In-House Counsel: Gatekeepers as Targets

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Introduction

On November 8, 2010, Lauren Stevens, a former Vice-President and Associate General Counsel of Glaxo-Smith-Kline (GSK), was indicted for making false statements, falsifying and/or concealing documents, and obstructing an investigation by the United States Food and Drug Administration (FDA) into GSK’s alleged off-label promotion of the antidepressant Wellbutrin. According to the indictment, the charges against Stevens arose out of alleged misrepresentations she made to the FDA in her role as corporate counsel concerning the completeness of GSK’s document production and the company’s promotional activities with respect to Wellbutrin. The indictment alleged, in sum and substance, that Stevens claimed that she had fully completed the document production requested by the FDA and that the corporation’s activities were consistent with the product label while, at the same time, she deliberately withheld a series of slides showing that Wellbutrin was being promoted for other uses.

On March 23, 2011, in the context of deciding pre-trial motions, the court dismissed the indictment against Stevens without prejudice due to erroneous instructions the government provided to the grand jury regarding her advice of counsel defense.\(^1\) During grand jury proceedings, the government incorrectly instructed the grand jury that advice of counsel was an affirmative defense to be asserted after the defendant was charged rather than, as the court found, something that goes to mens rea and can therefore negate the “element of wrongful intent of a defendant that is required for a conviction.”\(^2\) The court found that this error went to the “heart of the indictment” in that it likely influenced the grand jury’s decision to indict, and dismissed the indictment without prejudice. As of the date of this article, it is unclear whether the government will seek another indictment of Stevens before a different grand jury.

Regardless of whether the government seeks a second indictment, the Stevens prosecution represents a cautionary tale in the brave new world of corporate counsel. Since the collapse of Enron, the Department of Justice (DOJ) and regulators, bolstered by legislation such as the Sarbanes-Oxley Act (SOX), have intensified their efforts to attain greater corporate transparency and to “use the full weight of the law to expose and root out corporate acts of corruption.”\(^3\) Indeed, SOX requires attorneys who appear before the Securities and Exchange Commission (SEC) to report violations of the securities law “up the ladder,”\(^4\) while government investigators increasingly demand that corporate counsel cooperate fully and act as “private prosecutors” in ferreting out and correcting corporate misconduct.

Given these responsibilities, in-house counsel are now seen as gatekeepers who share the burden of protecting the public from harmful corporate ac-
tions.\textsuperscript{5} Both the SEC and DOJ have endorsed this notion. In April 2007, SEC Chairman Christopher Cox stated his belief that in-house counsel and the SEC are “partners” who have a shared “mission to protect investors.”\textsuperscript{6} Similarly, the “McNulty Memorandum,” issued by the Deputy Attorney General in December of 2006, makes abundantly clear that in making charging decisions the DOJ will evaluate, among other things, “whether the corporation made a voluntary and timely disclosure, and the corporation’s willingness to provide relevant evidence and to identify the culprits within the corporation.”\textsuperscript{7} The current regulatory environment also has spawned a “culture of waiver,” in which it is expected that the corporation and its counsel will conduct a full and thorough internal investigation and disclose the results to the government.\textsuperscript{8}

As the prosecution of Stevens demonstrates, this new regulatory climate, and the corporate cooperation and transparency it has engendered, has created potential perils and pitfalls for in-house counsel. With increasing frequency, regulators and prosecutors not only scrutinize the substance of an internal investigation or other response to a government inquiry, but also the manner and process by which the corporation responds. In assessing the company’s cooperation, the government is examining with greater intensity the manner in which in-house counsel complies with his or her obligation to preserve, protect and produce evidence and information, which oftentimes includes the company’s internal investigation report. These obligations sometimes place in-house counsel in a predicament where acting as advocate for their employer conflicts with their obligation to the government and their perceived role as private prosecutors in detecting and stopping misconduct. Although in-house counsel clearly should advocate zealously on behalf of their employers, a perceived failure to comply fully with governmental inquiries may make in-house counsel susceptible to allegations of obstruction of justice. The prosecution of Stevens is a graphic illustration of that tension. This article examines the trend towards increased scrutiny and prosecution of in-house counsel in their role as gatekeepers. The article also examines ways in which in-house counsel can balance their corporate responsibilities with government regulatory compliance, and act effectively as gatekeepers without becoming targets themselves.

