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40 Years Of FCPA: A Journey From Conviction To Dismissal

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Leading up to the 40th anniversary of the Foreign Corrupt Practices Act on Dec. 19, this Expert Analysis series features reflections from attorneys who have played a role in the evolution of FCPA enforcement, defense and compliance.


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As we recognize the 40th anniversary of the enactment of the Foreign Corrupt Practices Act, we remember that the statute was little enforced until about 10 years ago, when there was a flurry of enforcement activity, culminating in several trials. We were among the team of defense lawyers in one of those trials. The trial was a joint defense effort, and this piece is written to recognize that joint effort.

MS. LEVINE: My entire case would have differed, Your Honor …

THE COURT: ... [B]ut what difference would it have made?

MS. LEVINE: ... I don't know exactly how I would have framed this case had I had the full scope of discovery, but I can tell the Court it would have been different.

Had the government been prepared to go to trial, had it produced Brady material, had it not engaged in a pattern of misconduct from the day they obtained the search warrant ... Everybody in this case was tainted.

This was our final argument to now-retired Judge A. Howard Matz of the Central District of California in one of the first criminal convictions of a corporation under the Foreign Corrupt Practices Act. United States v. Aguilar et al., Case No. 10-CR-1031 (C.D. Cal.). It was November 2011, 11 months after our clients were charged, and six months after a jury found them guilty. We were asking the court to throw out the convictions and dismiss the indictment with prejudice. And that is what the court did. Judge Matz found that a series of pre- and post-indictment government misconduct, which slowly came to light during trial and the post-trial motions, violated the defendants' constitutional rights. (The order, Docket No. 665, can be found **here**.)

Lindsey Manufacturing is a small, privately owned company that manufactures and sells equipment used

by electrical utility companies in the U.S. and abroad. The company did business in Mexico and, unremarkably, used a Mexican sales agent to help secure business. In 2008, the government began investigating the company, allegedly for making commission payments to its Mexican sales agent that were actually bribes funneled to a Mexican state-owned utility company.

On Oct. 21, 2010, the government presented its final evidence to the grand jury. The first superseding indictment was returned that day, charging the company and two of its executives in an alleged scheme to bribe Mexican officials to obtain contracts with a Mexican utility company. The government was presumed to be ready to proceed to trial once the indictment was returned. But our joint defense team didn't believe the government was ready; we called its bluff. In a rare move for a white collar case, the company defendants exercised their rights for a speedy trial. Five months after indictment, a jury was empaneled.

Judge Matz said the case proceeded at an "unusually rapid pace."[1] Both sides filed and litigated what the court called "an extraordinary number" of motions, ex parte applications, requests for judicial notice, and other disputes necessitating dozens of hearings before and during the trial.[2] The docket had 333 entries between the first superseding indictment on Oct. 21, 2010, and the first day of trial on March 30, 2011. There were another 285 entries between the guilty verdicts on May 10, 2011, and Dec. 1, 2011, when Judge Matz vacated the convictions and dismissed the first superseding indictment. Law360 published 19 articles about the case in a just a nine-month period.

We defended the case as we would any other, scrutinizing every aspect of the government's investigation and attacking each of the legal theories and factual arguments on the merits, all the while preparing an affirmative case to show our clients' innocence. The twist in this case was the truncated time in which we prepared. Having refused to waive their rights to a speedy trial, the defendants took control of the case; this along with the compressed time frame forced the government to make errors. And many errors were made:

- In 2008, the government obtained and executed a search warrant at the company's facilities. It was later revealed that the FBI affidavit supporting the warrant contained material false statements that were drafted by a prosecutor. At our insistence — and after several motions, hearings and a court order — the government produced all drafts of the affidavit, which revealed exactly when and by whom the false statements were drafted. The government was never able to provide an explanation for this.

- In executing the 2008 warrant, the government failed to comply with requirements for the seizure of electronic documents and searched buildings that clearly were not within the scope of the warrant. We raised this conduct in several motions seeking suppression of evidence and dismissal based on government misconduct.

