

Criminalizing the Boardroom:

A Communications Guidebook for Prosecutorial Targets



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The image shows two men in business suits standing in a modern office with large windows. One man is holding a clipboard and looking at the other. The scene is backlit by the bright light from the windows, creating a silhouette effect. The view outside the window shows a cityscape.

Foreword

by Richard S. Levick, CEO, LEVICK

Today, [Mens Rea](#) seems to be noticeably absent from far too many prosecutions. It's not just perspective, but the analysis of our times that bears this out. Board members are increasingly reluctant to serve, for fear of liability. The trend of CEOs exiting after a few years with Midas-sized golden parachutes is the new normal. Can you blame them? If the price of longevity is not only the inevitable down cycles, but the very public criticism of activists' investors re-evaluating nearly every decision; monetized whistleblowers; mountains of critical press clippings; email and texts records that constitute forensic evidence of every utterance; and, now, flexible prosecutors stretching the law like so much Silly Putty, it just may be time to cash in chips before getting the gold watch.

It was fascinating to speak with an alumnus from a fine federal correctional institution on one of the highest profile prosecutions of the last decade, who said, "Every step of the way, I received advice and counsel from the best law and accounting firms; it was fully transparent and deliberate." Yet serve considerable time he did, not because he intended to defraud, illicitly profit, or break the law, but because he was diligently trying to abide in its labyrinth. This has become such an issue, and in fact, an apparent requirement for prosecutorial promotion — like a beat officer with ticket quotas — that we now wonder if the rule of law is not just

being subverted by those who would seek to avoid its clutches but also those sworn to uphold it.

Companies that commit acts of malice or willful neglect deserve punishment — including jail time for malefactors, if justified. But what happens when corporate executives or board members are wrongly accused of perpetrating crimes or end up being prosecuted for the routine administration of their duties? Unwarranted prosecutions are happening with alarming frequency in today’s America. Given the catastrophic consequences that can come with high-profile litigation — loss of livelihood and reputation, collapse of market share, permanent damage to a company’s brand, et al. — is there anything that can be done to avoid disruptive prosecution? LEVICK and Akerman explored problems and possible fixes in a multi-part 2019 *Forbes* series.

The response was striking. We received emails and phone calls from lawyer and business executives, some from whom I’ve never met. They all had one thing in common: they were writing or calling to share their profound concerns about overzealous prosecution and its effect on U.S. competitiveness. And almost all shared horror stories of colleagues and clients who were unfairly hounded by prosecutors.

The rule of law is what separates democracy from mob rule. But the clarion call for rule of law obscures a complicated truth. Within the rule of law are endless gray areas and the opportunity for misuse, as much by a bad acting CEO or nonfeasant board member as an overly ambitious prosecutor, or worse. The “rule of law” banner may make us feel superior to past civilizations, but it is the cookbook, not the feast. A lot gets confused in the cooking. We either apply it fairly or we are just as lost as repressive societies.

The challenge from a communications perspective is, “Which office do I go to, to get my reputation back?” as famously uttered by [Raymond Donovan](#), the former Labor Secretary under President Reagan, after being acquitted (along with six other defendants) in a contracting award case.

From a communications perspective, there are three challenges here:

1. Once the investigation is leaked or charges have been made, how do we protect the brand and communicate with key audiences, from employees to shareholders, customers to other potential regulators, foreign and domestic?
2. How do we communicate during the trial or public charges phase?
3. How do we rebuild the brand and recover the reputation?

Within these pages, we attempt to do just that, interviewing former prosecutors, defense lawyers, the falsely accused, and those who served time. The rules for communications are quite similar to what Dr. Martin Luther King, Jr., established in [Letter from a Birmingham Jail](#): fact finding, negotiation, self-purification, and direct action.

We will leave the self-purification to each actor, but the other three apply directly to a sound communications strategy. How do we limit damage, preserve reputation and the company brand, and resurrect if necessary? In business, that’s our version of “direct action.” In these pages we outline key best practices to help you through these challenging times.

Richard S. Levick, Esq.
Chairman & CEO



Criminalizing the Boardroom

There's no shortage of corporations in recent years that have committed abhorrent crimes and deserve whatever punishment they've gotten. If a company maliciously defrauds investors and clients (look no further than [Bernard L. Madoff Investment Securities LLC](#)), or deliberately lies about the dangers of its products (raise your hand, [Takata](#) and [Volkswagen Group](#)), then crocodile tears need not be shed about the censure it receives.

But too many corporate officers, directors, and managers these days find themselves subject to jagged inquiries. “Normal” corporate behavior is being criminalized, a trend that could trigger unsettling consequences for the U.S. economy.

“When corporate executives are being hounded by the belligerent enforcement of arcane regulations or obscure laws, it is bad for the rule of law and bad for capitalism,” maintains [Scott D. Marrs](#), the Regional Managing Partner of Akerman LLP's Texas offices and a corporate litigation specialist who serves on the board of directors of the [Texas General Counsel Forum](#). Government, especially the federal Department of Justice (DOJ), should “exercise extreme caution before exercising its power to initiate criminal proceedings,” [warns](#) an analysis from the American Enterprise Institute (AEI).

Why? Because “too many companies face unwarranted indictments, untenable fines, costly court appearances, and a stinging loss of reputation in the marketplace,” Marrs points out. In my experience, when a company is criminally charged, outsiders — including customers and shareholders — assume guilt. After all, by definition, a criminal charge is more lethal than a civil infraction. Indeed, the negative narrative is even more pronounced because it's the first thing that most people have heard about the company. As a young man growing up and cutting my political eyeteeth in a *caveat*

emptor marketplace, I assumed government stood for righteous oversight of business. Today, not so much.

Individual executives caught up in these allegations confront increasingly harsh prison sentences, not to mention fines and loss of livelihood. It all adds up to what Marrs calls a business environment beleaguered by “coercive regulatory enforcement.”

Add to the mix state attorneys general, who often see high-profile charges against corporations as ways to raise their political profile. There's a reason people joke that “AG” stands for “aspiring governor.”

I'm blessed to know several current and former state and federal AGs. Good persons all. But the formula for rising political fortunes on the wings of high-profile cases — often at the expense of business — is just too much of a professional booster to resist. Business and government should not be a zero-sum game.

The DOJ and other enforcers have become increasingly aggressive by expanding their definitions of criminal liability, diminishing the role of *intent* in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs, Marrs notes.

Further, we are seeing greater application of what lawyers call the “[FCPA](#) (Foreign Corrupt Practices Act) standard.” In other words, corporate executives are being held liable for their supply chain vendors and for *what they should have known*. Factor in the lightning speed of business; the perfect record-keeping of emails, texts, and video that capture nearly every thought and utterance, no matter if out-of-context; online and [employee activism](#); and the rise of activist investors who pressure companies to make ever-higher margins, and it leads to a dangerous climate.

Sadly, that climate has not improved since [Shook, Hardy & Bacon](#) analyzed it several years ago for the [Association of Corporate Counsel \(ACC\)](#). Their paper concluded that, “To more broadly regulate issues of corporate culture, criminal enforcement has been used to maximize the government's leverage over companies and individuals alike.” Given these dramatic increases in liability exposure, business executives have little choice but to educate themselves and their employees on the risks.

U.S. prosecutors' "formula," as the *Economist* recently put it, "is simple: find a large company that may (or may not) have done something wrong; threaten its managers with commercial ruin, preferably with criminal charges; force them to use their shareholders' money to pay an enormous fine to drop the charges in a secret settlement (so nobody can check the details). Then repeat with another large company."

It's the perfect dodge for cash-strapped states and a federal government loath to raise taxes. Justice, as the *Economist* reminds us, "should not be based on extortion behind closed doors." Nor should it hinge on hounding big companies into financial settlements just so they avoid the specter of a public trial.

The climate out there remains precarious. To lessen those risks, companies should study the crisis mitigation strategies outlined below.

LEARNING THE LESSONS OF THE WELLCARE CASE

by [John Lauro](#), Lead Trial Attorney for WellCare Executives

Business executives and their legal counsel wouldn't think that in carrying out business decisions based on legal advice and reasonable interpretation of a new ambiguous statute, they would find themselves in the crosshairs of federal prosecutors seeking felony charges. Yet that is exactly what happened with [WellCare](#), its CEO Todd Farha, its CFO, and its General Counsel, as federal prosecutors continue to blur the lines between regulatory issues suitable for administrative or civil remedies and further water down the level of "guilty knowledge" to determine criminal intent.

Under Florida's so-called "80/20 Statute," Medicaid providers who expend less than 80 percent of Medicaid funds for the provision of behavioral healthcare services were required to pay back the difference to Florida's Agency for Healthcare Administration (AHCA). WellCare, with advice of its counsel and the former head of AHCA, had interpreted the statute and the contract with AHCA to allow the inclusion of funds paid to an affiliate behavioral healthcare organization that provided the services.

Notably, there were no clarifying AHCA regulations that prohibited this reasonable interpretation of the law and contract. In this case, there were no hidden companies, overbilling, or medically unnecessary procedures; nor were there any claims of substandard health care or fictitious patients as there are in typical healthcare fraud cases. Rather the case boiled down to a legal interpretation of a statute and contract.

Nevertheless, federal prosecutors claimed that funds paid to an affiliate should not have been included as part of the 80 percent expenditure formula, despite the lack of any controlling regulations or other legal authority.

Although Department of Justice prosecution guidelines urge prosecutors to use administrative and civil remedies for regulatory disputes of this sort, in this classic case of overcriminalization of business decision-making, prosecutors abused their

discretion and instead filed felony fraud charges. This was in sharp contrast to the way the government handled another Medicaid provider, which had, similar to WellCare, counted funds paid to its affiliate as part of the 80 percent calculation. That company was sued in a civil action; Florida settled the case without obtaining any rebate!

The trial lasted three months and the jury deliberated for weeks before reaching a verdict. It acquitted CEO Todd Farha on most of the charges, was hung on others, but found him guilty of one count of healthcare fraud, even though he was acquitted of a false statement count regarding the very same financial submission that formed the basis of the healthcare fraud count.

The appeal centered on the level of Mens Rea or criminal intent that the government must prove beyond a reasonable doubt in criminal cases. Instead of proving "knowing and willful" knowledge of the alleged fraud as the statute requires, the Eleventh Circuit approved a watered-down level of Mens Rea that it could find him guilty of healthcare fraud if he was "deliberately indifferent" to the truth or falsity of the alleged false submissions. As a practical matter, this allows a jury to convict based upon negligence or recklessness, rather than the criminal intent or "guilty knowledge" needed for a false-statement conviction. This sets a dangerous precedent for any executive-making decisions in a regulated industry where legal and regulatory interpretations are required.

Mr. Farha, who has served his sentence, is an advocate of criminal law reform, opposing the criminalization of business decision-making. His goal is to prevent other businessmen and women from being unfairly targeted for prosecution, and to have the courts and congress rein in such abusive practices.

For more articles about the WellCare case, [click here](#).



Increasing Corporate Criminalization Threatens U.S. Economic Competitiveness

When a company is guilty of willful misconduct, it deserves to be punished to the full extent of the law. Indeed, the ability of regulators and law enforcement officials to pursue criminal charges undergirds U.S. corporate law.

