Avoiding Traditional Obstruction of Justice Statutes While Conducting Corporate Internal Investigations

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I. INTRODUCTION: AN OVERVIEW OF TRADITIONAL OBSTRUCTION OF JUSTICE STATUTES.

The recent obstruction of justice prosecution of Arthur Andersen demonstrated the breadth and danger of traditional obstruction of justice statutes. Lawyers conducting internal investigations must proceed in a manner that protects themselves and their corporate clients from any allegation of attempting to obstruct an investigation. The dangers of obstructing justice are always present when conducting internal investigations because lawyers must counsel employees regarding: (1) government interviews; (2) document destruction/retention issues; and (3) E-mail deletion/retention. When conducting an internal investigation, lawyers are gathering the relevant facts necessary to analyze the specific allegations at issue. The process of gathering documents and interviewing witnesses often reveals facts that are incriminating to the company and its employees.

Employees and records custodians that are involved in the investigation often attempt to "help" the company by maintaining the confidentiality of information that they believe might be damaging to the company even if the employees are innocent of any criminal conduct. As a result, employees often destroy documents or data in an effort to "help" the company. Unfortunately, many corporations and individuals are eventually prosecuted for attempting to conceal facts that are material to the government's investigation rather than their own original misconduct. They are forced to plead guilty or pay civil fines due to their efforts to cover up or destroy information related to the original misconduct.

In today's business world, the mere allegation by the government that a company has obstructed a government investigation can devastate its reputation and result in the corporation or its employees being criminally prosecuted for the attempted cover up. In the pages that follow, we review the statutory elements of traditional obstruction of justice statutes and discuss recent judicial interpretations regarding these statutes. We also provide practical advice on how to comply with the obstruction of justice statutes.


Lawyers conducting internal investigations must be aware of the obstruction of justice statute codified at 18 U.S.C. § 1503. The "omnibus clause" makes it a federal crime to obstruct a judicial proceeding. The clause provides that
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"...[W]hoever corruptly or by threats or force, or by any threatening letter of communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished. ... If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

The elements of obstructing justice pursuant to the omnibus clause of 18 U.S.C. § 1503 are:

(1) a judicial proceeding must be pending;

(2) the defendant must know that the judicial proceeding is pending;

(3) the defendant must act "corruptly" with the specific intent of purpose to obstruct, influence or impede a proceeding in its due administration of justice United States v. Bashaw, 982 F.2d 168, 170 (6th Cir. 1992).

A. Defendants Must Know That a Judicial Proceeding is Pending. The first and second elements of an omnibus obstruction violation requires a defendant to know that a judicial proceeding is pending. "[C]orruptly" impeding the "due administration of justice" requires that a judicial proceeding be pending on the date that the obstructive act is committed. A grand jury proceeding is clearly a judicial proceeding. United States v. Tackett, 113 F.3d 603, 612 (6th Cir. 1997). In Tackett, the court held that although the omnibus clause of Section 1503 requires that the prosecution prove that a defendant's actions were intended to obstruct an actual judicial proceeding, the government need not prove that the actions had their intended affect. Id. Furthermore, an endeavor to obstruct justice violates the law even if unbeknownst to the defendant, the plan is doomed to fail or "for failure" from the start. United States v. Aguilar, 515 U.S. 593 at 599.

The U.S. Supreme Court held long ago in Pettibone v. United States that the obstruction of the due administration of justice in any court of the United States, corruptly or by threats or force, is indeed made criminal, but such an obstruction can only arise when justice is being administered. Unless that fact exists, the statutory offense cannot be committed; and while, with knowledge or notice of that fact the intent to offend the company's obstructive action, without such knowledge or notice, the evil intent is lacking. Pettibone v. United States, 148 U.S. 197, 207 (1893).

The government must prove that the defendant knew about the pending judicial proceeding. In United States v. Mullins, 22 F.3d 1365 (6th Cir. 1994), the Sixth Circuit stated that the mental state necessary for conviction under 18 U.S.C. § 1503 is that the defendant must have the "general intent of knowledge, as well as the specific intent of purpose, to obstruct a judicial proceeding." Mullins at 1369. However, if the obstructive act occurred "after" the judicial proceeding was completed, then no intent to obstruct that proceeding can be shown. Id. at 1370. In United States v. Bashaw, 982 F.2d at 171, the Sixth Circuit held that the only evidence of misconduct
was that the defendant "stared" at the jurors during his brother's trial, and then made threatening comments to them "after" the trial was over. The Court reversed a conviction under 18 U.S.C. § 1503, because there was no evidence that the conduct which is the basis for the indictment could have interfered with the due administration of justice. Id. at 171. The Court noted that, although an individual need not succeed in obstructing justice to violate Section 1503, a defendant must at least undertake action from which an obstruction of justice was a reasonably foreseeable result. Bashaw, 982 F.2d 168, 172 (6th Cir. 1992). Because the jury's duties already had been completed, his statements could not have had as their "natural and probable effect" the obstruction of justice, nor was such an obstruction reasonably foreseeable. Id.

