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INTERNAL INVESTIGATIONS

Section 1519: Why Obstructing an Investigation By Company Counsel May Now Be a Federal Crime

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In-house attorneys charged with performing internal investigations face a difficult dilemma: Despite their day-to-day role as advisers to company management and employees, they must be prepared to set this role aside when necessary to properly represent the company's interests and effectively ferret out wrongdoing. Department of Justice and other agency policies that encourage corporate cooperation with law enforcement reinforce this investigative role and are leading to a virtual ''deputization'' of company counsel in ongoing law enforcement efforts.

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While certainly beneficial for law enforcement priorities, corporate cooperation policies have a potential to align the goals of in-house counsel investigating misconduct more closely with those of government regulators than with the management and employees with whom those counsel work. Companies often seek to demonstrate cooperation and thereby avoid prosecution, fines, or other penalties by supplying damaging evidence of wrongdoing to regulators. While this strategy may be effective for companies, it can create legal jeopardy for management and employees and lead to their prosecutions.

The conflict between company and employee interests can become especially acute when investigative interviews by company counsel lead to deliberate false statements or other obstructive conduct by culpable employees. Until recently, misleading company counsel in the course of an internal investigation where no government proceeding was pending did not itself constitute criminal obstruction of justice under federal statutes. That may have changed, however. A recent stock-option backdating prosecution from the Central District

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of California, *United States v. Ray*, marks a fundamental shift in the understanding of company counsel's role in the investigative context.[1]

In *Ray*, the government charged a senior public company executive with conspiracy to violate a recently enacted federal obstruction statute, Section 802 of the Sarbanes-Oxley Act of 2002, codified at 18 U.S.C. § 1519. The executive's conviction was based not on conspiracy to obstruct a federal investigation but instead a preliminary inquiry by the company's general counsel into stock-option grant practices at a time when no federal investigation was pending or even imminent. In *Ray*, therefore, it was a lie to company counsel, made long before any government inquiry to the company, that constituted the federal crime of obstruction of justice.

The innovative *Ray* prosecution raises significant questions about the changing role of corporate counsel. First, have company attorneys conducting investigations now been effectively ''deputized,'' such that false statements made to them may be criminalized just as if they were made to FBI agents conducting official government investigations? Second, what steps should company counsel take to address the possibility that their investigative interviews may become the basis for an independent prosecution of company employees? Finally, what are the potential ramifications of this prosecutive strategy for inside and outside counsel's ability to maintain the confidence of management and thus continue to play their traditional role as trusted company advisers? While it is too early to tell whether *Ray* will represent an enduring change in the government's approach to internal investigations, it is clear that the tensions between company and individual interests created by internal corporate investigations are unlikely to subside anytime in the foreseeable future.

Encouragement of Corporate Self-Policing by Law Enforcement

Getting to the bottom of employee misconduct is often of critical importance for companies because of the potential for vicarious liability and the opportunity to win lenience from the government through voluntary disclosure. Demonstrating cooperation in the case of criminal violations can be critical to a company's survival, as corporations can become criminally liable for an employee's wrongful acts where the employee acted with the intent to further the interests of the corporation.[2]

Credible corporate internal investigations conducted by in-house and outside counsel, followed by voluntary disclosure and remediation efforts, have traditionally helped companies demonstrate good-faith cooperation and avoid adverse action by government regulators. In recent years, the Department of Justice and other agencies have maintained specific written policies explicitly promoting such corporate cooperation with law enforcement. DOJ's Antitrust Division, the Department of Defense, the Environmental Protection Agency, and the Internal Revenue Service, for example, have all maintained explicit policies of providing lenience to corporations that investigate and disclose misconduct prior to inquiries by federal authorities.[3] The Securities and Exchange Commission's prosecutorial discretion standards promote ''self-policing,'' ''remediation,'' and ''cooperation'' by companies, including voluntary investigations and self-reporting.[4] The federal sentencing scheme has also encouraged corporations to seek sentencing benefits through investigation and self-disclosure. The U.S. Sentencing Guidelines' Chapter Eight, titled ''Sentencing of Organizations,'' contains a penalty scheme that offers significant lenience to corporations that maintain compliance programs, cooperate with ongoing investigations, and voluntarily disclose wrongdoing.[5]