But when corporate executives are wrongly accused of committing criminal acts in the routine administration of their duties, and where more reasonable administrative or civil remedies are appropriate, the consequences can be devastating; they face the possibility of losing their livelihoods and reputations. Look no further than the unjustified prosecution of Todd Newman, a hedge fund manager at [Diamondback Capital Management](#), whose conviction for insider trading based on dubious evidence was eventually overturned — but not before he suffered nightmarish losses.

Companies, moreover, confront the specter of extreme financial penalties and serious — if not irrevocable — danger to their brands. [JPMorgan Chase & Co.](#) and [Perella Weinberg Partners](#) both absorbed hits when executive Sean Stewart, who'd worked at both firms, was found guilty in a high-profile insider trading trial. His conviction was later [dismissed over legal missteps](#).

What makes recent trends doubly frustrating is that they offer corporate CEOs, general counsels, and board members relatively few guideposts. Legal precedents on corporate criminalization tend not to get established because most cases, Newman's and Stewart's notwithstanding, get settled out of court. For many corporations, reaching a settlement is preferable to risking the public spectacle and potentially nasty recriminations of a trial.

The legal landscape is crowded: more than 300,000 regulatory statutes in this country carry potential criminal penalties, a figure that dwarfs any comparable metric in other industrialized countries. Compliance with (relatively) new Dodd-Frank financial disclosure reforms alone requires thousands of pages of new rules.

Unfortunately, the settlement often requires the corporation to throw their executives under the bus.

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“It's becoming increasingly difficult for company executives, board members, and their counsel to keep track of all their areas of potential legal liability,” observes litigation specialist [Scott D. Marrs](#) of Akerman.

“The old ‘scorecards’ don't work anymore,” Marrs says. “The scope of regulatory and prosecutorial actions leveled against companies — and the fines and penalties they incur — continues to grow at an unsettling rate.”

No area is immune: the government has pursued criminal actions against companies across a wide spectrum, from antitrust, trade sanctions, and consumer lending requirements to bribery, environmental compliance, and the enforcement of food and drug safety laws.

Just as vexing, Marrs points out, are the nature of the monetary rewards that follow corporate criminalization settlements. Too many regulators and prosecutors have come to regard enforcement activities as something of a cash cow.

The office of Rhode Island's attorney general funded a physical expansion of its workplace thanks to largesse received from a [settlement with Google](#). New York State insinuated itself into snagging a tenth of BNP Paribas' then-record [\\$9 billion settlement](#) with the federal government over the French company's violations of U.S. sanctions against Iran and the Sudan.

It's not readily apparent why a state government — *any* state government — is entitled to a percentage of a federal fine imposed on a foreign company for violating U.S. trade provisions.

Economists worry that the trend toward criminalizing “normal” business conduct throws off corporate planning, retards growth, and discourages foreign entities from investing in the U.S., all of which undermine America’s [global competitiveness](#).

Moreover, the Federal Department of Justice (DOJ) and other enforcers have become ultra-aggressive in expanding their definitions of criminal liability, diminishing the role of intent in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs.

“Left unchecked, this trend is bad for the rule of law and unhealthy for a business community that strains to compete in international markets,” says Marrs. “Board members in charge of mitigating risk increasingly find themselves at wit’s end.”

The consequences of unwarranted criminalization are profound: they run far deeper than just one prosecution. It’s tough enough for American corporations to compete with foreign companies that are often heavily subsidized by their national and local governments.

When U.S. companies start getting prosecuted for the conduct of regular business, it puts everyone at risk: executives, board members, workers, and shareholders.

Described below are the best practices and communications strategies and tactics that companies should consider pursuing to avoid these pitfalls.



PREPARE BY INOCULATING AND INSTITUTING

Long-time governance and investigations counsel [Bill Ide](#), now helping to lead Akerman’s practice in corporate reputation, urges clients to inoculate in advance of potential litigation and institute a proactive response system before a prosecutor or regulator comes calling.

“Companies need to have governance and compliance best practices in place that have been validated as credible by independent audits,” Ide says. In the event of an adverse situation, he believes a company’s board of directors “must demonstrate that it launched a third-party expert fact-finding review that will determine ‘what

happened and why’ and ensure that it never happens again. By moving quickly, communicating concern and committing to make public the findings, it is often possible to have media and regulators stand down until the expert lawyer’s report is issued.”

Too often, Ide argues, “prosecutors seek to distort the optics of outliers who have evaded compliance best practices oversight as leverage to pressure companies to settle criminal charges that they know would not stand the light of day with a judge in a criminal trial.”

Best Steps for Avoiding Unwarranted Prosecution



Many of the alleged crimes perpetrated by U.S. companies are, in the words of the Economist, “often obscure and the reasoning behind the punishments opaque.” The specter of public recrimination hangs over any potential trial, which is why so many corporations choose to settle.

“Even with respect to the most culpable companies, the system is a failure, as it allows the companies and their senior officials to evade the scrutiny and censure that would follow ‘an unequivocal criminal conviction,’” notes [Kevin M. LaCroix](#), an attorney and the executive vice president of insurance intermediary [RT ProExec](#).

[Jacqueline Arango](#), the co-chief of [Akerman’s white collar practice group](#) argues that, “The convoluted web of rules and regulations to which businesses must comply means that even the most conscientious of companies encounters compliance issues. Maintaining compliance is an all-consuming job for a corporate general counsel’s office.”

SOFTWARE TO KEEP COMPANIES COMPLIANT

KeenCorp’s software is designed to help companies assess risk (“Are you seeing all the risks across the organization?”); facilitate change (“Are your people really coming with you?”); enhance your culture and engagement (“How are your people doing this week?”); and strengthen your capacity to evaluate (“Are there people issues that impact investment return?”).

