'Honey Laundering,' A Toilet Flush, and a Governor's Yahoo Account

The New Age of Anticipatory Obstruction of Justice

Late one night last year, a defense attorney's client decided to erase a document file folder and certain emails from his personal laptop computer. As it turns out, a month earlier the client had gotten himself involved in a small-time mortgage fraud scheme with two college friends. With some time to reflect on what he had done, the client began to experience some pangs of concern that his wife — or even worse, federal law enforcement — might one day gain access to the documents and emails and figure out what he had been doing.

The client's fear about perhaps someday being the subject of law enforcement attention was very real. That said, there is no evidence that the client knew of an ongoing — or even planned — investigation. Instead, his otherwise unremarkable actions were little more than an anticipatory "precaution."

The question now confronting the defense attorney is whether the client's actions violated the law.

Pursuant to the under-used, but particularly power-packed, 18 U.S.C. § 1519, such "anticipatory obstruction of justice" does, in fact, constitute a chargeable offense. But despite its undeniable prosecutorial punch, to the vast majority of practitioners and federal prosecutors this statute remains terra incognita. Two recent cases, however, promise to place § 1519 on a pedestal, turning the charge into a far more familiar prosecutorial tool.

Section 1519's Origin and Power

Those familiar obstruction of justice charges[1] have always been particularly pointed arrows in the government's ample charging quiver. Whether as "add-ons," or, less likely, as substantive stand-alones, experienced prosecutors will almost always include obstruction charges when they believe the evidence supports them. Section 1519, however, is perhaps the most versatile and inclusive obstruction provision of the bunch providing a needed small-bore solution for a large-scale need.

Passed in 2002, § 1519, despite its 20-year maximum sentence, suffered the ignoble treatment of benign neglect, generating more academic debate than real-world application (always a sure sign that the drafters' intent had gone unheeded). Unceremoniously titled "Destruction, Alteration, or Falsification of Records in Federal Investigations and Bankruptcy," and part of § 802 of the Sarbanes-Oxley Act of 2002, § 1519 provides:

> Whoever *knowingly* alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible

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> 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 any case filed under Title 11, *or* in *relation* to or *contemplation* of *any* such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.[2]

A comparison with sister obstruction provisions in § 1503 and § 1505, both of which require the prosecution to establish the existence of a *pending* federal investigation or judicial proceeding, is particularly instructive. In contradistinction to those more pedestrian obstruction provisions, § 1519 shoots harder than it kicks in that it frees the prosecution from having to establish the limiting element of a pending investigation or proceeding.

Put another way, prosecutors charging under § 1519 need not shoulder the heavy burden of proving that a particular defendant engaged in the obstructive conduct with the corrupt intent to affect a *particular* government investigation or proceeding.[3] The obvious advantage to prosecutors is that they need not, for example, prove that the defendant shredded certain documents with the intent of obstructing the FBI's investigation into his involvement in a particular criminal scheme. Instead, the Assistant U.S. Attorney need only prove that the defendant shredded the documents, at least in part, to make life more difficult for *future* investigators, *if and when* they eventually appear. That, as anyone who has ever prosecuted or defended a criminal case will likely agree, is an extremely significant distinction.

Sounding the Charge With The High-Profile *Wolff* Case

Patrick J. Fitzgerald, the U.S. Attorney in Chicago, convened a press conference in September 2010 to announce the indictment of 11 high-ranking corporate executives and six foreign and domestic corporations in *United States v. Alexander Wolff, et al.*,[4] the nation's most extensive food fraud and anti-dumping prosecution.

The charges provide a fascinating glimpse into an extraordinary transnational effort to criminally evade nearly $80 million in duties and tariffs by illegally importing mislabeled, and often contaminated, Chinese honey. But of even more interest to the criminal law practitioner should be the government's reliance on obstruction charges to frame its case.

What Alleged Facts Buttress the *Wolff* Charges?

