“White collar crime” is, without a doubt, one of the most buzzed-about and fastest growing areas of the law. It is nearly impossible to pick up the newspaper or turn on the television without seeing a reference to a corporate executive accused of some kind of criminal behavior. The words “Enron” and “Ponzi” (and even “subprime”) are uttered with such incredible frequency that they might as well appear in the thesaurus as synonyms of “illegal.” Most law schools have one or more courses dedicated to studying white collar crime, and most large law firms have an entire department devoted to the practice area.

But what does it mean to practice white collar crime? For all of the interest and attention, most law students (and many practicing lawyers) have no sense of what it means or what it is like to practice in the area of white collar criminal defense or prosecution. There are several reasons why this practice area remains obscure to outsiders, one of which is that it is something of a club which is dominated by current and former prosecutors or other kinds of government attorneys. But it is also the nature of the cases and the work – which is mostly done outside of the courtroom in the context of an investigation.

---

1 With thanks to Jonathan Leiken for his advice and time.
For a young lawyer coming out of law school, finding your way into white collar criminal law practice can be difficult. It is not easy to get a job as a prosecutor directly out of school, and solo practitioners who do white collar criminal defense work do not hire many young lawyers to work with them. Perhaps the best way to enter this world is as an associate in a white collar criminal defense practice at a large law firm. This article will explore the experiences you can expect in such a practice.

*What is white collar crime? What are the cases like?*

In a large law firm, the practice of white collar crime is centered on the defense of large companies who have independently detected, are under investigation for, or are charged with some type of fraud or deceit. This includes accounting fraud, disclosure fraud, government contracts fraud, and insider trading. Violations of the Foreign Corrupt Practices Act, which prohibits bribing foreign government officials, are also in the purview of the white collar crime group at most firms. These cases are large, complex, fast-moving, and centered on facts rather than motions and procedures. Few of these investigations will end in a trial. Most will end with a negotiated settlement and some will even end when the agency closes the file without bringing charges.

Many of the major players in the field of white collar defense were only secondary players in the law school curriculum, or in some cases, were not present at all. The Securities and Exchange Commission, the Commodity Futures Trading Commission, the Drug Enforcement Administration, the Department of Defense, the Health and Human Services Administration, and the recently created Special Inspector General of the Troubled Asset Relief Program are only a few of the agencies that a
white collar defense attorney will work with on a regular basis. The near daily interactions with these governmental bodies far exceed any contact a white collar defense attorney will have with the courts. Furthermore, the rules promulgated by these regulatory bodies – as opposed to case law – become the basis upon which a defense strategy is developed.

*How does an investigation unfold?*

Unlike a trial, which begins when one side files a complaint describing how the other side has caused them injury, the white collar criminal process begins when a regulatory agency issues a voluntary request or subpoena to a company. In order to respond to the government, the company begins collecting e-mails, hard drives, and files, often with the help of an outside law firm. At large companies, this process can result in the collection of millions of documents that must be reviewed for relevance and attorney-client privilege before being produced to the government. While the collection and review of documents is underway, the company and law firm try to piece together why the request has been made and on what grounds the government may bring a civil or criminal action.

The agency will often follow up a voluntary request with questions as it reviews documents and may even allow counsel to make presentations on topics of concern. Answering the agency may require counsel to collect more documents, to conduct an intensive review of the documents already collected, or to interview current and former employees of the company. As the agency’s investigation continues it may choose to ask individuals to testify. This investigation process can take months or even years.
At the end of the process, the agency can choose to close the file or bring charges against the company or certain employees. Some agencies will inform the company of their intent to bring charges and may give the company time to persuade the agency that different charges, or no charges at all, should be brought. The company may also choose to negotiate a settlement with the agency regarding any threatened penalty as well as the charges that will be filed. This is common practice at some agencies, including the Securities and Exchange Commission (the “SEC”). Two of the largest SEC actions in recent years, those against General Electric and Siemens AG, were brought as settled actions, which means the companies agreed to certain fines and penalties before the charges were filed and neither admitted nor denied the allegations in the complaint.