B. Defendants Must Corruptly Endeavor to Obstruct a Judicial Proceeding. The third element of the offense requires the government to prove that there was a "corrupt endeavor" under the statute to impede or obstruct justice. The "corrupt endeavor" language in the statute clearly reaches any "attempt" to obstruct the administration of proceedings even if the attempt does not succeed. United States v. Aguilar, 515 U.S. 593 (1995). In United States v. Atkin, 107 F.3d 1213, 1218 (6th Cir. 1997), the Court held that the omnibus clause does not require proof that the defendant actually influenced an officer of the Court. Instead, to sustain a conviction under Section 1503, the government must prove that the defendant acted with an intent to influence judicial proceedings. Id. Moreover, the defendant's actions need not be successful; an "endeavor" suffices so long as that endeavor has the natural and probable effect of interfering with the due administration of justice. In other words, the defendant must at least undertake some action from which an obstruction of justice was a reasonably foreseeable result. Id. at 1218. In U.S. v. Russell, 255 U.S. 138, 143 (1921), the court held that the use of the term "endeavor" eliminates the technicalities and ambiguities of a word like "attempt." The Court stated that the word "endeavor" describes any effort or essay to accomplish the evil purpose that Section 1503 was enacted to prevent. Id.

In summary, the Sixth Circuit and other courts have consistently held that the statutory language "corruptly endeavors" requires that the defendant knew a judicial proceeding was pending, and intended to obstruct it. U.S. v. Monus, 128 F.3d 376, 387 (6th Cir. 1997).

C. A Lawyer Can Obstruct Justice By Merely Performing Traditional Litigation Related Conduct. In U.S. v. Ceuto, 151 F.3d 620 (7th Cir. 1998) the Court (citing the Sixth Circuit's decision in U.S. v. Tackett, 113 F.3d 603 (6th Cir. 1997)) stated that 18 U.S.C. § 1503 was intended to ensure that criminals could not circumvent the statute's purpose by devising novel and creative schemes that would interfere with the administration of justice but would nonetheless fall outside the scope of Section 1503's specific prohibitions. In Cueto, a lawyer's conviction for obstruction of justice was upheld by the Seventh Circuit despite the fact that much of his conduct was characterized by the Court as "traditional litigation related conduct". The government indicted Lawyer Cueto alleging that he had sufficient business relationships with his client that generated a "financial motive" for him to conspire with the defendant to impede and delay an FBI investigation. Lawyer Cueto was indicted for attacking the reputation of law enforcement agents and urging the local county attorney's office to investigate and indict the agents for alleged extortion. Id. at 628. The indictment also alleged that Cueto
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conspired to influence and hinder the function of the grand jury by filing false motions attacking the operations of the FBI and the Office of the United States Attorney, in an attempt to delay and disrupt the investigation and to discharge the grand jury. In upholding Lawyer Cueto’s conviction, the Court stated that "even though courts may be hesitant, with good reason and caution, to include traditional litigation-related conduct within the scope of § 1503, the omnibus clause has been interpreted broadly in accordance with Congressional intent to promote the new administration of justice and to prevent the miscarriage of justice, and an individual's status as an attorney engaged in litigation-related conduct does not provide protection from criminal conduct. Id. at 632.

The Seventh Circuit emphasized Cueto's "financial motive" for assisting the defendant. Most in-house lawyers who are conducting internal investigations have stock options and other financial interests in their respective companies and, therefore, have similar "financial motives" for protecting their company/client.

D. Anticipatory Obstruction of Justice. Even though a judicial proceeding must generally be pending before a lawyer can obstruct justice, there is a concept of anticipatory obstruction that has been approved by the courts. In United States v. Schaffner, 715 F.2d 1099 (6th Cir. 1983), the Sixth Circuit held that for purposes of 18 U.S.C. § 1503, a person may be a witness under Section 1503 even though he has not been subpoenaed. All that is necessary is a showing that the defendant expected the person to testify. Id. at 1101. Any other interpretation would allow a defendant to freely obstruct justice up until formal service of a subpoena. In Schaffner, a lawyer was indicted for persuading a witness to hide out and avoid testifying for the government. See also U.S. v. Ruggiero, 934 F.2d 440 (2nd Cir. 1991).

E. Conclusion. The specific intent requirement provides a substantial layer of protection for lawyers who are conducting internal investigations. As long as lawyers are instructing employees to tell the truth and not destroy evidence, it is unlikely that the government could prove that counsel had "corruptly endeavored" to persuade a witness to impede or obstruct the due administration of justice.

