

ENFORCEMENT CORNER



The Curious Case of the Prosecution of Lawyer Paul Kellogg

by John R. Fleder

The indictment, trial, conviction and sentencing of Paul Kellogg, the former in-house counsel for Berkeley Nutraceuticals, could be the plot of a movie. Even after the trial and sentencing, whether Kellogg is cast as a criminal mastermind or unwitting dupe remains an open question. Regardless, Kellogg's case contains lessons for inside and outside counsel and others.

While the prosecution of lawyers in other industries, particularly in connection with financial crimes, is no longer unheard of, Kellogg's conviction is one of, at most, a handful of criminal cases against in-house lawyers arising out of Federal Food, Drug, and Cosmetic Act (FDCA) violations.

The Government's Prosecution of Berkeley Nutraceuticals

This case arose from the government's investigation into Berkeley Nutraceuticals and its dietary supplement products, including Enzyte, which the company promoted on late-night cable channels as a "once-a-day tablet for natural male enhancement."¹ The prosecution of Berkeley Nutraceuticals was not solely motivated by—or focused on—labeling and promotional compliance, though. Berkeley Nutraceuticals, we now know, was engaged in old fashioned fraud—for example, repeatedly billing customers for refills that they did not order. In addition, while there were issues about whether the company was complying with the FDCA and the Federal Trade Commission (FTC) Act in promoting its products, Paul Kellogg, at least, seems to have gotten himself into really hot water when the company started trying to evade regulatory authorities.

The Prosecution of Berkeley's In-House Counsel

Many people will feel at least some sympathy for Kellogg based on the court filings. According to the sentencing

memoranda filed by his counsel, Kellogg has, and has had since October 2004, a form of leukemia.² Additionally, he is a husband and father of young children and came to Berkeley Nutraceuticals in August 2003, well after the company's business practices had been established. Kellogg earlier was outside counsel to the company. The government was already investigating the company when he started as in-house counsel, and not more than 18 months later, dozens of federal agents executed a search warrant at the company premises.³ In sum, Kellogg may have enjoyed little of the upside at Berkeley Nutraceuticals, but much of the downside.

His conviction arose out of two distinct series of events, one that the government alleged was designed to evade the Food and Drug Administration (FDA) and another that the government alleged was designed to evade the FTC. The allegations discussed below were contained in the government's pleadings and other court filings.

Conspiring to Obstruct an FDA Proceeding

Kellogg's conviction on one conspiracy count arose out of an FDA inspection. In an apparent attempt to hide labeling for Rovicid, Berkeley Nutraceuticals' dietary supplement product, from FDA, Kellogg directed Berkeley Nutraceuticals' employees to drive a truckload of Rovicid which contained "old" labeling to an offsite location so that FDA inspectors would only see the Rovicid labeled with "current" claims. After FDA inspectors were gone, the truckload of Rovicid with the old claims was brought back to the company's warehouse for distribution. A jury found Kellogg guilty of conspiracy to obstruct proceedings before FDA.

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Conspiring to Obstruct an FTC Proceeding

If Kellogg's conviction for conspiracy to obstruct the FDA seems like the work of a criminal mastermind, then Kellogg's conspiracy conviction relating to the FTC may largely appear that of the unwitting dupe. In fact, the federal district court judge that sentenced Kellogg stated in open court that "[t]he evidence in this case suggested that Paul Kellogg followed the instructions of others and was convicted as a result."⁴ The court made this statement concerning two trusts that, according to the government, were created to hide or shield money from the FTC. Although Kellogg apparently had some knowledge of the purpose of the trusts, he did not create the trusts, nor, it would seem, benefit from them. He was simply the trustee. In fact, according to his counsel's sentencing memorandum, "at the time of the actual funding of the trusts in October 2004, [he] had been diagnosed with leukemia and was hospitalized while undergoing chemotherapy treatment."⁵ Nevertheless, Kellogg was charged with, and convicted of, conspiracy counts in connection with these trusts. If the fact pattern did not give the government pause, it seemed to bother the court. To be clear, the court did not seem to be critical of the decision to prosecute Kellogg. Instead, the court stated it was "concerned why the government did not indict others for their involvement in the money laundering activity."⁶ The court was apparently referring to Berkeley's outside counsel who drafted and created the trusts. Taken together with the court's statement that Kellogg just "followed the instructions of others," the implicit question from the court is why those who gave the instructions, i.e., created the trust, were not also prosecuted. As is often the case in connection with criminal or civil proceedings, the complete story and a full answer may never be known.