\textit{The Trend Towards Prosecuting In-House Counsel}

As the federal government strengthens its efforts to crack down on corporate corruption, it has relied with greater frequency on obstruction of justice as a weapon in its arsenal.\textsuperscript{9} As the government has come to view an internal investigation—and a waiver of any privilege as to its contents and conclusions—as a necessary part of cooperation, it is only natural that the manner in which in-house counsel conducts that investigation and discloses its contents has come under greater scrutiny. A thorough and fully disclosed investigation conducted in an objective manner will result in the company being deemed a good corporate citizen. On the other hand, a flawed investigation that is considered incomplete or tainted could convince the government that intervention and corrective action—whether by prosecution or the imposition of a deferred prosecution or corporate integrity agreement—is needed. As a result of this increased scrutiny and transparency, obstruction of justice has become a favored charge with which to indict in-house counsel.\textsuperscript{10} In-house counsel have been charged with obstruction of justice for making materially false statements about accounting practices, destroying evidence, deleting incriminating material and intentionally impeding official proceedings.\textsuperscript{11}

Two indictments of in-house counsel in the late 1990s foreshadowed this recent trend. In 1995, Steven Wolis, general counsel of the Keith Group of Companies, Inc. (Keith Group) was indicted on charges of perjury, false statements, and obstruction of justice.\textsuperscript{12} In 1997, Michael Rosoff, in-house counsel of Towers Financial Corp. (Towers) was indicted on charges of conspiracy, securities fraud,
obstruction of justice, and making false statements.\textsuperscript{13} At the time their lawyers were charged, both the Keith Group and Towers were under investigation by the SEC for allegedly misrepresenting company financials and reporting profits while they were actually suffering losses.

Wolis and Rosoff, however, were indicted for interfering with the SEC’s investigation of their respective corporations, not any substantive offenses. During the SEC investigation of the Keith Group, Wolis allegedly made false statements concerning the Keith Group’s accounting practices.\textsuperscript{14} Rosoff also allegedly provided false testimony to the SEC and, more flagrantly, destroyed documents in anticipation of a subpoena.\textsuperscript{15} Wolis ultimately pled guilty to obstructing the administration of justice and was sentenced to a year of probation and sixty days’ home detention.\textsuperscript{16} Rosoff was found guilty after trial and given an enhanced sentence of over seven years in prison for using his position as in-house counsel to commit securities fraud.\textsuperscript{17}

The Keith Group and Towers investigations highlighted the changing focus of government regulators from the underlying substantive offenses to how corporate personnel facilitated or obstructed the investigations of those offenses. Rosoff’s enhanced sentence for his role in the offense further illustrates the view, embodied in the United States Sentencing Guidelines and elsewhere, that in-house counsel should be held to a higher standard of conduct and be expected to prevent corporate corruption.

During the spate of corporate scandals at the turn of the millennia, two more highly publicized cases found in-house counsel under scrutiny for obstruction of justice. The first involved Franklin Brown, the former Vice President and Chief Legal Counsel of Rite Aid Corporation. Brown was indicted on charges of conspiring to defraud Rite Aid, conspiring to obstruct justice, witness tampering, wire fraud, obstructing a grand jury proceeding, and making false statements to the SEC\textsuperscript{18} in connection with an investigation into Rite Aid’s accounting practices.\textsuperscript{19} That investigation revealed that Brown, along with other Rite Aid executives, submitted artificially inflated profits to investors. However, Brown also was charged with providing false and misleading answers to Rite Aid’s internal investigators, the SEC, and the FBI.\textsuperscript{20} Additionally, Brown was accused of coaching employees’ responses to investigators and instructing a Rite Aid employee to delete incriminating material from his computer.\textsuperscript{21} Brown was convicted by a jury of conspiring to commit accounting fraud, filing false statements with the SEC, conspiring to obstruct justice, obstructing grand jury proceedings, obstructing government agency proceedings, and witness tampering. He received a ten-year prison sentence.\textsuperscript{22}