[Founder and CFO Viktor Mirovic](#) points out that KeenCorp’s software was recently used to help a global legal team identify the alleged crimes and culprits in a convoluted bankruptcy case. “What normally would have taken months of painstaking work was completed in a week,” Mirovic says. “Above all, our software helps companies ensure that their executives are fully compliant with existing laws and regulations. It’s a constantly updated scorecard that helps companies stay on the straight and narrow and connect to their employees when and where it matters.”

Akerman’s [Jacqueline Arango](#) advises that the instant you suspect that the company may be in the government’s crosshairs, you should be consulting with white collar

What can U.S. companies do to inoculate themselves from potentially devastating legal and regulatory probes? There are no sure-fire remedies, but smart corporations should consider:

- Establishing a **Corporate Compliance Framework** that is endorsed by the board and embraced by *all* senior-level executives and managers; ideally, the framework should outline a corporate code of conduct, investigation protocols, clear punishment for violations of company policies, regulations, and the law, and a crisis mitigation plan
- Developing a **Communications Strategy** that captures the corporate commitment to good governance, embraces transparency, strengthens the company’s commitment to corporate social responsibility, cultivates prominent third parties, and encourages “authenticity” at the top
- Devising a **Crisis Mitigation Plan** including cross-functional participants, outside counsel and advisors, in preparation for *any* crisis that might arise
- Insisting on **Compliance Benchmarks** in annual performance reviews for all levels of employees, including managers and executives
- Requiring **Quarterly Reporting to the Board** regarding compliance and regulatory matters

counsel. Too many company executives say and do things that cannot be reversed or mitigated once counsel comes on board. Before executives speak with anyone — internal or external — legal and communications counsel should be retained.

It’s not getting any easier for companies. DOJ and other enforcers have become increasingly aggressive by expanding their definitions of criminal liability, diminishing the role of intent in white collar prosecutions while dismissing the utility of voluntary corporate compliance programs, notes Arango’s Akerman colleague [Scott Marrs](#).

Even with the change in administrations, the trend toward corporate criminalization shows little sign of slowing down. All of which means companies need to speed up their contingency preparations for the day when a criminal prosecution — fair or unfair, warranted or unwarranted — could head their way.

- Establishing *Relationships with all Regulatory Bodies* with oversight responsibility for your company, including providing regular updates to regulators on key issues, and
- Retaining *Outside Counsel Specifically for the Board* in instances where a legal, regulatory or compliance matter involves a member of senior management, so as not to put the GC in an untenable position.

Even if a company takes these preventative steps, it's still not easy for it to make decisions in the "gray area," where an action may be technically legal, but can be

LIMIT YOUR SOCIAL MEDIA EXPOSURE

[Sameer Somal](#), Co-Founder of [Blue Ocean Global Technology](#), believes that potential defendants must limit their exposure on social media or be confronted with dire consequences.

"Our dependence on the Internet for information and communication underpins the paradigm shift in how we approach creating, repairing and monitoring our digital reputations," he argues.

"Social media evidence is discoverable and admissible. What you post online, both prior to and during a legal proceeding, may hurt you in court. Anything you type or is posted about you can be used as evidence. We advise attorneys and their clients that everything shared online is accessible by the plaintiff's legal team. Expect that you will be asked when your social media accounts were created and if you have posted something directly or indirectly related to the lawsuit, which includes instances labeled "private" or restricted from a public audience.

1. Do not delete your accounts or past social media posts. Courts have established precedence of admitting social media content in favor or against your case. While controlling who can see your information is acceptable, courts have found erasing content suspicious and may consider it destruction of evidence. Adjust privacy settings, but do not delete social media posts. Even information that is thought to be deleted permanently is often recoverable through forensic and cloud storage methods.
2. Text messaging and all digital communication are discoverable. Even self-incriminating messages sent privately through direct text or via an app, such as WhatsApp or Facebook Messenger may be requested by the opposing party. Prosecutors can serve dependents with disclosure notices that require them to reveal private correspondence and password protected devices.

interpreted in different ways, sometimes leading to prosecution. All companies must make decisions in this gray area, but executives tend to underestimate the risk associated with these decisions, sometimes naively believing that a legal or audit opinion will protect them.

Special software now exists that enables companies to proactively identify when seemingly benign risks become dangerous. Companies using [KeenCorp](#) software liken it to a "check engine light" for legal, accounting, and social media risk.

3. Win by not losing and limit your social media exposure. Recognize that other people in your network may share content that can affect your legal proceeding. Unguarded moments may reveal material information. Where appropriate, notify colleagues, family and close friends. Photos that you publish, or those published by someone else without your consent, are admissible. Comments made by others can adversely impact your case and provide evidence against your direct defense. Ensure that when you are tagged by someone else, your settings do not automatically syndicate the original post to your profile or social media news feed.
4. Consider a [Virtual Private Network](#) (VPN), which provides an alternative IP address to every email or website you engage with. A VPN allows you to send and receive data as if you were directly connected to someone rather than leaving a public fingerprint. Consider [ExpressVPN](#), [Hotspot Shield](#), [CyberGhost](#) and [IPVanish](#) for such services. Never respond to messages from people you do not recognize. Avoid clicking on a link that can be dangerous, downloading a questionable app, or even visiting websites of dubious authenticity.
5. Preservation of social media data responsibilities also apply to the plaintiff and opposing legal team. Review of [electronically stored information](#) (ESI) applies to the defendants but may also be an opportunity for your legal team to ensure that plaintiffs are held to the same standards. When the plaintiff fails to produce ESI, especially emails, your legal team may seek dismissal of claims and even monetary sanctions.
6. Tools available for monitoring and researching social media include [X1 Social Discovery](#), [Socialware](#), [Socialite](#), [Hanzo Archives](#), and [Page Vault](#). Recommend that your litigation team search and monitor the internet for anything that can undermine the plaintiff's credibility or claims. The best defense may benefit from proactively verifying all information and analyzing each social media account, profile, activity and related commentary."



