# Federal Criminal Investigations of Lawyers: Risks and Consequences

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This article reflects the views of its authors and does not speak for the panel generally or the authors' law firm, Jones Day.

## I. INTRODUCTION

Attorneys are bound by the same criminal laws as everyone else. They can be prosecuted for committing mail or wire fraud, embezzling money, laundering money from an illicit source, or bribing foreign officials to facilitate local business transactions. But as white-collar crimes have become more complex and socially destructive (e.g., the Enron scandal), Congress has expanded the application of federal criminal law to business-connected activities, and the Department of Justice has put a very high priority on convicting corporate wrongdoers. On any given day, the Department of Justice and many other federal agencies are conducting inquiries or investigations of many corporations large and small. This presents certain risks for corporate attorneys because many of their core responsibilities—advising a client on whether a particular course of action is "legal," handling inquiries and document requests from federal agencies, even crafting and enforcing document-retention policies—can lead to scrutiny of the attorney's conduct through the prism of criminal law. In-house counsel may have more day-to-day exposure to

these risks, but both inside and outside counsel render advice or interact with the government on behalf of their clients in ways that could present risk. This short article identifies some of the thornier issues and offers some thoughts on how to minimize the risk of running afoul of the Department of Justice while still fulfilling one's duty to the client.

## II. CRIMINAL LIABILITY FOR ATTORNEYS: SOME SPECIFIC ISSUES

### A. Obstruction of Justice and False Statements

Of all the federal criminal statutes, corporate lawyers are likeliest to encounter those relating to obstruction of justice and false statements. The obstruction of justice statutes have always been particularly expansive in their reach and have recently become more so. Prior to the Sarbanes-Oxley Act, only individuals who acted with a "corrupt purpose" to influence an "official proceeding" risked criminal liability. The breadth of pre-SOX obstruction was on display in the well-publicized, multi-year prosecution of Arthur Andersen, LLP. In that case, following the SEC's public announcement of its investigation into Enron, an in-house attorney instructed other Arthur Andersen employees to comply with the company's document-retention policy—an

instruction that caused those employees to destroy a number of documents related to Enron. Despite the absence of direct evidence of criminal intent and despite the Department of Justice's decision not to accuse the attorney involved of any crime, Arthur Andersen was initially convicted of obstruction of justice for destroying these documents. As the Supreme Court later noted in overturning the conviction, "it is striking how little culpability the [jury] instructions required. For example, the jury was told that, 'even if [Arthur Andersen] honestly and sincerely believed that its conduct was lawful, you may find [the company] guilty.'" *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (quoting the jury instructions). Although Arthur Andersen won a reversal of its conviction in the Supreme Court, this "victory" came only after the prosecution essentially destroyed the company.

After *Arthur Andersen*, Sarbanes-Oxley added a new provision to the criminal code which extends obstruction of justice liability to anyone who

> 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.

18 U.S.C. § 1519 (emphasis added). This provision thus criminalizes the destruction of any document "in relation to or contemplation of" any investigation by any department or agency of the United States, whether at present or in the future. No longer must defendants have a "corrupt" purpose, or intend to stymie an existing investigation. To run afoul of the law, a defendant need only act with "the intent to impede, obstruct, or influence the proper administration of *any matter* within the jurisdiction of [a U.S. agency]." *United States v. Kun Yun Jho*, 465 F.Supp.2d 618, 636 (E.D. Tex. 2006).

Indeed, obstruction can result in a federal prosecution even if the obstructing party never interacts with federal officials. In *United States v. Ray*, No. 2:08-cr-01443 (C.D. Cal. Dec. 15, 2008), for example, the government charged an executive at KB Homes with conspiring to commit obstruction of justice by agreeing with another executive to make false statements to the company's general counsel during an internal investigation. Mr. Ray pleaded guilty to these charges even though he was obstructing only a private, internal investigation by in-house counsel, and even

though no federal investigation had been initiated at the time. Mr. Ray did, however, admit in his plea agreement that he knew the internal investigation could result in SEC charges. *See* Docket Entry 3, *United States v. Ray*, No. 2:08-cr-01443, at 21-22 (C.D. Cal. Dec. 15, 2008).

The false statements statute is also very broad, applying to almost any interaction with a federal employee. The statute reaches anyone who

> in *any matter* within the jurisdiction of the executive, legislative, or judicial branch of the government of the United States, knowingly and willfully . . . conceals . . . a material fact; [or] . . . makes any materially false, fictitious, or fraudulent statement or misrepresentation; or [] makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry . . . .

18 U.S.C. § 1001 (emphasis added). As Judge Kavanaugh from the D.C. Circuit has explained, the statute "applies to virtually any statement an individual makes to virtually any federal government official—even when the individual making the statement is not under oath (unlike in perjury cases) or otherwise aware that criminal punishment can result from a false statement." *United States v. Moore*, 612 F.3d 698, 703 (D.C. Cir. 2010) (Kavanaugh, J., concurring).

These statutes present genuine risks for attorneys. Attorneys who do not draw lines between statements made as advocacy for their clients and statements of fact, or who make categorical statements to federal officials when some nuance was required for complete accuracy, or who fail to disclose documents—whatever their actual, subjective reasons—might look like intentional obstructers of justice in retrospect, particularly if their corporate client was actually engaged in wrongdoing.

In November 2010, a federal grand jury indicted an in-house lawyer at GlaxoSmithKline ("GSK"), for allegedly concealing documents, obstructing an FDA investigation, and making false statements to federal officials.[1] The indictment, which grew out of an informal FDA investigation into GSK for allegedly sponsoring illegal off-label promotion of an anti-depressant drug, alleges that the in-house lawyer withheld some key documents and issued false denials of wrongdoing on the company's behalf in letters sent to the FDA. For example, in one letter, the attorney stated that GSK "has not developed, devised,

[1] Of course, the authors of this article have no "inside" information on the merits of the charge. We know only what we have read in the media and in public court filings.

established, or maintained any program or activity to promote or encourage, either directly or indirectly, the use of [that particular drug] as a means to achieve weight loss or treat obesity." Docket Entry 1, No. RWT-10-0694, at 7 (D. Md. Nov. 8, 2010) (quoting Feb. 28, 2003 letter). The government alleges that the in-house lawyer made this statement even though she "knew that [GSK] had maintained programs and activities that directly and indirectly promoted and encouraged the use of [the drug] to achieve weight loss and treat obesity." *Id.*

Again, without making any comment on the merits of the pending case, the in-house lawyer was apparently involved in two common activities of corporate attorneys faced with an inquiry from a government agency: (1) advocating that her client had not acted improperly; and (2) deciding which documents should be produced. Keep in mind that the GSK in-house attorney was not responding to a grand jury subpoena, but to an informal letter request from the federal agency that was the day-to-day regulator of her company's industry, such that communication between inside counsel and the agency was presumably a regularly occurring event. For many lawyers acting for a client in a similar

context, personal exposure to criminal prosecution would not necessarily even be on their radar screens.

A further lesson may be gleaned from a document that figures prominently in the indictment. The indictment alleges that during the document production, GSK's in-house counsel asked other attorneys to prepare a memorandum summarizing the pros and cons of producing some allegedly incriminating documents. The resulting memo listed as a "con" that production "[p]rovides incriminating evidence about potential off-label promotion of [the drug at issue] that may be used against [GSK] in this or a future investigation." Docket Entry 1, No. RWT-10-0694 at 9. This statement in an internal memo now looks likely to play an important role in the government's case.

Regardless of whether the conduct of GSK's in-house lawyer is proven to be criminal, her prosecution highlights several of the risks facing lawyers who represent companies subject to government inquiry. Deciding which documents should be produced while arguing to regulators that the corporation has done nothing wrong is a routine responsibility of many business lawyers. This case draws attention to the possible risk for a lawyer who expansively advocates a client's innocence while being aware

of some evidence which may be viewed as contradicting that claim. Whatever the significance of the pros-and-cons memorandum turns out to be, it demonstrates that statements made during internal deliberations among counsel can have serious consequences in the criminal arena. The indictment also makes use of alleged statements by the in-house counsel in letters to the FDA that the production was "complete." This suggests that counsel responding to document requests from government agencies should use great care in their communications as to how they describe their production. Finally, this prosecution demonstrates that even informal, voluntary requests without subpoenas or civil investigative demands can carry risks for all involved and therefore deserve very careful handling.

