



## WHITE-COLLAR CRIME

## Expert Analysis

# Assessing Developments On Criminalization of Legal Advice

Attorneys involved in criminal cases are constantly being called upon to give legal advice with respect to sensitive, complex and often ambiguous matters. Historically, attorneys have challenged established principals of law by forging new and creative arguments and sometimes advise clients how to avoid strictures of the law. Rarely has erroneous legal advice been criminalized without a finding that the attorney is knowingly and deliberately rendering advice which will further criminal conduct.<sup>1</sup> Two recent cases starkly present the issue of whether and how legal advice can be prosecuted.

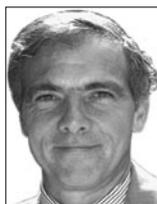
### 'United States v. Kuehne'

A well-known, Miami-based white collar defense attorney was indicted in February 2008 for violations of the federal money laundering laws. Named as a co-defendant in a case brought against a supposed Colombian drug kingpin and his Colombian-based accountant, the attorney, Ben Kuehne, was charged with one count of money laundering conspiracy in violation of 18 U.S.C. §1957 for knowingly engaging in a monetary transaction with criminally derived property of a value greater than \$10,000 having been derived from a specified unlawful activity, and one count of a money laundering concealment conspiracy in violation of 18 U.S.C. §1956 for conspiring to launder illegal proceeds knowing that the transaction was designed

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to conceal the illegal nature of the funds. According to the indictment, the proceeds allegedly laundered were derived illegally from the dealing of illegal narcotics and wire fraud.

Mr. Kuehne and his co-defendants also were charged with four substantive money laundering counts and one count of wire fraud conspiracy. With respect to the wire fraud count, the government

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alleged that the defendants believed that the Colombian government intended to seize the assets to be sent for the defense team of the alleged drug kingpin. Despite this knowledge, the defendants used the wires to transfer the funds to Mr. Kuehne's trust account, thereby "depriv[ing] the Colombian Government of its right to seize and thereafter forfeit these illegal proceeds."<sup>2</sup>

Mr. Kuehne sought dismissal of count one of the indictment—conspiracy to violate §1957—claiming that Congress

had explicitly excepted his actions from criminal liability. Given the significance of a lawyer being prosecuted for professional services related to the representation of a client, the case drew a great deal of attention.<sup>3</sup>

Mr. Kuehne's involvement in the case began at the end of 2001, shortly after Fabio Ochoa-Vasquez, the alleged Colombian drug kingpin, was charged with conspiracy to smuggle 30 tons of cocaine per month into the United States between 1997 and 1999. Mr. Ochoa hired several defense attorneys to represent him, including Roy Black. In December 2001, Mr. Black's defense team hired Mr. Kuehne to conduct an investigation into the source of the funds to be used by Mr. Ochoa to pay his million-dollar legal tab. Specifically, the indictment alleges that Mr. Kuehne was tasked with verifying that the funds were derived from untainted sources and, therefore, not subject to forfeiture by the government.

Between January 2002 and April 2003, numerous wire transfers totaling more than \$5 million were sent to Mr. Kuehne's attorney trust account from various bank accounts inside and outside the United States in payment of Mr. Ochoa's legal fees. After investigating the source of the funds, Mr. Kuehne drafted several opinion letters advising Mr. Ochoa's defense team that he had "conducted a comprehensive analysis of the source of all funds" and that all were valid and legal. The funds were then transferred from Mr. Kuehne's trust account to Mr. Ochoa's defense team, less Mr. Kuehne's fee for services rendered.

Subsequently, the government indicted Mr. Kuehne, alleging that he, along with Mr. Ochoa and Gloria Florez Velez, the Colombian accountant, conspired to violate the laws against money laundering. With respect to count one, the indictment specifically alleged that the defendants “conspired and caused financial transactions involving the wire transfer of more than \$10,000 in funds to, and within, the United States from Colombia and would forward those proceeds to the Ochoa criminal defense team with false opinion letters certifying that the funds were from a legitimate source.”<sup>4</sup>

According to the government, Mr. Kuehne repeatedly represented in his opinion letters that he had verified the sources of funds received, when in fact the funds were transferred from fictitious individuals or entities.<sup>5</sup> According to the government, Mr. Kuehne must have known that the sources were incredible and the assets were tainted. Further, the indictment alleged that the object of the conspiracy was to engage in the monetary transactions for the purpose of paying legal fees to the Ochoa criminal defense team.

Mr. Kuehne filed a motion to dismiss count one of the indictment, arguing that transactions involving criminal defense fees specifically are exempted from the criminal behavior covered by §1957.<sup>6</sup> Section 1957 prohibits a person from engaging in monetary transactions in property derived from specified unlawful activity. Section 1957(f)(1) provides an exception to the term “monetary transactions” for those “transaction[s] necessary to preserve a person’s right to representation as guaranteed by the Sixth Amendment to the Constitution.”

