The Five Best Ways for Your Client's Employees to Get Themselves Indicted.

Jack Sharman

A Little 11th Circuit Law.

Jack Sharman

LIGHTFOOT

LIGHTFOOT FRANKLIN WHITE LLC
TRIAL & APPELLATE COUNSEL

MEMORANDUM

TO: BBA CLE Attendees

FROM: Jackson R. Sharman III

DATE: September 24, 2015

I. Introduction

This memorandum provides a brief overview of recent Eleventh Circuit decisions on issues of criminal liability for bribery and gratuities under 18 U.S.C. §666, obstruction of justice under 18 U.S.C. §§1503, 1512, and 1519, and honest-services fraud under 18 U.S.C. §1346. It also examines some obstruction of justice cases from other jurisdictions.

II. Summary

The Eleventh Circuit has interpreted §666 broadly and upheld most convictions for bribery, so long as there was evidence sufficient to show any kind of corrupt influence with regard to a business transaction between a public official and another person. All courts of appeals, including the Eleventh Circuit, have construed obstruction of justice laws broadly. In addition, the Eleventh Circuit has upheld many convictions for honest-services fraud since the Supreme Court decided *Skilling* in 2010. However, the Eleventh Circuit has overturned pre-*Skilling* convictions for violations of the honest-services statute based on mere self-dealing and that failed to allege or show evidence of a bribery or kickback scheme.

III. What is the current state of Eleventh Circuit law regarding bribery and gratuities?

The Eleventh Circuit has taken a broad view of what constitutes bribery under 18 U.S.C. §666. While the Supreme Court held in *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, that proving bribery of federal officials under 18 U.S.C. §201 requires an explicit quid pro quo agreement, courts of appeals have split as to whether prosecutions under §666 require the same. Section 666(a)(1)(B) provides that any agent of a state, local, or tribal governmental agency that:

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of [an organization that receives at least $10,000 yearly from the federal government] , government, or agency involving any thing of value of $5,000 or more . . . shall be fined under this title, imprisoned not more than 10 years, or both.

Section 666(a)(2) likewise criminalizes conduct whereby any person:

> corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, *in connection with* any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

In *United States v. McNair*, the Eleventh Circuit joined the Sixth and Seventh Circuit Courts of Appeals in holding that §666 "does not impose a specific *quid pro quo* requirement." 605 F.3d 1152, 1188 (11th Cir. 2010). The court explained that "the government is not required to tie or directly link a benefit or payment to a specific official act by that [government] employee," but merely that there was intent to "corruptly influence or to be influenced 'in connection with any business' or 'transaction.' " *Id.* Since *McNair*, the Eleventh Circuit Court of Appeals has largely upheld convictions under §666. See *United States v. White*, 2014 WL

1274627 (11th Cir. March 31, 2014) (upholding a §666 conviction of a former member of a county Board of Commissioners for taking bribes to influence county affairs); *United States v. Keen*, 676 F.3d 981 (11th Cir. 2012) (holding that §666 applies to a state "agent" even when that individual is not authorized to exercise control over the funds). But, see *United States v. Jiminez*, 705 F.3d 1305 (11th Cir. 2013) (overturning conviction of local Head Start administrator under the §666(a)(1)(A) prohibition on misapplying funds). In order for a conviction to be sustained, however, there must be evidence from which a reasonable jury could infer corrupt influence. While most convictions have been of public officials, a private citizen can could be found guilty of §666(a)(2) if a jury finds that he or they offered something of value to a public official to "corruptly" influence the official.

IV. What constitutes obstruction of justice?

Courts have generally construed the obstruction of justice statutes broadly, but most still require a showing of intent in order to sustain an obstruction of justice conviction.

A. Section 1503

Section 1503 criminalizes corrupt—e.g. willful—endeavors to influence, obstruct, or impede the due administration of justice. *United States v. Barfield*, 999 F.2d 1520 (11th Cir. 1993). The Eleventh Circuit held in *United States v. Johnson*, 485 F.3d 1264, that false testimony can provide the basis for a §1503 conviction, even when the testimony did not actually obstruct justice. *Id.* at 1270. All that is required is that the statement has the natural and probable consequence of doing so. *Id.* However, the government must show willfulness and awareness of the proceeding to succeed. In order to prove a §1503 violation, "the Government must establish (1) that a judicial proceeding was pending; (2) that the defendant had knowledge of the judicial proceeding; and (3) that the defendant acted corruptly with the specific intent to

influence, obstruct, or impede any juror or officer of the court in that judicial proceeding in its due administration of justice." *United States v. Myers*, 524 Fed. Appx. 479, 484 (11th Cir. 2013). Thus, "[i]f the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, as opposed to some ancillary proceeding, such as an investigation independent of the court's or grand jury's authority, he lacks the requisite intent to obstruct." *Id.* (quoting *United States v. Aguilar*, 515 U.S. 593, 599 (1995)).

B. Section 1519

Passed as a part of Sarbanes-Oxley in 2002, §1519 provides:

> 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 or any case filed under title 11, 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

18 U.S.C. §1519.

Recently, and famously, the Supreme Court decided the "fish case," *Yates v. United States*, 354 U.S. 298 (2015). In *Yates*, the defendant fishing-charter captain was convicted of knowingly disposing of undersized fish in order to prevent government from taking lawful custody and control of them, and thus violating Sarbanes–Oxley by destroying or concealing a tangible object with the intent to impede, obstructs, or influence government's investigation into unlawful harvesting undersized grouper. The Supreme Court held that "tangible object," within meaning of Sarbanes-Oxley, covers objects that one can use to record or preserve information, and an undersized fish is not a "tangible object" for purposes of Section 1519.

The Eleventh Circuit, along with other courts of appeals, has construed the statute broadly.

The Eleventh Circuit has held that to be found guilty under the statute, one does not have to know of any particular investigation. See *United States v. McQueen*, 727 F.3d 1144 (11th Cir. 2013). Joining the Third and Eighth Circuits, the court in *McQueen* stated that "[t]here is nothing in the language that says the defendant must also know that any possible investigation is federal in nature." *Id.* at 1152 (citing *United States v. Moyer*, 674 F.3d 192, 208 (3d Cir. 2012); *United States v. Yielding*, 657 F.3d 688, 710 (8th Cir. 2011)). Going a step further, the Eleventh Circuit has held that §1519 "does not require that an investigation be pending or that the defendant be aware of one when he falsifies the record. Instead, the statute only requires that the falsification be done with intent to impede an investigation and 'in contemplation' of that investigation." *United States v. Taohim*, 529 Fed. Appx. 969, 974 (11th Cir. 2013). In *Taohim*, the court sustained the §1519 conviction of a ship captain who had instructed his chief officer to throw plastic pipes overboard without logging the disposal in the garbage log, in violation of an international convention and federal law. *Id.* Because a jury had concluded that he had anticipated future agency proceedings—a port inspection—at the time he falsified the garbage log, it did not matter that at the time of the violation "the vessel was outside the territory of the United States and no investigation was pending." *Id.* Thus, to violate §1519, one need only alter, destroy, or otherwise affect documents with the intent to impede any potential future investigation or proceeding by a court or other agency. See also *United States v. Hoffman-Vaile*, 568 F.3d 1335 (11th Cir. 2009) (sustaining a §1519 conviction based on violation of a grand jury subpoena).

