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Opinion

# Paul Nitze: Cases lost the day they were filed

Paul Nitze  
The Aspen Times  
Aspen, CO Colorado

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If you've been through DIA or another big airport of late, you may have seen a billboard for a national law firm showing a farmer staring down a chicken. The copy reads something like this: "If you don't have a strategy, litigation is just a game of chicken."

It's actually worse than that. If you don't have a strategy, litigation is a game of chicken that you have already lost. That lesson was not absorbed by Aspen's chief deputy district attorney, Arnold Mordkin, who lost his cases against Marlin Brown and Erik Peltonen on Thursday.

Those cases got national attention, both for the novel prosecutorial strategy used, and for the tragic deaths that gave rise to them. Four members of the Lofgren family died from carbon monoxide poisoning sometime during Thanksgiving weekend 2008. A faulty Munchkin boiler leaked the gas into their house on Popcorn Lane. Peltonen inspected and allegedly signed off on the boiler, which had been installed by Brown.

Building inspectors can face civil liability for failing their duties, but this may have been the first time in American history that an inspector was charged with criminally negligent homicide for this type of mistake. So it's fair to say that Mordkin was already swimming upstream when he decided to bring criminal charges.

And he doubled down by using a grand jury to bring the charges. These days, grand juries are more common on the big screen than in real life. In most states, Colorado included, grand juries are used sparingly. They have fallen into disuse because they suck up a lot of prosecutorial resources, but also because judges can view them with suspicion.

When a district attorney brings charges at the outer edge of the law via a grand jury, as Mordkin did here, it can look like he's bypassing normal procedure because he fears a judge might throw out the case. When a grand jury brings an indictment, the magistrate judge who would normally make a probable cause finding is cut out. It's also true that unusual cases are well-suited for grand juries, because they need the kind of preliminary investigation that grand juries provide, but it remains a risky business.

Mordkin took that gamble, and then deployed a strategy that guaranteed the indictment would be dismissed. His charges specified dates of offense between 2004 and 2006, but criminally negligent homicide has a three-year statute of limitations. Any charges brought in 2010, which was when the grand jury indictment came down, had to relate to conduct after July of 2007.

In a normal prosecution Mordkin could have amended the indictment midway through, but by using the grand jury he was stuck with the original charging language. Mordkin was quoted as being "disappointed," after yesterday's ruling, but that makes no sense. That's like saying you're "disappointed" you lost a baseball game after walking over to the umpire and forfeiting.

Any well-defended criminal case is fought via pretrial motion. Here the DA's office was going up against Abe Hutt,

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one of the four or five best defense attorneys in the state. A really good attorney like Hutt will play to keep the case from ever reaching a jury. As a prosecutor, you have to expect that any procedural crack in your case will be exploited.

Take the federal government's recent prosecution of Raj Rajaratnam for insider trading as a counter example. He was successfully prosecuted by Preet Bharara, the U.S. Attorney for the Southern District of New York, and is now in prison. Bharara used wiretaps in an insider trading investigation for the first time ever, and he knew it would be controversial.

When the time came to defend those wiretaps, Bharara was prepared. He filed a monster response to the defense's motion to suppress the wiretaps. On its face, the response was the product of months of work. The government predicted every conceivable challenge to the wiretap evidence, and they laid the groundwork to defeat them.

That is how you keep a case from turning into a game of chicken. You do all that work because you owe it to the taxpayers not to waste their money on a dead-end case. You do it because charging someone criminally can ruin his life no matter what happens to the case; the stain of a criminal indictment lasts forever. You do it for the victims, who deserve the best effort you can muster.

And in this instance, Mordkin was already under attack for criminalizing conduct that is normally handled as a personal injury case. Lawyers for the Feuerbachs and Rittenours, the surviving relatives of the Lofgren family, will try to obtain the grand jury transcripts and use them in their civil lawsuits against Brown, Peltonen and others. Even if it is completely inadvertent, criminal charges that were defective on their face will now provide ammunition in a civil lawsuit.

Anyone who has ever sat in a prosecutor's chair knows how easy it is for someone to peer over your shoulder and second-guess your decisions. Prosecutors should be granted wide latitude, in part because many developments can't be foreseen. New evidence emerges. Witnesses recant their prior statements.

But that latitude does not extend to strategic errors that are avoidable. If Mordkin does not bring this case back in front of the grand jury, he needs to explain why he didn't see this coming.

*Paul Nitze has been a part-time Aspenite his entire life. He currently lives in Washington, D.C.*

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