

**INTERVIEW WITH T. MARKUS FUNK,
PARTNER, PERKINS COIE,
DENVER, COLORADO**

Let say there is no criminal investigation.
And there is no corporate internal investigation.
But you decide to cover up the crime anyway.
In anticipation of a possible investigation.
Are you obstructing justice?

Well, the U.S. Attorney in Chicago says yes.
Last month, Patrick Fitzgerald prosecuted a
German based multinational under 18 USC 1519
charging obstruction of justice.

T. Markus Funk is a partner at Perkins Coie in
Denver, Colorado.

Prior to joining Perkins Coie earlier this month,
Funk was a prosecutor in the U.S. Attorney's office
in Chicago.

We interviewed Funk on October 5, 2010.

CCR: You graduated from Northwestern University

School of Law in 1995. What have you been doing
since?

FUNK: After graduating, I clerked for Chief Judge
Catherine Perry in the Eastern District of Missouri –
in St. Louis.

I then went over to Oxford University where I
was a lecturer in law for two years.

After Oxford, I clerked for Judge Morris Arnold
on the Eighth Circuit Court of Appeals.

After clerking for Judge Arnold, I went to the
U.S. Attorney's office in Chicago. That was in
November 2000.

CCR: And you are now a partner at Perkins Coie
working out of the Denver and Chicago offices.

What was your work at the U.S. Attorney's
office?

FUNK: I started in general crimes. That is the
entry-level position for lawyers in the U.S.
Attorney's office in Chicago. I then moved on to the
Narcotics Division, the Major Case Division, and
spent my last four years in Public Corruption and
Organized Crime.

CCR: What is your practice at Perkins Coie?

FUNK: I'm in the white collar investigations and
defense group of Perkins, where I work on a variety
of white collar defense matters, as well as on
commercial litigation.

I have particular focus on the Foreign Corrupt
Practices Act.

CCR: How did you end up in the Denver office?

FUNK: My grandfather was a rancher in Colorado,
so my wife and I moved to Denver.

In terms of Perkins, I had some colleagues in
the Chicago office that joined Perkins in Chicago.
These peers were, in my view, some of the best
prosecutors and attorneys to come out of the
Chicago office in the last decade.

I was excited when they interviewed me for
their Denver office, and was thrilled to join their
team.

CCR: How did you become interested in law? Did
you come from a family of lawyers?

FUNK: I became interested in law through a friend
of mine. I did a little bit of writing at the University
of Illinois. I wrote for the Daily Illini on current
affairs and legal issues, and law naturally appealed
to me.

CCR: Are you from Chicago?

FUNK: I grew up near Frankfurt, Germany, living
there until I was 18 years old. During this time I
would travel to the United States quite a bit.

My father, a freelance photographer who at the

time worked for National Geographic Magazine, is from downstate Illinois, and my mother was German.

CCR: What took you to Oxford?

FUNK: My mother became ill in the late 1990s, and I wanted to be as close as I could to her. Because she lived in Spain at the time, I decided to move to England and teach law. I was there for two years.

CCR: You have written an article titled "Charges That Sting: 'Honey Laundering' Indictment Heraldng New Era of Obstruction Prosecutions?"

That case was brought by the U.S. Attorney in Chicago last month. Tell us about it.

FUNK: *Wolff* is an anti-dumping case involving honey, and the charges were brought by the Chicago U.S. Attorney's Office.

It involves a German company – Alfred Wolff Company. The allegation is that company executives and others were involved in illegally trans-shipping honey from China – trying to criminally conceal the fact that the honey was from China.

They were attempting to funnel the honey through other countries – including India and Russia – ultimately illegally importing that honey into the United States.

The allegations are that some \$80 million in duties were avoided through this scheme – which lasted from 2002 to 2009.

Wolff therefore has the distinction of being the largest such case in U.S. history.

CCR: This is a major corporate crime prosecution. And it did not get the publicity that a corporate crime prosecution of this size deserves. Why is that?

FUNK: I'm not sure. From what I can tell, the case has received a fair amount of overseas press. That said, it has to some extent been overlooked by the US mainstream media.

