

# Expert Guide

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CORPORATE *LiveWire*

## Fraud & White Collar Crime

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# Payback: Criminal or Civil?

By Luke McGrath

The reaction is visceral: “*That [insert explosive/executive/employee/fiduciary name here] stole our money. He/she lied to our faces. Now we are left holding the bag and cleaning up his/her mess. It is time for payback, let’s call the cops.*”

As General Counsel or Chairmen of the Board, you must fight against this normal reaction. Sure, notifying law enforcement may be advisable and, indeed, necessary, but before doing so, it is important for a company and its managers to know all the facts, conduct an analysis of the risks, and prepare the proper presentation for law enforcement. Equally important is evaluating your obligations under any relevant insurance policies and notifying your insurer. The difference between acting on instinct and taking measured steps to assess the situation, pursue the appropriate course of conduct, and package your case may be the difference between writing off the costs arising out of criminal conduct (and exposing the company to claims of negligence) and getting both PAYBACK and PAID-BACK.

## Do You Or Do You Not Notify Law Enforcement?

### Law Enforcement Does Not Always Recognise Your Case As A Crime To Be Prosecuted

Every victim believes the crime he or she is reporting is important – and rightly so. However, the truth is that even for corporate crime, law enforcement personnel may not prioritise your complaint. In fact, they may not consider a reported crime to be within their scope of authority, and disputes that hinge upon potentially criminal activity may be viewed as private matters between two sophisticated parties. For example, a police department may not consider activity arising out of a contract dispute to be a crime. For that reason, actions that may give rise to civil fraud liability may not be prosecuted. Other things to remember:

- Law enforcement is busy.
- Law enforcement is a blunt instrument not a precision instrument.
- Law enforcement may not be the best way to resolve your specific needs.



- Not every criminal goes to prison, but if a person is in prison, they cannot make money to pay you back
- You may wish to pursue a prosecution to make an example of a fiduciary or to reassure investors (in addition or in lieu of payback) – be sure to clearly define these goals in advance and get “buy-in” from all relevant stakeholders.

## Is It Always An Either/Or?

In addition, the option of whether or not to contact law enforcement is not an either/or decision. The major issue is TIMING - when is it appropriate to notify law enforcement and for what purpose? Remember, the failure to report a known crime is a misdemeanor when you have actual knowledge of its commission and your silence could be construed as concealing that crime. See 18 USC § 4. Accordingly, careful evaluation and understanding of all the facts may result in an obligation to contact law enforcement – but you must know the facts.

Notifying law enforcement and your insurer may be best handled once you are confident that most if not all of the relevant facts are known. Then, down the road when you have had the benefit of

time and more information, you can revisit the question of whether law enforcement is the correct option. Remember:

- Whatever you do, make a choice – don’t let others make it for you.
  - The running of limitations periods for civil remedies becomes important for a financial crime because the limitations period may start before the fraud is actually discovered.
  - Decide which goes first: (a) a civil investigation and claim; or (b) a criminal complaint?
- PRACTICE NOTE:** pursuing a criminal complaint may hinder your ability to investigate and bring a civil claim (since prosecutors may even seek to stay your civil case).

## The Do's and Don'ts: Working with Law Enforcement

Once you have decided that working with law enforcement is the right choice, remember:

### Do:

- Determine whether you should approach State or Federal law enforcement – calling “the Feds” is tempting, but a State prosecutor may be the right choice depending on the facts.
- Package your case – make it simple and provide the tools a busy law enforcement representative will need to immediately see that a crime has been committed and can be proven. This is extremely important – you will want to present the case on a silver platter.
- Prosecute for the prosecutor – investigate and provide updates to law enforcement. Remember documents are usually key to packaging and refining your case – know your own documents and provide them, timelines and summaries of complex issues.
- Keep informed and engaged with law enforcement to avoid duplicative investigation and to ensure coordinated efforts,

- Discuss media strategy with law enforcement – decide whether or not to talk to media and how to do so
- Consider hiring a private investigator – be sure to consider this carefully because it may or may not be appropriate depending on timing, law enforcement preference and the facts.

### Don't:

- Threaten an executive or employee with criminal prosecution.
- Blab: whether it is internally or outside the company, a prosecution (and a reputation) could be ruined if you or anyone in management talks to others about the subject of the case and that conversation aids the defense.
- Assume your case will be a priority – follow up.
- Resist inquiry – law enforcement will not assist if they are not given access.

## Restitution – Do you really get “paid-back” or is it just payback?

The most frustrating aspect of any civil investigation or criminal prosecution is coming to the realisation that the responsible party no longer has assets sufficient to cover the damages they have caused. Remember to:

- Conduct a cost/benefit analysis – a civil investigation may be more costly than assisting law enforcement (if they will take the case).
- Manage expectations – criminals don’t usually save their money, so get “buy-in” on the goals to be achieved: payback vs. getting paid-back.
- Chase assets offshore – don’t overlook that “business” trip to Nevis on an executive’s expense report.
- A settlement/plea bargain is money in the bank – striking a deal may save you money and get you paid-back, even if the responsible party gets only a slap on the wrist.

- Restitution – it works, or does it? Civil disgorgement, freezing of assets and other civil remedies may beat State-imposed Restitution.

<b><u>Checklist for Crisis Management</u></b>	
1. Reread the relevant employment agreements, corporate policies, and other documentation.	<input type="checkbox"/>
2. Get preliminary facts without confronting the responsible party.	<input type="checkbox"/>
3. Make a preliminary decision: Notify law enforcement now or get more facts?	<input type="checkbox"/>
4. Get more facts and conduct non-confrontational interview with responsible party if possible. (This may be tricky: Should you alert a target he or she is in fact a suspect of a crime? Should you advise the target to get an attorney, or at least advise that you may use information against him/her? Work these items out in advance with outside counsel (or internally as needed).)	<input type="checkbox"/>
5. Make a choice: pursue civil remedies (including alternative dispute resolution), criminal charges, or both.	<input type="checkbox"/>
6. If pursuing both, evaluate cost/benefits of proceeding first with one or the other: Civil first? Criminal first?	<input type="checkbox"/>
7. Choose whether or not to involve the media.	<input type="checkbox"/>
8. For restitution: Read your insurance coverage – make sure there is no cap for claims arising out of "Employee Dishonesty."	<input type="checkbox"/>
9. Work with your carrier so insurance payments are not characterised improperly as reimbursements for embezzlement, for example, if the reimbursement is actually for something else, like property damage.	<input type="checkbox"/>
10. If you get restitution, ensure the amount is in addition to any insurance proceeds and not to be reduced by recovery from insurance (unless it results in a windfall).	<input type="checkbox"/>

### **Conclusion: Don't Let Crime Pay – Get Payback AND Get Paid-Back**

This article provides a checklist of some basic topics to consider, but a company's General Counsel must assess the need for outside assistance in addition to the assessment discussed above. Outside counsel with law enforcement experience (or experience working with law enforcement) may make the difference. In any event, in order to improve the odds that the responsible party is brought to justice and that the company is reimbursed for the damages caused, it is imperative to manage the process and make the right decisions at the outset. Doing so will save time and money and can improve the chances of getting both payback and paid-back.

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