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White Collar Roundup - June 2019

Former College Coaches Find That Federal Sentencing Is No Slam Dunk

Earlier this month, U.S. District Judge Edgardo Ramos of the Southern District of New York sentenced a former assistant basketball coach for the University of Arizona to three months in prison for accepting thousands of dollars in bribes in return for steering players to certain agents. The former coach, Emanuel Richardson, was the first coach in the college athletics scandal to receive a prison sentence. Richardson and two other former basketball coaches — the University of Southern California's Anthony Bland and Oklahoma State University's Lamont Evans — were arrested last fall in the Federal Bureau of Investigation's high-profile probe into corruption in college basketball. Earlier this year, Richardson pleaded guilty to conspiracy to commit bribery and admitted he had accepted $20,000 in meetings with National Basketball Association agent Christian Dawkins and an undercover FBI agent, in which he agreed to direct to Dawkins Arizona players turning pro. Bland and Evans also pleaded guilty to conspiracy to commit bribery for similar conduct.

In the government's sentencing memorandum, U.S. Attorney Geoffrey S. Berman sought between 18 and 24 months' incarceration for Richardson, arguing the former coach had abused his position as a mentor to student-athletes for his own personal gain. Richardson requested a term of probation. As reported here, in rendering a sentence of three months' imprisonment, Judge Ramos noted about Richardson's conduct, "It was not a one-day, one-time decision. … More importantly, from the standpoint of the court, the student-athletes Mr. Richardson coached were victimized." By the same token, Judge Ramos, a former Day Pitney LLP partner, acknowledged Richardson "has positively impacted dozens if not hundreds of young men over the course of his career." The following day, Judge Ramos likewise sentenced Evans to three months' imprisonment. Bland was sentenced to a term of two years' probation.

A Cautionary Tale About Outsourcing Investigations

Chief Judge Colleen McMahon of the U.S. District Court for the Southern District of New York threw a brushback pitch to the Department of Justice (DOJ) last month, urging it away from micromanaging corporations' internal investigations in a way that could implicate *Garrity v. New Jersey*, 385 U.S. 493 (1967). In the government's case against former Deutsche Bank trader Gavin Black, who was convicted in connection with rigging the London Interbank Offered Rate, Black argued that the statements he made to Deutsche Bank's internal investigators under threat of termination were "fairly attributable" to the government due to the DOJ's close involvement in the internal investigation and therefore inadmissible under *Garrity*. Chief Judge McMahon agreed with Black that the DOJ "outsourced the important developmental stage of its investigation to Deutsche Bank" and thereafter "built its own 'investigation' into specific employees, such as Gavin Black, on a very firm foundation constructed for it by the bank and its lawyers." Though Chief Judge McMahon did not vacate Black's conviction or dismiss the indictment, because prosecutors did not rely on Black's statements in obtaining his conviction, the chief judge sent a clear message encouraging greater separation between government and internal investigators if the government later hopes to pursue prosecution of an employee who submits to an interview in the investigation under threat of termination. In the wake of Chief Judge McMahon's ruling, DOJ officials, offering individual views at conferences, have sought both to rebuff the idea that the DOJ directs corporate internal investigations and to note the difficulties in avoiding *Garrity* issues in some cases. What is clear, however, is that Chief Judge McMahon's shot across the bow will further distill attention on this issue, from the perspectives of both the DOJ and the companies now developing plans for new internal investigations.

Where the Correct Answer May Be Cannabis

Marijuana has been legalized in many states, in some cases for medicinal use and in others for recreational use as well. But it remains illegal under federal law across the country. This juxtaposition is sure to create confusion and, inevitably, some interesting law school-style hypotheticals.

One such hypothetical even ensnared an Assistant U.S. Attorney (AUSA). Recently, the DOJ's Office of the Inspector General (OIG) issued an investigative summary detailing the circumstances. An AUSA, suffering from back pain, began using marijuana in edible form medicinally in 2016. The report does not say whether this occurred under a physician's care or in a state with legalized cannabis, but it notes the AUSA admitted that his use violated state and federal laws.

Like many federal employees (and all AUSAs), the prosecutor had to fill out the notorious form SF-86, a detailed government questionnaire used to determine whether to issue security clearances. One of the questions asks whether the applicant has used a "controlled substance" in the past seven years. In 2017, the AUSA completed an SF-86 and answered that question, falsely, no. Soon after, the AUSA became embroiled in a marital dispute. His spouse, assuming the AUSA had falsely completed his SF-86, threatened to reveal this to the DOJ. The AUSA instead self-disclosed his cannabis use.