### B. Advice of Counsel

Advising clients presents many of the same risks as interacting with regulators. Businesses and individuals defending themselves against charges of complex criminal conduct sometimes defend those charges by arguing that they acted on the advice of counsel. To make this argument, a defendant must establish that he or she fully disclosed all relevant information to

his attorney, received a reasonable legal opinion from that attorney, and relied on the opinion in good faith.

As regulations become increasingly complex, lawyers are responsible for educating clients about the outer boundaries of legality. The often blurred character of these boundaries, in turn, requires difficult judgment calls that maximize flexibility for clients without crossing the line into illegality. Of course, the advice of counsel defense is not intended to allow lawyers to arbitrarily or maliciously provide a cleansing bath to conduct that is, in fact, illegal. When outside counsel appear to prosecutors to have stretched the law "too far," prosecutors have the option to investigate, indict, and prosecute them.

In an investigation by the DOJ regarding wealthy individuals who utilized aggressive tax shelters, the criminal liability ultimately fell on the professionals—the lawyers and the accountants.[2] The government alleged that the lawyers and accountants blessed tax shelters as legitimate despite knowing that

[2] *See, e.g.*, Lynnley Browning, *3 Convicted in KPMG Tax Fraud Case*, New York Times (Dec. 17, 2008) (available online at http://www.nytimes.com/2008/12/18/business/18kpmg.html) (last checked March 10, 2011).

they violated the federal tax laws and, in doing so, themselves broke the law. These prosecutions illustrate that advice of counsel originally intended to provide clients with defenses to civil fraud penalties can, when the government can prove that the advice was not given in good faith, result in the providers of that advice being charged with federal crimes.

For in-house counsel, reliance on the advice of outside lawyers provides a very uncertain shield. For example, in the case of GSK's in-house counsel, after her defense attorneys indicated their intent to pursue an advice of counsel defense based on her interaction with outside lawyers on the issues in question, the government moved to preclude advice of counsel as a defense to obstruction of justice, on the theory that obstruction is a general intent crime for which belief in the legality of one's actions is irrelevant. The government explained that "[s]uch advice would not negate the only elements of the crime: knowledge of the facts and the intent to make evidence unavailable in an investigation." Docket Entry 19, No. RWT-10-0694, at 11.

The government's position, if correct, would demonstrate a weakness of the advice of counsel defense. The government's interpretation means—in theory—that a lawyer can commit

obstruction by withholding a document even if that lawyer was advised by outside counsel that the company did not need to produce it. The lawyer need only knowingly not produce the document, at least in part, because the document was harmful to the client.

Further, the prosecution of GSK's former in-house counsel even hints at the possibility of the advice of outside counsel forming the basis of a conspiracy between in-house and outside counsel to deceive regulators. As the government explained in its motion to exclude the advice of counsel defense, the "advice of counsel defense" is "not available where the counsel participates in the crime." *Id.* at 17 (citing *United States v. West*, 392 F.3d 450, 457 (D.C. Cir. 2004)). The defense is not available to GSK's in-house lawyer, the government argued, "if the evidence shows that some other counsel agreed with [her] to conceal the 'incriminating' documents and information from the FDA." *Id.* at 17. This reasoning suggests that if GSK's outside counsel advised GSK's in-house lawyer that certain documents need not be produced, that advice not only failed to insulate GSK's in-house lawyer from liability, but may have exposed the outside lawyers to co-conspirator liability. Indeed, GSK's in-house lawyer has since

filed a motion to compel the government to divulge the names of her "alleged co-conspirators." Docket Entry 48, No. RWT-10-0694 (D. Md. Feb. 23, 2011).[3] Given the large numbers of lawyers who are involved from time to time in responding to complex document requests from a governmental agency, there are lessons to be drawn from this case, no matter its ultimate merit.

