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Article 1

In-house Counsel Beware!

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“[A] lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud.”¹

Judge Roger W. Titus

INTRODUCTION

The May 2011 trial of Lauren Stevens, the former Vice President and Associate General Counsel of GlaxoSmithKline (GSK), ended in a judgment of acquittal before the defense called a single witness.² The government charged Stevens with obstruction of justice and false statements for failing to turn over allegedly incriminating documents in response to a voluntary request for information from the Food and Drug Administration (FDA) in 2002.³ The FDA inquiry concerned whether GSK improperly promoted its FDA-approved depression drug, Wellbutrin, for an unapproved use—weight loss—in violation of the Food, Drug, and Cosmetic Act.⁴ Judge Titus, who presided over Stevens’ trial, found that Stevens acted in good faith and on the reliance of counsel in her response to the FDA’s inquiry about Wellbutrin.⁵ Thus, Judge Titus held that a reasonable jury could not convict Stevens and granted her motion for a judgment of acquittal.⁶

Members of the defense bar watched the case closely out of fear that a guilty verdict might hamper their ability to represent their clients zealously. After Judge Titus’ ruling, the defense bar breathed a collective sigh of relief. But, it is not clear that defense attorneys are out of prosecutors’ crosshairs simply because of the Stevens acquittal. Indeed, the prosecution of Stevens reflects and expands on several recent trends in prosecution that will probably not change as a result of the acquittal. First, the government, particularly the FDA, has shifted its focus from prosecuting corporations to prosecuting individuals for misconduct in corporations.⁷ The FDA has made recent

1. Transcript of Trial at 9–10, *United States v. Stevens*, No. RWT-10-694 (D. Md. May 10, 2011) [hereinafter *Stevens Transcript*].

2. *Id.* at 10.

3. Indictment, *United States v. Stevens*, No. RWT-10-694 (D. Md. April 13, 2011) [hereinafter *Stevens Indictment*].

4. 21 U.S.C. § 301 (2010).

5. *Stevens Transcript*, *supra* note 1, at 5.

6. *Id.* at 9–10.

7. *See, e.g.*, Lanny A. Breuer, Assistant Att’y Gen., Criminal Div., Prepared Address to the 22nd National Forum on the Foreign Corrupt Practices Act (Nov. 17,

pronouncements about its desire to hold responsible corporate officers accountable for misconduct at pharmaceutical companies.⁸ The FDA has also charged executives with misdemeanors in high-profile health care fraud cases in an effort to deter improper marketing practices within health care companies.⁹ It is possible that the government's prosecution of Stevens was an attempt to hold someone in the corporation responsible for the alleged illegal promotional activities of GSK. If the Stevens prosecution is a natural outgrowth of the government's effort to prosecute individuals, then Stevens' acquittal may not deter the government from indicting in-house counsel in the future.

Second, in addition to holding corporate officers responsible for conduct within the firm, the government has stepped up its effort to hold lawyers accountable as gatekeepers at their respective organizations. The government has not been shy about prosecuting in-house counsel at securities firms for facilitating or actively engaging in securities violations with their clients.¹⁰ Prior to the Stevens prosecution, however, the government's focus on in-house attorneys appeared to be based on their involvement in the misconduct.¹¹ Thus, the Stevens prosecution expands the scope of gatekeeper prosecutions because there is no allegation that Stevens was involved in the actual wrongdoing. As the government has ramped up its efforts to hold in-house

2009) [hereinafter Breuer Prepared Address], *available at* <http://www.justice.gov/criminal/pr/speeches-testimony/documents/11-17-09aagbreuer-remarks-fcpa.pdf> (“[P]rosecution of individuals is a cornerstone of our enforcement strategy.”); Lanny A. Breuer, Assistant Att’y Gen., Criminal Div., Prepared Keynote Address to the Tenth Annual Pharmaceutical Regulatory and Compliance Congress and Best Practices Forum (Nov. 12, 2009) [hereinafter Breuer Keynote], *available at* http://www.ehcca.com/presentations/pharmacongress10/breuer_2.pdf (“Pharmaceutical companies must ensure that they are dealing honestly and fairly with . . . government programs. And if they don’t, the Department of Justice will be vigilant in holding companies and individuals who break the law accountable . . . by bringing criminal indictments if the facts and the law warrant.”); Letter from Margaret Hamburg, Comm’r of Food and Drugs, Food and Drug Admin., to the Hon. Charles E. Grassley, Ranking Member, Senate Comm. on Fin. (Mar. 4, 2010) [hereinafter Hamburg Letter], *available at* <http://grassley.senate.gov/about/upload/FDA-3-4-10-Hamburg-letter-to-Grassley-re-GAO-report-on-OCI.pdf> (explaining the FDA’s intention to “to increase the appropriate use of misdemeanor prosecutions . . . to hold responsible corporate officials accountable”).

8. *See* Hamburg Letter, *supra* note 7.

9. *See, e.g.*, United States v. Purdue Frederick Co., 495 F. Supp. 2d 569 (W.D. Va. 2007).

10. *See infra* note 88 and accompanying text (explaining the government’s prosecution of attorneys involved in option backdating with their clients).

11. *See infra* note 88 and accompanying text.

attorneys accountable for the actions of their client corporations, it is unlikely that the outcome in the Stevens case will deter the government from continuing to expand its prosecutions of lawyers as gatekeepers.

Third, in recent years, the government has used pretextual prosecutions based on cover-up crimes, such as obstruction of justice, as a quick and effective means of obtaining a conviction in a complicated case.¹² Thus, instead of charging the target of the investigation with the conduct that prompted the investigation, the government has chosen to charge the target for actions taken during the course of the investigation. The Stevens prosecution may reflect the government's attempt to broaden the reach of pretextual prosecutions because the initial target of the FDA's investigation was GSK, not Stevens. There is no reason to believe that the government will stop looking for ways to push the envelope through pretextual prosecutions.

Fourth, the government has a long history of attacking the corporate attorney-client privilege through its charging policies.¹³ The government posits that corporations use the corporate attorney-client privilege as a shield to thwart government inquiry into corporate practices. By targeting in-house counsel, the government can gain access to privileged documents that may reveal the misconduct of the corporation.¹⁴ Because the government has a long-standing distrust of the corporate attorney-client privilege, it is unlikely that the government will stop trying to find ways to pierce the privilege.

In short, it is possible that these or other trends will converge again and lead to the prosecution of in-house or outside counsel for actions in connection with the representation of a client during a government investigation. Therefore, it is necessary to examine not only these trends but also the ultimate question of whether Judge Titus is correct. Should attorneys fear being prosecuted for decisions they make during a document production because the government may not agree with their choices? Should the corporate attorney-client privi-

12. See, e.g., Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9 (2005) (detailing prosecutions of individuals for cover-up crimes rather than the substantive crime that initiated the investigation).

13. See generally Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199 (2010) [hereinafter Copeland, *Preserving*] (explaining the history of the U.S. Department of Justice charging policies and their negative impact on the corporate attorney-client privilege).

14. If an attorney is involved in a client's criminal conduct, the attorney-client privilege will not protect communications between the attorney and the client. EDNA SELAN EPSTEIN, *THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK-PRODUCT DOCTRINE* 416 (4th ed. 2001).

lege be pierced because the government believes that an attorney's actions in responding to its request for information amount to a cover-up of a client's alleged crimes? The government already has a substantial amount of leverage over defense attorneys and their corporate clients. But that leverage would be greater still if the government could threaten to prosecute the corporation's attorney and invoke the crime-fraud exception to the attorney-client privilege any time the government and the defense attorney disagree on the documents that a defense attorney must produce in response to a government inquiry. In the Stevens case, the government viewed the attorney-client privileged documents, but has still not charged the corporation or any of its employees for the alleged illegal promotion that was the original subject of investigation.¹⁵ As a matter of equity, it is difficult to understand how the government can charge an attorney for covering up a client's crime when the government has not even charged the client with a crime.

15. On November 3, 2011, GSK announced that it had agreed in principle to a three billion dollar settlement with the government to resolve civil and criminal claims regarding (1) the development and marketing of its drug Avandia, (2) the DOJ's investigation regarding GSK's fraud in the Medicare Rebate Program, and (3) the eight-year investigation into GSK's sales and marketing programs for several popular GSK drugs. Press Release, GlaxoSmithKline, GlaxoSmithKline Reaches Agreement in Principle to Resolve Multiple Investigations with U.S. Government (Nov. 3, 2011) [hereinafter GSK Press Release], available at <http://www.gsk.com/media/pressreleases/2011/2011-pressrelease-710182.htm>; see also Dominic Rushe, *GlaxoSmithKline Pays £1.9bn to Settle U.S. Legal Inquiries*, GUARDIAN (Nov. 3, 2011), <http://www.guardian.co.uk/business/2011/nov/03/glaxosmithkline-pays-three-billion-dollars-to-settle-us-probe>. The terms and payment of the settlement are to be worked out in 2012. Presumably, some portion of this settlement relates to the off-label promotion of Wellbutrin, but at the time of publication, the details are still unclear. Most likely, GSK will enter into a Corporate Integrity Agreement with the government in which GSK will agree to compliance measures to ensure that these problems do not recur. If there are criminal charges against GSK, two possible scenarios based on the government's history with these types of prosecutions emerge. First, the government might charge GSK with a misdemeanor, which would prevent GSK from facing collateral consequences of conviction, such as exclusion from participation in Medicare and Medicaid. See *infra* note 56 and accompanying text. Prosecutors often pursue this course of conduct because patients would be harmed by their inability to obtain Medicare or Medicaid reimbursements for GSK drugs. See Katrice Bridges Copeland, *Enforcing Integrity*, 87 IND. L.J. (forthcoming 2012) [hereinafter Copeland, *Enforcing Integrity*]. Alternatively, the government might charge a subsidiary of GSK with a felony and allow that subsidiary to be excluded from Medicare and Medicaid without having a negative impact on GSK's ability to participate in Medicare and Medicaid. *Id.* When the government pursued Pfizer for off-label promotion of its drug Bextra, it allowed Pfizer to create a shell subsidiary to plead guilty and be excluded from Medicare and Medicaid. *Id.* No matter which of these options the government pursues, the felony charges against Stevens were more serious than any potential criminal charges that GSK might face.

This Article argues that the prosecution of Lauren Stevens for covering up the alleged crimes of GSK was misguided both as a matter of law and a matter of policy. In particular, this Article contends that the government should not prosecute attorneys for obstruction of justice or other cover-up crimes for actions taken in good faith during a government investigation into a client's conduct.¹⁶ Part I provides background on the Lauren Stevens case and the convergence of the four prosecution trends that led the government to indict her.¹⁷ Part II argues that Lauren Stevens did not obstruct the government's investigation of GSK.¹⁸ Accordingly, the government should not have sought attorney-client privileged documents by invoking the crime-fraud exception or charged Stevens because the evidence did not support the charges. Part III argues that the government should not charge in-house or outside counsel for obstruction of justice when the attorney's actions were taken in good faith during the representation of the client. It proposes that the U.S. Department of Justice (DOJ) provide guidance to U.S. Attorneys on bringing charges against defense counsel. In addition, it recommends that the DOJ institute a rule requiring approval before instituting charges against defense counsel for actions taken during the course of the investigation.¹⁹ This Article concludes that the good faith standard, guidance to prosecutors, and an approval mechanism are necessary actions to rein in overzealous prosecutors who may seek to target their adversaries in government investigations.²⁰

I. BACKGROUND

A. The FDA's Investigation of GlaxoSmithKline

In 2002, the FDA investigated GSK for promoting Wellbutrin, an antidepressant drug, for weight loss. Under the law, a prescription drug that has been approved by the FDA for one use (depression) may not be promoted as safe and effective for an unapproved use (weight loss).²¹ The practice of promoting an approved drug for an unapproved use is referred to as off-label marketing. The FDA sent GSK a letter to inform them that the FDA had reason to believe that

16. See discussion *infra* Part III.

17. See discussion *infra* Part I.

18. See discussion *infra* Part II.

19. See discussion *infra* Part III.

20. See discussion *infra* Conclusion.

21. See Copeland, *Enforcing Integrity*, *supra* note 15.

GSK had promoted the use of Wellbutrin for weight loss, an unapproved use.²² In the letter, the FDA requested copies of materials regarding GSK's marketing programs, "including copies of all slides, videos, handouts and other materials presented or distributed at any GSK program or activity related to Wellbutrin."²³ Further, the FDA asked GSK to "identify any compensation provided to individuals involved in programs or activities related to Wellbutrin."²⁴

Lauren Stevens was in charge of GSK's response to the FDA's inquiry and investigation.²⁵ She led a group of lawyers who collected documents and information to provide to the FDA. In a telephone conference on October 25, 2002, Stevens pledged to make an effort to acquire materials from health-care professionals who made presentations at GSK-sponsored promotional programs.²⁶ She agreed to make a "good-faith effort" to attempt to collect these documents even if they were not "created by or under the custody or control of GSK."²⁷ There were more than 2000 speakers who had made presentations on Wellbutrin at GSK-sponsored events.²⁸ In December 2002, Stevens sent letters to 550 of the speakers requesting slides and materials that were used while promoting Wellbutrin.²⁹ Only forty of the speakers sent materials to Stevens in response to her letter.³⁰ Stevens did not, however, end up turning over all of the materials that she received from the speakers. Stevens withheld some slides from doctors that demonstrated that those doctors were promoting Wellbutrin for weight loss. She sent each of the offending doctors a letter admonishing them for their off-label promotion and informing them that their actions were inconsistent with the "FDA's requirements, GSK policy, and [their] contract[s] with GSK."³¹ After consulting with outside counsel, Stevens did not produce the allegedly incriminating presentation materials.³²

At the FDA's request, Stevens prepared a document that summarized the payments to doctors who were involved in programs related

22. Stevens Indictment, *supra* note 3, at 1–2.

23. *Id.*

24. *Id.*

25. *Id.* at 2.

26. *Id.* at 3.

27. *Id.*

28. *Id.* at 4.

29. *Id.*

30. *Id.*

31. *Id.* at 5.

32. *Id.* at 9–10.

to Wellbutrin. Initially, when the document was created, Stevens had included a column entitled “Entertainment” that specified any entertainment costs incurred on behalf of the doctors such as spa treatments, ski trips, and sporting events. GSK’s outside counsel, a former FDA attorney, told Stevens not to include the entertainment column.³³ Thus, she deleted that column before turning the document over to the FDA.³⁴ In her final response letter to the FDA, Stevens indicated that the production of documents was complete.³⁵ She also stated, “[a]lthough there were isolated deficiencies, the objective evidence clearly demonstrates that GlaxoSmithKline has not developed, maintained, or encouraged promotional plans or activities to promote, directly or indirectly, Wellbutrin for weight loss, the treatment of obesity, or any other unapproved indication.”³⁶ Approximately four months later, a whistleblower provided the government with slides from two doctors that showed that they promoted Wellbutrin for weight loss.³⁷ All of these facts regarding Stevens’ deliberations with outside counsel came to light because a magistrate judge in Massachusetts granted the prosecutor access to the documents based on the crime-fraud exception to the attorney-client privilege.³⁸

On November 18, 2010, Stevens was indicted for obstruction of justice, false statements, and aiding and abetting for her conduct during the 2002 investigation.³⁹ In March 2011, Judge Titus dismissed Stevens’ indictment without prejudice because the prosecutor misinformed the grand jury regarding the impact of the “advice of counsel” defense.⁴⁰ On April 13, 2011, Stevens was re-indicted for obstruction of justice and false statements. The case went to trial on April 27,

33. *Id.* at 9.