In 2004, Stephen Woghin, the former general counsel of Computer Associates, was charged with conspiracy to commit securities fraud and obstruction of justice arising out of his alleged conduct in connection with an investigation into Computer Associates’ alleged improper reporting and accounting of its revenue.\textsuperscript{23}

Woghin was targeted, however, not for his involvement in this revenue reporting scheme, but for his attempt to cover it up. In 2002, Computer Associates retained outside counsel to represent it in connection with the pending government investigations. When the law firm questioned Woghin as to his knowledge of Computer Associates’s accounting practices, Woghin did not disclose and in fact falsely denied the existence of such practices even though he knew the law firm would be providing the information from his interview to the government.\textsuperscript{24} Additionally, Woghin also apparently coached other Computer Associates employees not to disclose the company’s accounting practices in their interviews.\textsuperscript{25} Woghin was charged with conspiracy to commit securities fraud and obstruction of justice. He pled guilty and was sentenced to 24 months.\textsuperscript{26}

These examples illustrate the risks in-house counsel can face for conduct during federal investigations.
that can be viewed as obstructionist. The cases discussed above illustrate federal investigators’ expectations and reliance on in-house counsel to provide fully corporate documents and relevant information in order to prevent illegal conduct or ensure compliance. As engaged in by the defendants referenced above, acts such as destroying documents and coaching others to lie, show a clear intent to impede or obstruct an investigation. While the obstruction involved in these cases may appear more flagrant than the conduct in the Stevens case, these examples nonetheless depict an increasing trend of government investigators holding in-house counsel criminally liable when they are viewed as impeding or thwarting an investigation.

The Stevens Case

The Stevens case began with the FDA’s investigation into GSK’s alleged off-label promotion of Wellbutrin in October 2002. As part of the FDA investigation, the FDA sent GSK a letter stating that the FDA believed GSK promoted Wellbutrin for the unapproved purpose of weight loss. The FDA inquired into GSK’s promotional programs and specifically asked GSK to provide the FDA with slides, videos, handouts, and other materials associated with the promotion of Wellbutrin.27

Stevens coordinated GSK’s response to the FDA investigation in her position as in-house counsel. According to the indictment, Stevens was “in charge of” GSK’s “response to the FDA’s inquiry and investigation” and “led a team of lawyers and paralegals who gathered documents and information.”28 In that role, Stevens participated in a telephone conference with FDA representatives and informed them that she would turn over all information regarding the promotion of Wellbutrin, including materials that were not created by GSK or in its custody.29 Stevens reiterated her intentions in a letter she sent to the FDA that confirmed that GSK would attempt to provide the FDA with promotional materials in the custody of third parties. Stevens stated that she would make a good faith effort to obtain the additional materials and would notify the FDA of any inability to secure them.30

In compliance with the FDA’s request, Stevens sent letters to 550 of the 2,700 speakers who promoted Wellbutrin.31 Stevens asked the speakers to provide all the materials demanded by the FDA. Stevens received 40 responses, 28 of which involved the off-label promotion of Wellbutrin.32 Included in the materials produced in response to Stevens’ inquiries were slides that some of the speakers had used in their presentations promoting Wellbutrin’s off-label use.

Once Stevens received the responses, however, she determined that GSK was not required to produce the materials promoting off-label uses of Wellbutrin. Stevens wrote the FDA and indicated she had produced everything to which she had agreed, but failed to produce the slides. In her correspondence with the FDA, Stevens also claimed that GSK’s promotion of Wellbutrin was consistent with the product label and that GSK had not marketed Wellbutrin for weight loss.33

Stevens also consulted with other attorneys—both inside and outside GSK—as to whether she should produce the off-label promotional items she had received. Among other things, she received a memorandum outlining the pros and cons of production.34 Arguments made in favor of producing the materials included responsiveness to the FDA document request and maintaining credibility with the FDA;35 arguments against production revolved around the incriminating nature of the materials.36 According to the government, this dialogue showed that Stevens was aware of her obligation to provide the information in response to the FDA’s request, but did not want to disclose materials that might implicate GSK in off-label promotion. Ultimately, Stevens decided against producing the off-label promotional items in her final production.37 According to the indictment, Stevens nonetheless represented to the FDA that GSK’s production was “final” and “complete.”38

