



# For The Defense

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February 2010 No. 1

## No Let-up: DOJ Prosecutorial Misconduct Continues (An Update)

By Marc Rothenberg & Laura A. Brill

Last June *For the Defense* featured two articles that detailed recent cases in which the government committed serious violations of its statutory and constitutional discovery obligations. Those cases included *United States v. Stevens*, *United States v. Jones*, *United States v. W.R. Grace*, *United States v. Shaygan*, and the New York State case of *People v. Peiser, et al.*<sup>1</sup> Despite harshly worded rulings and the imposition of severe sanctions, DOJ prosecutors continued this disturbing trend of egregious misconduct in the Department's highest profile cases: the Brocade, Broadcom, and Blackwater prosecutions. This serious misconduct by some of the Department's most experienced prosecutors has resulted in the dismissal of charges and reversal of convictions. In a seeming effort to secure high-profile convictions, these DOJ prosecutors lost sight of the Department's most important and fundamental mandate—to do justice, not to win at all cost.

*United States v. Reyes (9th Cir.) (Brocade Communications)*<sup>2</sup>: In August 2009, the Ninth Circuit reversed the conviction of Gregory Reyes, the former Chief Executive Officer of Brocade Communications Systems, and ordered a new trial based upon the government's making of a false statement of material fact to the jury during closing argument. Reyes was convicted in 2008 of conspiracy and securities fraud, among other charges, for his role in signing off on company financials that did not accurately reflect backdated stock options, thereby underreporting Brocade's expenses.

Reyes's defense at trial was that Brocade's finance department was aware of the backdating practice, and that, in signing off on the financials, he relied in good faith upon the accuracy of the finance department's accounting and documentation, and therefore lacked intent to deceive. During the trial the government called as a witness one of the finance department's employees who testified that other

members of the department and she were unaware of the backdating practice. However, prior to trial, other more senior members of the finance department admitted to the FBI that they were aware of the backdating. Those individuals did not testify at trial. During closing arguments, defense counsel argued that the finance department knew about the backdating practice, thus supporting Reyes's position that he had no intent to deceive. In rebuttal, the government argued that the *entire* finance department had no idea that the backdating was occurring, and even displayed a diagram reflecting that the finance department was unaware of the practice.

The Ninth Circuit found that the government, in making this argument, had asserted material facts to the jury that it knew were false or had strong reason to doubt, based on contradictory evidence that was not presented to the jury. In chastising the government, the Ninth Circuit stated that the DOJ's deliberate false statements "harm[ed] the trial process and integrity of our prosecutorial system."<sup>3</sup> Further, the Ninth Circuit sternly warned the DOJ that, "[w]e do not lightly tolerate" such conduct, and that there was "no reason to tolerate such misconduct here."<sup>4</sup>

*United States v. Ruehle (C.D. Ca.) (Broadcom Corp.)*<sup>5</sup>: In December 2009, in another stock-options backdating prosecution, U.S. District Court Judge Cormac Carney dismissed with prejudice the indictment against William Ruehle, the former Chief Financial Officer of Broadcom Corp., and entered a judgment of acquittal. Judge Carney also dismissed with prejudice the indictment against Dr. Henry Nicholas, Broadcom's co-founder and former chief executive officer. The two had been under indictment since June 2008 for allegedly engaging in a stock-option backdating scheme that caused Broadcom to write down \$2.2 billion in profits. In addition, Judge Carney also dismissed without prejudice the Securities

and Exchange Commission's civil case against Ruehle; Nicholas; Dr. Henry Samuelli, Broadcom's co-founder and former chief technical officer; and David Dull, Broadcom's former general counsel, and urged the SEC not to proceed further with its case.