34. *Id.*

35. *Id.* at 10.

36. *Id.* at 12.

37. *Id.* at 11.

38. Judge Titus references the magistrate judge’s decision in the trial transcript, but not in a written order.

39. *See* Stevens Indictment, *supra* note 3.

40. *United States v. Stevens*, 711 F. Supp. 2d 556, 568 (D. Md. 2011). In response to a juror question about whether it mattered if Stevens “was getting direction from somebody else about how to handle this,” the prosecutor stated that the advice of counsel defense was only relevant at trial and that if the grand jurors found probable cause on the elements, that is sufficient to return an indictment. *Id.* at 564–65. The court found that this was an inappropriate response because the advice of counsel is not an affirmative defense. It negates the mens rea required for the obstruction of justice charges. *Id.*

2011.⁴¹ At the conclusion of the prosecution's case, the defendant made a motion for judgment of acquittal.⁴² The motion pointed out several deficiencies in the prosecution's case, argued that the obstruction of justice counts should be dismissed because of the safe harbor provision and maintained that Stevens' actions were based on the advice of counsel.⁴³ On May 10, 2011, Judge Titus granted the defense's motion for judgment of acquittal.⁴⁴ The judge found that Stevens' answers to the FDA requests were not perfect, but were made in good faith reliance on outside counsel's advice. The judge said, "I conclude on the basis of the record before me that only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury ever convict this defendant."⁴⁵ Reportedly, the jury applauded when the judge informed them that he was granting the judgment of acquittal and that their service was complete.⁴⁶

B. Prosecution Trends and the Lauren Stevens Case

The government's prosecution of Lauren Stevens for obstruction of justice and false statements can be explained, at least in part, by prosecution trends in the last several years. The government has increased its efforts to hold individuals responsible for conduct at corporations through the use of the "responsible corporate officer" doctrine and the prosecution of attorneys as gatekeepers.⁴⁷ Further, the government continues to demonstrate a preference for prosecuting individuals for cover-up crimes rather than the crime that initiated the investigation.⁴⁸ Finally, the government's prosecution strategy has also shown its hostility to corporate attorney-client privilege.⁴⁹

41. Tom Schoenberg, *Ex-Glaxo Lawyer 'Went Too Far,' U.S. Says at Opening of Obstruction Case*, BLOOMBERG (Apr. 27, 2011), <http://www.bloomberg.com/news/2011-04-27/ex-glaxo-lawyer-went-too-far-u-s-says-at-opening-of-obstruction-trial.html>.

42. Lauren Stevens' Motion Under Fed. R. Crim. P. 29 for Judgment of Acquittal, *United States v. Stevens*, No. 10-CR-694-RWT (D. Md. May 8, 2011) [hereinafter Stevens' Motion for Acquittal].

43. *Id.* at 2-3.

44. Stevens Transcript, *supra* note 1, at 10.

45. *Id.* at 8.

46. Sue Reisinger, *Crossing the Line: The Trial of GlaxoSmithKline Lawyer Lauren Stevens*, CORPORATE COUNSEL (June 23, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202497750428>.

47. See Hamburg Letter, *supra* note 7.

48. See, e.g., Green, *supra* note 12.

49. See, e.g., Copeland, *Preserving*, *supra* note 13.

These trends were fused together in the prosecution of Lauren Stevens.

1. *Responsible Corporate Officer Doctrine*

Prosecutors have been under considerable pressure to combat health care fraud and abuse. The government has dedicated substantial resources to detecting and deterring fraud in our Medicare and Medicaid systems.⁵⁰ One of the most important targets for the government's enforcement efforts has been large pharmaceutical companies like GSK. Over the last ten years, the government has cracked down on pharmaceutical companies that engaged in off-label promotion.⁵¹ Many drug companies engaged in off-label promotion without regard to the truth of their claims or the safety of consumers.⁵² Indeed, some manufacturers promoted FDA-approved drugs for uses that the FDA had explicitly found to be unsafe.⁵³ Other manufacturers were so defiant of the FDA rules that they had entire departments dedicated to off-label promotion.⁵⁴ Although the government spent years investigating pharmaceutical manufacturers for their improper

50. Tracy Russo, *HEAT: A Year of Tackling Health Care Fraud*, U.S. DEP'T JUST.: JUST. BLOG (Aug. 27, 2010), <http://blogs.usdoj.gov/blog/archives/934> (detailing the administration's efforts and successes in combating health care fraud through increased budgets and collaborations between the U.S. Department of Justice and the Department of Health and Human Services).

51. SAMMY ALMASHAT ET AL., PUB. CITIZEN'S HEALTH RESEARCH GRP., RAPIDLY INCREASING CRIMINAL AND CIVIL MONETARY PENALTIES AGAINST THE PHARMACEUTICAL INDUSTRY: 1991 TO 2010 18 (Dec. 16, 2010), *available at* <http://www.citizen.org/documents/rapidlyincreasingcriminalandcivilpenalties.pdf> ("From 1991 through 2005, unlawful promotion constituted only 16 percent of all [health care fraud] violations, comprising only \$516 million in financial penalties. Over the past five years (2006-2010), unlawful promotion came to comprise over half (53 percent) of all violations totaling at least \$3.3 billion in financial penalties, a six-fold increase in financial penalties for this violation compared with the previous fifteen years. In comparison, total financial penalties for all violations increased just three-fold over this same time period.").

52. *See, e.g.*, Ryan McCarthy, *Eli Lilly's Marketing Fraud and Ghostwriting Scandal*, HUFFINGTON POST (July 13, 2009), http://www.huffingtonpost.com/2009/06/12/eli-lillys-zyprexa-fraud_n_214907.html (explaining that Eli Lilly marketed its anti-psychotic drug Zyprexa for use by elderly patients with dementia despite seven studies that demonstrated that it was unsafe for that use).

53. *See, e.g.*, Copeland, *Enforcing Integrity*, *supra* note 15 (explaining that Pfizer marketed its drug Bextra, a painkiller known as a Cox-2 inhibitor, for post-surgical pain even though the FDA explicitly found that Bextra was unsafe for that use).

54. *See* Sandra H. Johnson, *Polluting Medical Judgment? False Assumption in the Pursuit of False Claims Regarding Off-Label Prescribing*, 9 MINN. J. L. SCI. & TECH. 61, 111-12 (2008) (explaining the coordinated effort that Parke-Davis engaged in to pursue the off-label promotion of its drug Neurontin).

promotional practices, the government's enforcement efforts mostly consisted of entering into civil administrative settlements with pharmaceutical companies that required manufacturers to pay a fine and agree to compliance measures.⁵⁵ In the event that the government actually charged the pharmaceutical company with a crime, the charge was a misdemeanor so that the pharmaceutical company would not be excluded from participation in Medicare and Medicaid.⁵⁶ Because the fines and criminal penalties that prosecutors imposed on pharmaceutical manufacturers were significantly lower than the profits that the manufacturers obtained by engaging in off-label promotion, the manufacturers viewed the fines as just a cost of doing business.⁵⁷ As a result, the government has gone back to the drawing board, so to speak, to find more effective ways to enforce the drug marketing rules.

In an effort to deter this misconduct, the government has begun targeting individuals within corporations for criminal charges. On March 4, 2010, the FDA called for more prosecutions of responsible corporate officers under the Food Drug and Cosmetic Act (FDCA).⁵⁸ Under the "responsible corporate officer" (RCO) doctrine, "[o]ne who has control over activities that lead to a subordinate's violation of a statute may incur liability for failure to fulfill the duty, commensurate with his position of authority in the corporate hierarchy, to

55. See, e.g., Copeland, *Enforcing Integrity*, *supra* note 15, at 2 (detailing numerous instances of the government concluding their investigations with Corporate Integrity Agreements).

56. The effect of an exclusion from Medicare, Medicaid, and other federal health care programs is that "no Federal health care program payment may be made for any items or services (1) furnished by an excluded individual or entity, or (2) directed or prescribed by an excluded physician." Office of Inspector General, Publication of the OIG Special Advisory Bulletin on the Effect of Exclusion From Participation in Federal Health Care Programs, 64 Fed. Reg. 52, 791-02 (Sept. 30, 1999).

57. See, e.g., Copeland, *Enforcing Integrity*, *supra* note 15, at 3 (explaining that the repeated use of Corporate Integrity Agreements to resolve off-label promotion cases has been ineffective at deterring manufacturers from repeatedly engaging in off-label promotion because the fines imposed in the agreements are nothing more than the cost of doing business and are substantially outweighed by the potential profits from off-label promotion).

58. Hamburg Letter, *supra* note 7. The FDA commissioner explained:

A third recommendation from the committee was to increase the appropriate use of misdemeanor prosecutions, a valuable enforcement tool, to hold responsible corporate officials accountable. Criteria now have been developed for consideration in selection of misdemeanor prosecution cases and will be incorporated into the revised policies and procedures that cover appropriate use of misdemeanor prosecutions.

Id.

prevent or correct such violations.”⁵⁹ Importantly, a responsible corporate officer can be held liable even though he did not have personal knowledge of or participate in the wrongdoing.⁶⁰ The only defense that is available is that the “defendant was ‘powerless’ to prevent or correct the violation.”⁶¹ But the courts have not specified the standard necessary to satisfy that burden. By using the RCO doctrine, the government is able to send a message to corporate executives that they must monitor their employees or face personal criminal liability. Thus, after years of treating the pharmaceutical industry with kid gloves, the FDA is flexing its muscles.

In February 2011, the FDA updated its Regulatory Procedures Manual (RPM) to provide non-binding guidance to FDA personnel on whether to recommend a misdemeanor prosecution against an executive under the RCO doctrine.⁶² The RPM instructs FDA personnel to consider “the individual’s position in the company and relationship to the violation, and whether the official had the authority to correct or prevent the violation.”⁶³ The RPM also notes that “[k]nowledge of and actual participation in the violation are not a prerequisite to a misdemeanor prosecution but are factors that may be relevant.”⁶⁴ The RPM lists seven other factors for FDA personnel to consider:

1. Whether the violation involves actual or potential harm to the public;
2. Whether the violation is obvious;
3. Whether the violation reflects a pattern of illegal behavior and/or failure to heed prior warnings;
4. Whether the violation is widespread;
5. Whether the violation is serious;
6. The quality of the legal and factual support for the proposed prosecution; and

59. See JULIE R. O’SULLIVAN, FEDERAL WHITE COLLAR CRIME CASES AND MATERIALS 248 (4th ed. 2009) (quoting Kathleen F. Brickey, *Criminal Liability of Corporate Officers for Strict Liability Offenses – Another View*, 35 VAND. L. REV. 1337, 1338–40 (1982)).

60. *Id.* at 231.

61. *United States v. Park*, 421 U.S. 658, 673 (1975).

62. FDA REGULATORY PROCEDURES MANUAL § 6-5-3 (2011), available at <http://www.fda.gov/ICECI/ComplianceManuals/RegulatoryProceduresManual/ucm176738.htm#SUB6-5-3> (last visited Jan. 26, 2011).

63. *Id.*

64. *Id.*

7. Whether the proposed prosecution is a prudent use of agency resources.⁶⁵

The FDA has successfully used the RCO doctrine to hold executives, including in-house counsel, criminally liable for misdemeanor offenses under the FDCA. One prominent example is the guilty plea and subsequent exclusion of Purdue Pharma executives as responsible corporate officers for the improper marketing of OxyContin.⁶⁶ The government alleged that Purdue Pharma marketed OxyContin, a time-released painkiller, as “being ‘less addictive and less subject to abuse’ than existing painkillers.”⁶⁷ In fact, OxyContin instead was a highly addictive painkiller that reportedly led to many deaths and criminal activity by its users.⁶⁸ The government charged the general counsel, Howard Udell, and two other executives with misdemeanor misbranding as responsible corporate officers for Purdue Pharma’s false marketing. The FDCA’s misbranding prohibition is incredibly broad and, among other things, has been interpreted to mean that it is a crime to include false or misleading information about a drug on its label or in advertisements.⁶⁹ Although the government never specified the theory of liability for Udell under the RCO doctrine, it is possible that Udell signed off on promotional materials for OxyContin as part of his responsibilities as general counsel.⁷⁰ As such, he was likely considered to be responsible for ensuring that the marketing materials complied with the law. As part of Udell’s guilty plea, he paid a fi-

65. *Id.*

66. *See* United States v. Purdue Frederick Co., 495 F. Supp. 2d 569 (W.D. Va. 2007).

67. Jill Nawrocki, *OxyContin Flap to Cost Purdue Pharma GC \$8M*, CORP. COUNS. (June 25, 2007), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1182503148067>. When the FDA first approved OxyContin, the FDA permitted “Purdue Pharma to state the time-released nature of a narcotic like OxyContin ‘is believed to reduce’ its potential to be abused.” Barry Meier, *Narcotic Maker Guilty of Deceit Over Marketing*, N.Y. TIMES (May 11, 2007), <http://www.nytimes.com/2007/05/11/business/11drug.html>. But the sales representatives wrongly informed doctors that “the statement meant that OxyContin was less likely to lead to addiction or abuse than traditional, fast-acting painkillers like Percocet.” *Id.*

68. Nawrocki, *supra* note 67 (explaining that there were 228 OxyContin-related deaths in the Western District of Virginia from 1996 to 2005).

69. The FDCA prohibits “[t]he introduction or delivery for introduction into interstate commerce of any food, drug, device, tobacco product, or cosmetic that is adulterated or misbranded.” 21 U.S.C. § 331(a) (2006). A drug or device is considered to be misbranded if it has a “false or misleading label” or does not bear “adequate directions for use.” 21 U.S.C. §§ 352(a), 352(f) (2006).

70. Nawrocki, *supra* note 67.

ne of eight million dollars to the Virginia Medicaid Control Unit's Program Income Fund.⁷¹

The large fine, however, was only a part of Udell's sanction. On March 31, 2008, the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) sent a letter to Udell informing him that he would be excluded from participation in Medicare, Medicaid, and all other federal health care programs for twenty years.⁷² The letter explained that the exclusion was a result of his conviction of a misdemeanor offense relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct in the delivery of a health care item or service.⁷³ The result of exclusion of a health care executive is that the executive is virtually unemployable in the health care industry.⁷⁴ Exclusion, however, is not a criminal penalty. It is meant to safeguard the Medicare and Medicaid systems from untrustworthy health care providers.

