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DOJ, Heal Thyself

Need for a Compliance Program Against Prosecutorial Misconduct

By Jim Walden and Georgia Winston

Federal prosecutors have rightly demanded that corporations invest time and money in compliance programs to combat corporate crime. The Department of Justice (DOJ) has enforced this imperative with a big stick: If an employee breaks the law while engaged in the company's business, the company's lack of an "effective compliance program" is a ground for imposing the "corporate death penalty," as in the case of Arthur Andersen, or a range of lesser (but still severe) penalties.

But what about compliance in the business of dispensing justice? The uptick in implosions of high-profile criminal cases has been cause for concern among the DOJ's most ardent supporters. Policymakers need to ask whether the DOJ is doing as much to mitigate its own risks of employee misconduct as it requires of the companies it investigates and prosecutes.

DOJ's Standards for Others Are High

Companies that adopt weak compliance programs, or none at all, face similar risks: corporate prosecution. The key consideration, according to the now-famous Holder Memo, is "whether the program is adequately designed for maximum effectiveness in preventing and detecting wrongdoing by employees and whether corporate management is enforcing the program or is tacitly encouraging or pressuring employees to engage in misconduct to achieve business objectives." ("Bringing Criminal Charges Against Corporations," DOJ memorandum, June 16, 1999.)

The DOJ's expectations are sometimes punctuated by tough-talking prosecutors. "If you don't have a good compliance program and we find out," one DOJ official warned executives, "we will give you a compliance program. I guarantee it will be something not to your liking." ("Top DOJ Official Says Better Prosecutions Coming," *Compliance Week*, June 8, 2007.) Compliance program failings are often met with extended and expensive "independent monitorships," even in cases where the scope of the wrongdoing was very limited in comparison with a target company's overall global business operations.

Shared Pain?

Meanwhile, some courts have acted with unprecedented force after finding misconduct by federal prosecutors. A few failed cases have affected our foreign relations and the fate of elections, and resulted in dismissed indictments, public censure, injunctive relief, sanctions, and criminal investigation of the prosecutors themselves. These sanctions have had a ripple effect on other prosecutions.

In the Blackwater case, involving the alleged shooting of 34 Iraqi civilians, the judge found that line-level prosecutors had misused involuntary statements from the defendants to gather other evidence. The judge criticized the prosecutors' "reckless behavior," finding that they had "purposefully flouted the advice of [other prosecutors] when obtaining the substance of the defendants' compelled statements, and in so doing, knowingly endangered the viability of the prosecution." (*U.S. v. Slough*, No. 08-cr-360, 2009 WL 5173785 (D.D.C. Dec. 31, 2009)). The effect of the dismissal had international implications, as the Iraqi government denounced the situation as "unjust," and a U.S. commander expressed concern over a "backlash" against other security companies in Iraq. ("Iraq Says U.S. Blackwater Case Dismissal 'Unacceptable,'" *The New York Times*, Jan. 1, 2010).

The DOJ ultimately dropped charges against former Alaska Senator Ted Stevens, but only after the damage had been done and Stevens lost his bid for reelection. (*U.S. v. Stevens*, No. 08-cr-231 (D.D.C. Apr. 7, 2009)). And the prosecutorial misconduct in *Stevens* led prosecutors to seek remand in two related cases in which the defendants had already been convicted and begun to serve their sentences. The appeals court ordered those defendants released pending the district court's decision on remand. *U.S. v. Kott*, 333 Fed. App'x 204 (9th Cir. 2009); *U.S. v. Kohring*, 334 Fed. App'x 836 (9th Cir. 2009).

In the Broadcom case, a disgusted, conservative judge concluded that prosecutors had "intimidated and improperly influenced" three critical defense witnesses and had "distorted the truth-finding process and compromised the integrity of the trial." *U.S. v. Ruehle*, No. 08-cr-139 (transcript, Dec. 15, 2009). On that basis, the court dismissed the stock-options backdating indictments against two defendants. The judge even vacated the conviction of another defendant who had already accepted a guilty plea because of the court's "grave concerns over the government's tactics." *U.S. v. Samueli*, No. 08-cr-156 (Dec. 14, 2009). All dismissals were with prejudice against further prosecution.

Misconduct in the Detroit "sleeper cell" terrorism case was even more egregious. The judge dismissed several charges against three defendants, and granted a new trial on remaining charges after a court-ordered review by the DOJ found that the trial team had engaged in a widespread pattern of misconduct. *U.S. v. Koubriti*, 336 F. Supp. 2d 676 (E.D. Mich.

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2004). The court's rebuke characterized the prosecution's misconduct as "prevalent and pervasive," making it "abundantly clear [that] the prosecution misled the Court, the jury, and the defense as to the nature, character and complexion of critical evidence that provided important foundations for the prosecution's case." The prosecutor's misconduct stepped so far over the line that he and the State Department employee who had assisted in the prosecution were indicted for conspiracy and obstruction of justice. *U.S. v. Convertino*, No. 06-cr-20173 (E.D. Mich. 2006). They were eventually acquitted.