Mr. Kuehne argued that courts uniformly have applied this exemption to transactions involving funds paid to an attorney for legitimate criminal defense services and that his role in investigating the source of the funds and rendering an opinion on the validity of the money fell within the exemption because all funds transferred to Mr. Kuehne were: (1) used to pay Mr. Ochoa’s defense team and (2) “transactions” necessary to preserve Mr. Ochoa’s Sixth Amendment rights.

Mr. Kuehne noted that the purpose of the exemption, as set forth in legislative history, was to remove “the chilling effect” on the willingness of lawyers to take on clients if they were to be subjected to criminal prosecution. Stressing the dangers posed by the issues involved in his motion, Mr. Kuehne wrote that “[e]ven when the fees tendered by [a] client appear to be untainted, there will almost always be some level of uncertainty. And without an exemption from *criminal* prosecution, many clients with untainted funds will be unable to find lawyers willing to take their cases.”<sup>7</sup>

The government argued that the exemption was inapplicable, opining that the wire transfers of funds from Mr. Ochoa to Mr. Kuehne and subsequently to Mr. Ochoa’s defense team were not “*necessary*” to preserve Mr. Ochoa’s right to representation.<sup>8</sup> Specifically, the government argued that although the statutory exemption provided for monetary transactions necessary to preserve a person’s Sixth Amendment rights, the Sixth Amendment did not guarantee a defendant the right to use illegal proceeds to retain counsel.

In taking this position, the government relied heavily on the U.S. Supreme Court’s decision in *Caplin & Drysdale, Chartered v. United States*.<sup>9</sup> In that case, a law firm claimed that it was entitled to legal fees paid from funds that had been subject to criminal forfeiture pursuant to a plea agreement, arguing that the forfeiture statute unconstitutionally infringed on a criminal defendant’s right to counsel of choice. In rejecting the law firm’s position, the Supreme Court opined that no deprivation of a constitutional right occurred when a defendant was prevented from using criminal proceeds to pay for legal services, writing that “[a] robbery suspect, for example, has no Sixth Amendment right to use funds he has stolen from a bank to retain an attorney to defend him if he is apprehended.”<sup>10</sup> In essence, the government argued that *Caplin & Drysdale* vitiated the statutory exception in §1957(f)(1).<sup>11</sup>

Mr. Kuehne wrote, however, that he believed the government had missed the entire point of the exemption.

Congress did not enact the exemption in the mistaken belief that a criminal had a Sixth Amendment right to pay a lawyer with proceeds of a crime. Congress was concerned with the chilling effect that the threat of criminal prosecution would have on the willingness of defense lawyers to represent persons who might have untainted funds. If there were a magical way of determining with certainty whether a fee is tainted at the time when it is offered, the exemption would be unnecessary. But there is no magical way of doing so. That is why Congress believed the exemption was “necessary to preserve” Sixth Amendment rights.<sup>12</sup>

This argument was echoed by the National Association of Criminal Defense Lawyers in its amicus curiae brief submitted in support of Mr. Kuehne. Rather than rendering §1957(f)(1) a nullity, the NACDL argued that *Caplin & Drysdale* held only that the government may seek forfeiture of tainted funds used to pay criminal defense fees. Moreover, the NACDL wrote that the government’s “imposition of such indirect constraints on [an] individual’s Sixth Amendment right to counsel of choice is both constitutionally suspect and inconsistent with the prophylactic exception of 18 U.S.C. §1957(f)(1).”<sup>13</sup>

The District Court concurred with the defendant and amicus curiae, opining that the government’s analysis was flawed and that the Supreme Court’s decision was limited to whether the Sixth Amendment prohibited the forfeiture of criminal proceeds to attorneys. “Unlike §1957, the civil forfeiture statute does not include an exemption for attorney’s fees. Absent such a statutory exemption the Supreme Court reasoned that the Sixth Amendment did not protect such assets from forfeiture.” This holding does not, however, extend to the exemption set forth in §1957(f)(1).<sup>14</sup>

The court noted that the exemption as created by Congress was necessary to prevent the breadth of the money laundering statute from impinging upon the attorney-client relationship. “If I were to construe the statutory exemption as the government suggests, the exemption for

such transactions would amount to no exemption at all.”<sup>15</sup> Accordingly, the court granted Mr. Kuehne’s motion to dismiss the money laundering conspiracy count in the indictment against him.

What remains are the substantive money laundering counts and the two remaining conspiracy counts—money laundering by concealment and wire fraud, which observers say are “hanging on by a thread.”<sup>16</sup> The court deferred ruling on the defendants’ motions to dismiss these counts on the basis of statute of limitations and lack of clarity.<sup>17</sup> Discovery continues in the case.

### ‘In the Matter of Felix Vinluan’

The issue that arose in *In the Matter of Felix Vinluan*, as set forth below, is not as familiar as cases involving forfeiture. However, it also relates directly to an attorney’s ability to represent his or her client without fear of criminal liability.

Mr. Vinluan is a New York attorney who represented 10 nurses from the Republic of the Philippines who had been recruited to work in the United States at a Long Island nursing home. Each of the nurses executed an employment contract which provided they were to receive free travel to the U.S., two months of free housing and medical coverage, training, and assistance in obtaining legal residency, and nursing licenses. In exchange, the nurses committed to three years employment. The contract further provided for liquidated damages in the amount of \$25,000 should the nurses fail to honor their commitment.<sup>18</sup>

The nurses claimed that the terms of their employment were breached almost immediately upon their arrival in the U.S. They were not provided with nursing licenses or adequate housing and were underpaid. In response, the nurses filed oral and written complaints with their employer, which they believed were not properly addressed. As a result, the nurses sought the assistance of Mr. Vinluan, an attorney specializing in immigration law.

The nurses indicated to Mr. Vinluan that they wanted to resign because of the intolerable working conditions. The attorney advised the nurses that under the New York Education Law, they could not leave their positions during a shift when they were on

duty, but that they had the right to resign once their shifts had ended. Nevertheless, he counseled the nurses that it might be in their best interest to remain in their positions while he pursued other remedies. Following their meeting, Mr. Vinluan filed a complaint on behalf of the nurses with the Office of Special Counsel for Immigration Related Unfair Employment Practices in Washington, D.C. on April 6, 2006.

In spite of Mr. Vinluan’s advice, on April 7, 2006, the nurses resigned en masse after meeting with the attorney. The nurses used an identical form letter to submit their resignations, providing notice before their respective scheduled shifts that ranged from eight to 72 hours. Mr. Vinluan claimed that he was unaware of the nurses’ intentions in this regard. The nurses maintained that they decided to collectively resign with little notice because they feared retaliation from their employer.<sup>19</sup>

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The employer filed a civil action against Mr. Vinluan and the nurses seeking damages for breach of contract and tortious interference with the contracts. That action is still pending in Nassau County Supreme Court before Judge Stephen Bucaria. In addition, a complaint was filed with the New York State Education Department charging that the nurses had abandoned their patients simultaneously without adequate notice. In September 2006, after an investigation, the Education Department closed the case finding no wrongdoing on the part of the nurses. Specifically, the Education Department found that the nurses had not engaged in professional misconduct because they neither resigned mid-shift, nor deprived patients of nursing care.

However, in March 2007, the nurses and Mr. Vinluan were indicted in Suffolk County. The first count of the indictment charged that Mr. Vinluan and the nurses

had violated New York Penal Law §105.00 (Conspiracy in the Sixth Degree) by conspiring to engage in conduct constituting crimes of endangering the welfare of a child and endangering the welfare of a physically disabled person.

The second count of the indictment charged Mr. Vinluan with criminal solicitation in the fifth degree in violation of New York Penal Law §100.00 on the grounds that he intended that the nurses engage in criminal conduct by resigning. The indictment alleged that Mr. Vinluan “requested and otherwise attempted to cause the nurses to resign immediately.” The remaining counts of the indictment charged that the defendants acted in concert to endanger the welfare of the nursing home’s patients in violation of New York Penal Law §260.10(1) (Endangering the Welfare of a Child) and §260.25 (Endangering the Welfare of a Disabled Person).

The defendants’ motions to dismiss the indictment were denied by the trial court, but were taken up by the Appellate Division under Article 78. Mr. Vinluan argued that the prosecution improperly sought to punish him for exercising his First Amendment right of free speech in providing the nurses with legal advice. The nurse defendants further argued that the prosecution was improper because it contravened the Thirteenth Amendment’s prohibition against involuntary servitude by seeking to impose criminal sanctions upon them for resigning their positions.

The Appellate Division, Second Department, concluded that the prosecution impermissibly violated Mr. Vinluan’s First and Fourteenth Amendment rights, writing that “[i]t cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law.” Relying on a Supreme Court decision that the actions of lawyers from the National Association for the Advancement of Colored People advising African Americans to institute litigation of a particular kind were constitutionally protected, the Appellate Division found that the First and Fourteenth Amendment protections necessarily included advising one that his or her legal rights have been infringed.<sup>20</sup>

Analyzing the conduct alleged in the government’s indictment, the court noted that Mr. Vinluan’s criminal liability clearly

was predicated upon conduct in which Mr. Vinluan counseled his clients of their legal rights. "Thus, the indictment affirmatively seeks to punish Mr. Vinluan for providing legal services, which he avers was given in good faith." In response, the District Attorney did not dispute that Mr. Vinluan had acted in good faith, but urged the court to conclude his advice was not constitutionally protected because he advised the nurses to commit a crime.

Opining that the nurses' conduct in resigning did not constitute a crime, and dismissing the indictment against them on the grounds that the prosecution violated their Thirteenth Amendment rights, the court disagreed with the District Attorney that Mr. Vinluan counseled his clients to commit a crime.

More importantly, regardless of whether Vinluan's legal assessment was accurate, it was objectively reasonable. We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal, loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice.<sup>21</sup>

The court concluded that the impact of such a policy was "profoundly disturbing" and an "assault on the adversarial system of justice." Accordingly, the charges against Mr. Vinluan were dismissed.

Conclusion

Being a lawyer does not shield one from liability for engaging in wrongful conduct. A lawyer who engages in a crime either outside his role as an advocate or in his lawyerly role, such as knowingly filing a false affidavit or stealing funds from a client, can be justifiably prosecuted. Under no circumstances, however, should a lawyer face criminal charges for advice or work properly rendered to a client. Such exposure impacts a client's fundamental right to meaningful access to the

courts, and also dangerously impinges on a client and attorney's constitutional rights.

Attorneys cannot effectively represent clients when distracted by concerns about their own potential liability.<sup>22</sup> The *Kuehne* and *Vinluan* cases are reminders of the danger that some prosecutors may disagree with this notion. Another cautionary tale is the year-long recent Justice Department investigation of Bush administration attorneys who wrote legal memorandums authorizing waterboarding and other harsh interrogation methods. Although the DOJ concluded that the attorneys should not be prosecuted, they still may be subject to state disciplinary action.<sup>23</sup> Despite the controversial nature of these attorneys' legal conclusions, the legal community should be somewhat relieved with the decision not to prosecute these attorneys given the dangerous precedent it may set.



1. See *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974) (affirming conviction for obstruction of justice of attorney who advised a non-client witness to invoke his Fifth Amendment right in an SEC investigation, rejecting argument that advising non-client witness to invoke Fifth Amendment right is protected conduct).

2. Third Superseding Indictment, *United States v. Kuehne*, No. 05-20770-CR, ¶35.

3. Julie Kay, "Miami's Defense Community Rallies for Indicted—and Cash-Strapped—Attorney," *The National Law Journal* (Nov. 14, 2008); Paul Brinkmann, "Attorneys React Along Political Fault Lines to Kuehne Indictment," *Triangle Business Journal* (Feb. 22, 2008); Scott Michels, "Money-Laundering Prosecution Worries Lawyers," *ABC News On-Line* (July 22, 2008).

4. Third Superseding Indictment, *United States v. Kuehne*, No. 05-20770-CR, ¶3.

5. *Id.* at ¶¶21-28.

6. Motion to Dismiss Count One of the Third Superseding Indictment, *United States v. Kuehne*, 05-20770-CR (July 15, 2008) ("Kuehne's Memorandum").

7. *Id.* at pp. 15-16 (emphasis in original).

8. Government's Opposition to Defendants' Motion to Dismiss Count One, *United States v. Kuehne*, 05-20770-Cr. (Sept. 5, 2008) ("Government's Memorandum") at p. 6 (emphasis added).

9. 491 U.S. 617 (1989).

10. *Id.* at 626.

11. Government's Memorandum at p. 10.

12. *Kuehne's Memorandum* at p. 11.

13. Brief of Amicus Curiae National Association of Criminal Defense Lawyers in Support of Defendant Kuehne's Motion to Dismiss, *United States v. Kuehne*, 05-20770-Cr (Aug. 29, 2008).

14. 2008 WL 5381394, \*3 (S.D.Fla. Dec. 22, 2008).

15. *Id.* at \*4.

16. John Pacenti, "Kuehne Case 'Hanging on by a Thread,'" *Daily Business Review* (Jan. 5, 2009).

17. *United States v. Florez Velez*, 2008 WL 5412909 (S.D.Fla. Dec. 30, 2008).

18. 60 A.D.3d 237, 873 N.Y.S.2d 72, 75 (2d Dept. 2009).

19. *Id.* at 76.

20. *Id.* at 82 (citing *National Assn. for Advancement of Colored People v. Button*, 371 U.S. 415, 437 (1963)).

21. *Id.* at 83.

22. Otto Obermaier and Robert Morvillo, "White Collar Crime, Business & Regulatory Offenses," §2A.05[4]. See also John K. Villa, "Banking Crimes: Fraud, Money Laundering and Embezzlement."

23. David Johnston and Scott Shane, "Interrogation Memos: Inquiry Suggests No Charges," *The New York Times* (May 6, 2009).