

# Representing a Business Client Victimized by Embezzlement

June 27, 2012

The scenario: Your law office phone rings early on a Monday morning. It is one of your favorite business clients that you have represented for years. The client is agitated because its longtime bookkeeper is suspected of stealing \$150,000 from the business over the past two years. You learn that the problem with the bookkeeper came to light during a recent audit of your client's privately held business. The audit showed that the bookkeeper was writing checks to one of the client's accounts payable, recording the payments on the corporate books, forging the payees' name on the back of the checks, and depositing them into a personal account. The bookkeeper recently resisted attempts to let the client see the books when the client suspected inflated invoices. The client is embarrassed and asks what can be done.

As a civil lawyer, your first instinct is to think about filing a lawsuit and obtaining a civil judgment. But some clients do not want to engage in litigation because of reasons including the expense and amount of time required. And, some clients want to see the perpetrator behind bars. In these situations, you may want to advise your client about the process for getting the perpetrator criminally prosecuted.

Many business crimes go unreported. The failure to report business embezzlements is epidemic, enabling offenders to repeat the criminal conduct at another business. There are many reasons for the failure to report: embarrassment, feeling sorry for the embezzler, lack of interest in dealing with the authorities, the time and cost involved in reporting the crime, complicity in the embezzlement, the offender's promise to repay the embezzled funds, the potential for blackmail, lack of insurance for the loss, and fear of detection of other crimes in the business. These are legitimate areas for concern that must be carefully examined. This article discusses the process of seeking criminal prosecution of those responsible for defrauding your clients. It also makes suggestions about how to approach the legal and practical issues involved in representing clients with these problems. **Are You Capable of Handling the Matter?**

Once you have an overview of the situation from the initial client telephone call, the first question for you, the lawyer, is whether you are competent to handle such a matter. It may seem easy. After all,

you merely need to help the client tell what happened when law enforcement shows up at your law office to take the report, right? Wrong. While this strategy might work for reporting a burglary or a violent crime, it probably will not work for most business crimes. There are many factors to consider. This article will help prepare you for such a case and determine whether to associate with other counsel with criminal law and victim advocacy experience. **Does Law Enforcement Care about Your Client's Problem?** The first thing to know is that law enforcement may be reluctant to take the case. They are busy investigating murders, drug deals, rapes, and burglaries—the bread and butter of most police departments and prosecutors' offices. These are the types of cases prosecutors learn to handle, often to the exclusion of business crimes. Because of high turnover in most prosecutors' offices, there often are no senior prosecutors available to take on a complex business crime case, and the police know it. For that reason, the police do not focus many resources on business crimes. Business crimes are often document intensive. They can be time consuming to investigate, work up, and prepare for prosecution. There is a common saying in prosecutors' offices that sums up the problem: "I don't like prosecuting business crimes—I end up doing more time than the defendant." And, some law enforcement officers are not interested in cases in which they think the criminal will avoid serious jail time. Because of such institutional reluctance from the police and prosecutors, it is advisable to involve a seasoned, criminal lawyer to get the client's business fraud case prosecuted. Obtaining a lawyer with expertise can immeasurably improve the client's chances of success. Such lawyers know the police, the prosecutors, and the politics in the prosecutors' offices, and they know how the various authorities will receive a business fraud case. **Termination of Employment?** After the client's initial detection of the problem, a decision must be made immediately about whether to fire the suspected embezzler. Often, it is best to hold off on the termination. Maintaining the status quo may enable you to gather evidence through investigative techniques such as interviewing the bookkeeper or recording a telephone call with the bookkeeper. These or other strategies might not work if the bookkeeper suspects detection. Executing these and other investigative steps often requires caution, judgment and assistance from someone experienced in handling investigations. If you decide not to fire the suspect, steps must be taken to protect against further losses. If the client chooses to terminate the suspect, the implications of termination (such as the risk of being sued for wrongful termination, slander, libel, etc.) should be considered and discussed. **The Detailed Interview** The next step is to conduct a detailed interview. If possible, try to do so without letting others in the company know that an investigation is underway. Throughout the process, it is important to put your client at ease. Encourage your client to be candid with you. Let him know that you need to know all the facts—even those that are unfavorable to him. A good lawyer will be able to figure out what to say about the facts, even the bad ones. Remind the client that your conversations are privileged, and take steps to protect the privilege by limiting the people who are part of the conversations. During the interview, be a good listener. You might want to have another person take notes so you can focus on the client's answers. Get as much information as possible. Determine what documents are involved, where they are located, and how to get copies. If you are a civil lawyer, ignore the tendency to conclude that the client's problem is a civil one. Some state criminal codes make it a crime to make a false report of crime. If you decide to report, it is imperative that you ensure that the

