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This is the authors' final, accepted and refereed manuscript to the article published in

International Journal of Private Law

Vol 6 No.4, 2013, pp. 383 - 394

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White-Collar Crime Lawyers: The Case of Transocean in Court

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Second revision of research paper submitted to the

International Journal of Private Law

January 3, 2012

Abstract

White-collar criminals are persons of respectability and high social status, who commit financial crime in the course of their occupation. In a national sample of 305 convicted criminals, the average age was 48 years old, and the average sentence was 2.2 years in prison. White-collar crime lawyers defend criminals in court. The case of Transocean is presented in this article, where the company and their prosecuted advisors will probably spend about \$10 million on lawyers in the first round in a district court. This emphasizes a distinguishing feature of white-collar criminals from street criminals, where white-collar criminals can pay for a knowledgeable defense. Some criminals may have quite famous lawyers, who are well-known for getting their probably guilty clients off. A knowledge level perspective is applied in this paper, where the relative knowledge between defense and prosecution has an influence on how the case is handled and possibly even on the court verdict.

Keywords: White-collar criminals; financial crime; Empirical study; Knowledge management.

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Introduction

White-collar crime is defined both in terms of the offence and in terms of the offender. The offence is typically financial crime such as fraud, tax evasion, corruption and insider trading. The offender is typically a person of respectability and high social status, who commits crime in the course of his occupation (Sutherland, 1949). Sutherland's (1949) theory of white-collar crime has served as a catalyst for an area of research that continues today (e.g., Alalehto and Larsson, 2009; Benson and Simpson, 2009; Blicke et al., 2006; Goldstraw-White, 2012; Robb, 2006).

When prosecuted in court, white-collar criminals are defended by lawyers. A lawyer is a knowledge worker specializing in the development and application of legal knowledge to solve client problems (Becker et al., 2001). Lawyers represent their clients in legal matters by presenting evidence and legal arguments as well as providing counsel to clients concerning their legal rights and obligations (Galanter and Palay, 1991; Mountain, 2001; Nottage, 1998; Phillips, 2005).

In this article, we study the role of lawyers and their white-collar criminal clients in terms of agency theory, where the lawyer is the agent and the white-collar criminal is the principal. Furthermore, we will discuss the specific case of Transocean – a multinational company with headquarters in the USA and later in Switzerland - and the company's tax advisors in Norway, since both the company and the advisors were prosecuted in court in 2012/2013. Transocean was prosecuted in court because – among other issues – an oil rig was transported out of Norwegian waters, then sold in international waters, and then transported back into Norwegian waters for further oil drilling. Sales profits were not reported to the Norwegian tax

authorities. Transocean was accused of underpaying in total up to \$1.8 billion in taxes. This became a tax evasion case in court.

Research on the roles of lawyers in white-collar crime is important since it provides new insights into a profitable area of legal advice. For example, the client may pay for several top-rated lawyers to defend the case in court.

Characteristics of Lawyers

Lawyers are competent in general legal principles and procedures and in the substantive and procedural aspects of the law; thus they have the ability to analyze and provide solutions to legal problems (Dibbern et al., 2008). Lawyers, as knowledge workers, apply a variety of knowledge categories such as declarative and procedural knowledge. Most lawyers spend several hours a day answering queries, generally the types of queries you cannot really capture or look up in a know-how database. As part of the execution of knowledge processes, knowledge lawyers can decide for themselves and is free to decide whether and what knowledge they need, what knowledge they want to evaluate, develop, implement, and communicate. When several lawyers work on a case, there is often an independence of professionals working together, which might be characterized as collective individualism or individualistic collectivism that makes the sharing of knowledge both dynamic and random. Lawyers, as knowledge professionals with a great deal of autonomy, are free to choose an individual approach to knowledge processes, including the need, storage, access, sharing, application, creation, and e evaluation of knowledge. Autonomy of the performance is an important structural feature that can promote knowledge processes, since such autonomy encourages individuals to develop new knowledge. At the same time, several people (brains) looking at the same problem can come up with different, novel approaches to solving the problem.