The Justice Department's policies set forth explicit criteria by which federal prosecutors should judge whether to charge a corporation with a crime.[6] These nine criteria include: (1) the nature and seriousness of the offense; (2) the pervasiveness of wrongdoing within the corporation; (3) a history of similar conduct; (4) timely and voluntary disclosure of wrongdoing and willingness to cooperate; (5) a compliance program; (6) remedial actions; (7) collateral consequences, including harm to shareholders, pension holders, and nonculpable employees; (8) adequacy of prosecution of individuals; and (9) adequacy of civil or regulatory enforcement actions.[7] Corporations therefore have much to gain, and even more to lose, based on their ability to self-report and to provide valuable investigative assistance to the government.

The Justice Department has further incentivized self-regulation by corporations through its recent increased reliance on deferred prosecution agreements and non-prosecution agreements to resolve large-scale corporate prosecutions. DPAs and NPAs have been described as a form of probation or ''pretrial diversion,'' under which a corporation under investigation enters into a contractual agreement with the government to provide

[1] *United States v. Ray*, No. 2:08-cr–01443 (C.D. Cal. Dec. 15, 2008).

[2] *See, e.g., United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 970-71 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999).

[3] *See* McNeil and Brian, *Internal Corporate Investigations*, 3rd Ed. (2007) at 252 & n. 42 (citing various agency policies).

[4] *See* ''SEC Issues Report of Investigation and Statement Setting Forth Framework for Evaluating Cooperation In Exercising Prosecutorial Discretion,'' SEC press release, available at http://www.sec.gov/news/headlines/prosdiscretion.htm; Lisa Griffin, ''Compelled Cooperation and the New Corporate Criminal Procedure,'' 82 N.Y.U. L. Rev. 311, 317 (2007) (noting that SEC's policy dates back to the 1970s).

[5] U.S.S.G. § 8C2.5(g).

[6] The first of these policies, the 1999 Holder Memorandum, named for the current attorney general who was then the deputy attorney general, laid out standards for prosecution of corporate entities that tracked considerations addressed by the Sentencing Guidelines and the U.S. Attorney's Manual. *See* Griffin at 320 & n. 37. The Holder Memorandum was superseded in 2003 by the Thompson Memorandum, issued by then-Deputy Attorney General Larry Thompson. Since the issuance of the Thompson Memorandum, the nine prescribed considerations for decisions to charge a corporation have been carried over into subsequent policy guidance, first in the December 2006 McNulty Memorandum and then ultimately in the most recent 2008 policy contained in the U.S. Attorney's Manual. *See* U.S.A.M. 9-28.000 *et seq.*, ''Principles of Federal Prosecution of Business Organizations,'' available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/28mcrm.htm.

[7] U.S.A.M. 9-28.300.

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cooperation, often in the form of access to witnesses and evidence, and undertake reforms in exchange for the nonfiling, dismissal, or deferral of criminal charges.[8] Companies may be required to hire monitors approved by the government who will be charged with investigating and reporting on the company's compliance efforts and remediation of wrongdoing during a period prescribed under the agreement.[9] In 2007 and 2008 alone, DOJ entered into 56 corporate DPAs and NPAs, and one analysis has totaled the number of such agreements between 1993 and 2008 at 112.[10]

Given the strong corporate incentives to place investigative resources at law enforcement's disposal, it is not surprising that in recent years the focus of white collar prosecutions has been shifting away from companies and toward individuals. Because of the regulatory policies encouraging cooperation, the benefits to a company of providing helpful evidence and witness information to the government may significantly outweigh the advantages of ''circling the wagons'' to protect culpable employees, especially where cooperation may help the company avoid prosecution. Indeed, the DOJ's corporate charging policy expressly contemplates consideration of the ''adequacy of the prosecution of individuals responsible for the corporation's malfeasance'' in determinations of whether to prosecute corporations.[11] Since July 2002, for example, more than one thousand convictions or guilty pleas of individual defendants have been obtained in corporate fraud cases, but few corporations themselves have been charged.[12] Corporations may find, therefore, that assisting the government's investigation and prosecution of individuals, even their own employees, is the safest course.