In reaching this extraordinary decision, Judge Carney found that the government "intimidated and improperly influenced the three witnesses critical to Mr. Ruehle's defense."<sup>6</sup> The three witnesses were Nancy Tullos, Broadcom's former vice president of human resources; David Dull; and Dr. Samuelli. Specifically, with respect to Tullos, Judge Carney found that the government had inappropriately contacted her new employer when she did not initially cooperate with its investigation, causing her to lose her job. In addition, Judge Carney determined that Tullos's plea deal was based on a "questionable factual basis" in that she pled guilty to obstruction of justice for asking an employee to delete an email *seven years* before the government's investigation began.<sup>7</sup> With respect to Dull, after Judge Carney granted him immunity at trial so that he could testify for the defense, the government contacted Dull's attorney and threatened to prosecute Dull for perjury if he testified consistently with his prior SEC testimony. In addition, the government also attempted to influence his testimony by promising a "soft cross" if Dull incriminated Ruehle.<sup>8</sup> Finally, with respect to Samuelli, Judge Carney found that the government engaged in a "campaign of intimidation and other misconduct to embarrass him and bring him down" when it knew or should have known that Samuelli did nothing wrong by, among other things, falsely stating and leaking to the media that Samuelli was not cooperating with the government, improperly pressuring Broadcom to terminate his employment, obtaining an inflammatory indictment against him, and then crafting an "unconscionable" plea agreement that led him to plead guilty to a crime he did not commit.<sup>9</sup>

Judge Carney concluded that the cumulative effect of the government's egregious misconduct "distorted the truth-finding process and compromised the integrity of the trial."<sup>10</sup> Judge Carney concluded further that, as a result, "[t]o submit this case to the jury would make a mockery of Mr. Ruehle's constitutional right to compulsory process and a fair trial."<sup>11</sup> Judge Carney also dismissed the indictment against Nicholas, because that case hinged on the testimony of the three individuals involved in Ruehle's case.

*United States v. Slough, et al. (D.D.C.) (Blackwater Worldwide)*<sup>12</sup>: In December 2009, U.S. District Court Judge Ricardo Urbina dismissed all of the charges against the five Blackwater Worldwide security guards who were accused of killing unarmed Iraqi citizens in a crowded downtown Baghdad traffic circle in 2007. In a scathing 90-page opinion, Judge Urbina found that the government *repeatedly* violated the defendants' constitutional rights by using their statements

to State Department investigators after the shooting, which were made under the threat of job loss, as well as evidence derived from those statements, in its investigation and prosecution. In *Garrity v. New Jersey*,<sup>13</sup> the Supreme Court held that statements made under threat of job loss, as well as evidence derived from such statements, cannot be used in any subsequent criminal prosecution. Judge Urbina determined that not only did the government use such statements, but the prosecution, its investigators, and key witnesses, in some cases, aggressively sought out those statements. Moreover, the government also inexplicably ignored repeated warnings from a senior Department official against the use of the defendants' statements.

Specifically, Judge Urbina concluded that, in the days following the defendants' meetings with the State Department's investigators, the defendants' statements were leaked to the media and disseminated all over the world. As a result of the leak, the government's key witnesses were exposed to the defendants' statements, which in part formed the basis for their grand jury testimony that resulted in the indictment. In addition, the government also interviewed the State Department investigators who interviewed the defendants—specifically asking questions about the defendants' statements—and then used that information to obtain search warrants. Moreover, the government also used those statements in its plea negotiations and charging decisions.

Judge Urbina concluded that the government's explanations for its outrageous conduct "were all too often contradictory, unbelievable, and lacking in credibility." As a result, Judge Urbina dismissed all of the charges with prejudice.

*The Ogden Memoranda—The DOJ's "Guidelines" For Handling Discovery In Criminal Cases*: In the wake of the government's repeated and egregious discovery violations, Deputy Attorney General David Ogden earlier this year issued three memoranda (the "Ogden Memoranda") intended to provide DOJ prosecutors with guidance to "help ensure that they meet discovery obligations in future cases."<sup>14</sup> As reflected in the Ogden Memoranda, the Department recognized that the government's failure to meet its discovery obligations "can have a disproportionate effect on public and judicial confidence in prosecutors and the criminal justice system." The Department further recognized that "such loss in confidence can have significant negative consequences on our effort to achieve justice in every case."

The Ogden Memoranda set forth the "minimum considerations" that prosecutors should undertake in handling criminal discovery, and reaffirmed the Department's policy that a prosecutor's obligations go beyond the requirements of the Constitution, the Federal Rules of Criminal Procedure, the Jencks Act, and the principles set forth in *Brady v. Maryland*, 373 U.S. 83 (1963), and *Giglio v. United States*, 405 U.S. 150 (1972). In addition, recognizing that some variances in discovery practices are inevitable based

upon local circuit and district rules, the Ogden Memoranda also direct each U.S. Attorney's Office and Department office handling criminal cases to develop or update discovery policies that reflect such local rules and court precedent.

