



No Attorney's Fee Award for This Type of Prosecutors' Misconduct

September 22, 2011

The case of *United States v. Shaygan* recently made the news when the U.S. Court of Appeals for the 11th Circuit [overturned a district court's award of \\$600,000 in attorney's fees](#) to a defendant who was the victim of prosecutorial misconduct. The misconduct was indeed egregious — including recording conversations between a lawyer and a defense investigator, violating discovery orders, and vexatiously filing a superseding indictment in retaliation for the defense filing a motion to suppress. But it should not surprise anyone that the appeals court nevertheless found that a fee award wasn't appropriate.

Briefly, here is the reason. The Hyde Amendment allows courts to award attorney's fees to criminal defendants who are the victims of prosecutorial misconduct. Given the extraordinary nature of this relief, awards of fees under this act are rare. Since the amendment went into effect in 1997, it has been applied in only a narrow scope of cases in which "the position of the United States was vexatious, frivolous, or in bad faith." This has consistently been held to mean that the overall litigating position of the United States was in bad faith; that is to say, that the prosecution brought the case knowing that the charges were false or baseless.

The district court in *Shaygan* disregarded this precedent by awarding Hyde Amendment attorney's fees for prosecutorial misconduct that occurred after the charges were brought against the defendant, rather than for misconduct in bringing the charges in the first place. The prosecution had brought charges against Shaygan, a physician, for allegedly distributing and dispensing a controlled substance outside the scope of professional practice. The district court acknowledged that the initiation of the prosecution and the original indictment against Shaygan were brought in good faith—making this precisely the sort of case to which the Hyde Amendment does not apply. It is no surprise then that the higher court overturned this ruling to bring the decision in line with law established by precedent.

In overturning the district court's decision, the Eleventh Circuit stated, "[W]e cannot read the Hyde Amendment to license judicial second-guessing of prosecutions that are objectively reasonable."

We similarly acknowledge that there are limits on the types of prosecutorial misconduct for which *Hyde* fees can be awarded. Defendants who fall victim to the type of misconduct present in *Shaygan* should be able to receive both a review of their verdict



IfrahLaw

Strategic Defense in
Federal Investigations

Crime In The Suites

An Analysis of Current Issues in White Collar Defense



(depending on the point at which the misconduct is revealed) and sanctions against the prosecutors. Defendants who are truly victims of an overall litigating position that is vexatious, frivolous, or in bad faith should never have rightfully been on trial to begin with, and therefore these are the ones that are truly entitled to the recovery of attorney's fees. The Eleventh Circuit's opinion reaffirms our understanding of the law.

Crime in the Suites is authored by the Ifrah 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.

The commentary and cases included in this blog are contributed by Jeff Ifrah and firm associates Rachel Hirsch, Jeff Hamlin, Steven Eichorn and Sarah Coffey. These posts are edited by Jeff Ifrah and Jonathan Groner, the former managing editor of the Legal Times. We look forward to hearing your thoughts and comments!