



P E R S P E C T I V E

When Prosecution Is Outsourced to the Private Bar

BY ELKAN ABRAMOWITZ

The following is an edited version of a speech given by Elkan Abramowitz as he accepted the Norman S. Ostrow Award from the New York Council of Defense Lawyers on March 14.

I want to talk about what I perceive to be a disturbing trend in the prosecution of corporate crime. This is a complex topic, and I can only touch the surface today, but I at least have some time to be provocative if not profound.

As many commentators have pointed out, the theory that corporations, a fictional person in the law, can form the requisite mental intent to commit a crime is just that: a theory, not a self-evident one and one unknown at common law and unknown in many countries around the world. Whatever the utility of holding a corporation civilly responsible for the individual acts of its employees, the same cannot necessarily be said in the criminal context. The conviction of a corporation doesn't punish the individual wrongdoers, it often punishes the shareholders and innocent employees regardless of whether they are guilty of any wrongdoing, as the Arthur Andersen conviction, later reversed too late to save the company, demonstrated.

The simple threat of a corporate indictment is having the effect of forcing corporations to conduct internal investigations upon any suspicion of wrongdoing, and disclosing alleged criminality to the government in order to try to prevent itself at all costs from being indicted and suffering the fate of Arthur Andersen.

Since the 2003 demise of Andersen, almost all major federal corporate cases have been resolved by either a declination of corporate prosecution or by the company entering into a deferred prosecution agreement, both conditioned on the continuing cooperation by the corporation in disclosing the wrongdoing to the government. The statistics are alarming: In the 13 years between 1992-2005, the U.S. Department of Justice resolved 24 corporate criminal cases in this manner; in 2006 alone, 20. Then last year, in 2007, the number grew to 35. Put another way, this type of corporate disposition has more than doubled in the last two years over the prior 13. All this at a time when referrals of white-collar cases from the traditional investigative agencies, such as the FBI, are reported to be way down. The referrals instead are coming from the private bar.

These non-prosecution or deferred prosecution agreements typically give

the government much more power over the corporation than it could have obtained if the corporation were actually convicted of a crime in court. These agreements often provide for a continuing obligation by the company to cooperate by providing damaging information and witnesses whenever the government wants them. They sometimes also involve the appointment of outside monitors paid for by the company either to act as ombudsmen or as a director on the board, charged with reporting any wrongdoing to the government. Having such a monitor sitting on the board is pretty close to having Big Brother watching every corporate move and is truly an anomaly in this era of general governmental deregulation.

As one former prosecutor has put it: "Prosecutors know how to investigate and prosecute crimes. They aren't equipped to regulate corporations. In every corporation, experts with training and experience struggle with complex legal, accounting, compliance, marketplace, compensation and information technology issues. How does a criminal prosecutor even begin to understand the terminology applied to each of these sub-areas, much less develop a sophisticated opinion on best practices?"

And, yet, because as we all know the concepts of "mail fraud" and "conspiracy"

are expansive, this hypersensitivity to corporate wrongdoing, fueled by the desire to please the government which holds the hammer over the corporation's head, we are seeing more and more criminal charges premised on hitherto debatable esoteric legal and accounting principles, now labeled as fraud.

This wholesale outsourcing of the prosecutive function to the private bar is troublesome in other respects as well. Before full time prosecutors are hired they are subject to rigorous background checks and are put through some period of training in representing the government. Governmental investigation and prosecution of crime is subject to a hopefully uniform national policy as well as the restraining values of our society as expressed in the Bill of Rights, including, the Fifth Amendment right not to incriminate oneself and the Sixth Amendment right to counsel, among others. Every prosecutor knows that individuals called in to testify may refuse to do so and may have counsel act on their behalf and they operate within that system. And, hopefully most of the time, they investigate without any bias to find a particular result.

When a corporation is conducting an internal investigation, on the other hand, there is almost an institutional bias to find and expose criminality, because the company usually can only receive the non-prosecution or deferred prosecution agreement if it cooperates in disclosing the wrongdoing. And in conducting the investigation, employees are explicitly made to understand that if they refuse to testify they will be terminated and often told that their legal fees will not be paid if they choose to defend themselves, whether the government demands the corporation do these things or not. Thus, when the results of the investigation conducted in this manner are turned over to the government, it gets more ammunition than it would otherwise get if it alone were prosecuting a case referred to it by the FBI or other law-enforcement

agency. The outsourced prosecution thus is less subject to the values expressed in the Bill of Rights than one we as a society permit our full time prosecutors to conduct on their own.

When I look around the room today at the over 700 lawyers attending this lunch signifying some attachment to the specialty of white-collar defense and remembering how few of us there were in the 1970's when I went into private practice and became a white-collar criminal defense lawyer, I am concerned as to what has happened to this specialty. What I see is too many of us drifting from being defense lawyers to being private G-men, conducting and disclosing the results of corporate internal investigations to the government, which in turn brings charges against individuals it never would have or could have prosecuted on its own.

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Whatever social utility is believed to be served by this system, I believe that this outsourcing of a purely governmental function, is extremely dangerous.

Before this organization becomes better known as the New York Council of Private Prosecutors, there are some suggested reforms under discussion for us to consider and fight for, short of the total abolition of corporate criminal liability—a topic worth debating at

least in the case of publicly owned corporations—that should be able to limit the threat that exists today that every illegal act by an employee exposes a company to criminal liability. One sensible approach that has been the subject of some Congressional testimony would focus on whether a corporation had created a real and effective corporate compliance program, or just a paper one. If a corporation had such a program in place prior to the commission of a criminal act by an employee, corporate criminal liability could be imposed only if the government could plead and prove that the program itself was not created in good faith and was not reasonably effective.

If a company employs such a program, it would operate as a total bar to criminal liability, thus limiting dramatically the number of cases in which a corporation as an entity would fear its destruction unless it was forced to cooperate with the government. Such a rule might have the effect of putting the investigation and prosecution back into the government where it belongs.

If such a law were passed, there may not be 700 people here next year, because, let's face it, the legal fees we all have earned from this wholesale practice of outsourcing has been one of the major reasons this specialty has grown so much. But I believe our system of justice will be better for it.