

## Outside Counsel

# Challenges and Opportunities for New Counsel as Trial Approaches

State and local regulators and law enforcement authorities continue to expand their reach into areas ranging from anti-trust and environmental crimes to data security and campaign finance. Counsel who are engaged in the midst of an ongoing investigation or shortly before trial can face a unique set of challenges, particularly when law enforcement authorities are seeking to criminalize conduct that is more typically the subject of civil, administrative, or regulatory proceedings. Nonetheless, these engagements can also create a meaningful opportunity to secure a favorable outcome for the client.

As outlined below, success is dependent on a number of factors, including identifying and navigating competing law enforcement interests, effectively communicating with predecessor or co-counsel, understanding potentially unfamiliar areas of law and preparing to think creatively with respect to trial strategy or potential resolutions.



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### Identifying the Players

Almost any investigation presents the opportunity for law enforcement officers and prosecutors to proceed either under state and local laws or, alternatively, under federal law. In corruption investigations, for instance, the federal mail and wire fraud statutes, along with the Travel Act (18 U.S.C. §§1341, 1343, and 1952, respectively), create innumerable ways for federal authorities to investigate and charge conduct that might have been historically viewed as a state or local matter.

Alternatively, as district attorneys' offices and offices of state attorneys general continue to develop sophisticated and specialized practice areas, these prosecutors are positioned to take on long term and more complicated investigations. As such, it is imperative to understand overlapping (and sometimes competing) interests of federal, state, and local

prosecutorial offices. Successes in staving off charges from a particular office will be short-lived if those successes kindle renewed interest from a different prosecutor's office.

Our recent experience defending a state court prosecution offered a text book example of how jurisdictional overlap can complicate cases. First, the district attorney denied any obligation to produce materials in the possession of a state agency that had conducted significant portions of the investigation under its regulatory authority. Additionally, the government's "star" witness was slated to testify pursuant to a federal cooperation agreement and the district attorney took a very narrow view of what might constitute impeachment materials in its requests to federal prosecutors. This involvement of multiple agencies and entities necessarily created complications with discovery obligations and created substantial pre-trial motion practice that were typical of the challenges arise when confronting investigations conducted by multiple stakeholders.

### Coordinating With Existing or Predecessor Counsel

Being engaged late in an investigation or on the eve of a trial necessarily

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requires coordination with the client's existing or predecessor counsel. In many instances, counsel will often have invaluable insights into the practices and predilections of local investigators, prosecutors, and the bench. In other situations, the transition may be more challenging as it may be necessary to re-visit strategic decisions made by predecessor counsel.

Communication is the key to successfully navigating these relationships. In instances where counsel is joining an existing team, open lines of dialogue are critical to prioritizing the client's needs and ensuring that counsels' different, but equally valid, perspectives on everything from witness preparation to trial strategy and to plea negotiations are considered. Alternatively, where counsel is being replaced, communication is equally, if not more, vital to determining how the client has been advised to date and the state of relationships with the prosecutors and the bench.

### Navigating the Unusual

Operating at the intersection of federal, state, and local investigations and prosecutions will often mean confronting unusual theories and infrequently used statutes. As a result, brief banks or standard jury instructions may be of limited utility. Counsel needs to recognize that the government and the court may be on unfamiliar terrain and thus effective lawyering will require education alongside advocacy.

In a recent matter, our client confronted a novel scheme to defraud theory and a charge of violating the criminal provisions of a technical regulatory statute for which there was one reported prosecution more

than 15 years ago. The paucity of cases meant that, among other things, there was no model jury instruction to offer the court for that count. The relatively untested prosecution theory provided strategic openings to challenge the government's proof as to the intent to violate the relatively arcane regulatory law. But, in light of the novelty of the prosecution, the court elected to proceed cautiously on legal matters, leaving a number of issues open at the start of trial which presented uncertainty that the defense can use to its advantage.

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### Thinking Outside the Box

State and local authorities may have more authority and less restrictions on how to shape a potential resolution. Charge bargaining and plea agreements that carry recommendations to specific sentences are far more readily available to state and local prosecutors than to their federal counterparts.

Additionally, state and local officials may seek to impose or may be open to negotiating collaterals terms that may be outside the scope of what federal authorities are authorized to negotiate. Further, these officials' discretion may be particularly broad when they are prosecuting seldom

used statutes for which neither they nor the bench have a standard "heartland" of expected outcomes.

Successful resolutions in these matters necessarily requires creative thinking. Plea agreements, deferred prosecution, or non-prosecution agreements can be linked to collateral consequences, such as the surrender or temporary suspension of professional licenses, agreement to resign from employment, debarment from certain type of contracts, or the willingness to forego specified classes of commercial activity for a period of time

### Conclusion

Joining a case as trial counsel can be like drinking from the proverbial firehose. Counsel need to establish a relationship with existing or predecessor counsel, learn the documents and witnesses in a record time, appropriately manage expectations and navigate charging theories and judicial practices that may fall outside their everyday experience. But, as outlined above, there also are meaningful ways in which counsel can change the existing dynamic between the government and the accused, can engage in creative problem solving, and secure the best possible outcome for their clients.