- Leading up to trial, the prosecution failed to turn over complete transcripts of FBI agent grand jury testimony, despite multiple defense discovery requests, motions, and a court order. Most of the transcripts were turned over in the middle of trial (10 days after opening statements). The remaining transcripts were disclosed seven weeks after trial ended. These grand jury transcripts revealed a litany of material false and misleading statements, as well as

material omissions, concealing important and exculpatory evidence that was improperly withheld and interfered with our clients' right to a fair trial.

- During trial, the prosecution elicited testimony about a separate FCPA criminal case involving a separate bribery scheme and with separate defendants (the "O'Shea" case pending in the Southern District of Texas). During its closing argument, the government wrongly argued that the company defendants were connected to this separate scheme. Judge Matz overruled our objection to this argument during trial but later acknowledged that the objection should have been sustained because the government's argument was misleading and in violation of an earlier court order.

- Before closing arguments, Judge Matz rejected the government's request for a "willful blindness" or "deliberate ignorance" jury instruction, determining that the definitions were not within the more limited definition of "knowledge" under the FCPA. Despite this, during the government's closing argument, one of the prosecutors argued that the company defendants had turned a "blind eye" and "closed their eyes" to the alleged wrongdoing (the prosecutor actually covered his eyes to emphasize this argument). We immediately objected to each of these improper references. Judge Matz gave the jury limiting instructions but later determined that the limiting instructions were not enough, finding that the prosecutor's arguments were material misstatements that "undoubtedly resonated with at least some of the weary jurors."

- Finally, during trial, a government witness and the prosecution attributed a particular alleged bribe (a $29,500 school tuition payment for a Mexican official's son) to Lindsey Manufacturing. After trial, we realized that a government pleading in the O'Shea case — one of our prosecutors also handled the O'Shea matter — attributed the exact same alleged bribe to another company that unquestionably had no connection to the company defendants. We presented this to the court as undisclosed Brady material: the same prosecutor seeking to convict different defendants in different cases based on a single payment that only one of them could have made. The court agreed.

In all, nine motions to dismiss the indictment were filed and briefed over a nine-month period. Most of the motions raised issues of government misconduct. But it wasn't until after trial and after the parties briefed the final motion that the court fully understood the extent of the government's errors. As Judge Matz explained in his final order, the fast moving case caused him to "miss the proverbial forest for the trees":

This Court was confronted with so many motions challenging the Government's conduct that it was difficult to step back and look into whether what was going on reflected not isolated acts but a pattern of invidious conduct. Although the Court did issue orders granting various of Defendants' motions . . . it did not fully comprehend how the various pieces fit together. And fit together they do. The Government has acknowledged making many "mistakes," as it characterizes them. "Many" indeed. So many in fact, and so varied, and occurring over so lengthy a period (between 2008 and 2011) that they add up to an

unusual and extreme picture of a prosecution gone badly awry. To paraphrase what former Senator Everett Dirksen supposedly said, “a few mistakes here and a few mistakes there and pretty soon you’re talking misconduct.”[3]

The court expressed its “deep regret” in finding that that the prosecutors allowed a key FBI agent to give untruthful testimony, inserted material false statements into a search warrant affidavit, failed to comply with discovery obligations, and made misrepresentations to the court and the jury.[4] In vacating the convictions and dismissing the indictment, Judge Matz reminded the government that a “prosecutor’s job isn’t just to win, but to win fairly, staying well within the rules.”[5] In our case, the government strayed from those rules.

This case was in many ways the first of its kind. There was no playbook for defending against an FCPA criminal trial. But would we have done things differently had there been? Probably not. The defense team was aggressive and flexible and pursued and followed through on every opportunity to defend our clients. We did this despite having the most compelling and complete evidence withheld until after the verdicts were returned. In the end, we may have lost the trial battle, but the unwavering commitment of the defense team allowed us to win the war.

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Sima Namiri-Kalantari and Megan Weisgerber are associates in the firm's Los Angeles office. They were summer associates in 2011, when the post-trial motion to dismiss was briefed.

[1] Order at 4.

[2] Id.

[3] Order at 5.

[4] Id. at 2.

[5] Id. at 29.