Basic knowledge is required for a lawyer as a professional to understand and interpret information, and basic knowledge is required for a law firm as a knowledge organization to receive inputs and produce outputs (Galanter and Palay, 1991). Advanced knowledge is knowledge necessary to get acceptable work done (Zack, 1999). Advanced knowledge is required for a lawyer as a knowledge worker to achieve satisfactory work performance, and advanced knowledge is required for a law firm as a knowledge organization to produce legal advice and legal documents that are acceptable to clients. When advanced knowledge is combined with basic knowledge, then we find professional knowledge workers and professional knowledge organizations in the legal industry (Mountain, 2001; Nottage, 1998; Phillips, 2005). Innovative knowledge is knowledge that makes a real difference. When lawyers apply innovative knowledge in analysis and reasoning based on incoming and available information, then new insights and possible novel solutions are generated in terms of situation patterns, actor profiles and client strategies.

Knowledge levels were here defined as basic knowledge, advanced knowledge and innovative knowledge (Parsons, 2004).

An alternative approach is to define knowledge levels in terms of knowledge depth: know-what, know-how, and know-why, respectively. These knowledge depth levels represent the extent of insight and understanding about a phenomenon. While know-what is the simple perception of what is going on, know-why is a complicated insight into cause-and-effect relationships about why things are going on:

1. *Know-what* is knowledge about what is happening and what is going on. A lawyer perceives that something is going on, that might need his or her attention. The lawyer's insight is limited to the perception of something happening. The lawyer understands neither how it is happening nor why it is happening.

2. *Know-how* is a lawyer's knowledge about how a legal case develops, how a criminal behaves, how investigations can be carried out, or how a criminal business enterprise is organized. The lawyer's insight is not limited to the perception that something is happening; he or she also understands how it is happening or how 'it is'. Similarly, know-how is present when the lawyer understands how legal work is to be carried out and how the client will react to advice put forward in the process.
3. *Know-why* is the knowledge representing the deepest form of understanding and insights into a phenomenon. The lawyer does not only know that it has occurred and how it has occurred, but he or she also has developed an understanding of why it has occurred or why it is like this. It is a matter of causal understanding, where cause-and-effect relationships are understood.

A law firm is a business entity formed by one or more lawyers to engage in the practice of law. Most law firms use a partnership form of organization. In such a framework, lawyers who are highly effective in using and applying knowledge for fee earning are eventually rewarded with partner status, and thus own a stake in the firm, resulting in an income often ten times as much as initially earned.

In many countries, lawyers and law firms enjoy privileges that make them attractive to white-collar criminals and crime. For example, money placed in a client account at a Norwegian law firm is strictly confidential. The law firm does not have to tell tax or other authorities about names or amounts. Knowing that some of this money flow freely to and from tax havens like the Cayman Islands and knowing that some of the money originates from white-collar crime makes the job of the prosecution extremely difficult (Vanvik, 2011).

Another example is Danish law firms where there is an "in kassu" system. Many inkassus are run by law firms, and they buy debts and chase "debtors" for many companies in Denmark.

The reason is that unlike non-law firms, they are authorized and not subject to regulation. The only way a complaint can be filed is through the law firms' own organization Board of Lawyers (Trustpilot, 2013).

Agency Theory with Principal and Agent

While the client can be defined as the principal who needs a lawyer's knowledge work, the lawyer can be defined as the agent carrying out knowledge work on behalf of the client. In this perspective, the relationship between client and lawyer can be studied in terms of agency theory with principal and agent. Agency theory has broadened the risk-sharing literature to include the agency problem that occurs when cooperating parties have different goals and division of labor. The cooperating parties are engaged in an agency relationship defined as a contract under which one or more persons [the principal(s) engage another person (agent) to perform some service on their behalf] delegate some decision making authority to the agent (Jensen and Meckling, 1976). Agency theory describes the relationship between the two parties using the concept of a contract.

According to Eisenhardt (1985), agency theory is concerned with resolving two problems that can occur in agency relationships. The first is the agency problem that arises when the desires or goals of the principal and agent conflict and it is difficult or expensive for the principal to verify what the agent is actually doing. The second is the problem of risk sharing that arises when the principal and agent have different risk preferences. The first agency problem occurs when the two parties do not share productivity gains. The risk-sharing problem might be the result of different attitudes towards the use of new technologies, for example. Because the unit of analysis is the contract governing the relationship between the two parties, the focus of the theory is on determining the most efficient contract governing the principal-agent relationship given assumptions about people [e.g., self-interest, bounded rationality, risk

aversion)], organizations (e.g., goal conflict of members), and information (e.g., information is a commodity that can be purchased).