The Investigative Interview: Company Versus Employee

Perhaps nowhere is the conflict between corporate and individual interests more apparent than in the context of investigative interviews of company employees. Such interviews can be especially significant for measuring corporate cooperation if they yield evidence considered valuable for government investigations and subsequent prosecutions. In addition to providing important investigative leads, interviews of employees can produce incriminating admissions or false denials, evidencing a consciousness of guilt.

In light of the clear benefits of cooperation, the ''corporate *Miranda* warning'' to interviewees can be readily understood as a practice specifically designed to facilitate companies' disclosure of such information to the government. Corporate counsel have developed the practice of providing this warning prior to conducting detailed factual interviews in the course of internal company investigations.[13] Both the language and purpose of the warning reinforce the reality that companies may have strong incentives to furnish damaging information regarding their own employees to the government, and the warning admonishes the employee that just such a result is likely.[14]

The corporate *Miranda* warning highlights the conflict between corporation and employee created by the cooperation incentive. The warning expressly disavows any responsibility on the part of company counsel to safeguard the employee's interests during the investigation and reaffirms that counsel represents only the company. This disavowal is necessary to prevent an employee from later invoking the attorney-client privilege in order to block a corporation's disclosure of the contents of an interview to the government.[15]

Recent cases demonstrate the potential for conflict between companies and employees arising from cooperation with the government. In one recent criminal prosecution, for example, a former chief financial officer under indictment for securities fraud successfully challenged the admission of statements made to company counsel during an internal investigation and subsequently produced to the government on the ground that he had not been adequately warned that counsel did not represent him personally and did not owe him a duty of privilege.[16] Examples like this highlight that it is the investigative interview stage of any investigation, perhaps more than any other, that presents the greatest risk of conflict between the interests of company and employee.

The New Obstruction?

In choosing whether to answer questions during an internal company investigation, an employee confronts a difficult choice. Many companies will condition continued employment on submitting to such interviews, creating significant pressure for the employee to cooperate. On the other hand, because admissions of misconduct may themselves also lead to adverse employment consequences, including termination, a culpable employee may have a strong incentive to refuse to be

[8] Griffin, at 321-22.

[9] DOJ's current guidance on corporate monitors in DPAs and NPAs clarifies that monitors are principally responsible for ''evaluat[ing] whether a corporation has both adopted and effectively implemented ethics and compliance programs to address and reduce the risk of recurrence of the corporation's misconduct.'' *See* Memorandum from Craig Morford, Acting Deputy Attorney General, to heads of department components (March 7, 2008), available at http://www.usdoj.gov/dag/morford-useofmonitorsmemo-03072008.pdf.

[10] *See* Lawrence Finder and Ryan McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 St. Louis Univ. L. Rev. 1 (2006), and *Corporate Counsel Review* (published at South Texas College of Law) and *Annual Corporate Pre-Trial Agreement Update*—2007: Volume XXVII, No. 2, November 2008.

[11] *See* U.S.A.M. 9-28.300

[12] Griffin, at 328 & n. 89.

[13] *See* McNeil & Brian, *Internal Corporate Investigations*, 3rd Ed. (2007) at 103-06.

[14] Also commonly known as the *Upjohn* warning (derived from the U.S. Supreme Court's decision in *Upjohn Co. v. United States*, 449 U.S. 383 (1981)), the warning is now routinely used to advise that counsel conducts the investigation on behalf of the company only, that counsel does not represent the employee personally, that the substance of the interview is covered by the company's attorney-client privilege, and that this privilege may be waived by the company without notice to or consent of the employee, resulting in possible or likely disclosure to third parties, including law enforcement agencies. *See* McNeil & Brian, at 103-06.

[15] *See* McNeil & Brian, at 103 (noting that an employee may seek to suppress any statements made to counsel in a later enforcement action based on a putative attorney-client privilege).