Obviously, at the time of the press conference, there was a lot of interest in the Blagojevich prosecution.

And so many of the questions the press asked of U.S. Attorney Patrick Fitzgerald trended in that direction, and unfortunately ignored the details of this landmark case.

CCR: Are you involved at all in the defense of this case?

FUNK: No, not at all.

CCR: The defendant is a major German multinational.

FUNK: Yes. Wolff was the largest importer of

honey into the United States. It was also the largest importer of honey into Europe.

CCR: The U.S. government imposed a significant tariff on Chinese honey. Why?

FUNK: The tariff varied over the years. But 221 percent was the average tariff that was imposed. China being a non-market economy, the US government obviously concluded that the honey was being sold below market value, and was being "dumped" on the US market.

CCR: The allegation is that this company imported Chinese honey into the United States without paying the tariff. How did they do it?

FUNK: China is the world's largest producer of honey, and there is not much of a domestic Chinese market for honey.

The allegation is that the company took the Chinese honey and then routed it on to countries such as India and Russia.

Defendants would then re-label the honey, and thereafter dummy up the paperwork to indicate that the honey was actually produced in one of these other countries. In some cases they would adulterate the honey with sugar. In other cases, they would mix Indian honey with Chinese honey.

The bottom line is that the defendants attempted to disguise the true origin of the honey prior to shipping it into the United States from one of these other countries.

The purpose of these activities was to avoid the duties. This was the heart of the alleged illegal scheme.

CCR: Some of the honey was labeled organic, when in fact it wasn't organic?

FUNK: Yes. And some of it was adulterated and contained antibiotics.

The government alleges that Wolff, a major old-line German holding company involved in a number of different businesses, labeled the honey organic when it was not in fact organic.

And, as I noted, the government goes further, alleging that some of the honey was contaminated with antibiotics and cut with sugar.

CCR: There were five other companies involved and charged. And eleven high ranking executives were charged. Were most of those Wolff executives?

FUNK: They were.

CCR: The article you wrote focuses on obstruction of justice. Why is this a significant case in that regard?

FUNK: 18 USC Section 1519 is the obstruction statute prosecutors charged in this case.

There were four substantive charges of violations of 1519, and obstruction was also one of the objects of the conspiracy charged.

Interestingly, this statute has been on the books since 2002, but to date has not been heavily enforced by the Department of Justice.

This reality may be traceable to a reluctance of prosecutors to try out such a new and untested statute.

But it may also reflect the fact that the Department hadn't put very much emphasis on the statute.

In any event, this statute has not been used frequently.

What makes this prosecution particularly significant is that the obstruction alleged here is not linked to any particular ongoing investigation or prosecution, or even to an ongoing internal investigation.

The allegation here is that the obstruction was done prospectively, with the purpose of avoiding governmental detection altogether.

CCR: Give us a little background. Prior to section 1519, what sections did prosecutors rely on to bring an obstruction case?

And how do they differ from 1519?

FUNK: There are a number of obstruction sections throughout the code.

The key manner in which those sections differ from 1519 is that they require the government to prove that the individuals engaged in the obstructive conduct were trying to obstruct a particular ongoing investigation.

If an individual shreds documents, the government has the burden of proving that the individual shredded the documents knowing that, say, the FBI was doing an investigation of that individual and that the individual shredded the documents in order to derail or otherwise hinder that particular investigation.

What makes 1519 a unique, and particularly powerful, weapon in the government's arsenal is that the prosecutor need not prove that there was any particular investigation defendants were trying to obstruct.

Instead, the prosecutor simply has to prove that the defendants were trying to obstruct an investigation.

And so, in the context of the Wolff case, that

the allegation is that defendants' rationale for creating dummy documents was, at least in part, that they wanted to avoid detection by law enforcement in the future.

And that is all the prosecution has to prove.

Put another way, the prosecution does not have to allege, or prove, which particular law enforcement investigation defendants were trying to obstruct.

Another aspect of 1519 prosecutions is that even trying to obstruct an internal investigation could get you in legal trouble, provided the government can prove that the reason you wanted to obstruct the internal investigation is because you were fearful that the results of that internal investigations would someday make its way to the federal government.

