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White Collar Roundup - February 2018

DOJ "Blue Book" (Its Litigation Manual) Unsealed in Part

As reported here, here and here, the National Association of Criminal Defense Lawyers (NACDL) has been in hot pursuit of the litigation manual of the U.S. Department of Justice (DOJ), known as the "Blue Book." The NACDL had filed a Freedom of Information Act (FOIA) request for the Blue Book, but the DOJ determined it was exempt from disclosure as attorney work product. The district court agreed, and the NACDL appealed to the U.S. Court of Appeals for the District of Columbia. That court largely agreed but remanded the case to the district court to "assess whether the Blue Book contains non-exempt statement of policy that are reasonably segregable [from] the protected attorney work product and therefore should be disclosed." After that long endeavor, the NACDL won a small victory when the district court ordered a few portions of the Blue Book to be disclosed, and those passages have now been unsealed. For more (and to find out what all the hubbub is about), click here. But don't get too excited, since the unsealed portions contain information that is neither earth-shattering nor terribly surprising.

Up in Smoke: Changes in Marijuana Policy

Earlier this year, U.S. Attorney General Jeff Sessions issued a memo to revise the federal government's position on marijuana enforcement. The one-page memo notes that the federal Controlled Substances Act (CSA) reflects "Congress's determination that marijuana is a dangerous drug and that marijuana activity is a serious crime." It then directs federal prosecutors to follow the "well-established principles that govern all federal prosecutions," which were outlined by Attorney General Benjamin Civiletti in 1980 and refined over time into Chapter 9-27.000 of the U.S. Attorney's Manual. The memo then specifically rescinds as "unnecessary" the "previous guidance specific to marijuana enforcement," including previous memoranda issued by deputy attorney generals during the Obama administration. The memo unleashed a flurry of speculation, not the least about how the Department of the Treasury's Financial Crimes Enforcement Network (FinCEN) might react. FinCEN had issued guidance regarding financial transactions involving marijuana activities that are legal under state law. For more on that, click here or here.

Losing Attorney of Choice to Conflict

Criminal defendants often want to use a lawyer they know and trust when defending themselves against government charges. Sometimes, however, their lawyer's prior work causes a conflict that forever prevents that representation. Such is the case in *United States v. DiScala* pending in the U.S. District Court for the Eastern District of New York. There, defendant Michael Morris's lawyer, Miranda Fritz, was disqualified based on her prior representation of co-defendant Craig Josephberg in a somewhat related FINRA arbitration. At a late stage in the proceedings, Josephberg argued Fritz should be disqualified, and District Judge Eric Vitaliano agreed. Morris sought reconsideration, which was denied. Morris suggested that the court could sever Morris's and Josephberg's trials as a middle ground. "But, there is no safe middle ground, just an ethical quagmire," Judge Vitaliano noted. The court explained that "Fritz would be honor bound to deflect attention away from Morris, including, if facts permitted, shifting blame to Josephberg," which "would violate the loyalty owed to Josephberg arising from her representation of him individually regarding conduct substantially related to the subject matter of this prosecution." Fritz suggested she could fix that problem by avoiding making such arguments in Morris's trial, but the court balked at that suggestion. As it said, "These are the threads from which ineffective assistance of counsel claims are woven."

DOJ Looking to Dismiss False Claims Act Cases

According to this memorandum, attorneys within the DOJ Commercial Litigation Branch, Fraud Section and assistant U.S. attorneys who handle cases under the False Claims Act (FCA) should take a close look at FCA cases and file motions to dismiss when they are without merit. The FCA allows private citizens, known as "relators," to file qui tam actions on behalf of the government to collect money they allege the defendant improperly obtained from the government. Under the FCA, the government may intervene in the action and prosecute it alongside the relator or allow the relator to handle the litigation alone. Either way, if the relator wins, the government gets repaid what it lost, and the relator collects a portion of the judgment for bringing the claim. Historically, if the government didn't consider the qui tam action to have merit, it would simply refrain from intervening and allow the relator to bear the burden of prosecuting the action. The recent DOJ memorandum may work to upend that pattern by directing the government attorneys who evaluate FCA cases to intervene and move to dismiss meritless cases pursuant to 31 U.S.C. § 3730(c)(2)(A). Under that section, however, the government may do so only if the relator "has been notified by the Government of the filing of the motion and the court has provided the person with an opportunity for a hearing on the motion." To read more, click here.