[16] *United States v. Nicholas,* No. 8:08-cr-00139 (C.D. Cal. June 4, 2008); notice of motion and motion to strike government's ex parte application for evidentiary hearing re: attorney-client privilege, filed Jan. 20, 1999.

interviewed, or to minimize or falsely deny knowledge and involvement in wrongdoing. Attempts to minimize or misrepresent may occur even where true culpability would be difficult to prove.

False Statements to Corporate Counsel. The risk to the employee in making such false denials is significant. A determination that an employee has misled counsel or concealed facts may invite greater scrutiny and suspicion by the company, as well as an employment sanction. In addition, an employee's desire to adhere to a false version of events during a subsequent government investigation may create additional criminal liability. As one commentator has noted, ''It is increasingly the statements made during an investigation, rather than the alleged misconduct that triggered the investigation, that forms the basis for criminal liability.''[17] Finally, lies to company counsel may add to the government's arsenal of evidence in a later prosecution for the underlying conduct, where knowing false statements can be used to show the employee's consciousness of guilt.

Until recently, however, only lies made to government agents and not company counsel risked creating independent criminal liability under federal law. Such deception was commonly prosecuted under 18 U.S.C. § 1001, which applies to the knowing and willful making of a material false statement to federal authorities in the context of an investigation or other regulatory matter.

The federal obstruction-of-justice statutes have also penalized misleading statements, but again these statutes have been applied where such statements were directed at governmental actors and official proceedings or investigations. For example, 18 U.S.C. § 1503 criminalizes ''corruptly'' influencing, obstructing, or impeding the due course of justice in the context of a judicial or grand jury proceeding. In *United States v. Aguilar*, the U.S. Supreme Court suggested that Section 1503 could criminalize the making of false statements to a subpoenaed federal investigator with an intent that such information be conveyed by the investigator to a grand jury in order to obstruct justice.[18] Another obstruction statute, 18 U.S.C. § 1505, applies somewhat more broadly and penalizes corruptly influencing, obstructing, or impeding pending federal investigations.[19] Section 1505 has been used to criminalize false statements to federal agents conducting investigations or other regulatory actions.[20] A third statute, 18 U.S.C. § 1512(c), penalizes corruptly obstructing, influencing, or impeding official proceedings, as well as attempts to do so.

Both Section 1503 and 1505 require the existence of a pending federal investigation or proceeding, and *Aguilar* held that the obstructive act must have a clear ''nexus'' with the pending proceeding, a link in time, causation, or logic such that the act would have the ''natural and probable effect'' of interfering with the due administration of justice.[21] In addition, although a pending or imminent federal proceeding is no longer required for obstruction in violation of Section 1512(c), courts have nonetheless generally held that a defendant must have an intent to obstruct a specific and identifiable proceeding in order to violate that section.[22]

Given that the government is increasingly the ''end user'' of the fruits of corporate investigative efforts, it should come as no surprise that federal prosecutors have in several recent cases attempted to apply these statutes to obstructive acts directed at corporate counsel rather than their own investigators. But these prosecutions have only addressed misstatements to private counsel under circumstances where the defendant clearly understood that the misstatements would ultimately influence already pending government investigations.

The obstruction and conspiracy convictions of three former Rite Aid Corp. executives in a 2002 case, for example, were based on misstatements or omissions made to Rite Aid's internal investigators at a time when the company was already cooperating with the SEC and the FBI.[23] In a 2006 prosecution involving a gas trader employed by El Paso Merchant Energy, the government brought Section 1512(c) obstruction charges based on statements the trader made to an outside law firm hired by his employer after a government investigation had already begun.[24] In April 2006, Computer Associates CEO Sanjay Kumar pleaded guilty to obstruction of justice under Section 1512(c) on the basis of false statements about accounting fraud made to outside counsel, on the government's theory that Kumar ''intended'' his misstatements and false justifications to be ultimately presented to DOJ and the FBI, which had already commenced investigations.[25] In 2007, a former employee of Collins & Aikman, an automotive parts company, was prosecuted for conspiracy to obstruct in violation of Section 1505 on the basis of allegations that the employee knew that false and misleading information provided to the audit committee of the company would be submitted to the SEC in its pending investigation.[26] In these cases, therefore, the government charged obstruction only under circumstances where there was a

[17] Griffin, at 333.