Overzealous Prosecutors and The Risk of Voluntary Disclosure

What happens when a corporate “misdeed” is not the product of willful or malevolent behavior? What if their action would have passed legal muster until very recently? Even worse, what if their prosecution was triggered by an overly ambitious prosecutor looking for a headline and a healthy settlement?

The [National Association of Criminal Defense Lawyers \(NACDL\)](#), as well as prominent attorneys, shared a litany of alarming stories. Indeed, NACDL’s analysis reveals that some 95% of all criminal convictions are now obtained through plea bargaining instead of jury trials. Prosecutors know that few companies can afford the expense and the jarring publicity generated by a high-profile trial.

Washington, D.C. attorney [Paul D. Kamenar](#), a public policy lawyer who litigates, lectures, and lobbies on over-criminalization issues, emailed links to the [Cato Institute](#), [the Heritage Foundation](#), the [Federalist Society](#), NACDL, the [U.S. Chamber of Commerce Institute for Legal Reform](#), and the [Washington Legal Foundation](#) websites, all focusing on over-criminalization and prosecutorial misconduct.

Kamenar specifically cited the nightmare experiences of two corporate CEOs in the medical field. Todd Farha (see first sidebar), a young Harvard MBA businessman and former CEO of [WellCare Health Plans](#), was convicted and sentenced to prison in 2014 for Medicaid fraud, but not because the company provided faulty services. Instead, he was found guilty for not calculating what the government argued was the “proper”

amount of Medicaid funds to rebate, which hinged on a vague and confusing regulatory accounting formula. Third-party experts agreed that the interpretation of the refund formula by the CEO, the CFO, and the General Counsel, was reasonable. Moreover, there were ample administrative and civil remedies to correct any disputed overpayments, particularly where requisite criminal intent was lacking. The NACDL has a [special link](#) with nearly three dozen articles, op-eds, podcasts, and legal briefs devoted to this unfair prosecution. They’re worth a careful read.

[Howard Root](#), the former CEO of Minnesota-based [Vascular Solutions, Inc.](#), and author of [Cardiac Arrest: Five Heart-Stopping Years as a CEO on the Feds’ Hit-List](#), spent a half-decade and \$25 million (!) in legal fees combating what proved to be a groundless Department of Justice (DOJ) claim that his company was fraudulently marketing a vascular health device. An embittered ex-employee of Vascular had leveled the reckless charge — and DOJ bought into it, ignoring the fact that the device in question had never harmed a patient and represented less than one percent of the company’s overall sales.

After being put through a legal labyrinth, he and Vascular were eventually acquitted of all wrongdoing. Not long ago he sold Vascular for a billion dollars, which must have been a gratifying moment.

“I wish my story was a lightning strike in the perfect storm — a few unscrupulous prosecutors conned by desperate whistleblowers,” Root says today. “But prosecutions like mine are exploding across the United States. When prosecutors can use false criminal charges to destroy everyone except the few wealthy and unbroken defendants like me, then virtually everyone is in danger — even if you’ve done nothing wrong.”

Have we entered a period where only the exceptionally wealthy can defend themselves against the state, regardless of the charge? And, worse still, are we reaching a tipping point where the very fear of long-arm prosecution will deflate capitalism’s beating heart?

Indeed, NACDL’s analysis reveals that some 95% of all criminal convictions are now obtained through plea bargaining instead of jury trials. Prosecutors know that few companies can afford the expense and the jarring publicity generated by a high-profile trial.

Among the businesspeople who find themselves caught in Root’s “perfect storm” of legal jeopardy are corporate executives like Farha who have adhered to the advice of in-house counsel. What was previously deemed “routine” or “innocuous” is, in today’s litigious climate, seen by overzealous prosecutors as unlawful — or grounds for a high-profile settlement. In other words, following the advice of counsel is no guarantee of liberty, even when good faith is never in question.

“With over 4,450 crimes scattered throughout the federal criminal code, and untold numbers of federal regulatory criminal provisions, our nation’s addiction to criminalization backlogs our judiciary, overflows our prisons, and forces innocent individuals to plead guilty not because they actually are, but because exercising their constitutional right to a trial is prohibitively expensive and too much of a risk,” maintains NACDL. “This inefficient and ineffective system is, of course, a tremendous taxpayer burden.”

The burden extends beyond taxpayers. As Akerman’s [Scott D. Marrs](#), puts it: “Not many clients have the unlimited resources and thickness of skin to get into a nasty trial climate. Often the percentage move is to agree to a settlement — even if the client hasn’t done anything unlawful. That’s not a healthy situation for anyone.”

It also may not be healthy that certain corporations have taken to hiring former prosecutors to help them avert unfair prosecutions.

These former prosecutors appear to be preaching *voluntary disclosure* — urging companies to be as upfront and transparent as possible. The fewer corporate activities seen as furtive, the greater the likelihood that prosecutors will look elsewhere. Transparency always carries a degree of risk; but the risk associated with opacity is, in this instance, far greater.

SMART COMPANIES/SMART COMMUNICATIONS

There are no guarantees, of course, but yes, there *are* certain communications steps a company can take to inoculate itself against an unfair regulatory probe or an unwarranted prosecution.

Take these initiatives now. If you wait until the prosecutor or regulator calls, it’s too late.

