

An incisivemedia website

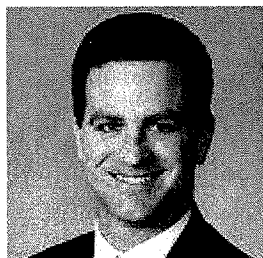
THE NATIONAL LAW JOURNAL

WWW.NLJ.COM

WEB-ONLY

A corporate investigations attorney talks about sophisticated entities, and whether they're victims

Peter Page / Staff reporter
November 7, 2008



Perkins Coie's Patrick Collins

During his 12 years as a federal prosecutor in Chicago, Patrick Collins tried, and won, 20 criminal cases, among the most notable, the conviction of former Illinois Governor George Ryan. Collins joined the corporate investigations practice at Perkins Coie's Chicago office in March 2007, just about when the subprime mortgage market began unraveling into the economic crisis that dominated the presidential campaign. *The National Law Journal* asked him if he is seeing any courtroom trends developing from the credit meltdown.

NLJ: What sort of calls are you getting as a result of the credit crisis?

PC: We are hearing from sophisticated corporate entities asking us if there are claims to be brought because of malfeasance by a financial institution.

NLJ: What's unusual about that?

PC: Sophisticated corporations are not normally the victims in these complex transactions, but those are claims being considered as a direct result of the subprime and Lehman Brothers fallout.

NLJ: Have suits been filed?

PC: These aren't our cases, but we noticed that BP filed a suit here in Chicago [alleging that] Northern Trust mismanaged employee pension funds. [BP Corp. North America Inc. Savings Plan Investment Oversight Committee v Northern Trust Investments, No. 08-cv-6029 (N.D. Ill.).] Bank of America has sued Bear Stearns in New York for [allegedly] not disclosing all the risks in a \$4 billion deal. [Bank of America v. Bear Stearns Asset Management Inc., No. 08-cv-9265, (S.D.N.Y.).] You just don't normally see a BP or Bank of America making allegations like this. I don't know if two lawsuits by sophisticated entities against other sophisticated entities is a trend but it is very unusual.

NLJ: Because big corporations ought to be more diligent than Mom and Pop investors?

PC: That's right. It is not remarkable to have class action lawyers file suits with these claims, but these are not that sort of client.

NLJ: Does that tell us something about how complex these exotic financing deals really were?

PC: Well, we are hearing from sophisticated corporate plaintiffs who claim they were not told all the material facts. That is unique. Those are claims that we hear from unsophisticated, individual investors. Now the first defense is almost always that the core facts were disclosed and the plaintiff assumed the risk. Litigation gets you into the fine print to see how the risk was allocated.

NLJ: Is this job security for you?

PC: The fallout from this financial mess will take years to unravel, both criminally and civilly. When you have large, well-funded corporations fighting with a lot at stake, it is something like a full employment act for litigators.

Subscribe to The National Law Journal

 [Printer-friendly Version](#)  [Email this Article](#)  [Comment on this Article](#)  [Reprints & Permissions](#)

Foul Play

DOJ sends sharp message to prosecutors following the Ted Stevens debacle. **BY STEVEN ANDERSEN**

The duty to share exculpatory evidence with the defense is not a gray area. In the words of one former U.S. attorney: "It's Prosecution 101." So the revelation of withheld evidence that led to the dismissal of former Sen. Ted Stevens' corruption conviction has not just further tarnished the Justice Department, it has left former prosecutors shaking their heads in dismay. ¶ "It was quite disappointing," says Wendy Wysong, a partner at Clifford Chance and a former assistant U.S. attorney in the District of Columbia. "As a former prosecutor, I sympathize with

the prosecutors in the sense that obviously they were taken by surprise that the case went to trial so quickly. On the other hand, we're trained to never indict until we're ready to go to trial."

The high-profile prosecutorial misconduct cast another shadow over the department, just as it works to gain distance from Bush-era controversies and establish a new culture under Attorney General Eric Holder.

While no one expects the DOJ to change its priorities as a result of the Stevens affair, the debacle has already affected policy. On April 14, Holder announced enhanced training for all prosecutors on sharing evidence. And the precedent of misconduct may provide new leverage for corporate defendants to push back against what they perceive as prosecutorial excess.

Prosecutor's Nightmare

Prosecutors are a tight-knit group, even after they go over to the other side. These days they seem to share

a kind of funk over the Stevens case.