Other courts of appeals have likewise sustained convictions under the statute even when the defendant had no knowledge of any pending investigation at the time of the conduct. See, e.g., *United States v. Yielding*, 657 F.3d 688 (8th Cir. 2011) (interpreting §1519 broadly and upholding a conviction based on underlying violations of the Medicare antikickback statute); *United States v. Wortman*, 488 F.3d 752, 753 (7th Cir. 2007) (holding that a woman who destroyed a CD containing child pornography belonging to her boyfriend was subject to §1519). In sustaining a §1519 conviction, the Fifth Circuit laid out the three circumstances to which the statute applies:

> (1) when a defendant acts directly with respect to the investigation or proper administration of any matter, that is, a pending matter,
> (2) when a defendant acts in contemplation of any such matter, and
> (3) when a defendant acts in relation to any such matter.

United States v. McRae, 702 F.3d 806, 837 (5th Cir. 2012) (citing *United States v. Kernell*, 667 F.3d 746, 754–56 (6th Cir. 2012)). Most starkly, the Sixth Circuit upheld a conviction of a former college student who had hacked into then Vice Presidential Candidate Sara Palin's email account and was subsequently convicted under §1519. *Kernell*, 667 F.3d at 754–56. Rejecting Kernell's statutory-construction and vagueness arguments, the court construed the "in contemplation" language broadly and required no nexus between the conduct and a potential investigation. *Id.* The broad interpretation of "in contemplation" and "in relation," along with the absence of a nexus requirement, thus creates the potential for broad criminal liability under §1519.

C. Section 1512

The relevant portions of §1512 provide that:

> Whoever knowingly uses intimidation, threatens, or *corruptly persuades* another person, or attempts to do so, or engages in misleading conduct toward another person, with intent to . . . cause

> or induce any person to--(A) withhold testimony, or withhold a record, document, or other object, from an official proceeding; (B) alter, destroy, mutilate, or conceal an object with intent to impair the object's integrity or availability for use in an official proceeding . . . shall be fined under this title or imprisoned not more than 20 years, or both. . . .
>
> Whoever corruptly--(1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. §1512(b) & (c) (emphasis added and some subsections omitted). *See also Arthur Anderson, LLP v. United States*, 544 U.S. 696 (2005) (criminal liability under §1512 requires that the defendant be conscious of wrongdoing).

V. Honest-services fraud

The Supreme Court limited the scope of 18 U.S.C. §1346 in *Skilling v. United States*, 561 U.S. 358 (2010). Section 1346 provides that the term "scheme or artifice to defraud," as it is used in federal mail- and wire-fraud statutes, includes "a scheme or artifice to deprive another of the intangible right of honest services." In *Skilling*, the Court held that the statute only applies to fraudulent schemes involving bribes or kickbacks. 561 U.S. at 408–09. Skilling had participated in a fraudulent scheme to inflate the stock price of his company, which netted him great pecuniary gain. *Id.* at 413. Refusing to read the statute broadly enough to cover the government's self-dealing theory against Skilling, the Court reasoned that to do so "would raise the due process concerns underlying the vagueness doctrine." *Id.* at 408. The Court thus required the government to show bribery or kickbacks in order to prove its case under §1346.

The Eleventh Circuit has upheld §1346 convictions based on bribery or schemes to defraud since *Skilling* but has overturned them where the theory rested solely on a self-dealing

theory. In *United States v. Nelson*, the court considered a challenge by a former member of the Jacksonville Port Authority (Jaxport) to his conviction under §1346 in light of *Skilling*. 712 F.3d 498. Nelson worked as a volunteer on the board, and he accepted monthly payments as a consultant through a local contractor that sometimes bid on Jaxport projects and otherwise did business with Jaxport. Though it was technically legal for Nelson to work for a local contractor provided that he abstain from voting on matters involving the particular contractor, he was nonetheless convicted under §1346 because he "solicited and accepted bribes from [the contractor]." *Id.* at 501.

The defendant claimed that §1346 as applied to him was unconstitutionally vague because the statute "fails to describe the nature and scope of the fiduciary obligations owed by public officials to the public" and that the district court improperly instructed the jury as to what constitutes a bribe under §1346. 712 F.3d at 499. The court rejected Nelson's vagueness challenge, relying heavily on both Nelson's status as a public official and the *quid pro quo* arrangement, whereby "Nelson agreed to represent [the contractor's] interests before JaxPort in exchange for monthly payments routed through a middleman." *Id.* at 509. The court noted that this was a "classic bribery and kickback scenario," not a close call under the limiting construction the Supreme Court gave §1346 in *Skilling*. *Id.*

The court likewise rejected Nelson's challenge to two jury instructions regarding §1346. Since he failed to object at trial, the court applied plain error review. The first instruction defined "intent to defraud" as "act[ing] knowingly and with the specific intent to solicit, demand, or accept bribe payments." *Id.* at 511. The second challenge rested on the fact that the trial court instructions had "provided that corrupt intent is an element of both honest-services fraud and federal funds bribery" and that "corruptly" required that the jury find that Nelson acted

"unlawfully." *Id.* at 511–12. The court rejected this challenge as well, noting that the instruction "required—correctly—that the jury find that Nelson voluntarily and deliberately engaged in unlawful conduct." *Id.* at 512. Despite the perceived circularity in the instructions, the court held that they "accurately express[ed] the law applicable to the case." *Id.*

A useful companion case to *Nelson* is *United States v. Aunspaugh*, 792 F.3d 1302 (11th Cir. July 8, 2015). In *Aunspaugh*, the Eleventh Circuit held that a defendant can be guilty under the 18 U.S.C. § 1346 "honest services" provision of the mail fraud statute only on proof of kickbacks or bribes, not self-dealing or conflicts of interest. In other words, post-*Skilling*, a "conflict of interest" without more does not pose an honest-services problem.

In *Fordham v. United States*, 706 F.3d 1345, a former state mental health center employee and a former private contractor attacked their §1346 convictions on collateral review, alleging that their convictions were invalid in light of *Skilling*. The two men had been convicted of involvement in a bribery and fraud scheme with other co-conspirators to defraud a mental health center in Georgia. *Id.* at 1347. In holding that both men were procedurally defaulted from asserting their claims, the court held that there was no actual prejudice against either of them because the only theory of honest-services fraud of which the jury *could* have found them guilty was one of bribery. *Id.* at 1350. In other words, *Skilling*'s limitation on §1346 did not affect their conviction because the conviction was based on §1346 theories still valid after *Skilling*.