CCR: Is 1519 problematic in any way?

FUNK: There certainly have been some Constitutional challenges to 1519 alleging that the statute is void for vagueness.

The one that comes to mind is the Eleventh Circuit decision which rejected any claim that there was a vagueness problem.

But the statute is not vague. And the fact that the prosecutors need to only establish that there was an intent to obstruct an investigation in the future in itself does not in my mind raise any great Constitutional concerns.

CCR: You say federal prosecutors have arguably deputized company counsel conducting internal investigations. How are company counsel being deputized?

FUNK: Consider the Carson case out of California. The female employee in that case heard that there was going to be an internal investigation. The firm conducting this investigation asked to interview her.

That employee, Ms. Carson, on her way to the interview allegedly destroyed various documents that were incriminating.

The government thereafter got wind of her conduct and charged her under 1519, alleging that at least part of her intent was to avoid detection by law enforcement.

How the government is going to prove that, we shall see, but from the pre-trial filings it looks like the government will call the attorneys conducting the internal investigation to the witness stand. The case goes to trial in November.

CCR: Was there an ongoing federal investigation at the time of the destruction of documents?

FUNK: There was not an ongoing investigation that Ms. Carson knew of. Instead, the allegation is that she attempted to obstruct an internal investigation in part because she feared a future federal investigation.

CCR: How did she obstruct the investigation?

FUNK: She physically took the documents and flushed them down the toilet prior to walking into the room to be interviewed by the attorneys.

CCR: How many prosecutions have there been under 1519?

FUNK: There have been a few. Carson was one of the higher profile ones. But speaking globally, only a small handful of cases have been reported.

CCR: Why the reluctance of federal prosecutors to move under this statute?

FUNK: It is a new statute that until fairly recently was not constitutionally tested. Look at the FCPA. It's been around for over 20 years. But only fairly recently has the government begun to emphasize FCPA investigations and prosecutions.

So, there exists a natural reluctance to charge a new and untested statute.

That, in combination with perhaps a lack of Main Justice familiarity with, and emphasis on, the statute helps explain the relative dearth of 1519 prosecutions.

In the *Wolff* case, on the other hand, it appears that 1519 is being used strategically as one of the primary arguments for criminal liability. That is what makes *Wolff* particularly interesting.

CCR: It's often said that it's not the crime, it's the cover-up that gets you into trouble. I guess that's the message that prosecutors here are trying to send. They are alleging both a crime and a cover-up.

FUNK: Yes. And they are alleging that the cover-up was integral to the crime.

CCR: How did the defendants cover-up?

FUNK: They created false documents to mislead the federal authorities into thinking that this honey came from sources other than China.

The government, based on the indictment, is in possession of e-mails and other evidence in which the defendants remind each other to be careful in their communications.

In one case, one of the Chinese defendants sends an e-mail saying – "here are the fake documents."

The co-conspirators also remind each other to speak in German so as to avoid detection, destroy their sent and received emails, and use Skype and

other methods of communications that they view as harder to trace.

The government also alleges that defendants recruited a scientist who provided them with lab reports that are inaccurate.

As it turns out, you can identify the source of the honey, in part, through chemical analysis.

So, defendants allegedly obtained the assistance of a lab technician who essentially dummed up the lab reports.

So, there are a number of different ways the purported obstruction took place. And the allegations are extremely detailed. It's a 77-page indictment.

CCR: How is the white collar unit at the U.S. Attorney's office in Chicago organized?

FUNK: There is a fraud unit. And then there are a number of other designated units. Individual cases are distributed throughout the office.

When I was in public corruption, I had white collar cases.

When I was in general crimes, I had white collar cases.

The Chicago office is very flexible, with prosecutors handling a wide variety of cases.

CCR: How many attorneys are there in the Chicago office?

FUNK: We have added a lot in the last few years. My estimate would be that we are in the neighborhood of 150 or so attorneys in the criminal section.

CCR: What is the reputation of the Chicago office among federal prosecutors?

