
CORPORATE CRIME REPORTER

INTERVIEW WITH NEIL GETNICK, GETNICK & GETNICK, NEW YORK, NEW YORK

Pushing the bounds of civil prosecution to deter crime, The New York State Bar Association's Section on Commercial and Federal Litigation last week released a report that calls on New York City to control corruption and racketeering in the commercial carting industry by placing garbage haulers under the supervision of Independent Private Sector Inspectors General (IPSIGs). The job of the IPSIG would be to continually monitor the haulers for price-fixing, overcharging, and other unlawful activities. (*See article, this issue*)

The man who authored that report and who coined the term "civil prosecution" is Neil Getnick, a managing partner in the New York City law firm of Getnick & Getnick. Getnick & Getnick serves as a general and litigation counsel to a variety of commercial clients as well as individuals. The firm handles all forms of commercial litigation, with a special expertise in the area of commercial fraud.

Prior to joining the firm in January 1983, Getnick spent four years with the Manhattan District Attorney's office first in its trial division, and later in the fraud division.

Getnick graduated from Cornell Law School in 1978.

We interviewed Getnick on April 7, 1994.

CCR: What is civil prosecution and how does your firm go about practicing in this area of law?

GETNICK: The firm has developed a team approach for litigating matters arising from commercial fraud, coordinating attorneys, investigators, accountants and industry experts. The firm specializes in the civil prosecution of business crime, utilizing a wide variety of common law and statutory remedies, including the Racketeer-Influenced and Corrupt Organizations Act (RICO). Civil prosecution, in short, is the fashioning of civil remedies for criminal misconduct.

CCR: This is an unusual practice.

GETNICK: There are other firms that utilize these same techniques to a certain extent. But we are unique to the extent that we have a dedicated practice focusing on civil prosecution.

CCR: What would be some examples of cases that fall in the civil prosecution area?

GETNICK: Let's take a look at some of the cases that we have handled. We started handling investment fraud cases in the early 1980s, where we would represent individuals who were victims of various investment fraud schemes. We often brought those cases as class actions or civil RICO cases.

Then in the mid-1980s, we began to adapt that model for industry itself. Since that time, we have worked with the insurance industry to establish systems to combat complex insurance fraud. We have worked with the construction industry to develop approaches that specifically targets

corruption, waste and abuse that affect that industry.

And most recently we have been working with the computer industry to target the problem of high-end theft impacting that industry.

CCR: Isn't this the government's job? Shouldn't the government be ferreting out corruption?

GETNICK: Certainly the government should be doing this sort of thing, but this is not a matter exclusively for the public or private sector. Rather, it is an opportunity for both the public and private sector to target this area and often that is done with what is called parallel prosecution. In that situation, you have private parties bringing a civil case and the government bringing its criminal case against the alleged wrongdoer.

CCR: This kind of practice isn't new in the sense that there have always been private plaintiffs' attorneys suing corporate wrongdoers in tort, in class actions, for fraud under RICO. How is your practice actually different from those kinds of practices?

GETNICK: In two main ways. First, it is different in the way we organize ourselves. To a great extent, we function as a private economic crime unit, with a team of attorneys, investigators, accountants and industry experts targeting a specific problem and developing a strategic approach to deal with that problem from inception, by way of investigation, through completion, by way of litigation and trial, if necessary.

Secondly, we use the civil RICO statute and more recently the federal False Claims Act. Both of these statutes, to a great extent, empower private citizens and the private bar to act as private attorneys general.

CCR: Is the government ever your client?

GETNICK: Yes, both directly and indirectly.

Directly, for example, in New York City, where we represent the New York City School Construction Authority as their civil prosecution counsel, working with their office of Inspector General. That particular governmental agency, through its inspector general, has a very far reaching approach, making use of the latest investigative techniques, and other means of ferreting out fraud, waste and abuse in the school construction area in New York City.

We function alongside the Inspector General's office by bringing civil RICO actions and otherwise acting as civil prosecution counsel when specific acts of misconduct are uncovered.