And Speaking of FCA Cases, the DOJ Limits Use of Guidance Documents

On January 25, the DOJ, through Associate Attorney General Rachel Brand, issued a memorandum limiting the use of agency guidance documents in affirmative civil enforcement cases. The memo builds on the November 16, 2017, memorandum issued by Attorney General Jeff Sessions disavowing the issuance of DOJ guidance documents outside the legislative process. The memo broadens this mandate to apply to DOJ litigators with respect to "determining the legal relevance of other agencies' guidance documents" in affirmative civil litigation. Fundamentally, the DOJ may not "use noncompliance with guidance documents as a basis for proving violations of applicable law" in affirmative civil enforcement actions. The DOJ may, however, continue to use guidance documents that summarize laws in effect and use evidence that a party reviewed those summaries as proof of knowledge of the requisite law. The memo applies to all new civil litigation and pending litigation "wherever practicable."

Customs Directive Regarding Border Searches of Electronics

U.S. Customs and Border Protection (CBP) issued a directive regarding how it would conduct searches of electronic devices at border crossings. The directive is designed to "provide guidance and standard operating procedures for searching, reviewing, retaining, and sharing information contained in computers, tablets, removable media, disks, drives, tapes, mobile phones, cameras, music and other media players, and any other communication, electronic, or digital devices subject to inbound and outbound border searches by" CBP. The policy instructs CBP to respect the rights of individuals against unreasonable search and seizure. It outlines the manner in which CBP officers will search such devices and the procedures such officers will follow. Significantly, section 5.2 specifically details the agency's handling of "Privileged or Other Sensitive Materials." For a good explanation of that provision, click here. For an article about the uptick in such border searches, click here.

Sometimes Even Prosecutorial Error Doesn't Matter

The First Circuit refused to order a new trial in *United States v. Gorski* even though the prosecutor's statements in the government's rebuttal summation infringed on the defendant's Fifth Amendment right not to testify in his own defense. In the case, defendant David Gorski was tried for conspiracy and wire fraud based on an alleged scheme to defraud the United States by "knowingly procuring government contracts based on the false premise that the company was owned and controlled by military veterans who became disabled in connection with their military service." At his trial, Gorski didn't testify and, instead of sitting at the defense table, sat with his family in the gallery. In its rebuttal summation, the government sought to rebut his good-faith defense, arguing, "Remember, he's the one doing all these things, but he wants you to blame the lawyers, blame the accountants, blame the brokers, blame the contracting officers. That's what he wants because at the end of the day he can't face the music. He can't stand in front of you." Defense counsel objected, and the district judge told the jury, "Let me caution the jury that the defendant has a constitutional right not to testify, and no inference of any kind can be drawn from the fact that he did not testify." Gorski's counsel didn't object to that instruction. After Gorski was convicted, he moved for a new trial, arguing that the prosecutor's statement "improperly drew the jury's attention to his decision not to testify, thus violating his Fifth Amendment right against self-incrimination, and also improperly shifted the burden of proof to Gorski." The district court denied the motion, finding any error to be harmless, and Gorski appealed. The First Circuit affirmed. It ultimately concluded that "the government's case against Gorski was too strong for it to have been an abuse of

discretion for the District Court to have determined that the prosecutor's statements were harmless in light of the curative instruction."

Speedy Trial Delay Results in Dismissal of Indictment with Prejudice

The Second Circuit in *United States v. Tigano* dismissed the indictment against Joseph Tigano III with prejudice because of a violation of Tigano's Sixth Amendment right to a speedy trial. At the start of its opinion, the Second Circuit noted, "Tigano's facts are exceptional in nearly every meaningful respect within the context of a Sixth Amendment speedy trial analysis." Tigano was arrested on October 2, 2008, ordered detained and indicted for violations of the CSA for allegedly growing marijuana. Over the course of the next seven years of pretrial detention, Tigano sought in vain to proceed to trial. During that time, he was subjected to three separate competency hearings, each of which determined he was competent to stand trial, based largely on his repeated desire to proceed quickly to trial and not to plead guilty. After this seven-year delay, his trial was finally held on May 4, 2015, and he was convicted. He appealed the conviction, arguing in part that his Sixth Amendment right to a speedy trial was violated, and the Second Circuit agreed. In doing so, the court concluded as follows: "We reiterate that the nearly seven years of pretrial detention in this case, as well as Tigano's single-minded focus on obtaining a speedy trial, present extreme facts in the speedy trial context. In other words, these facts represent what we expect will be a ceiling, rather than a floor, for Sixth Amendment analysis. Yet the case is no less significant because of its outlier status. Years of subtle neglects resulted in a flagrant violation of Tigano's Sixth Amendment right to a speedy trial. ... Tigano's years of imprisonment represent a failure of our courts to comply with their obligation to bring defendants to 'a speedy and public trial.' U.S. Const. amend. VI." The court vacated his conviction and dismissed the indictment with prejudice.

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