result of thinking about ways in which our criminal law practice intersects with our labor and employment law work. Our white collar practices require us to know a different substantive area of the law from that of our employment lawyer counterparts, and our interactions with prosecutors and law enforcement investigators require us to approach certain problems from a very different perspective from what a civil lawyer may use. Given the risk of criminal sanctions for violations of state and federal employment laws, labor and employment law practitioners would benefit from the perspective of a criminal law practitioner.

## Illustrative Areas Where Employment Law and Criminal Law Often Overlap

At the outset, it is helpful to highlight circumstances in which a crossover from the realm of employment law to that of criminal law may occur outside of the obvious immigration-related areas.

One such area arises with domestic violence orders. Your client, for example, may receive a court order that requires one employee to stay away from another employee. This may occur in a domestic violence situation. Some states have broader anti-stalking laws not limited to disputes within a family. What are your client's responsibilities as the employer of both the person who obtained the order and the party against whom the order is entered? Depending on the applicable law in your jurisdiction, your client may well be required to separate the two employees, furlough one until matters are resolved, or seek relief from the injunction.

Another area of overlap concerns criminal subpoenas and search warrants. Your client may receive a subpoena to

turn over records in a criminal case or may be served, without warning, with a search warrant. Responding to a criminal subpoena is not the same as responding to a discovery request under civil rules. In the criminal context, it is more likely that your client may have the right and obligation to refuse to turn over records until other conditions are met. For example, in a recent matter in which we defended a medical practice served with a subpoena by a state insurance agency, we successfully argued that, while a Medicaid fraud unit in a prosecutor's office would likely be entitled to review some of the medically privileged materials sought, the state insurance department was not so entitled.

There is really no civil counterpart to federal agents showing up at your client's door with a search warrant that authorizes the seizure of all of your client's files and computers. A number of complex and difficult questions may arise in such situations that the civil practitioner should not attempt to address without the insights of an experienced criminal lawyer. How do you deal with the need to keep records so that you may continue in business? Should your client continue in business? How does the company meet its responsibilities to produce information when key individual employees refuse to work with the business for fear of incrimination, or because the individual employees are cooperating with the government? Some of the answers may lie in the technology. For example, agreeing to allow a client's network hard drive to be "mirror imaged" while preserving the right to assert privileges may allow the government to proceed with its investigation while also enabling the business to continue to operate.

A third area of overlap between criminal law and employment law arises when allegations of child pornography are raised against an employee. You may have a client who maintains a computer network on which a supervisor finds child pornography. As your client probably has

policies in place that make it clear that the computers are company property, your client is now in possession of child pornography. It is a crime to possess child pornography, and it can be criminal to destroy evidence of child pornography.<sup>1</sup> In other words, your employer client may not be able to keep the child pornography or simply delete it without risking criminal exposure. What advice should the employment lawyer provide to such a client? The answer is to work with the criminal authorities while also taking appropriate actions to terminate the employee. Counsel should not request the client forward the images to him or her and others for review and comment.

Financial controls to reduce theft and fraud are another area rife with both criminal law and employment law implications. Theft and fraud in the workplace are always concerns and will likely be a growing problem in the current economic climate. Issues and concerns are abundant in this area. Do you advise your clients to ensure their bookkeeping practices include regular bank statement reconciliations of all accounts? Is your client carefully controlling credit card issuance and use and ensuring that reimbursed expenses are fully documented? Are there clearly no circumstances in which company checking accounts use an employee's home address for mailings? Do your client's offer letters carefully describe compensation, followed by regular reviews to ensure that senior staff is paid consistent with the agreed-upon terms? Do your client's policies clearly prohibit moonlighting that may siphon off corporate opportunities? Have you encouraged your clients to discuss the topic of enhancing financial controls with their outside accountants? While the employer's initial focus may be on what to do with the worker who is suspected of defalcation from an employment status perspective, criminal law considerations will ultimately arise, such as whether to report the suspicions to law enforcement.

---

Andru H. Volinsky and Ron Schneider are shareholders at Bernstein, Shur, Sawyer and Nelson. Andru manages the firm's Manchester, New Hampshire office, while Ron practices from the firm's offices in Portland, Maine.

One last, perhaps more complex, area of overlap is worth considering. Employment lawyers are commonly asked to advise their clients concerning the client's characterization of a worker as an independent contractor rather than as an employee. Disputes over these characterizations often arise in private litigation or in audits by state and federal regulatory agencies. These disputes may also have significant criminal law implications that must be fully considered. When a worker is mischaracterized as an independent contractor, the characterization reduces the employee census which, in turn, affects the premiums paid on various insurances such as unemployment compensation and workers' compensation insurance. Employers file documents for these programs electronically or through the mail, leading to potential claims of mail or wire fraud for intentionally understated census reports.<sup>2</sup> These crimes may be state or federal, or both, and you may even find your client dealing with more than one prosecutor's office to explain a suspicious decision to treat a worker as an independent contractor. Moreover, the mischaracterization itself may subject employers to criminal sanctions in some states.

Also related to the mischaracterization of workers is a failure to withhold taxes and a failure to pay the employer's share of state and federal income tax and social security. These problems may be both civil and criminal. A *Klein* conspiracy is a tacit or direct agreement among the owners or managers of a business to impede a governmental agency (e.g., the IRS) from performing its lawful functions to ascertain income, collect taxes, and investigate violations of internal revenue laws.<sup>3</sup> Intentionally mischaracterizing an employee as an independent contractor to avoid paying an employer's federal share of income taxes and social security may be prosecuted in this fashion and may lead to complex problems for the client company and the individuals involved in management and accounting functions.

Often these kinds of conspiracies are accompanied by activities that can be characterized as money laundering or structuring transactions to avoid cash reporting requirements. For example, a string of cash payments to independent

contractors in amounts just under \$10,000 suggests a need to consider the crime of "structuring."<sup>4</sup> Structuring is doing business in a way that avoids the federal requirements mandating that financial institutions report cash transactions in amounts that exceed \$10,000. Finding cash transactions or, under some circumstances, finding checks that are issued in amounts to artificially stay beneath the \$10,000 reporting requirement, is an indication of a structuring or money laundering problem.

#### How a Criminal Attorney Can Assist the Employment Law Attorney

Of course, criminal lawyers can provide direct representation to your clients and their employees under investigation, charged with crimes, or served with court orders or subpoenas. Criminal lawyers also represent the sons, daughters, and spouses of your important client managers when these relatives are faced with criminal problems. Criminal lawyers assist with parallel civil and criminal investigations like those conducted by the Department of Labor or the Securities and Exchange Commission.

It is difficult to provide general advice for the circumstance when your employer client receives a letter indicating it is the subject of a federal criminal investigation or, worse yet, when the investigators show up at your client's door. Nonetheless, there are a few overarching principles that are useful to consider. At the outset, ask yourself who is the client and whose interests you must protect, regardless of who may be calling from the client organization. Many lawyers have been led astray by not keeping straight that their client is the business, and not the CEO who is the subject of the whistleblower complaint by the bookkeeper.<sup>5</sup>

Do not make matters worse by destroying documents or electronic files even if your client has an existing policy of destroying archived records. Records retention policies may exist for good reasons (e.g., saving storage fees or protecting against the inadvertent disclosure of confidential records). However, records retention policies never justify the destruction of records when a client has notice of a governmental investigation.

Remember Arthur Andersen, the worldwide accounting firm? Andersen advised its employees to preserve only their most basic audit work papers in a famous memorandum in the Enron scandal and repeatedly reminded employees of its records destruction practices. Andersen did not survive even the investigation of its conduct. Contrary to the Arthur Andersen example, records retention policies should include a specific "litigation hold" provision for preserving records when the client reasonably believes litigation or an investigation may occur.

**Often, the first party through the government's door gets the best plea deal or avoids prosecution entirely.**

Criminal investigations require clients to think and act quickly. There is a huge premium for getting ahead of the criminal investigation and understanding its implications before the government's investigators do. Often, the first party through the government's door gets the best plea deal or avoids prosecution entirely. A part of acting quickly is the gathering of relevant records, which should be accomplished in careful consultation with experienced counsel to avoid claims of obstruction of justice by making records less accessible or inaccessible to governmental investigators. At the same time, you also must keep your clients from losing access to seized records necessary for ongoing business purposes or to build a defense.

