

31st White Collar Crime Institute



Legal experts from across the nation engaged in lively discussions on new trends in FCPA, economic sanctions, and securities enforcement, national security and cybercrime and more during the 31st National Institute on White Collar Crime, March 8-10 in Miami Beach, FL.

Keynote speakers included Alan Dershowitz, renowned lawyer and scholar; Kenneth A. Blanco, Acting Assistant Attorney General, Criminal Division of the U.S. Department of Justice; and W. Neil Eggleston, former White House Counsel. The conference featured four plenary panels featuring insight from general counsels, sentencing advice from judges, a discussion on the Fourth Amendment, and the art of storytelling.

While judges rely heavily on the U.S. Sentencing Guidelines when deciding on the fate of a defendant, a panel of judges moderated by Hon. Paul Friedman, offered guidance to prosecutors and defense attorneys on what they can do to help ensure that the sentence is as fair and accurate as possible.

Lastly, with the advent of smartphones and other digital devices, lawyers face unique privacy and ethical challenges; a panel of experts moderated by CJS Chair Elect Morris “Sandy” Weinberg, examined in depth the Supreme Court’s recent rulings on the digital age and the Fourth Amendment.

Panel on Rising Hate Violence

The Criminal Justice Section hosted a panel discussion on religious based hate crimes on April 6, 2017 at Latham & Watkins in Washington, D.C. Following an opening remarks by Congressman Don Beyer of Virginia, one of the sponsors of the recently introduced No Hate Act, the panel discussed the issues and proposed solutions to fighting hate in various communities -- through legislation, and within the criminal justice system.

Panelists included Arjun Sethi (advocate from the Sikh Community and professor at Georgetown Law), Tamara Kessler (Chief, Criminal Section, Civil Rights Division, U.S. Department of Justice), Sam Simon (Chief Counsel for Senator Richard Blumenthal, Senior Senator from Connecticut), Lakshmi Sridaran (Director of National Policy and Advocacy, SAALT-South Asian Americans Leading Together), Abed Ayoub, (Legal & Policy Director at American-Arab Anti-Discrimination Committee) and Richard T. Foltin (Director of National and Legislative Affairs, American Jewish Committee).

The panel discussed the ABA’s latest initiative in developing a hate crimes app as well as needed policy developments and advocacy within the legal community. The panel was moderated by CJS’s Director of Standards and Policy, Sara Elizabeth Dill, and was co-sponsored by the ABA Section for Civil Rights and Social Justice.



CJS policy initiatives, updates on policy-related projects

CJ Policies Passed at the ABA Midyear Meeting

The American Bar Association adopted all four resolutions sponsored by the Criminal Justice Section during the ABA House of Delegates meeting February 6 in Miami, FL. The resolutions include #112A which urges DOJ to strengthen efforts for accuracy in microscopic hair analysis; #112B which urges prosecutors to implement conviction-integrity policies when office supports defendant's motion to vacate; #112C which urges law enforcement to translate Miranda warnings "in as many languages, dialects as necessary;" and #112D which urges repeal/modification of prohibitions on blood donations by gay men.

The ABA Weighs in on Educational Collateral Consequences

The Criminal Justice Section, with the assistance of the ABA Governmental Affairs Office, submitted a comment letter in support of the Maryland Fair Access to Education Act of 2017, and its companion Senate bill. The bill calls for the prohibition of discrimination for admissions purposes to state funded institutions of higher learning based on an applicant's criminal history. The Section's numerous policies on collateral consequences, including the Criminal Justice Standards on Collateral Sanctions and Discretionary Disqualification of Convicted Persons 19-3.1, which opposes the discretionary disqualification of a person from opportunities and benefits including housing, employment, and professional licensure informed its support of this legislation. Copies of the letters can be found on the Section's policy web portal.

The ABA Files Amicus Brief in *Lee v. United States*

The ABA recently filed a brief in *Lee v. United States* on behalf of the petitioner. The issue in the case was whether it is always irrational for a defendant to reject a plea offer notwithstanding strong evidence of guilt when the plea would result in mandatory and permanent deportation. Relying on the ABA and the

Section's extensive immigration policies, especially in response to *Padilla*, the brief, spearheaded by CJS Director of Standards Project Sara Elizabeth Dill and the Amicus Committee, was drafted and submitted by attorneys from McDermott Will & Emery LLP. Oral arguments for the case took place on March 28, 2017.

ABA Task Forces on College Due Process Rights and Victim Protections Meet

CJS was a major player in the creation and work of two important task forces in early 2017. The Task Force on Building Public Trust in the American Justice System submitted its report in early February to the ABA House of Delegates. CJS Senior Staff Attorney Patrice Payne led staff efforts for both task forces, and CJS Council member Kevin Curtin was chosen as one of the representatives to this task force.

The Task Force on Best Practices for Colleges and Universities in Resolving Allegations of Campus Sexual Misconduct, chaired by CJS Council Member Andrew Boutros, produced a resolution that will be voted on at the Spring CJS Council Meeting in Jackson Hole, WY.



