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Result seen as jolt for high-flying prosecutor

By Greg Moran

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U.S. Attorney Carol Lam wrote the book, quite literally, on prosecuting health care fraud.

But the inconclusive and deflating end yesterday of her high-profile, high-stakes pursuit of Medicare fraud against Alvarado Hospital, its former chief executive and parent company Tenet HealthSystem Hospitals was the kind of ending that Lam certainly wouldn't write and clearly didn't want.

The hung jury may have also altered Lam's profile in San Diego, one largely shaped by the prosecutions of former councilmen Ralph Inzunza and Michael Zucchet in the City Hall strip club scandal, and the bribery conviction of former Rep. Randy "Duke" Cunningham.

"Carol Lam was riding a very big high previously," said Shaun Martin, a professor at the University of San Diego School of Law. "She still has a lot of credibility locally and nationally. But it is not any more the uninterrupted string of successes it was before."

It marked the second hung jury in the Alvarado saga, which has attracted keen interest nationally because of Lam's novel prosecution theory.

Lam, who co-wrote the book "Prosecuting and Defending Health Care Fraud Cases" and is considered the government's top health care fraud lawyer, invested enormous amounts of her prestige in the case.

In many respects, it had become a signature case for her tenure as U.S. attorney in San Diego. Just three months after she was installed in 2002, FBI agents raided Alvarado with search warrants, setting the case in motion. And in a hardball move, Alvarado's former CEO Barry Weinbaum was personally charged with a crime.

Legal experts said Lam was signaling to health care executives that they could be sent to prison if convicted of making fraudulent contracts with doctors.

Lam crafted a theory that sent shivers through the health care industry. At its heart were "relocation agreements," contracts that hospitals use to recruit doctors and whose use is widespread in the industry.



Carol Lam

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Lam said Alvarado was using the agreements as bribe packages or kickbacks in exchange for doctors referring patients to the hospital.

The hospital said it did everything by the book and nothing was illegal. Nationally, other health care groups anxiously watched, fearing a guilty verdict would imperil their relocation agreements, or the practice.

When the first trial ended in a hung jury last year, Lam reshuffled the prosecution team and, in an unusual step, decided she would personally prosecute the retrial.

The second hung jury – mistrials are often seen as defeats for prosecutors – is a blow to Lam, several legal observers said.

“I think it's a setback for her,” said Michael Crowley, a criminal defense lawyer. He represented David Cowan, a former City Hall staffer who was charged in the strip club case and later acquitted. Crowley also represented two witnesses called in the Alvarado case.

Health care fraud cases are notoriously difficult, said Crowley – “like nailing Jell-O to a tree” – but he said Lam was reaching in this case.

Crowley also sounded a theme heard by defense lawyers and critics in the City Hall corruption case: that Lam was transforming conduct that should be punished in civil court – by fines, for example – or administratively, and criminalizing it.

“The criminal arena is just not the proper venue for these kinds of cases,” he said.

Martin said Lam's prosecutorial posture is unsettling to some. “She has been very aggressive in rooting out problems that potentially could be resolved civilly, but potentially are criminal,” he said.

“It's a very aggressive use of her office. Some people don't like that. Others very much like that.”

Charles La Bella, the lawyer who represented Weinbaum and was a assistant U.S. attorney in the office before Lam's tenure, said the mistrial shows jurors are wary of prosecutions that stretch the boundary between criminal conduct and civil wrongdoing.

“In recent times, the government has been pushing to criminalize conduct that is not criminal, but could and should be handled administratively,” he said.

“I think juries are pushing back a little bit and saying government, you've gone too far here. I think you are seeing the pendulum swing back.”

La Bella declined to say what this setback would mean to Lam's tenure overall, but he noted how deep her involvement was.

“She invested herself in this case,” he said. “It was her judgment that was invoked to bring this case the first time, and the second time. So I think it reflects on her judgment.”

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Lam issued a terse statement yesterday saying the government still believed it was “important to address violations of the Medicare anti-kickback statute” and expressed regret that the jury could not reach a verdict.

Comments by some jurors indicated that they disagreed with the prosecution's theory.

“The charges should never have been brought,” said juror Chris Welch, a post office worker from Spring Valley. “When you look at the files, you see everything was documented. It was all there, in case after case.”

The government could decide to try the case a third time, but Crowley said that is unlikely.

While still flying high after the Cunningham prosecution, Lam's other high-profile cases are unresolved.

Zucchet's conviction in the City Hall case was reversed by the trial judge, who acquitted him of most charges.

Lam has indicated she wants to appeal that ruling, but her superiors in Washington have yet to approve it. Lawyers for two men convicted in the City Hall corruption case, lobbyist Lance Malone and Inzunza, are also appealing their convictions.

Her office has also indicted three people in the City Hall pension scandal, and more indictments are widely expected from a second grand jury investigating the scandal.

How all the cases shake out will ultimately determine Lam's standing, but convictions in the Alvarado case clearly would have helped.

“Carol came in with the notion she was going to attack white-collar crime,” Crowley said. “I think that is admirable when something like Duke Cunningham comes up. That's the kind of thing she should look for.

“But I think she's pushing the edge of the envelope here in these other cases, and with not the greatest success.”

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