From the outset, Stevens pled not guilty and vehemently asserted that she acted appropriately in her interactions with the FDA. Stevens’s counsel has stressed that everything Stevens “did in this case was consistent with ethical lawyering,” and indicated from the inception of the case that Stevens would assert the advice of counsel defense. Despite Stevens’s protests of innocence, the DOJ adopted a firm stance with respect to her case. Assistant Attorney General Tony West stated that “[c]riminal charges are appropriate when false statements such as those alleged here are made to the [FDA].” Moreover, FDA Associate Commissioner for Regulatory Affairs, Dara Corrigan, emphasized that the “indictment demonstrates that those who purposefully subvert the regulatory functions of the FDA through false statements and misleading information will be held accountable for their deception.”

In the context of pretrial motions, the government filed a motion to preclude Stevens from asserting the advice of counsel defense and moved in limine to exclude evidence regarding the opinions of in-house and outside counsel that were not expressed to Stevens at the time of GSK’s response to the FDA inquiry. Stevens filed, among other motions, a Motion for Disclosure of the Government’s Testimony to the Grand Jury pursuant to Rule 6(e)(3)(E)(ii) of the Federal Rules of Criminal Procedure. In their motion papers, Stevens’s counsel revealed details concerning Stevens’s advice of counsel defense and argued that if the “government failed to instruct the grand jury on the potential applicability of the advice of counsel defense . . . there would exist ample grounds to dismiss the Indictment pursuant to Rule 6(e)(3)(E)(ii).” After reviewing the grand jury transcripts in camera, the court found that the government had in fact erred in responding to a grand juror’s inquiry concerning Stevens’s advice of counsel defense. As the court explained, advice of counsel negates the specific intent required for obstruction of justice and, given the government’s failure to properly instruct the grand jury in this regard, there was “grave doubt that the decision to indict was free from the substantial influence” of the erroneous instruction. Since the court found this error went to the heart of the grand jury’s decision to indict Stevens, the court dismissed the indictment without prejudice.

Although it is unclear whether the DOJ will seek another indictment of Stevens, it is important to note how vigorously the DOJ has prosecuted Stevens even though Stevens was not involved with the alleged underlying crime of promoting Wellbutrin’s off-label use. Unlike the earlier cases involving financial schemes, Stevens had no pecuniary interest in obstructing the FDA’s investigation; rather, it appears she was acting solely as a zealous advocate to protect her employer. The Stevens case stands as a stark warning that the DOJ is prepared to go after all individuals, including in-house counsel, to ensure full compliance with investigative demands and inquiries.

**Conclusions and Lessons to Be Learned**

As Stevens and the other cases cited above illustrate, the government’s increasing expectation and reliance upon the disclosure of confidential and otherwise privileged materials to prosecute corporate misconduct has led to intensified scrutiny of the actions of in-house counsel who are responsible for supervising the investigations and responding to governmental inquiries. As an initial matter, the government is likely to examine what was done to preserve and protect documents and data. Preservation memoranda to all relevant employees halting the automatic deletion or destruction of documents or electronic data, and the “mirroring” of personal computers or company laptops, are all measures that are necessary to avoid the broad and far-reaching provisions of the obstruction statutes enacted under SOX.

Of equal importance, and as reflected in Stevens, is the content of communications with the government concerning the nature and scope of the search for responsive materials and their production. Although Stevens could be criticized for with-
holding the slides and other material evidencing off-label promotion, it is not clear that the government could or would have ever charged her if not for her alleged misrepresentations to the effect that all of the requested materials had been produced and that the company’s activities in promoting the product were consistent with its label when she allegedly knew they were not. The allegation that she represented that the production was “final” and “complete” went to the heart of the charges against her. In communications with the government, in-house counsel has to walk a fine line between zealous advocacy and non-disclosure versus outright misrepresentation. The government accused Stevens of crossing that line. Clearly, making statements in absolute terms to the government such as Stevens allegedly did should be avoided whenever possible.