III. OBSTRUCTING AN AGENCY PROCEEDING OR CONGRESSIONAL INVESTIGATION UNDER 18 U.S.C. § 1505.

Section 1505 contains language very similar to Section 1503. However, Section 1505 was enacted to protect the integrity of administrative and Congressional proceedings. The omnibus clause of Section 1505 provides, in pertinent part:

Whoever corruptly, or by threats or force, or by any threatening letter or communication influences, obstructs, or impedes or endeavors to influence, or obstruct, or impede the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States, or the due and proper exercise of the power of inquiry under which any inquiry or investigation is being had by either House, or any Committee of either House or any Joint Committee of the Congress shall be [guilty of a crime].
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For the government to prove that a defendant violated Section 1505, the government must prove the following elements:

(1) That a proceeding was pending before a department or agency of the United States or before Congress;

(2) That the Defendant was aware of the pending proceeding; and

(3) That the Defendant intentionally and corruptly endeavored to obstruct that proceeding.

The Defendant need not succeed in the endeavor to obstruct justice, rather it is sufficient that the Defendant has made an effort to accomplish an evil purpose outlawed by the Statute. United States v. Sprecher, 783 F. Supp. 133, 117 (S.D. NY 1992).

A. How Do Courts Define "Proceedings" Under 18 U.S.C. § 1505? The term proceeding before a governmental department or agency under Section 1505 means a proceeding in the manner and form prescribed for conducting business before the department or the agency. United States v. Sprecher, 783 F.Supp. 133. The term "court proceeding" is very broad in scope because it includes all steps in a "proceeding" from the beginning of the proceeding to the end of the proceeding. Consequently, prosecutors under Section 1505 have more flexibility than under Section 1503. A pending proceeding can be found surprisingly early during an informal interview.

In United States v. Fructmann, 421 F.2d 1019 (6th Cir. 1970) an attorney in charge of the Cleveland Office of the Federal Trade Commission was investigating the defendant's discount practices, suspecting that illegal price discrimination under the Clayton Act had occurred. The government attorney visited the defendant's manufacturing facility and asked to see all invoices reflecting purchases of steel by the defendant's customers. The corporate employee complied with the government lawyer's request and provided, along with other records, false invoices purporting to show that certain sales of steel were to Canadian companies as opposed to companies in the United States. However, the corporate employee knew that the steel had in fact been sold in the United States and that discounts granted to United States' customers were prohibited under the Clayton Act. The Sixth Circuit found no merit in the defendant's contention that the word "proceeding" refers only to those steps before a federal agency which are "judicial or administrative in nature." Id. at 1021. The Sixth Circuit noted that "the term proceeding is a term of broad scope, encompassing both the investigative and the adjudicated functions of a department or agency. United States v. Fruchtman, 421 F.2d 1019 (6th Cir. 1970).

B. Defendant's Corrupt Endeavor To Obstruct An Investigation. The proper inquiry in determining whether a defendant endeavors "corruptly" to obstruct a federal investigation is whether the defendant has the requisite intent to improperly influence the investigation, not on the means that the defendant employed in bringing this influence to bear. Any endeavor done with the requisite intent violates the statute. U.S. v. Mitchell, 877 F.2d 294 (4th Cir. 1989).
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Lawyers who are interviewing and preparing witnesses during internal corporate investigations must thoroughly understand the breadth of 18 U.S.C. § 1512. This statute was enacted in 1982 as part of the Victim and Witness Protection Act and represents a congressional intent to criminalize any tampering with potential witnesses in official proceedings.

A. No Need to Show That a Judicial Proceeding is Pending. Under Sections 1503 and 1505, the government must show that a judicial proceeding or investigation is actually pending in order to prove that an obstructive act violates those statutes. However, conviction for corruptly persuading another person with intent to influence testimony in an official proceeding does not require proof that the proceeding in question actually be pending or about to begin when the obstructive act occurs. It merely requires that the defendant feared that such a proceeding had been or might be instituted and corruptly persuaded persons with the intent to influence their possible testimony in such a proceeding. 18 U.S.C. § 1512(f).

Consequently, a broader range of conduct may be prosecuted under 18 U.S.C. §1512(b) and 18 U.S.C. §1512(f). Under this section, it is now a crime to "engage in misleading conduct toward another person with the intent to influence, delay or prevent that person's testimony or to cause or induce any person to withhold testimony or documents."

B. Corruptly Persuading or Engaging in Misleading Conduct Toward Witnesses. A portion of 18 U.S.C. § 1512 that is most likely to arise in a corporate internal investigation is codified in 18 U.S.C. § 1512(b). That portion states:

[w]hoever knowingly uses intimidation or physical force, threatens, or corruptly persuades another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to

(1) influence, delay or prevent the testimony of any person in an official proceeding;

(2) cause or induce any person to

(A) withhold testimony or withhold a record, document or other object, from an official proceeding;

(B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding;

(C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding; or
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(D) be absent from an official proceeding to which such person has been summoned by legal process; or

(3) hinder, delay or prevent the communication to a law enforcement officer or judge of the United States relating to the commission or possible commission of a federal offense or a violation of conditions of probation, parole, or release pending judicial proceedings;

shall be fined under this title or imprisoned not more than ten years, or both. 18 U.S.C. § 1512(b)

C. U.S. v. Arthur Andersen, LLP. No discussion of 18 U.S.C. § 1512 would be complete without an analysis of the Arthur Andersen prosecution. The following paragraphs summarize the essence of the Andersen case and briefly explain how an 89-year old accounting firm with 28,000 employees was brought down in less than a year by an allegation that Arthur Andersen obstructed justice under 18 U.S.C. § 1512.