[18] *See United States v. Aguilar*, 515 U.S. 593, 601-02 (1995).

[19] Dana Hill, ''Anticipatory Obstruction of Justice: Pre-Emptive Document Destruction Under the Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519,'' 89 Cornell L. Rev. 1519, 1530 & n. 45 (2004).

[20] *See, e.g.*, *United States v. Senffner,* 280 F.3d 755, 761 (7th Cir. 2002) (holding that an SEC investigation is a ''pending proceeding'' for purposes of Section 1505); *United States v. Hopper,* 177 F.3d 824, 831 (9th Cir. 1999) (U.S. Marshal's collection of delinquent taxes qualified as an IRS ''proceeding''); *United States v. Schwartz*, 924 F.2d 410, 423 (2d Cir. 1991) (customs interviews qualify as pending agency proceedings); *United States v. Leo*, 941 F.2d 181, 199-200 (3d Cir. 1991) (Section 1505 applied to obstruction of a defense audit agency).

[21] *See Aguilar* at 599 (discussing Section 1503); *Hopper*, 177 F.3d at 830 (applying *Aguilar* nexus requirement in Section 1505 case).

[22] 18 U.S.C. § 1512(e) (pending proceeding not required); Hill, at 1543-44 and 1547-48 & ns. 147-159 and 174-177; *United States v. Shively*, 927 F.2d 804, 812-13 (5th Cir. 1991); *United States v. Frankhauser*, 80 F.3d 641, 651-52 (1st Cir. 1996).

[23] Griffin, at 373-74 & n. 332, citing Indictment in *United States v. Grass*, No. 1:02-cr-00146, at 76-80 (M.D. Pa. June 21, 2002) (detailing charges against executives).

[24] Griffin, at 371-72 & n. 320; indictment, *United States v. Singleton,* No. 4:06–cr-00080, 2006 WL 1984467 at 16-21 (S.D. Tex. July 14, 2006).

[25] Griffin, at 372-373 & n. 326; superseding indictment, *United States v. Kumar,* No. 1:04-cr-08046 (E.D.N.Y. June 28, 2005).

[26] *United States v. Jones*, No. 1:07-00227 (S.D.N.Y. March 23, 2007).

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clear nexus between the defendant's intentional conduct and an intent to obstruct a specific, pending government proceeding.

Does Section 1519 Criminalize Lies to Company Counsel?

Sarbanes-Oxley legislation appears to have given the government an opportunity to expand its reach to prosecute attempts to obstruct company counsel investigations even when there is no nexus with a pending or anticipated government investigation. Section 802 of the Sarbanes-Oxley Act, codified at 18 U.S.C. § 1519, punishes the act of ''knowingly alter[ing], destroy[ing], mutilat[ing], conceal[ing], cover[ing] up, falsif[ying], [and] mak[ing] a false entry in any record, document or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States'' or the doing so ''in relation to or contemplation of any such matter or case.'' Although principally intended as an ''anti-shredding'' obstruction statute, Section 1519's recent use makes clear that it may potentially be used to criminalize false statements made to corporate investigators acting independently of, and even prior to, the commencement of any federal investigation.

Absence of Government Investigation. Like Section 1512(c), Section 1519 does not require the existence of a pending investigation at the time of the obstructive act. Unlike other obstruction statutes, however, Section 1519 eliminates the mens rea requirement that the defendant undertake the obstructive act with the corrupt intent to affect any particular government proceeding. Instead, the government need show only that the obstructive act was knowingly directed at evidence relating to an issue or matter within the jurisdiction of any U.S. department or agency and that the defendant acted at least ''in relation to'' or ''in contemplation'' of such issue or matter.[27] The legislative history of Section 1519 confirms that Congress intended to eliminate the requirement that the obstructive conduct be tied by intent to any pending or imminent proceeding.[28]