The DOJ Inspector General investigated and concluded the AUSA had violated federal and state laws in "possessing, transporting, and consuming marijuana edibles" as well as 18 U.S.C. § 1001 (false statements) in completing his SF-86. The case was then presented to both federal and state authorities, each of which, interestingly, declined to prosecute. But unfortunately for the AUSA, it may not end there. The OIG has also referred the case to the Justice Department's Executive Office for United States Attorneys and Office of Professional Responsibility.

The Joint Chiefs of ... Tax

In the latest sign of growing international cooperation in government investigations, the leaders of a five-nation consortium of tax officials marked its one-year anniversary by gathering in the nation's capital and highlighting their initial progress. The Joint Chiefs of Global Tax Enforcement, or J5, consists of senior officials from the Criminal Investigation division of the Internal Revenue Service and from similar tax enforcement agencies in the United Kingdom, Canada, Australia and the Netherlands. In a joint statement from Washington, DC, the J5 announced it already was involved in "more than 50 investigations" involving international enablers of tax evasion, among other initiatives. As Simon York, the director of Her Majesty's Revenue and Customs Fraud Investigation Service, elaborated, "When we launched the J5 we were clear that we wanted to use our combined powers and expertise to close the net on offshore tax evaders, international organized crime groups and those who help them. In just 12 months, that net has tightened with more than 50 investigations underway, meaning that now some of the most harmful or most prolific enablers of tax crime are in our sights." In its announcement, the J5 also described its focus on other areas, including money laundering, smuggling of illicit commodities, and personal tax fraud and evasion as well as cryptocurrencies. To further these goals, there had "already been hundreds of data exchanges between J5 partner agencies with more data being exchanged in the past year than the previous 10 years combined." Some of these data exchanges are taking place on a virtual platform called FCInet that, as the J5 described, allows member agencies to compare, analyze and exchange data anonymously and without surrendering control to a central database. With sophisticated tools and a high level of activity only one year in, the first prosecutions from the Joint Chiefs of Tax appear to be only a matter of time.

State vs. Federal FOIA Showdown

New Jersey Attorney General Gurbir S. Grewal took the unusual step recently of filing a complaint against the DOJ for its alleged delay in disclosing documents relating to the DOJ's recent curtailment of legal online gambling and any connection with lobbyist Sheldon Adelson. Adelson is the CEO and chairman of casino company Las Vegas Sands. The lawsuit arose when, after nearly a decade of precedent suggesting that online gaming was permitted under the federal Wire Act, 18 U.S.C. § 1084, the DOJ changed course early this year. Specifically, the DOJ's Office of Legal Counsel published a memorandum opinion titled *Reconsidering Whether the Wire Act Applies to Non-Sports Gambling*. The crux of this opinion was that, notwithstanding state law legalizing online gaming, prosecutors could still bring criminal charges under the Wire Act against both individuals and entities involved with such gaming. Pursuant to the complaint, Grewal's office filed a Freedom of Information Act (FOIA) request in February, seeking documents concerning any connection between the DOJ's change in policy and any lobbying efforts by Adelson to fight the threat of online gaming to his casino business in Las Vegas. The lawsuit alleges that the DOJ granted expedited processing to the FOIA request but had still failed to provide documents or legal grounds therefore by the time of the complaint. The lawsuit seeks to compel the DOJ's compliance with the FOIA

request. The DOJ's change in policy could have significant implications for New Jersey. According to a release from the New Jersey Attorney General's office, online gaming in New Jersey generates $352 million in annual revenue and $60 million in direct gaming taxes. Who will prevail in this state versus federal faceoff? Only time, and the judges in the District of New Jersey, will tell.

New Jersey Also Broadens Focus on Cybersecurity

New Jersey's Bureau of Securities, an entity within the State Attorney General's office, began its 2019 evaluation of nearly 1,000 registered investment adviser firms statewide, the Bureau recently announced. This year, the Bureau is focusing on the protection of customer data and personal information, which, as it explained, is part of New Jersey's efforts to enhance cybersecurity in the financial industries. The Bureau generally conducts its annual evaluation using an online examination and risk assessment tool, which requires investment firms to provide numerous responses regarding their business activities. The annual examination permits the Bureau to identify areas of concern and conduct targeted inquiries where necessary. The Bureau's new cybersecurity questions seek information relating to the email practices of investment advisers, including their communications with clients and third parties, which, as the Bureau explained, are intended to ensure that investment advisers act responsibly with clients' personal information. In a world where cyber incidents are sharply on the rise and hackers increasingly target financial institutions for ransom in New Jersey and beyond, the Bureau's enhanced focus on cybersecurity comes not a moment too soon.

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