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The New Law of Anticipatory Obstruction of Justice

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We are all creatures of habit—even corporate counsel and big-firm lawyers—and old habits die hard. But few things are more dangerous than a lawyer continuing a habit after the law supporting the habit has changed. That risky situation now exists regarding the law of obstruction of justice (OOJ).

In this case, the habit relates to the "pending official proceeding" requirement. For many years, that requirement was used as a rule-of-thumb for determining whether obstructive conduct (such as the destruction of documents) could give rise to criminal liability under the federal OOJ laws. The rule was: if there was an official proceeding pending, the conduct could constitute obstruction, but if there was no official proceeding pending, no obstruction charge was possible.

The rule was simple, logical, and easy to apply. After all, the name of the violation is "obstruction of justice;" so, if there is no pending proceeding, the obstructive conduct could not obstruct the government's pursuit of justice. For corporate counsel, the rule meant that potentially obstructive conduct (like the destruction of corporate documents) could often be disregarded as possibly forming the basis for an OOJ charge.

The problem is, that rule is no longer valid.

The vehicle for this change is Section 1519, which Congress passed in 2002 as part of the Sarbanes-Oxley Act. Initially, the new law seemed like just another example of Congressional drum-beating, this time in the wake of the Enron and WorldCom scandals. Obstruction was already covered by other statutes (e.g., Sections 1503, 1505, 1510, and 1512), and Section 1519 was ambiguously entitled "Destruction, alteration, or falsification of records in Federal investigations and bankruptcy." The statute appeared to be just another OOJ law about document destruction.

However, one thing is very different about Section 1519: it does not require a pending official proceeding. More specifically, Section 1519 covers conduct committed in "contemplation of" such a proceeding or investigation. Thus, for any conduct that is otherwise addressed by Section 1519 (such as document destruction), the old "pending official proceeding" rule-of-thumb does not apply. As a result, corporate counsel and other practitioners who continue to apply that rule might get themselves and their clients into trouble.

Don't feel bad if you missed this change; it was not obvious. In fact, immediately after Sarbanes Oxley was passed, Attorney General Ashcroft issued a DOJ memorandum that referred to Section 1519 but did not mention the new "in contemplation of" language. Within a few days, Senator Patrick Leahy, who drafted Section 1519, wrote back to Ashcroft and complained that the DOJ memorandum had missed some of the most pro-government aspects of the new law.

Initially, only a few sharp-eyed scholars noticed the "in contemplation of" language, and the statute was not used much, probably because prosecutors were more accustomed to using other OOJ statutes—prosecutors are creatures of habit too—and because of concerns about the interpretation and constitutionality of the statute.

After a few years, though, a trickle of cases have provided clear answers to the questions surrounding Section 1519. Yes, it covers conduct occurring before a proceeding, so long as it is in anticipation of a proceeding. No, the statute is not unconstitutionally vague. No, unlike the other OOJ statutes, Section 1519 does not require the conduct to be "willful;" the conduct need only be "knowing." No, the statute is not limited to corporate destruction of records; it covers any "anticipatory obstruction of justice," even if done outside the business context.

Recently, DOJ has realized the potential of Section 1519 and begun to use the statute more aggressively. For example, the statute was used in 2009 to charge a defendant who hacked into Sarah Palin's private Yahoo account, because, when the defendant realized he might be investigated for the crime, he destroyed his computer's records. In 2010, an attorney was charged with destroying a client's laptop containing child pornography, where an investigation of the client's activities seemed likely to occur but had not yet been opened.

This new era of "anticipatory obstruction of justice" will be especially troublesome for companies in highly-regulated industries, because the ever-present prospect of a government inquiry could provide a basis for inferring — quite incorrectly — that the documents were destroyed "in contemplation of" a federal investigation.

The point here is clear: Section 1519 has changed the landscape of obstruction law, and corporate counsel and other lawyers who continue to rely on their old habits, do so at their peril.

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