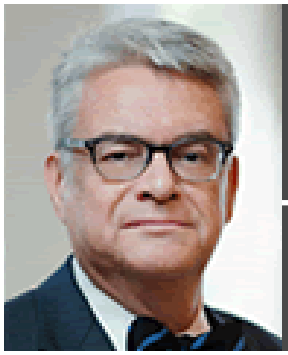

ETHICS: PRACTICE LESSONS FROM PUBLIC CORRUPTION

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Practice Lessons from Public Corruption
Jack Sharman

Indictments of lawyers are significant in ways that criminal charges against laypersons are not. Lawyers are self-governing; they benefit from privileges; they are repositories of trust. They are self-governing because they set their own admission-standards and discipline their members with almost no outside interference. Their conversations with clients and their work output are protected from disclosure – kept secret – in ways and under circumstances unthinkable in other sectors of the economy. They are trustworthy: they hold money in trust; they act as fiduciaries; and courts in many important ways rely upon their word.

On the other hand, lawyers are subject to the law, civil and criminal, just like any other citizen. Although a client may love his or her attorney, lawyers as a class are not popular. For a prosecutor, indicting a lawyer can bring public relations cachet. If the prosecutor can demonstrate that the crime-fraud exception to the attorney-client privilege applies, otherwise unavailable evidence may be produced.

Few lawyers, however hard-fought the battle or the controversy or the client, can imagine themselves being charged with a crime for – at least in their eyes – "acting as a lawyer." Indictment, though, was exactly what happened to Joel Gilbert, a young partner at a major southeastern law firm.

After clerking for the Alabama Supreme Court following his law school graduation, Joel Gilbert began working at Balch & Bingham as an associate in 2003 and was eventually promoted to equity partner. He specialized in environmental law. His colleagues testified that he was known to be a trustworthy, truthful, and law-abiding person. During the period relevant to this case – 2014, 2015, and 2016 – he represented several clients across dozens of matters and annually had about 2,400 hours of billable and non-billable time.

Indicting The Lawyers

The criminal case arose from Joel's representation of Drummond, a coal company, in connection with the EPA's efforts in Alabama. Drummond wanted to engage in community outreach and issue advocacy against the EPA's plan to take two regulatory actions related to the 35th Avenue Superfund Site in north Birmingham (the "Superfund plan"). First, the EPA proposed to list the Superfund Site on the "National Priorities List," which is reserved for the areas in the country with the most serious pollution ("the NPL Listing Proposal"). And second, the EPA proposed to expand the Superfund site to cover the City of Tarrant and the Inglenook neighborhood ("the Site Expansion Proposal"). See Indictment ¶¶ 7-9. The Indictment alleged that companies determined to be responsible for pollution within the Site "could have faced tens of millions of dollars in cleanup costs and fines." Id. at ¶ 7.

From the start, the EPA's Superfund plan was unpopular in Alabama. It was opposed not only by the local business community but also by the Governor, the Attorney General, the state legislature, and the state's environmental regulators. Indeed, in September, 2014—well before the "bribery scheme" in this case took place—the Alabama Department of Environmental Management

(ADEM) sent a letter to the EPA stating emphatically: "The State DOES NOT CONCUR in the proposed [NPL] listing for numerous reasons."

Drummond opposed the EPA's Superfund plan on scientific, economic, and policy grounds. In its view, the alleged pollution in north Birmingham had been vastly overstated by EPA and environmental activists relying on flawed scientific studies. In fact, as EPA subsequently determined, there was no harmful pollution warranting EPA action. Many local community leaders agreed, and believed the Superfund plan was an ideological crusade that ignored the interests of local residents, whose property values stood to be substantially harmed if the Superfund plan went forward.

To help advance the political and legal fight against the Superfund plan, several Drummond executives consulted with the company's outside counsel at Balch & Bingham, a Birmingham-based regional law firm. On behalf of Drummond, Balch & Bingham hired the Oliver Robinson Foundation to help educate the public about, and advocate against, the Superfund plan. Indictment ¶ 14. The Foundation was well-known in Birmingham and had prior experience in community outreach and education campaigns. It was founded by and affiliated with Oliver L. Robinson, Jr., a part-time legislator in the Alabama State House of Representatives who represented a district that did not include the Site or any of the areas being considered by EPA under the Site Expansion Proposal. Robinson was a pro-business Democrat and a natural political ally of Drummond on the Superfund issue.