On March 2, the Jacob Burns Center for Ethics in the Practice of Law and the ABA Criminal Justice Section hosted the panel discussion "Protecting Fair Trials in High Profile Criminal Cases," at the Cardozo School of Law in New York.

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Member news, staff efforts, information for members

International Criminal Justice Event

The CJS co-sponsored an event on April 13, 2017 with the ABA's International Criminal Court Project and the Center for Human Rights. This two part program, hosted at Nelson Mullins in Washington, D.C., included distinguished panelists in international criminal justice discussing international criminal law in a retreating world, including remarks by Ben Ferencz, former Nuremberg prosecutor.

The event featured Fatou Bensouda, Madame Prosecutor of the International Criminal Court; Ambassador David Scheffer, former U.S. Ambassador at-large for War Crimes Issues; and Michael S. Greco (moderator), Chair, ABA's International Criminal Court Project, and ABA President 2005-06. The event also included a panel on United States policy on the ICC and international criminal justice *writ large*, with panelists Janet Benshoof, President and Founder of The Global Justice Center; John B. Bellinger, III, Partner, Arnold & Porter, and former Legal Advisor at the U.S. Department of State; Mr. Stephen Lamony, Senior Advocate for Africa at Amnesty International; and CJS Director of Standards Project Sara Elizabeth Dill (moderator).



Judge Donald to be Honored with the ABA Margaret Brent Lawyers of Achievement Award

Judge Bernice B. Donald, Sixth Circuit Court of Appeals and immediate past chair of the ABA Criminal Justice Section, will be honored with the ABA Margaret Brent Lawyers of Achievement Award during the ABA Annual Meeting on Sunday, August 13th in New York. The Margaret Brent Women Lawyers of Achievement Award, established by the Commission in 1991, recognizes and celebrates the accom-

plishments of women lawyers who have excelled in their field and have paved the way to success for other women lawyers.

Hope College Students Return to CJS for Informative Discussion

CJS welcomed back Hope College students for the second year in a row this past February for their honors program, where students have the opportunity to interview a variety of professionals in D.C. CJS Staff Attorney Lauren Beebe King led a lively discussion with students on CJS policy, the Standards, and the legal profession. Many students attending this program are applying to law school, and enjoyed the opportunity to discuss the policy side of the legal profession.

CJS on Campus

CJS Staff Attorney Lauren Beebe King discussed the value of ABA membership with law students while speaking on a panel at George Washington University Law School on February 15, 2017. King answered a variety of questions about student membership and opportunities for policy and publication as a student, emphasizing the importance of the law student voice in the Criminal Justice Section.

Reduced Tuition for CJS Members: Siracusa International Institute

The Siracusa International Institute for Criminal Justice and Human Rights has launched the Siracusa Institute's International Defence Counsel Training Program. It is the first multifaceted and globally-oriented Programme specifically designed for defense lawyers, in-house counsel and jurists dealing with cases related to the prosecution of international crimes in national and international jurisdictions, including crimes of a transnational nature. The program includes various modules of training in relevant jurisprudence of international courts, procedural elements of international proceedings, and the substantive and procedural aspects of international legal cooperation in cases related to international and transnational crimes. Discounts and/or accommodation financial assistance for the May and June 2017 sessions may be available to ABA members. Please contact Sara Elizabeth Dill (sara.dill@americanbar.org) for further details.

CJS Staff Rabiah Burks Departs

Rabiah Burks, CJS Senior Public Relations Specialist, has left the ABA to work at the Families Against Mandatory Minimums (FAMM).

WHAT TO DO WHEN THE FEDS COME KNOCKING

By Mary Corporon

It is an increasingly complex calculus to determine what to do with a business client who becomes the target of a federal civil regulatory investigation. Such investigations may be launched by numerous federal agencies, including the Federal Trade Commission, Securities & Exchange Commission, Internal Revenue Service, Federal Elections Commission, and the like. Some of these agencies have independent criminal investigation divisions (such as the IRS). Most do not. However, as any experienced white collar practitioner can tell you, these federal regulatory agencies can and do set up sting operations and can and do report their findings to law enforcement agencies or the Department of Justice for prosecution.

When you are approached by a client regarding such an investigation, you must first determine whether your client has clearly been engaged in criminal activity, and has wandered far over the criminal line. All of us know what to do at that point. We assume DEFCON One posture in behalf of the client, including peppering all possible agencies with a notice that the individual is represented by counsel, and that all communications should go to counsel. We respond to all requests for information with an invocation of the Fifth Amendment privilege. We demand to see warrants for searches. We demand taint teams prior to the inspection of evidence. All the while, we inquire through back channels if any possible resolution exists, which will not subject our client to the draconian white collar sentences imposed under the Federal Sentencing Guidelines. At DEFCON One, it is easy to know what to do.

A much more subtle problem is posed, however, by a much more likely client -- a purportedly legitimate business enterprise, for which there are hints and rumors of some federal investigation afoot.

Assume hypothetically that the business which approaches you for advice does appear to have strayed into a few gray areas, but also appears generally to be attempting to run a legitimate business enterprise. Assume that this business is quite profitable, and thus the business owners are loathe simply to shut it down.