Although not at issue in Stevens, the government also is likely to examine the manner in which in-house counsel obtains witness statements. In addition to examining the substance of such statements, it must be assumed that the government will look at the circumstances under which they were provided to determine if the witness was coached or coerced. In-house counsel should therefore be extremely careful not to do anything — such as telling a witness the substance of what other witnesses have said or suggesting an answer — that can be misinterpreted as influencing the witness’s statement. Similarly, in-house counsel should avoid discussing issues such as termination, indemnification, severance, or possible civil or criminal liability in the context of the interview. Messages to a witness concerning potential rewards or punishment always leave room for misinterpretation. Interviewing the witness with another person present and properly documenting the interview (with a memorandum that includes the provision of Upjohn warnings and instructing the witness to tell the truth) will also help avoid any appearances of impropriety.

In-house counsel’s dual role as advocate for the company and perceived private prosecutor has heightened what was already an inherent tension. In the current regulatory climate, in-house counsel should assume that its conduct in responding to governmental inquiries will be subject to scrutiny and thus should avoid doing anything that may be viewed in hindsight as obstructing or impeding an investigation.

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2 Id. at 13.


6 Id. at 16.

7 Valerie Figueredo, Misadventures into Corporate Prosecutions After the Holder, Thompson, and McNulty Memoranda, 33 DAYTON L. REV. 1, 29 (2007).


9 Bucy, supra note 3 at 299-300.

10 ACC Report, supra, n. 4 at 4.

11 Id. at 37-50.

12 Litigation Release, United States Securities and Exchange Commission, United States v. Hugh Keith and


Litigation Release, United States Securities and Exchange Commission, supra, n. 11.

Byrne, supra, n. 12 at 6.

Florida Bar v. Wolis, 783 So. 2d 1057, 1058 (Fla. 2001).

Byrne, supra, n. 12 at 6.


United States v. Grass, U.S. District Court, Middle District of Pennsylvania, Indictment at 76.

Id. at 77-79.

Id. at 79.


Id. at 9-11.

Id. at 10-11.

ACC Report, supra, n. 4 at 36.


Id. at 2. Notably, the government did not indict anyone else involved in GSK’s response to the FDA. In light of defense counsel’s recent disclosures showing that Stevens worked closely with a team of GSK in-house counsel and outside counsel from the law firm of King & Spalding in formulating GSK’s responses to the FDA, it will be interesting to see if the government attempts to prosecute any of the other individuals involved.

Id. at 3.

Id. at 3.

Id. at 4.

Id. at 4.

Id. at 7.

It is unclear from the indictment who provided Stevens with this memorandum or how it ended up in the government’s hands.

Id. at 9.

Id. at 9.

Id. at 9.

38 Id. at 8-9.


40 Stevens, 2011 BL 75843 at 2-3.

41 Id. at 3. In accordance with Rule 6(e)(3)(E)(ii) of the Federal Rules of Criminal Procedure, a court may authorize disclosure of grand jury transcripts “at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury.”

42 United States v. Stevens, No. 10-CR-694, Memorandum of Law in Support of Defendant’s Motion for Disclosure of the Government’s Presentation to the Grand Jury Relating to the Advice of Counsel Defense and 18 U.S.C. 1515(c). Stevens’s counsel asserted that King & Spalding attorneys were “intimately involved in the investigation of the underlying facts, the collection of relevant documents, and the preparation of GSK’s response” and that King & Spalding concluded that GSK did not have a corporate strategy to promote Wellbutrin to achieve weight loss or to treat obesity, Stevens’s counsel further asserted that since “good-faith reliance on the advice of counsel is critical to the issue of intent,” it has the “potential to be highly exculpatory.”

43 Id. at 8.

44 Stevens, 2011 BL 75843 at 16, quoting United States v. Peralta, 763 F. Supp. 14, 21 (S.D.N.Y. 1991). The court included an excerpt from the grand jury transcript in its opinion. During grand jury proceedings, a juror asked, “Does it matter that maybe she was—that Lauren Stevens was getting direction from somebody else about how to handle this? Does it matter or is it not relevant?” To which a prosecutor responded “There is something in the law called the advice of counsel defense that is a defense that a defendant can raise, once the defendant has been charged.” A second prosecutor stated that advice of counsel “can be relevant at trial.” Id. at 11-12.


46 Id. at 19.
See 18 U.S.C. § 1519. SOX significantly broadens the scope of obstruction of justice and makes anyone who “knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States subject to liability.” Under these provisions, the failure to preserve documents in the face of a governmental inquiry could clearly be construed as a criminal act.