The contract between Balch & Bingham and the Foundation was no different from many other agreements routinely entered into by law firms across the country to engage in vigorous issue advocacy on behalf of their clients. The Foundation was retained for, among other things, the "collection and dissemination of information" regarding the Superfund plan. Pursuant to the contract, the Foundation hired workers to engage in a public-advocacy campaign to distribute flyers, make phone calls, knock on doors, and otherwise express the view that the EPA's Superfund plan was scientifically unsound and disastrous as a policy matter. The preamble of the contract made clear that the relationship was subject to federal, state, and local laws, including the Alabama Ethics Law. The contract said nothing about Robinson taking any "official action" by using any of the powers of his office to assist Drummond in any way.

There were three defendants: Joel Gilbert, a young partner at Balch; Steve McKinney, a senior partner at Balch, head of the firm's environmental section, and former chair of the ABA's Environment and Natural Resources Section; and David Roberson, a vice-president at Drummond and the client contact with Balch. The Government used the contract as the basis for indicting the three defendants for federal "bribery" in violation of 18 U.S.C. § 1343, 1346 (honest-services bribery) and 18 U.S.C. § 666 (federal-program bribery). The prosecution claimed that hiring the Foundation to engage in issue advocacy was part of a criminal "conspiracy." In particular, the Government alleged that the Defendants gave the Foundation "monthly payments in exchange for, among other things, favorable official action by Representative Robinson in relation to the environmental issues in north Birmingham." Indictment ¶ 18.

The Indictment identified four basic categories of alleged "official action." Namely, Robinson was to:

> (1) "communicate[] . . . opposition to EPA's actions to the residents of north Birmingham" without disclosing that his Foundation was "being paid to represent the exclusive interests of Balch & Bingham and Drummond Company."
> (2) "make a public statement and pressure and advise" two state executive agencies, the Alabama Environmental Management Commission ("AEMC") and Alabama Department of Environmental Management ("ADEM"), "to take and maintain a position on behalf of the State of Alabama favorable to Balch & Bingham and Drummond Company in relation to EPA's efforts to list the 35th Avenue Superfund Site on the National Priorities List and expand the Superfund Site";
> (3) "meet with and advise EPA officials to take a position favorable to Balch & Bingham and Drummond Company in relation to EPA's efforts to list the 35th Avenue Superfund Site on the National Priorities List and expand the Superfund Site into Tarrant and Inglenook"; and
> (4) "vote as a member of the State of Alabama House of Representative's Rules Committee to send the joint resolution (SJR97) . . . to the floor of the House of Representatives for consideration by the membership of the House with the recommendation that the resolution be adopted."

Indictment ¶¶ 62, 64.

The Government's allegations under section 666 (federal-program bribery) relied on the same four categories of conduct: by paying the Foundation to engage in community education and issue advocacy, Defendants "did corruptly give, offer, and agree to give" a thing of value to Robinson, an agent of the State of Alabama, "with intent to influence and reward" him "in connection with"

some "business, transaction or series of transactions of the State of Alabama involving" something "of value of $5,000 and more." Indictment ¶ 64.

In short, the Indictment alleged that Defendants committed both forms of bribery by hiring and paying the Foundation in exchange for: (1) public advocacy to "the residents of north Birmingham" expressing the view that the Superfund plan should not proceed; (2) a public statement Robinson made to a state executive branch agency and an official in a different state executive branch entity expressing the same view; (3) a meeting with members of a federal agency on the topic; and (4) a symbolic committee vote in favor of having the full Alabama House vote on a joint resolution "urging 'the Attorney General and ADEM to combat the EPA's overreach.'" Indictment ¶¶ 38, 62, 64.

Six Takeaways

Each case has its own peculiarities, but what are the takeaways we should consider to avoid the risk of criminal prosecution or other sanction as a result of what we understand to be "practicing law"?

Let us start by brushing away a cliché: "avoid getting indicted for a crime by not committing a crime in the first place." Offenses that happen to be committed by someone who has a bar license but which otherwise stand on their own two feet – possession of child pornography, manufacture and sale of methamphetamine, being a straw purchaser for an unlawful firearm – are not our subject today. Whether or not one is a lawyer, one should avoid possessing child pornography, selling meth, or running guns. The potential offenses that concern us today are those that arise from the operation of most lawyers' daily lives: timesheets, budgets, consultants, check requests, confidentiality concerns, setting up files, and describing matters. Like almost all other white-collar crimes, these lawyer-crimes, if they exist, exist because the lawyer possessed wrongful intent when he or she took action (or failed to take action). A participant in a mock trial, a very nice older lady, once threw up her hands in exasperation at the end and exclaimed: "I just want to know whether he did it or not."