Besides, suddenly abandoning a profitable business would appear to be evidence of guilty knowledge -- no?

What do you do with this client? The following is intended to be a not-at-all-inclusive list of possible strategies for responding under these circumstances, to keep the client out of prison and to keep the profits flowing.

Determine Who Will Be Your Client, And Cleave Only Unto Your Client

If you are approached by someone in a company actively doing business, it will become readily apparent that there may be many individual humans in need of legal assistance (as well as one or more business entities). These may include the owner of a small business, his or her spouse, a corporate board of directors, officers, key employees, and independent contractors providing key advice (such as brokers, attorneys and accountants). Usually, a unified approach to a federal investigation from all these would be helpful. You cannot be all things to all of these people. Pick your client early. Will it be the corporation itself? Will it be the CEO? Will it be the accountant who received the first batch of requests for information about the company? In a civil agency investigative case, the same attorney may represent one or more of these persons, so if the case is concluded at the civil stage all is well. If you assume representation of multiple persons in this civil proceeding, and the case develops eventually into a criminal prosecution, you then may not be able to represent any defendant. Choose wisely.

Once you have determined the identity of your client(s), though you may speak to non-represented parties, and will likely encourage them to act in concert in their responses, you should not make *any* official declarations to government agencies, purporting to speak in behalf of everyone at a company. For strategic reasons, limit your productions to the narrowest answer possible. (Our firm has been in trials in which shipping container loads of documents came rolling into evidence like the 5:15 San Francisco express, because lawyers early in a case had purported to respond to a request for documents with blanket assertions that "we" provide certain documents, or that a long list of persons and entities had responded in a unified response. Don't make the government's evidentiary case in every single forfeiture action and prosecution down the line easy for them.)

Instead, decide which entity is making the response. Draft a response taking into account other suggestions below, and submit documents intended to be in compliance with requests for information. Walk a tightrope. Define the response to be from the narrowest number of entities possible, while simultaneously suggesting that it is a broad actual production of documents or information requested.

In other words, say something along these lines: "Enclosed, please find documents and records we intend to be in response to your requests in your investigation of Smelly Corporation, Inc. These responses are from my client, Sue, in accounting on the 9th Floor, and, because Sue in accounting is my client, I do not have authority to send a response from any other person or entity...."

Mary Corporon is an attorney at Christenson & Jenson, and a member of the CJS Women in Criminal Justice Committee.

Other persons or entities who have received similar requests might suggest to the federal agency that Sue already sent in some records, so they hope that answers the agency's questions. Sometimes, it does.

Know the Consequences of Certain Agency and Governmental Actions

You need to familiarize yourself with a totality of possible consequences suggested by various agency actions.

Know, for example, that a complaint to the Better Business Bureau (BBB), if left unanswered, will result in a BBB rating of "F". Know that a BBB rating of "F" may trigger other governmental investigations. Know that single "F" rating may be stated in affidavits as support for injunctions to cease business operations. That "F" rating may appear in affidavits supporting seizure of assets, search warrants, and eventually in grand jury testimony supporting an indictment. "For want of a nail, a shoe was lost..." Teach your clients that *any* inquiry by private, local, state or federal agencies, suggesting that your client has misrepresented its goods or products, or has misrepresented its financial status, must be addressed as a serious matter. Draft your client's answer to BBB inquiries, or State consumer department inquiries, as though it will become Exhibit "A" in an eventual effort to enjoin the operation of your client's business and seize its assets. It very well may be.

Know that the prime directive of federal investigative agencies is to justify their existence. They must, therefore, proceed with investigations, in which businesses are found to be operating outside the law and are shut down, in the public interest. The agency is attempting to locate a business operating in violation of the law, and then to obtain (1) an injunction that the business cease operation; (2) an order for the seizure of all assets of the business and of the principles of the business; (3) the appointment of a receiver to manage the records of the business and the assets seized; (4) to retain those frozen assets; and (5) to refer criminal actors to authorities for prosecution.

Any disruption in this conga line may cause a disruption of the entire process of indicting your client (and may also disrupt the forfeiture of your client's assets, or the destruction of her business). You need to disrupt this series of events to the greatest extent possible.

Arm Your Client with What You Will Need for the War

You will need to communicate confidentially with your client regarding all of the events that are to occur in the future. There are numerous cases in which the confidential communications between principals in a corporation, and its attorneys, which reside on the servers and electronic devices of the corporation, are captured and held in the possession of government agencies or prosecutors. This is actually a fairly common occurrence. Therefore, the absolute minute your client contacts you about such a problem, you must direct your client to cease

all communications with you through any means which may eventually be seized by the government. Your client should obtain an independent e-mail which will be used solely and exclusively for your attorney/client communications. This e-mail should not be set up so as to pass through the servers at your client's business, and your client should not use devices which are owned by the company or regularly found in the business offices, for the purposes of your communications. Your client should e-mail you from home, from a separate private phone, or from the city library. Your client should set up an independent e-mail exclusively for this use. For example, tell your client to obtain an e-mail address, "ceo@smellycorporationprivilegedattorneycommunications@msn.com." (Of course, long walks in the park, and conversations on park benches are still the gold standard of attorney client confidential communications.)