Similarly, in *United States v. Katopodis*, 428 Fed. Appx. 902, the court rejected a former nonprofit executive's challenge to his §1346 conviction in light of *Skilling*. 428 Fed. Appx. 902 (11th Cir. 2011). The former CEO of a nonprofit was alleged to have defrauded a municipality that donated funds to the nonprofit. *Id.* at 904. The court held that *Skilling* had no effect on the

conviction because the nonprofit CEO had been convicted under a theory that he defrauded the local government by appropriating his nonprofit's funds for personal use. *Id.*

The Eleventh Circuit overturned a §1346 conviction based solely on a self-dealing theory in *United States v. Siegelman*, 640 F.3d 1159 (2011). In *Siegelman*, the court reversed Richard Scrushy's convictions on two counts of honest-services fraud that were based only on self-dealing, and the court rejected the government's post-*Skilling* bribery arguments made on appeal due to lack of evidence in the record. *Id.* at 1176. The court made a similar reversal in *United States v. Davidson*, 399 Fed. Appx. 525 (11th Cir. 2010), crediting the appellant's argument that the undisclosed, self-dealing theory on which she was convicted was insufficient under *Skilling*.

Men In Black.

Jack Sharman

THE FBI: MOVIES AND REAL LIFE

Beatrice: You here to make fun of me too?
Kay: No, ma'am. We at the FBI do not have a sense of humor we're aware of. May we come in?
Beatrice: Sure.

--- from *Men In Black* (1997)

Ten Techniques for Building Rapport

1) Establish artificial time constraints. Allow the potential source to feel that there is
an end in sight.
2) Remember nonverbals. Ensure that both your body language and voice are nonthreatening.
3) Speak slower. Do not oversell and talk too fast. You lose credibility quickly and appear too strong and threatening.
4) Have a sympathy or assistance theme. Human beings want to provide assistance and help. It also appeals to their ego that they may know more than you.
5) Suspend your ego. This probably represents the hardest technique but, without a doubt, is the most effective. Do not build yourself up—build someone else up, and you will have strong rapport.
6) Validate others. Human beings crave feeling connected and accepted. Validation feeds this need, and few offer it. Be the great validator and have instant, valuable rapport.
7) Ask "how, when, and why" questions. When you want to dig deep and make a connection, asking these questions serves as the safest, most effective way. People will tell you what they are willing to talk about.
8) Connect using quid pro quo. Some people are more guarded than others. Allow them to feel comfortable by sharing a little about yourself if needed. Do not overdo it.
9) Give gifts (reciprocal altruism). Human beings reciprocate gifts given. Give a gift, either intangible or material, and seek a conversation and rapport in return.
10) Manage expectations. Avoid feeling and embodying disappointment by ensuring that your methods focus on benefiting the targeted individual, not you. Ultimately, you will win, but your mind-set needs to focus on the other person.

Jack Sharman (205) 581-0789 jsharman@lightfootlaw.com

Blog: White Collar Wire [jacksharman.com]

Twitter: @WhiteCollarWire

Grand Jury Subpoenas.

Jack Sharman

United States District Court

MIDDLE DISTRICT OF ALABAMA

TO:

Custodian of Records
[redacted]

SUBPOENA TO TESTIFY BEFORE GRAND JURY

SUBPOENA FOR:

☒ PERSON ☐ DOCUMENT(S) OR OBJECT(S)

YOU ARE HEREBY COMMANDED to appear and testify before the Grand Jury of the United States District Court at the place, date, and time specified below.

PLACE	COURTROOM
UNITED STATES COURTHOUSE 1 CHURCH STREET MONTGOMERY, ALABAMA 36104	Grand Jury Room
	DATE AND TIME May 4, 2010 12:00 P.M.

YOU ARE ALSO COMMANDED to bring with you the following document(s) or object(s):

SEE ATTACHMENT

☐ Please see additional information on reverse

This subpoena shall remain in effect until you are granted leave to depart by the court or by an officer acting on behalf of the court.

Clerk	DATE
DEBRA P. HACKETT	April 15, 2010
(BY) DEPUTY CLERK	

This subpoena is issued on application of the United States of America	NAME, ADDRESS AND PHONE NUMBER OF TRIAL ATTORNEYS
	Peter Ainsworth Peter M. Koski Trial Attorneys, U.S. Department of Justice Public Integrity Section 1400 New York Avenue, N.W. Washington, D.C. 20005 (202) 514-1412

If not applicable, enter "none"

AO 110 (Rev. 12/89) Subpoena to Testify Before Grand Jury

RETURN OF SERVICE[1]

RECEIVED BY SERVER	DATE	PLACE
SERVED	DATE	PLACE
SERVED ON (PRINT NAME)		
SERVED BY (PRINT NAME)	TITLE	

STATEMENT OF SERVICE FEES

TRAVEL	SERVICES	TOTAL

DECLARATION OF SERVER[2]

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Return of service and Statement of Service Fees is true and correct.

Executed on _____ _____
Date Signature of Server

_____
Address of Server

ADDITIONAL INFORMATION

(1) As to who may serve a subpoena and the manner of its service see Rule 17(d), Federal Rules of Criminal Procedure, or Rule 45(c), Federal Rules of Civil Procedure.

(2) "Fees and mileage need not be tendered to the witness upon service of a subpoena issued on behalf of the United States or an officer or agency thereof (Rule 45(c), Federal Rules of Civil Procedure; Rule 17(d), Federal Rules of Criminal Procedure) or on behalf of certain indigent parties and criminal defendants who are unable to pay such costs (28 USC 1825, Rule 17(b) Federal Rules of Criminal Procedure".

ATTACHMENT A

[redacted]

1. For the time period January 1, 2008, up to and including the present, any and all documents relating to gambling and/or electronic bingo in the State of Alabama.

2. Any and all documents relating to clients for whom [redacted] performed services with respect to the matters identified in paragraph 1, to include the dates that [redacted] performed services for each client.

3. Any and all documents relating to expenses incurred on behalf of a client, including any documents describing the nature of and reason for the expense with respect to the clients identified in paragraph 2. The production should also include any record showing that the cost was passed on to a client, and the description given to that client for the expense. Finally, the documents should include any record showing that the expense was reimbursed.

4. Any and all documents relating to the terms and conditions of compensation between [redacted] and its clients with respect to the matters identified in paragraph 1.

5. Any and all documents relating to advice, counsel, or work provided to the clients identified in paragraph 2, including but not limited to vote sheets and tallies.

6. Any and all documents to include bank account information associated with and relating to all Political Action Committees (a.k.a. "PACs"), or similar entities that: (a) are in any way associated with the issues identified in paragraph 1, or (b) received money from any of the persons or entities described in paragraphs 7(a) through 7(i), including but not limited to QuickBooks and other accounting software, ledgers, and spreadsheets that are designed to keep track of donations, contributions, expenditures, and transfers, including but not limited to transfers between and among other PACs.

