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Obstruction of Justice

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Imagine this scenario: The general counsel of a corporation learns that the Department of Justice has set new priorities emphasizing investigations of a specific type of corporate misconduct. Based on internal reports, she suspects that her company is or may become a target of an investigation.

She immediately directs the company's information technology staff to delete email communications and a shared electronic folder that contains evidence of this misconduct. All of these electronic files are due for deletion pursuant to the company's document retention policy. The general counsel also warns employees not to speak with federal investigators about any misconduct.

What, if any, of the general counsel's conduct amounts to obstruction of justice? The question is that of intent, and the answer may depend on the statute used by prosecutors and the federal circuit where the act occurred.

Defining "Corrupt" Intent

Although federal obstruction statutes require a defendant to have a "corrupt" intent, Congress has not defined the term in two statutes prosecutors frequently use: 18 U.S.C. §§ 1503 and 1512. Without an explicit meaning written into the statute, courts have inconsistently defined corrupt intent.

In 2005, the Supreme Court, in *Arthur Andersen LLP v. United States*, attempted to rectify a split of authority by addressing what it means to "corruptly persuade another person" to engage in obstructive conduct under Section 1512(b). The Court noted that the terms "corruptly" is "normally associated with wrongful, immoral, depraved, or evil," and found that a defendant must have "some consciousness of wrongdoing."

Some circuits have hewn closely to *Arthur Andersen*'s language, and not just for Section 1512(b). For example, the Seventh Circuit pattern jury instructions for both Section 1503 and 1512 require a defendant's purpose to be "wrongful." Reading the *Arthur Andersen* standard into Section 1503, the Second Circuit, in *United States v. Quattrone*, emphasized that corrupt intent must be "wrongful" or "immoral." While the Fifth Circuit does not used the term "wrongful" in its Section 1503 pattern jury instructions, it does require a defendant to act "knowingly and dishonestly."

In contrast, the Ninth Circuit has adopted a lower intent requirement for some obstruction charges. Although it has applied the "wrongful, immoral, depraved, or evil" standard from *Arthur Andersen* in Section 1512(b) cases, the court does not require this instruction with other obstruction provisions. In *United States v. Watters*, the court reasoned that because Section 1512(c) is unlike Section 1512(b) in that it does not use "knowingly" to modify "corrupt," the prosecution does not need to prove a "wrongful, immoral, depraved, or evil" purpose. Similarly, the Ninth Circuit's Section 1503 model jury instructions, relying on *United States v. Rasheed*, only require a prosecutor to show that a defendant acted with the "purpose of obstructing justice."

Multiple Purposes

Due to the centrality of intent in an obstruction case, it is common for com-

panies and prosecutors to argue about whether acts were done corruptly or with an innocent purpose. But a jury may not have to make a binary choice. The Fifth Circuit, Ninth Circuit, and Eleventh Circuit each have held that a defendant who acts with multiple purposes, including innocent ones, may still be criminally liable so long as one of those purposes was corrupt.

Law's Application to Fact Pattern

Did the general counsel in the hypothetical scenario commit a crime by ordering the destruction of records? Based on the definitions of corrupt and the multiple-purpose intent case law, she might still have criminal exposure even if the destruction of records was consistent with the company's retention policies so long as the general counsel also wanted to ensure that a federal grand jury would never see the documents.

Turning to the general counsel's instruction to employees not to speak with federal investigators, this creates many risks for the company and general counsel. For example, if the company was considering cooperating with the Department of Justice, affirmatively telling employees not to speak would likely harm the company's efforts to obtain benefits for their cooperation. Additionally, such a statement could violate a professional conduct rule or company policy, which may result in discipline or termination for the general counsel. But would the general counsel's decision to tell employees not to speak with federal investigators amount to a crime? Again, the answer turns on intent and the interpretation of "corrupt."

In the Ninth Circuit, telling a witness to remain silent if questioned by law enforcement ordinarily is not criminal. In *United States v. Liew*, decided in May 2017, the defendant told a witness that disclosing certain facts "would not be good" for the witness or the witness's family. The Ninth Circuit held that such a directive was not corrupt, even "viewed in its most damning light." The Ninth Circuit reasoned that the defendant, who was not a lawyer, simply "provided the same advice that many criminal attorneys would do in that situation." The Ninth Circuit did not discuss whether the witness viewed the defendant's reference to the witness's family to be a threat, which could have changed the outcome of the case.

Based on *Liew*, an attorney in the Ninth Circuit doing nothing more than telling witnesses not to disclose certain information to law enforcement would not have committed a crime. This does not mean that such a directive by a general counsel is a good idea. The Ninth Circuit discussed how the defendant's instruction would be admissible to prove the underlying crime that the defendant was attempting to conceal, which shows another risk the general counsel would be taking by providing such a directive.

Some courts have found an attorney has committed a crime by advising a witness not to talk. In *United States v. Shotts*, the Eleventh Circuit upheld the conviction of an attorney who told a non-client witness to "just not say anything" to the FBI so that the witness would not "be bothered." The court, the reasoned that the jury could have drawn a reasonable inference that the lawyer, who himself was implicated in the FBI's investigation of a corrupt judge, was "attempting with an improper motive" to silence the witness.

Shotts was decided before *Arthur Andersen*. While it still might not be a good idea for the attorney to suggest that a non-client remain silent for the reasons stated above, it is unlikely post-*Arthur Andersen* that an attorney would be convicted of obstruction for doing nothing more than offering this advice, especially if the attorney is not a target of the underlying investigation.

Even in light of *Arthur Andersen*, however, there are times in which an attorney may run afoul of the law in telling a witness to remain silent. In *United States v. Cintolo*, the First Circuit affirmed an attorney's obstruction conviction for advising his client not to testify. In that case, the judge had granted the client immunity and compelled his testimony. Because the witness no longer had a Fifth Amendment right to remain silent and could not be prosecuted for making incriminating statements, the attorney was advising his client to violate the court's order and was not protecting his client's constitutional rights. In *United States v. Cioffi*, the Second Circuit affirmed the conviction of an attorney who told a non-client witness to either: (a) remain silent; (b) lie to the SEC; or (c) "visit" the target of the investigation. The witness felt the latter statement was a threat. Of course, an attorney would likely violate the obstruction statutes by advising a witness to lie, providing corrupt benefits for the witness not to talk, or threatening the witness, implicitly or explicitly.

Because of the complex issues that would arise if a general counsel provided advice to employees not to talk to federal investigators, the general counsel should proceed very cautiously and should consider all possible negative effects of giving employees this advice. Ultimately, the cautious and correct approach likely would be to inform employees of: (1) the possibility that law enforcement may want to speak with the employees; (2) the employees' the right to an attorney at any interview; and (3) their right to speak or not to speak to investigators.

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