- **Adopt a communications strategy** that is thoroughly transparent, hinges on corporate social responsibility, taps key third parties, and demands “authenticity” from all senior officers.
- **Devise and practice a crisis mitigation plan** that prepares for any investigation or prosecution that might arise and engages all key board members, cross-functional executives, and advisors.
- **Enlist third parties** such as civic leaders, law professors, former prosecutors, and think tank officials who can attest to your company’s commitment to community betterment and compliance with the rule of law.
- **Join with like-minded organizations to create videos that attract search engines** so that the issue of overzealous prosecution generates greater national attention. Videos are well worth the effort because they accomplish two critical strategic tasks: First, they make parties sympathetic. The more we see this about a person, not a thing, the more sympathetic audiences are; and second, video has a significant impact on what we see first on search engines. When it’s your story or the prosecutors, far better it be yours.
- **Spotlight disturbing examples of overzealous prosecution** while acknowledging that certain companies deserve to be prosecuted.
- **Influence social media** through a smart campaign. This might mean social advertising or third parties; it might mean intelligence gathering of online activity, or it may mean doing nothing at all because it will only draw unwanted attention. The critical issue here is understanding that social media is the Greek Chorus and has the ability to motivate or demotivate prosecutors and journalistic behavior. Use it strategically and not as an afterthought. Make the social and digital team part of the inner strategic circle.

“As far as deciding which firms to prosecute,” observes [Professor Eugene Soltes](#), an Associate Professor of Business Administration at Harvard Business School and the author of [Why They Do It: Inside the Mind of the White-Collar Criminal](#), “I think the biggest shift has been around voluntary disclosure — especially in the context of the Foreign Corrupt Practices Act (FCPA). Firms that bring such issues to prosecutors can qualify to not be charged if they are fully transparent. This is an important shift in policy and changes the calculus about how firms approach some of these issues.”

Achieving a level of voluntary disclosure that might dissuade a prosecutor from launching an investigation is easier said than done. What other steps can companies take to try and inoculate themselves?

First, the CEO and the GC need to dictate from day one that ***the fewer non-transparent activities, the better***. Sure, there are proprietary initiatives and secret-sauce recipes that can’t be exposed to sunlight, but they should be few and far between.

Second, don’t wait until something unsavory happens, ***move now, during peacetime***. Once the charge has gone public, it’s too late. It’s unfortunate, but too many stakeholders, customers, and constituents conflate accusations with guilt.

Third, and this requires some collective action, ***join with associations, law professors, former prosecutors, and think tanks*** such as those mentioned above, as well as others known for their free enterprise and judicial fairness views, and articulate the need for

CORPORATE CRIMINALIZATION FROM THE GERMAN PERSPECTIVE, BY UWE WOLFF, NAIMA-MEDIA

In the 1990s, the behavior of public prosecutors in Germany began to change. Traditionally part of a sluggish, state judicial apparatus, public prosecutors suddenly became adversarial, especially toward managers of top German companies.

German representatives of the so-called “[Deutschland-AG](#)” found themselves targeted by these aggressive new public prosecutors. Terms such as “Deutschland-AG” and “[Germany Inc.](#)” describe a nation that has strong social and political ties to its large corporations — among them, [Volkswagen](#), [Bayer](#), and [Deutsche Bank](#). In the old days, attacks by public prosecutors or journalists could be cushioned in this economic-political biotope by a close “buddy” network. But that all changed two decades ago.

What happened? In the 1990s, private television networks became more widespread in Germany. They spotlighted television dramas — mainly American but some originating in Germany, too — that depicted public prosecutors as conquering heroes. In these dramas, TV prosecutors exuded self-confidence; they weren’t afraid to climb into the ring with top corporate lawyers. They wore expensive suits, resided in fancy offices, and knew what they had to do to compete at the top. They craved high-profile cases and weren’t afraid to bring down prominent executives.

It’s not surprising that this television milieu influenced the attitude and behavior of public prosecutors. This is the phenomenon that New York Law School Professor [Richard K. Sherwin](#) described in his remarkable book, [When Law goes Pop — The Vanishing Line between Law and Popular Culture: The Influence of Pop Culture on the Legal System](#).

Public prosecutors also came to realize how unsettling investigations could be for a company and its management. Especially in Germany, where there is no corporate criminal law — i.e., where it’s not the company that’s prosecuted but its management — industry leaders were very sensitive. Spectacular cases showed that new public prosecutors were not to be ignored. Suddenly, corporate managers were being arrested and companies “raided,” all in front of whirring cameras.

Germany’s top managers become unnerved. Gone was their “Nobody-can-do-anything-to-me” attitude. Instead, they ended up paying multi-million penalties to avoid further investigations, imprisonment, or a trial lasting months or years. Criminal lawyers now refer to this as “extortion.”

German public prosecutors have been pleased with the results of their new aggressiveness. Fines recently paid by Volkswagen and Audi illustrate the prosecutors’ success in transforming German business culture.

The public prosecutor’s office in Munich, especially, has made a name for itself in collecting corporate financial penalties. Top executives at [Siemens](#), [Ferrostaal](#), [MAN](#), have all incurred fines.

This trend is by no means limited to Germany: France, Italy, Austria, the Netherlands, the United Kingdom, and Scandinavia have all seen public prosecutions escalate.

balance. Produce videos to help dominate the search engines so that the challenge of overzealous prosecution becomes a national cause more than the sound and fury of a single victim. The overregulation argument is an old saw that has lost a lot of its firepower because it was used for decades as an argument against all regulation. Show the negative impact on jurisprudence, business, the public trust or public policy, not just the potential negative impact on a single company or executive. The larger the risk to other audiences, the more likely the issue is to gain traction and sympathy.

