ARE YOU OBSTRUCTING JUSTICE WITHOUT REALIZING IT?

by Sarah Q. Wirskye

The crime of obstruction of justice refers to interfering with the work of police, investigators, regulatory agencies, prosecutors, or other government officials. Obstruction can generally be grouped into the following three categories: (1) statements and actions toward the government; (2) statements and actions toward third parties; and (3) deleting, altering or failing to produce documents. In addition to a term of imprisonment, obstruction can increase a defendant's sentence under § 3C1.1 of the Federal Sentencing Guidelines.[1]

Obstruction allegations often arise in health care investigations. These are usually easier for the government to prove rather than explaining complex healthcare fraud schemes to the jury. Obstructive behavior also makes it easier for the government to establish the defendant's state of mind. Obstructive behavior, particularly relating to documents, also makes it easier for the government to execute a search warrant, which makes it more difficult and more costly for a provider to defend themselves in an investigation. Martha Stewart's trial is a great example of the force of the obstruction statutes. She was criminally convicted of obstruction for covering up actions that had only civil insider trading consequences and a criminal charge of securities fraud that was dismissed as a matter of law.

The federal obstruction law is located at 18 USC §1501, *et. seq.*[2] This article will discuss some of the provisions more commonly used in healthcare fraud cases. It does not focus on what we would all view as obstruction – for example, bribing a juror – but rather more obscure obstructive conduct. For example, an innocent misstatement, adding or removing helpful information in documents or inadvertently failing to produce a responsive document may be viewed as obstruction by the government. This article also contains tips to avoid actions the government may construe as obstruction.

THE LAW

The primary federal obstruction statutes used in healthcare fraud cases are 18 USC §§ 1503, 1512, 1516,[3] 1518 and 1519.

The Omnibus Clause - § 1503

Section 1503, titled "Influencing or Injuring Officer or Juror," contains the Omnibus Obstruction Clause. The penalty for violating this statute, absent a killing or attempted killing, is a fine and up to 10 years imprisonment.

The Omnibus Clause states that a person who "corruptly or by threats of force, or by threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede the due administration of justice" is guilty of obstruction of justice. Federal courts have read this clause expansively to proscribe any conduct that interferes with a judicial process. To obtain a conviction under §1503, the government must prove that there was a pending federal judicial proceeding, the defendant knew of that proceeding, and the defendant had corrupt intent to interfere or attempted to interfere with the proceeding. Cases under this provision include the concealment, alteration or destruction of documents, and the encouraging or rendering of false testimony. Actual obstruction is not an element, however.

General Witness Tampering Clause and Documents - § 1512

While certain provisions in §1512 address witness tampering, subsection (c) provides for a fine and up to 20 years of imprisonment when an individual "corruptly (1) alters, destroys, mutilates, or conceals a record or document, or other object or attempts to do so, with the intent to impair the objects integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so." This provision is used in document obstruction cases.

Obstruction of Investigations of Health Care Offenses - § 1518

In 1996, as a part of HIPAA, congress added a new criminal statute which provides "[w]hoever willfully prevents, obstructs, misleads,

delays or attempts to prevent, obstruct, mislead, or delay the communication of information or records relating to a violation of a federal health care offense to a criminal investigator shall be fined under this title or imprisoned not more than five years, or both."

Anticipatory Obstruction of Justice - § 1519

Section 1519, titled "Destruction, Alteration or Falsification of Records in Federal Investigations and Bankruptcy," was passed under the Sarbanes-Oxley Act. This provision provides that "[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States..., or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both."

This provision was highly controversial when enacted because it removes certain key proof burdens. Significantly, the government does not have to prove which specific "pending proceeding" the accused attempted to obstruct. Prosecutors charging violations of § 1519 must however, still establish the following: (1) the accused knowingly directed the obstructive act to affect an issue or matter within the jurisdiction of any United States department or agency; and (2) the accused acted at least "in relation to" or "in contemplation" of such issue or matter.

HELPFUL HINTS

There are three primary areas in which healthcare providers potentially violate the obstruction statutes. The following discusses those types of actions I have personally seen in my cases and includes things that a provider can do to avoid a potential violation.

Government Interviews of the Provider

When speaking to a government employee, it is important that a provider is prepared and knows their facts. While an intentional or blatant lie to an investigator is likely an easy obstruction case for the government to prove (if the other elements of the statute are satisfied), even an innocent misstatement may be construed as obstruction of justice. There was a case in which a healthcare provider represented he had only once ordered from a pharmaceutical supplier who was under investigation. In fact, he had ordered from that supplier twice, but this was several years prior to his questioning and he had merely forgotten. Throughout the investigation, the government agent took the position that the healthcare provider had obstructed justice based upon this innocent misstatement.

Government Interviews of Third Parties

Under no circumstances should a healthcare provider instruct a witness not to talk to the government nor suggest what to say. This sometimes occurs when a healthcare provider is under investigation, and he or she tells the employees not to talk about certain topics or not to talk to the government. I have seen cases in which the instruction to not speak to the government may be for the "protection of the employee" so the employee does not become "scared". Again, these actions were characterized as obstruction by the government.

Ideally, a provider should not discuss the investigation with anyone. Counsel who practice in this area can have a short conversation with the employees and provide them with the ground rules. Alternatively, all a healthcare provider should say to their employees regarding being interviewed by a government investigator is that if they talk to the government, they should tell the truth.

Documents

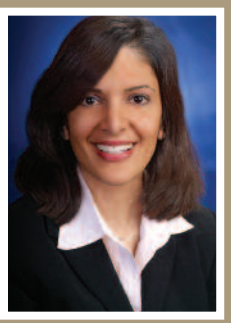
Destroying, altering, or not producing responsive documents could also lead to an obstruction charge. Destroying, failing to produce, or altering *incriminating* information in documents is a fairly easy obstruction case for the government to prove if the other elements of the statute are satisfied. However, merely "cleaning up the files" before production may be construed as obstruction of justice. You should never do this. In the event that any additional notes must be made (which I do ***not*** recommend), those notes should be dated with the present date so that it is clear this information was added after the document request. Finally, something as simple as deleting an email may also be construed as obstruction. You should have counsel advise you regarding a document preservation procedure if you receive a request for documents from the government.

Overall, if you are under administrative, civil and certainly a criminal investigation, it is helpful to have counsel to guide you through the process of interacting with the government and potential witnesses so there are no allegations of obstruction. ■

1 Defendants in the federal system see upward departures for obstruction under § 3C 1.1 more often than any other upward departure.

2 State statutes somewhat similar to the federal obstruction law are found in Chapters 36, 37 and 39 of the Texas Penal Code. These statutes are rarely used in white collar prosecutions and, therefore, are not discussed in this article.

3 This statute is titled Obstruction of a Federal Audit and criminalizes "endeavor[ing] to influence, obstruct, or impede a Federal auditor in the performance of official duties relating to a person, entity, or program receiving in excess of $100,000, directly or indirectly, from the United States in any one year period..." This provision is generally inapplicable in the dental and orthodontic context.



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