"I think the white collar bar is all following it because it's sort of a prosecutor's nightmare," says Patrick Collins, a partner at Perkins Coie and a former U.S. attorney in Chicago. "You're taught from day one that your job is to seek justice and not to win. Every prosecutor who has a high-profile case wants to win. At some point, there can be a tension between winning

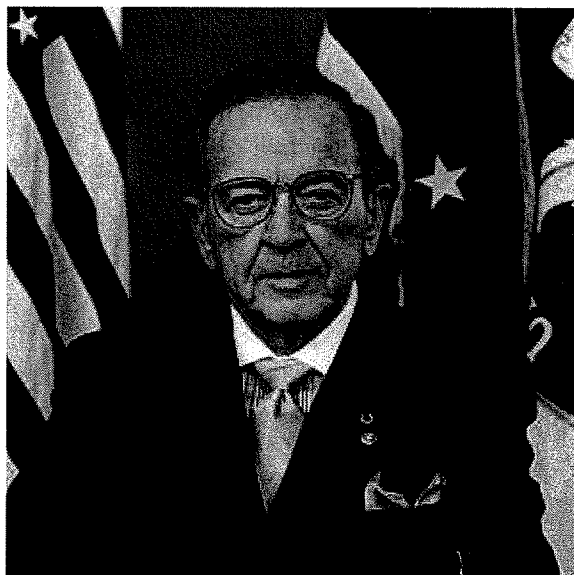
and doing the right thing."

Collins says there is no excuse for not turning over exculpatory evidence and doesn't buy the notion that it slipped through the cracks. (In this case, the evidence in question was a contradictory statement on the value of Stevens' home by star witness Bill Allen.)

"It was material; it's not something you forget," he says. "For every prosecutor it's second nature that if you get something like this you get it in a report and turn it over. Again, it's this tension between winning versus doing justice. I think that some prosecutors forget that there is a big distinction there, and [think] winning transcends all else. It can't. Once you've done that, you've lost your soul as a prosecutor."

Politics can be a factor. The more prominent a case, the more input, management and even overt pressure flow from political appointees at the top of the department.

Partisanship is not the issue so much as managing careers that are governed by election cycles. This



Former Senator Ted Stevens

QUICK READ

Former prosecutors aghast at Stevens debacle

Justice sometimes at odds with desire to win

Potential leverage for corporate defendants

was a case, after all, of a Republican-led DOJ taking down a senior Republican senator as the clock ticked toward an election that showed every indication of heavy Democratic gains. But the highly charged tenor of a headline-grabbing case can affect even the career prosecutors in the trenches.

“One of the things that happens in a political or high-profile case like this is that there’s a huge push to get it done

before a change in the administration,” says a former prosecutor who asked not to be named. “As government lawyers think about re-entering the private sector at the end of an administration, they want to leave a mark with a big case. In that sense, sometimes the political process overwhelms careful preparation.”

One Bad Cop

As much as former prosecutors wince

at the blow to their fraternal pride, they don’t deny that the Stevens uproar opens a line of defense for their clients.

“This is a good time for corporate defendants who feel like they are being unfairly targeted or unfairly treated,” says Wysong. “Prosecutors don’t want to be seen as bullies or as unethical. I think companies will get a good reception from judges as well. People are going to be sensitive about this because they’ve seen the pendulum go too far.”

As long as prosecutors stay on the straight and narrow, they carry the full gravitas of their office: upholders of the law, defenders of the common good. But when they stray, the script flips.

Just as a dirty cop taints the whole police force, overreaching prosecutors affect the entire Justice Department.

“One of the angles you have to consider as a defense lawyer is putting

Prosecution 101

EVERY PROSECUTOR KNOWS—OR SHOULD KNOW—THE SIGNIFICANCE OF *Brady v. Maryland*. The watershed 1963 Supreme Court case set the bar for how prosecutors treat exculpatory evidence.

The Court held that withholding evidence material to establishing guilt or punishment violates due process under the 14th Amendment. In *Brady*, the prosecution withheld testimony from a co-defendant who took sole responsibility for a murder, corroborating the defendant’s version of events. Police who lie to suspects have since been called “Brady cops.”

Congratulations to 25% of you!

Only 1 in 4 companies feel very confident they could respond appropriately to discovery requests

according to a 2009 ARMA International survey. No matter where information lives, it needs to be managed consistently – otherwise, you’re at risk of exposing or losing business-critical data. Managing your information consistently across your enterprise is a critical foundation to compliance.

A not-for-profit professional association, **ARMA International** is the global authority on managing records and information. We provide best practices and other resources to help organizations manage their information for the greatest return and protection.

**Resources for better information management
at www.arma.org/email.**

Sponsored by:



