



Prosecutors' Misconduct Is More Than Just 'Honest Mistakes'

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A federal judge in the District of Columbia recently ruled that the U.S. Department of Justice will be allowed to retry star pitcher Roger Clemens on perjury charges after a mistrial was declared earlier this summer when the prosecution made reference to inadmissible evidence in open court.

The government claimed that its violation of court orders was done inadvertently and was not an instance of intentional prosecutorial misconduct. Government examples of misconduct seem to abound these days. We recently wrote about [the Lindsey Manufacturing case under the FCPA](#) and about [the Lazare Kobayaga case, a genocide case](#), in which it was clear that traditional discovery standards were not followed.

It is curious to us that Assistant Attorney General Lanny Breuer recently told a group of assembled state prosecutors that although prosecutors must always abide by the highest standards of conduct, "certain defense lawyers nevertheless continue to want to try and turn honest mistakes into instances of misconduct. This kind of gamesmanship is unfortunate."

Breuer described steps that the department has taken, such as providing guidance to all prosecutors on gathering and reviewing discoverable information, to ensure that DOJ attorneys abide by their ethical obligations. At the same time, he said, the department will not "shrink from our obligation to investigate and prosecute criminal activity without fear or favor, because of the possibility that an opportunistic defense lawyer will try and make hay out of an honest mistake."



His clear implication was that the department is now behaving ethically with few exceptions, and that defense lawyers who raise issues of misconduct, such as the withholding of potentially exculpatory documents, are merely gaming the system. We disagree with both of those ideas.

We don't imply that all prosecutors cut corners, merely that it is a more significant problem than Breuer seems to think. We believe that defense attorneys who point out prosecutors' errors and misconduct are both representing their clients zealously and functioning as an important check in the criminal justice system. They are not simply looking for tiny, nit-picking errors, and if they do so, judges will put defense attorneys in their place.

If the department really is doing what Breuer says and is going "farther than what the Supreme Court requires," there should be no problem with pesky defense lawyers who ensure that this is indeed what's happening. And if there are in fact a good many serious lapses, defense attorneys – not prosecutors' training programs – are the last line of defense against overreaching.

Crime in the Suites is authored by the [Ifrac Law Firm](#), a Washington DC-based law firm specializing in the defense of government investigations and litigation. Our client base spans many regulated industries, particularly e-business, e-commerce, government contracts, gaming and healthcare.

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