

1985

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Recommended Citation

Thomas P. Sullivan, *Policing Bench and Bar: Ethical Imperatives*, 16 Loy. U. Chi. L. J. 433 (1985).

Available at: <http://lawcommons.luc.edu/lucj/vol16/iss3/3>

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Policing Bench and Bar: Ethical Imperatives*

OPERATION GREYLRORD: ETHICAL PROBLEMS OF INVESTIGATORS

*Thomas P. Sullivan***

I. INTRODUCTION

In 1981, before the Greylord investigation was made public, I made a statement at the time I left the office of the United States Attorney in which I said, in part: "There seems to be in Chicago and the surrounding areas a pervasive, deep-seated lack of honesty at all levels of government and business. I do not know whether it is worse here than elsewhere, but I do know that public and private corruption is commonplace in our city." In that statement, I was referring to, among other things, matters that had come to my attention in the Greylord investigation. The investigation involves members of the bench and the bar, the very persons who are sworn to do justice and who are supposed to adhere to high ethical standards.

Much has been disclosed about that investigation. Much is still not known publicly but will become known in due course.

I would like to share with you today some observations about that investigation, although I am prohibited from revealing all of the facts at this time. This talk will focus on the ethical obligations of the investigators, rather than those persons who are under investigation. The ethical aspects of the conduct under investigation really do not require discussion, because it is obvious that the solicitation, payment, and receipt of bribes is unethical and indeed unlawful activity for lawyers and judges to engage in. Rather, I will focus on the ethical problems facing investigators in cases like Greylord.

* The following material is an edited lecture given at the Baker & McKenzie Foundation Inaugural Lecture Series on Inquiry into Contemporary Problems of Legal Ethics, Spring 1984, Loyola University of Chicago School of Law.

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II. THE PROSECUTION OF LAWYERS AND JUDGES

The chief federal prosecutor in a metropolitan area, once informed by reliable sources about corruption among lawyers and judges in local courts, has a sworn duty to investigate and prosecute violations of federal law. No person stands above the law. Under our tripartite system of government, the executive, legislature and judiciary comprise essential components of the government. We have witnessed throughout the country and particularly in this district many prosecutions of members of the executive and legislative branches. The judiciary is also subject to the prosecutor's scrutiny, no matter how distressing the disclosures may be, and regardless of the risks of retaliation by other judges against those who have the temerity to investigate judicial conduct.

Federal jurisdiction to prosecute criminal misconduct by judges and lawyers arises out of several federal statutes. Among them are the mail fraud statute, which prohibits a scheme to defraud coupled with a mailing; the Hobbs Act, which prohibits extortion under color of law; and the Racketeer Influenced and Corrupt Organization ("RICO") statute.

Although there is ample jurisdiction in federal criminal law, it is a sad commentary that the United States Attorney has to be called upon to conduct this investigation rather than the judiciary itself, local bar groups, the Judicial Inquiry Board, or the local state's attorney. In Chicago, by reason of circumstances which I describe below, it falls upon the United States Attorney to investigate these kinds of matters and to prosecute members of the bar and judiciary.

III. PRACTICAL AND ETHICAL PROBLEMS

There are some very serious problems that face a prosecutor in such a situation, many of which have ethical implications for the people involved in the investigation. These ethical problems include: (1) who should be targeted as the subjects of the investigation; (2) what means should be used to secure evidence; and (3) because the investigation involves the court system, who ought to be notified about the existence of the investigation?

A. Choosing Targets

With respect to the targets of the investigation, it is clear that whatever the function of a prosecutor or a law enforcement investigator, it is emphatically not to test the morality of the citizens. It

is improper, in my view, to tempt persons selected at random, because that is a form of entrapment and an improper use of government resources. Therefore, any investigation should be aimed solely at persons about whom the prosecutor has already received substantial and reliable evidence indicating that person's involvement in criminal activity. If that standard test is adhered to, then there should be no problem of entrapment, of overreaching, or of improper use of governmental resources.

B. Gathering Evidence

Once you have established the targets of the investigation, the prosecutor must go about obtaining the evidence necessary to support a conviction. In these cases, as in most "white collar" crime, there is no victim in the usual sense of the word. Nobody has been murdered, robbed or battered. The defendant pays to achieve a desired result. The witness may receive money to alter his testimony, or the judge may be paid for the result. The lawyer gets a fee and a bonus and enhances his reputation. Thus, everyone involved receives some benefit, so that, unlike a typical street crime, no immediate victim exists. Since no victim reports the illegal activity, law enforcement officials face unique problems when trying to gather reliable evidence. No one contacts the prosecutor's office complaining that he has just been hit over the head and robbed.