7. Any and all documents relating to the following persons or entities:

   a. Country Crossing, or any of its employees, agents, or representatives,

   b. Ronald "Ronnie" Gilley, or any of his agents, associates, or family members,

   c. Macon County Greyhound Park in Macon County, Alabama (a.k.a. "Victoryland"), or any of its employees, agents, or representatives,

   d. Milton McGregor, or any of his agents, associates, or family members,

e. Jarrod Massey, or any of his agents, associates, or family members,

f. Jennifer Pouncy, or any of her agents, associates, or family members,

g. Bradley Unruh, or any of his agents, associates, or family members,

h. Poarch Band of Creek Indians, or any of its employees, agents, or representatives, and

i. Any member of either chamber of the Alabama legislature with respect to the matters described in paragraph 1, or any of his/her agents, associates, employees, representatives, or family members.

For purposes of this subpoena, the term "documents" includes writings or records of every kind or character, conveying information by mechanical, electronic, photographic, or other means, whether encarded, taped, stored or coded electrostatically, electromagnetically, or otherwise. The term "documents" includes, but is not limited to, any and all correspondence and communication, whether written or recorded, including e-mail, notes, memoranda, minutes, summaries, telephone records, telephone message logs or slips, calendars, date books, travel documents, interoffice communications, results of investigations, videotapes, audiotapes, microfiche, microfilm, any electronic media, copies of bills, bill numbers, draft legislation, reports discussing legislative sessions, work orders, invoices, expense reports, receipts, billing records and statements, accounting and financial records of any kind, including copies of checks (front and back), wire transfers, cash payments or receipts, cashier's checks, money orders, credit cards, debit cards, check request forms, ledgers, or other records reflecting payments or loans.

For purposes of this subpoena, the term "documents" refers to any record in the company's possession, custody, or control, and "documents" includes all drafts or unfinished versions of documents.

If a document demanded by this subpoena is withheld under a claim of privilege, or is otherwise withheld, provide the following information regarding the record: (1) its date; (2) the name and title of its author(s); (3) the name and title of each person to whom it was addressed, distributed and disclosed; (4) the number of pages; (5) an identification of any attachments or appendices; (6) a description of its subject matter; (7) its present location and the name of its present custodian; (8) the paragraph of this subpoena to which it is responsive; and (9) the nature of the claimed privilege or other reason the document is withheld.

NINTH JUDICIAL CIRCUIT SUBPOENA DUCES TECUM

STATE OF ALABAMA)
DEKALB COUNTY)

TO ANY LAWFUL OFFICER OF SAID STATE OF ALABAMA - GREETINGS:

WE COMMAND YOU, that without delay you execute the Writ, and make due return to this office at Fort Payne, Alabama, as to how you have executed same, according to law.

LUTHER STRANGE
ATTORNEY GENERAL

BY: _____
BILL LISENBY, JR.
Assistant Attorney General

TO: [redacted]

Pursuant to the provisions of the Laws of the State of Alabama, Sections 36-15-13; 12-16-198; and 12-17-184(18), Code of Alabama 1975, and A.R.C.P. 17.3, you are hereby summoned and commanded to appear* before the DeKalb County Grand Jury at the DeKalb County Courthouse, Fort Payne, Alabama, at 2:00 p.m. on October 23, 2012, and until discharged by the due course of law, and bring with you and produce at such time and place as aforesaid, the following documents, papers, and records, then and there to testify regarding same:

Photocopies of any and all documents and records regarding:

1. **All transactions of any kind involving or related in any manner to [redacted] also known as [redacted]**
2. **All transactions of any kind involving the receipt by [redacted] of funds or other assets from [redacted]**
3. **All transactions of any kind involving the receipt by [redacted] of funds or other assets from any corporation, partnership, or other entity in which [redacted] is a shareholder or member;**
4. **All transactions of any kind involving the payment of funds or other assets by [redacted] to [redacted]**
5. **All transactions of any kind involving the payment by [redacted] of funds or other assets to any corporation, partnership or other entity in which [redacted] is a shareholder or member; and**
6. **All transactions of any kind related to the premises located at [redacted]**

The documents and records listed above specifically include, but are not limited to, the following:

1. **All notes, documents, memoranda, correspondence, promissory notes, checks (front and back), payment receipts, bank statements and other records of any kind relating in any manner to any loans made by [redacted] to [redacted] also known as [redacted] and to the repayment of that loan;**
2. **All notes, documents, memoranda, correspondence, promissory notes, checks (front and back), payment receipts, bank statements and other records of any kind relating to any payments made or delivered to [redacted] by [redacted] including all payments made or delivered by [redacted] that were related in any manner to any loans made by [redacted] to [redacted] also known as [redacted]**
3. **All notes, documents, memoranda, correspondence, checks (front and back), payment receipts, bank statements and other records of any kind related to a mortgage given by [redacted] to [redacted] on October 28, 2008, and to the satisfaction and release of that mortgage;**

DONE this the 3rd day of October, 2012.

LUTHER STRANGE
ATTORNEY GENERAL

BY: _____
BILL LISENBY, JR.
Assistant Attorney General

Do not disclose the existence of this subpoena or the fact of your compliance to the customer or any other individual. Any such disclosure could seriously impede the investigation being conducted and, thereby, interfere with the enforcement of the State criminal law.

*In lieu of personally appearing with the commanded records at the DeKalb County Grand Jury on October 23, 2012, the Custodian of Records may mail the commanded records so that they are received no later than the close of business on Friday, October 19, 2012, or the Custodian may arrange to deliver the commanded records to Special Agent Thomas F. Coram, State of Alabama, Office of the Attorney General, by October 19, 2012. Mailed records should be directed to Special Agent Thomas F. Coram, State of Alabama, Office of the Attorney General, 501 Washington Avenue, Montgomery, Alabama 36130. Arrangements for delivery may be made through telephone number (205) 520-4443.

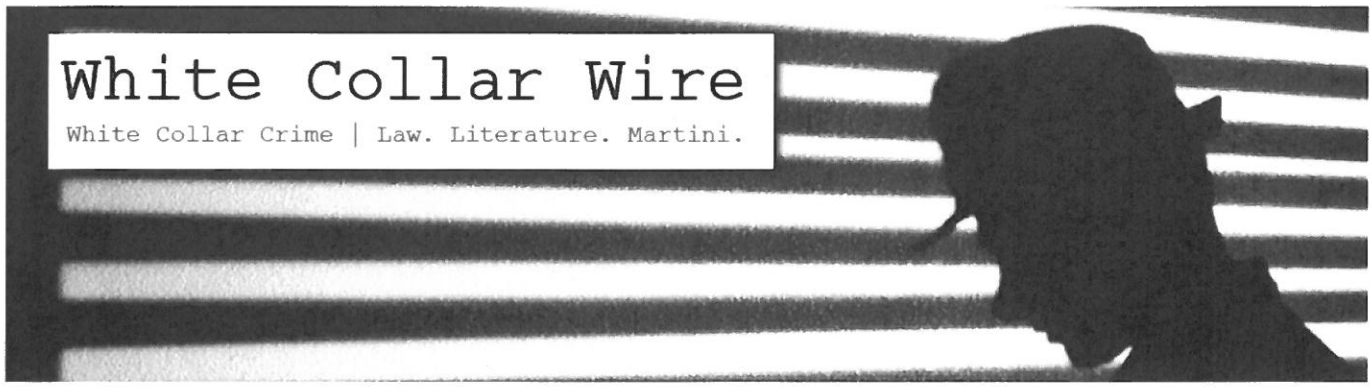
Executed Date and Time: _____

Received By: _____

Lawful Officer: _____ Case No. 159656-001

Barry Bonds, Ramblin' Man.