1. The Indictment Charging An Obstructive Act. The government alleged that Andersen attempted to obstruct justice by the wholesale destruction of documents. The indictment charged Arthur Andersen, in part, as follows:

In the summer and fall of 2001, a series of significant developments led to Andersen's foreseeing eminent civil litigation against, and government investigations of, Enron and Andersen.

On or about October 16, 2001, Enron issued a press release announcing a $618 million net loss for the third quarter of 2001. That same day, but not as part of the press release, Enron announced to analysts that it would reduce shareholder equity by approximately $1.2 billion. The market reacted immediately and the stock price of Enron shares plummeted.

By Friday, October 19, 2001, Enron alerted the Andersen audit team that the SEC had begun an inquiry regarding the Enron "special purpose entities" and the involvement of Enron's chief financial officer.

The next morning, an emergency conference call among high-level ANDERSEN management was convened to address the SEC inquiry. During the call, it was decided that documentation that could assist Enron in responding to the SEC was to be assembled by the ANDERSEN auditors.

After spending Monday, October 22, 2001, at Enron, Andersen partners assigned to the Enron engagement team launched on October 23, 2001, a wholesale destruction of documents at Andersen's office in Houston, Texas. Andersen personnel were called to urgent and mandatory meetings. Instead of being advised to preserve documentation so as to assist Enron and the SEC, Andersen employees on the Enron engagement team were instructed by Andersen partners and others to destroy immediately documentation relating to Enron, and told to work overtime if necessary to accomplish the destruction. During the next few weeks an unparalleled initiative was undertaken to shred physical documentation and delete computer files...
On or about November 8, 2001, the SEC served Andersen with the anticipated subpoena relating to its work for Enron. In response, members of the Andersen team on the Enron audit were alerted finally that there could be "no more shredding" because the firm had been officially "served" for documents.

2. The Charge: Obstruction of Justice. The government alleged in its indictment that:

[O]n or about and between October 10, 2001 and November 9, 2001, within the Southern District of Texas and elsewhere, including Chicago, Illinois, Portland, Oregon, and London, England, Andersen, through its partners and others, did knowingly, intentionally, and corruptly persuade and attempt to persuade other persons, to wit: Andersen employees, with intent to cause and induce such persons to (a) withhold records, documents and other objects from official proceedings, namely: regulatory and criminal proceedings and investigations, and (b) alter, destroy, mutilate and conceal objects with intent to impair the object's integrity and availability for use in such official proceedings.

3. The Obstruction of Justice Statute. Title 18 USC § 1512(b) provides that:

Whoever knowingly . . . and corruptly persuades another person, or attempts to do so with intent . . . to cause or induce any person to withhold . . . a record, document or other object from an official proceeding, or alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be guilty of a crime.

In order to prove Andersen guilty of violating the obstruction of justice statute, the government had to prove each of the following two elements beyond a reasonable doubt:

(1) First, that on or about the dates charged, the Andersen firm, through its agents, corruptly persuaded or attempted to corruptly persuade another person or persons; and

(2) Second, that Andersen, through its agents, acted knowingly and with intent to cause or induce another person or persons to (a) withhold a record or document from an official proceeding, or alter, destroy, mutilate, or conceal an object with intent to impair the object's availability for use in an official proceeding.

4. The Jury Instructions. The judge instructed the jury that it could find Arthur Andersen guilty for the acts of its employees if the partnership agent was acting with the intent, at least in part, to benefit the partnership.

The specific jury instructions to the Andersen jury read, in part, as follows:

In order for a partnership agent to be acting within the scope of his or her employment, the agent must be acting with the intent, at least in part, to benefit the partnership. It is not necessary, however, for the government to prove that the agent's sole or even primary motive was to benefit the partnership. Furthermore,
the government need not prove that the partnership was actually benefited by the agent's actions....

An agent must also be acting in line with his or her duties as an agent of the partnership in order to be acting within the scope of his or her employment. An agent is acting in line with his or her duties when the agent's acts deal with a matter the performance of which is generally entrusted to the agent. Stated another way, an act is in line with an agent's duties if it relates directly to the performance of the agent's general duties for the partnership. It is not, however, necessary for the particular act itself to have been authorized by the partnership.

If an agent was acting within the scope of his or her employment, the fact that the agent's act was illegal, contrary to the partnership's instructions or against the partnership's policies, does not relieve the partnership of responsibility for the agent's act. A partnership may be held responsible for the acts its agents perform within the scope of their employment even though the agent's conduct may be contrary to the partnership's actual instructions or contrary to the partnership's stated policies. You may, however, consider the existence of Andersen's policies and instructions and the diligence of its efforts to enforce any such policies and instructions, in determining whether the firm's agents were acting within the scope of their employment. The fact that some agents of the partnership may not have committed any improper acts or possessed any improper intent does not relieve the partnership of responsibility for the improper acts or intents of the other agents of the firm. Finally, the agent of a partnership who commits an act need not be a high level or managerial agent in order for the act to be attributable to the firm. A partnership may be held responsible for the acts of agents who are subordinate or low level employees.