Criminal lawyers also represent witnesses employed by your clients. Some witnesses are purely fact witnesses who only need guidance through the criminal justice system. Other witnesses may have criminal exposure and require the

criminal lawyer to negotiate immunity or guilty pleas. Still other witnesses may become codefendants or may provide evidence against your company. Employee witnesses often have interests different from their corporate employers, and individual counsel is often required. The ticklish issue of what information may be shared among lawyers representing different witnesses and the company must be considered in advance. In extreme cases, lawyers have been investigated and prosecuted for encouraging witnesses to withhold evidence from a grand jury by invoking Fifth Amendment privileges to protect the interests of other, undisclosed persons.<sup>6</sup>

**The Sentencing Guidelines make clear that the culture of the organization and the conduct of its leadership are critically important.**

Whether representing witnesses or potential defendants, effective representation requires the early involvement of your criminal lawyer. The more a criminal lawyer knows and the earlier he or she knows it, the better the representation will be.

Criminal lawyers should also be consulted about compliance issues. A corporation's duty to investigate allegations of criminal wrongdoing has existed for decades.<sup>7</sup> Companies that are investigated for criminal misconduct are judged based upon the policies and procedures they have in place to prevent crime in the first instance and on how well they respond when receiving notice of potential criminal conduct. The U.S. Sentencing Guidelines, a series of rules that provide guidance to federal courts when imposing criminal sentences, place a premium

on employers having strong compliance programs. Culpability for an employer is a matter of considering the steps taken by the organization prior to the offense to prevent and detect conduct, the level and extent of involvement in, or tolerance of, the offense by senior personnel, and the organization's response to learning that an offense may have been committed. The Sentencing Guidelines define what a court will expect to see in terms of an effective compliance and ethics program. In this respect, the Sentencing Guidelines make clear that the culture of the organization and the conduct of its leadership are critically important.<sup>8</sup> The commission of a crime by an employee does not necessarily mean that an employer lacks the required effective program to prevent and detect violations of law. However, careful due diligence, the promulgation of clear standards of good conduct, and assignment of responsibility to oversee the compliance program to senior-level personnel are recognized hallmarks of effective compliance programs. Courts look for these factors when sentencing organizations, and prosecutors consider them when they make charging decisions.

Employment lawyers should be especially vigilant in this area to protect their clients. Teaming with an experienced white collar criminal lawyer to scrutinize client compliance programs and to respond to notice of misconduct makes good sense.

Criminal lawyers are also adept at assisting with issues when the client is the victim of a crime. Corporations victimized by fraud or other criminal acts must often work with state and federal investigators and their sometimes intrusive investigative techniques. Criminal lawyers understand how these agencies work and have contacts with specific agents that will often allow the criminal investigation to proceed in a less disruptive fashion than might otherwise occur.

Most clients will also want to know how the criminal process works and how the system functions as a practical matter. State court victim's advocates found in many prosecutors' offices are not always the best source of practical information about what the client may expect from the criminal justice system. An experienced criminal defense attorney is able

to provide useful and valuable information for clients as they move through the system. An experienced criminal defense lawyer can be particularly useful during the sentencing phase of the process, working with the prosecutor and the court to ensure appropriate restitution as a part of sentencing or as part of an asset-forfeiture proceeding. At times, fairly technical rules and the sometimes conflicting concerns of probation officers, victim advocates, prosecutors, investigators, and sentencing judges must all be addressed for an employer to have a realistic chance at recovering a loss.

In conclusion, in addition to his or her personal experience, a good criminal lawyer will have access to an array of resources to understand the crimes and investigative techniques that your employer clients may face. Employment lawyers would be well-served not to wait for an emergency. Take a criminal lawyer to lunch and start your mutually beneficial relationship now.

#### Endnotes

1. See 18 U.S.C. § 1466A.
2. See 18 U.S.C. §§ 1341 and 1343.
3. *United States v. Klein*, 247 F.2d 908 (2nd Cir. 1957), *cert. denied* 355 U.S. 924 (1958). See also, *United States v. Marek*, 548 F.3d 147 (1st Cir. 2008).
4. 31 U.S.C. § 5324.
5. See ABA Model R. Prof. Conduct 1.13 (2003).
6. See, e.g., *United States v. Cintolo*, 818 F.2d 980 (1st Cir.), *cert. denied*, 484 U.S. 913 (1987).
7. See, e.g., *United States v. Dotterweich*, 320 U.S. 277 (1943).
8. U.S. Sentencing Guidelines § 8B2.1 (2008).