Jack Sharman



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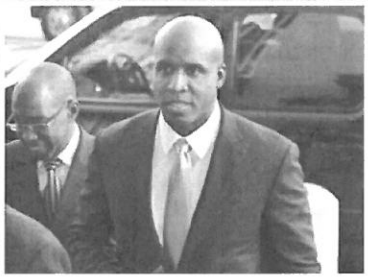
Barry Bonds, Ramblin' Man

Posted on April 23, 2015 by Jack Sharman

The federal appeals court in San Francisco recently reversed baseball player Barry Bonds's conviction for obstruction of justice.

The criminal charge and conviction arose out of testimony that Bonds gave to a grand jury investigating the illegal provision and use of steroids in major league baseball. As the Ninth Circuit Court of Appeals summarized it:

> *During a grand jury proceeding, defendant gave a rambling, nonresponsive answer to a simple question. Because there is insufficient evidence that Statement C was material, defendant's conviction for obstruction of justice in violation of 18 U.S.C. 1503 is not supported by the record. Whatever section 1503's scope may be in other circumstances, defendant's conviction here must be reversed.*



Grand jury slugfest.

Why is this decision relevant to corporations, their employees and their lawyers?

In interviews by government agents, in grand jury testimony led by prosecutors or in testimony at trial, a witness gets a lot of bad questions and gives a lot of bad answers. "Bad" answers are not necessarily untruthful. They may be vague; or not responsive to the question; or simply an observation made into the air in order to fill the silence.

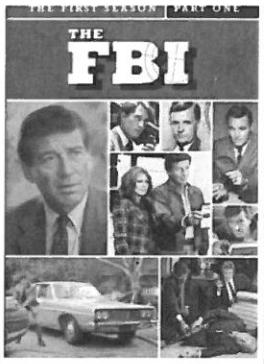
Even well-prepared witnesses fall victim to this syndrome. Invariably, they fail to (a) listen to the question; (b) answer the question; and (c) stop. If it's incomprehensible question, they fail to ask for a new question. If it's a question they don't like, they answer some other, unasked question.

This problem is particularly acute with business people. In general, business people are compensated for having answers to questions and solutions to problems. To respond "I just don't know" or "I don't get your question" is not well received in commerce. Business people are trying to do a deal and "get to yes." "Yes" is not the place that agents, prosecutors and regulators seek. (At least, not that kind of "yes.")

- June 2014
- May 2014
- April 2014
- March 2014
- February 2014
- January 2014
- December 2013
- November 2013
- October 2013
- September 2013
- August 2013

CATEGORIES

- Appeals
- Bank Fraud
- Brady/Giglio
- Bribery
- Cocktails
- Compliance
- Congressional Investigations
- Cooperation Agreements
- Corporate counsel
- Costs, Budgets and Fees
- Crime Fiction
- Deferred Prosecution Agreements
- Drugs
- Due Process
- Ethics
- Evidence
- Experts
- FCPA
- Fifth Amendment
- Fourth Amendment
- Grand Jury
- Health Care
- Insider Trading
- Insurance
- Internal Investigations
- International
- Law Practice Management
- Lawyers
- Leadership
- Legal Education
- Obstruction of Justice
- Organized Crime
- Parallel Proceedings
- Poetry
- Ponzi
- Presumption of Innocence
- Prison
- Privacy
- Privilege
- Public Corruption
- SEC
- Securities Fraud
- Sentencing
- Social Media
- Style and Grammar
- Surveillance
- Tax
- Technology
- Theology



Sharp haircuts, dull questions.

We have discussed here and here and here the do's and don't's of interactions with government agents. In particular, do not fall prey to the Efrem Zimbalist, Jr. syndrome.

That lesson is worth repeating:

"Government Agents," a Lightfoot140 by Jack Sharman.
from LFW PLUS

02:20 HD

"Government Agents," a Lightfoot140 by Jack Sharman. from LFW on Vimeo.

This entry was posted in Obstruction of Justice and tagged Barry Bonds, Efrem Zimbalist, FBI, Grand Jury, Lightfoot 140, obstruction of justice, television. Bookmark the permalink.

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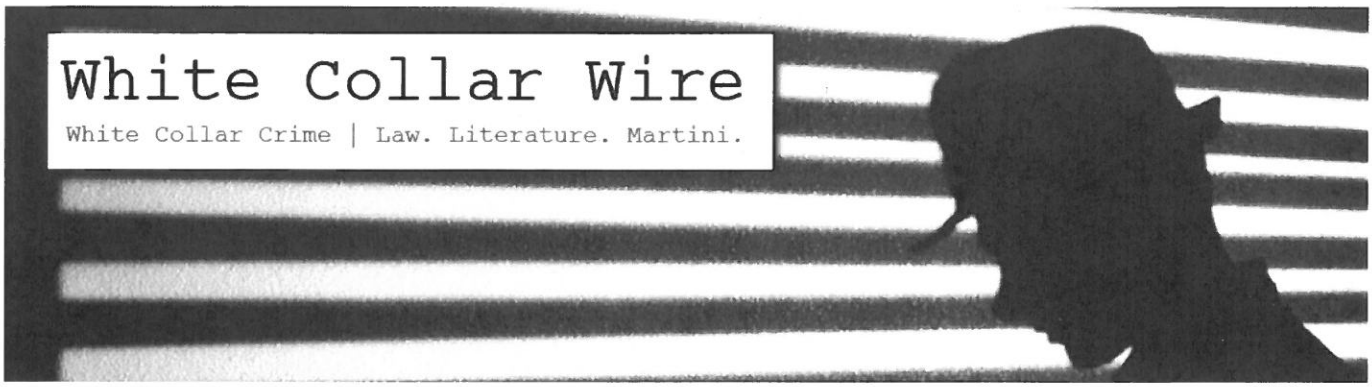
FIFA Indictments and the Notion of Global Compliance →

Mr. Rogers, Dewey LeBoeuf and Indicted Employees.

Jack Sharman



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For Corporate Counsel || Stalking Horses, Pitchfork Crowds, Narrow Neckties, Mr. Rogers's Slippers and Indicted Employees: 6 Steps To Dodge Being Deweyed

Posted on March 23, 2014 by Jack Sharman

". . . brave, clean and reverent. And, cooperative in the civil investigation."

You may (or may not) recall the Boy Scout Law:

"A Scout is trustworthy, loyal, helpful, friendly, courteous, kind, obedient, cheerful, friendly, brave, clean and reverent."

Your corporate employees, officers and colleagues may exhibit all, some or none of those characteristics. Even if one masters all the peculiars of the Boy Scout Law, however, strict adherence is no shield against indictment in the situation where one moves from "witness" to "target" for reasons outside the control of the "Scout."