Without a victim's complaint, a prosecutor might wish to rely solely on information about the lawyer's or judge's past activities when deciding whether to indict that lawyer or judge. Such evidence as to past conduct, however, usually proves inadequate to bring a prosecution. A successful prosecution requires strong corroboration. Unfortunately, the evidence initially given to the prosecutor about any past conduct may come from only a single source, or from a source that is suspect. Therefore, the successful investigation and prosecution of cases like this depends upon obtaining evidence of criminal conduct to take place in the future.

In cases involving crimes by lawyers and judges, experienced investigators rely on two basic methods of obtaining such evidence. With the first method, the prosecutor "turns" one of the persons involved into a government witness by threatening prosecution, a long sentence, or by granting immunity. That person then can provide information about past conduct that he knows of and was probably involved in, and cooperate in a ruse to uncover new criminal activity.

For example, when I was in office I prosecuted a case involving

an organization planning to bring dynamite into Chicago and blow up a place on the south side of the city. The FBI "turned" one of the participants, who then wore a recording device and got the evidence necessary for a successful prosecution. We also prosecuted about half of the people involved in the Electrical Inspection Bureau of the City of Chicago in reliance upon informants who described past conduct and who also wore recording devices to get corroborating evidence of new misconduct.

The second method investigators use to obtain evidence is a government-operated undercover or sting operation, that is, a ruse of the government's own making. The case law is clear that government agents may engage in ruses involving criminal conduct to obtain evidence of crime. Such activity is justified and is not itself criminal, according to the Court in *United States v. Rosner*. The United States Attorney's Office typically sets up the ruse. The Illinois Courts Commission and Judicial Inquiry Board do not really have the capacity to run an undercover operation. Furthermore, the state's attorney in Cook County has never had the facilities available to handle complex white collar crime. That office is so busy with street crime and other matters that it relies on the United States Attorney to handle white collar crime.

In conducting an undercover operation in a courtroom, the use of actual cases involving real defendants creates serious complications. The ruse results in the defendant being found not guilty. People are acquitted who may not otherwise be acquitted. The government is responsible for this. The prosecutor must consider the possibility that a drunk driver will be acquitted because he or she helped make the pay-off, and that later the driver might go out to celebrate, get drunk and run over a child. A person may be acquitted of hitting somebody over the head with a blunt instrument and go out the next day and knock somebody else over the head. The possibilities are endless, and they are all negative. Furthermore, the judgment of acquittal is probably final under the double jeopardy clause even though it was obtained by fraud.

To avoid the problems involved in using actual cases, sham cases were used in Operation Greylord. In the Greylord investigation, different approaches were used to obtain evidence. Under one approach, an assistant state's attorney acted undercover in cooperation with the FBI. Under another method that same lawyer left the state's attorney's office and set up a private practice as a defense lawyer. He and several FBI agents who were lawyers acted as defense lawyers, falsifying cases in which other agents posed as

violators of the law. Thus, the operation was carried out by having undercover prosecutors and undercover defense lawyers.

C. Ethical Implications - In Re Friedman

Having given an outline of how the investigation was done, I now turn to the thorny question of how to avoid unethical conduct in carrying out such an investigation. When the investigation involves the court system, as this one did, unique problems arise because the Illinois Code of Professional Responsibility prohibits misleading the court by submitting perjured testimony or false evidence. The Illinois Supreme Court has ruled on that subject in the case of *In re Friedman*, decided in 1979, while Operation Greylord was under consideration and review in the United States Attorney's office. The case involved disciplinary proceedings brought against Morton Friedman, who was Chief of the Criminal Division in the Cook County State's Attorney's office. The disciplinary proceedings involved two incidences. In one, a lawyer representing a person arrested for driving while intoxicated allegedly offered a bribe to a policeman to testify falsely. The police officer informed Friedman about the attempted bribe. At Mr. Friedman's direction, the officer pretended to go along with the bribe by falsely testifying that a state witness was unavailable. The trial judge, without the necessary state witness, was forced to dismiss the case. The defense lawyer, who assumed the officer has falsely testified for the money, paid the policeman fifty dollars. Having successfully obtained evidence of the lawyer's criminal act of bribing an officer, the prosecutor, Mr. Friedman, immediately notified the trial judge about what had occurred.

The disciplinary proceeding against Friedman also involved a case in which a Chicago police officer arrested a man for aggravated battery. Mr. Friedman learned that the arresting officer was offered a bribe by the defendant's lawyer. At Mr. Friedman's direction, the policeman pretended to cooperate. The officer falsely testified at trial that the prosecuting witness had refused to testify. The court was forced to dismiss the case, and the defense lawyer slipped the officer \$250. The judge was immediately informed of this, whereupon he reinstated the charge.

