

BRIBE, SWINDLE OR STEAL



How Companies Get Caught – Chuck Duross

[00:00:08] Welcome back to Bribe, Swindle or Steal. I'm Alexandra Wrage, and my guest today is Chuck Duross, who heads Morrison Foerster's global anti-bribery practice, where he has overseen Foreign Corrupt Practices Act investigations relating to business in more than 50 countries. Prior to joining the firm, Chuck served as a deputy chief in the DOJ's Fraud Section, where he led the FCPA unit and was in charge of all of the DOJ's FCPA investigations, prosecutions and resolutions. Today, we're talking about how companies — and people — get caught after they engage in bribery, and Chuck is the right man for this job. TRACE member companies will also know Chuck is a regular speaker at TRACE events, and he never disappoints. With that, Chuck, thank you for joining me.

[00:00:51] Wow, no pressure. OK.

[00:00:54] You've talked a lot about how it is that companies get caught, and I think that's an area of perennial interest to those practicing in this field. Why don't you start, not with companies, but with individuals? There's a new focus on individuals that you've talked about a little bit. Why is that relevant, apart from to the individuals themselves?

[00:01:17] It's certainly been something DOJ had been focusing on for quite some time, but I think, just in the past couple of years, if you were to look at the track record that DOJ has, they really have focused on increasing the number of individuals being prosecuted, both investigated and then, ultimately, either through guilty pleas or convictions at trial. DOJ, I think, has been fairly aggressive on that front. You see it in multiple ways. One, you see it in terms of their policies. Previously, the pilot program, which is now part of the U.S. Attorneys' Manual, really creates incentives for companies to cooperate against their own executives and employees. You certainly see an effort by DOJ to encourage the focus on individuals, even by companies conducting their own internal investigations. You've seen the outcome of that. Just last year in 2017, about a dozen individuals were convicted, either at trial or through guilty pleas. An additional seven were charged, and another eight were sentenced. You see that, even as of just a couple of days ago, there were five former Venezuelan officials charged for money laundering that were connected to PDVSA, the state-owned oil company in Venezuela. I think that shows through the aggressive approach that DOJ is taking these cases in particular and, obviously, SEC as well. But with regard to DOJ, there is a limit as to the ability of the U.S. government to go after foreign government officials under the FCPA. You're not allowed to reach them, but DOJ will go after them for violating money laundering laws in which they laundered the proceeds of an FCPA violation. Both individual executives as well as foreign officials are being prosecuted by DOJ and fairly aggressively, with a variety of different techniques.

[00:02:59] Perhaps you could give us some examples of individuals that have been pursued and what sort of jail time they're getting. I think it's always surprising, especially to people outside the United States. Then maybe you could walk us through some of the techniques that are used to catch the individuals.

[00:03:15] The prison sentences that have been received by different executives and even foreign government officials for FCPA-related offenses, like money laundering, have really gone the full gamut — everything from probation or time served for executives and others that cooperated with the government, all the way up to the lengthiest prison sentence, who was Joel Esquenazi. Now, a number of years ago, he received a 15-year prison sentence, which was I think twice as long as the closest other prison sentence, which was about seven and a half years for Charles Jumet; Carlos Rodriguez, who got about seven. There are some unique circumstances that drive the sentences in some of these cases. In Joel Esquenazi case, the longest in history, he went to trial as opposed to pleading guilty, and oftentimes, people refer to that as "the trial penalty." But then on top of that, in Joel Esquenazi's case, he testified for days, and it was pretty obvious to anybody who was in the courtroom that the judge believed that he had been less than truthful. I guess in the business you'd call it perjury. At one point, Joel raised his head and said, "Lightning should strike me if what I say is not true," and the judge in front of the jury said, "Don't say that when you're sitting so close to me." Ultimately, when it came time for Joel to get his sentence, he received a 15-year sentence, which, of course, as some people who follow this space will recognize, the Esquenazi case ended up becoming a very significant decision, ultimately, on the 11th Circuit talking about, "What was the definition of foreign official?" But it also, besides having that significant component to it in terms of an important judicial decision, resulted in the lengthiest sentence in history.

[00:04:54] When you refer to "the trial penalty" — I know you're not using that term too seriously — is what you're referring to there the idea that if they're going to waste the government's time and resources by taking it to trial, the penalty will be inflated as a result?

[00:05:08] Yes. I guess it's sort of a term of our — certainly not anything officially reflected in the law or any sort of policies, but oftentimes, the way it does work through the sentencing guidelines is that somebody pleads guilty early on in the process, accepts responsibility. Those also who cooperate, there are various mechanisms to reduce the potential sentence somebody is facing. At the end of the day, the sentence is imposed by the court, not the prosecutors, and so judges can weigh how they want to do it. The downside, as a criminal defense attorney representing people, is the facts are really not in favor of your particular client. They all come out in front of the judge, and the judge is the one that ends up thinking that you're wasting his time or her time and the jurors' time. Then I think there is sort of a potential trial penalty, if you will, for having gone to trial in the first place and not accepted responsibility and try to resolve the matter short of trial.

[00:06:03] One other penalty that I think is still surprising is Douglas Murphy and the American Rice case. That was over 15 years ago, and he ended up with more than five years. Does that strike you as an outlier, or was that just the beginning of a trend?

[00:06:20] I wouldn't put it as an outlier because there are a number of sentences that have come in the three-, four- and five-year range that people have gotten in certain cases, and again, that is a that case went to trial. Oftentimes, those tend to be the cases that result in longer sentences. In that particular case, Douglas Murphy went to trial. First, he moved to get the indictment tossed out, which he did. Then, through the Fifth Circuit, it was reversed or remanded and the indictment was reinstated. They then went to trial. He was convicted. It went up on appeal again. The sentence was affirmed by the Fifth Circuit. Ultimately, he ended up paying a fairly stiff price in terms of a case from many years ago, but I think you see that the sentences here can really range. At the end of the day, if you're a business executive or myself, a week in prison is too long. Whether you say, "Oh, it was just a year or two years,"

I think people would probably say that's more than long enough, but some of these sentences, certainly, under the guideline ranges, will suggest a sentence of five and 10 years or more. Some judges ultimately don't impose that, and you see fights that play themselves out in front of judges who are trying to make assessments about, "Does the defendant really deserve this kind of penalty given where he or she was working or what was going on?," or the facts and circumstances, whether there were others who were more culpable. You do see it play itself out in various ways, but the sentences can be three, four or five years. 15 is definitely an outlier, but it's not unusual to get a sentence of that length.

[00:07:50] How are these people and these companies getting caught?

[00:07:54] The Department of Justice — and to a lesser degree, the SEC — but certainly DOJ have all kinds of different tools in the toolkit in figuring out how to collect evidence and ultimately marshal that evidence at trial against whether it be a company or individuals. Most of the time, individuals are the ones going to trial. First of all, I think it's important for people to understand exactly how DOJ ends up pursuing these kinds of cases. They typically will work with one or more law enforcement agencies. FBI — the Federal Bureau of Investigation — is clearly the No. 1 Partner of DOJ when it comes to foreign bribery cases, but there are other agencies that play very significant roles that I think most people may not appreciate. Chief among them, I would say, is IRS Criminal Investigations. The IRSCI, as it's referred to, is actually an agency that's used quite frequently by DOJ because they're really good at following the money. That really is part and parcel to what they do, so it's not unusual to see IRS involved in significant FCPA cases or even the only agency to be involved in the investigation. Then, on top of that, there are other agencies that, depending on the matter, will come into play, including Homeland Security Investigations. Those agents that work for those law enforcement agencies will approach these cases — at least my experience shows me — they'll approach these cases using all of the tools that they would otherwise use in a different case. I think people are often surprised if they hear the word "wiretap" or "search warrant" or an "undercover sting" with relationship to a foreign bribery investigation. The truth is I don't think people should. The prosecutors that join the FCPA unit often come from U.S. Attorney's offices around the country, whether that be D.C. or New York or Miami or Houston or San Francisco. They join the FCPA unit, and they've worked on cases with wiretaps and search warrants and undercover recordings and the like, so it's not unusual to see that. You see it play itself out in a variety of the cases the DOJ has brought over the years. If you think a little bit about that, some of these cases come to mind. If you think about, for example, undercover recordings, which is probably one of the most basic law enforcement techniques — which is, you get somebody who's willing to cooperate, and that person ends up wearing a wire, or they have a recording device, including maybe video. They'll go, and they'll meet with somebody. Typically, I tell clients, if someone calls you from five years ago and says, "Hey, let's talk about how we paid bribes to so-and-so," I would hang up the phone, and I would call your nearest defense attorney because I suspect maybe they're cooperating with law enforcement, and they're there to try to record you and talk about the good old days. That happens. It's not unusual, in part because when somebody shows up, and they're trying to cooperate with law enforcement, what DOJ or FBI will say to these folks, "We'd trust, but verify. Will you wear a wire and go connect the dots for this for us and go and speak with one of your former co-workers, for example, that was involved in conduct that is being investigated?" The Siegelman case is a fantastic example of that in which the former general counsel of the company ended up agreeing to wear a wire, and he went and made this recording of Joseph Siegelman, who is the former CEO. The former general counsel went to go meet with the former CEO, and there's a video — you can get it online — in which he went to go meet this guy, and I thought it was amazing. It's all public now, but the former CEO is meeting with him. They step

out onto this balcony in Miami, and he asks the former general counsel Weisman to lift up his shirt to show him he's not wearing a wire. Once he puts his shirt down, the guy says, "Well, you got to lift your shirt up." Now both these guys are lifting up their shirts and looking at each other. When it's all said and done, what I thought was hysterical was this idea that this is like "Prince of the City," some 1970s movie with duct tape on somebody's chest. I mean, none of that's true. That's just simply not how wires are done nowadays. Technology has come pretty far. Ultimately, this tape ends up being used again Siegelman, but it's not the only case. There are many cases in which recordings have been made. Prominently, in a case that's pending now, the Alstom case in Connecticut — there was a whole series of undercover recordings that were made, so that's pretty typical. Then there are other techniques I would point out that may be less typical, but they certainly happen with a certain degree of frequency. One is wiretaps. I think many people remember from "The Wire" on HBO. It was a fantastic movie — not always accurate, but a fantastic movie. People don't realize that things like that, which may be used in a drug case or an organized crime case, those kinds of wiretaps can be used with effectiveness in a foreign bribery case. There was a wiretap used in the investigation of Congressman Jefferson, who was ultimately charged with FCPA violations. Captured on those recordings were his exchanges with a Nigerian middleman who famously, at one point, was saying to somebody about how to kill an ape with a sledgehammer, which I thought was an interesting phrase. But it's not just that case. The Cilins case — Frederic Cilins, who was a French national who came to the United States in order to pay off a witness in front of a grand jury. There's a wiretap in that case, which is public. Then most recently, just last year, there was a case charge in August against a guy named Joseph Baptiste out of Boston, if I recall correctly. There was a wiretap in that case, so having wiretaps is not unusual, I would say. They're difficult to get because you have to be able to show that a particular phone is being used for illicit purposes and, certainly, the international nature of these cases become very complicated because you cannot operate a wiretap on a phone outside of the United States, so there are some limitations to what you can do. It's not Hollywood. There really are significant limitations, but wiretaps are not unusual. Then undercover sting operations in which either a confidential informant is introduced to somebody — that certainly has happened in a number of cases in the recent past or, for example, certain people will cooperate and will interact with folks claiming to be looking to engage in corrupt activity. Those people are, in fact, either paid informants or are trying to get a reduced sentence with DOJ. I think the most famous example of that comes out in the Africa Sting case, in which there was an informant that was working with the FBI over a two-year period to make recordings. Ultimately, the case was not successful for a variety of reasons that we probably don't have time to get into on this episode. Nevertheless, I think it shows you the lengths to which FBI and DOJ will pursue those kinds of recordings and gathering of evidence. What I would say to everybody is: It's easier. It's not just this unique technique, but the truth is that, as a former prosecutor, I would much rather have a recording of someone saying that they're going to pay a bribe than try to dig through 10,000 emails to try to stitch together all the different dots and the nuanced communications between people. There are lots of incentives for why DOJ or FBI would want to be doing that. Again, this is not necessarily something that the SEC can do, but they're often in parallel, and they can benefit from this sort of gathering of information. Those are among the sources.