So: herewith 6 lessons to heed if you wish to avoid ending up like a young man named Zachary Warren.

Mother's Day.

It is unusual for the government to indict leaders of a major law firm, as the Manhattan District Attorney's office indicted three of the leaders of the now very-defunct Dewey & LeBoeuf. What has caused the most discussion, controversy and even introspection is the indictment of a fourth defendant, one Zachary Warren, a 29 year-old "client relations manager" — apparently, a glorified internal bill collector with a distinguished resume, both before and after Dewey.

What can inside counsel, or those who advise them, learn from the path that led these four men — but young Mr. Warren, in particular — to being charged and perp-walked? More remains to be told of this tale: as in all such white-collar sagas, there are likely at least two sides to every side. I do not know Mr. Warren, nor do I have any special insight into what he, the investigating agents and the prosecutors were or might have been thinking.

- June 2014
- May 2014
- April 2014
- March 2014
- February 2014
- January 2014
- December 2013
- November 2013
- October 2013
- September 2013
- August 2013

CATEGORIES

- Appeals
- Bank Fraud
- Brady/Giglio
- Bribery
- Cocktails
- Compliance
- Congressional Investigations
- Cooperation Agreements
- Corporate counsel
- Costs, Budgets and Fees
- Crime Fiction
- Deferred Prosecution Agreements
- Drugs
- Due Process
- Ethics
- Evidence
- Experts
- FCPA
- Fifth Amendment
- Fourth Amendment
- Grand Jury
- Health Care
- Insider Trading
- Insurance
- Internal Investigations
- International
- Law Practice Management
- Lawyers
- Leadership
- Legal Education
- Obstruction of Justice
- Organized Crime
- Parallel Proceedings
- Poetry
- Ponzi
- Presumption of Innocence
- Prison
- Privacy
- Privilege
- Public Corruption
- SEC
- Securities Fraud
- Sentencing
- Social Media
- Style and Grammar
- Surveillance
- Tax
- Technology
- Theology

Nevertheless, I can at least provide six lessons on how to minimize the likelihood that you — inside corporate counsel, risk manager or chief compliance officer — will have to explain to the boss or the board how your own Mr. or Ms. Warren got himself in a criminal fix.

Some background is unavoidable. The best places to start are an article by James B. Stewart in the New York *Times* (A Dragnet at Dewey & LeBoeuf Snares a Minnow); an *Atlantic* article by Stewart (In Dewey's Wreckage, Indictments); and a post by David Lat at *Above The Law* (What Dewey Know About Zachary Warren, Defendant No. 4 In The Criminal Case?). Read the articles in full, but here are some relevant portions:

From James B. Stewart in the *Times*:

> *"You've been indicted," an assistant Manhattan district attorney, Peirce Moser, told Zachary Warren, a 29-year-old magna cum laude graduate of Georgetown Law School with a prestigious clerkship on the Federal Court of Appeals for the Sixth Circuit in Memphis.*
>
> *"Can you say that again?" a stunned Mr. Warren asked when he received the call two weeks ago Friday.*
>
> *Almost as surprised as Mr. Warren himself were Mr. Warren's cellmates before his arraignment a week ago — the top managers of Dewey & LeBoeuf, the global law firm that imploded in 2012. Although some of them had trouble remembering who Mr. Warren was, the indictment claims that all four were co-conspirators in a major accounting fraud. The firm's chairman, executive director and chief financial officer, ages 60, 57 and 55, had long known that they were the subjects of a criminal investigation. All had prominent criminal lawyers, while Mr. Warren had hired a lawyer only after the phone call that Friday.*
>
> *Alone among the defendants, Mr. Warren was charged in two separate indictments, one accusing him of a "scheme to defraud" and falsifying business records and the other charging him with six felony counts of having "made and caused" false entries in books and records. Mr. Warren pleaded not guilty and was released on $200,000 bail. His once-bright future has now been threatened.*
>
> *How did a 29-year-old with an impeccable record, someone who had never even taken an accounting course, end up as an accused mastermind of what the Manhattan district attorney, Cyrus Vance Jr., called "a massive effort to cook the books" of the once-giant law firm? And how did he get there without realizing he should hire a lawyer?*

From Mr. Lat:

> *I fall somewhere in between the extremes of "naive youngster ambushed by the DA's office" and "arrogant lawyer full of hubris." Here's my theory as to why Zachary Warren didn't bring a lawyer with him to the interview: he didn't see himself as one of "those people," i.e., a potential criminal defendant.*

And now for the 6 lessons.

Lesson Number 1: ***Recognize that the danger is not innocence or naivete on the one hand, nor guilt or arrogance on the other, but rather the conviction that "I" am not one of them.***

What's the tag line of the blog you're reading? Don't read us because you're a criminal. Read us

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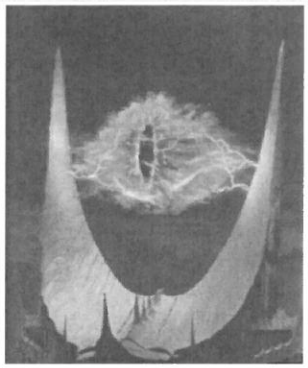
because, some time or other, someone may think you are. In his *Above The Law* post, Mr. Lat alludes to the problem, which is perhaps the most common trait among people charged with white-collar offenses. No employee, colleague, officer or director thinks that he or she is a criminal. Ready to do what you have to do for your family and future? Absolutely. Willing to throw an elbow? When needed, sure. Holding your nose through something unethical? Well, there was that one time, back in 1990.

But something *criminal*? Nope. No way. Criminals are people who break the law. They steal stuff and hurt people.



The Government point-of view (via New Line Cinema).

The task that arises from lesson number 1 is to convince those you are guiding that their assessment of their culpability (or lack of culpability) is irrelevant to how agents, investigators, prosecutors, regulators and politicians will view their culpability. Indeed, some of the facts that your employee trumpets as an emblem of innocence may, in the government's eyes — or "Eye," if you're a *Lord of the Rings* fan — be just as likely a badge of fraud.

Lesson Number 2: ***The civil case is always a stalking horse for the criminal case.***

Not very sporting.

Of course, "always" is not "always," but it is often enough to make it reliable. If a person believes he or she is part of a civil inquiry only, he or she will conclude — wrongly — that the exposure is limited. An employee or officer being interviewed by law enforcement or prosecutors should assume that there is a shadow criminal investigation and that he or she is at least a "subject" of that investigation.

Lesson Number 3: ***The company's civil case and the individual officer or employee's criminal case are on two different planets because of the current pitchfork mentality about putting "somebody" in jail.***

We'd like a word.