Udell appealed his debarment within HHS. He argued that because his conviction was based on his status as a responsible corporate officer and not his own personal wrongdoing, it was improper to exclude him under the statute. HHS upheld his exclusion at every level of review. On October 28, 2009, Udell filed an action in district court against the Secretary of Health and Human Services, Kathleen

71. Plea Agreement, *United States v. Udell*, No. 1:07CR29 (W.D. Va. May 10, 2007), *available at* <http://www.vawd.uscourts.gov/PurdueFrederickCo/Plea-Agreement-Udell.pdf>.

72. *Udell v. Inspector Gen.*, No. C-08-493, Dep't of Health & Human Servs. Dep'tal Appeals Bd. (Jan. 9, 2009), *available at* <http://www.hhs.gov/dab/decisions/civildecisions/2009/CR1884.pdf>. An individual who has been convicted of a misdemeanor relating to fraud, theft, embezzlement, breach of fiduciary responsibility, or other financial misconduct may be excluded from participation in all federal health care programs. 42 U.S.C. § 1320a-7(b)(1) (2006).

73. *Udell*, No. C-08-493, *available at* <http://www.hhs.gov/dab/decisions/civildecisions/2009/CR1884.pdf>.

74. Health care companies that employ or enter into contracts with excluded individuals or entities to provide items or services to Federal program beneficiaries will face civil monetary penalties. Publication of the OIG Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs, 64 Fed. Reg. 52,793 (Sept. 30, 1999). Thus, the only time that an excluded individual could work for a health care company that contracts with the government without the company being penalized is when the company "is both able to pay the individual exclusively with private funds or from other non-federal funding sources, and where the services furnished by the excluded individual relate solely to non-federal program patients." *Id.* Therefore, "the practical effect of an OIG exclusion is to preclude employment of an excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from a federal health care program." *Id.*

Sebelius, challenging his exclusion.⁷⁵ The district court upheld the exclusion and flatly rejected Udell's argument that his exclusion was improper because he was convicted based solely on his status and did not engage in any wrongdoing.⁷⁶ Udell's appeal to the D.C. Circuit is currently pending.

After the success of the Udell case, there can be no doubt that the FDA intends to pursue executives, even general counsel, as responsible corporate officers. The goal of these prosecutions is to hold someone within the corporation accountable for the misconduct. Through these prosecutions, the government sends a strong message to corporate executives to conform their conduct to the law and to vigorously monitor their employees to ensure compliance.

This development in the enforcement of health care fraud and abuse laws may help to explain, at least in part, the prosecution of Lauren Stevens. While the government did not formally invoke the RCO doctrine in Stevens' case, the prosecution is certainly in the spirit of the government's stated objective to hold "responsible corporate officers" accountable for wrongdoing within the corporation. One might argue that as general counsel, Stevens was supposed to make sure that GSK's drug marketing practices complied with the law. Therefore, by punishing Stevens, the responsible corporate officer, someone within GSK is accountable for GSK's misconduct rather than the faceless corporation. By charging Stevens with felonies that carried substantial penalties, however, the government substantially raised the stakes of the typical responsible corporate officer prosecutions on misdemeanor charges.

2. *Attorneys as Gatekeepers*

While there has been a push to hold responsible corporate officers accountable in general, there has also been a specific threat to general counsel as "gatekeepers." Gatekeepers are responsible for preventing misconduct. Traditionally, however, lawyers have maintained independence from their clients such that the lawyers were not held responsible for the transgressions of their clients.⁷⁷ In some situations, that tradition of independence allowed lawyers to turn a blind eye to

75. *Friedman v. Sebelius*, 755 F. Supp. 2d 98, 104 (D. D.C. 2010).

76. *Id.* at 117–18.

77. Peter J. Henning, *Sarbanes-Oxley Act § 307 and Corporate Counsel: Who Better to Prevent Corporate Crime*, 8 BUFF. CRIM. L. REV. 323, 332 (2004) [hereinafter Henning, *Sarbanes-Oxley*].

client wrongdoing.⁷⁸ The government, convinced that diligent lawyers could have thwarted client misconduct in many cases involving financial fraud,⁷⁹ has increased the pressure on in-house counsel to be effective gatekeepers. In particular, the government has pursued in-house counsel criminally when frauds that presumably could have been avoided occur in the corporation.⁸⁰ Essentially, the government holds attorneys criminally responsible for their own misconduct⁸¹ and for their failure to nip their clients' misconduct in the bud.⁸²

After the financial scandals in 2000 and 2001, Congress singled out attorneys as gatekeepers in the securities market through the Sarbanes-Oxley Act.⁸³ Section 307, which addresses attorneys, "was designed to enlist lawyers in the cause of preventing corporate crime."⁸⁴ Under section 307, Congress gave the Securities and Exchange Commission (SEC or the Commission) the authority to establish "mini-

78. *Id.*

79. Su Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1037 (2005) [hereinafter Kim, *Banality*] (explaining that in "the SEC's view, general counsels could play a greater role in their companies if only they would, by an act of conscious will, assert themselves more, claim a place 'at the table,' and, magically, gain 'access to the board.'").

80. *See generally id.*

81. *See generally* Susan P. Koniak, *When the Hurlyburly's Done: The Bar's Struggle with the SEC*, 103 COLUM. L. REV. 1236 (2003) (explaining the role that lawyers played in aiding the corporate scandals in 2001 and 2002).

82. "A review of the gatekeeping literature suggests that a gatekeeper enforcement regime must have at least three key elements: (1) a gatekeeper — someone 'who can and will prevent misconduct reliably,' (2) a gate — some service which the wrongdoer needs to accomplish his goal, and (3) a law enforcement mechanism — an enforceable duty — that obligates private parties to take some action aimed at averting misconduct when detected." Su Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 415 (2008) [hereinafter Kim, *Gatekeepers*] (internal citations omitted).

83. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.); *see also* Kim, *Banality*, *supra* note 79, at 985 ("Recognizing that many of these lawyers facilitated illegal transactions or failed to act to protect the organizational client, Congress passed a statute singling out inside counsel, for the first in U.S. history, for special treatment in the fight against securities fraud.").

84. Henning, *Sarbanes-Oxley*, *supra* note 77, at 324. Senator Edwards, explaining the need for Section 307, said:

One of the most critical responsibilities that [corporate] lawyers have is, when they see something occurring or about to occur that violates the law, breaks the law, they must act as an advocate for the shareholders, for the company itself, for the investors. They are there and they can see what is happening. They know the law and their responsibility is to do something about it if they see the law being broken or about to be broken.

Id. at 337 (emphasis omitted) (quoting 148 Cong. Rec. S6551-52 (daily ed. July 10, 2002)).

num standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers.”⁸⁵ Specifically, section 307 directed the SEC to enact a rule “requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty . . . to the chief legal counsel or the chief executive officer of the company.”⁸⁶ In addition, the SEC was to adopt a rule requiring further up the ladder reporting if the chief legal counsel or chief executive officer did not respond appropriately.⁸⁷

Since the enactment of section 307, the government has brought criminal charges against several attorneys for failing to meet their obligations as gatekeepers. In particular, the government has targeted attorneys involved in option backdating.⁸⁸ The SEC’s first target for option backdating was William Sorin, former general counsel of Comverse Technology. Sorin was responsible for drafting Comverse Technology’s stock option plans. He was also responsible for filing false reports with the SEC that did not acknowledge the additional compensation provided to executives by the option backdating.⁸⁹ Sorin made over fourteen million dollars from selling backdated stock options.⁹⁰ The SEC sued Sorin, and the DOJ charged him criminally for his actions.⁹¹ He ultimately settled with the SEC for millions of dollars and pled guilty to one count of conspiracy to commit securities, mail, and wire fraud.⁹² Following the Sorin prosecution, the SEC and DOJ successfully prosecuted general counsel for option backdating at many prominent companies including Apple, Inc., United

85. 15 U.S.C. § 7245 (2002).

86. *Id.*

87. *Id.*

88. The practice of option backdating involves granting stock options to coincide with a date in the past when the stock price was at a historic low for the quarter. For example, if the stock price of a company is \$50 today, but the stock options are backdated two months to when the stock price was at a low of \$20, the executive will have a profit of \$30/share if she exercises her stock options. By granting backdated options, companies were able to provide additional off-the-book compensation to executives.

89. Association of Corporate Counsel, *From Trusted Counselor to Vigilant Gatekeeper: The Evolving Liability Environment for Corporate Counsel* 23 (Sept. 2007), available at <http://www.acc.com/vl/public/Article/loader.cfm?csModule=security/getfile&pageid=1592>.

90. *Id.* at 32.

91. *Id.* at 24.

92. *Id.*; see also Chad Bray, *Former Comverse Counsel Pleads Guilty*, N.Y. TIMES (Nov. 3, 2006), <http://www.nytimes.com/2006/11/03/business/03comverse.html?pagewanted=all>.

Health, CNET, and McAfee, to name a few.⁹³ In general, “the SEC has targeted attorneys (and other executives) when there has [sic] been written indications of deliberate backdating, falsified documents, efforts to hide manipulations from auditors or investigators, and indications that the attorneys personally benefited.”⁹⁴ The SEC has also pursued in-house counsel for their involvement in other types of accounting scandals.⁹⁵

In addition to its prosecution of the option backdating and accounting scandals, the government has also ramped up its efforts to pursue general counsel for misconduct during internal investigations. The most prominent target in this category was Ann Baskins, the former general counsel for Hewlett Packard (HP). The investigation at HP was initiated to look into leaks of confidential business information from HP board meetings.⁹⁶ As part of the investigation, however, HP’s outside investigators engaged in the practice of “pretexting,” meaning “using false pretenses to obtain certain board members’ personal information from telephone companies.”⁹⁷ At the Congressional hearings on the scandal at HP, Baskins exercised her Fifth Amendment privilege, and her colleagues laid the blame for the pretexting squarely on Baskins and her poor legal advice.⁹⁸ Ultimately, the government indicted Baskins’ colleague Kevin T. Hunsaker, another in-house counsel, for the pretexting scandal.⁹⁹

The government has not been shy about using its newly found power to charge in-house counsel criminally. Throughout all of the prosecutions of in-house counsel, however, the trend has been “that the in-house counsel being prosecuted are those against whom the government can level allegations that the lawyer was both an essential participant in fraudulent conduct and knew and understood at the time that the conduct was fraudulent.”¹⁰⁰ Thus, the Lauren Stevens case is somewhat of a departure from the typical gatekeeper prosecutions because there was no allegation that Stevens was involved in the off-label promotional activities or their approval. Therefore, the government’s prosecution of Stevens could be seen as an expansion of gatekeeper liability.

93. Association of Corporate Counsel, *supra* note 89, at 25, 27–29.

94. *Id.* at 30.

95. *Id.* at 57–63.

96. See Kim, *Gatekeepers*, *supra* note 82, at 412.

97. *Id.*

98. See *id.*

99. Association of Corporate Counsel, *supra* note 89, at 34.

100. *Id.* at 80.

3. *Pretextual Prosecutions and the Expansion of the Cover-Up Crimes*

The prosecution of corporations and individuals for accounting scandals and complex fraud schemes is time consuming, fact intensive, and difficult to explain to juries. Not surprisingly, the government has searched for more economical and efficient means of prosecuting individuals and corporations for misconduct. One method that the government has employed is to target the cover-up of the wrongdoing during the investigation through the obstruction of justice statutes. Congress enacted the federal obstruction of justice statutes to protect the honor and integrity of proceedings before the federal judiciary, federal agencies, and the United States Congress.¹⁰¹ Thus, obstruction of justice is a “process crime,” which is concerned with punishing those who harm the justice system rather than an individual victim.¹⁰²

Over the past several years, prosecutors have charged defendants with process crimes instead of or in addition to the substantive offense.¹⁰³ Thus, if the government was investigating an individual for money laundering, but the individual engaged in obstructive conduct during the investigation, the prosecutor would charge the individual with obstruction of justice instead of or in addition to money laundering. The practice of charging defendants with process crimes rather than the substantive offense that initiated the investigation has been termed “pretextual prosecution.”¹⁰⁴ This prosecution strategy has taken off in recent years due to the complexity of trials involving accounting scandals and other complicated business transactions.¹⁰⁵

101. Christopher R. Chase, *To Shred or Not to Shred: Document Retention Policies and Federal Obstruction of Justice Statutes*, 8 FORDHAM J. CORP. & FIN. L. 721 (2003); Justin Alexander Kasprisin, *Obstruction of Justice*, 47 AM. CRIM. L. REV. 847 (2010).

102. Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1439–41 (2009) (explaining that the phrase process crime refers to “criminal offenses with content addressing acts that interfere with the procedures and administration of justice.”).

103. See, e.g., Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135 (2004).

104. See Green, *supra* note 12, at 37 n.142; Litman, *supra* note 103, at 1137; Murphy, *supra* note 102, at 1442–45; Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–03: On Sideshow Prosecutions, Spitzer’s Clash With Donaldson Over Turf, The Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 449 (2004); Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 584 (2005).

105. Oesterle, *supra* note 104, at 446–49 (explaining the consequences of complex cases, such as (1) long and expensive trials with costly experts; (2) defendants with

Prosecutors have made the judgment that obstruction of justice and other process crimes are easier for a jury to understand. So long as the process crime charge is meritorious, the issue is whether the prosecutor's decision to charge the process crime, rather than the underlying offense that initiated the investigation, is justified.¹⁰⁶

In addition to the prosecutors who resort to pretextual prosecutions based on process crimes, there is also some scholarly support for pretextual prosecutions of this type. Professor Harry Litman argues that pretextual prosecutions are justified because they reflect the prosecutor's broad choice among potential defendants.¹⁰⁷ Because the cases against the potential defendants will vary in terms of the seriousness of the crime, strength of evidence, and the collateral benefit to the community, it is understandable that the prosecutor would choose to charge the defendant who is "plainly guilty" and whose prosecution would be of greatest benefit to the community.¹⁰⁸ Thus, so long as the charge is meritorious, Professor Litman argues that the use of pretextual prosecutions is beneficial.¹⁰⁹

Professors Daniel C. Richman and William J. Stuntz acknowledge that charging white collar criminals with pretextual crimes "conserves investigative resources and reduces the risk of serious injustice."¹¹⁰ Thus, criminals cannot escape punishment for committing offenses that inflict harm on many people due to the complexity of the case. And, the government can maximize its resources by pursuing less serious charges that require little expertise.

One prominent example is Martha Stewart, whom the government charged with obstruction of justice and perjury for lying to investigators about her sale of ImClone stock rather than insider trading (the

deeper pockets that can hire excellent attorneys and experts and outspend the prosecution; (3) juries that are overwhelmed by complex facts; and (4) in cases where several people are involved in the wrongdoing, difficulty assigning individual guilt).

106. See Murphy, *supra* note 102, at 1442–43 (explaining the difference between a pretextual prosecution and a baseless prosecution). Professor Murphy explains that process crimes make the perfect pretextual crimes because: (1) they "penalize a core of harmful activity that most agree ought to be outlawed;" (2) process crimes have long sentences for their violation; (3) the government is able to "create environments (such as grand jury hearings or discovery requests)" where process crimes are likely to occur; and (4) process crimes "derive from some primary transgression—however unprovable it may be." *Id.* at 1444–45.

107. Litman, *supra* note 103, at 1159–60.

108. *Id.* at 1161.

109. *Id.*

110. Richman & Stuntz, *supra* note 104, at 595.

underlying offense).¹¹¹ But, until recently, this strategy was largely reserved for corporate executives who were accused of wrongdoing or individuals accused of wrongdoing. The charges were essentially a pretext because the principal reason for the obstruction charge is not the obstructive activity; it is to ensure that the individual is punished for the underlying criminality which may be too difficult to prove at trial.¹¹²

The important difference between the Stevens prosecution and other cases where obstruction is charged instead of the underlying offense is that Stevens had no involvement in the alleged underlying criminal conduct. Presumably, the fault for the alleged off-label promotion could not be assigned to Stevens. The individuals involved in the promotional activities, their supervisors, and/or the executives of the company would be to blame for the promotional practices. There is no allegation that Stevens advised the executives on their Wellbutrin promotional activities. Therefore, Stevens was charged solely for actions that she took in connection with representing the company after the alleged criminal conduct occurred. Her alleged wrongdoing arose during the course of her investigation of GSK's alleged criminal conduct.

Thus, the prosecution cannot be justified based on the belief that charging her will produce an "important collateral benefit to the public welfare" such as preventing her from taking similar actions in investigations in the future.¹¹³ There was no evidence that Stevens had counseled GSK to engage in off-label promotion. Accordingly, Stevens could not be considered a facilitator of the fraud.¹¹⁴ As Stevens was neither suspected of other crimes nor a facilitator of GSK's alleged crimes, her prosecution cannot be justified by the need to conserve judicial resources or risk a major injustice.¹¹⁵

111. Dan Ackman, *Martha Stewart Found Guilty*, FORBES (Mar. 5, 2004), available at http://www.forbes.com/2004/03/05/cx_da_0305marthafinal.html.

112. Litman, *supra* note 103, at 1135, 1147 (calling these types of prosecutions the Al Capone approach because Al Capone was a Chicago mobster who was charged with federal tax evasion instead of his many alleged crimes).

113. Litman, *supra* note 103, at 1161.

114. Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 688 (2005) [Henning, *Targeting*]. In *United States v. Anderson*, the government indicted two attorneys for assisting their client, a hospital, in creating a legal way to compensate two doctors for patient referrals. 85 F. Supp. 2d 1047 (1999), *rev'd* 217 F.3d 823 (10th Cir. 2000). The attorneys did this to circumvent the Stark law, which prevents payments for physician referrals. In that case, the court found that the lawyers facilitated the fraud. *Id.*

115. Richman & Stuntz, *supra* note 104, at 595.

One lingering question is whether the government prosecuted Stevens as a proxy for GSK. In other words, was the prosecution of Stevens the government's strategy for punishing GSK? Or, did the government prosecute Stevens because it wanted to punish her for her obstructive conduct? It is important to note that just because Stevens was charged with process crimes does not necessarily mean that the prosecution was pretextual. But, like many pretextual prosecutions based on process crimes, Stevens' alleged wrongdoing occurred during the course of the government's investigation of entirely different conduct, and there were no criminal charges for the underlying misconduct. To date, neither GSK nor any of its employees have been criminally charged with any wrongdoing associated with the alleged off-label promotion. Thus, one could certainly infer that after eight years of investigating GSK for off-label promotion, the government saw an easy way out—the prosecution of Lauren Stevens for covering up GSK's alleged off-label promotion. In that sense, Stevens' case could be considered a pretextual prosecution where what the government really wants to punish is the off-label promotion, not the supposed cover up.

4. *The Corporate Attorney-Client Privilege*

For many years, the government has viewed the corporate attorney-client privilege as an impediment to efficient investigation into corporate wrongdoing. In the government's view, corporations hire attorneys to conduct internal investigations to cloak those interactions with the privilege and protect ordinary business documents from government discovery.¹¹⁶ In addition, corporations are perceived as protecting their employees by entering into joint defense agreements and paying employees' legal fees.¹¹⁷ Because internal investigations

116. See *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before S. Comm. on the Judiciary*, 109th Cong. 117–18 (2007) (statement of Paul J. McNulty, Deputy Att'y Gen.) [hereinafter *The Thompson Memorandum's Effect*] (“Prosecutors complain to me that in some instances, corporate counsel run virtually every document through the corporation's legal department just so that they can assert attorney-client privilege or work product protection. Some attorneys assert privilege like that famous scene of Lucille Ball gobbling chocolates off of a conveyor belt. Everything is swallowed up by the in-house legal department . . . if the privilege is used in this fashion, it is not only meaningless; it obstructs the government's efforts to discover the truth. And many U.S. Attorneys' Offices have spent tens of thousands of dollars in taxpayer money in years of senseless litigation over pretrial privilege matters, delaying justice and accountability.”).

117. *Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Attorneys* at VI (Jan. 20, 2003) [hereinafter *Thompson*

conducted by corporate counsel are protected by the attorney-client privilege, the government is forced to expend more resources to conduct the investigation. If the government is unable to rely on corporate counsel's interviews and investigation, the government must conduct its own interviews and offer immunity to some witnesses to secure their testimony.¹¹⁸ Thus, the government set out to change the incentive structure so that corporations would find it in their best interest to turn over documents that would normally be shielded by the corporate attorney-client privilege.

In 2003, following several business scandals, Deputy-Attorney General Larry Thompson issued a memorandum entitled "Principles of Federal Prosecution of Business Organizations," which became known as the Thompson Memorandum.¹¹⁹ Although the Thompson

Memorandum], available at http://www.justice.gov/dag/cftf/corporate_guidelines.htm ("Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents. Thus, while cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation."); *The Thompson Memorandum's Effect*, *supra* note 116, at 120 ("[A] corporation's advancement of legal fees can concern prosecutors where that fact, taken with other facts, gives rise to a real concern that the corporation is 'circling the wagons,' or, in other words, is using or conditioning the payment of attorneys' fees as a tool to limit or prevent the communication of truthful information from current and former employees to the government, in order to protect either the employees or the corporation itself.").

118. *Thompson Memorandum*, *supra* note 117, at VI ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel. Such waivers permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."); *Memorandum from Paul J. McNulty, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Attorneys* at 8 (Dec. 12, 2006) [hereinafter *McNulty Memorandum*], available at http://www.justice.gov/dag/speeches/2006/mcnulty_memo.pdf ("[A] company's disclosure of privileged information may permit the government to expedite its investigation."); *The Thompson Memorandum's Effect*, *supra* note 116, at 116 ("If the company decides to cooperate, it can face additional delay while the government duplicates the company's efforts in collecting documents and interviewing witnesses, or it may choose to waive privilege and offer the results of its internal investigation so that the government moves faster. The choice to waive often allows the government to make a charging decision within months rather than years, and saves the company money and employee time and protects the value of its stock.").

119. *Thompson Memorandum*, *supra* note 117.

Memorandum was not the DOJ's first pronouncement on the factors to consider in deciding whether to indict a corporation, it was the first time that the guidance was considered mandatory.¹²⁰ The Thompson Memorandum focused on cooperation as a critical factor in deciding whether to indict a corporation. It explained that waiver of the attorney-client privilege was a factor to consider as well as whether the corporation was protecting its culpable employees.¹²¹ It also said that in "appropriate circumstances" prosecutors could request that corporations waive the attorney-client privilege.¹²² The Thompson Memorandum was a game-changer in that defense counsel began to report that prosecutors would ask for waiver of the privilege in the very first meeting between the government and corporate counsel.¹²³ Corporations had to choose between saving themselves from indictment and maintaining the attorney-client privilege. Often, corporations waived the privilege and allowed the government access to all of the information about culpable employees. Thus, employees began to be sacrificial lambs while corporations escaped without prosecution or with a deferred or non-prosecution agreement.

The American Bar Association and many other groups pressured the DOJ to change its policy because it had created a "culture of waiver" within the business community.¹²⁴ But the DOJ did not act until Senator Arlen Specter introduced legislation to protect the corporate attorney-client privilege.¹²⁵ The DOJ adopted a revised version of the charging guidelines written by then-Deputy Attorney General Tom McNulty, which became known as the McNulty Memorandum.¹²⁶ The McNulty Memorandum purported to restrict the government's ability to request corporations to waive the attorney-client privilege by requiring written authorization for waiver requests.¹²⁷ But the government was still permitted to consider a corporation's refusal to waive the privilege in deciding whether the corpo-

120. Copeland, *Preserving*, *supra* note 13, at 1211–12.

121. *Thompson Memorandum*, *supra* note 117, at VI.

122. *Id.*

123. See Copeland, *Preserving*, *supra* note 13, at 1214.

124. See *Coerced Waiver of the Attorney-Client Privilege: The Negative Impact for Clients, Corporate Compliance, and the American Legal System: Hearing Before the S. Jud. Comm.*, 109th Cong. 11 (2007) (statement of the Coalition to Preserve the Attorney-Client Privilege).

125. Senator Specter introduced the Attorney-Client Privilege Protection Act in 2009. S. 445, 111th Cong. (2009). For a detailed discussion of the Attorney-Client Privilege Protection Act, see Copeland, *Preserving*, *supra* note 13, at 1233–38.

126. See *McNulty Memorandum*, *supra* note 118.

127. *Id.* at 10–11.

ration had cooperated with the investigation.¹²⁸ The McNulty Memorandum also stated that prosecutors should not consider the payment of attorneys' fees in determining a corporation's cooperation.¹²⁹

In 2008, under continued pressure from Congress and several interest groups, the DOJ amended its policy again. Deputy Attorney General Mark Filip wrote the current policy which appears in the United States Attorneys' Manual and is commonly known as the Filip Guidelines. The Filip Guidelines prohibit the government from requesting waiver of the corporate attorney-client privilege or holding a refusal to waive the privilege against a corporation in assessing cooperation.¹³⁰ Instead, the focus is on whether the corporation cooperated by sharing all of the facts it learned in its internal investigation.¹³¹ There is still the danger, however, that sharing such facts could lead to an inadvertent waiver of the privilege. Nevertheless, the change in policy was seen as a victory for the defense bar.

This supposed victory, however, is not an indication that the government suddenly respects the corporate attorney-client privilege or looks upon defense lawyers favorably. As Professor Peter Henning has explained,

[T]here is . . . a trend towards using the criminal law and the government's investigatory tools against lawyers because of what appears to be a deep-seated suspicion of legal advice as something harmful or inappropriate. Lawyers commit crimes, and there is no claim that they should be exempt from the application of the criminal law. But, at the same time, the presence of a lawyer is not a red flag or in any way nefarious.¹³²

The Stevens prosecution is the ultimate example of targeting an attorney for her legal advice. In a brilliant move, the government charged Lauren Stevens with obstruction of justice for failing to turn over allegedly incriminating documents. GSK's investigation would ordinarily have been protected by the corporate attorney-client privi-

128. *Id.* at 9.

129. *Id.* at 11.

130. U.S. ATTORNEYS' MANUAL § 9-28.710 (2011).

131. The U.S. Attorneys' Manual states:

[W]hat the government seeks and needs to advance its legitimate (indeed, essential) law enforcement mission is not waiver of [attorney client privilege and work product] protections, but rather the facts known to the corporation about the putative criminal misconduct under review The critical factor is whether the corporation has provided the facts about the events . . .

Id.

132. Henning, *Targeting*, *supra* note 114, at 674-75.

lege. The government claimed that GSK instructed Stevens to cover up wrongdoing and thwart the government investigation. As a result of this claim, the government convinced a magistrate judge that the crime fraud exception to the attorney-client privilege applied and that the government should have had access to all of the privileged documents that dealt with GSK's response to the government inquiry. Consequently, the government gained insight into GSK's promotional activities that would ordinarily be unavailable.

By targeting the general counsel, the government sends the message that cooperation is not only appreciated, it is required. Unlike in the pre-Filip Guidelines era, however, the touchstone of cooperation is not waiver of the attorney-client privilege.¹³³ In this situation, cooperation means turning over all documents, no matter how incriminating, at an early stage in the investigation when there is no legal obligation to do so. Failure to cooperate in this manner leads to obstruction of justice charges against in-house counsel and piercing the corporate attorney-client privilege based on the crime-fraud exception. Although the government was not successful in this case, prosecutors may attempt this strategy in a future case where they believe the failure to cooperate is more egregious.

5. Conclusion

The Stevens prosecution does not fit neatly into the scheme of prosecutions of responsible corporate officers or gatekeepers. Nor do the government's use of pretextual prosecutions or its disdain for the corporate attorney-client privilege explain Stevens' prosecution. But there are aspects of the Stevens prosecution that both reflect and expand the reach of each of these trends. If the government had not found success by pursuing responsible corporate officers and in-house counsel as gatekeepers, it is unlikely they would have taken the risk of pursuing Stevens for her conduct during the GSK investigation. Further, the government's successful use of pretextual prosecutions as a means of punishing individuals who committed complex crimes certainly encouraged them to expand their use of pretextual prosecutions as a critical law enforcement tool. Finally, it is hard to imagine that the government would vigorously pursue in-house counsel by invoking the crime-fraud exception to the attorney-client privilege if they did not find attorney-client privileged documents critical to successful prosecutions.

133. U.S. ATTORNEYS' MANUAL § 9-28.710.

II. THE LEGAL AND POLICY ARGUMENTS

A. Misguided as a Matter of Law

The government should not have charged Lauren Stevens with obstruction of justice or false statements for her actions during the FDA's investigation of GSK. In fact, the government should never have received the attorney-client privileged documents that made the indictment possible. Stevens, on behalf of GSK, responded to a voluntary request for information. In the absence of a civil investigative demand or subpoena, GSK did not have a legal obligation to provide information on its marketing activities for Wellbutrin. In addition, Stevens' conduct during the investigation did not meet the standard of obstruction. Further, Stevens had meritorious defenses to her conduct that should have counseled the government against charging her. Not only did Stevens' conduct fit into the safe harbor provision of obstruction of justice, but she also relied upon the advice of outside counsel when she responded to the government's inquiry. This Part will address the government's improper access to the evidence via the crime-fraud exception, the obstruction of justice counts and the safe harbor provision, and the advice of counsel defense.¹³⁴

1. *The Crime-Fraud Exception to the Attorney-Client Privilege*

The government improperly obtained the evidence that they used to prosecute Stevens for obstruction of justice by invoking the crime-fraud exception to the attorney-client privilege.¹³⁵ The crime-fraud

134. This Article does not fully address the false statement charges because they are incredibly fact specific and cannot be generalized to further the discussion of whether an attorney should be charged for this type of pre-indictment conduct. Further, some of the obstruction charges incorporate the alleged false statements and will be addressed in the obstruction of justice section making a separate discussion on false statements redundant.