Garoupa (2007) applied agency theory to criminal organizations. He models the criminal firm as a family business with one principal and several agents. He has an illegal monopoly in mind where it is difficult to detect and punish the principal unless an agent is detected. Furthermore, it is assumed that agents work rather independently so that the likelihood of detection of one agent is fairly independent from that of another. An example of such agents is drug dealers in the street with the principal being the local distributor. Another example would be agents as extortionists or blackmailers distributed across a city with the principal being the coordinator of their activities providing them with information or criminal know-how.

Gross (1978: 65) discusses criminals as agents for a criminal organization in the following way:

Although organizations are here held to be criminogenic and although courts no longer exhibit much hesitation in charging the organization itself with crime, organizations of course cannot themselves act - they must have agents who act for them. Who will the persons be who will act for organizations in their criminal behavior?

In general, agency models view corruption and other kinds of financial crime as a consequence of the principal's inability to effectively prevent the agents from abusing their power for personal gain. The main reasons for this inability are the principal's lack of information about the agents' work, lack of effective checks and balances, and ineffective enforcement and punishment for criminal executives (Li and Ouyang, 2007).

The Transocean Case

Transocean is accused of having underpaid taxes by up to 10 billion Norwegian crowns (\$1.8 billion) in 2000-2002, according to the police unit that investigates economic crime, Økokrim, in Norway. Police say the alleged underpayments stem from several transactions in connection with the sale of 12 oil rigs from Transocean's Norwegian subsidiary to other company units in the Cayman Islands. Taxes are a key part of Transocean's strategy since its rigs move between jurisdictions, and "it is common in the oil rig business", says Stephen L. Hayes, executive vice president of tax matters at Transocean. The company, after growing to become the world's largest drilling contractor via three acquisitions of rivals worth \$27 billion in the decade to 2009, rebased to Switzerland from the Caymans for tax reasons. The company, which had operational headquarters in Houston before the Swiss move, has also shifted assets between subsidiaries over the years, which are at the heart of the Norwegian case (Klesty and Reddall, 2011).

Norwegian authorities indicted two companies owned by owned by offshore drilling rig contractor Transocean Ltd and three tax advisers over suspicions of tax fraud. "From 1996/97, the Transocean Group's master plan was to concentrate the ownership of the Group's Norwegian rigs in companies registered in the Cayman Islands", Økokrim said in the 24-page indictment issued this week. The final decision in the Norway tax case was to be made by a Norwegian court, said Morten Eriksen, a lawyer for Økokrim. Transocean denied the allegations and said it intended to clear its name in court. "The indictment is based on an inadequate comprehension of the facts", defense counsel Erling O. Lyngtveit said in the statement. "Moreover in our opinion Økokrim base their conclusions on peculiar and original interpretation of Norwegian and international tax legislation (Klesty and Reddall, 2011).

The largest tax evasion case in Norwegian history started in December 2012, with prosecutors claiming that tax advisors for rig firm Transocean must have known they were misleading tax authorities. Raids on Transocean's offices in Stavanger in Norway and years of investigation

by Økokrim led to the firm, its advisers and affiliates being charged with evading taxes. Prosecutors claimed that Transocean’s tax planning was managed in detail from its Houston headquarters, with Norwegian tax advisers at Ernst & Young as central players. A tax attorney at Oslo law firm Thommessen is also involved in the case, but local Transocean management in Norway is not believed to have been involved. Prosecutors claim the alleged tax evasion was conducted from Houston headquarters (News, 2012).

Sample of White-Collar Criminals

In this research on white-collar crime, convicted criminals have been registered in a database since the end of 2009. Every year, there is an average of one hundred criminals convicted. At the end of 2012, the database consisted of 305 convicted white-collar criminals. Some characteristics for the criminals and crimes are listed in Table 1. The average age of a white-collar criminal in Norway is 48 years old. The average prison sentence is 2.2 years in jail. The average amount involved in the crime is 47 million kroner (about \$8 million). The average size of the organization where the criminal had his or her occupation was measured in terms of business revenue and business employees, where the average number of employees was 124 people.