Corporations are not natural persons and cannot be imprisoned. When very bad things happen, the natural impulse is to determine (or shift) blame. The fruit of that impulse is to hope someone goes to jail — even where the civil and criminal standards are different; where "knowledge" and "intent" must be discerned differently; and where the rules of evidence and Constitutional principles apply to individuals in ways that differ from the manner in which they apply to corporate entities. Judges are not immune from such sentiments, as where a federal judge publicly urges the Department of Justice to prosecute individuals:

> *U.S. District Judge William H. Pauley approved the auto maker's settlement with prosecutors Thursday, saying it "painted a reprehensible picture of corporate misconduct." But he added that ultimately individuals are responsible for corporate misconduct and urged the Manhattan U.S. attorney's office, which conducted the investigation into Toyota, to continue its probe.*
>
> *"I sincerely hope that this is not the end but rather the beginning to seek to hold those individuals responsible for making these decisions accountable," Judge Pauley said during a roughly 20-minute hearing in Manhattan federal court.*
>
> *When asked if prosecutors would pursue individuals during a news conference Wednesday, Manhattan U.S. Attorney Preet Bharara said he wasn't "foreclosing anything" but believed the settlement is the "final resolution" of the case.*
>
> *"[T]he rules of evidence sometimes do not allow you to use certain kinds of evidence and certain documents against individuals, although they might be admissible against the company itself,"*

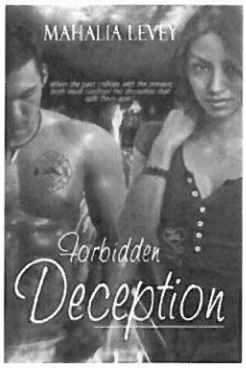
said Mr. Bharara. "And so although there is an admission that there were individuals who engaged in conduct which provides for a basis to bring a case against the company, they are not charged here."

The comments add to a growing chorus from judges who have criticized prosecutors for settling claims of wrongdoing with companies while not bringing charges against executives or others who actually made the decisions.

Lesson Number 4: ***Government agents and investigators lie to you. They deceive you all the time; it is ethical for them to do so; and there is little you can do about it.***

Many employees think that, in general, law-enforcement agents do not lie (or, at least, that law-enforcement agents do like lie to people like them).

Surprisingly large numbers of otherwise savvy, well-educated people profess shock and dismay when they find out that an agent has misled them, told them an untruth or left out an important fact that might have changed their answer to a question.

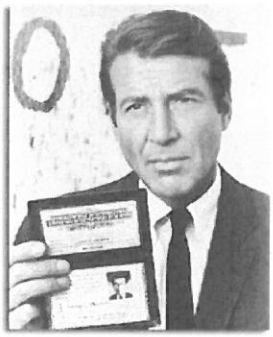


Not so forbidden, actually.

However heartfelt, such dismay is misplaced. Much of what we expect law-enforcement to do — especially with regard to undercover operations, searches-and-seizures and interrogations — is premised on not being forthcoming. Like any other witness, an FBI agent or a sheriff's deputy must testify truthfully in court proceedings, and is subject to perjury and other sanctions if he or she fails to do so. By the time we reach that stage of an investigation and prosecution, however, our employee or colleague has already spoken with the agents out of a desire to cooperate; from fear of being perceived as not cooperating; or from embarrassment at being associated with particular events, even by implication.

This compulsion to speak leads us to the next lesson: avoid the Efrem Zimbalist, Jr. Syndrome.

Lesson Number 5: ***Teach your employees and colleagues to avoid the Efrem Zimbalist, Jr. Syndrome.***


Getting carded, back when there was no casual Friday.

I've spoken before on why businesspeople talk to agents without having their lawyer or the company lawyer present. I call it the "Efrem Zimbalist, Jr. Syndrome," named after the star of the old television series *The FBI*. Watch this 140-second video on the Efrem Zimbalist, Jr. Syndrome, then keep reading.

(An aside: I've written before on the relationship between crime and narrow neckties: Criminals In Ties: Contract Law and Reservoir Dogs)

Lesson Number 6: ***Tell the truth in response to questions you understand, and demand a new question if you don't understand the old one, but don't put on Fred Rogers's slippers.***

If your employee or colleague decides to cooperate in an investigation, they need to meditate on the old chestnut "in for a penny, in for a pound." Lying is the quickest path to indictment. In complicated, expensive, protracted business-crime or regulatory investigations, false-statement or obstruction charges are easier and cheaper to prove that the underlying, substantive conduct. And, judges and juries jump to conclusions about liars and document-shredders.

On the other hand, answering "truthfully" does not mean answering "cuddly." Assume that the agent knows the answer (or has a decent guess about the answer, or has a preconceived notion about the answer) to every question that he or she poses. Further, assume that each question, and therefore each answer, is at best a "neutral" event from the perspective of the person being questioned.

Good luck.

Foot powder and an immunity letter.

This entry was posted in Cooperation Agreements, Parallel Proceedings and tagged Boy Scouts, cooperation, David Lat, Dewey & Leboeuf, Efrem Zimbalist, Fred Rogers, James B. Stewart, parallel proceedings, Zachary Warren. Bookmark the permalink.

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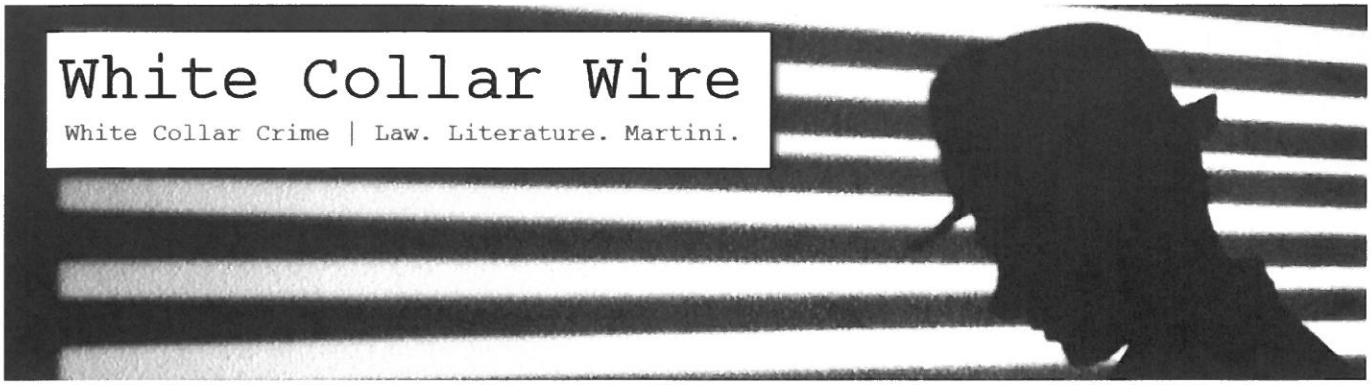
ABA White-Collar Crime Committee Winter/Spring 2014 Newsletter →

Innocent People, Guilty Pleas.

Jack Sharman

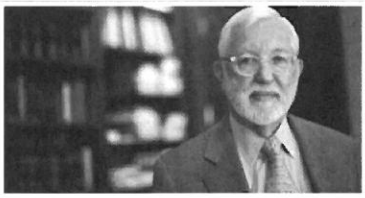


Why Innocent People Plead Guilty: Judge Rakoff, Eddie Coyle, Albert Camus and Sweet Dreams of Oppression

Posted on December 7, 2014 by Jack Sharman

If they give awards for "Best White-Collar Article of The Year," I wish to nominate one. And it's not even, strictly speaking, an article only about white-collar crime.