Courts appear receptive to Section 1519's application to the investigative interview context. Caselaw confirms that Section 1519 criminalizes false and misleading statements made at an early stage of events that have the potential to influence a subsequent investigation and that no pending proceeding is required at the time of the obstructive act. In *United States v. Hunt*, for example, the Eleventh Circuit upheld the conviction of a police officer for knowingly making a false description of an arrest incident in a police report before any FBI investigation into excessive force was launched.[29] The court held that the evidence showed that the officer knew such claims were within the FBI's investigative jurisdiction.[30] Thus, while the obstructive act was not directed at any particular federal investigation, the evidence showed that the defendant understood it to relate to a matter within the scope of the FBI's authority.

Similarly, in *United States v. Kun Yun Jho*, the court held that a defendant violated Section 1519 even where there was no pending investigation and the defendant acted merely ''in contemplation'' of or in relation to a matter that was within the jurisdiction of a federal agency.[31] In *Jho*, the defendant was found guilty of conspiring to violate Section 1519 by agreeing to knowingly falsify entries in an Oil Record Book regarding the proper functioning of a sea vessel's oil pollution equipment. No Coast Guard investigation existed at the time of the false statements, nor did the government allege that the defendant intended to obstruct a particular investigation.[32] Instead, the court held that allegations that the defendant acted with an intent to obstruct a matter within the jurisdiction of the Coast Guard, i.e., oil-record entries, were sufficient.

United States v. Ray: Obstruction of Company Investigation

Given this precedent, it does not seem surprising that the government would seek to expand the scope of Section 1519 to fit the corporate investigation context. A very recent Central District of California criminal conviction in the stock-option backdating context, *United States v. Ray*, provides the first high-profile example of how Section 1519 might be applied to criminalize false statements made to company counsel before any federal investigation has been initiated. In *Ray*, the former vice president of human resources of KB Home agreed to plead guilty to one count of conspiracy to violate Section 1519 based on false statements he made to the company's general counsel during an internal company investigation that allegedly concealed the existence of a historical practice of stock-option backdating at the company.[33] At the time of Ray's statements, no government investigation was pending and the general counsel was simply conducting an internal inquiry into option-grant practices pursuant to a request from the head of KB Home's audit committee.[34] As part of the plea agreement, however, Ray acknowledged that he was aware that the internal investigation ''could possibly lead to'' an SEC investigation given that ''the SEC was scrutinizing and investigating such practices'' at other companies, and thereby intended to obstruct or influence a matter falling within the jurisdiction of the SEC.[35]

Several aspects of the guilty plea in *Ray* demonstrate the government's innovative approach in using Section 1519 to reach obstructive conduct occurring long before its own involvement in the matter. First, the government appears to have adapted the reasoning of cases like *Hunt* and *Jho* to apply Section 1519, a statute in-

[27] *See* Giampapa & Suh, ''Four Words That Can End Your Career: How a Single E-Mail Can Lead to Criminal Charges, Civil Sanctions, and Disbarment,'' *Bloomberg Corporate Law Journal*, Vol. 3, No. 1, at 4 (Winter 2008).

[28] *See* Hill, at 1559-60 & n. 266 (citing 148 Cong. Rec. S7,419 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy)).

[29] *United States v. Hunt*, 526 F.3d 739, 742 (11th Cir. 2008).

[30] *Id.* at 745.

[31] *United States v. Jho*, 465 F. Supp. 2d 618, 636 (5th Cir. 2008).

[32] *Id.*

[33] *See* plea agreement for Gary Ray, *United States v. Ray*, n. 1, *supra*.

[34] *Id.*

[35] *Id.*

tended to address the ''destruction, alteration, or falsification of records,'' to false statements made orally. The plea agreement itself contains the defendant's acknowledgment that the general counsel's report, which incorporated the defendant's verbal statements, constituted a falsified ''record'' within the meaning of the statute.[36] According to the government's prosecution theory, the defendant knew that his misstatements and omissions made to the general counsel would ultimately be included in an investigative report upon which the company's board and senior management would rely for the purpose of issuing and certifying the company's financial statements,[37] thus placing the issue within the SEC's jurisdiction.