| Total 305 criminals | Mean | Median | Minimum | Maximum |
|----------------------------|-------------------|------------------|--------------------|----------------------|
| Age when convicted | 48 years | 47 years | 17 years | 77 years |
| Age when crime | 43 years | 42 years | 16 years | 73 years |
| Years prison | 2.2 years | 1.6 years | 0.04 years | 9 years |
| Crime amount | 47 million kroner | 5 million kroner | 0.1 million kroner | 1,200 million kroner |

| | | | | |
|--------------------|-----------------------|----------------------|---------------------|------------------------|
| Personal income | 335,000 kroner | 170,000 kroner | 0 kroner | 4,000,000 kroner |
| Personal tax | 140,000 kroner | 60,000 kroner | 0 kroner | 1,700,000 kroner |
| Personal wealth | 1,514,000 kroner | 0 kroner | 0 kroner | 62,000,000 kroner |
| Business revenue | 190 million kroner | 11 million kroner | 1 million kroner | 2000 million kroner |
| Business employees | 124 persons | 10 persons | 1 person | 2000 persons |

Table 1. Characteristics of convicted white-collar criminals and crimes

The Transocean Court Case

Oslo District Court started its proceedings in the Transocean case on December 5, 2012. It was scheduled to last for 8 months. A total of 29 persons were presented in court:

- Public prosecutor Morten Eriksen with four associates (5 persons).
- Accused six Transocean executives from the USA with six defense lawyers (12 persons), prosecuted because of tax fraud
- Accused lawyer Sverre E. Koch with three defense lawyers (4 persons), prosecuted for tax fraud advice.
- Accused lawyer Klaus Klausen with three defense lawyers (4 persons), prosecuted for tax fraud advice.
- Accused lawyer Einar Brask with three defense lawyers (4 persons), prosecuted for tax fraud advice.

It was estimated that the accused persons and Transocean would pay about \$10 million for their defense lawyers, even though defense can be obtained for free in Norwegian courts. It is interesting to note that the prosecution had only 17 percent of the engaged personnel in the

court room. In addition to the prosecution and defense, there were 3 judges in the district court on this case, making a total of 32 persons for 8 months in court.

From a legal perspective, this situation is characterized by efforts to conclude whether the charged persons and company are guilty or not guilty. From a knowledge perspective, this situation is characterized by a competition as illustrated in figure 1.