And therein lay the problem, of course. In white-collar cases, including those involving lawyers, there are rarely major disputes about the facts. A check is a check, the contract was in fact awarded, a vote on the bill was taken. In contrast, in cases involving street crime, there may be defenses (such as alibi or duress) but there is rarely a dispute that a crime has occurred: someone walked in the bank, pulled a gun, and held it up.

For that reason, it does us little good to say "don't commit the crime if you can't do the time." What might be some takeaways that will help us?

Look for public dollars. The starting point for federal or state public-corruption investigations is public money. Public funds can enter a lawyer's professional life in many ways. The client may be public (like an agency), semiprivate (like an industrial development board), or private but receiving public money (certain programs designed to encourage minority business ownership, for example).

Look for public people. In the news, it is always elected officials who are at the center of public-corruption allegations, but public officials draw upon the services of lobbyists, crisis communicators, fundraisers – and lawyers. They are subject to state and federal regulation. It is not difficult to run afoul of state ethics laws or campaign-finance rules that can serve as a jumping off point for federal charges of honest services mail and wire fraud, federal program bribery, money laundering, and other offenses.

Check the changing scope of the engagement. Almost any matter morphs from inception to conclusion. In most instances, the changing circumstances of the representation are driven by tactics, strategy, or the budget. If public money or public officials or agencies are involved in the transaction or litigation, however, it is important to keep an eye on the shifting landscape. What was permissible at the outset may look very different halfway through the engagement. At a minimum, periodic reviews and updated retention agreements may be necessary.

Seek blessing. Do not go alone. Before undertaking a matter, entering into an agreement, or making a payment that implicates public officials, agencies, or money, seek review and approval internally or externally. Many law firms, for example, have an internal general counsel charged with, among other things, ethics and compliance issues. Corporate law departments often have similar resources. Assuming that the matter can be raised "blindly," a state bar association may be willing to provide input and counsel. In all these circumstances, it is critical to provide the advisor with all the facts, not just those facts that you hope will make it more likely that the engagement or other course of action will end up getting blessed.

Update the file. Attorneys have many skills. What are some skills they lack? Correctly and precisely identifying engagements; giving full explanations for check requests; and making sure that nonlawyers – the folks in accounting, for example – have a full understanding of what we are

doing. Consider these administrative tasks in the light of how they might read three years from now in a federal courtroom at a criminal trial. It does not matter what you understand a notation on the check request to be. It only matters how the jury understands it.

Be parsimonious with privilege. Lawyers love privilege. Nobody else does – and especially prosecutors. Do what you need to do to discharge your professional obligations, but confidentiality and nondisclosure agreements with vast fields of toxic-sounding secrecy language are sure to get the attention of the prosecutor and poison the heart of your jurors.

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A modest amount of common sense, caution, and extra work will go a long way towards guaranteeing that the closest you come to interacting with the American criminal justice system is something you see on Netflix.

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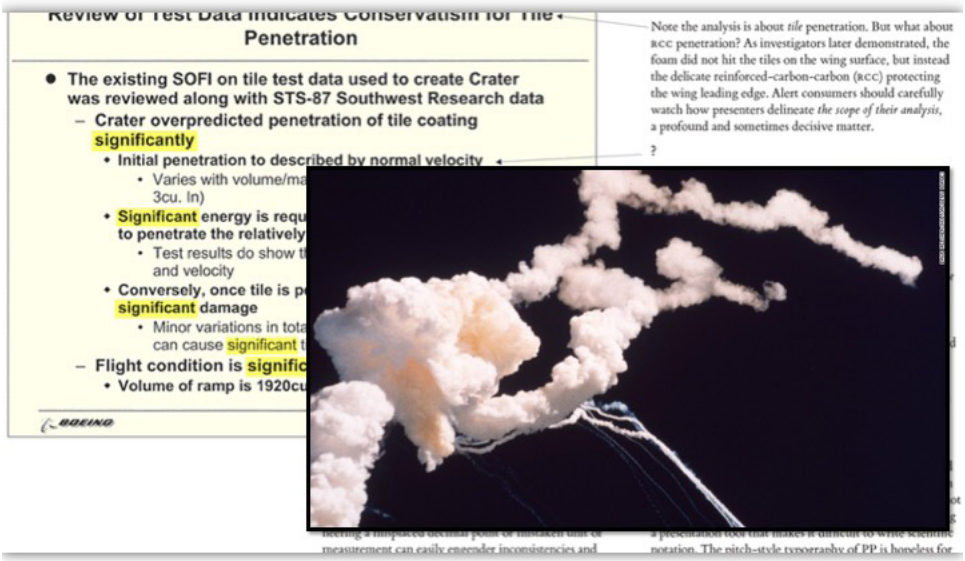
METRO PICTURES CORPORATION
PRESENTS
VIOLA DANA
IN
THE OFF-SHORE PIRATE
BY F. SCOTT FITZGERALD