Be strict with your clients about maintaining actual confidential communications. Do not respond to emails from your client which come from company sources. Do not text your client about any matter of substance, to any cell phone owned by the company. (If you begin to suspect that your own e-mails, servers and phone communications are being intercepted, assume DEFCON One.)

In addition to having a private means of communication available, your client will need to preserve the resources necessary to defend against the worst scenarios. The *Luis* decision, released by the Supreme Court in 2016, may provide some encouragement to attorneys who have heretofore been used to clients of substantial resources left unable to defend themselves, because all their assets had been seized in anticipation of forfeiture, and the previously well-off client is now penniless.

Assess your client's circumstances. Make a reasoned assessment of the flat fee that will be required for your client to defend herself through the end of the process, including an indictment and criminal jury trial if necessary. Familiarize yourself with your own state's ethical rules regarding flat fees in criminal investigations and criminal cases. Then, collect the flat fee for representation through trial (which must be placed directly into your operating account and not in your trust account, in order to rest as much as possible beyond the reach of seizure.)

In assessing and charging a fee in this manner, you must keep in mind the requirements of many state bar associations, that you not charge an "excessive fee" and/or that your fees be "reasonable." I would suggest that you advise your client of these ethical requirements, in writing and in advance in your fee agreement, and advise your client of her right to seek a refund of any "excessive" fee at the conclusion of the representation. By this measure, your client may be able to retain the services of the attorney of her choice, and may be able to retain the services of investigators and experts she will need, while at the same time being entitled to a disgorgement of an "unreasonable fee" at the conclusion of the case, if the client

is (for example) not actually investigated in any vigorous way. Do not wait for the client to be hit with a civil asset seizure and motion for injunctive relief before preparing for the worst case scenario. As is the case with most disaster preparation, by the time the disaster is upon us, it is too late.

You should also consider capturing the evidence your client may need to defend herself, if the worst eventuality happens. Your client's servers and other electronic devices may be seized. Paper records may be seized. (Obviously, under no circumstances should you or your client begin to alter records, or "lose" the evidence. This may lead to an independent criminal prosecution against your own client or yourself. The first rule of criminal defense practice is: "if anyone is leaving the courtroom in handcuffs at the end of the case, it will not be me." Do not obstruct justice, and do not encourage your client to do so.)

You should, however, carefully copy key evidence in the case and save it for yourself. You should have professionals image every server, and those images should be saved in counsel's control as your work product, and as evidence in the case. Every electronic device which has not left its imprint on the company server, but which may be in your client's office to be seized at the time a warrant is served, must also be imaged, including your client's hard drive at her desk, cellular telephone, iPad and the phones and tablets of anyone in the corporation who may be a target or a witness in the case. It has happened more than once that a federal agency or law enforcement officer has seized a corporate server, hard drive or telephone, only to have that server, hard drive or phone lost or hopelessly corrupted, and the exculpatory evidence thereon unavailable for the defense at trial. Save everything you can, as attorney work product.

Moreover, where the client wishes to continue to operate a profitable business, a back-up server will then exist for the client to continue to use, even if a federal agency seizes the existing servers one dark day. As more material goes to your client's corporate server, continue to back that up as attorney work product, on a regular basis.

Finally, you need to capture the statements and testimony of witnesses and employees, before the government investigators get to them. I know this will shock many, but witnesses frequently change their recollections about the "truth". Little fish swimming in a big pond frequently do so, after they have been contacted by law enforcement, and threatened or offered immunity. Big fish do so, after prosecutors have shown them the Federal Sentencing Guidelines calculations and offered them a deal in exchange for "truthful testimony" (in a way that does not, I am sure, tamper with that witness). As an attorney, you should take as many recorded statements as you legally can, as early as you can, from as many potential witnesses as possible, including angry customers, lower echelon employees, and state investigators. Get them on record and keep this record as part

of your work product.

Assess and Improve Your Client's Existing Operation

Now that you have determined who your client is, have arranged for the client to have private communications, to have an adequate war chest, and a functioning business even if her server is seized, you must assess your client's circumstances going forward, and improve them, against the day of future litigation.

Find out, if you are able, what the federal agency sniffing around seems to be concerned about. If your client is already in your office expressing concerns about an investigation, this means she heard something. Find out what they have heard, and follow up. Have numerous customers, for instance, been contacted by a state consumer protection board? This is sometimes a precursor to a federal investigation. If so, contact the customers and find out what their complaints are about. Get their story. Record it if you are legally able to do so in your jurisdiction. Appear before the state agency and defend that claim.

Then, sit down with your client, and attempt to resolve the problems exposed by your investigation. (Remember, we are talking about a hypothetical business client who is attempting to operate a legitimate business, but who may have danced into a few gray areas inadvertently.) Clean up those gray areas. If that is not the client you find you have, after closer inspection, then move to DEFCON One.