Indirectly, we make use of the federal False

Claims Act. Under that Act, a whistleblower or relator who has unique knowledge of fraud against the federal government can bring an action on behalf of the United States, often working alongside the Justice Department.

CCR: Can this whole practice come under the heading "privatizing government"? A government inspector general could hire employees and do this work.

GETNICK: While this practice area moves toward privatization, it certainly doesn't supplant government. What it does to a great extent is even the odds, so that government has the necessary supplementary resources to fully address and fully attack the fraudulent conduct in the marketplace.

CCR: The New York State Bar Association put out a report two days ago that called on New York City to control corruption and racketeering in the commercial carting industry by placing garbage haulers under the supervision of what you call Independent Private Sector Inspector Generals (IPSIG) who would continually monitor them for price-fixing, overcharging and other unlawful activities.

To begin with, what is the commercial carting industry, and what is the problem?

GETNICK: The commercial carting industry in New York City was created in or about 1956 when private trucking interests took over the hauling of trash from commercial establishments. In other words, the government's sanitation department no longer provided services to commercial establishments. Private carters did the job instead.

The problem that developed, according to the New York State Organized Crime Task Force, which released a definitive study on this subject in 1987, is that very soon thereafter, the industry came under the control of organized crime interests which effectively served as a cartel, monopolized it, and imbued it with corruption.

CCR: The New York State Bar Association released a report last week that recommended that these companies be placed under the supervision of an IPSIG.

GETNICK: A couple of preliminary things. The report was written by myself and by Joseph Belluck, who was a summer associate in our firm in 1993. We wrote the report on behalf of the New York State Bar Association's Civil Prosecution Committee.

The report was approved of and released by the State Bar's Commercial and Federal Litigation

Section.

CCR: Did you invent the term "civil prosecution"?

GETNICK: The first time that I encountered the term civil prosecution is when I coined it in connection with a presentation that I made to the insurance industry in 1988, encouraging that industry to utilize this team approach to combat insurance fraud.

CCR: Corporate criminal defense lawyers want to make a clear distinction between the civil and criminal arenas. They don't believe the area should be blurred.

GETNICK: The term prosecution is most often considered in its criminal context. Criminal prosecution involves a public authority. Such a prosecution is brought on behalf of the government and the people.

Civil prosecution involves most often a private party, or a governmental entity functioning in a non-prosecutorial capacity. Accordingly, it is targeted to meet the aims of those parties. Those aims would include stopping the activity, compensating the aggrieved party, deterring future similar behavior and laying the predicate for a criminal action.

The fact that there is an overlap between civil and criminal prosecution is made clear from the RICO statute itself. RICO is a criminal statute found within the federal criminal code, but it contains specific civil remedies.

CCR: But in coining the term "civil prosecution," are you commenting on the difficulties inherent in using criminal prosecutions to control corporate and white-collar crime?

GETNICK: Criminal prosecution can only be as effective as the resources supporting it and the creativity applied to it. The reality is that criminal prosecution itself is being reformed, as demonstrated recently in the New York City area by what are called industry-styled prosecutions. You have the Manhattan District Attorneys office, as well as the federal prosecutor's offices in the Southern and Eastern Districts of New York, increasingly focusing on industries and their behavior and attempting to reform that behavior through various criminal prosecutions. These criminal prosecutions often result in civil remedies, as opposed to, or in addition to, the traditional convictions and resulting jail sentences.

The prime example that comes to mind was the prosecution led by the Manhattan District Attorney's Office focusing on Thomas and Joseph

Gambino, who allegedly controlled the trucking interests in the garment center. That criminal prosecution ultimately resulted in a plea bargain.

Instead of sending people to jail, the agreement forced the Gambinos and their companies to divest themselves of their interests in the garment center and create a fund of some \$12 million to finance a special master to oversee the deconstruction of their control over that segment of the New York City economy.

CCR: So, in the Gambino case, there was both a criminal and civil prosecution?

GETNICK: No, there was a criminal prosecution that included civil remedies to address the conduct that was being targeted.

CCR: Was there a civil lawsuit filed against Gambino?

GETNICK: No, there was not. There was a criminal prosecution which resulted in a plea bargain. As part of the plea bargain in the criminal case, the Gambinos agreed to dismantle their trucking interests and created a fund to finance a special master to oversee that process.

CCR: The report from the State Bar Association called for the City of New York to place these garbage haulers under the supervision of Independent Private Sector Inspector Generals (IPSIG). What is an IPSIG?

GETNICK: That term IPSIG first surfaced in a report published by the Civil Prosecution Committee and the New York State Bar Association Commercial and Federal Litigation Section in July 1993. An IPSIG is a privately financed, but officially sanctioned, watchdog entity. An IPSIG is a private firm with legal, auditing, investigative, and loss prevention skills, employed by an organization to ensure compliance with relevant law and regulations and to deter, prevent, uncover and report unethical and illegal conduct by, within and against the organization.

DC: Do IPSIGs exist and are you an IPSIG?

GETNICK: They do exist and Getnick & Getnick is considered to be an IPSIG.

In order to ensure that high professional, procedural and ethical standards are maintained IPSIGs are required to be certified and licensed by a regulatory, administrative or law enforcement agency relevant to the organization's area of business.

In New York State, there are three agencies that have employed the use of IPSIGs -- the New York State Organized Crime Task Force, the New York

City School Construction Authority, and the New York State Department of Environmental Conservation. Each of these entities has the ability to certify IPSIGs.

In criminal cases, IPSIGs may be appointed by the court.

CCR: What are some of the roles that an IPSIG can perform?

GETNICK: An IPSIG can apply to a variety of organizations in a variety of contexts. An IPSIG can be relevant to an organization that is entirely legitimate from start to finish, and is simply looking for a vehicle to assure the ability to detect, uncover and report unethical and illegal conduct. On the other end of the spectrum, an IPSIG can be used as a mechanism to watch over an organization that has been found guilty of some kind of illegal conduct and now needs to be monitored to prevent that from reoccurring.

From that perspective, an IPSIG may perform a number of roles. First, the monitoring and investigating of activities of an organization. Second, designing, supervising and implementing programs and procedures to prevent violations of the law and related unethical conduct. Third, designing and implementing of programs to raise and maintain ethical standards within an organization. And finally, assisting in the design and implementation of policies and procedures to enhance the economy, efficiency and effectiveness of the organization.

CCR: What advantage does a government get from going to an IPSIG as opposed to staying in-house?

GETNICK: With an IPSIG, the government gets one-on-one monitoring and the monitored party funds the process. So the government doesn't have to expend its time to provide and perform these monitoring functions. At the same time, the government doesn't have to continue to expend taxpayer dollars for the specific monitoring that is needed.

CCR: The law violator is paying for the service.

GETNICK: That is correct, but an IPSIG while applicable to a law violator, can also, in certain contexts, be applicable to a law abiding company. For example, in New York, it is now proposed in legislation before the city council that there be created experimental carting districts in which private commercial hauling companies can bid on and be awarded these routes.

In this case, the IPSIG's function would be to undertake a due diligence check on anyone awarded

such a bid to determine that the incoming company was corruption-free. And then from there on, the IPSIG's role would be to monitor the activity of that company to ensure that that company remained corruption free.

Should such a company find itself the recipient of a threat of extortion or some other type of illegal conduct, it would be able to turn to the IPSIG to assist it, including bringing that information to the attention of any relevant law enforcement authorities, who would be in a position to deal with that publicly.

CCR: A couple of years ago the *Village Voice* reported about then Consumer Affairs Commissioner Mark Green's role in this. The article pointed out that while you have locally corrupt hauling companies, the large national waste firms that would replace them have their own criminal records with antitrust, pollution and corruption violations.