Alfred L. Wolff Company (Wolff GmbH), founded in 1901, at the time of the indictment was a significant German food conglomerate — not to mention the United States and Europe's leading honey importer. Wolff had subsidiaries and production units strategically located throughout the world, including in Mexico, Hong Kong, China, Hungary, and Argentina.[5]

The criminal conduct alleged in the indictment travels all the way to the top of this established enterprise, in that 10 of the 11 individual *Wolff* defendants were top-ranking executives of either Wolff GmbH[6] or of one of its four affiliated defendant-companies. Making matters worse for Wolff GmbH — from a public relations perspective at least — the government claims thousands of tons of the honey were purportedly adulterated with potentially harmful antibiotics, cut with sugar, and then falsely labeled as "certified organic."

According to prosecutors, the *Wolff* defendants went to great lengths, and employed extraordinarily sophisticated means (including mislabeling the honey and illegally transshipping it through shell and front companies), to avoid steep U.S. import duties on honey originating from non-market economy — and leading global honey exporter — China. And it is easy to see why Wolff GmbH would do so. Between 2001 and 2007, the U.S. government imposed default anti-dumping duties on Chinese honey as high as 221 percent. In contrast, honey from Russia, India, Taiwan, and Thailand was not subject to similar anti-dumping duties.

How Did the *Wolff* Prosecutors Charge § 1519?

In terms of the particulars of the 44 filed counts, Count One's broad anchor allegation is that the *Wolff* defendants engaged in the above-described global conspiracy to avoid the heavy import tariffs on Chinese honey. The count charges that, between 2002 and 2009, defendants conspired to illegally smuggle goods into the United States, and to violate various U.S. Food and Drug Administration Acts relating to the importation of adulterated food products.

Count One is thick (and perhaps overly so) with factual allegations, offering the now-routine "speaking indictment"-style preview of the evidence the government intends to present at trial. This is not a surprise, considering the nature of the purported scheme. But what is surprising is that the prosecutors opted to also charge defendants with conspiring to obstruct justice, in violation of 18 U.S.C. § 1519.

The government's obstruction assault, moreover, does not begin and end with the conspiracy charge. Counts 41 through 44 up the ante by charging discrete *substantive* violations of § 1519. More specifically, the alleged obstructive conduct charged in these follow-on counts includes the dummying up of false sales contracts, the destruction of emails and debit notes, and the falsification of records submitted to the Department of Commerce.

It should, moreover, not go unnoticed that the *Wolff* indictment omits any reference to a defendant's state of mind. Put another way, the indictment does not charge that defendants engaged in the charged conduct to impede any *particular* pending federal investigation, whether external or internal.[7] Instead, Count One alleges that defendants "intended to impede, obstruct, and influence" the "investigation by, and the proper administration of," a "matter" before the Department of Commerce.

The upshot is an indictment carefully portraying the *Wolff* defendants as meticulously, but *prospectively,* engaging in a variety of efforts to cover their tracks. Their purported motivation was to insulate themselves from *any* adverse legal, professional, or reputational liability, whether emanating from in-house counsel, their competitors, their bosses, the United States, or a foreign government.[8] Stated plainly, it is clear that the obstruction charges filed here are more anchor than pivot.

Wolff's Present Litigative Posture

As of this writing, counsel have entered their appearances for two individual defendants (both of whom the government somewhat curiously has publicly identified as cooperating), as well as defendant Alfred L. Wolff Inc. The remaining defendants, in contrast, as of this writing have not submitted themselves to the jurisdiction of the U.S. courts, prompting the assigned U.S. Magistrate on October 31, 2010, to

issue no-bond bench warrants for their arrest. Although briefing on certain preliminary matters has commenced, U.S. District Judge Amy St. Eve has not yet set a trial date.

The Case of the Obstructive Flush

Although, as noted, § 1519 obstruction charges are far from routine, there are certainly some trailblazing predecessor cases to *Wolff*.[9] For example, in 2009 the government charged Hong "Rose" Carson, then 45 years old, with the decidedly "old school" offense of disposing of potentially incriminating documents by flushing them down a toilet. Carson is alleged to have resorted to this somewhat desperate measure upon discovering that her employer had retained outside counsel to conduct an internal investigation into possible Foreign Corrupt Practices Act violations.