Pay particular attention to the circumstances which in your judgment most threaten the client. For example, if you think the problem is that your client seems to be operating in concert with her brother-in-law, Bad Bob, consider the factors which are often used as proof of a conspiracy - a commonality of the chief officers, and a physical proximity of the business locations, for instance. Fix these problems if you can. Take Bad Bob off her corporate registrations. Fire him as an officer or director. If the real problem seems to be that Bad Bob keeps pretending to work for her business, and she is renting space in Bad Bob's offices, tell her to move. Tell her to breach the lease if necessary. Tell her to pay a little more for her new space. But tell her to get out of the Bad Bob Tower right now. If Bad Bob is a co-signer on her corporate checking accounts, get Bad Bob off her accounts. If he and his buddies are contacting her customers to "upsell" their misrepresented products, purporting to work for your client's company, then prepare a cease and desist letter. Be prepared to obtain an injunction against Bad Bob in behalf of your client, ordering him to leave her customer lists and her clients alone. If 10% of the sales crew have fallen into the bad habit of misrepresenting the company product, then very publicly fire the miscreant sales staff, and conduct in-house training for the remainder of the employees,

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UPDATE ON ATTORNEY PROFESSIONALISM AND ETHICS

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Obligations to Third Persons

N.C. Attorneys Must Disclose Info That Could Show Innocence

- Law in step with trend toward protecting against wrongful convictions
- Private attorneys now have exception to attorney-client privilege

North Carolina became the first state to require defense attorneys to disclose evidence that someone may have been wrongly convicted so long as it doesn't harm their clients, according to a professor specializing in prosecutorial ethics and disclosure. The rule extends the duty prosecutors already have under *Brady v. Maryland* to disclose evidence that could potentially exonerate an inmate, said Bennett Gershman, a professor at the Elisabeth Haub School of Law at Pace University, White Plains, N.Y. The new ethics rule is an exception to attorney-client privilege that would allow them to share evidence about innocence that previously could have cost them their law license, Gershman told Bloomberg BNA.

Previously, North Carolina defense attorneys in private practice—like all others across the U.S.—were forbidden under the rules of attorney-client privilege from sharing any information that could help someone wrongfully imprisoned even if their client had died, he said.

The new rule allows defense attorneys to unzip their lips, as long as the evidence can't harm their clients, he added. "It relieves the lawyer of the burden of not being allowed to disclose information that might be important and exculpatory to help maybe exonerate someone who has been wrongfully convicted," Gershman said. Attorneys could potentially face legal action until the courts can determine what is considered harmful to a client, he added. However, the law is in step with a trend toward protecting against wrongful convictions and imprisonment, Gershman said.

Prosecutors

Pretrial Parade of Seized Contraband Isn't Allowed in N.J.

- Public display of items that may later be suppressed serves no proper law enforcement purpose
- Presentation is extrajudicial speech that heightens public condemnation of accused

New Jersey prosecutors can't publicly exhibit the drugs, weapons, money or other contraband seized in criminal investigations, New Jersey's professional ethics committee advised Feb. 17. Choreographed press conferences where prosecutors and other law enforcement officials stand alongside a cache of guns or drugs while triumphantly announcing a successful arrest may be common in New York and the federal system, the committee said. But prosecutors in the Garden State risk violating New Jersey Rules of Professional Conduct 3.6 (trial publicity) and 3.8 (prosecutors special responsibilities) if they put on similar pretrial spectacles.

The committee rebuffed an unnamed prosecutor's claim that some staged displays should be allowed because New Jersey is in the throes of an "opioid crisis," and publicizing the fruits of these investigations advances public awareness about the problem and encourages citizens to cooperate with police. That argument is overbroad and nullifies the focus of Rule 3.8, the committee said. "There would be very little left of the prohibition against prejudicial extrajudicial statements if mere heightened public awareness of (thus leading presumably to enhanced general apprehension about) criminal activity was sufficient to justify extrajudicial statements by prosecutors," the committee said.

The New Jersey Supreme Court has consistently taken the position that such public displays are extrajudicial statements prohibited by Rule 3.6 and its predecessor, Disciplinary Rule 7-107, the committee added. It rejected the prosecutor's suggestion that New Jersey impliedly abandoned that stance when the rules were amended in 2004.

CJS Diversity Goal

The ABA Criminal Justice Section values diversity in all aspects of our membership, participation, publications, and programming. The ABA CJS encourages and seeks active involvement of lawyers and associate members of color, women, members with disabilities and LGBT members in ABA CJS's publications.

Mitigating Risk in a New Era of Grand Corruption Enforcement

By Glenn T. Ware and Kenneth Ray

Public perception of corruption has rapidly evolved — from an abstract topic of debate among practitioners to the focal point of global media coverage and mass street protests. In cases where it permeates top political echelons, so-called “grand corruption” distorts market-level business practices by causing pervasive damage to accountability and the rule of law. It has also shown it has the power to destabilize entire governments.

There’s a growing sense that the tide is turning. Mindful of the significant and systemic risk posed by grand corruption, local regulators and multilateral development banks have put businesses on notice: the onus is on them to proactively mitigate corruption risk by identifying red flags and strengthening internal controls. This short article zeroes in on three case studies — Brazil, China and Guatemala — and offers some best practices for companies operating in at-risk markets.