5. Corporations Can Be Criminally Prosecuted for the Acts of Its Lower Level Employees. On January 20, 2003, Deputy Attorney General Larry D. Thompson issued a memorandum revising the principles that the Department of Justice prosecutors will follow when determining whether to criminally prosecute a corporation or other business entity. These principles revise earlier Department of Justice guidelines that are contained in a memorandum prepared by Deputy Attorney General Eric Holder in 1999. The new prosecution principles revise the "Holder Memorandum" by focusing on the authenticity of a corporation's cooperation and whether corporate compliance plans are in place to insure compliance with federal laws.

A. Factors for Consideration. In addition to the likelihood of success at trial and the probable deterrent benefits of a conviction, prosecutors will now consider the following factors when deciding whether to criminally prosecute a corporation:

(1) the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;

(2) the pervasiveness of wrongdoing with the corporation, including the complicity in, or condonation of, the wrongdoing by corporate management;
(3) the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;

(4) the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection;

(5) the existence and adequacy of the corporation's compliance program;

(6) the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;

(7) collateral consequences, including disproportionate harm to shareholders, pension holders and employees not proven personally culpable and impact on the public arising from the prosecution;

(8) the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and

(9) the adequacy of remedies such as civil or regulatory enforcement actions.

The most troubling factor is in paragraph four (4) where the government generally seeks a waiver of the corporate-attorney client and work product privilege in order to determine whether the corporation should be criminally prosecuted.

B. Analysis of Each Charging Factor.

(1) Nature and Seriousness of the Offense. The nature and seriousness of the offense, including the risk of harm to the public from the criminal conduct, are primary factors in determining whether to charge a corporation.

(2) Pervasiveness of Wrongdoing Within the Corporation. The Department of Justice recognizes that a corporation can only act through natural persons, and it is therefore held responsible for the acts of such persons attributable to it. The government will charge a corporation for even minor misconduct if the wrongdoing is pervasive or undertaken by a large number of employees. For example, if salesmen are engaging in criminal conduct, or conduct is condoned by upper management, then this factor favors criminal prosecution of the corporation. However, a company with a compliance plan in place may avoid being prosecuted for an isolated act that is performed by a rogue employee.
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(3) The Corporation's Past History. The government expects corporations to learn from their prior mistakes. If a corporation has been previously subject to noncriminal guidance, warnings or sanctions and it has not instituted a compliance plan to prevent future unlawful conduct, this factor favors criminal prosecution of the corporation.

(4) Corporation and Voluntary Disclosure. A corporation's timely and voluntary disclosure of the wrongdoing and its willingness to cooperate with the government's investigation are key factors in determining whether to prosecute a corporation. For example, the government expects corporations to:

(i) identify the wrongdoers within the corporation;

(ii) make witnesses available to the government for interviews;

(iii) disclose the complete results of its internal investigation; and

(iv) to waive attorney-client and work product privileges.

As we learned from the Arthur Andersen case, deciding whether to waive the attorney-client privilege and provide the government with documents is a critical decision. While most CEOs favor waiving the attorney-client privilege, one must remember that a simple email by one of Andersen's in-house lawyers appears to be the main reason that it was convicted at trial.

(5) Corporate Compliance Programs. In light of the Arthur Andersen and Enron case as well as others, it is now politically correct for the government to criminally prosecute corporations. The new guidelines outlined in Deputy Attorney General Thompson's memorandum provide a stern warning for corporate America. However, the Thompson memorandum also provides a method for corporations to protect themselves. Specifically, the Thompson memorandum states that compliance programs that are established by corporate management to prevent and detect misconduct may absolve the corporation from criminal liability. However, even a well-designed corporate compliance program must be more than a "paper program." In other words, the compliance program must be enforced in a consistent manner in order to protect the corporation from prosecution.

C. The Sarbanes-Oxley Act Amendment to 18 U.S.C. § 1512. Before the Sarbanes-Oxley Act amended Section 1512, it was limited by its own language to acts of an individual who coerced a third party with intent to tamper with a witness's testimony or evidence that could be used in an official proceeding. However, Section 1512 did not criminalize the obstructive act of the person who actually destroyed the evidence. However, the Sarbanes-Oxley Act created a new Section 1512(c) to catch individuals who are altering or destroying documents or evidence rather than the individual who is corruptly persuading another individual to destroy documents or evidence. The new 18 U.S.C. § 1512(c) reads as follows:
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Whoever corruptly -

(1) alters, destroys, mutilates or conceals a record, document or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding or

(2) otherwise obstructs, influences or impedes any official proceeding, or attempts to do so, shall be fined under this title and imprisoned not more than 20 years or both.