allegations the client relates to you are fact-based and withstand scrutiny. Listen objectively to the client and ask lots of questions. Make sure you are satisfied that the clients' complaints are brought in good faith before proceeding. After the interview, consult with the criminal attorney to determine what crimes may have been committed and the elements of each offense. Remember that in every criminal case, the government must prove both that a crime was committed and that it was committed by the defendant. The government must prove these two elements beyond all reasonable doubt. Before a prosecutor may undertake a prosecution, the prosecutor must believe that the person's conduct constitutes an offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction. For federal prosecutors, this standard is set out in the United States Department of Justice, United States Attorneys' Manual, Section 9-27.220. There are similar requirements in state ethics codes for state prosecutors. You must decide whether to report the crime now or do more fact-finding, which might increase your chances of law enforcement opening an investigation. At this point, you will also want to consider whether there is any risk to the client if the embezzlement is reported. If the authorities investigate, will anything else—criminal or civil—come to light that the client will have to address? For example, what are the chances that the bookkeeper, once detected, might call the police anonymously to report some criminal activity involving the client or someone else at the business? What if the bookkeeper, when confronted or arrested, tells the police something that damages the client? What if the investigation reveals other irregularities? The risk to the client and the business must be assessed before moving forward. Businesses often have dirty laundry that they would prefer not to have exposed and scrutinized. Your preliminary inquiry should address these issues. In these cases, a seasoned criminal attorney can add value because she may be able to provide insight into what the police and prosecutors may be interested in, and how to minimize the risk to the client. In some cases, a formal internal investigation may be the best next step to help protect the client against future probes by shareholders or government agencies. **Fact Gathering** Assuming that the decision is to investigate prior to reporting the crime, the investigation is one of the most critical steps in the process of getting those responsible for the fraud or embezzlement prosecuted. It is beyond the scope of this article to describe the numerous investigative techniques that might be employed in the bookkeeper scenario described above. Consider, however, the following: ask the bank for copies of the front and back of all of the checks payable to the account in question; obtain samples of the bookkeeper's known handwriting; and look for any signs that the bookkeeper is living beyond his means. At this point, you will not have subpoena power or the luxury of discovery; you will have to be creative.

Hiring a private investigator can dramatically increase the likelihood that the police will accept and work the case. Private investigators are typically good at getting witnesses to talk. Most are former law enforcement officers who are skilled at talking to police, the audience we are trying to reach and persuade to take the case. If law enforcement understands that a former officer worked up the case, they may perceive it as more credible. Also, private investigators know many creative investigative techniques. For example, in our bookkeeper scenario, one investigative technique might be to collect the bookkeeper's curbside trash for a few weeks and go through it looking for evidence. You would

be astonished by what people throw out. Private investigators also know how to properly collect evidence, maintain a chain-of-custody, and document the steps of the investigation. This knowledge can be invaluable in getting your client's case prosecuted and obtaining a conviction. **Physical Evidence** During the interview, you may take possession of certain documentary evidence that should be handled with care. Let's say that in our hypothetical case, the client hands you the cancelled checks. As you reach for them, your mind flashes to an old episode of Law and Order, where fingerprint evidence was compromised when some documents were handled without due care. You wonder "Should I touch the checks?" (Or, you missed that episode and excitedly snatch them out of the client's hands.) Having an experienced criminal lawyer or private investigator on your team will help you to make informed judgments about how to proceed. The answer to the question – do I touch the checks? – is that in an abundance of caution, you should not. Use a pair of tweezers if you must handle them. Examine both the front and the back of the check. The back is particularly important, because for the bookkeeper's scheme to work in our scenario, someone had to endorse the check that was payable to one of the client's accounts payable. Who signed the check? How does the handwriting on the front and back of the check compare to the bookkeeper's known handwriting? Where was the check negotiated and deposited?

