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Penetrating an Organization's Internal Investigation: Does 18 U.S.C. § 1519 Create More Problems Than It Solves?

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Impeding an organization's internal investigation into alleged wrongdoing can be a federal crime, even though no federal investigation has been instituted. Such conduct has been proscribed since 2002, when 18 U.S.C. § 1519 was enacted. Section 1519's impact on internal investigations, a staple in the defense of organizations, is significant given how courts have interpreted § 1519. Corporate counsel, organizations and their employees must carefully navigate the conflicting currents posed, and issues raised by, the statute.

On October 5, 2011, the Eighth Circuit affirmed the conviction of Geffrey Yielding.[2] A jury convicted Yielding of aiding and abetting a violation of the Medicare anti-kickback law[3] and falsification of documents in contravention of § 1519.[4] Yielding's case is notable for two reasons. One, it demonstrates the reach of § 1519, especially when combined with Title 18's aiding and abetting provision. Yielding was not charged with actually creating all the offending documents. Someone else did that. Two, the documents, generated during the internal investigation, came to light six months later, when the Federal Bureau of Investigation ("FBI") searched Yielding's house after commencing its investigation.

Yielding was an administrative assistant for a neurosurgeon who performed surgeries at the Baptist Health Medical Center in Arkansas. Yielding would inform Baptist's charge nurse what supplies were needed for the neurosurgeon's operations. The charge nurse would ensure the items were available. Yielding's wife established Advanced Neurophysiology, Inc. ("ANI"), a medical services company. Its sole owner, she was also an independent sales agent for two companies. One sold external bone growth stimulators, and the other sold bone allograft, a substitute bone used to fill a void in a patient's bone after surgery or trauma. During 2003–2004, ANI paid the Baptist charge nurse thousands of dollars to ensure that ANI received the business associated with the neurosurgeon's operations at Baptist.

Baptist terminated the charge nurse in November 2004 when an internal investigation revealed irregularities surrounding the purchases of bone growth stimulators and bone allograft. It concluded the purchases were unauthorized and should not have been made. Baptist notified Yielding's neurosurgeon-employer by email that the purchases of the bone growth stimulators and allograft were "very suspicious" and it was continuing its investigation. Uninvolved in the scheme, the neurosurgeon forwarded the email to Yielding as a matter of routine.

Three days later a cashier's check in the amount of $34,018.90 was issued payable to ANI. It was the precise amount of ANI's illicit payments to the charge nurse. The remitter line on the check read "REPAYMENT OF LOAN." Bank records for that day show that Yielding withdrew a certain amount of funds from his personal account and deposited an amount sufficient to purchase the cashier's check. According to the charge nurse, who later pled guilty and testified for the government, Yielding came to him in December 2004, after receiving the email from his neurosurgeon-employer about Baptist's internal investigation, told him to "keep it quiet," and asked him to execute a promissory note to make it appear to have been signed in January 2004. Yielding also asked the charge nurse to sign the cashier's check that would make the payment from ANI to the charge nurse look like a loan.

In mid-2005, the FBI opened an investigation. In April 2006, it executed a search warrant at Yielding's house, seizing the false ANI promissory note signed by the charge nurse and dated January 2004 and marked as paid in December 2004. Yielding's wife told the FBI that she and her husband loaned the charge nurse the funds reflected in the ANI promissory note and that the charge nurse had paid the loan back. Yielding initially told the same story. When confronted with bank records showing his purchase of the cashier's check, Yielding told the FBI that the charge nurse instigated the scheme.

Prior to trial, Yielding's wife passed away. But Yielding was indicted, tried and convicted. His crime: helping his wife create ANI documents to support the bogus loan to influence Baptist's inquiry to conclude there was no wrongdoing, thereby reducing the likelihood of any further law enforcement investigation.

Section 1519 and Its Legislative History

Section 1519 was passed as part of the Sarbanes-Oxley Act of 2002[5] to address the Congressional view that the existing federal statutes dealing with obstructive behavior were riddled with loopholes and burdensome proof requirements. For example, according to the Senate Report on § 1519, 18 U.S.C. § 1503 had been narrowly interpreted "to apply only to situations where the obstruction of justice can be closely tied to a pending judicial proceeding."[6] Other federal statutes covering obstructive conduct focused more on the different types of government functions that were obstructed.[7] And, in the *Arthur Andersen* case, prosecutors had to use the "witness tampering" statute, 18 U.S.C. § 1512, to prosecute persons for shredding documents using the "legal fiction" that the defendants were being prosecuted for telling other persons to shred documents, not simply for destroying evidence themselves. Congress wanted a

statute without “overly technical legal distinctions” so that when a person destroyed evidence with the intent of obstructing any type of investigation or matter within the jurisdiction of a federal agency, prosecutors would face few encumbrances to their efforts.[8]

Consequently, § 1519 was meant to apply broadly to all acts to destroy or fabricate evidence so long as they are done with intent to impede or influence an investigation or proper administration of any matter within the jurisdiction of an agency of the United States, or are such acts done either in relation to or in contemplation of such a matter or investigation. No technical requirement was included to tie obstructive conduct to a pending or imminent proceeding or matter. Acts done in contemplation of, or in relation to, a matter or investigation were also covered by § 1519.[9] Distinctions between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries (regardless of their title) were eliminated. Destroying or falsifying documents to impede these types of matters or investigations, which in fact are within the jurisdiction of any federal agency, are within § 1519’s ambit.[10]

Though originally cast as an “anti-shredding” statute, prosecutors have used § 1519 to charge criminal acts ranging from altering a password to files on a personal home computer[11] to making false oral statements to private attorneys conducting internal investigations for private companies.[12] The government’s aggressive application of § 1519 is due to the statute’s broad language and the concomitant expansive judicial interpretation of the statute.

For example, citing the plain language of the statute and its legislative history, the Second Circuit in *United States v. Gray* recently held that § 1519 does not require prosecutors to prove a nexus between a defendant’s obstructive conduct and a pending official proceeding.[13] Notably, *Gray* involved false statements made by defendants in an internal investigation by a privately-owned prison. The lack of a nexus requirement means that a defendant need merely contemplate the potential for a future investigation in taking actions to conceal or manipulate evidence.[14]

While most courts conclude that obstructive conduct under § 1519 does not need to be linked to a particular official proceeding, the statute has been interpreted as a specific intent crime. Thus, a defendant must act intentionally or willfully to impede, obstruct, or influence an investigation of the proper administration of a matter to be culpable. For example, in *United States v. Stevens*, the court concluded that a defense of good faith reliance on the advice of counsel was available to a defendant charged under § 1519, and if proven, would negate the government’s required showing of wrongful intent.[15]

In the context of internal investigations, § 1519 has been used to prosecute both company employees taking steps in reaction to the investigation, as noted earlier, and even counsel participating in the investigation. In *United States v. Ray*,[16] an employee was prosecuted under § 1519 for false oral statements given during an internal organizational investigation. The statements were made by a company executive to counsel conducting an internal investigation at the request of the company’s audit committee. Ray’s false statements pertaining to the practices involving back-dating of stock options were before any government agency had inquired of the company. Rather, the audit committee was considering whether any revised disclosure in the company’s SEC filings might be necessary. In *United States v. Carson*,[17] the government brought charges under § 1519 against an employee who, upon learning of the retention of counsel to conduct an internal investigation into possible corrupt payments and FCPA exposure, allegedly flushed documents down the toilet in the company’s bathroom and provided false and misleading information to attorneys conducting the investigation, all before the government commenced its investigation.

In *United States v. Russell*,[18] the defendant was an attorney who represented a church, one of whose employees was discovered to have child pornography on his computer. After referring the employee to a criminal defense lawyer, Russell (who considered the computer contraband) took the computer apart, thereby impairing its integrity and making it unavailable to the FBI in its subsequent investigation of the employee. The defendant-attorney was indicted for violating § 1519.[19] In *Stevens*, in-house counsel tasked with gathering information and responding to an FDA inquiry into off-label promotion of a prescription drug was charged under § 1519 for withholding presentation slides used by speakers at promotional events discussing off-label uses of the drug and making false statements in written responses to the FDA.[20]

Internal Investigation Issues

Use of § 1519 to prosecute conduct committed during internal investigations will complicate corporate counsel’s role. In those internal investigations where the organization is the victim, counsel’s primary role is ferreting out the facts. But where prosecution of the organization based upon the inquiry’s findings is possible, counsel has a dual role: finding the facts and developing defenses. In fulfilling the latter task, counsel’s advocate role may involve a more partisan characterization of what happened rather than a dispassionate recital. What if the government believes counsel went too far in crafting the facts? Can the attorney be prosecuted for presenting those “crafted” facts to the government in the form of the results of a purportedly balanced internal investigation? The *Russell* case presents an extreme example where investigative counsel’s actions during the internal investigation were the basis for his later being charged under § 1519. Maybe this issue will arise only in such extreme cases. But, then again, maybe it will not.[21]