Congress created this provision, in part, to address the alleged massive document destruction conduct that was engaged in by Arthur Andersen.


Lawyers conducting internal investigations must also be aware and analyze the risks while preparing witnesses and documents that are prepared under oath. Such risks may include the possibility of perjury by the employee/witnesses, or within any attested document that may be produced in a court or ancillary proceeding. Furthermore, the lawyer must be careful to avoid any claim that he suborned perjury. The two statutes dealing with perjury are 18 U.S.C. § 1621, and § 1623. Subornation of perjury is covered by 18 U.S.C. § 1622.

When preparing witnesses or documents lawyers should take steps to avoid even the appearance that they are altering the facts through witnesses or documents.

A. Perjury Under Section 1621.

Section 1621 states, in part, as follows:

Whoever -

(1) having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true; or

(2) in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true;

is guilty of perjury.

The government in prosecuting a defendant for perjury must establish that the defendant:
(1) took an oath,
(2) willfully made the false statement, and
(3) made the false statement with knowledge of its falsity.

1. The Oath. The oath requirement is not limited to court appearances. Section 1621(2) also includes perjury that arises when one willfully subscribes any material matter believed to be untrue in any declaration, certificate, verification, or statement, as prescribed under Section 1746. Thus, Section 1621 exposes other materials to the penalty of perjury.

Title 28, § 1746 reads as follows:

Unsworn declarations under penalty of perjury

Section 1746: Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)"

2. Willful. The witness or declarant must act with criminal intent as evidenced by the knowledge or belief that his statement is false at the time the statement is made. The Sixth Circuit has interpreted willfulness in the context of Section 1621 to mean that the government must demonstrate that the person testifying did not believe his responses to be true. In U.S. v. DeZarn, 157 F.3d 1042 (6th Cir. 1998) the Court held that "thus, by its very nature, perjury requires an inquiry into the defendant's state of mind and his intent to deceive at the time the testimony was given. Indeed, the entire focus of a perjury inquiry centers upon what the testifier knew and when he knew it because in order to make a determination as to whether that person intended to testify falsely, it must be established beyond a reasonable doubt that he knew his testimony to be false when he gave it. In order to prove this, the government, of necessity, must present evidence of the extent of a defendant's knowledge of the subject matter of the questioning and the circumstances surrounding how he came to that
knowledge. Id. at 1049.

3. State or Subscribe. The act of perjury occurs when a declarant, with the requisite mens rea, states or subscribes to the falsehood. It includes verbal testimony and those documents signed under oath pursuant to Section 1746 of Title 28, United States Code.

4. Material Matter. Since the Supreme Court decision in United States v. Gaudin, 515 U.S. 506, 522-23 (1995), the issue of materiality must be submitted to and determined by the jury. Id. A false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed. Kungys v. United States, 485 U.S. 759, 770 (1988).

5. False Answers. If the question upon which the perjury charge is based was "inarticulately phrased, and, . . . was susceptible to two different interpretations" there can be no perjury. U.S. v. Wall, 371 F.2d 398, 400 (6th Cir. 1967).

In Wall, Loretta Wall's perjury conviction was reversed because the Court ruled that the question posed by the prosecution during Wall's grand jury testimony was ambiguous. "Q. Have you ever been on trips with Mr. X?" Ms. Wall responded "I have not." The Court, in rendering its decision noted that the question can mean one of two things: (1) that Ms. Wall had accompanied Mr. X, or (2) that they were in a particular place together. According to evidence submitted at the perjury trial, Mr. X had traveled to Miami Beach, Florida on February 13, 1964. Ms. Wall traveled to Miami Beach, Florida, on February 14, 1964. Therefore, Ms. Wall's answer is consistent with the first meaning of the prosecution's question. However, the government also submitted into evidence that Ms. Wall was seen with Mr. X, exiting his room at a motel in Miami Beach. Accordingly, Ms. Wall's response was false under the second meaning of the prosecution's question. The prosecution did not meet its burden of proof demonstrating what "the question meant to Ms. Wall when she answered it" Id. at 400.

Stating the literal truth to an incorrect question can subject a defendant to the penalty of perjury. In DeZarn, 157 F.3d 1042 (6th Cir. 1998), a defendant was asked whether or not a "Preakness Party" in 1991 was a campaign fundraiser, and whether he had collected contributions, and he answered no to both questions. The subject of the investigation, however, had been a "Preakness Party" in 1990. The government established that DeZarn was aware of the context of the questioning. The Sixth Circuit upheld DeZarn's conviction by refusing to adopt the "literal truth defense." The Court stated that the Bronston "literal truth" defense applies in cases where a perjury defendant responds to a question with an unresponsive answer. Id. at 1051. As noted, an unresponsive answer is unique. . .because its unresponsiveness. . .prevents it from being tested in the context of the question - - unless there is speculation as to what the unresponsive answer implies. . .(a defendant cannot be convicted of perjury if his answer is literally true on one reasonable interpretation of the question asked when there is not evidence supporting one construction over the other.) Id. at 1051. The Court held that DeZarn gave unequivocal and direct and fully responsive answers to the questions asked by the investigator. Furthermore, the Court determined that there was more than ample context and evidence demonstrating that
DeZarn knew the answers that he provided the investigator were false. Id. at 1051.