Penetration
The existing SOFI on tile test data used to create Crater was reviewed along with STS-87 Southwest Research data
– Crater overpredicted penetration of tile coating significantly
• Initial penetration to described by normal velocity
• Varies with volume/ma
3cu. In)
• Significant energy is requ
to penetrate the relatively
• Test results do show t
and velocity
• Conversely, once tile is p
significant damage
• Minor variations in tota
can cause significant t
– Flight condition is signific
• Volume of ramp is 1920cu
BOEING
Note the analysis is about tile penetration. But what about RCC penetration? As investigators later demonstrated, the foam did not hit the tiles on the wing surface, but instead the delicate reinforced-carbon-carbon (RCC) protecting the wing leading edge. Alert consumers should carefully watch how presenters delineate the scope of their analysis, a profound and sometimes decisive matter.
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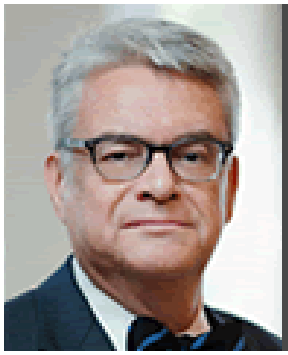
SECRET
THIS IS A COVER SHEET
FOR CLASSIFIED INFORMATION
RESTRICTED DATA
SECRET



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When the government knocks on your door, Jack Sharman's your experienced ally.

Jack defends businesses and individuals in civil and criminal white collar cases, provides guidance during corporate internal investigations and advises on how to stay in compliance with the law. In an environment of increased enforcement, regulatory scrutiny and a skeptical public, clients rely on his informed counsel to navigate the most difficult circumstances they will likely ever face.

Jack leads the firm's White Collar Criminal Defense & Corporate Investigations practice group. He handles and takes to trial matters involving kickback allegations, government contract fraud, public corruption, the Foreign Corrupt Practices Act, congressional investigations, election contests, healthcare fraud, qui tam lawsuits, the False Claims Act, and Department of Defense or military investigations.

Clients benefit from the decades of high-profile experience that Jack brings to the table. He served as special counsel to the House Financial Services Committee for the Whitewater investigation involving President Bill Clinton. From 2016-17, Jack was special counsel to the Judiciary Committee of the Alabama House of Representatives for the impeachment investigation of Gov. Robert Bentley. Following law school, Jack clerked for Judge David B. Sentelle, U.S. Court of Appeals for the District of Columbia Circuit, and worked at a Washington, D.C.-based international law firm. He also taught law as an adjunct professor at Washington & Lee University and the University of Alabama.

Jack often updates his White Collar Wire blog and manages a Twitter account focused on white collar crime and enforcement matters.

Practice Areas

- White Collar Criminal Defense & Corporate Investigations
- Directors' & Officers' Liability
- Securities & Shareholder Disputes
- International Disputes

Awards

- Benchmark Litigation, "Local Litigation Star" — White Collar Crime (2018-19)
- The Best Lawyers in America©, "Lawyer of the Year" — Corporate Compliance Law (2019)
- The Best Lawyers in America©, "Lawyer of the Year" — Criminal Defense: White Collar (2019)
- Mid-South Super Lawyers (2017-18)

Education

- Harvard Law School (J.D., 1989) - Editor-in-Chief, Harvard Journal of Law & Public Policy
- Washington University (M.F.A., 1986)
- Institute for European Studies, Geneva, Switzerland (Certificate in European Studies, 1985)
- Washington & Lee University (B.A., 1983)