At present there are only a handful of reported cases where prosecutions under § 1519 were based upon activities in a connection with a non-law enforcement investigation. But these cases demonstrate that corporate counsel must not only determine whether substantive violations occurred in the organization, but also scrutinize more closely the responses to the internal inquiry to uncover conduct possibly offending § 1519. Prosecutions based upon those responses, including actions done in contemplation of, and during, counsel’s interviews of employees, are a realistic probability. Additionally, one intriguing unanswered question is whether § 1519’s prohibition against “conceal[ing], cover[ing] up . . . any record, document, or tangible object” creates, by implication, an obligation on corporate counsel who represents an entity without Fifth Amendment protections against self-incrimination, or the entity itself, to disclose unfavorable documents or information obtained during the investigation?

New questions arise, while old strategies need to be re-evaluated. For example, should the warnings given to the interviewee, commonly referred to as *Upjohn* warnings,[22] include advice as to § 1519? Will giving this warning before the interview decrease the likelihood that employees will consent to be interviewed? Should one withhold the portion of the warning dealing with § 1519 at the beginning of the interview and give it only if it appears § 1519 is implicated during the interview? Will the existing tensions inherent in these interviews be exacerbated? How will the possibility that corporate counsel may be a witness against the employee affect the interview? Will the interview have to be more precisely scripted? Will memoranda outlining the substance of the interview have to be much more complete?

And how will this extension of potential criminal liability into the organization's internal investigative process affect the organization's relationships with its employees generally? The areas of potential conflict are surely magnified. Previously non-prosecutable attempts to influence improperly the internal investigation may now be crimes, whether they succeed or not. Will corporate counsel, knowing that the organization is likely to cooperate with the government by sharing their investigative results to secure leniency, be inclined to act more like a prosecutor to garner even greater favor with the government?[23] Answers to these questions, and others, are not known precisely.

The breadth of § 1519 also expands federal contract, grant, or programmatic criminal liability. The jury was instructed that Yielding could be found guilty for obstructing "the proper administration of a *pending* matter, namely, the provision of products to Medicare patients," presumably by creating false documents that precluded Medicare from adequately assessing the purchases and use of the items.[24] In *Gray,* the court found that the private prison had a contractual obligation to report excessive force allegations to the U.S. Marshal's Office, the federal contracting agency. These connections between the private inquiry and later federal involvement, one through a federal healthcare program and the other under a federal contract, served as a basis for liability.

All agencies that administer federal contracts, grants, and programs rely upon accurate information to fulfill their administrative role. Documents are created, submitted, and subject to review as part of the administrative role. Providing any misleading information in these documents could theoretically "impede, obstruct, or influence" the proper administration of the matter. Alteration of documents to reflect what was expected to happen as compared to what was actually done in relation to a federal contract, grant, or other program could be a new offense. Similarly failing to document something required to be noted could be a federal offense.[25] This offense, punishable by 20 years in prison, is in addition to existing federal statutes that proscribe specifically supplying false information to the administrator of a grant, contract or program.[26]

Conclusion

Enacted to address issues Congress perceived in the matrix of federal statutes covering obstructive conduct in response to one high-profile case, § 1519 is another example of an extremely broadly worded statute that raises more issues than it addresses. Its use to penetrate the internal investigative process of organizations may very well interfere with the determination of facts. Why? Because it creates criminal liability for misleading conduct, whether perceived accurately or not, well before any interaction with the government. And, it adds a new layer of potential criminal charges superimposed over the remaining provisions of Title 18 dealing with submitting false, fraudulent or misleading information to federal agencies. It is another example of piling on. The specter of this liability raises serious legal and ethical issues for corporate counsel in ferreting out wrongdoing in the organization.

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[2] *United States v. Yielding*, 657 F.3d 688(8th Cir. 2011).

[3] 42 U.S.C. § 1320a-7(b)(2).

[4] Concurrent sentences of 60 months on the former charge and 78 months on the latter were imposed. *Yielding*, 657 F.3d at 697. Yielding was also ordered to pay nearly $1 million in restitution. *Id.*

[5] Pub. L. No. 107-204, § 802(a), 116 Stat. 745, 800.

[6] S. Rep. No. 107-146, at 6–7 (2002).