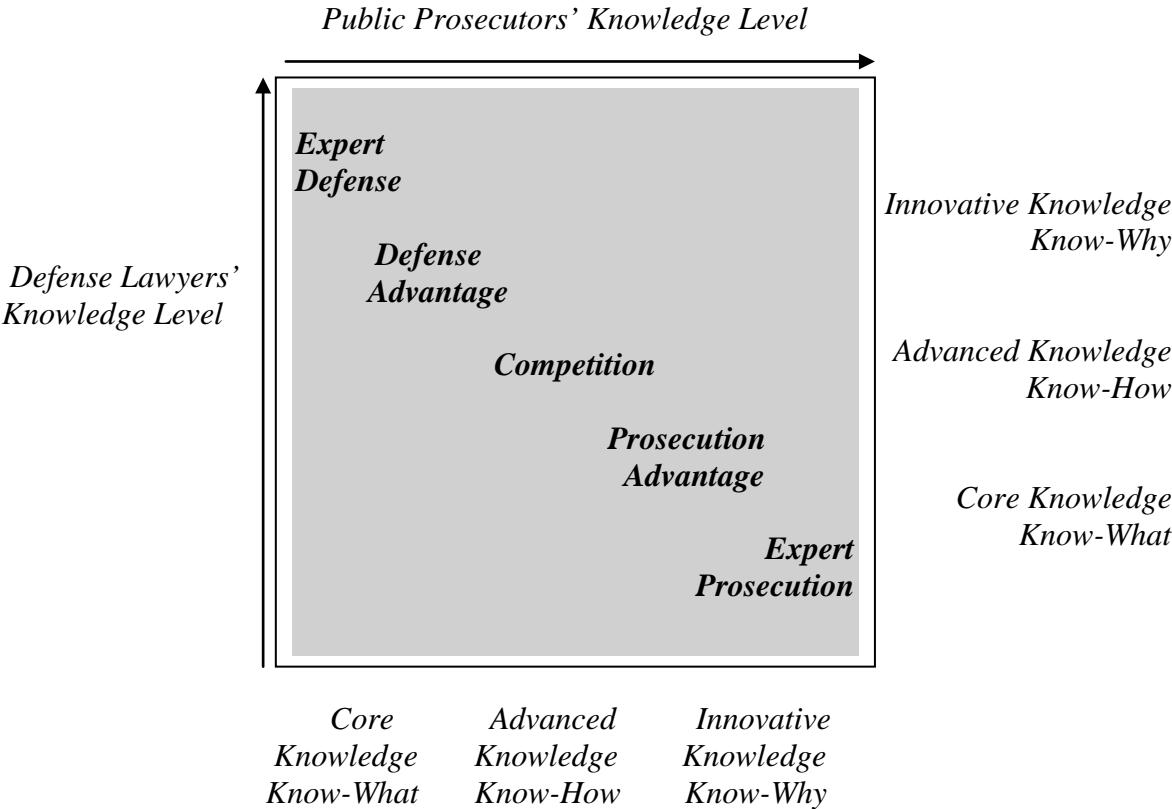


Figure 1. Knowledge Rivalry between the Prosecution and the Defense in Court

Depending on the relative knowledge levels of prosecution and defense, a knowledge rivalry with three alternative situations might exist as illustrated in figure 1:

1. Defense lawyers are experts, while prosecutors are not experts in areas such as international tax regulations, tax havens, global company operations, and management

of international operations. Defense lawyers have innovative knowledge (know-why), while prosecutors have core knowledge (know-what).

2. Prosecutors are experts, while defense lawyers are not experts in Norwegian laws and regulations. Defense lawyers have core knowledge (know-what), while prosecutors have innovative knowledge (know-why).
3. Both parties are at about the same knowledge level, leading to a real knowledge competition in court between the defense lawyers and prosecutors.

Discussion

While street criminals such as burglars and rapists seldom can afford several top defense lawyers for weeks and months in court, white-collar criminals often can afford it. This discrepancy emphasizes the importance of Sutherland's (1949) seminal work on white-collar crime. The most economically disadvantaged members of society are not the only ones committing crime. Members of the privileged socioeconomic class are also engaged in criminal behavior (Brightman, 2009) and the types of crime may differ from those of the lower classes. Some examples of the former are business executives bribing public officials to obtain contracts, chief accountants manipulating balance sheets to avoid taxes, procurement managers approving fake invoices for personal gain (Simpson and Weisburd, 2009), or tax evasion as in the Transocean case.

Criminal behavior by members of the privileged socioeconomic class is labeled white-collar crime (Benson and Simpson, 2009). As mentioned earlier, Sutherland (1949), in his seminal work, defined white-collar crime as crime committed by a person of respectability and high social status in the course of his occupation. According to Brightman (2009), Sutherland's theory of white-collar crime from 1939 was controversial, particularly since many of the academics in the audience perceived themselves to be members of the upper echelon of

American society, where white-collar criminals can be found. Despite his critics, Sutherland's theory of white-collar criminality served as the catalyst for an area of research that continues today. In particular, differential association theory proposes that a person associating with individuals who have deviant or unlawful mores, values, and norms learns criminal behavior. Certain characteristics play a key role in placing individuals in a position to act illegally. These include the proposition that criminal behavior is learned through interaction with other criminal persons in the upper echelon and the interaction that occurs in small intimate groups who might be involved in corruption, money laundering or embezzlement (Hansen, 2009).

Sutherland argued that criminal acts are illegalities that are contingently differentiated from other illegalities by virtue of the specific administrative procedures to which they are subject. Some individual white-collar offenders avoid criminal prosecution because of the class bias of the courts (Tombs and Whyte, 2007). White-collar crime is sometimes considered creative crime (Brisman, 2010).

Brightman (2009) differs slightly from Sutherland regarding the definition of white-collar crime. While societal status may still determine access to wealth and property, he argues that the term white-collar crime should be broader in scope and include virtually any non-violent act committed for financial gain, regardless of one's social status. For example, access to technology, such as personal computers and the Internet, now allows individuals from all social classes to buy and sell stocks or engage in similar activities that were once the bastion of the financial elite.

In Sutherland's definition of white-collar crime, a white-collar criminal is a person of respectability and high social status who commits crime in the course of his occupation. This excludes many kinds of crime of the higher class, e.g., most of their cases of murder, adultery, and intoxication, since these are not customarily a part of their white-collar business activities

(Benson and Simpson, 2009). It also excludes lower class criminals committing financial crime, as pointed out by Brightman (2009).