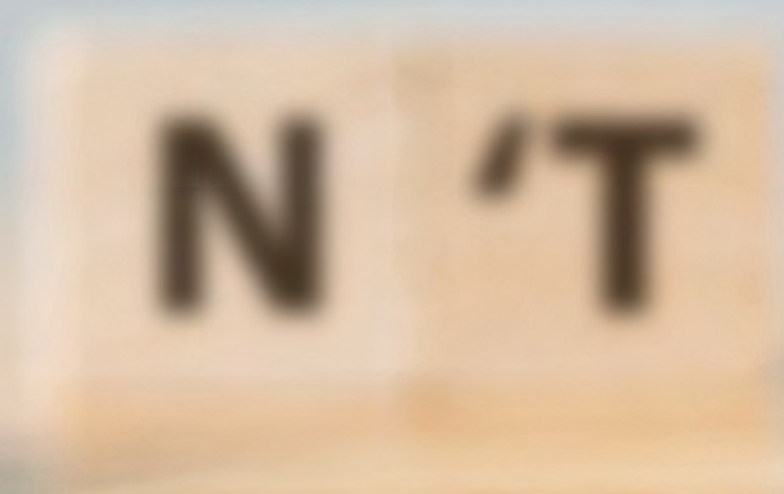
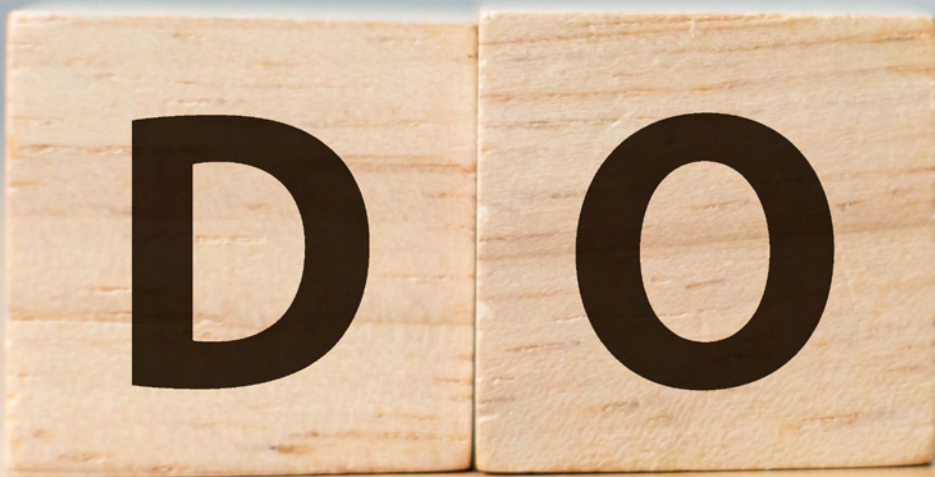
Finally, **collect and publicize the most egregious examples**. Rather than allowing selfish prosecutors to dominate headlines, try to engage the public square with capitalism's reliance on fairness, not intimidation, as the lodestar. Applaud proper prosecutions and argue for some regulation while changing the national dialogue to address the discretion and intimidation that have become prosecutorial weapons rather than scales of justice.

This strategy was adopted a few years ago by the FCPA defense bar, which substantially changed the national dialogue. Amid the FCPA debate, DOJ and Securities and Exchange Commission (SEC) lawyers increasingly saw a “don't over-prosecute” message every time they searched the Internet. If you want to impact collective behavior, there is no more powerful way than to influence search results; videos do that faster than anything. But you need to coordinate this with other companies, former prosecutors, thought leaders, business executives, and law professors. No one company can do this alone.

Are unwarranted prosecutions the scourge that Kamenar, Farha, Root, Marrs, and others fear? Trends certainly appear to be heading in that direction. Before a nasty prosecution heads your way, you ought to take some constructive steps.



Final Word: Best Practices



Clearly, our original series struck a chord with readers and members of the legal community. The trend toward over-criminalization — overzealous prosecution run amok — shows little sign of abating in Corporate America. Prosecutors at every level of government are incentivized to target companies and push for settlements.

For every Howard Root and Todd Farha, who had the resources and gumption to fight back, there are a hundred or more executives or board members resigned to negotiating a settlement rather than risk the ordeal and embarrassment of a public trial. More than nine out of 10 legal actions launched by prosecutors end up settling, which only serves to encourage more and more prosecutions. Through transparency and voluntary disclosure, there are best practices that companies can contemplate to inoculate themselves.

1. **Gather the Facts:** One of the most challenging aspects of accusations is the “bust the trust,” and now suddenly, we don’t know what — or whom — to believe. It

calls into question everything. Even though this is a factual and legal analysis, it feels like an existential one, because it makes you question everything you knew or thought you knew.

2. **It’s About the Team:** The team you are about to put together will make all the difference. Legal, communications, internal, etc. Your team has to focus on fact gathering and not a predetermined outcome. Much as it is painful to realize, individuals are naturally self-preservationists and will tell you the best version of the “facts” if it will make them or their department look better. Question everything. When you hear opinions, recommendations, and facts, read them back. “To be clear, you are saying…” When permitted by counsel, codify it. Memories are fleeting and there is no more lonely feeling than being the sole heir to ugly facts. As [Count Galeazzo Ciano](#) said in the Ciano Diaries, “Success has many fathers while failure is an orphan.”
3. **Take Control:** The best way to take control is to develop a full chronology of the facts and a calendar of future gating events — all the upcoming activities, from legal deadlines and investor relations requirements to public hearings and industry events — which are likely to spark media interest. Your entire team must agree on this recitation. The more you understand what is going to happen, the easier it is to take control of the public narrative, internal morale, and your own emotions.

IS RECKLESS PROSECUTION CLOUDING THE FUTURE OF CORPORATE BOARDS?