Transparency International defines grand corruption as an act “causing the State or any of its people a loss greater than 100 times the annual minimum subsistence income of its people as a result of bribery, embezzlement or other corruption offense.” Similarly, the United Nations Convention Against Corruption (UNCAC), in its preamble, describes “cases of corruption that involve vast quantities of assets, which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States.”¹

New daylight on an ancient scourge

From Brasilia to Beijing, a steady stream of public reports, disclosures and media exposés have detailed incidences of illicit or improper systemic activity — including bribery, money laundering, tax evasion, cronyism, self-dealing and misappropriation — reaching the highest levels of corporate and government leadership.

Social media and the Internet have thrown additional daylight on grand corruption — acting as a kind of “X-ray” technology capable of detecting and revealing the inner workings of corruption. US and UK regulators, as well as multilateral development banks, have added further visibility by publishing the details of corruption schemes as part of their enforcement actions and administrative sanctions, respectively.

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A growing appetite for white-collar enforcement

Regulators in certain emerging-market jurisdictions have also launched vigorous efforts to join the anti-corruption enforcement chorus, reversing long-held perceptions of hesitancy to take action against political and business elites once seen as beyond the reach of the law.

These regulators are now demonstrating a growing appetite to expose and punish white-collar wrongdoers. They are increasingly sharing information — and conducting joint or concurrent investigations of corruption-related crimes — with local and foreign counterparts. In so doing, they are also receiving valuable assistance from multilateral development banks via referrals.

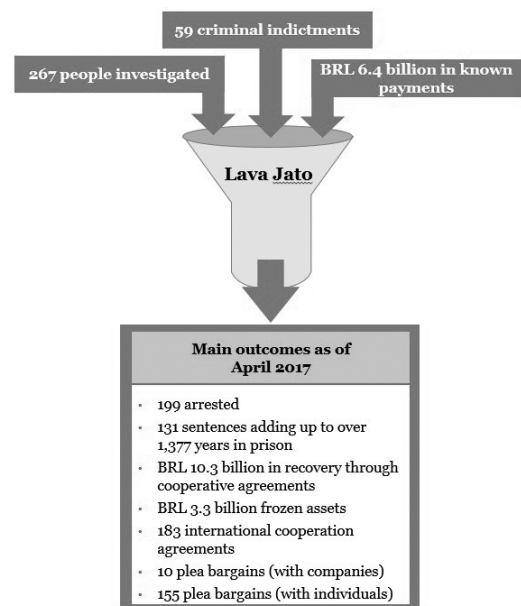
Lessons from Brazil, China and Guatemala

Brazil, China and Guatemala offer illustrative case studies of jurisdictions where local authorities have taken the lead in investigating and prosecuting parties involved in grand corruption, pointing to collusion at the highest levels. Organizations with operations in these and similar jurisdictions should take heed, as the impact of grand corruption enforcement — both locally and globally — can neither be ignored nor underestimated.

Brazil: “Operation Car Wash”

A routine 2014 investigation of a black-market currency trader suspected of money laundering has evolved into the largest corruption scandal in Brazil’s history — one whose impact is still being felt today.

Operation Lava Jato (“Operation Car Wash”) uncovered improper



er business practices via an extensive network of collusion between construction contractors, government officials and Brazilian and multinational companies. Investigators suspect local politicians received illegal payments of more than BRL 6 billion (approximately \$1.8 billion as of 2014), thereby influencing the awarding of tenders and purposely inflating public contract amounts.²

Meanwhile, a concurrent Brazilian law enforcement investigation named *Operation Zelotes* (“Operation Zealots”), announced in 2015, revealed a major tax evasion scheme involving alleged kickbacks to tax authorities in exchange for reduced fines against companies that had failed to comply with local tax regulations. These aggressive actions taken by local regulators, coupled with the sustained outcry of a weary public seeking reform, continue to define and shape Brazil. The fallout from these scandals exposed the depth and extent of alleged governmental and political ties to the scheme, and played a major role in triggering the impeachment of former President Dilma Rousseff.

The takeaway: There has been a paradigm shift in the expectations of ethical conduct now placed on those doing business in Brazil. In light of these grand corruption-related developments, organizations seeking to expand their existing operations or to identify new opportunities in Brazil will need to develop controls for public procurement and strictly comply with the provisions of the Brazil Clean Companies Act — as well as other relevant Brazilian laws — or run the risk of fines, imprisonment and damage to their brand.

China: “Tigers and Flies”

Upon assuming office in 2012, President Xi Jinping immediately vowed to crack down on corruption in China, spearheading a well-publicized campaign targeting both high-level (“tigers”) and low-level (“flies”) government officials for abuse of power. Swift actions in the form of investigations, formal charges and, in some instances, life imprisonment sentences have been issued to hundreds of senior Chinese government officials. Between 2013 and 2016, nearly 2,000 Communist Party officials were indicted for corruption-related offenses allegedly involving the reported theft of more than \$1 billion.³

Local anti-corruption enforcement has reportedly had such a significant impact that one former Chinese Central Bank official suggested the crackdown was a primary driver in China’s recent GDP slowdown.⁴ Some analysts suggest that corruption in China has simply been driven underground, while others argue that the campaign targets the President’s political rivals and spares allies from prosecution.⁵

In any event, the Chinese government has made clear that anti-corruption enforcement is, and will remain, a major priority. Any organization with operations in China will need to be vigilant in calibrating their market strategy — and to incorporate

appropriate risk mitigation procedures.

