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OPINION

■ CRIMINAL LAW

Pinstripes to prison stripes

By Thomas Hagemann SPECIAL TO THE NATIONAL LAW JOURNAL

IT'S UNLIKELY that when President Reagan declared a "war on drugs" in the 1980s, he also meant to declare a war on attorneys. Nonetheless, the president's and the Department of Justice's steadfast hope that they could dismantle the global drug cartels required taking radical steps back then, including treating some of the lawyers who got paid with "dirty" money like criminals. More and more, however, it seems today that practically any attorney—not just the "drug lawyers" or the Mafia consigliere—risks being hauled into criminal court for fulfilling his sworn duty to represent a client zealously. As with so many slopes, it's getting a bit slippery out there.

Prior to Reagan's edict, defense attorneys and prosecutors enjoyed a fairly cordial relationship. There was general respect for the fact that the defense attorney's job description did not include letting the government win, that defense lawyers obstruct the government's efforts and that our system gained overall from a fair fight. A defense attorney's zealotry—hiding facts, telling favorable truths, turning hostile witnesses into friendly ones—was part and parcel of due process and justice and helped balance the investigative powers of the prosecution. To be sure, attorneys were prosecuted before the 1980s, but not very often, and a large measure of behavioral slack was given between professional adversaries.

Enter the war on drugs. In the beginning, the government's approach toward drug dealers' defenders may have been novel and aggressive, but it also made a fair amount of sense at the time: Follow the dirty money and don't let a drug kingpin pay for a bevy of lawyers protecting those in his realm. Prosecutions of lawyers increased dramatically.

New 'wars'

Then there were the wars on gangs, corporate polluters and health care fraud. Now, we have the war on terrorism and yet to come: the war on bad accounting. Somewhere along the way, criminal defense attorneys, indeed, all nongovernment attorneys, went from being perceived by many prosecutors as vital, albeit annoying, parts of the criminal justice system to mere impediments against righteous wars. But our jobs and our ethical duties mandate that we act from time to time as impediments.

A recent case in point is *U.S. v. Koch Industries*, in which the company's in-house environmental lawyer was indicted for not telling a federal agency precise details of an environmental problem. He spoke generally and in vague terms to the agency, and put things in as favorable a light as possible, which is what in-house environmental lawyers sometimes do. They have a duty to ensure environmental compliance, but not to tell everything they know when they speak with a government agency. This case could have been an Armageddon concerning the role of in-house counsel, but the government accepted an 11th-hour company plea and all indicted individuals, including the lawyer, were dismissed.

Even more chillingly, in *U.S. v. Beckner*, the 5th U.S. Circuit Court of Appeals dealt with Donald Beckner, a defense lawyer and former U.S. attorney who was tried three times for aiding and abetting his client's fraud. He had set up roadblocks that impeded Securities and Exchange Commission efforts and he represented an unsavory client.

What's frightening about *Beckner* is not just that Beckner was indicted or that the government retried him three times before the court finally reversed his conviction, but that the opinion reads like a gift to an abused defendant—a reversal based on insufficient evidence. There was no legal bar to prevent the government from transforming Beckner's zealous representation to a case of aiding and abetting.

This type of prosecution should concern everyone in the profession. The prosecution stepped relentlessly into the gray zone of attorney behavior and, based on no apparent standards of conduct, spun that behavior as criminal.

The problem is the chilling effect. I spoke recently with a former federal prosecutor, now a defense lawyer in Miami, who is giving up criminal defense due to fear of such untempered prosecutorial discretion. Private attorneys are charged with the duty to do everything legally and ethically within their power on behalf of their client. If prosecutors say, "don't get anywhere near the line, or you could be a target yourself," many attorneys will comply. Cooperate. Stay away from the unsavory clients altogether. Don't be as adversarial as necessary. And our system of justice will suffer.

So follow the case of Lynne Stewart, the New York attorney recently charged with helping her client—a most unsavory person—further his terrorist efforts from prison, and think about for whom the bell tolls. The case is an offshoot of the war on terrorism and, to some degree, the new laws against terrorism. Who could have a problem with any effort to fight that war? Yet the more the government equates obstruction of justice with zealous representation, the more we may be moved from worthy adversaries to annoying impediments to silent lambs. NLJ

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