*How do white collar criminal defense attorneys advocate for their client in the context of an investigation? What is the role of the junior associate?*

While the government conducts its investigation, the company works with its external counsel to conduct its own investigation in anticipation of what the government might ask or allege in the future. The goal is to understand the company and any potential problems well enough to explain to the agency why the company should not be charged at the end of the investigation or why any charges that are brought should be minimized. To effectively advocate for the company, you must understand more than just the law. This may require learning the intricacies of the company’s business and learning foreign concepts, like the accounting rules for recognizing revenue or how net income relates to earnings per share.
Although document review is often described in terms that would make it seem torturous, with emphasis on long hours, windowless rooms, and endless stacks of paper, in reality, it is not all bad. Most modern document reviews are computer-based since most investigations rely heavily on email traffic and hard drives. Even if you find yourself staring at a room full of boxes, you will discover that you get a unique insight by being the person that is piecing together the story. The junior associate who knows what documents exist, what they say, and where they are is a key player on the team. You may be the only person who will ever read all of the emails or review all of the presentations, and you will be expected to summarize what you’ve seen and learned.

This can be overwhelming. You’ve just spent three years reading fact patterns and case law, where everything is neatly tied up in two or three pages. Law school did not teach you how to spot wrong-doing in email traffic or financial presentations. Law school did teach you how to form an argument based on facts and case law, and as you review the documents, you must do more than look for the obviously bad language. You must think about how the documents could be used to piece together an argument that your client either did something wrong or that they did nothing wrong. After reviewing thousands of pages of documents, you will report to a senior associate or partner about what you learned. This experience is very similar to that of being called on in class. No matter how much you think you have prepared, there is always one question that you did not anticipate and which requires you to desperately search your notes for an answer, or hesitantly reply, “I don’t know.”

Document review may be accompanied or followed by witness interviews. Although you will be able to garner much of the story from documents, hearing a current
or former employee of the company explain their job and tell their story is invaluable. The format of a witness interview is different than a deposition or trial testimony because, with rare exceptions, this is not an adversarial process. The goal is to understand the company and the events that led to an investigation, not to prove that one side or another is right. The lawyer conducting the interview may present documents that are hard to understand or that could refresh the individual’s recollection. You may be asked to gather any documents that you think should be discussed during this interview. If you have never attended such an interview, this can be daunting, but understanding the goal of the interview and what the interviewee will be expected to talk about can be helpful. As you review and collect documents, you can imagine what you would ask about each one if you were a partner or how you would explain to the partner why you decided to include it. This will help when you present the packet to the partner.

After days, weeks, or months of reviewing documents and reporting their contents, the time will come to prepare a presentation to the government agency. Law school taught you to write effectively and to make strong oral arguments, but persuading a government agency is different than persuading a judge or a jury. Agencies are concerned with enforcing the regulations they have promulgated and protecting the public from deceptive practices. While case law may be helpful, it is unlikely to be as effective as an honest, but persuasive, presentation of the facts of the case that is based on documents. It is important to be as truthful as possible in this setting as you may deal with the agency’s lawyers and experts repeatedly over the course of the investigation.
As a junior associate, it is rare that you will be primarily responsible for this presentation and it is more likely that you will not even attend the presentation at all. However, at this point your understanding of the documents and issues in the case will make you a key player on the firm’s white collar team. Your job will be to make sure that those who will be presenting are fully prepared to answer any questions that may arise, and that they are fully apprised of any problematic facts or documents that may be brought up during the presentation. A young associate may be the only one who has seen the document that challenges an assertion by the agency or knows where to find the one that supports a conclusion favoring the company. For a junior associate, being able to thoughtfully contribute to the development of the presentation can ensure that, in the next case, you are more than a document reviewer (though it will be years before you are completely free from this duty).

*Why would I want to go into this field?*

White collar crime is an ever-changing practice. Every few years, a new scandal reveals that deceitful business people have invented a new way to mislead and defraud the public. New regulations and new regulatory bodies spring up in response. As a junior associate, if you are willing to put in the time and effort to understand the facts of one of these investigations and to learn the practice, you will soon discover that you are an integral part of the team. The opportunity to know the most about any specific practice area is rare at a large firm, but this is one area where you can truly become the team expert.