The government throughout the pendency of the indictment has maintained that Carson, in so doing, sought to obstruct "an investigation within the jurisdiction of a federal agency when she destroyed documents relevant to [her employer's] internal investigation. …"[10] That said, even though the prosecutors' approach was more rifle shot than shotgun blast, it was always a bit unclear how the government would prove intent; the assumption was that, as is so often the case, the government had evidence demonstrating intent that simply was not (yet) in the public record.

On February 25, 2011, however, the government in a surprise move — and "in the interests of justice" — dropped the § 1519 charge (Count 16) against Carson. Carson's case is pending in the Central District of California, with trial most recently rescheduled for Nov. 4, 2011. It is, of course, not inconceivable (though not likely) that the government could refile the charge, depending on how its evidence develops during pretrial preparation.

How Sarah Palin's Email Account Led to Anticipatory Obstruction Charges

Another case vividly illustrating the benefits § 1519 holds for prosecutors is *United States v. Kernell*. In that case, 20-year-old defendant David Kernell is alleged to have gained unauthorized access to Sarah Palin's private Gov.Palin@yahoo.com email account while she was the Republican nominee for vice president and the governor of Alaska. Kernell, a self-described activist whose express intent was to locate "incriminating" information in order to "derail" Gov. Palin's campaign, was overcome by a frisson of dread that the FBI might discover his access to the account, as well as his dissemination of information he unlawfully obtained from it. To help alleviate these lingering concerns, Kernell allegedly removed, altered, and concealed various records from his personal laptop that related to his use of, and control over, Gov. Palin's email account.

As it turned out, however, Kernell's attempts to conceal were for naught. The FBI caught up with him, and prosecutors in their First Superseding Indictment charged Kernell with attempting to destroy this electronic evidence to avoid possible *future* federal law enforcement detection.

In response, Kernell asked the court to dismiss the government's charge of "anticipatory obstruction of justice." The district court in the end rejected Kernell's arguments, ruling that (1) § 1519 applies to obstructive conduct relating to personal electronic files stored on a personal computer; (2) pursuant to § 1519's plain language, no open investigation is required for § 1519 to pertain; (3) an individual's conduct may violate § 1519 even if the individual does not actually succeed in the obstructive objective; and (4) § 1519 is not void for vagueness.

With these setbacks behind him, Kernell proceeded to trial.

On April 30, 2010, a federal jury in Tennessee convicted the former University of Tennessee student on the anticipatory obstruction count. On Nov. 19, 2010, the district court sentenced Kernell to 12 months and 1 day imprisonment for that violation, agreeing with defense counsel that Kernell's personal history mitigated in favor of a lighter sentence than the prosecution's requested 18 months incarceration, but rejecting defense requests for probation.

The Bright Future Of Anticipatory Obstruction of Justice

The government's decisions to charge variants of § 1519 anticipatory obstruction of justice in *Wolff*, *Carson*, and *Kernell* were not only bold (and, in the *Carson* case at least, perhaps a bit too bold), but they were also largely unprecedented. In terms of the government's rationale for doing so, § 1519's 20-year statutory maximum is clearly one draw. But what surely appeals even more to prosecutorial sensibilities is what § 1519 does *not* require the government to prove. True, prosecutors charging § 1519 must still convince a jury that (1) the defendant knowingly engaged in an obstructive act; (2) the act impacted an issue or matter within the jurisdiction of *any* U.S. department or agency, and (3) defendant acted at least "in relation to" or "in contemplation" of such (prospective) issue or matter. But, uniquely to § 1519, they need not prove (4) *which* specific "pending proceeding(s)" defendant attempted to obstruct. Suffice it to say that this fourth element is a significant one; not having to prove it not only lifts a considerable weight from the collective prosecutorial shoulders at trial, but also dramatically widens the charging net for agents and prosecutors trying to pair up facts uncovered during their investigations with potential criminal proscriptions.