135. The attorney-client privilege protects a client's confidential communications with counsel from disclosure to third parties. The purpose of the privilege is to encourage "full and frank communication between attorneys and their clients" to "promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). In short, the privilege allows clients to speak openly with their attorneys about their problems without fear that whatever they tell their attorneys will be disclosed to others. When attorneys are fully informed about their clients' circumstances, they are able to provide comprehensive legal advice and act effectively on their clients' behalf. Susan W. Crump, *The Attorney-Client Privilege and Other Ethical Issues in the Corporate Context Where There is Widespread Fraud or Criminal Conduct*, 45 S. TEX. L. REV. 171, 173 (2003) (citing *Upjohn*, 449 U.S. at 389 ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the law-

exception permits prosecutors or other litigants to gain access to otherwise confidential attorney-client communications that took place for the purpose of furthering an intended crime or fraud.¹³⁶ The goal of the exception is to prevent clients from misusing the attorney-client privilege to further their future unlawful actions.¹³⁷ As the Supreme Court stated in *Clark v. United States*, “[a] client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.”¹³⁸ But a client who consults an attorney after a government inquiry is initiated, like GSK, is entitled to confidentiality.

It is permissible and even desirable for someone to seek legal advice in advance of taking a particular course of action. In those situations, the client needs to have the freedom to disclose all of the pertinent facts to the attorney. Without full disclosure, attorneys will be severely hampered in performing their functions. Further, it is appropriate to seek legal representation after one has been charged with a crime or charges are imminent. The crime-fraud exception falls between these two extremes—seeking legal advice so that your actions conform with the law and seeking legal counsel after you are charged with a crime. It aims to prevent clients from consulting lawyers in contemplation of a crime or fraud.¹³⁹

All the policy reasons that support the existence of the privilege are said to cease as the line is crossed from legal advice given on how one may conform one’s actions to the requirements of the law or to assistance in defending oneself against the consequences of one’s past actions into the domain of contemplated or actual illegal action.¹⁴⁰

The difficulty lies in distinguishing between “legal advice in defense of a past crime or fraud and a cover-up of a past crime or fraud.”¹⁴¹ If the distinction is not appropriately drawn, however, the privilege will

yer’s being fully informed by the client.”)). Because the attorney-client privilege shields potentially probative evidence, it is construed narrowly. *Fisher v. United States*, 425 U.S. 391, 403 (1976) (explaining that the attorney-client privilege only applies “where necessary to achieve its purpose”).

136. EPSTEIN, *supra* note 14, at 418–19.

137. *United States v. Zolin*, 491 U.S. 554, 562–63 (1989) (explaining that the purpose of the attorney-client privilege is defeated when the attorney’s advice refers to future unlawful conduct rather than past unlawful conduct).

138. 289 U.S. 1, 15 (1933).

139. EPSTEIN, *supra* note 14, at 419.

140. *Id.* at 420.

141. *Id.* at 422.

be lost completely any time an attorney is defending someone accused of a crime or fraud.¹⁴²

With respect to whether there is an intended crime or fraud, it is the client's intent at the time of the attorney-client communication that controls.¹⁴³ Thus, the attorney need not have knowledge that the client intends to use the attorney's advice in furtherance of a crime or fraud to pierce the privilege.¹⁴⁴ Nevertheless, as Professor David Fried has noted, it is difficult, if not impossible, to determine the client's reason for consulting a lawyer "without knowing what facts the client disclosed; whether the facts varied, intentionally or otherwise, from the truth; what the attorney advised; and whether the client took the attorney's advice."¹⁴⁵

To raise the crime-fraud exception, the proponent must put forth sufficient evidence to make a prima facie showing that the party in question committed a crime or fraud.¹⁴⁶ It is not enough, however, to show that allegations of misconduct exist or even that the party to the communication is under grand jury investigation. Without a showing of an underlying crime or fraud, the proponent cannot invoke this exception.¹⁴⁷ Once the proponent makes this threshold showing, he or she is required to introduce a prima facie case, demonstrating "(1) that the client was engag[ed] in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity."¹⁴⁸

Not surprisingly, courts have struggled with deciding the amount and type of evidence that must be shown to satisfy the court that the privilege does not apply.¹⁴⁹ There is no requirement that the evidence

142. *Id.*

143. H. Lowell Brown, *The Crime-Fraud Exception to the Attorney-Client Privilege in the Context of Corporate Counseling*, 87 KY. L.J. 1191, 1230 (1999).

144. *Id.* at 1231.

145. David J. Fried, *Too High a Price for the Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 444-45 (1986).

146. Brown, *supra* note 143, at 1225.

147. *Id.* at 1226.

148. *In re Grand Jury Proceedings*, 417 F.3d 18, 22 (1st Cir. 2005).

149. Auburn K. Daily & S. Britta Thornquist, *Has the Exception Outgrown the Privilege?: Exploring the Application of the Crime-Fraud Exception to the Attorney-Client Privilege*, 16 GEO. J. LEGAL ETHICS 583, 585 (2003) (explaining that courts are grappling with the quantum of evidence needed to overcome the privilege, whether the attorney-client communication can meet the burden, and whether the judge should do an *in camera* inspection to make the determination); Christopher Paul

be independent of the allegedly privileged communications.¹⁵⁰ Nor is there a requirement that the evidence presented be competent and admissible.¹⁵¹ Instead, in *United States v. Zolin*¹⁵² the Supreme Court permitted the content of the allegedly privileged communications to be examined to determine whether the crime-fraud exception applied. While declining to impose a blanket rule permitting *in camera* review of privileged communications, the Court found that “before a district court may engage in *in camera* review at the request of the party opposing the privilege, that party must present evidence sufficient to support a reasonable belief that *in camera* review may yield evidence that establishes the exception’s applicability.”¹⁵³ Thus, after the *Zolin* decision, the confidentiality of the communications may be violated as part of the determination of whether the communications were made in furtherance of a crime or fraud. It matters little that the judge will subject the documents to *in camera* inspection before he turns them over to opposing counsel because even if the judge determines that the communications do not support a finding of crime or fraud, the judge cannot unlearn what he discovered during *in camera* review.

The implications of a finding of crime or fraud are far reaching for the client. If the court determines that the proponent has adequately proven the applicability of the crime-fraud exception, then all of the communications with counsel that assisted the client in perpetrating the crime or fraud lack the protection of the attorney-client privilege.¹⁵⁴ As a result, the prosecutor will be able to obtain an indictment based on incriminating evidence provided by the attorney as well as any other evidence of the crime that the prosecutor possessed.¹⁵⁵ Indeed, the attorney may be required to testify before the

Galanek, *The Impact of the Zolin Decision on the Crime-Fraud Exception to the Attorney-Client Privilege*, 24 GA. L. REV. 1115, 1124–25 (1990).

150. Daily & Thornquist, *supra* note 149, at 588–89 (explaining that the Ninth Circuit once took the position that independent evidence was required, but that it has not been followed).

151. *Id.* at 589 (explaining that the Fifth Circuit required that evidence be admissible but it has not been followed because district courts need not follow the rules of evidence when determining the applicability of privileges).

152. 491 U.S. 554 (1989).

153. *Id.* at 574–75.

154. Cary Bricker, *Revisiting the Crime-Fraud Exception to the Attorney-Client Privilege: A Proposal to Remedy the Disparity in Protections for Civil and Criminal Privilege Holders*, 82 TEMP. L. REV. 149, 163–64 (2009).

155. *Id.* at 164.

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grand jury about communications between the client and the attorney.¹⁵⁶

In Stevens' case, the prosecution never should have been able to pierce the corporate attorney-client privilege by claiming that GSK was engaged in a crime or fraud. First, even assuming that GSK committed a crime by engaging in off-label promotion, there was absolutely no evidence to support the theory that they consulted Stevens before they engaged in that conduct with the intent to commit a crime. Second, there was very little evidence to support the theory that Stevens was consulted for the purpose of engaging in a cover-up crime to hide the off-label promotion. The only evidence that supported the government's cover-up theory was that Stevens, on behalf of GSK, did not turn over all of the allegedly incriminating documents in response to the voluntary request for information.¹⁵⁷ The government learned that some documents were held back from the whistleblower and the fact that the documents were later disclosed after the issuance of a subpoena.¹⁵⁸ It is also possible that the government presented some evidence *ex parte*, but the magistrate judge who granted the government access to the attorney-client privileged documents did not prepare a written opinion. Perhaps the circumstantial evidence was sufficient under *Zolin* to warrant *in camera* review of the attorney-client privileged documents to determine whether the exception applied. After all, the standard is quite low and it is in the judge's discretion whether to grant the *in camera* review.¹⁵⁹ But it is difficult to understand why the judge decided that the crime-fraud exception applied after the judge reviewed the attorney-client privileged communications. As Judge Titus said, "the privileged documents in this case show a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client."¹⁶⁰ Further, the attorney-client communications did not reveal that the client, GSK, wanted Lauren Stevens to engage in a cover-up.¹⁶¹ In short, there was no support for the notion that GSK asked Stevens to do anything other than lead the investigative team and respond to the FDA's voluntary request for information. Further, the evidence

156. *Id.*

157. Stevens Indictment, *supra* note 3, at 11.

158. *Id.*

159. *See supra* note 154 and accompanying text.

160. Stevens Transcript, *supra* note 1, at 5.

161. *Id.*

failed to demonstrate that Stevens acted in bad faith when responding to the FDA. Thus, the government never should have gained access to GSK's privileged documents.

If the corporate attorney-client privilege can be pierced in a case like this where the government is not satisfied with the defendant's response to a voluntary request for information, what is left of the privilege? Certainly, the government should not be able to invoke the crime-fraud exception anytime it disagrees with the defense about the scope of and appropriate response to a request for information. These types of disputes are an inevitable part of litigation. The defense will always read the request for information or subpoena as narrowly as possible and the government will always read it as broadly as possible. That is the nature of the adversarial process. To grant the government access to attorney-client privileged documents in a case such as this turns the attorney-client privilege on its head. Any time there is a dispute, the presumption of privilege would be transformed into a presumption against the privilege. That would have profound implications for both the attorney and the client because the attorney would no longer be able to promise confidentiality.

2. *Obstruction of Justice*

The prosecutor charged Stevens with obstruction of justice for (1) failing to turn over documents; (2) claiming that the production was complete even though she withheld responsive documents; and (3) altering a chart that contained speaker compensation to remove the entertainment expenses.¹⁶² Because the alleged misconduct took place before an indictment was issued, the government proceeded under 18 U.S.C. §§ 1512 and 1519. Both of those sections are potentially applicable to attorney conduct during an internal investigation.¹⁶³

162. See Stevens Indictment, *supra* note 3, at 13–16.

163. Section 1503, the Omnibus Provision, is the obstruction statute that is used the most often because it has the broadest reach. The Omnibus Provision is concerned with obstruction by attempting to influence jurors or officers in a judicial proceeding and obstruction of the “due administration of justice.” 18 U.S.C. § 1503 (2008). It provides that “[w]hoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice . . . shall be punished.” *Id.* Because § 1503 has been interpreted to require a pending judicial proceeding, however, it is not the easiest route to charge an attorney for conduct that took place during an internal investigation which ordinarily occurs in the pre-indictment stage. See *United States v. Aguilar*, 515 U.S. 593 (1995) (explaining that it is not enough that actions were taken to influence an investigation; there must be knowledge of a pending proceeding for a person to have the evil intent to obstruct). The Omnibus Provision

Section 1512 was enacted to prevent tampering with a witness, victim, or informant.¹⁶⁴ Congress added § 1512(c) to the obstruction statutes as part of the Sarbanes-Oxley Act of 2002¹⁶⁵ to deal with document destruction in the wake of the Arthur Anderson case.¹⁶⁶ Under § 1512(c), liability is imposed on anyone who “corruptly (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so . . . ; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so”¹⁶⁷ Thus, under the amended version of § 1512, the government can prosecute the individual who alters the documents as well as the person who induces her to do so.

Section 1519 was also enacted as part of the Sarbanes-Oxley Act to address the destruction, alteration or falsification of documents in federal investigations.¹⁶⁸ It provides that:

Whoever 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 . . . shall be fined under this title, imprisoned . . . or both.¹⁶⁹

could apply to the concealment, alteration, or destruction of subpoenaed documents because a grand jury would have issued the subpoena. *Id.*; see 18 U.S.C. § 1503. Some courts have held, however, that concealment and destruction of documents likely to be sought by subpoena is actionable under § 1503 if the person knows of the pending proceeding before the subpoena is issued. See, e.g., *United States v. Lundwall*, 1 F. Supp. 2d 249 (S.D.N.Y. 1998). Much like § 1503, § 1505’s Omnibus Provision, which addresses obstruction of agency or Congressional proceedings, has a requirement of a pending proceeding that could preclude its use for an attorney’s conduct during an internal investigation. 18 U.S.C. § 1505 (2008). For a detailed discussion of all of the obstruction of justice provisions and their ability to address document destruction at various stages in litigation, see generally Chase, *supra* note 101.

164. 18 U.S.C. § 1512 (2006). As originally enacted, however, it only prevented causing or inducing any person to (1) withhold testimony; (2) alter, destroy, or conceal an object; (3) evade legal process summoning that person to appear as a witness or produce a record or document; or (4) be absent from an official proceeding for which that person has been summoned. Chase, *supra* note 101, at 739–40. Thus, it did not cover a situation where an individual withheld testimony or destroyed evidence on her own accord. See *id.*

165. Sarbanes-Oxley Act of 2002, H.R. 3763, 107th Cong., 116 Stat. 745, 807 (2002).

166. Kasprisin, *supra* note 101, at 878–79.

167. 18 U.S.C. § 1512(c)(2) (2006).

168. Pub. L. No. 107-204, Title VII § 802(a), 116 Stat. 800 (codified at 18 U.S.C. § 1519).

169. 18 U.S.C. § 1519 (2006).