In order to obtain evidence against two corrupt lawyers, Mr. Friedman knowingly misled the courts, resulting in dismissals of two cases. He was charged with unethical conduct. The hearing board found no violations of professional ethics. The review board, by a five to three vote, recommended censure, and then the case

went to the Illinois Supreme Court. The vote in the supreme court was split. The majority of the justices held that Mr. Friedman had violated the Illinois Code of Professional Responsibility. However, the court discharged him because they believed there was inadequate precedent to guide his conduct and because Mr. Friedman had acted in good faith. Two of the judges who voted against Mr. Friedman, Justices Goldenhersh and Kluczynski, said:

While [Friedman] asserts that he is not arguing that the end justifies the means, we so construe his argument and find it unacceptable. The integrity of the courtroom is so vital to the health of our legal system that no violation of that integrity, no matter what its motivation, can be condoned or ignored. . . . even if no other ways existed to ferret out bribery, the respondent would still not be privileged to engage in unethical . . . conduct. . . .

In a separate opinion, Justice Clark said:

Lawyers who cause or permit lies to be told to judges are guilty of conduct which tends to defeat the administration of justice, regardless of the motive of the lawyer and regardless of the immediate impact of the lie. . . . even if the respondent had in good faith believed that . . . he could not talk to the trial judge, he should not have taken it upon himself to decide whether the temporary deception of the trial judge was appropriate. He should have had the common sense and ethical circumspection to have brought his dilemma to the attention of the presiding judge of the criminal division or the chief judge of the circuit court, . . . or to this court itself.

Justice Moran wrote an opinion in which he said: "Respondent's conduct was . . . a violation of the disciplinary rules. . . . To excuse his conduct because a conviction for bribery would otherwise be impossible would make the court not only a victim of respondent's duplicity but also an advocate of the philosophy that a conviction by any means is the ultimate goal of our system of justice."

Justices Underwood and Ryan stated that Mr. Friedman had not violated any part of the Illinois Code of Professional Responsibility, saying that as a practical matter it was necessary in order to get the evidence that they let the pay-off go through, and in order to get the pay-off, the case has to be dismissed. These justices said: "What was done here seems to me preferable to informing the judge in advance, thereby making him a participant, or immunizing the corrupt lawyer from investigation and prosecution, which, I fear, will inevitably result if [Friedman's] conduct is held ethically impermissible."

It was after *Friedman* that we faced the substantial allegations of corruption in the judiciary. It is my personal opinion that any prosecutor has the ethical obligation, and I certainly felt a personal ethical obligation, to pursue those allegations of wrongdoing. It would have been unethical, cowardly, and immoral to do nothing. I firmly believe that corruption flourishes when people sit by and do nothing. But a prosecutor in these circumstances must be very cautious in order to frame his investigation so as to avoid violations of the Code of Professional Responsibility or the rights of any of the many people involved.

In the Greylord investigation, the study and approval process slowly progressed over a year's time. Many lawyers in the Department of Justice and elsewhere carefully analyzed the ethical problems. During the course of the investigation, ethical issues were constantly reviewed and re-evaluated by the office of the United States Attorney, the Department of Justice, and the Federal Bureau of Investigation. As a result of this review, I have isolated six standards which I think must be met if this kind of investigation is to adhere to the Code of Professional Responsibility and satisfy the problems raised by the majority of the justices who decided *Friedman*. As I explain each of these standards, I will also attempt to describe how the government complied with the standards in Greylord.

IV. SIX GUIDELINES USED IN THE GREYLORD INVESTIGATION

(1) *No feasible alternative.* The first condition is that there should be no feasible alternative to the undercover operation. The Greylord undercover investigation was undertaken only after it was decided that there was no workable alternate mode of obtaining sufficient evidence to prosecute.

(2) *Careful target selection.* The investigation must target only persons as to whom substantial and reliable evidence showed were already involved in criminal activity of the kind under investigation. As I have explained above, this was the case in Greylord.

(3) *Careful case selection.* The contrived cases should be and were carefully staged so as to avoid undue risk of harm to third parties, including police who were unaware of the operation. The real cases used should not, and did not, involve defendants with a record of violence or a long criminal record. A case-by-case approval process should be and was put in place, and strict guidelines should be adopted as to the kinds of cases and defendants to be

involved. There has to be a very careful look at who is going to be targeted and what kinds of cases are going to be used, whether they be fake cases or real cases.

(4) *Careful and continuous supervision.* The investigation should be and was carefully and continuously monitored. The Greylord investigation was supervised by the United States Attorney personally and senior lawyers in his office; the State's Attorney of Cook County personally and senior lawyers in his office; lawyers at the highest level of the Department of Justice in Washington; and both the Director of the Federal Bureau of Investigation personally and top officials of the Bureau.

(5) *Minimization of evidence gathering.* It is important that the government agents do only what is necessary to obtain evidence of criminal activity. As soon as a provable case is made against a particular person, the operation should cease as to that person. If a person is targeted under the tests outlined above and he rebuffs the approach or fails to respond to overtures of criminal conduct, the investigation should cease as to him without further ado.