18 U.S.C. § 1621 covers perjuries committed in various federal proceedings. Congress passed Section 1623 to specifically insure the veracity of testimony obtained in grand jury and court proceedings. Subsection (a) of 18 U.S.C. § 1623 states as follows:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined under this title or imprisoned not more than five years, or both.

The main difference between 18 U.S.C. § 1621 and 18 U.S.C. § 1623 relates to the government's burden of proof for convicting a defendant. Specifically, 18 U.S.C. § 1623(e) states as follows:

(e) Proof beyond a reasonable doubt under this section is sufficient for conviction. It shall not be necessary that such proof be made by any particular number of witnesses or by documentary or other type of evidence.

This burden on the prosecution is substantially lower than the "two witness" common law rule that requires two witnesses for the government to carry its burden of proof under 18 U.S.C. § 1621.


Section 1622 states that subornation of perjury is as follows:

Whoever procures another to commit any perjury is guilty of subornation of perjury, and shall be fined under this title or imprisoned not more than five years, or both.

There are very few reported decisions under Section 1622 involving attorneys and internal investigations. In order for the government to convict a lawyer of suborning perjury, the government must prove that the lawyer basically asked the witness to lie. Specifically, the government must prove

(1) That perjury was in fact committed;
(2) That the defendant procured the perjury corruptly, knowingly, believing or having reason to believe it to be false testimony; and

(3) That the defendant knew, believed, or had reason to believe that the perjurer had knowledge of the falsity of his or her testimony.

Lawyers conducting internal investigations who follow basic due diligence procedures outlined at the end of this chapter should never face the allegation by the government that they have suborned perjury.


18 U.S.C. § 4 provides that:

Whoever, having knowledge of the actual commission of a felony cognizable by a court of the United States, conceals and does not as soon as possible make known the same to some judge or other person in civil or military authority under the United States, shall be fined under this title or imprisoned not more than three years, or both.

Thus, misprision of a felony can fundamentally be described as the crime of concealing and failing to report a felony. The four elements necessary to sustain a conviction for misprision of a felony pursuant to 18 U.S.C. § 4 are:

(1) the principal committed and completed the felony alleged;

(2) the defendant had knowledge of the fact;

(3) the defendant failed to notify the authorities; and

(4) the defendant took affirmative steps to conceal the crime of the principal. United States v. Stuard, 566 F.2d 1, 1-2 (6th Cir. 1977).

The requirement that the defendant also must take "affirmative steps to conceal the crime" is the key element under 18 U.S.C. § 4. The fact that the defendant had knowledge of the commission of the felony or the defendant’s failure to report the felony, "standing alone, is insufficient to support a conviction for misprision of a felony." United States v. Goldberg, 862 F.2d 101, 104 (6th Cir. 1988).

In Goldberg, the Sixth Circuit reversed the conviction of a defendant/doctor who plead guilty to violating 18 U.S.C. § 4. The defendant/doctor had plead guilty to the following conduct:

Judge's Question:
I want you to tell me in your own words what you did to cause this charge to be brought against you?

Defendant's Answer:

Your honor, I knew that Mr. Boyer was at the Puritan Pharmacy, and I knew Mr. Boyer and the pharmacist that was there, I am not sure which one, at the Puritan Pharmacy, were adding things to prescriptions, to my own prescriptions.

Judge's Question:

Adding what?

Defendant's Answer:

Face cream prescriptions to my own prescriptions. I knew, because at least one patient who showed me that they had medications such as Nutracort was not prescribed by me. It happened often and enough that I knew about it. This happened in 1985 in the city of Detroit. I knew it was against the federal law because I knew Medicaid was paying for it and they paid through the mail. I didn't report it to the federal authorities and I know this was wrong.

Judge's Question:

Did you conceal this, your knowledge?

Defendant's Answer.

Yes, Sir.

Judge's Question:

Did you know what you were doing was against the law?

Defendant's Answer.

Yes, Sir.

The government relied on this question and answer exchange as a necessary factual basis for the defendant/doctor's guilty plea. Specifically, the government argued that the defendant/doctor's statement that he concealed his knowledge that the pharmacist was adding items to his prescriptions was sufficient to establish
"active concealment." The government relied heavily on a Fifth Circuit opinion, United States v. Davila, 698 F.2d 715 (5th Cir. 1983) as precedential authority for their position. In Davila, the Fifth Circuit affirmed Davila's conviction based on his pleading guilty to misprision of a felony. Defendant Davila had agreed to hold money that was to be paid to a witness who had been bribed. The Fifth Circuit held that holding the funds that were to be used to bribe a witness was sufficient to establish the affirmative act of concealment necessary to the commission of the crime of misprision of a felony.