Criminal defense attorneys who are former prosecutors know well the phenomenon that prosecutorial success breeds imitators, and that once-novel legal theories, after being proven roadworthy in court, quickly become the accepted norm.[11] Practitioners are therefore well-advised not only to keep on the lookout for developments in *Wolff* (and, perhaps, *Carson*), but to also dig through the U.S. Code for a closer look at 18 U.S.C. § 1519.

Notes

1. *See, e.g.*, 18 U.S.C. §§ 1510 (felony to obstruct criminal investigations); 1511 (felony to obstruct state or local law enforcement with the intent to facilitate an illegal gambling business); 1512 (felony to tamper with a witness, victim, or informant); 1513 (felony to retaliate against a witness, victim, or informant); 1516 (felony to obstruct a federal audit); 1517 (felony to obstruct the examination of a financial institution); and 1518 (felony to obstruct a criminal investigation of health care offenses).

2. Emphasis added.

3. Section 1519's legislative history, indeed, confirms the intent of Congress to eliminate the requirement that the obstructive conduct be tied by intent to any pending or imminent proceeding. *See generally* 148 Cong. Rec. S7,419 (daily ed. July 26, 2002) (statement of Sen. Patrick Leahy). Courts have ruled that a plain-language reading of § 1519 is in keeping with this legislative intent. *See, e.g., United States v. Jho*, 534 F.3d 398 (5th Cir. 2008) (defendant found guilty of conspiring to violate § 1519 for falsifying records relating to ship's oil pollution equipment); *United States v. Ray*, No. 2:08-cr–01443 (C.D. Cal.

Dec. 15, 2008) (executive's false statements to general counsel concerning practice of back-dating stock options violated § 1519 because executive knew SEC investigation was in the cards). Moreover, as the Department of Justice's "Field Guidance" publication succinctly put it, "[n]o corrupt persuasion is required [for a § 1519 conviction]." *See Field Guidance on New Criminal Authorities Enacted in the Sarbanes-Oxley Act of 2002 (H.R. 3763) Concerning Corporate Fraud and Accountability*, at http://www.justice.gov/ag/readingroom/sarox1.htm (last visited September 13, 2010).

4.*United States v. Wolff*, 08-CR-00417 (August 31, 2010) (St. Eve, J.). For the full indictment, *see* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01a.pdf. For the Department of Justice's corresponding press release, *see* http://www.justice.gov/usao/iln/pr/chicago/2010/pr0901_01.pdf.

5. *See* http://www.honeylocator.com/profiles/3645400.asp.

6. The Wolff Company is the food branch of the German Wolff & Olsen holding group.

7. The indictment does, however, identify the U.S. Department of Commerce's new shipper review program as the primary — but not necessarily exclusive — focus of defendants' alleged obstructive strategy.

8. Of course, the government will surely argue that any motivating factors not having to do with the U.S. government is simply background noise, and will point to defendants' communications to make this point.

9. *See also United States v. Jho*, 534 F.3d 398 (5th Cir. 2008) (defendant found guilty of conspiring to violate § 1519 for falsifying records relating to ship's oil pollution equipment; conviction was based on defendant's intent to obstruct a matter within jurisdiction of the U.S. Coast Guard); *United States v. Ray*, No. 2:08-cr–01443 (C.D. Cal. Dec. 15, 2008) (executive's false statements to general counsel concerning practice of back-dating stock options intended, at least in part, to thwart SEC investigation).

10. In light of the potential ramifications from such internal investigation-related conduct, attorneys must be mindful to incorporate the giving of *Upjohn* warnings into their standard practice. (An *Upjohn* warning, a name derived from the famous Supreme Court case of *Upjohn Company v. United States,* is a privilege-related disclaimer issued by an attorney for a company to an employee of the company, advising the employee that the attorney does not represent the employee, but rather the company as legal entity.).

11. Indeed, just based on the raw numbers, § 1519 appears to be catching on. More than half of the 84 U.S. district court cases citing § 1519 are dated 2009 or later. ■

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