If electronic eavesdropping devices are used they should be used only to the extent necessary to obtain reliable evidence, and only in accordance with statutory procedure. The federal statute which authorizes electronic eavesdropping requires that if a conversation is overheard and it is irrelevant to the matter under investigation, the eavesdropping device must be shut down immediately. Those procedures were followed in Operation Greylord. In order to electronically eavesdrop without the knowledge of any party to a conversation, approval must be obtained from the local United States Attorney, and then from a high-ranking Assistant Attorney General, and then an order from the local federal chief judge must be secured. This was done in Operation Greylord. With respect to the eavesdropping of a judge's chambers, the statute and case law contain no exception for a judge's chambers. The law simply does not distinguish as to the place of the eavesdropping. When the halls of justice are used for criminal activity, legitimate law enforcement investigatory tools may properly be used, subject, of course, to the requirements described above.

(6) *Notification to appropriate authorities in the judiciary and local law enforcement.* Persons in authority in both the state and federal judiciary and law enforcement should be and were notified or fully advised of this investigation. Among the active participants in the investigation were: the State's Attorney of Cook County and his top assistants; the director of the Illinois Depart-

ment of Law Enforcement and his top assistants; the superintendent of the Chicago Police Department and some of his top aides; the Director of the FBI and many agents, including the committee of the FBI which supervises undercover activities; and the Attorney General of the United States personally and many of his assistants, including his Deputy, the Chief of the Criminal Division, and the Office of Legal Counsel which renders legal opinions to the Attorney General and to United States Attorneys throughout the country.

In addition to those active participants, others were notified in the state and federal judiciary, namely: the Chief Judge of the United States District Court in Chicago and the Chief Judge of the Criminal Court in Cook County.

Those are the six points which, in my judgment and in the judgment of those who worked with us, demonstrate that this investigation was conducted fairly, legally and in accordance with the Code of Professional Responsibility. Again, consideration and approval of the investigation took over one year, and all aspects of the ethical questions were carefully studied and considered. Because state trial judges were under investigation, it was felt appropriate and proper to notify the state judiciary and state law enforcement agencies in advance.

To hold that the courtroom is exempt from deliberate deception by law enforcement officers acting undercover in the name of the integrity of the judicial process would mock that process, and would immunize corrupt judges from effective investigation and prosecution by proper authorities. I would like to quote more of what I said when I left office in 1981:

The justification [for corruption] cannot be found in community acceptance or tacit approval. The corruption operates in stealth and secrecy, and when it is exposed in courts, the juries almost always convict. Those jurors share the sense of outrage and frustration we feel when we uncover these misdeeds. And we know in our bones that the cases which reach the courts represent only a tiny fraction of the whole. What causes this situation, and what can be done to correct it? There are many answers but none seem satisfactory. One might think a lack of proper moral or religious training is to blame until it is shown that those involved often have fine backgrounds of family, church, education and upbringing. A solution might be found in increased swiftness and severity of punishment, but those who have devoted years to law enforcement cannot help but wonder whether there is any meaningful deterrent effect from the criminal justice sys-

tem. We found, for example, during the height of the publicity about the indictments against the city electrical inspectors, other inspectors were making extortionate demands and even speaking of the pending cases while doing so.

We can brush all this aside by saying that the citizenry deserves what it gets in its public servants, but that is a counsel of despair. Rather, I suggest that each of us must renew personal dedication to integrity and be willing to tell the authorities, — to 'get involved,' — when we encounter fraud and corruption, whether it be public or private. We must put into practice in our own daily lives the principles of candor, fairness and honesty which we attempt to instill in our children.

That is what I said then; that is what I say now. Sadly, many people in government in Chicago regard their office as a private domain and fail to see the office as a public trust. There are many other cities where that attitude prevails, but there are some where a better view still exists. We just happen to be in one of the areas where many people in government feel that it is their own private club. Unfortunately, whenever statements like that are made, there is a risk of unfairly damaging the reputations of the good people in government. I do not intend to demean those good people, who are probably the majority. Also, many people condemn the entire judiciary. Nothing could be more inappropriate. I believe that the majority of the judiciary in Cook County are honorable, intelligent men and women. But the risk that the public — through error or cynicism — might view the entire judiciary as corrupt cannot be a reason to forego the investigation. To the many judges who are honorable men and women, I apologize if anything I have done has unfairly caused a slur on their reputations.

Time will tell whether the defendants in the Greylord cases are guilty as charged. They are entitled to full due process of law, including the presumption of innocence. In the meantime, the citizens of the Northern District of Illinois may take satisfaction in the knowledge that there are public servants from the city, county and federal governments who are outraged by judicial corruption and who are willing fearlessly to investigate and expose it when it is discovered.