By way of analogy, the government argued that the defendant/doctor in this case, in continuing to write prescriptions when he was aware that additional items were being added to the prescription by the pharmacist, equates with defendant Davila's action in agreeing to be a stakeholder. Id.

The Sixth Circuit disagreed stating that the defendant/doctor did nothing more than provide the opportunity for the pharmacists to continue with their fraudulent conduct, but the defendant/doctor did not engage in active concealment from the authorities of the fact that after the prescription was written, the pharmacist added to the prescriptions. The Sixth Circuit noted that the defendant/doctor's answers to the questions that the judge asked him were insufficient to establish anything more than his failure to report ongoing criminal conduct. Id. at 105.


Most lawyers are aware of the obvious hazards inherent in advising clients regarding tax matters. Charges of obstructing justice and conspiring to evade taxes are among the weapons that the Internal Revenue Service uses to insure integrity among tax professionals. However, many lawyers do not realize just how careful they must be to protect themselves from Internal Revenue Code § 7212(a).

The "omnibus clause" of 26 U.S.C. § 7212(a) provides, in pertinent part:

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall [be guilty of a crime]....

Section 7212(a) addresses two different kinds of offenses. The first clause of Section 7212(a) addresses "specific threats against an officer or employee acting in an official capacity...." United States v. Kassouf, 144 F.3d 952, 955 (6th Cir. 1998). The second clause, known as the "omnibus clause," is a catch-all clause that addresses "other activities which may obstruct or impede the due administration of [Title 26]." Id. The omnibus clause greatly expanded the reach of Section 7212(a). Under the omnibus clause, "grounds for prosecution are..."
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established if an individual using any means of corruption, force, or threat of force, undertakes the aforementioned prohibited acts." United States v. Bowman, 173 F.3d 595, 598 (6th Cir. 1998). Thus, unlike the first clause of Section 7212(a), "under the omnibus clause, the prohibited act need not be an effort to intimidate or impede an individual officer or employee." Id.

United States v. Kassouf, was the Sixth Circuit's first opportunity to interpret the omnibus clause of Section 7212(a). In Kassouf, the Court analogized the omnibus clause of Section 7212(a) to the very similar obstruction of justice statute - 18 U.S.C. § 1503 - and therefore limited the application of the omnibus clause of Section 7212(a) to a pending IRS proceeding or investigation of which the defendant was aware at the time the obstructing or impeding conduct occurred. Central to the Court's limitation of the application of the omnibus clause of Section 7212(a) was an understanding that "courts should interpret statutes that impose criminal liability narrowly to ensure proper notice to the accused." Id. at 958.

Defendant Kassouf was accused of using his partnerships and controlled corporate general partners to conduct transactions for his personal benefit, without keeping records necessary to determine the tax consequences of those transactions. The government alleged that defendant Kassouf attempted to make it difficult for the Internal Revenue Service to trace his activities by transferring funds between bank accounts and failing to keep bank records before the Internal Revenue Service began an audit. In dismissing the indictment, the Supreme Court noted that defendant Kassouf had no specific knowledge that the Internal Revenue Service would ever investigate his activities. Id. As a result, the Sixth Circuit dismissed Mr. Kassouf's case. However, the court pointed out that if, upon hearing that the Internal Revenue Service was conducting an audit of his returns, defendant Kassouf had begun destroying records and funneling money through various accounts to prevent detection of his illegal activities, then Section 7212(a) would clearly be violated. Id. at 956.

In United States v. Bowman, 173 F.3d 595 (6th Cir. 1998) the Sixth Circuit revisited its decision in Kassouf, and held that it must be limited to "its precise holding and facts...." Id. at 600. The Court embraced the central theme of Kassouf by stating "[w]hen applying an obstruction of justice statute, this Court will narrowly construe such a criminal law to ensure that 'proper notice of the unlawfulness of the activity and the reach of the statute' is given to the public." Id. at 600. The Court recognized that such a narrow application of the statute protects "the public from vague or overly broad statutes that may impose criminal penalties for otherwise lawful activities." Id. at 600. However, the Court also recognized that it must "be careful not to limit a statute's application in such a way as to leave it meaningless." Id. Thus, the Court determined that "unless Kassouf is limited to its facts, its effect would be to prevent the prosecution of actions whose sole purpose is to obstruct or impede the IRS in the administration of its duties, as those acts of obstruction only trigger or attempt to trigger investigations by the IRS." Id.

In Kassouf, the Sixth Circuit noted that filing false tax forms with the Internal Revenue Service was specifically designed to cause a particular action on the part of the Internal Revenue Service. Id. As a result, Bowman's actions reflected his sole purpose to obstruct and impede the Internal Revenue Service in the administration of
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its duties. Id.

X. CONCLUSION.

While conducting internal investigations lawyers must consistently advise the employees of the corporation of the breadth and scope of the obstruction of justice statutes. Employees should also be advised on how to safeguard documents and electronic evidence.