As you investigate the case, it is important that you determine the amount of loss. There is a direct relationship between the size of the loss and law enforcement's interest in undertaking and pursuing an investigation. In our scenario, the estimated loss is about \$150,000. Assuming it is well-founded, this loss amount would likely get the attention of the local police, but it is debatable whether federal law enforcement such as the FBI would be interested. In this type of situation, a criminal lawyer, particularly a former prosecutor, would have an informed opinion, perhaps after checking with the right local law enforcement contacts. If, after your investigation concludes, there is a lack of credible proof either that embezzlement occurred or as to who committed the crime, the police probably will not open an investigation. Typically, business crimes must be spoon-fed to law enforcement. Unlike violent crimes, where the victims report and then wait for the police to figure out who did it, business crimes must be presented as a package, already prepared and ready to go. **The Prosecution**

### **Memorandum**

The key to "packaging" your case for law enforcement is to prepare a prosecution memorandum, which summarizes the facts, evidence, and law involved. It hands the case to law enforcement on a silver platter. Whether you provide it to the police or to a prosecutor, a prosecution memorandum will provide a compelling presentation of the facts involved in the case and help identify holes in the proof. It can also serve as a guide for any civil action you might undertake at your client's direction. In preparing the prosecution summary, avoid overly opinionated commentary. For example, the embezzler is not "a lying, thieving crook." Rather, the "embezzler over a period of about 15 months took money belonging to the client's business in the approximate amount of \$150,000." Let the facts speak for themselves in the prosecution memorandum and, for that matter, in your dealings with the authorities. Avoid characterizations and conclusions; they rarely persuade, and they may

make your client seem less credible.

We recommend that a prosecution memorandum contain the following seven sections: Synopsis; Background of the Defendant (including a prior record); Statement of the Evidence; Proposed Criminal Charges; Witnesses (with a brief summary of expected testimony and contact information); Special Problems or Weaknesses; and Conclusion.

There are some discretionary topics that may also be included, depending on your jurisdiction and whether you are seeking state or federal prosecution of the matter. One such topic is a calculation of the relevant sentencing guidelines or statutory sentencing range, which should be done by an attorney with a background in criminal law. This information will be important to law enforcement for two reasons. Prosecutors are more likely to accept a case that promises a chance of serious jail time, and the sentencing guidelines are often a measure of the crime's seriousness.

Another discretionary topic for the prosecution memorandum is a discussion of the possibility of asset forfeiture. This is a complicated subject, and the forfeiture laws vary from state to state. But forfeiture is an important tool in the prosecutor's tool box. Law enforcement and prosecutors are interested in asset forfeiture because they often have a financial stake in forfeitures; the assets forfeited can sometimes be used by law enforcement or be sold and the monies provided to law enforcement. Assets forfeited (their monetary equivalent) might even be divided between law enforcement and the victim. Many prosecutors' offices have attorneys exclusively devoted to handling asset forfeiture issues, and identifying the possibility of asset forfeiture in your case might attract their interest.

Under federal law, property used in the commission of the crime may be forfeited. This is called "facilitator property," which could be the personal computer used to embezzle funds. The proceeds of the crime, such as the cash obtained directly from the embezzlement or items purchased with the money may also be forfeited. Additionally, the government may seize "substitute assets," assets obtained by the criminal that constitute neither facilitator property nor proceeds. In our embezzler scenario, if the bookkeeper embezzled \$150,000 and spent it on a lavish lifestyle, the government may seize the embezzler's house, 401(k) account, or other assets as a "substitute asset" under federal law. If asset forfeiture is a possibility, it should be fleshed out as much as possible in the prosecution memorandum. **Report to Whom?**