What Sutherland meant by respectable and high social status individuals, is not quite clear, but in today's business world we can assume he refers to business managers and executives. They are, for the most part, individuals with power and influence that are associated with respectability, trust and high social status. Part of the standard view of white-collar offenders is that they are mainstream, law-abiding individuals. They are assumed to be irregular offenders, not people who engage in crime on a regular basis (Benson and Simpson, 2009: 39):

Unlike the run-of-the-mill common street criminal who usually has had repeated contacts with the criminal justice system, white-collar offenders are thought not to have prior criminal records.

However, it might be that they have not been caught previously. As part of the white-collar criminal definition, the role of class has been highly contested, because the status of an offender may matter less than the harm done by someone in a trusted occupational position. Croall (2007) argues that the term crime is also contentious, since many of the harmful activities of businesses or occupational groups are not subject to criminal law and punishment but administrative or regulatory law and penalties and sanctions. Therefore, some have suggested a definition of white-collar crime as an abuse of a legitimate occupational role that is regulated by law, typically representing a violation of trust.

When white-collar criminals appear before their sentencing judges, they can correctly claim to be first-time offenders. They are wealthy, highly educated, and socially connected. They are elite individuals, according to the description and attitudes of white-collar criminals as suggested by Sutherland.

Therefore, very few white-collar criminals seem to be put on trial, and even fewer higher class criminals are sentenced to imprisonment, and if they are, they go to a type of prison that is said to be a 'country club' type. This is in contrast to most other financial crime sentences, where the financial criminals who appear in the justice system and are typically not wealthy, highly educated, or socially connected. White-collar criminals are not entrenched in traditional criminal lifestyles as are common street criminals. Some of them belong to the elite in society, and are typically individuals owning, employed by or in legitimate organizations.

What Podgor (2007) found to be the most interesting aspect of Sutherland's work is that a scholar needed to proclaim that crimes of the "upper socioeconomic class" were, in fact, crimes that should be prosecuted. It is apparent that prior to the coining of the term white-collar crime, wealth and power allowed some persons to escape criminal liability. These individuals were characterized by high status, enjoying high levels of trust, and their criminal acts were made possible by their legitimate employment, special knowledge, or corporate ownership.

Why would white-collar crime lawyers be different from other specialist lawyers? Those who can afford will always hire the best lawyers to defend or argue their case. The rich and powerful will always have better access to justice because they can pay for the services of lawyers who have expertise on the case at issue and are being paid for the hours they render versus a public defense attorney who does not have the time to study rigidly or devote his or her time to the case. Examples are divorce cases in the US, the UK or Italy, where parties hire the best divorce lawyers. It could also be that lawyers employed in the public sector are often not as brilliant as their counterparts. Top law firms often hire top law graduates, and those who cannot make it in the profession, may end up outside the firms.

White-collar crime lawyers are different from other specialist lawyers because of the knowledge gap, the resource gap and the uncertainty whether or not it is a crime. Corporate

financial crime cases have a tendency to be associated with great uncertainty in terms of know-what, know-how and know-why. This uncertainty makes judges – who are not necessarily familiar with international business operations – uncertain whether or not it is a crime. A situation is then created in court, where it is very much up to defense lawyers to present the case in such a manner that it seems to be outside punishable conditions. Defense lawyers can presents causes and links in the case as business evidence for pleading not guilty, where judges have a hard time following the business lines, business actors and consequences in relation to Norwegian law.

Conclusion

Our research on convicted white-collar criminals in Norway has created a database of 305 cases from the end of 2009 to the end of 2012. A newly emerging court case is concerned with tax evasion by Transocean and tax advice from three tax lawyers, all of whom are defendants. The district court ruling is expected in 2014. It is expected that the case will move on into a court of appeals, and possibly the Supreme Court may consider a final judgment in the Transocean case in 2016 or 2017. This research is not concerned with whether or not the persons and the company are guilty as charged. Rather, this paper has presented the knowledge management view on white-collar crime cases, where white-collar criminals can afford a much better defense than street level criminals. This discrepancy emphasizes the importance of the white-collar crime concept as defined by Sutherland (1949) in his seminal work. The agency theory further emphasized role importance of principal (criminal) and agent (lawyer) for privileged white-collar criminals.

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