Guatemala: “La Línea”

Recent anti-corruption developments in Central America’s most populous country may not have garnered similar widespread media attention, but they serve as an example of how local enforcement can be a game-changer in environments where corruption is generally perceived to be relatively high.

Guatemalan authorities, with support from the United Nations, launched multiple concurrent investigations beginning in 2014 targeting alleged bribery, abuse of power and misuse of public funds. The most prominent of these investigations, *La Línea*, uncovered an elaborate scheme in which local customs and tax officials received kickbacks from importers in exchange for tariff reductions. Other investigations targeted illicit funds donated to election campaigns in order to secure government contracts; bribes received by authorities in exchange for port operation concessions; and improper purchases of lavish gifts made by high-level government officials.⁶

These investigations eventually led to the arrest of President Otto Pérez Molina and Vice-President Roxana Baldetti, among other government officials, on bribery and money laundering charges. Organizations considering doing business in Guatemala will need to stay apprised of local developments as authorities continue to investigate and prosecute those involved in these schemes.

Beyond due diligence: Heightened measures for a heightened risk environment

These examples show that businesses operating in markets prone to grand corruption must make smart and sustained investments in risk mitigation. A market-level strategy underpinned by on-the-ground, risk-based intelligence and an informed understanding of local and multi-jurisdictional requirements is a solid first step.

This intelligence must be capable of isolating the symptoms of grand corruption, and accurately gauging the breadth and depth of potential threats. That means going above and beyond cursory diligence checks to obtain a robust market-level understanding of regulatory and reputational risk exposure. It also requires a closer examination of enterprise-level and relational susceptibility to grand corruption — manifested, for example, in the form of dubious professional or familial ties, opaque beneficial ownership structures and unsubstantiated business partner arrangements.

No “double jeopardy” protection: Why FCPA compliance is no longer sufficient

It is no longer sufficient to simply focus on compliance with the most prominent laws, such as the US Foreign Corrupt

Practices Act (FCPA) and the UK Bribery Act (UKBA). The regulatory and enforcement regimes across other jurisdictions can now result in companies and even executives being subject to concurrent investigations, with overlapping civil, criminal and/or administrative liability.

Since “double jeopardy” protection does not typically apply to anti-corruption laws across borders, a single instance of misconduct could potentially expose businesses and their executives to liability across multiple jurisdictions. That’s why organizations must be able to pivot their global anti-corruption policies, procedures and controls between extraterritorial and local requirements, as appropriate.

For instance, the propriety of certain gift and hospitality practices often requires specialized knowledge of local regulations and/or customs covering interactions with public officials prior to making an offer or extending an invitation. Additionally, certain local regulations may impose stricter prohibitions than the FCPA regarding facilitation payments — requiring further consultation prior to releasing a shipment or securing a permit.

Mitigating exposure to grand corruption

Cronyism, opaque tendering and procurement, predatory licensing/permitting and other corrupt practices often pervade the local business landscape where grand corruption takes hold. Organizations eager to expand existing operations, establish relationships with new business partners, or gain access to new customers in such markets will need to carefully evaluate whether the potential exposure to grand corruption — for itself or its business partners — is worth the potential return.

Endnotes

¹ Transparency International: “What Is Grand Corruption and How Can We Stop It?”, 2016 (www.transparency.org/news/feature/what_is_grand_corruption_and_how_can_we_stop_it). United Nations: Preamble to the United Nations Convention Against Corruption (UNCAC), 2003 (www.un-documents.net/uncac.htm)

² Brazilian Public Prosecutor's Office (*Ministério Público Federal*): Operation Lava Jato by the Numbers, retrieved: April 2017 (www.lavajato.mpf.mp.br).

³ ChinaFile: *Visualizing China's Anti-Corruption Campaign*, January 21, 2016 (www.chinafile.com/infographics/visualizing-chinas-anti-corruption-campaign).

⁴ Chan Huan Jun and Lin Xueling. “Corruption clean-up is top reason for China’s slowdown: Former central banker,” Channel NewsAsia. July 27, 2016.

⁵ Tiezzi, Shannon. “China Vows to Keep up Anti-Corruption Efforts in 2016,” *The Diplomat*. January 26, 2016.

⁶ International Commission Against Impunity in Guatemala (CICIG): “CICIG Participation in Criminal Proceedings” (cicig.org).