Lessons from Paul Kellogg's Case

What lessons can we learn from Paul Kellogg's case? First, it is important to note that neither of the two events that were the basis for Kellogg's convictions appeared to involve only providing legal advice. In connection with the FDA inspection, Kellogg was not convicted of giving advice about whether it was lawful to move the product offsite. Instead, according to the government, he gave an instruction to do so. As in-house counsel, the line between advising on legal matters and participating in business decisions can get blurred. In this case, it seems

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clear that Kellogg crossed that line. Moreover, if the purpose of the offsite move was made with the "intent to defraud or mislead" the FDA, it could have resulted in an FDCA felony. Nevertheless, the proper role of an in-house counsel would seem to be to provide legal advice about a potential course of action and take appropriate steps to try to make certain that his employees do not violate the law.

In the other instance giving rise to his conviction, Kellogg was much less active, but similarly, was not primarily performing a legal counsel function. Indeed, in his sentencing memorandum Kellogg's counsel argued that "[h]is qualifications as a lawyer did not enable him to serve as a trustee."⁷ In other words, anyone could have done it. It is not clear from the record whether Kellogg knew that the trusts were created for the purpose of shielding money from the FTC. In any event, the lesson for other in-house lawyers would seem to be that it may not be enough to hire outside counsel to advise the company. In-house counsel may not be shielded if outside counsel pursues a path that is deemed illegal. But of course, the question is why cannot the company and its in-house counsel rely on legal advice rendered by outside counsel? The answer may be unclear. Where that advice suggests a clearly unlawful path, no one may be protected. Seeking and relying in good faith on advice rendered by competent outside counsel should be enough to protect both the company and its in-house counsel from criminal prosecution.

Second, Kellogg's convictions arose from an attempt to seemingly cover up an FDA violation, and an attempt to evade an FTC investigation. Kellogg's conviction was not

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for the underlying regulatory violations, but instead the attempt to avoid the consequences of those violations. As attorneys we can do much to help our clients resolve their problems favorably. Attempting to deceive federal regulatory authorities is not an acceptable means to achieve favorable results, however.

Conclusion

In the end, there does seem to have been some proportionality in the punishments imposed in connection with this case. Berkeley Nutraceuticals' founder Steven Warshak was sentenced to a 25-year prison term. Paul Kellogg was sentenced to a term of a year and a day. Those sentences reflect the differences between the roles that those two individuals played in the activity for which they were convicted. One cannot read the pleadings in this case and feel anything other than Paul Kellogg could have and should have known better. Hopefully, his case will serve as a reminder to other attorneys to carefully execute our legal and ethical duties as lawyers. Δ

- 1 Edwards, Jim, The \$100 Million Sex Pill Scandal, *Brandweek* (Apr. 4, 2007), available at http://www.brandweek.com/bw/eseach/article_display.jsp?vnu_content_id=1003567034 (last visited Jan. 28, 2009).
- 2 Sentencing Memorandum of Paul J. Kellogg at 15, *United States of America v. Paul J. Kellogg*, 1:06-cr-00111-SAS (3) (S.D. Ohio, (Aug. 1, 2008)) available at <https://ecf.ohsd.uscourts.gov> (Doc. No. 600).
- 3 Jim Edwards, *supra* note 1.
- 4 Statement of the Court at 14, *United States of America v. Steven E. Warshak*, 1:06-cr-00111-SAS (S.D. Ohio, (Aug. 27, 2008)).
- 5 Sentencing Memorandum of Paul J. Kellogg at 15, *supra* note 2.
- 6 Statement of the Court at 13-14, *supra* note 4.
- 7 Sentencing Memorandum of Paul J. Kellogg at 16, *supra* note 2.

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