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PERSPECTIVE

Are bankruptcy criminal referrals sad or not sad?

By Leonard L. Gumport

When a party or witness commits perjury in a civil case in federal court, does the judge have a statutory duty to make a criminal referral? In non-bankruptcy civil cases, Congress has not told Article III federal judges what to do. In bankruptcy cases, Congress certainly did tell bankruptcy judges (if not all federal judges) what to do. As a result, the statutory criminal referral duties of judges presiding in federal civil cases are different in bankruptcy and non-bankruptcy cases. Sad or not sad?

In *SEC v. Payton*, 176 F. Supp. 3d 346 (S.D.N.Y. 2016), U.S. District Judge Jed S. Rakoff ruled that a federal judge has discretion to refrain from making a criminal referral of perjury committed in a civil case. In *Payton*, which was an SEC enforcement case, Rakoff decided that a federal judge should make a criminal referral of perjury committed in a civil case “only in exceptional circumstances.” Rakoff explained that, if frequently invoked, the threat of a criminal referral for perjury might “have a chilling effect on civil litigants who wish to testify in suspicious circumstances.” Among other things, Rakoff also reasoned that, “because a formal perjury referral from a federal judge carries heavy weight, it may impede the prosecution from exercising its own independent judgment as to whether perjury has occurred or whether, even if it has, criminal prosecution is appropriate.”

Payton did not involve a federal statute that purported to require or excuse a federal judge from making a criminal referral of perjury committed in a civil case. The statutory landscape is different in bankrupt-

cy cases. Perjury committed in a bankruptcy case is a criminal offense under 18 U.S.C. Section 152, which is part of Chapter 9 of Title 18. Section 3057(a) of Title 18 provides: “Any judge, receiver, or trustee having reasonable grounds for believing that any violation under chapter 9 of this title” has been committed, “shall report to the appropriate United States attorney all the facts and circumstances of the case, the names of the witnesses and the offense or offenses believed to have been committed. Where one of such officers has made such report, the others need not do so.”

In 1926, Congress enacted the statutory predecessor of Section 3057 as Section 29(e) of the Bankruptcy Act of 1898. In the 1926 amendment, the word “referee” appeared instead of “judge.” During approximately 1929-39, bankruptcy-related scandals occurred that involved lawyers, trustees, referees, district judges, and two circuit judges. These scandals did not induce Congress to repeal the criminal referral provisions in Section 29. In 1978, in enacting the Bankruptcy Reform Act, Congress established the modern Article I bankruptcy judge and changed the word “referee” to “judge” in what is now Section 3057.

In 2005, Congress added to the criminal referral duties of bankruptcy judges by enacting 18 U.S.C. Section 158. In Section 158(c), Congress designated the U.S. attorney for each judicial district and an FBI agent from the field district as the individuals who have “primary responsibility for carrying out the duties of a United States attorney under section 3057.” In Section 158(d), Congress mandated that: “The bankruptcy courts shall establish procedures for referring any case that may contain a

materially fraudulent statement in a bankruptcy schedule to the individuals designated in this section.”

Does the mandatory reporting obligation of Section 3057(a) apply only to Article I bankruptcy judges? Maybe it does, and maybe it doesn’t. Sad! Context and history suggest that the term “judge” in Section 3057(a) means bankruptcy judges, who are the successors to the bankruptcy referees that were the subject of the 1926 amendment to Section 29 of the 1898 Bankruptcy Act. The language of Section 3057(a), however, imposes its reporting duties on “[a]ny judge,” not just Article I bankruptcy judges.

What is the utility of mandating judges (Article I or Article III) to make criminal referrals in bankruptcy cases even though judges presiding in other federal civil cases have discretion not to make criminal referrals? Statistics on criminal referrals made by judges are not published by the Executive Office of United States Attorneys.

The response of bankruptcy courts to 18 U.S.C. Section 158(d) suggests that there is some reluctance to force judges to make criminal referrals. Several bankruptcy courts substantially delayed establishing (publicly, at least) the required referral procedures.

Upon receipt of a bankruptcy judge’s criminal referral under Section 3057, what duties, if any, apply to the U.S. attorney? Section 3057(b) provides: “The United States attorney thereupon shall inquire into the facts and report thereon to the judge, and if it appears probable that any such offense has been committed, shall without delay, present the matter to the grand jury, unless upon inquiry and examination he decides that the ends of public justice do not require investigation or prosecution,

in which case he shall report the facts to the Attorney General for his direction.”

The Justice Manual of the U.S. Department of Justice does not guide prosecutors on when, if ever, they should report back under Section 3057(b) to the judge who made the referral. Section 9-41.010 of the Justice Manual discusses Section 3057, but does not mention whether prosecutors ever have a duty to report back to the judge. Similarly, section 9-2.111 instructs federal prosecutors to notify the United States Trustee Program of a declination, but does not say whether or how the judge should be notified.

Should prosecutors have a duty to report back to bankruptcy judges on what happened to their criminal referrals as required by Section 3057(b)? Recall that Congress enacted the prosecutor’s report-back duty in 1926, when the person to whom the prosecutor reported back was the relatively less elevated referee, not a judicial officer comparable to the modern statutory bankruptcy judge.

Thought should be given to whether the bankruptcy criminal referral statutes could be improved. That would not be sad.

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