Section 1519 is meant to be broader than the other obstruction statutes. Section 1519 prohibits acts that interfere with pending investigations and acts performed “in relation to or in contemplation of” any matter before an agency.¹⁷⁰ Thus, there is no requirement of a “pending proceeding” as in the other obstruction statutes. Section 1519 covers any situation where evidence may be altered, thus making the crime easier to prove.¹⁷¹ Further, the sentence of twenty years makes it a desirable statute to use.¹⁷²

Importantly, there is a defense to obstruction of justice charges where the allegedly obstructive conduct occurs while providing bona fide legal services. Section 1515(c), which is known as the “safe harbor,” provides, “[t]his chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.”¹⁷³ The safe harbor negates the mental element of the offense because someone “who is performing bona fide legal representation does not have an improper purpose.”¹⁷⁴ The defendant-lawyer bears the burden of raising the

170. *Id.*

171. Kasprisin, *supra* note 101, at 883–85 (explaining that under § 1519, the defendant must act knowingly rather than corruptly and that the knowledge that is required is not of the pending federal proceeding, but simply that “the person knew they were altering, destroying, mutilating, concealing, covering up, falsifying, or making a false entry in a document, record, or tangible object”).

172. 18 U.S.C. § 1519.

173. 18 U.S.C. § 1515(c) (1996).

174. *United States v. Kloess*, 251 F.3d 941, 948 (11th Cir. 2001). Kloess was an attorney charged with violating 18 U.S.C. § 1512(b)(3) for obstruction of justice when he knowingly misled the Court regarding the true identity of his client to conceal a probation violation. *Kloess*, 251 F.3d at 943. Kloess’s client, Gene Easterling, was on probation for a federal offense when he was stopped for a traffic violation and found to be in possession of a gun, which violated his probation. Easterling provided the police with a driver’s license showing the name Craig Wallace and he was subsequently charged under that name. Kloess then entered a plea of guilty *in absentia* for him under the name Craig Wallace. The obstruction charges were based on Kloess’ knowledge that his client’s name was really Gene Easterling. The claim was that he concealed his client’s true identity to hide Easterling’s probation violation. Kloess moved to dismiss the indictment because he claimed that it did not include an essential element found in a safe harbor provision of a separate section, § 1515(c), which protected attorneys providing bona fide legal representation services from liability for obstruction. *Id.* at 943–44. Thus, Kloess argued the government had to plead and prove that his conduct did not fall within the protection of the safe harbor provision. *Id.* The district court granted Kloess’ motion to dismiss the indictment because it found that the burden should be on the government. The government appealed the dismissal. *Id.* at 944. The Eleventh Circuit found that the safe harbor was an affirmative defense that negated the mental state of obstruction. Thus, the burden of production for the safe harbor defense was on the defendant-attorney, but that the burden of proof was on the government at all times. *Id.* at 949.

defense and demonstrating that she is entitled to its protection.¹⁷⁵ Once the defendant lawyer has properly raised that defense, however, the government bears the burden of disproving the defense beyond a reasonable doubt.¹⁷⁶

The government argued that the safe harbor did not apply to Stevens because her conduct assisted GSK in the commission of a crime.¹⁷⁷ Presumably, Stevens allegedly assisted GSK in committing obstruction of justice. The question, however, is not whether Stevens' conduct hindered the government's investigation of GSK; it is whether her conduct was taken as part of a bona fide legal representation. This distinction is critical because many lawful actions that attorneys take impede government investigations. The safe harbor would not serve any purpose if a finding that an attorney's actions hindered the investigation was enough to defeat it.

The important question is whether the attorney took the actions for an improper purpose. The government bears the burden of proving an improper purpose beyond a reasonable doubt. GSK asked Stevens, in her capacity as general counsel, to head an investigative team to respond to the FDA's voluntary request for information.¹⁷⁸ In the course of the investigation, Stevens made decisions and judgments in responding to the FDA's inquiry.¹⁷⁹ The government argued that "[a] reasonable jury could conclude that the defendant took deliberate action to conceal the relevant facts from the FDA, while creating the appearance of cooperation and candor."¹⁸⁰ The mere fact that the government did not agree with Stevens' decisions, however, does not demonstrate that she acted with an improper purpose. The only thing that the government proved was that Stevens was a zealous advocate on behalf of GSK. There is an inevitable conflict between a

175. *Id.* at 948–49. The defendant-attorney's burden can be met by demonstrating that she is a validly licensed attorney who was hired to provide legal representation and that the charged conduct consists of that representation. *Id.* In some situations, the defendant-attorney's burden of production is met by the allegations in the indictment. *Id.* at 948 n.8. The attorney is entitled to have an expert who will explain that the lawyer's conduct was actually in line with her ethical obligations to her client and her duty to provide zealous advocacy. *Id.* at 949; *see also* MODEL RULES OF PROF'L CONDUCT Canon 2 (2010) ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

176. *Kloess*, 251 F.3d at 949.

177. United States' Initial Response to Defendant's Motion for Judgment of Acquittal at 10, *United States v. Stevens*, No. 10-CR-694-RWT (D. Md. May 9, 2011) [hereinafter *United States' Initial Response*].

178. Stevens Transcript, *supra* note 1, at 5–6.

179. *Id.* at 5.

180. United States' Initial Response, *supra* note 177, at 8.

lawyer's duty to be a zealous advocate and the government's efforts to obtain facts. As Stevens' lawyers argued in her motion for a judgment of acquittal, it is the lawyer's duty "to defend her client, to minimize her client's exposure, to press for advantage where possible, to seek advice where advisable, and to exercise judgment in doing so. It is to protect this exercise of judgment, and of zealous advocacy, that the § 1515(c) safe harbor exists."¹⁸¹ Thus, Stevens had an absolute defense to the obstruction of justice charges.

Even if the safe harbor did not apply, however, the government did not demonstrate that Stevens obstructed justice. The government charged Stevens with obstruction of a proceeding under 18 U.S.C. § 1512(c)(2).¹⁸² The government alleged that by withholding and concealing documents that allegedly demonstrated that GSK had promoted Wellbutrin for unapproved uses, Stevens "attempted to and did corruptly obstruct, influence, and impede an official proceeding."¹⁸³ Further, the government alleged that Stevens impeded the official proceeding by sending a letter to the FDA stating that she had completed the response to the government's inquiry.¹⁸⁴ The government also charged Lauren Stevens with obstruction of justice by falsifying and concealing documents under 18 U.S.C. § 1519 for altering a spreadsheet that she created for the government.¹⁸⁵ Each of these charges is without merit.

The government sent GSK a voluntary request for information. In addition to gathering GSK's documents, the government requested that Stevens gather documents that were not in GSK's possession from doctors who assisted GSK in promoting Wellbutrin.¹⁸⁶ Ordinarily, an entity is only responsible for gathering the documents in its own possession.¹⁸⁷ When some of those documents demonstrated that a number of doctors were promoting Wellbutrin off-label, Stevens con-

181. Stevens' Motion for Acquittal, *supra* note 42, at 18.

182. Stevens Indictment, *supra* note 3, at 13.

183. *Id.*

184. *Id.* at 14.

185. *Id.*

186. *Id.* at 3–5.

187. *See* FED. R. CIV. P. 34(a)(1) (explaining that the obligation to produce documents extends to those documents that are in the responding party's "possession, custody, or control"). In some cases, courts have interpreted Rule 34's "possession, custody, or control" provision to include documents that the responding party has the legal right or practical ability to obtain. *See, e.g.,* Searock v. Stripling, 736 F.2d 650, 653–54 (11th Cir. 1984). The requests at issue in those cases, however, were part of the formal civil discovery process where legal sanctions are available for the failure to produce documents. The Stevens case involves a voluntary request for information.

sulted with outside counsel to determine whether she was required to produce the documents.¹⁸⁸ Outside counsel advised her that she did not have to produce the documents.¹⁸⁹ Thus, Stevens asserted that the production was complete. The government interpreted Stevens' assertion to mean that GSK had turned over every potentially responsive document that the FDA requested. But, it could also mean that GSK had produced all of the documents that it intended to turn over in response to the voluntary request for information. Perhaps Stevens should have been clearer in her letter. A lack of clarity, however, is not enough to demonstrate "corrupt" concealment. Concealment requires some act to prevent detection or hide the documents.¹⁹⁰ The government knew that the documents existed and that they were not produced. Stevens did not engage in any effort to convince the government that the documents did not exist.

Further, the statement that "[a]lthough there were isolated deficiencies, the objective evidence clearly demonstrates that GSK has not developed, maintained, or encouraged promotional plans or activities to promote, directly or indirectly, Wellbutrin SR for weight loss, the treatment of obesity, or any other unapproved indication," is defensible.¹⁹¹ First, GSK does not deny that there were cases of doctors or employees of GSK who promoted Wellbutrin off-label. Instead, GSK acknowledges that there were off-label promotional activities by

188. When deciding whether to produce presentation materials by physicians who had given promotional presentations regarding Wellbutrin, Stevens had other lawyers involved in the case prepare a memorandum regarding the pros and cons of producing the slide sets to the FDA. Stevens Indictment, *supra* note 3, at 10. In the "Pros" category, the attorneys said: (1) that it "[r]esponds to FDA's request 5(a) for copies of all materials presented by individuals identified in response to item 3 and relating to Wellbutrin SR"; and (2) that it "[p]otentially garners credibility with FDA." *Id.* In the "Cons" category, the attorneys said: (1) that it "[p]rovides information that appears to promote off-label uses of Wellbutrin for weight loss as well as ADHD, sexual dysfunction, and other unapproved uses;" (2) that it "[p]otentially demonstrates GSK's lack of control over GSK sales representatives;" (3) that it "[p]otentially demonstrates GSK's lack of control over physician speakers;" and (4) that it "[p]rovides incriminating evidence about potential off-label promotion of Wellbutrin SR that may be used against GSK in this or in a future investigation." *Id.*

189. Stevens' Motion for Acquittal, *supra* note 42, at 8–9.

190. *See, e.g.*, United States v. Lench, 806 F.2d 1443, 1446–47 (9th Cir. 1986) (upholding obstruction of justice conviction for defendant who concealed documents requested in a subpoena by moving them to his garage in anticipation of a search and denying their existence); United States v. Weiss, 491 F.2d 460, 466 (2d Cir. 1974) (contrasting "concealment" with "mere failure to produce the documents" requested in the subpoena).

191. Stevens Indictment, *supra* note 3, at 12.

admitting “isolated deficiencies.”¹⁹² In fact, one could argue that by calling the off-label activities “isolated deficiencies,” GSK was merely attempting to distinguish itself from the pharmaceutical companies that intentionally promoted their drugs off-label through concerted marketing efforts.¹⁹³ Second, apart from the merits of the statement, it is nothing more than a legal conclusion. It is pure advocacy. It is well within the bounds of the ethics rules to advocate on behalf of a client in this manner. Although reliance is not an element of the offense, the notion that a prosecutor will be obstructed in his investigation based on a legal conclusion asserted by the defense is far-fetched at best. Indeed, if Stevens’ statement is objectionable as “false” or “obstruction,” then any statement in a brief that comes to a legal conclusion contrary to the government’s position is also actionable. When attorneys have to be concerned with making legal conclusions in advocating for their clients, we have a complete breakdown of the adversarial system of justice.

Finally, the government’s claim that Stevens obstructed justice by falsifying a document is similarly without merit. The FDA requested that Stevens create a promotional speaker spreadsheet that detailed speaker events.¹⁹⁴ An early draft of the document had a column for entertainment activities, but after consultation with outside counsel Stevens removed it.¹⁹⁵ Thus, the claim that Stevens obstructed justice by falsifying a document rests on the fact that she edited a document that she created at the government’s request before turning it over to the government. Importantly, it is not predicated on the falsity of the information provided in the document. The government made no claim that the information that Stevens provided in the spreadsheet was inaccurate. GSK delivered exactly what it promised — “databases listing all speaker events including the date, location, speaker, and where available, the number of attendees.”¹⁹⁶ Thus, there is no basis for the government’s claim that Stevens falsified the document.

In sum, Lauren Stevens did not obstruct the government’s investigation into GSK. While she may not have produced documents that could have potentially incriminated her client in response to a voluntary request for information, her actions lacked the corrupt intent

192. *Id.*

193. *See supra* note 54 and accompanying text (explaining the inappropriate marketing practices of pharmaceutical manufacturers).

194. Stevens Indictment, *supra* note 3, at 9.

195. Stevens’ Motion for Acquittal, *supra* note 42, at 13.

196. *Id.* at 12.

necessary for obstruction of justice. Stevens provided bona fide legal services to GSK during the course of the investigation. The government may have wanted more documents, but Stevens was not obligated to provide the documents because it was a voluntary request for information. There is no claim that Stevens failed to turn over the documents at issue when she faced a subpoena. Thus, unless obstruction of justice is interpreted to mean a failure to produce documents when there is no legal obligation to do so, Stevens did not obstruct justice.

3. *The Advice of Counsel Defense*

Because Judge Titus granted Stevens' motion for judgment of acquittal at the close of the prosecution's case, Stevens never had to present her advice of counsel defense. Nevertheless, the advice of counsel was central to the case and was heavily litigated in the pre-trial stage.¹⁹⁷ In fact, the original indictment was dismissed without prejudice because of the prosecutor's "erroneous and prejudicial legal advice given to the grand jury" about the advice of counsel defense.¹⁹⁸

Stevens claimed that she relied on the advice of outside counsel when she responded to the government inquiry on behalf of GSK.¹⁹⁹ Reliance on the advice of counsel is only applicable if the charged offense is a specific intent crime.²⁰⁰ The government argued that the de-

197. See, e.g., United States' Motion to Preclude Advice of Counsel Def. to 18 U.S.C. § 1519 and for Hearing Regarding the Applicability of the Def. to Other Charges, United States v. Stevens, No. RWT-10-0694 (D. Md. Dec. 17, 2010) [hereinafter United States' Motion to Preclude Advice] (arguing that Stevens should not be permitted to raise the advice of counsel defense).

198. United States v. Stevens, 771 F. Supp. 2d 556, 564 (D. Md. 2011). A grand juror asked the prosecutor whether it mattered that Stevens "was getting direction from somebody else about how to handle this?" *Id.* The prosecutor responded that "the advice of counsel defense . . . is a defense that a defendant can raise, once the defendant has been charged." *Id.* Another prosecutor responded that "while [the advice of defense counsel] can be relevant at trial . . . if you find probable cause for the elements here that the attorney Lauren Stevens reasonably knew that she was making false statements and the elements that Patrick [Jasperse] went through, then that's sufficient to find probable cause." *Id.* at 565. The court found that the instruction was erroneous because the grand jurors were told that the defense was irrelevant to whether probable cause existed for an indictment. *Id.* at 568. The court explained that the advice of counsel defense negates the mens rea requirement and that is relevant to the question of whether there is probable cause for an indictment. *Id.* at 567.

199. See United States' Motion to Preclude Advice, *supra* note 197, at 3.

200. See, e.g., United States v. Walters, 913 F.2d 388, 391 (7th Cir. 1990); United States v. Miller, 658 F.2d 235, 237 (4th Cir. 1981); United States v. Polytarides, 584 F.2d 1350, 1353 (4th Cir. 1978). A specific intent crime "is one in which the definition of the crime: (1) includes an intent to do some future act, or achieve some fur-

fense was not applicable because obstruction of justice under 18 U.S.C. § 1519 is not a specific intent crime.²⁰¹ The court, however, ruled against the government on this point because the statute requires that the individual must knowingly alter or destroy documents “with the intent to impede, obstruct, or influence the investigation.”²⁰² The court found that the intent to impede, obstruct, or influence satisfies the specific intent requirement because it demonstrates “consciousness of wrongdoing.”²⁰³ Thus, the advice of counsel defense was available to Stevens.