[7] *Id.*at 7.

[8] S. Rep. No. 107-146, at 7.

[9] Section 1519 provides that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes 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 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."

[10] S. Rep. No. 107-146, at 15.

[11] *See United States v. Kernell*, No. 3:08-CR-142, 2010 WL 1543846, at *2 (E.D. Tenn. Mar. 30, 2010).

[12] *See United States v. Gray*, 642 F.3d 371, 374 (2d Cir. 2011); Indictment ¶ 37, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Apr. 8, 2009) (ECF No. 1); Information ¶ 10, *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008) (ECF No. 1).

[13] 642 F.3d at 377.

[14] *See, e.g.*, *United States v. Fontenot*, 611 F.3d 734, 737–38 (11th Cir. 2010) (conviction under § 1519 possible even where defendant does not know an investigation will fall within the jurisdiction of the federal government); *Kernell*, 2010 WL 1543846, at *7 (same). *But see United States v. Hayes*, No. 3:09-cr-397, 2010 WL 2696894, at *5–6 (M.D. Pa. July 7, 2010) ("[T]he fact that § 1519 contains this all-encompassing, broad language, creates an even greater need for a nexus requirement. Without the requirement, the danger of both the lack of notice and criminalization of innocent actions which was contemplated by *Aguilar* and *Arthur Andersen* is present in § 1519. Therefore, § 1519 requires a nexus between the alleged obstruction and the matter within United States jurisdiction which the action is contemplated to obstruct.").

[15] 771 F. Supp. 2d 556, 560–62 (D. Md. 2011).

[16] *See* Information ¶ 10, *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008) (ECF No. 1).

[17] *See* Indictment ¶ 37, *United States v. Carson*, No. 8:09-cr-00077 (C.D. Cal. Apr. 8, 2009) (ECF No. 1).

[18] 639 F. Supp. 2d 226, 231 (D. Conn. 2007).

[19] Russell ultimately pled guilty to Misprision of a Felony, 18 U.S.C. § 4.

[20] Stevens was acquitted after presenting a successful reliance upon counsel defense.

[21] *Cf. United States v. Stevens*,discussed above. *But see* 18 U.S.C. § 1515(c) (stating that Title 18, Chapter 73, entitled Obstruction of Justice, "does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.").

[22] *Upjohn v. United States*, 449 U.S. 383 (1981).

[23] These inclinations can lead to serious abuses. *See, e.g.*,*United States v. Stein,* 495 F. Supp. 2d 390, 427 (S.D.N.Y. 2007) (dismissing the indictment against thirteen former KPMG employees and stating that KPMG's cooperative efforts in conjunction with the government's improper coercive actions relating to that cooperation interfered with the defendants' Sixth Amendment rights). § 1519's impact may be consistent with federal efforts to incentivize organizations to investigate, remediate and cooperate, including identifying culpable parties, to avoid prosecution and garner lesser sentences. *See, e.g.*, U.S. Dep't of Justice, *United States Attorneys' Manual*, chs. 9-28.720(a) (Cooperation: Disclosing the Relevant Facts), 9-28.730 (Obstructing the Investigation); U.S. Sentencing Comm'n,*Federal Sentencing Guidelines Manual* § 8C2.5(g) at 527 (2011) (Self-Reporting, Cooperation, and Acceptance of Responsibility); *In re Gisela de Leon-Meredith*, Exchange Act Release No. 44969, 76 SEC Docket 220 (Oct. 23, 2001) (noting that company produced details of internal investigation to government officials).

[24] 657 F.3d at 715.

[25] *United States v. Jho*, 534 F.3d 398, 401 (5th Cir. 2008) (defendant charged with violating § 1519 because he failed to maintain records relating to oil spills contrary to the provisions of the Marcol Protocol ultimately entered a plea agreement under which he pled guilty to 33 U.S.C. § 1908)

[26] *See, e.g*., 18 U.S.C. § 1005 (Bank Entries, Reports and Transactions); 18 U.S.C. § 1006 (Federal Credit Institution Entries, Reports and Transactions); 18 U.S.C. § 1010 (Department of Housing and Urban Development and Federal Housing Administration Transactions); 18 U.S.C. § 1007 (Federal Deposit Insurance Corporation Transactions); 18 U.S.C. § 1027 (False statements and Concealment of Facts in Relation to Documents Required by the Employee Retirement Income Security Act of 1974); 18 U.S.C. § 287 (False, Fictitious, or Fraudulent Claims).