GETNICK: The New York State Organized Crime Task Force studied this problem extensively in the late 1980s and recommended the creation of such experimental carting districts. The Department of Consumer Affairs, under then Commissioner Mark Green, proposed legislation in 1993 to create such districts.

Upon taking office as Public Advocate in New York City, Mark Green reintroduced that legislation, which calls for the creation of one of these districts in Manhattan and one outside of Manhattan, but also in the city of New York.

The State Bar report calls for the use of IPSIGs as a monitoring mechanism to ensure the employment of corruption free organizations from the start and to ensure corruption free activity on an ongoing basis.

An independent monitoring mechanism will assure that one group of bad actors is not replaced by another group of bad actors. As we break from traditional organized crime domination, we must make sure we don't trade that for some form of corruption in another organizational context.

CCR: But the waste industry nationwide is dominated by a few large companies controlling the market and those companies have their own records of wrongdoing. Could it be that there are no clean actors in business, and if that is the case, what do we do?

GETNICK: What we do is we work within the framework of government to create a new market niche that insists upon a clean actor and then

protect that clean actor from the types of threats and extortion that has discouraged such entities from entering into this marketplace. That is precisely what this proposed legislation attempts to do.

Public Advocate Mark Green has said that requiring carters to hire IPSIGs to monitor their activities is precisely the type of oversight that he envisioned as a means of eliminating organized crime influence in the carting industry. Green has acknowledged that the proposal is worth incorporating into the current legislation by way of amendment.

CCR: Is IPSIG just theory now, or has it been put into practice?

GETNICK: It is both theory and practice. The theory first surfaced in a study of the construction industry undertaken by the New York State Organized Crime State Task Force, which was released in 1989. That study concluded that 20 cents of every dollar spent within the construction industry in New York can be categorized as going to fraud, waste or abuse.

That report proposed that for every public construction project in excess of \$5 million, the developer be required by law to hire what was then called a certified investigative auditing firm, and what is now called an IPSIG.

While that specific proposal was never implemented as such, following that report, the New York State Organized Crime Task Force, the New York City School Construction Authority, and the New York State Department of Environmental Conservation, began to turn to IPSIGs as a means of carrying out monitoring functions.

IPSIGs have been used to date in a monitoring capacity.

I would point out that the IPSIG concept is fundamentally pro-business. In conjunction with the maintenance of a program to prevent and detect violations of the law, an IPSIG can assist a legitimate mainstream business to protect and promote its reputation for integrity and fairness, to minimize the intrusiveness of potential government overregulation and to cut costs and improve efficiencies by controlling unethical or wasteful practices by employees.

CCR: The corporation is paying the bill for the IPSIG. Do we have a potential conflict here?

GETNICK: Once the IPSIG is in place, it stays in place, unless for some reason, the monitored party can successfully establish that the IPSIG has failed

to perform adequately. But under no set of circumstances, where the IPSIG is established pursuant to government contract, legislative authority, or plea bargain, will the monitored party have the authority to fire the IPSIG because it does its job too well.

CCR: Who is the client of the IPSIG?

GETNICK: That client is the monitored party.

CCR: How then is it different from a corporation hiring a law firm to monitor corporate activities?

GETNICK: The IPSIG by definition is independent. If it finds evidence of misconduct, it is under an obligation to report that misconduct to the entity it monitors and to the supervising government agency.

In that sense, it is different from a law firm, which, in the context of an attorney/client privilege, would be under an obligation to withhold that information.

CCR: Should that IPSIG report be made public?

GETNICK: It would depend on the specific application and the nature of the agreement that created the IPSIG.

CCR: Why are IPSIGs important?

GETNICK: As both a remedy and a deterrent mechanism specifically tailored to organizations, the IPSIG concept reflects a revolutionary approach to corporate criminal liability. The concept has relevance to all kinds of business organizations, to those seeking to prevent corrupt and fraudulent conduct as well as to those seeking to correct it.

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