The Tip of the Iceberg

These high-profile cases are just the tip of the iceberg. A startling number of courts have found investigative misconduct, disclosure violations, witness interference, and trial misconduct. Courts in the First, Third, Seventh, Eighth, and Ninth Circuits recently reversed convictions because prosecutors made improper statements to jurors during trial. Courts in the Ninth and D.C. Circuits granted new trials and dismissed indictments because prosecutors failed to disclose key evidence to the defense. In the Eleventh Circuit, a judge went to the unusual length of entering injunctive relief after finding that prosecutors had violated their discovery obligations and launched a retaliatory investigation of defense counsel during trial. The judge also publicly reprimanded and imposed sanctions against the prosecutors for "acting with gross negligence," and "vexatiously and in bad faith," and ordered the United States to reimburse the defendant over $600,000 in attorneys' fees and costs. *U.S. v. Shaygan*, No. 08-cr-20112, 2009 WL 980289 (S.D. Fla. Apr. 9, 2009). And, in a First-Circuit case, the district judge attached to his decision a three-page annex of alleged misconduct by federal prosecutors in the district. *U.S. v. Jones*, 620 F. Supp. 2d 163 (D. Mass. 2009).

'Compliance' Risks in the U.S. Attorney's Office

In response to critical comments based on these cases, DOJ officials often reply that the overwhelming number of their prosecutors are conscientious, and that the proportion of cases with reported misconduct is low. The truth of this defense makes it no less ironic: This is precisely what private companies often claim after misconduct is revealed, but the federal government requires heightened compliance programs nonetheless. For example, a medical device company recently entered a three-year deferred-prosecution agreement and five-year corporate-integrity agreement despite the company's claim that the misconduct at issue involved only "a small fraction" of its business. (NeuroMetrix Inc. News Release, Feb. 9, 2009.)

It should not be left to judges to remedy these issues piecemeal. Anything less than a comprehensive and robust program to prevent misconduct and train well-intentioned prosecutors to prevent error will inevitably lead to wrongful convictions — an extreme consequence that should not be tolerated in a civilized society. Prosecutorial misconduct also carries with it the risk of violating federal and state criminal and civil laws, as well as contempt of judicial proceedings. And it risks undermining public faith in the DOJ.

DOJ's New Policies: A Cure Or a Band-aid?

Within the DOJ, both the Office of Professional Responsibility (OPR) and the Office of the Inspector General (OIG) have the power and the duty to investigate the causes of, and recommend cures for, systematic prosecutorial error or misconduct. Yet neither has instituted any comprehensive investigations of the recent pattern, based on nationwide judicial findings, of prosecutorial misconduct or any comprehensive compliance and monitoring programs to address these systemic problems.

In January 2010, the DOJ issued new discovery guidelines to help ensure that prosecutors comply with their obligations under *Brady*, *Giglio*, and the Jencks Act. (Guidance for Prosecutors Regarding Criminal Discovery, DOJ memorandum, Jan. 4, 2010). These guidelines give instructions on where to look for potentially discoverable information, direct prosecutors to memorialize and disclose any variances in witness statements, and encourage prosecutors to review potentially discoverable material themselves.

Although these guidelines are a step in the right direction, they do nothing to address other potential abuses, including the types of witness interference and improper statements to the jury that have been repeated subjects of judicial ire. Nor do they address other risks of misconduct during the investigatory stage, which can have significant effects at trial. And they do nothing to ensure that prosecutors comply with the guidance that is in effect. They are, largely, toothless guidelines.

Recommendations

The DOJ, OPR, and OIG can and should take stronger steps to minimize prosecutorial misconduct by instituting some of the same strict compliance measures required of businesses. A meaningful, nationwide compliance program would have many components and contours, but three pillars are essential.

First and foremost, the DOJ needs to provide more meaningful training to prosecutors. Many prosecutors receive the bulk of their training at an "academy" during their first weeks on the job, and thereafter training programs vary greatly among the many U.S. Attorneys' Offices and DOJ components. This is inadequate. Education in prosecutorial ethics through a nationwide Webcasting system should be standardized, periodic, mandatory, and subject to certifications.

Second, pretrial disclosure requirements should be more methodically outlined for prosecutors, with mandatory checklists and certifications maintained in each case file. Periodic audits should be required, and the overall results of such audits should be periodically reviewed by the OIG, which can refine and enhance the process as lapses are discovered.

Third, allegations or judicial findings should be subject to centralized reporting, investigation, and periodic review to identify particularly troubled components or types of misconduct. Indeed, the OIG should conduct regular reviews to identify the most common other types of misconduct, allowing the DOJ to amplify its training programs on each type of potential violation. Such guidance and training should address investigative abuses (including improper influence of witnesses), trial misconduct (including inappropriate comments to the jury), and pretrial leaks of confidential or inflammatory information. The DOJ should coordinate with ethics officers to identify patterns of misconduct on an ongoing basis, so that any problems can be reported and addressed on a real-time basis. It should set up a hotline to the OPR so that DOJ employees may anonymously report any instances of misconduct. And the DOJ and OPR should establish and enforce clear disciplinary standards for any prosecutor who does not comply with the rules.

If the DOJ begins to take its own advice about the importance of strict compliance, it will go a long way toward curing some of its current ills.