FUNK: I see it as extremely solid, and it has been so for a long time. The reputation of the office was good under U.S. Attorney Scott Lassar. And it is strong under Patrick Fitzgerald.

CCR: Patrick Fitzgerald might be considered a prosecutor for life. Did you ever consider that for yourself?

FUNK: Being an Assistant U.S. Attorney is a great job. And so some people want to stay and continue to do that work for their entire careers.

It was not an easy decision to leave the office and the wonderful colleagues I had there.

But I talked about the decision with a number of former colleagues who really enjoyed private practice.

And I also spoke with my former colleagues who are now at Perkins, and they really enjoy their work there. These were some of the main factors

that persuaded me to leave a an office I was proud to be a part of during the past decade, and to join Perkins

CCR: Our last handful of interviews have dealt with the FCPA. And just coincidentally, a number of the attorneys who have interviewed have overseas connections.

Last week, we had interviewed O'Melveny's Richard Grime, who is a UK and US citizen.

We interviewed Asheesh Goel from Ropes & Gray who is from India.

Does being from overseas make you interested in doing legal work overseas?

FUNK: It does. I worked in Kosovo for the Justice Department. I was on loan to the State Department for two years. Much of the work we did in Kosovo had to do with anti-corruption efforts and efforts to clean up government.

So, I consider overseas work, FCPA work, as a natural for people like myself who have been criminal prosecutors and have had overseas experience.

If you haven't done criminal work, it may be a little bit more difficult, but I worked in an official capacity overseas and am familiar with working in different legal and cultural environments.

For me, this is a natural fit.

CCR: Will you also be doing public corruption defense work?

FUNK: That remains to be seen. My practice is still taking shape.

CCR: How many attorneys in Perkins Denver office?

FUNK: Roughly 35 attorneys.

CCR: Back to the Wolff prosecution. Do we have a sense as to the timeline of the prosecution?

FUNK: There is no trial date set yet. The majority of the defendants are not in the United States.

Whether they are going to be extradited remains to be seen.

I see this case going to go on for quite a bit of time. It's not going to be quickly resolved.

CCR: Is this a one off from Fitzgerald? Or will Main Justice start actively prosecuting under 1519?

FUNK: A successful, high-profile prosecution will usually attract imitators. But we shall see. Will the 1519 charges be dropped? Or will the defendants plead guilty to the charges?

If the Wolff case demonstrates that 1519 charges are effective, and the defendants are held to account for their alleged violations under the statute,

then the prosecution is likely to generate similar prosecutions elsewhere.

The bottom line is that the law should be attractive to prosecutors.

CCR: When you think Patrick Fitzgerald, you think public corruption, not corporate crime, right?

FUNK: That is, to a great extent, a function of what the press decides to report on.

The Chicago office under Fitzgerald is extensively engaged in white collar prosecutions.

They may not all be of the magnitude of the Wolff case.

The press certainly has heavily reported on the public corruption cases out of Chicago. And appropriately so. But I don't think that is an indication that the Chicago office doesn't do big-ticket white collar cases.

CCR: This case was clearly driven out of Chicago, not Main Justice, right?

FUNK: I'm not in a position of comment on that. But Fitzgerald held the press conference. The case was indicted out of Chicago. So, those are pretty solid indicia that it's a Chicago-driven case.

And while the U.S. Attorney and Main Justice take a lead role in many high-profile cases, very few would dispute that these cases are as a general rule driven by the attorneys assigned the case, and by the federal investigators who worked on the matter and brought the case to the US Attorney's Office.

CCR: Is it easier politically to bring this kind of case when the multinational is a foreign based multinational?

FUNK: I don't think politics has a whole lot to do with this kind of a case. I have to believe that this case would be brought whether the defendant was a domestic corporation or a foreign-based multinational.

CCR: You just started your career as a defense lawyer based in Denver. Does it matter in this day and age where a white collar defense lawyer is located?

FUNK: In the case of Perkins Coie, we have experienced, top-flight white collar practitioners in offices throughout the United States and overseas. I would agree that these days, your geographic location has little to do with the nature of your practice when it comes to white collar defense.

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