

DOJ's FCPA Trial Record

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You win some and you lose some. A prosecutor or litigator who tells you his or her trial record is not a real litigator, they are an insecure litigator. The fact they keep track is a tip off – time to run away and find someone else.

The great litigators win cases and they lose cases. If they tell you otherwise, do not hire them. They are a fraud.

While DOJ's record in FCPA cases may be less than perfect, DOJ would be foolish to react to these recent results. The O'Shea case was an unfortunate result.

The judge was no friend of DOJ. He has a reputation as an anti-government judge, and he certainly knows that the government cannot appeal a decision to grant a Rule 29 motion for judgment of acquittal.

The Lindsey case was an aberration. If the government had disclosed all the evidence it withheld, the government would still have won the case. The judge's decision to reverse the Lindsey convictions reflects a sloppy and inexperienced approach to the trial. It does not undermine DOJ's judgment in bringing the criminal case. The evidence was strong and the government should have won the case.

I expect that DOJ will do very well in 2012 in convicting individual defendants in FCPA criminal cases. That is not to say that defendants should avoid challenging the government by launching a vigorous defense to test the government's evidence.

There is a lot of pressure on defense counsel when their clients are arrested and indicted. The government describes its case against a defendant in press releases, preliminary hearings and motions hearings, using strong language and conclusions of guilt. One thing is clear – the government's cases are not always as strong as they suggest.

DOJ's Fraud Section needs to take several practical steps to ensure that they bring appropriate and strong cases against potential FCPA defendants.

1. Focus on Strong Cases – DOJ needs to indict those defendants where they have a significant amount of evidence to establish guilt. Judges are smart and they can smell a weak case. If they see problems in a case, they are likely to use pre-trial motions as a way to cut at the case and force a resolution (or even dismissal).

As a first step, DOJ needs to rely on cooperating corporations first to identify individuals at such companies how may warrant individual prosecution. With the corporation's cooperation, DOJ has a

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body of significant evidence which is available to use in the prosecution of individual officers and third-party agents.

2. **Avoid Aggressive Legal Theories of Liability** – DOJ needs to refrain from charging individuals using untested and aggressive theories of liability. Judges and juries have a good sense of fairness. Stretching legal theories of liability to capture fringe actors is a recipe for disaster.

3. **Assess a Case Fairly** – It is easy for prosecutors to get carried away with the anti-corruption mission, but evidence is evidence. Whether it is a misdemeanor or a massive fraud, prosecutors need to be able to assess evidence and strength of a case. It is easy to lose sight of this task, especially when FBI agents and others vested in the case are pressing for indictments against as many defendants as possible.