### C. The Crime-Fraud Exception to the Attorney-Client Privilege

Finally, it is important to note the fragility of the attorney-client privilege in the criminal context. First, while the Department of Justice is no longer as aggressive as it once was in seeking corporate privilege waivers, other federal and state agencies have not changed their policies to move away from demanding waivers. Furthermore, even if no privilege waiver is demanded, the client may decide to waive "voluntarily" in order to seek the positive treatment still available to companies that choose to waive.

[3] As of March 8, 2011, the government had not publicly responded to this motion, though many motions and documents are now being filed under seal.

Also, under the crime-fraud exception to the attorney-client privilege, "the 'privilege is [ ] forfeited if the attorney is assisting his client to commit a crime or a fraud.'" *United States v. Al-Shahin*, 474 F.3d 941, 946 (7th Cir. 2007) (quoting *Mattenson v. Baxter Healthcare Corp.*, 438 F.3d 763, 769 (7th Cir. 2006)). This exception operates identically whether the attorney actively participated in his client's crime (like an attorney who conspires with his client to forge financial statements) or was merely his client's unknowing tool in committing the crime (like an attorney who produces a fabricated document to the government after his client assured him or her that it was authentic). *See, e.g., In re Sealed Case*, 676 F.2d 793, 812 (D.C. Cir. 1982) ("[A] guilty client may not use the innocence or ignorance of its attorney to claim the court's protection against a grand jury subpoena."). In either scenario, the privilege is lost.

Proving the use of an attorney to commit a crime or fraud sufficient to break the attorney-client privilege is surprisingly easy. The party seeking to bust the privilege need only provide "prima facie" evidence of the involvement of the attorney in the crime or fraud (whether innocently or intentionally), and when "that evidence is supplied, the seal of secrecy is broken." *United States*

*v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993). The prima facie bar is low; it requires only "evidence sufficient 'to require the adverse party, the one with superior access to the evidence and in the best position to explain things, to come forward with that explanation.'" *Id.* (quoting *Matter of Feldberg*, 862 F.2d 622, 626 (7th Cir. 1985)).

Once the government provides the prima facie evidence, the district judge usually conducts a (often *in camera*) review of the privileged communications. The judge then determines whether the party seeking to preserve the privilege has provided a "satisfactory" explanation for why the crime-fraud exception does not apply, and that decision "may be disturbed only for an abuse of discretion." *Id.* In practice, this exception means that whenever the government or another litigant provides some evidence of attorney participation in a crime or fraud, the trial judge will get to pore through privileged communications and will have broad discretion to provide them to the prosecutors and to admit them at trial.

## III. PRACTICAL CONSIDERATIONS AND CONSEQUENCES

There are several general principles that lawyers should keep in mind to minimize exposure to criminal liability for their clients and themselves.

First, lawyers need to be aware of the context in which they give legal advice. For example, a lawyer at a large company who knows that a major federal task force is preparing charges against one of that company's primary clients must keep that investigation in mind when giving advice on otherwise innocuous matters. If things explode later, every action will be viewed through the prism of the then-ongoing investigation.

Second, lawyers should account for the possibility that investigators may someday read all internal communications, including those thought to be solidly privileged when written. The attorney-client privilege is a powerful shield but, as we have seen, it is by no means impenetrable. In addition to the occasional application of the crime fraud exception to the privilege, investigations not infrequently take twists and turns that lead to the client waiving its privilege. This means that even in internal communications, lawyers need to avoid making careless

statements which might be seen as incriminating of the lawyer or the client.