Calendar of Events

8th Annual Prescription for Criminal Justice Forensics: June 2, New York, NY

Second Global White Collar Crime Institute: June 7-8, São Paulo, Brazil

Third False Claims Act Trial Institute: June 14-16, Washington, DC

Transforming Perceptions: Implicit Bias Training for a Better Defense: June 23, Chicago, IL

26th Federal Sentencing Guidelines Seminar: June 28-30, St. Petersburg, FL

ISRCL Conference, July 9-13, San Francisco, CA

CJS Annual Meetings at the ABA Annual Meeting: Aug. 10-13, New York, NY

4th Annual Southeastern White Collar Crime Institute: Sept. 7-8, Braselton, GA (near Atlanta)

6th Annual London White Collar Crime Institute: Oct. 9-10, London, UK

10th Annual CJS Fall Institute and Council & Committee Meetings: Nov. 2-5, Washington, DC

ABA/ABA Money Laundering Enforcement Conference: Dec. 3-5, National Harbor, MD

For updates, visit ambar.org/cjsevents.

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about the importance of accurately representing the company product to customers. Record that training. Save that recording in your office. It is never too late to clean house.

By divorcing your client from bad actors, and by cleaning up unfortunate parts of your client's business, you may achieve your client's objective in two ways. First of all, if that federal agency comes seeking injunctive relief and a seizure of assets, you can attack these proceedings, if the government's supporting affidavits are based on circumstances which existed months ago, and which are no longer extant. ("We use to be in Bad Bob's office, but we aren't anymore; we use to have ten employees who were unfortunately misrepresenting our product, but they were all fired, and we have reached out to their victimized customers to correct the error"; etc.). If the federal agency can't obtain an initial seizure of assets, and an injunction against your client's business operation, they aren't nearly as likely to take the next step, of referring your client to the Office of the United States District Attorney. Secondly, if they do, you all know how much better you could try the case, if your client had fired all of her lying sales representatives a year before there ever was a grand jury investigation.

Responding to Investigative Requests for Documents

If your client has received a request for information (and you have determined to attempt your client's ongoing operation of the business), then you have to provide some response to the government. Remember, most initial requests for data by federal agencies will be "voluntary" requests. There are no sanctions directly imposed for failure to respond. On the other hand, a failure to respond will be pursued by the agency. It will be viewed as proof of guilty knowledge. A response in the nature of DEFCON One ("do you have a warrant" or "I assert my privileges under the Fifth Amendment of the United States Constitution") will be seen by the agency as an admission of guilt and a reason to redouble the investigative efforts.

Thus, your objective is to be as cooperative as you must, to persuade the agency to leave you alone, without handing them the indictment of anyone on a silver platter. This will require all of your skills. In no particular order, consider the following possibilities:

1. Do not purport to respond for anyone whom you do not represent. Limit the usefulness of admissions against future potential defendants;
2. If a response has been filed by anyone in the mix, see if the agency is satisfied with that response, and if they will forego responses from all the other individuals or entities;
3. Familiarize yourself with the Federal Rules of Evidence and with the State Rules of Evidence in your area. (If you

haven't done this long ago, why have you read so far in this article?) Then, "weasel word" your responses to the agency request for information, putatively giving them what they seek while disclaiming as many factors as you can that may allow for the introduction of the records as evidence, while also not actually lying to the agency. Consider, as a fanciful example, i.e., "we're not sure these records are even the records of Smelly Corporation, Inc., but we wanted to get these materials to you as quickly as possible, so please find enclosed the contents of the server somebody found in the basement of our office." Or, "I am not the records custodian for Smelly Corporation, Inc., and I don't know yet who is, but here are some things I found at Smelly Corporation, Inc. I am not sure if they are the authentic corporate records or not, and I am not sure this is even what you have requested, but I want to be as cooperative as possible." You get the drift.

4. Don't produce anything more than you were asked to produce;
5. If you believe that someone else has turned in records in response to an investigative request or subpoena from any agency, and if you believe privileged records appear in those documents (such as health care records or attorney/client communications), then demand a taint team with the agency, and that the documents be segregated and reviewed by a taint team for privileged records. Don't ever turn over documents to which you will assert any kind of privilege.
6. If you believe that someone else has turned over records in response to an investigative request, inquire of the agency if they need your response, as well, since it appears they already have everything you might possess about the subject matter.
7. If the agency suggests that it wishes to seek injunctive relief, or some kind of sanction against your client, please feel free to negotiate. All of these civil orders and arrangements are negotiable. The terms which can be negotiated are infinite. They may allow for the ongoing operation of a business, or the operation of another business by your client. Negotiate for factual findings, or for a specific lack of factual findings. Negotiate for terminology that the agreements are reached and civil orders entered, specifically without any finding of wrongdoing by your client, and in settlement of a disputed civil claim. Render the civil orders and injunctions against your client as toothless as possible, in the event they become exhibits in criminal proceedings.

With any luck, your client who is operating a more or less legal, and profitable business may continue to do so. In the alternative, she may live free to operate another business which is equally profitable. With the proper approach, she may avoid injunctions, receiverships and the destruction of her entire enterprise. Most importantly, she may avoid even having to defend an indictment.



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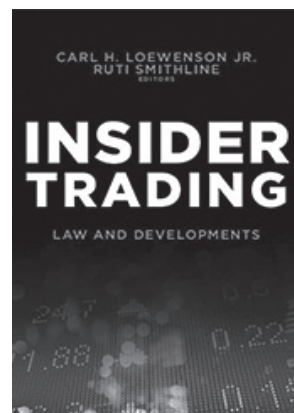
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