[00:15:29] Can you spend just a minute more on the Las Vegas sting operation? In a case like that, when you have a confidential informant, how directed is their conduct through the course of the process? I think this is just really unusual for people listening to the podcast who haven't had any experience on the prosecutorial side of things.

[00:15:50] Frankly, that's a great question because the answer is: It depends. Any kind of a confidential informant should be closely monitored by law enforcement, and in most instances, I think they are. That requires that the agent be constantly in communication with the CI, that the CI's communications with potential targets or witnesses in an investigation is recorded so that, frankly — by the way, just to be clear — particularly if it's an undercover sting, meaning it's one thing to go and make a recording of someone who's talking about past conduct that's occurred. It's another, as in the Africa sting case, in which it's a sting that's occurring, so you need to make sure that communications that the CI may be having with a particular target of the investigation is being properly captured and recorded in such a way that both a judge and a jury can later be comfortable in making an assessment about what truly happened in the interactions between the CI on the one hand and the defendant on the other. It does require a lot of back and forth, a lot of recordings. It really is, to your point, Alexandra, one of the areas that I think often gets attacked — and appropriately so — when there isn't as much oversight or communication with the CI, and the CI is running amok and doing things that he or she shouldn't be doing. That's certainly an area for criticism. In an instance in which you're talking about an undercover sting, it's all the more important that there be very close coordination and oversight.

[00:17:26] Can you back out now a little bit, away from just the domestic tools that are available, and talk a little bit about what's available internationally? These cases always cross borders. That's the nature of the FCPA. What's available to U.S. law enforcement to get access to people internationally?

[00:17:45] A number of different tools that DOJ uses, one of which is a mutual legal assistance treaty, sometimes referred to as an MLAT. That's a formal process by which the Department of Justice, through the Office of International Affairs, formally requests via the State Department that another government gather certain information and provide it to the United States. That could be everything from, for example, email accounts or bank records to conducting search warrants or conducting interviews and providing that information back to the United States. That generally tends to be a very cumbersome and relatively slow process for a variety of reasons, but it is the formal way by which evidence is gathered from other countries and then provided back to the government. There are a variety of other ways in which information is obtained and then shared. For example, there is informal cooperation between law enforcement where, for example, the FBI, as well as other law enforcement agencies, will have agents stationed in certain embassies — not in every embassy, but certain U.S. embassies around the globe. Those are known at the FBI as legal attachés, or legats, for short. They also have assistant legal attachés, which are known as ALATs. The legats and the ALATs — it's the government, so there's got to be a bit of an alphabet soup — those folks work in various embassies, and they have informal communications with their law enforcement counterparts. They can actually exchange information back and forth with those counterparts informally to gather information more quickly, which can often support the exchange of an MLAT later to actually formally gather the information. The SEC has something similar. They have MOUs, or memoranda of understanding, with their sister securities regulators around the globe, and they will share information via the MOUs and be able to exchange information back and forth, including bank records, among other things. That gives you at least an idea of the network that exists, and there are certain fora in which these agents and agencies get together, whether that be, for example, at the OECD's Working Group on Bribery. There are certainly meetings twice a year. There tend to be prosecutors and law enforcement meetings that are occurring at the OECD. There are meetings that occur at Eurojust and some other multilateral fora in which the U.S. will participate. There could be a robust sharing and coordination of efforts. That's the information-gathering side of things, and then the

actual putting the "habeas grabus," if you will, on people after the evidence is gathered and someone's charged — there are a variety of vehicles by which that happens. What will happen is, after the evidence is gathered and, ultimately, if charges are brought and being presented to a grand jury or arrest warrants sought, then what will end up happening is, if somebody is not in the United States, the way that the U.S. then goes about trying to secure that person and then ultimately have them brought to the United States is through a variety of vehicles. First, there's something known as a PAW, which is a provisional arrest warrant. Those provisional arrest warrants can be secured through — basically, you get the arrest warrant in the United States, and then you can send that arrest warrant to another country bilaterally — so one country to another — and then ask that country to make an arrest based on a provisional arrest warrant, and then you begin the extradition process based upon the charge in the United States and typically, the bilateral extradition treaty that exists between two countries. There are also multilateral fora in which you can seek somebody's arrest. I think the best known version of that is using Interpol red notices in which once an arrest warrant is secured in the United States — or any country, for that matter, that's a member of Interpol — they can then send that to Interpol, Interpol puts into its database, and when someone is crossing borders, that person can be arrested based on that red notice, and extradition proceedings can continue. As I understand it, by the way, Bill Browder has podcasts on this in much greater detail and is probably a really great source if people are interested in red notices.