Second, unlike the Rite-Aid, El Paso, Computer Associates, and Collins & Aikman prosecutions discussed above, the prosecution in *Ray* reflects a much broader interpretation of the mens rea required for obstruction. This broader interpretation is based on Section 1519's application to intentional acts done in mere ''contemplation'' of a hypothetical future proceeding, rather than acts directed at a specific federal proceeding that is pending or imminent. According to the plea agreement, no government investigation existed or was necessarily even expected at the time the general counsel created the investigative report.[38] At most, it appears to have been a mere possibility. By charging Section 1519, rather than Sections 1503, 1505, or 1512, the government has circumvented caselaw suggesting that a ''nexus'' might be required between the defendant's act and a particular proceeding for obstruction of justice.

Counsel's Considerations For Internal Investigations

Ray raises a number of questions about the potential future application of Section 1519 in the corporate investigation context. First, does the prosecution's theory suggest that private counsel can be ''deputized'' retroactively as the government's investigative proxies when the government believes that a witness has given false information to those counsel? In *Ray*, the allegation was not that the defendant sought to obstruct a governmental investigation—the plea agreement clarifies that none existed at the time—but instead that he conspired to obstruct the company's in-house investigation so that it would not blossom into a full-blown independent counsel and then SEC investigation. This is a remarkable expansion of obstruction law in that it renders a company counsel's investigation the functional equivalent of a government proceeding for obstruction purposes simply because it inquires into a matter that could fall within the SEC's or DOJ's jurisdiction. This approach also appears to treat voluntary disclosure to the government as a foregone conclusion for purposes of obstruction despite the fact that the plea agreement does not reflect that the company had made such a decision at the time of the statements.

Second, what are the lessons for company counsel conducting internal investigations? At a minimum, *Ray* suggests that company counsel undertaking even preliminary investigations into possible regulatory or criminal violations must assume that employees' false statements could be fair game for prosecutors just as they would be in the setting of an FBI interview or a grand jury proceeding. DOJ's recent approach to ''private lies'' in the internal investigation context warrants caution by company counsel so as to minimize the risk that employees might make misstatements or omissions during interviews rashly, through faulty recollection, surprise, or unfamiliarity with the evidence. Further, counsel should be careful to ensure that the results of such interviews are recorded accurately, as the consequences of erroneous summaries could be severe to the employee. Counsel should consider whether the corporate *Miranda* warning should be adapted to include an admonition that destruction of evidence or false statements during an internal investigation could be actionable under Section 1519.

Finally, the potential ramifications for company counsel's ability to enjoy the candor and trust of others within the company should not be ignored. The government's attempts to deputize company counsel as its proxy for obstruction purposes could have a significant impact on the ability of company counsel to maintain full and frank discussion with management peers and employees. Further clarification by DOJ is needed in the form of policy pronouncements or other guidelines of the circumstances under which misstatements to company counsel will be charged as obstruction so as to decrease the potential for confusion and mistrust in the relationship between in-house counsel and employees.

Conclusion

As noted, company counsel's role in conducting investigations and assisting voluntary disclosures has been heavily influenced by a corporate priority on seeking lenience from the government through cooperation, sometimes at the expense of employees' interests. *Ray* and other recent obstruction prosecutions indicate that the government may now view company counsel's role as even more closely aligned with its own priorities than ever before, permitting the prosecution of ''private lies'' where no government agency is involved. This deputization trend further complicates the role of the company lawyer seeking to balance responsibilities to the organization and its employees and highlights the divergence of interests when wrongdoing is under investigation. At a minimum, the government's new theory of obstruction under Section 1519 suggests that it now views internal corporate investigations into areas under its jurisdiction as fully integrated components of the system of ''justice'' protected from obstruction by federal criminal laws.

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[36] *Id.*

[37] *Id.*

[38] *Id.* (stating defendant's awareness that the general counsel's investigation ''could evolve into an independent investigation that could possibly lead to, among other things, an SEC investigation.'').

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