The Department's guidance consists of four steps prosecutors should undertake in the discovery process: (1) Gathering and Reviewing Discoverable Information; (2) Conducting the Review; (3) Making the Disclosures; and (4) Making a Record. With respect to gathering and reviewing discoverable information, the Ogden Memoranda reaffirm Department policy that all potentially exculpatory and impeachment material should be sought from every member of the prosecution team, which includes other state and federal law enforcement and agencies to the extent that joint or parallel investigations were conducted. The information to be reviewed should include the entire case file, as well as any substantive communications related to the case. This includes not only the government's own file, but also the case files and evidence gathered by any other agency or office that assisted in or conducted a parallel investigation. Other information to be reviewed includes any confidential source file, potential *Giglio* material, and evidence gathered during the investigation, including statements obtained in witness interviews, agent notes, and during trial preparation.

With respect to conducting the review, the Ogden Memoranda advise prosecutors to develop a review process that ensures that potentially discoverable information is identified. Although that review may be conducted by case agents, paralegals, and through electronic searches of material, the Ogden Memoranda reaffirm that the ultimate responsibility for what is identified and turned over to the defense rests with the prosecutor. Thus, although the review may be conducted by others, the decision of what to turn over may not. The Ogden Memoranda also advocate early disclosure of discoverable information, as it "often promotes

the truth-seeking mission of the Department and fosters a speedy resolution of many cases." In addition, early disclosure is also advantageous to the government, as any error in the scope of discovery can be more easily corrected. Further, the Ogden Memoranda also remind prosecutors that exculpatory information must be turned over promptly after it is discovered, and that a prosecutor's obligation with respect to discovery is continuing. Finally, the Ogden Memoranda advise prosecutors to develop a record of when and how discoverable information is turned over. Such a record can be helpful in resolving discovery disputes that may occur before or during trial, and can also be important in the event that post-conviction relief is sought.

Although the Department has taken significant remedial action to address its discovery violations by issuing the Ogden Memoranda, it remains to be seen what steps the Department will take to address and prevent the "win at all cost" mentality that appears to have pervaded the Department's high-profile cases. ■

1. Since that publication, Peiser and his two co-defendants were acquitted of all charges. Peiser was represented at trial by Blank Rome.
2. *United States v. Reyes, et al.*, No. 08-10047, No. 08-10140, 2009 U.S. App. LEXIS 24575 (9th Cir. Nov. 5, 2009).
3. *Id.* at \*19.
4. *Id.* at \*19-20.
5. *United States v. Ruehle*, Case No. SACR 08-00139-CJC (Tr., Dec. 15, 2009 at 5195).
6. *Id.*
7. *Id.* at 5196.
8. *Id.* at 5197.
9. *Id.* at 5197-5198.
10. *Id.* at 5195.
11. *Id.*
12. *United States v. Slough, et al.*, No. 08-0360, 2009 U.S. Dist. LEXIS 121809 (Dec. 31, 2009).
13. 385 U.S. 493 (1967).
14. The Ogden Memoranda can be found at <http://blogs.usdoj.gov/blog/archives/493>.

### White Collar, Internal & Government Investigations Practice Group

#### Philadelphia Office

Ian M. Comisky  
Norman E. Greenspan  
Matthew D. Lee  
Joseph G. Poluka\*  
James T. Strawley

#### Telephone

215.569.5646  
215.569.5635  
215.569.5352  
215.569.5624  
215.569.5664

#### New York Office

Jerry D. Bernstein  
Laura A. Brill  
Michelle Gitlitz Courtney  
James V. Masella III  
Inbal Paz  
Marc Rothenberg  
Leonard D. Steinman

#### Telephone

212.885.5511  
212.885.5533  
212.885.5068  
212.885.5562  
212.885.5010  
212.885.5121  
212.885.5524

#### Washington, DC Office

Jane F. Barrett  
Jeanne M. Grasso  
Gregory F. Linsin  
Jennifer Peru Gary  
Hardy Vieux  
Charles E. Wagner  
Shawn M. Wright

#### Telephone

202.772.5907  
202.772.5927  
202.772.5813  
202.772.5863  
202.772.5997  
202.772.5963  
202.772.5968

#### Princeton, NJ Office

Nicholas C. Harbist  
Stephen M. Orlofsky  
John J. Pribish

#### Telephone

609.750.2991  
609.750.2646  
609.750.2647

\*Editor