Once you see that the evidence makes out the prima facie elements of the crime, you must decide where to report. There are several places to consider making the initial report of the crime: local police, state police, the FBI, or another federal agency with jurisdiction. You can also report directly to one of the several prosecutor's offices, such as the local District Attorney, the United States Attorney's Office, the Attorney General's Office, or other state-based offices such as Florida's Office of the Statewide Prosecutor. There are advantages and disadvantages to all these options. For

example, the FBI usually has high monetary thresholds for opening an investigation, often requiring a loss of at least \$250,000. Some local agencies have instituted particular initiatives or task forces or operate within political climates that make certain cases more attractive. Understanding the loss thresholds and the local politics may make all the difference in finding the right law enforcement agency for your case. You can check the press releases the local district attorney's office, the nearest U.S. Attorney's Office, and the FBI or other federal agency for information about what cases have been prosecuted recently in these offices. Keep in mind, though, that many offices issue press releases only for significant or noteworthy cases, not run-of-the-mill embezzlements. Getting our \$150,000 embezzlement prosecuted will likely require the involvement of someone with personal contacts at the office.

The prosecution memorandum should be delivered to law enforcement at a formal presentation set up in advance. You must decide whether your client should attend or you should make the presentation alone. If your client makes a good impression and can stick to "just the facts," you may want to bring him with you to the meeting. If you do this, prepare your client for the interview by giving him a list of topics. Explain that questions should be answered with a quick "yes" or "no." You want your audience to see the case as clear cut. There must be no tirades. The client should be passionate about making the report. Law enforcement officers are quick to detect reluctance or hesitation. And how the business crime is reported can often influence how aggressively the official investigation is conducted. Sometimes, it is good to wait until after the client has had time to digest how the process works, to assess any risks to the client in reporting that you have identified through your initial and follow-up interview, and to prepare your client for the reporting process. Often, the lawyer should make the presentation alone.

Depending on the circumstances, the initial police report can be made at the law enforcement office such as a police station, at your law office, or elsewhere. You might be reporting to someone in uniform or to a plain-clothed detective. Law enforcement officers take reports all day, and your client must make a good first impression. During the presentation, you should talk to the police about whether to fire the person and whether that might interfere with investigation efforts that might be planned.

Along with the prosecution memorandum, you should provide any interview reports and the documentary evidence gathered during the investigation (the checks in our embezzlement scenario), during a formal presentation to the police and/or prosecutor. These presentations may last 30 minutes or more, and often consist of give-and-take discussion. Use the presentation to underscore how serious the client is about seeking prosecution. **It's Out of Your Hands** Once the prosecution memorandum is delivered and the presentation concluded, there is not much more you can do. The case is in the hands of the authorities. You may offer to serve as a facilitator if the police or prosecutor wants to gather additional evidence from your client or witnesses. During this part of the process, the police and prosecutor will be trying to confirm the evidence and facts presented in your prosecution memorandum or interview reports.

You must be prepared for the possibility that the police and/or prosecutor will disagree with your assessment of the matter and formally decline to prosecute the case. Usually, if “declination” (as it is called in the trade) is a possibility, the lawyer involved will detect some hesitation early on.

Prosecutors can have reservations about criminal prosecutions for several reasons, including the failure of the evidence to meet the “beyond a reasonable doubt” standard, difficulty in proving the “intent” element, or concerns about the client’s commitment to the case.