Third, the line between giving abstract legal advice and engaging in primary conduct is not always clear. Not infrequently, a lawyer opines that some conduct should not, in his or her opinion, be a violation of the law and the client company acts on that advice. Certain areas of the law—for example, what sales practices may violate the federal Anti-Kickback Statute—are certainly subject to divergent views. In some cases, prosecutors may vehemently disagree with the in-house or outside attorney's conclusion that the conduct was lawful. If the legal advice is offered as a defense, the prosecutors must decide whether it was offered and received in good faith. If they decide it was, then there will ordinarily be no prosecution. If, however, they decide that no reasonable lawyer could have thought the proposed sales practice was "legal," then they may decide that the lawyer was merely attempting to insulate a scheme that he or she knew was illegal from later prosecution. On that determination by the prosecutors rests the fate of the lawyer who gave the advice, whether or not that lawyer will be under criminal investigation for years (or worse), and whether or not that lawyer's advice helps the client

establish its good faith. Although most prosecutors may be slow to conclude that an attorney advising a client or producing documents on its behalf acted in criminally bad faith, exercising care in these situations will reduce the chances that a prosecutor might so conclude.

Every communication matters, and lawyers need to be careful about making overly broad or categorical statements to federal officials. Overstating the case may a serial practice in brief writing, but when dealing with regulators it can be risky. Even inadvertent misstatements might create serious risk.

## IV. CONCLUSION

Ultimately, as the prosecution of business crimes remain a priority and many industries are subject to substantial regulation, business lawyers will inevitably face more circumstances where their advice or their handling of government inquiries will present some risk of becoming more directly involved in the criminal process. Our clients understandably demand clear guidance and aggressive advocacy, while the government understandably demands strict compliance with the law. The proliferation of regulatory complexity—whether SOX, FDA, SEC, or otherwise driven—will increasingly put lawyers in the position of policing

the line of legality. Lawyers who do break the law by pushing too far past that line should not expect a free pass from prosecutors because they are advocates rather than primary actors. Indeed, they should expect the opposite.

If prosecutions of lawyers increase, no matter how justified each individual prosecution, lawyers will more often consider their personal exposure when giving advice or otherwise acting on a client's behalf—a consideration that can be fundamentally at odds with their obligation to zealously advocate for their clients' interests. And of course, the more lawyers fear punishment for their advocacy or for their advice, the more pressure there is for them to prioritize covering their backs over serving their clients.

But because we are lawyers, we must not succumb to this pressure. We are professionally and ethically bound to be zealous advocates for our clients—both in private and in public. We betray that obligation whenever we approach a client's problem by asking "well, how does this affect me?" Our advice is all we have, and if we stop providing it in an honest and considered way, then we do a disservice to our clients and our profession. Indeed, the best personal protection for lawyers is to act prudently and

reasonably on behalf of their clients. Being aware of the backdrop of criminal law can help lawyers produce a better outcome for their clients and themselves. Criminal investigations can be harrowing experiences, but prosecutors are generally reasonable public servants who only prosecute people that they truly believe are culpable criminals. Thus, lawyers who are honest in their judgment and candid with their clients should have nothing to fear.

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Dan Reidy is a trial lawyer with extensive experience handling numerous "high-profile" cases. He represents companies and individuals involved in criminal and other enforcement investigations. Dan also represents companies in complex civil litigation of all kinds, including patent, securities, False Claims Act, antitrust, post-acquisition, labor and employment, and commercial disputes.

As lead counsel, Dan has tried civil and criminal cases to bench and to jury in state and federal courts, representing both defendants and plaintiffs. Dan's practice also involves counseling companies, boards of directors, and audit and special committees in situations involving financial restatements, derivative claims, and criminal investigations of senior company officers, among others. As a prosecutor and ultimately as first assistant in the Chicago U.S. Attorney's Office, he focused on matters involving allegations of complex financial crimes. He was the lead prosecutor in the "Greylord" judicial corruption project and personally prosecuted a number of judges, lawyers, and court personnel.

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**James Burnham**

James Burnham is a new lawyer at Jones Day. He was formerly a law clerk to Chief Judge Alex Kozinski on the Ninth Circuit Court of Appeals. James graduated from the University of Chicago Law School in 2009 with high honors and, during law school, worked in the Federal Criminal Justice Project, a clinic devoted to litigating federal criminal cases in district court and on appeal.