If an individual or entity relies on the advice of its lawyer, the individual or entity has acted in good faith, which negates the mens rea of the crime.²⁰⁴ To assert an advice of counsel defense, the person or entity must prove the following factors: (1) the person or entity sought counsel’s advice in good faith; (2) the person or entity disclosed all pertinent information to counsel; (3) the person or entity acted on counsel’s advice in good faith; and (4) the attorney was competent in the particular area of law and disinterested in the matter.²⁰⁵

There can be no question that Stevens sought the advice of both in-house and outside counsel for the purpose of responding to the FDA’s inquiry. To claim otherwise would be problematic, given that the government had no evidence to the contrary despite the fact that it viewed attorney-client privileged documents as part of its investigation. It is also likely that Stevens provided outside counsel with all of the documents and relevant facts because it is normal practice in an internal investigation for outside counsel to be heavily involved in the production of documents. This is true even when the production appears to come from in-house counsel. Further, the privileged documents demonstrate the government’s awareness of the slide sets that the government claims were concealed and the document that the government claims was altered.²⁰⁶ In fact, it is clear from the privi-

ther consequence (i.e., a special motive for conduct), *beyond the conduct or result that constitutes the actus reus of the offense*; or (2) provides that the actor must be aware of a statutory attendant circumstance.” O’SULLIVAN, *supra* note 59, at 95 (quoting JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 119 (1995)).

201. See United States’ Motion to Preclude Advice, *supra* note 197, at 6–7 (arguing that the mens rea requirement for obstruction under § 1519 is knowingly, not willfully, therefore there is no specific intent requirement).

202. 18 U.S.C. § 1519 (2002).

203. *Stevens*, 771 F. Supp. 2d at 561.

204. O’SULLIVAN, *supra* note 59, at 98.

205. *United States v. Eisenstein*, 731 F.2d 1540, 1544 (11th Cir. 1984).

206. See *supra* note 188 (discussing the pro-con memo prepared by outside counsel when weighing whether to produce the documents).

leged documents that outside counsel advised Stevens not to produce the documents and to remove the “entertainment” column from the document that Stevens created for the government.²⁰⁷ The removal of that column is the basis for the claim that Stevens obstructed justice by altering a document. Nevertheless, the government argues that any reliance on the advice of counsel would have been improper because counsel advised Stevens to “make false statements to the FDA and to conceal promised documents and information from the FDA while representing that her response to the FDA was final and complete.”²⁰⁸ Given that Stevens was responding to a voluntary request for information, however, Stevens would not have any reason to believe that following outside counsel’s advice with respect to producing documents was illegal. Stevens had no legal obligation to provide any documents to the government.²⁰⁹ Further, GSK’s outside counsel included two former FDA attorneys.²¹⁰ It is perfectly reasonable that Stevens would rely upon their considerable expertise in determining how to respond to the government’s request. Thus, the Stevens case never even should have made it to the indictment stage because it was clear that she had relied in good faith on the advice of counsel. As such, she did not have an improper purpose or act with consciousness of wrongdoing when she responded to the FDA’s voluntary request for information.

207. Stevens’ Motion for Acquittal, *supra* note 42, at 14 (citing government exhibits). Outside counsel’s notes reflected that “entertainment” should be kept out of the spreadsheet. *Id.* at 13. Outside counsel’s notes also indicated that she “should *NOT* produce these presentations.” *Id.* at 9.

208. United States’ Motion to Preclude Advice, *supra* note 197, at 16.

209. The Federal Rules of Criminal Procedure require compliance with a subpoena and provide sanctions for failure to comply with the subpoena. *See* FED. R. CRIM. PRO. 17. Similarly, the United States Code requires compliance with civil investigative demands and provides sanctions for failure to comply. *See* 31 U.S.C. § 3733 (2010). There is no similar requirement for a voluntary request for information. When a corporation refuses to comply with a voluntary request for information the next step is to issue a subpoena. *See, e.g.,* Matthew Daly, *EPA: Halliburton Issued Subpoena for Refusing to Disclose Hydraulic Fracturing, ‘Fracking,’ Chemical Ingredients*, HUFFINGTON POST (Nov. 9, 2010, 5:41 PM), http://www.huffingtonpost.com/2010/11/09/epa-halliburton-subpoenae_n_781045.html (explaining that after Halliburton’s refusal to voluntarily provide information regarding fracking the EPA issued a subpoena to force Halliburton to produce the documents).

210. Stevens’ Motion for Acquittal, *supra* note 42, at 8.

B. Misguided as a Matter of Policy

1. *The Adversarial System of Justice*

The government bears some responsibility here. The government has become so reliant on the “cooperation” of the targets of their investigations that they often do not perform a truly independent investigation. Instead, corporate attorneys are put in the position of conducting internal investigations of their clients and then reporting the results to the government. Many scholars have discussed the disturbing trend of prosecutors “deputizing” defense attorneys during the course of government investigations.²¹¹ A defense attorney, however, is not a government agent. A defense attorney owes a duty of loyalty to her client.²¹² It defies the role of defense counsel to expect them to be objective reporters of a client’s wrongdoing to the government. Defense counsel’s fundamental objective is to prevent a client from facing criminal charges. Thus, defense attorneys attempt to control the information that is revealed to the government to minimize or prevent charges against their clients. Even once all of the information is revealed, defense counsel attempts to persuade the government not to indict her client by preparing a white paper and arguing that the client’s actions do not rise to the level of criminal activity.

If the prosecution of Lauren Stevens had been successful, it would have essentially stripped away an attorney’s role as an advocate during a government investigation. The government expects an attorney to turn over all documents that incriminate her client even when they are not compelled to do so by court order. The DOJ has explained that “[w]hen misconduct is discovered, the Department expects corporations to self-report to law enforcement, including any regulators,

211. See, e.g., Copeland, *Preserving*, *supra* note 13, at 1208; George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 998 (2005); Lawrence D. Funder, *Internal Investigations: Consequences of the Federal Deputization of Corporate America*, 45 S. TEX. L. REV. 111, 117 (2003); Julie R. O’Sullivan, *The Last Straw: The Department of Justice’s Privilege Waiver Policy and the Death of Adversarial Justice in Criminal Investigations of Corporations*, 57 DEPAUL L. REV. 329, 329, 336 (2008).

212. See *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. Counsel also has a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process.” (internal citations omitted)).

to investigate the misconduct, to discipline any wrongdoers, and to cooperate fully with government investigations.”²¹³

Perhaps, in some cases, it is in the best interests of the client to turn over everything and hope for cooperation credit. But there is no requirement that targets of an investigation voluntarily cooperate in building a case against themselves. Defense attorneys are not the partners of the government. If they were, then the government would not need to obtain civil investigative demands for documents, grand jury subpoenas for documents and testimony, electronic surveillance, or search warrants.²¹⁴ These powers ensure that the government can adequately and effectively investigate wrongdoing and prosecute culpable parties.²¹⁵ When the government uses these powers to investigate, defense counsel is legally obligated to comply with the government’s requests for information.

Although it is problematic that Stevens represented that she would gather documents from outside of GSK but failed to turn them over, there is not one case that suggests that an attorney has an obligation to turn over documents in response to a voluntary request for information. There is simply no support for the notion that failure to turn over documents in response to a voluntary request for information, which carries no force of law whatsoever, is actionable. The government’s case would have been much stronger if GSK had documents in its possession, received a subpoena that specifically requested those documents, failed to turn those documents over to the government, and then asserted that the response was complete. In that situation, GSK would have a legal duty to turn over the documents. In the absence of a legal duty to turn over documents, there is little justification for charging counsel with obstruction of justice for failing to turn over the documents.

2. *Prosecutorial Ethics*

Prosecutors have a great deal of discretion in making charging decisions. In the context of white collar crime, overlapping statutes often apply to the same conduct. Thus, prosecutors are expected to use

213. Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1227 (2006) (alteration in original) (quoting Interview with United States Attorney James B. Comey Regarding Department of Justice’s Policy on Requesting Corporations Under Criminal Investigations to Waive the Attorney Client Privilege and Work Product Protection, U.S. ATTYS’ BULL. 2, 1 (Nov. 2003)).

214. Silbert & Joannou, *supra* note 213, at 1225.

215. *Id.*

their discretion ethically when making charging decisions.²¹⁶ In recent years, prosecutors have taken a heightened role in regulating corporate attorneys by using the criminal law. The evidence is mounting that prosecutors now view legal advice in the course of an internal investigation as “an obstruction to criminal investigations and prosecutions.”²¹⁷ That view, however, is inconsistent with the adversarial process and the constitutional right to an attorney.

Prosecutors play a unique role in the judicial system and have special ethical rules that apply to their conduct. But there is little review of prosecutorial discretion. “So long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute,” there is no review of the prosecutor’s decision making.²¹⁸ The Model Rules of Professional Conduct instruct prosecutors to “refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”²¹⁹ The U.S. Attorneys’ Manual, which is not binding, instructs prosecutors that “both as a matter of fundamental fairness and in the interest of the efficient administration of justice, no prosecution should be initiated against any person unless the government believes that the person probably will be found guilty by an unbiased trier of fact.”²²⁰

Prosecutors must act not only as advocates, but as ministers of justice as well.²²¹ One important feature of our criminal justice system is the notion of the neutral prosecutor, who will select no individual for prosecution based on race, national origin, sex, the prosecutor’s personal feelings about the defendant, or the prosecutor’s potential career advancement.²²² In this situation, even more than typical pretextual prosecutions, there is a heightened danger that the prosecutor pursues the case because of animus against opposing counsel.

216. See, e.g., Ellen S. Podgor, *The Ethics and Professionalism of Prosecutors in Discretionary Decisions*, 68 FORDHAM L. REV. 1511 (2000) (examining areas of prosecutorial discretion and recommending additional education on the exercise of that discretion for prosecutors).

217. Henning, *Targeting*, *supra* note 114, at 694.

218. *Wayte v. United States*, 470 U.S. 598, 607 (1985).

219. MODEL RULES OF PROF’L CONDUCT R. 3.8(a) (2009).

220. U.S. ATTORNEYS’ MANUAL § 9-27.220 cmt. (2011).

221. MODEL RULES OF PROF’L CONDUCT R. 3.8 cmt. (2009) (explaining that prosecutors’ responsibility includes “specific obligations to see that the defendant is accorded procedural justice, that guilt is decided upon the basis of sufficient evidence, and that special precautions are taken to prevent and to rectify the conviction of innocent persons.”).

222. Bruce Green & Fred Zacharias, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837, 886–88 (2004) (reconciling various notions of the neutral prosecutor).

As Professor Bruce Green has explained, “the prosecutor’s professional judgment and detachment are to be trusted least” when he or she regulates defense counsel.²²³ As a result, there is a serious danger “of overdeterrence — that is, to avoid the possibility of an unwarranted prosecution, lawyers may refrain from engaging in lawful conduct that is professionally desirable.”²²⁴

The recent prosecutorial trends targeting attorneys as gatekeepers and increasing the use of pretextual prosecutions require that prosecutors exercise greater care in selecting charges. It is far too easy for prosecutors to base their charging decisions on defense counsel’s failure to cooperate during an investigation rather than on actual harm to the investigation. An obstruction of justice charge against opposing counsel should not be an “assertion of government power.”²²⁵ As Professor Erin Murphy has noted, the difficulty with prosecuting process crimes is that “[t]he further a prosecution moves from redressing the core prohibitions of process offenses — such as acts that directly pervert a function of justice or compromise a collective interest in a healthy system — the less firm the moral justification for punishment.”²²⁶ Thus, the severity of the obstructive activity must play an integral role in determining whether the prosecution is justified.

The problem is that prosecutors may not judge the harm from the obstructive conduct accurately due to tunnel vision. As Susan Brandes notes, “Tunnel vision can be explained as a species of cognitive bias that causes prosecutors to screen out information that might cast doubt on the accuracy of their initial version of events.”²²⁷ Unlike street crimes where the prosecutor makes a charging decision after the police have conducted an investigation, in white collar crime cases prosecutors often spend years investigating wrongdoing before they ever bring any charges. After several years dedicated to a particular case, even a conscientious prosecutor would experience some bias in her decision making with respect to that case.²²⁸ Research has

223. Bruce Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327, 328–29 (1998).

224. *Id.*

225. Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 *CAL. L. REV.* 1515, 1536 (2009).

226. Murphy, *supra* note 102, at 1441.

227. Susan A. Bandes, *The Lone Miscreant, the Self-Training Prosecutor, and Other Fictions: A Comment on Connick v. Thompson*, 80 *FORDHAM L. REV.* 715, 731 (2011).

228. Alafair S. Burke, *Improving Prosecutorial Decision Making: Some Lessons of Cognitive Science*, 47 *WM. & MARY L. REV.* 1587, 1593 (2006) (“[E]ven ‘virtuous,’ ‘conscientious,’ and ‘prudent’ prosecutors fall prey to cognitive failures.”); Keith A.

shown that once people develop theories, they are unlikely to change those theories even when confronted with information that puts the accuracy of their theories in doubt.²²⁹ Due to this bias, people are likely to seek out and “overvalue” information that bolsters their theories and discount any information that weakens their theories.²³⁰

In the Stevens case, the prosecutor decided to pursue Stevens for obstruction of justice based on her conduct during the investigation.²³¹ The prosecutor probably felt confident that Stevens had committed a crime. When the prosecutor viewed the attorney-client privileged documents, she was confronted with evidence that Stevens relied on the advice of her counsel when responding to the FDA’s inquiry. If Stevens relied on the advice of her counsel, then her actions were taken in good faith and were not obstructive. But that did not dissuade the prosecutor from going forward with the charges. Instead, the prosecutor looked for ways to reconcile the evidence “with the existing theory of guilt.”²³² Thus, the prosecutor decided that either Stevens did not disclose all of the facts to outside counsel or that it was unreasonable for Stevens to rely upon the advice of counsel because counsel advised her to “make false statements to the FDA and to conceal promised documents and information.”²³³ The prosecutor’s bias was so strong that even the fact that the Maryland U.S. At-

Findley & Michael S. Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 WIS. L. REV. 291, 319 (2006) (“[T]he longer that . . . prosecutors . . . live with a conclusion of guilt, repeating the conclusion and its bases, the more entrenched their conclusion becomes, and the more obvious it appears that all evidence pointed to that conclusion from the very beginning.”).