If the case is declined, it is difficult to credibly request that another agency to undertake and prosecute the case. You can do some fact finding, drill down into the facts, and try to demonstrate that the fraudster is dangerous and likely to do it again, and then take another run at the prosecutor or pick another venue for the presentation. But the chances of success after declination are very low. This underscores the importance of conducting a thorough investigation at the outset, preparing a detailed prosecution memorandum, and giving a powerful in-person presentation. Often the only option if the prosecutor has declined filing formal charges is to file a civil lawsuit and to develop evidence that will enable you to prevail in the civil case while also persuading the prosecutor to reconsider. This strategy should, however, only be undertaken after the prosecutor has indicated that the declination decision is grounded in the lack of evidence, that it may be revisited at a later date, and that there is likelihood of getting money out of the wrongdoer. It is important to consult with the prosecutor to determine the prosecutor’s views on a civil suit. Many prosecutors believe that parallel civil proceedings interfere with the criminal investigation or prosecution. While the subpoena power that you get with the filing of a civil case may develop evidence that you can share with the prosecutor, such evidence may complicate the criminal prosecution. The prosecutor may come to think you want a criminal prosecution merely to gain an advantage in the civil action you are contemplating. Prosecutors disdain this and will often decline a criminal prosecution if there is a perception that the criminal case is a tool to help gain leverage in the civil litigation. You should also be mindful that the ABA rule and many state ethics rules prohibit presenting, participating in presenting, or threatening to present criminal charges solely to obtain an advantage in a civil matter. Beyond being mindful of this ethical rule, the point is to consult with the prosecutor before undertaking a civil action related to the criminal case. If your presentation memorandum succeeds and formal charges are filed, you and your client should monitor the criminal case as it proceeds through the system. This is often a good time to review victims’ rights laws in your jurisdiction. You should write to the prosecutor advising that you and your client want to be heard before any plea offer is extended to the accused. Such a letter helps to ensure that if there is a change in prosecutors, the new prosecutor will be aware of your client’s request to be consulted. Discuss with the prosecutor whether you and your client should attend any hearings before the sentencing. While most victims’ rights laws provide that the victim may attend hearings, some prosecutors might view it as overkill, and care should be taken to respect the opinions of the prosecutor. In the meantime, have regular telephone contact or meetings with the prosecutor to monitor progress in the case. Also, consult with the prosecutor about what to do if the accused contacts your client, as there are

many different views about this issue. Once charged, the accused may either enter a plea of guilty or no contest or proceed to trial. Expect to have some considerable additional involvement in the process if the accused elects to proceed to trial, because the prosecutor will likely want to meet with your client to prepare the client for trial testimony. **Sentencing**

After the fraudster pleads guilty or is convicted at trial, the court will have a sentencing hearing. The sentencing hearing is the culmination of the entire process. If the case is resolved by a plea, some state courts will often sentence the defendant at the same time as the plea is entered. In federal court, the courts typically impose sentence after considering a detailed pre-sentence report prepared by federal officers, a victim impact statement (which you may have a hand in drafting), your client's testimony, and any sentencing mitigation evidence the defendant presents. You should consult with the prosecutor about the sentencing hearing well before it is to occur and plan on attending with your client. It is often important for the sentencing judge to see the victim in court. At sentencing, the court will pronounce and impose formal sentence on the accused. The sentence may include jail time, probation time, a fine, and/or restitution. You should consult the laws in your jurisdiction to determine whether you may make collateral use of the criminal judgment. Under federal law, for example, the court's order of restitution in a criminal case may be converted to an abstract of judgment in the amount of the restitution order and constitutes a lien on the property of the defendant located in that State "in the same manner . . . as a judgment of a court of general jurisdiction in that State." See 18 U.S.C. §3664. Thus, a victim named in a federal restitution order may endeavor to collect on the judgment as with any other judgment obtained. It is important that you explain the sentence and all its implications to your client.

## **Conclusion**

It can take a lot of effort to get those responsible for committing business crimes criminally prosecuted. While there are advantages to this strategy, such as not having to pay the prosecutor and getting the satisfaction of punishing the wrongdoer, there is also a downside: you and your client must cede control of the case to the prosecutors. The prosecutors may have different views of the evidence, the amount of loss, the strategy to employ, and other key issues. The prosecutors may decide to expand the investigation and target other individuals or even the business itself. Or, the prosecutor may decide that the evidence is insufficient to proceed. It is critical that the lawyer involved in such a representation understand the process, procedures and techniques that may be utilized in getting those responsible prosecuted, and the potential risks. It may be advisable to retain an attorney with the requisite expertise, and a private investigator to increase the chances of successfully persuading law enforcement to prosecute the case and to protect the client's rights once a prosecution is instituted. The legal services you provide can make a huge difference in whether your client achieves its objectives.



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