[00:21:54] Yeah, he's an interesting man on the topic, having had several taken out against him by a punitive Putin regime in Russia, but he's been able to have each of them unraveled, but not immediately. It can be a little terrifying, I assume.

[00:22:08] Yeah. There was a situation with someone from Nigerian law enforcement who had a red notice put out against him after he had been pushed out of law enforcement in Nigeria. It can be very troublesome because the red notices can be used for improper purposes, and it's a real challenge of trying to get that undone, and I've seen that happen in other circumstances.

[00:22:29] I think people imagine that Interpol is a much more elaborate law enforcement organization than it is. What they are doing is taking in information and disseminating it, and if the information they get is fraudulent and punitive, then it takes a while for that to be undone.

[00:22:49] Right. It's sort of the garbage in, garbage out. What's amazing is if you watch any Hollywood movie, these people running around in Interpol jackets as though they're some super law enforcement agency — it just flies in the face of the reality of it.

[00:23:03] We haven't really talked about how companies will cooperate with law enforcement to lure employees or third parties into the country so that the U.S. will obviously then be able to exercise jurisdiction over them. Can you give us an example of that? I think that's been used in a few FCPA cases.

[00:23:21] Sure. A lure is, again, applied across any kind of a criminal case, including FCPA, but it's really a generic term designed to get somebody to go either to the United States or to a jurisdiction that will then extradite someone to the United States or expel them to the United States. For example, there are some countries that will, in cooperation with the United States law enforcement, say, "Hey, why don't we meet in this third country so people feel comfortable? OK, we're not going to the U.S." And they'll go to "name the country." That person lands there, and they are denied entry into, let's say, the Dominican Republic, and they are put on for, quote-unquote, the next plane out. That plane happens to be going to Miami.

[00:24:06] Oh, that's very sneaky. I didn't know about that tactic.

[00:24:11] We used to do that in Miami, and people then fly into Miami not really by choice after that happened. That is a lure to a third country. Then, of course, separate from that, there are lures to the United States in which they set up a meeting or something along those lines, and they show up to the United States not realizing what's in store for them. Certainly, that can happen as well. Of course, whether it's border watch or a lure, for example, it really avoids the thing that takes, I think, the longest and is oftentimes the most meddlesome for law enforcement to deal with, which is extradition.

[00:24:43] Right. That's being used with some regularity in these anti-bribery cases and these FCPA cases. I think perhaps Tesler is the best example of that. There have been some more recently.

[00:24:54] Yes. There are certainly a number of examples in which people have been extradited to the United States. For example, many years ago, Ousama Naaman, who is a Lebanese-Canadian national who flew into Germany and was arrested on an Interpol red notice — so you bring in the red notice, and so he was arrested there and then extradited from Germany and, ultimately, found his way into a courtroom in Washington, D.C. But it's certainly been used a number of other cases, including persons in the United Kingdom, like Jeffrey Tesler, but also, and probably most famously, there are two cases. One involves Dmitry Firtash, a Ukrainian billionaire who was arrested in Austria, and there's a prolonged extradition process involving Dmitry Firtash, which, as I understand it, in 2017 ultimately lost its final appeal and, as I understand it, was being extradited to the United States. I don't know if that's happened yet, but it's not unusual to be a national from one country and arrested in another, like Ousama Naaman or Dmitry Firtash. That can certainly happen, but I think the most famous extradition that didn't work out was involving an entirely different set of circumstances. Years ago, in this case that was, in some ways, famous or infamous was the Viktor Kozeny case. Viktor Kozeny was this guy who was known as the "Pirate of Prague," and he was charged out of the Southern District of New York years ago with violating the FCPA, but he was based in the Bahamas, and he was arrested — on a provisional arrest warrant — and they sought his extradition to the United States from the Bahamas. As it turned out, the case went all the way to the Privy Council in London, and the U.S. lost the extradition request because they did not find that there was a parallel applicable criminal law in the Bahamas that paralleled the FCPA for the charges that he was facing the U.S. The lack of dual criminality, which is a fairly common element in these bilateral extradition treaties, meant that his extradition being requested by the United government did not need to be honored by the Bahamas because it didn't meet this dual criminality requirement. As a result, to this day, as far as I know it, Viktor Kozeny continues to live on a tropical island in the Bahamas, 90 miles outside the reach of the United States.

