

Obstruction of Justice: It's not the Crime, it's the Cover-up

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The familiar saying that "it's not the crime, it's the cover-up" is well-worn for a reason. Obstructive behavior or false statements can land defendants in hot water regardless of the substance of the government's underlying allegations. Consider the following:

- Martha Stewart was never convicted of insider trading—she went to federal prison for lying to investigators.
- The House of Representatives initiated impeachment proceedings against Bill Clinton on two charges—perjury and obstruction of justice.
- Richard Nixon resigned before the House could vote on whether to initiate charges, but the Judiciary Committee had approved three articles of impeachment against him—for obstruction of justice, abuse of power, and contempt of Congress.

A subject or target of an investigation must navigate treacherous terrain in simultaneously preparing a defense and avoiding any actions that might be perceived as obstructive.

What is obstruction of justice?

The crime of obstruction of justice is governed by a number of different statutes at the state and federal levels. Actions taken to bribe, intimidate, or use physical force against witnesses, law enforcement, or judicial officers can obstruct justice. Obstruction can also be committed through interfering with court proceedings, like influencing testimony, destroying evidence, or evading a subpoena. With respect to investigations, 18 U.S.C. § 1503 criminalizes "corruptly" attempting to "influence, intimidate, or impede" an official proceeding.

Prosecutions for obstruction of justice are very fact-specific. Often, they involve behavior that is not otherwise unlawful. For example, it's not illegal for a company to shred old files (assuming there is no separate legal recordkeeping obligation). But if the company manager engages in that same behavior to destroy documents relevant to an SEC investigation, the shredding is illegal obstruction of justice. The question turns on "intent," that is what was in the person's head at the time, and whether the actions were taken to hinder the investigation.

Generally, people don't record their thoughts as they occur, so the government proves what they were thinking by other evidence—did he know about the investigation, what types of documents were shredded, were these types of records routinely shredded, did he do it in the dead of night when no one was around, and so forth.

Don't I have to speak with the agent?

It is never a good idea to speak with an investigative agent without representation. You might think you've done nothing wrong, but if an agent wants to speak with you, that agent probably thinks you have. The federal criminal and regulatory

enforcement apparatus is incredibly complex and changes constantly. It is possible for the government to conclude that you are really close to the line—or even over it—without you realizing. The agent, unlike you, is an expert in the substance of the law, the government's position on what the law is, and obtaining incriminating admissions from people.

Moreover, there is a good chance you will not have a great memory of the events the agents are asking you questions about. Most of us have a hard time remembering what we had for lunch yesterday—much less events that occurred months, or even years ago. A lapse of memory or moment of confusion during the interview could later become grounds for a claim that you obstructed justice.

Put simply, speaking to an agent unprepared and uncounseled is bringing a knife to a gun fight.

But what if I'm not under oath?

It doesn't matter. Under 18 U.S.C. § 1001, it is an offense punishable by up to five years' imprisonment to "knowingly and willfully" make a false statement to federal investigators. For the past several years, Department of Justice policy has provided that the willfulness element requires the defendant actually know his or her conduct is unlawful, not just that the statement is false. As a result, by agency policy federal investigators now begin interviews by warning interviewees about potential liability under Section 1001. In other words, absent a mistake by the investigator, a person's unsworn statements to law enforcement can still give rise to criminal liability.

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