229. Burke, *supra* note 228, at 1593.

230. *Id.* (explaining that there are four different aspects of cognitive bias: “confirmation bias, selective information processing, belief perseverance, and the avoidance of cognitive dissonance”). Professor Burke explains that:

Confirmation bias is the tendency to seek to confirm, rather than disconfirm, any hypothesis under study. Selective information processing causes people to overvalue information that is consistent with their preexisting theories and to undervalue information that challenges those theories. Belief perseverance refers to the human tendency to continue to adhere to a theory, even after the evidence underlying the theory is disproved. Finally, the desire to avoid cognitive dissonance can cause people to adjust their beliefs to maintain existing self-perceptions.

Id. at 1593–94.

231. *See generally* Stevens Indictment, *supra* note 3 (detailing the allegations of wrongdoing against Stevens that occurred during the FDA’s investigation of GSK).

232. Burke, *supra* note 228, at 1606 (“The prosecutor will accept at face value any evidence that supports the theory of guilt and will interpret ambiguous evidence in a manner that strengthens her faith in the case.”).

233. United States’ Motion to Preclude Advice, *supra* note 197, at 16.

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torney refused to sign the indictment due to inadequate evidence did not discourage the prosecutor from going forward.²³⁴

In sum, even ethical prosecutors who want to do justice can be susceptible to bias. Whether the prosecutors' bias is conscious or not, additional guidance and even restrictions on their discretion when considering whether to indict their adversary would enhance ethical decision making.

III. GOOD FAITH

The facts of the Lauren Stevens case did not warrant obstruction of justice charges. Nor should prosecutors pursue obstruction of justice charges against in-house counsel for these types of disputes in the future. The government clearly pushed the envelope in this situation by charging obstruction for actions taken in response to a voluntary request for information where the company had no legal duty to produce documents. Further, charging in-house counsel with obstruction for editing a document that the counsel created for the government, as opposed to a pre-existing document, was also a novel charge. That is not to say that no situation exists where obstruction of justice charges are warranted against in-house counsel for the handling of an investigation. There can be no doubt, however, that prosecuting opposing counsel for misconduct during an investigation is a unique situation that requires special consideration. This Part argues that the government should adopt a good faith standard that advises against pursuing criminal charges against opposing counsel for actions taken during an internal investigation unless no reasonable attorney could find the attorney's actions acceptable. This standard is necessary to prevent prosecutors from having undue leverage on defense counsel during the course of an investigation. This standard, along with guidance to follow it, should be set forth in the U.S. Attorneys' Manual. Further, prosecutors should obtain approval before seeking an indictment of an adversary.

At first blush, good faith may seem like an amorphous standard. How does a prosecutor decide whether opposing counsel is acting in good faith when the prosecutor disagrees with the decisions that opposing counsel made during the investigation? It is hard for even the

234. See Sue Reisinger, *Why Didn't the Maryland U.S. Attorney Sign the Lauren Stevens Indictment?*, CORP. COUNS. (June 20, 2011), available at <http://www.law.com/jsp/cc/PubArticleFriendlyCC.jsp?id=1202497751188> (explaining that the Assistant U.S. Attorney went forward with the prosecution despite the objection of the Maryland U.S. Attorney).

fairest and most reasonable prosecutor to break away from the tunnel vision that inevitably develops during an investigation that spans several years. Certainly the prosecutors in the Lauren Stevens case forcefully argued that she did not act in good faith and was thus not entitled to the obstruction of justice safe harbor for attorneys or an advice of counsel defense. Those arguments, however, came after the indictment. What is missing is an objective assessment of an attorney's good faith before the government pursues obstruction of justice charges against opposing counsel.

Before pursuing an indictment against opposing counsel for obstruction of justice or other charges for actions taken in the course of an investigation, the question for the prosecutor should be whether the attorney acted in good faith representation of the client. In other words, would no reasonable attorney find the attorney's actions acceptable? Does the attorney have honest or bad intentions? Importantly, one cannot judge good faith by the end result; one must judge the attorney's intentions at the time that he took the action at issue. For example, if the prosecutor and defense counsel end up in court arguing about the appropriate response to a subpoena or civil investigative demand and the judge rules in favor of the prosecutor, that ruling should not be the basis for obstruction of justice charges unless some other showing of bad faith has been made. There has to be room for disagreement between the prosecution and defense based on arguments supported by the law. To find otherwise would destroy the adversarial process and exponentially increase the leverage that prosecutors already have over corporations and their counsel.

Because it is impossible to set forth every scenario that could occur between the prosecution and defense and make a determination of whether defense counsel acted in good or bad faith, the best course is for the DOJ to update the U.S. Attorneys' Manual to include guidance on when to pursue obstruction of justice or other charges against opposing counsel for actions taken during an investigation. The DOJ should provide factors for prosecutors to consider when deciding whether to seek an indictment against defense counsel. In addition to providing guidance to prosecutors, the DOJ should also require prosecutors to obtain approval from a superior who is not involved in the case before seeking an indictment.

The prosecutors should weigh all of the factors that they normally consider when deciding whether to indict an individual, such as the sufficiency of the evidence; the likelihood of success at trial; the probable deterrent, rehabilitative, and other consequences of conviction;

and the adequacy of noncriminal approaches.²³⁵ Due to the nature of the adversarial relationship between prosecutors and corporate attorneys, however, some additional considerations should come into play in deciding the appropriateness of the charges. In particular, due to the concern that zealous advocacy will be chilled by these types of prosecutions, it is important that the government consider whether the actions that are the subject of the charge were taken in good faith representation of the client.

There are many factors that may be relevant to a finding of good faith representation. A key issue will be the stage of the investigation where the alleged misconduct took place. If it took place in an early stage, such as during an agency's voluntary request for information, it is not easy to justify a prosecution because there is no legal duty to respond to a voluntary request for information. The only duty that defense counsel has at that point in the investigation is the duty of loyalty to her client. Thus, unless the client directs the attorney to fully cooperate with the government's investigation, turn over incriminating documents, and hope for leniency, defense counsel will be motivated to resist turning over any incriminating documents. Further, counsel might also advise the employees of the corporation not to speak with government investigators. If the attorney's actions are legal and she believes they are in the best interests of the client, her conduct should not be the basis of obstruction of justice charges.

Defense counsel's obligation to turn over documents, however, increases as they progress in the investigative process.²³⁶ Thus, if the government has obtained a civil investigative demand or a grand jury subpoena, defense counsel has a legal obligation to turn over documents.²³⁷ That does not mean, however, that any dispute over the appropriate scope of that response should lead to obstruction of justice charges. Nor should a motion to quash a subpoena based on valid legal arguments give rise to obstruction of justice charges. As previously mentioned, defense counsel will read subpoenas and civil investigative demands narrowly and only produce what they absolutely must produce to comply with the company's legal obligation.²³⁸ They do

235. U.S. ATTORNEYS' MANUAL §§ 9-27.230, 250 (2011).

236. While counsel may not have a legal obligation to turn over documents in response to a voluntary request for information, if the investigation proceeds to a grand jury and an indictment is issued, counsel must comply. FED. R. CRIM. P. 17(g) (explaining that an individual who fails to comply with a lawfully issued subpoena will be held in contempt of court).

237. *Id.*

238. See discussion *supra* Part III.A.1.

not have an obligation to volunteer to turn over incriminating documents that are not requested in the subpoena or civil investigative demand. The government, on the other hand, will read the requests broadly and may view the withholding of documents for privilege or non-responsiveness as obstructing the investigation. This is particularly true if the prosecutor is already predisposed to hostility toward the attorney-client privilege because of a belief that the corporation may be using the privilege to protect documents that would otherwise be discoverable. These types of disputes over the scope of the response to a civil investigative demand or subpoena should not result in obstruction of justice charges unless no reasonable attorney would interpret the document request in the manner that defense counsel interpreted it. On the other hand, if defense counsel is instructing employees to route e-mails through the in-house legal department to shield incriminating documents from discovery or destroying documents that the government might request or has already requested, it is unlikely that those actions are taken in good faith.

Another important factor to consider in a good faith determination is whether the attorney was involved in the misconduct or had direct responsibility for preventing the misconduct. If the attorney bears responsibility for the conduct that the government is investigating, the government should rightly question whether the attorney's actions are self-serving to protect her from criminal charges. In that situation, the attorney's actions are not taken in the good faith representation of the client.

Additionally, the government should heavily scrutinize a potential prosecution that is based on defense counsel's statements in the course of the investigation. In the Stevens case, the government pursued false statement and obstruction of justice charges because Stevens sent a letter saying that the production of documents was complete and that "GSK has not developed, devised, established, or maintained any program or activity to promote or encourage, either directly or indirectly, the use of Wellbutrin SR as a means to achieve weight loss or treat obesity."²³⁹ Even if the government does not agree with those types of assertions or finds them misleading, the government should not pursue an indictment unless the statements actually had some impact on the investigation. It is tough to assert that opposing counsel's legal conclusion about the legality of its client's conduct amounts to false statements or obstruction of justice.

239. Stevens Indictment, *supra* note 3, at 7–8.

These are not the types of statements that the government would rely on when deciding what steps to take in its investigation. The government would investigate the facts for itself before accepting opposing counsel's legal conclusion about the merits of the potential case against her client. To pretend that opposing counsel's assertion that her client's actions were legal will alter, let alone obstruct, a government investigation in any way is disingenuous. The government will come to its own conclusion about the legality of the conduct after it reviews all of the facts. In short, the government needs to consider whether the statements that they believe are false or obstructive are advocacy, legal conclusions, or statements of fact.

Finally, if the government is considering charging in-house counsel with covering up a client's crime, the government should consider whether there is ample evidence to support criminal charges against the client. As a matter of fundamental fairness, it is mind-boggling that an attorney can be convicted for covering up a client's crime when the government has not proven that the client committed a crime. An attorney who had no involvement in the alleged misconduct does not act in bad faith when she vigorously defends her client throughout the investigation.²⁴⁰ A vigorous defense should not be labeled obstruction.

The DOJ should also institute a requirement that Assistant U.S. Attorneys must receive approval before bringing charges against a corporate attorney for obstruction of justice or other charges arising from an investigation. When the DOJ operated under the factors that the McNulty Memorandum mandated be considered when charging corporations, prosecutors could not ask a corporation to waive the attorney-client privilege before certain requirements were met.²⁴¹ In particular, the McNulty Memorandum required prosecutors to "obtain written authorization from the United States Attorney who must provide a copy of the request to, and consult with, the Assistant Attorney General for the Criminal Division before granting or denying the request."²⁴² Because of the possibility of prosecutorial overreaching in this area, it seems appropriate to have this type of approval requirement before a prosecutor can criminally charge opposing counsel for actions taken during the course of an investigation. Further,

240. Henning, *Targeting*, *supra* note 114, at 680–84 (explaining that obstruction of justice charges have been brought against attorneys who have crossed the line from representing their clients to acting in concert with their client's wrongdoing).

241. *McNulty Memorandum*, *supra* note 118, at 8–11.

242. *Id.* at 9.

following approval of the charges there should be a determination as to whether the U.S. Attorney who was involved in the investigation should spearhead the prosecution. This requirement will help to preserve the appearance of impartiality. These approval requirements would have prevented the Stevens trial because the Maryland U.S. Attorney did not approve the indictment.

Some may argue that a pre-indictment determination of good faith is unnecessary because attorneys can raise good faith at trial. Alternatively, one may argue that requiring a pre-indictment determination of good faith is an undue hardship on the prosecutor. Both of those arguments are without merit. Prosecutors are obligated to seek justice, not to pursue adversaries who got the best of them during an investigation.²⁴³ Thus, requiring the prosecutor to examine whether the attorney acted in good faith and obtain permission to seek an indictment ensures objectivity and helps to satisfy the prosecutor's duty to seek justice. It is not an undue burden. It is a necessary step to safeguard the adversarial system of justice and preserve limited government resources. There are already some situations that require the prosecutor to obtain approval before prosecuting attorneys.²⁴⁴ If obtaining approval in those cases is not an undue burden, then it is unlikely to be an undue burden in this case. Further, by the time the opportunity arises for an attorney to defend herself at trial based on good faith, she will have already encountered the expense and hardship of a trial, lost her livelihood, and seen her name dragged through the mud. The extra steps are justified to ensure that attorneys do not suffer these consequences when they act in good faith.

The purpose of this proposal is not to give defense attorneys free rein to engage in obstructive conduct during an investigation. Rather, the purpose is to permit attorneys to zealously represent their clients' interests during an investigation without the fear that success may mean charges against the attorney. The alternative, which is to leave

243. See generally MODEL RULES OF PROF'L CONDUCT R. 3.8 (2010).

244. See U.S. ATTORNEYS' MANUAL § 9-2.032. The U.S. Attorneys' Manual requires notification to the criminal division whenever a U.S. Attorney is considering indicting an attorney based on charges that (1) the attorney served as counsel for an ongoing criminal organization; or (2) the charges are based on "actions or omissions by the attorney during the representation of a current or former client" when the client is likely to testify against the attorney pursuant to a cooperation agreement. *Id.* There is also guidance on when it is appropriate for the prosecutor to participate in those types of prosecutions against an attorney who represented a current or former target of an investigation. *Id.* The guidance stresses the need to avoid the appearance of a loss of "impartiality" in the prosecution. *Id.*

these charging decisions in the hands of individual prosecutors, creates too much potential for abuse.

CONCLUSION

The Stevens prosecution was a perfect storm in which several prosecution trends converged. The government's push to hold corporate officers and attorneys responsible for misconduct within the corporation put the eye of the storm squarely on Stevens. Stevens could be seen as a corporate officer or gatekeeper who was responsible for enforcing integrity in drug promotion. The government's long standing hostility to the corporate attorney-client privilege and the efficiency of pursuing pretextual prosecutions provided the perfect strategy for obtaining a conviction. Even though the government did not succeed in the Stevens case, there is still the danger that these trends will meet again and convince a prosecutor to pursue another in-house counsel.

Judge Titus is correct.²⁴⁵ When a corporation asks its in-house counsel to respond to a government request for information and in-house counsel makes decisions with which the government does not agree, that should not permit the government to pierce the corporate attorney-client privilege by invoking the crime-fraud exception.²⁴⁶ It is not a crime or fraud for a corporation to seek legal representation when under government investigation. It does not turn into a crime or fraud because the government does not agree with the choices defense counsel makes in response to the government's inquiry. When there is no evidence that the client wanted the attorney to cover up his or her prior crimes, there is no evidence that the client hired the attorney to help the client commit a crime or fraud. Thus, clients should not fear that their confidences will be violated simply because their attorney mounts a vigorous defense on their behalf. A vigorous defense is not a cover-up. Prosecutors and defense lawyers will always have disputes over the production of documents. So long as defense counsel acts in good faith when responding to a government inquiry on behalf of a corporation, the attorney should not fear prosecution for her advice.

245. Stevens Transcript, *supra* note 1, at 9–10.

246. *Id.*