[00:27:16] It could be considerably worse. I assume the Bahamas has sorted that out and has amended their law and adopted a law that's in line with the UN requirements.

[00:27:25] You know, I have no idea. It would be an interesting research project for someone. I actually don't know what the answer to that is.

[00:27:32] Companies can be nabbed with a surprising array of tools. I think — and you indicated this at the beginning — that people are still surprised at how traditional law enforcement tools can be used to catch corporate crime. Is there anything that surprises you anymore? You've been on the prosecutorial side. You are a defense attorney now. Is there anything that surprises you?

[00:27:53] I guess what I would say is — in some ways it's not a surprise, but it certainly comes as a surprise to some of my clients — starting maybe a decade or so ago was a concerted effort by the U.S. government led by DOJ and SEC, and also the FBI, was this effort to internationalize the network of law enforcement investigators that were pursuing these cases. As a product of that, you really see today, it's not hard to look around and see the outgrowth of those efforts. If you look at Lava Jato in Brazil, for example, the amount of cooperation that you see between the U.S. on the one hand and the Brazilian authorities on the other, like the MPF, working hand-in-glove and sharing information with a law enforcement partner that I would say, a decade ago, would not be something I would consider to be a traditional law enforcement partner of the United States. Obviously, the Canadians, as I'm sure you love — the Canadians, the RCMP — the SFO in London or the City of London police or maybe the Australian Federal Police, and there are lots of traditional, mostly English-speaking countries that the U.S. had a tradition of working with internationally, but not necessarily some of the emerging economies. You see more of that today than I think most people may have realized. You see it play itself out in cases like Lava Jato, but you also see very significant cases in the past year, year and a half, in which Norway's been involved or Sweden or the Netherlands, for example — really, countries that may not have had a long-term relationship with U.S. law enforcement, at least in the anti-corruption space. It's really developed, and I guess the point is it's exponential. It is really growing on itself, and you see that now play itself out in places like South Africa, or other countries like Colombia, which I think is going to continue to grow. I think that's probably a bit startling. I knew that there was effort afoot to make that happen; I didn't realize it was going to take off in quite the manner that it has.

[00:29:59] I've been surprised at how often the DOJ will offer up training resources to people to go to some of these very challenging countries and actually train their law enforcement and their DOJ-equivalent to work on these cases.

[00:30:16] Absolutely. No doubt. I would say the second point to that is because of that international network the DOJ and SEC have spent so much time developing, my sense is that they are much more aggressive today than they were when I was there, just because they feel as though they have the resources to make it happen, so seeking evidence from the foreign counterparts and pursuing proactive investigations where you're not just asking for information but actually getting the foreign counterpart to execute searches, to go and grab individuals, to conduct interviews. Those kinds of things very proactively, I've seen it, and it can really — I'll just put it this way — be very challenging for companies that are, on the one hand, trying to cooperate in a multi-jurisdictional investigation and, on the other hand, trying to address the fact that they are being the target of aggressive investigations and multiple tactics in multiple jurisdictions.

[00:31:15] I have to think that enforcement professionals everywhere have a sense of shared community on this issue and are emboldened by the support that they're getting from each other. The criminals are always isolated. The law enforcement can work in consort. It's interesting, as you say, the level of cooperation changing at a very brisk pace. Chuck, always a pleasure to chat with you. Thank you so much for your time today. I hope we'll be able to get you back on soon.

[00:31:42] Take care. Great talking.