[Kristin Calve](#), the publisher of the [Corporate Counsel Business Journal](#), isn’t the only expert on corporate governance who worries that the specter of being unfairly prosecuted is keeping eminently qualified people from seeking board directorships.

“Too many individuals who would make superb additions to corporate boards are declining the opportunity. They’re concerned about being caught up in a nasty prosecution that ends up costing them money and brings risk to their reputation,” Calve says. “The last thing someone coming onto a corporate board ought to be worried about is their susceptibility to a reckless prosecutor — but many are declining

the opportunity to serve. There’s little question that, left unchecked, these fears will have an adverse impact on the effectiveness and diversity of corporate boards.”

[The National Association of Corporate Directors \(NACD\)](#) conducts an annual survey that identifies the biggest priorities in board governance. In its 2019 [survey](#), apprehension about overregulation and related issues outpolled fears about an economic slowdown, geopolitical volatility, and technological disruption — not a healthy trend, since overcriminalization is wrapped into overregulation.

4. **Emotions Matter:** Confidence grows when you know your facts, which is why the chronology and calendar are so critical. Make no mistake, emotions are going to play an outsized role. From the morale of employees to your own ability to make clear minded decisions. Being a target is an incredibly difficult thing. The more you have a trusted team, clear facts, sympathetic narrative, and an understanding of what is next, you can survive and make the best decisions.
5. **It's Not About Fair:** While you can argue victimhood and bias, it is usually a waste of precious resources and clear thinking to spend time on how unfair the prosecution is. It may be true, but audiences are sympathetic, and it prevents you from your best thinking. If there is a fairness argument to make, have other parties do it for you. They will be believed.



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LEVICK is a crisis communications and public affairs agency representing countries and companies in the highest profile matters worldwide. Comprised of attorneys, former journalists, intelligence officers, authors, and members of governments, we provide our clients with risk intelligence to anticipate forthcoming challenges; crisis remediation; rehabilitation, and reemergence.

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For more than 25 years, general counsel and other members of the in-house legal community have relied on Corporate Counsel Business Journal for leading-edge information tailored to their specific needs. We do this through a unique partnership conceived by founder Al Driver, former GC of one of the world's leading retailers.

Our model, focused on service, not profits, proved potent. It is built on the common ground shared by multiple constituencies: the world's leading corporate law departments; outside counsel from elite law firms; innovative companies with products and services designed to help corporate law departments serve their clients more efficiently and effectively; and various individuals and groups, including educators, businesspeople, bar associations, legal foundations, and civil justice reform advocates, with agendas shared by GCs and their in-house teams.

Unlike other publications catering to the in-house bar, CCBJ cuts through the noise, eschewing glitz and gossip, to deliver timely, in-depth content with a laser focus on serving the interests of its partners. That's why we continue to evolve and serve 25 years later. Yes, the role of in-house counsel has changed in many ways, big and small, but so have we in ways that assure we consistently deliver value to our readers and partners.

About **The Crisis and Litigation Communicators Alliance (CLCA)**

The Crisis and Litigation Communicators Alliance (CLCA) is an international network of independent, owner managed PR firms who specialise in Litigation and Crisis PR.

About **Lauro Law Firm**

The Lauro Law Firm was formed by John F. Lauro, a former federal prosecutor in New York City and partner at a national law firm. Mr. Lauro has handled numerous white collar criminal and civil cases involving healthcare fraud, securities fraud, foreign and domestic bribery, bank fraud, defense contractor fraud, money laundering and racketeering, public corruption, antitrust, theft of intellectual property, false claims and qui tam litigation, tax violations, breach of contract, personal injury, civil fraud, and class action litigation. Clients involved in such matters often need a lawyer to represent them in connection with the criminal as well as civil aspects of their case.

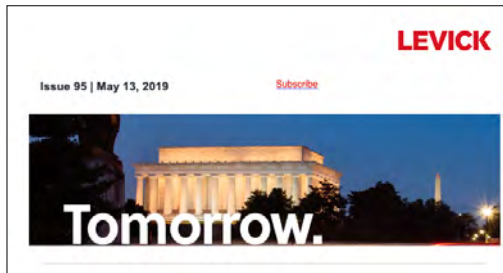
Our firm has the ability to do both — that is, to represent a client throughout parallel criminal and civil proceedings and try the case in both forums. The Lauro Law Firm has a single mission: to provide exceptional legal services to individuals and businesses involved in crisis situations. Our firm handles a broad array of complex white collar criminal and civil litigation matters before federal and state courts, regulatory agencies, and administrative bodies and is prepared at all times to take a case to court, if necessary. Our focus, however, is to avoid charges being brought and obtaining the best possible result without the need to go to court.



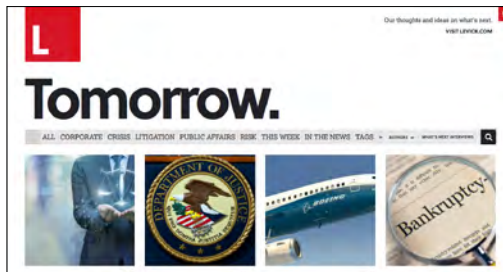
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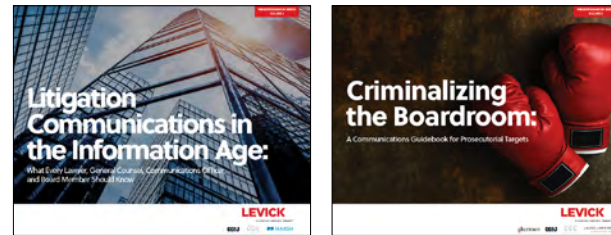
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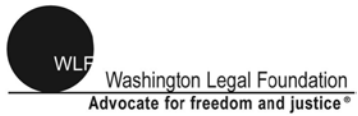
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