Jed Rakoff is a federal district judge in the Southern District of New York (in other words, in Manhattan). We have mentioned Judge Rakoff before, here and here. He also famously criticized DOJ's failure, as he perceived it, to prosecute individual executives in the financial crisis.



Judge Jed Rakoff

Here, he has a thoughtful article on Why Innocent People Plead Guilty.

Portions bear quoting at some length:

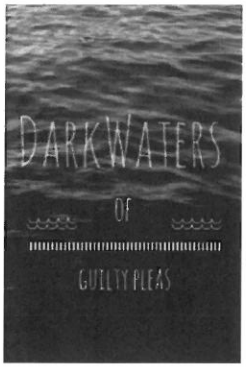
> *The criminal justice system in the United States today bears little relationship to what the Founding Fathers contemplated, what the movies and television portray, or what the average American believes.*
>
> *To the Founding Fathers, the critical element in the system was the jury trial, which served not only as a truth-seeking mechanism and a means of achieving fairness, but also as a shield against tyranny. As Thomas Jefferson famously said, "I consider [trial by jury] as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution."*
>
> *The Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." The Constitution further guarantees that at the trial, the accused will have the assistance of counsel, who can confront and cross-examine his accusers and present evidence on the accused's behalf. He may be convicted only if an impartial jury of his peers is unanimously of the view that he is guilty beyond a reasonable doubt and so states, publicly, in its verdict.*
>
> *The drama inherent in these guarantees is regularly portrayed in movies and television programs as an open battle played out in public before a judge and jury. But this is all a mirage. In actuality, our criminal justice system is almost exclusively a system of plea bargaining, negotiated behind closed doors and with no judicial oversight. The outcome is very largely determined by the*

- June 2014
- May 2014
- April 2014
- March 2014
- February 2014
- January 2014
- December 2013
- November 2013
- October 2013
- September 2013
- August 2013

CATEGORIES

- Appeals
- Bank Fraud
- Brady/Giglio
- Bribery
- Cocktails
- Compliance
- Congressional Investigations
- Cooperation Agreements
- Corporate counsel
- Costs, Budgets and Fees
- Crime Fiction
- Deferred Prosecution Agreements
- Drugs
- Due Process
- Ethics
- Evidence
- Experts
- FCPA
- Fifth Amendment
- Fourth Amendment
- Grand Jury
- Health Care
- Insider Trading
- Insurance
- Internal Investigations
- International
- Law Practice Management
- Lawyers
- Leadership
- Legal Education
- Obstruction of Justice
- Organized Crime
- Parallel Proceedings
- Poetry
- Ponzi
- Presumption of Innocence
- Prison
- Privacy
- Privilege
- Public Corruption
- SEC
- Securities Fraud
- Sentencing
- Social Media
- Style and Grammar
- Surveillance
- Tax
- Technology
- Theology

prosecutor alone.



Judge Rakoff explains why it is really the prosecutor, rather than the judge, who sets the sentence:

> *[T]he information-deprived defense lawyer, typically within a few days after the arrest, meets with the overconfident prosecutor, who makes clear that, unless the case can be promptly resolved by a plea bargain, he intends to charge the defendant with the most severe offenses he can prove. Indeed, until late last year, federal prosecutors were under orders from a series of attorney generals to charge the defendant with the most serious charges that could be proved—unless, of course, the defendant was willing to enter into a plea bargain. If, however, the defendant wants to plead guilty, the prosecutor will offer him a considerably reduced charge—but only if the plea is agreed to promptly (thus saving the prosecutor valuable resources). Otherwise, he will charge the maximum, and, while he will not close the door to any later plea bargain, it will be to a higher-level offense than the one offered at the outset of the case.*
>
> *In this typical situation, the prosecutor has all the advantages. He knows a lot about the case (and, as noted, probably feels more confident about it than he should, since he has only heard from one side), whereas the defense lawyer knows very little. Furthermore, the prosecutor controls the decision to charge the defendant with a crime. Indeed, the law of every US jurisdiction leaves this to the prosecutor's unfettered discretion; and both the prosecutor and the defense lawyer know that the grand jury, which typically will hear from one side only, is highly likely to approve any charge the prosecutor recommends.*
>
> *But what really puts the prosecutor in the driver's seat is the fact that he—because of mandatory minimums, sentencing guidelines (which, though no longer mandatory in the federal system, are still widely followed by most judges), and simply his ability to shape whatever charges are brought—can effectively dictate the sentence by how he publicly describes the offense. For example, the prosecutor can agree with the defense counsel in a federal narcotics case that, if there is a plea bargain, the defendant will only have to plead guilty to the personal sale of a few ounces of heroin, which carries no mandatory minimum and a guidelines range of less than two years; but if the defendant does not plead guilty, he will be charged with the drug conspiracy of which his sale was a small part, a conspiracy involving many kilograms of heroin, which could mean a ten-year mandatory minimum and a guidelines range of twenty years or more. Put another way, it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision.*

Why should you care about any of this? You haven't tried heroin since the 1970s, much less sold it.

You should care because you likely do not consider yourself a criminal and would be be offended if someone in authority charged you publicly with being one. As Judge Rakoff puts it:

> *A cynic might ask: What's wrong with that? After all, crime rates have declined over the past twenty years to levels not seen since the early 1960s, and it is difficult to escape the conclusion that our criminal justice system, by giving prosecutors the power to force criminals to accept significant jail terms, has played a major part in this reduction. Most Americans feel a lot safer today than they did just a few decades ago, and that feeling has contributed substantially to their enjoyment of life. Why should we cavil at the empowering of prosecutors that has brought us this result?*
>
> * * * *
>
> *First, it is one-sided. Our criminal justice system is premised on the notion that, before we deprive a person of his liberty, he will have his "day in court," i.e., he will be able to put the government to its proof and present his own facts and arguments, following which a jury of his peers will determine whether or not he is guilty of a crime and a neutral judge will, if he is found guilty, determine his sentence. As noted, numerous guarantees of this fair-minded approach are embodied in our Constitution, and were put there because of the Founding Fathers' experience with the rigged British system of colonial justice. Is not the plea bargain system we have now substituted for our constitutional ideal similarly rigged?*

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Second, and closely related, the system of plea bargains dictated by prosecutors is the product of largely secret negotiations behind closed doors in the prosecutor's office, and is subject to almost no review, either internally or by the courts. Such a secretive system inevitably invites arbitrary results. Indeed, there is a great irony in the fact that legislative measures that were designed to rectify the perceived evils of disparity and arbitrariness in sentencing have empowered prosecutors to preside over a plea-bargaining system that is so secretive and without rules that we do not even know whether or not it operates in an arbitrary manner.

Third, and possibly the gravest objection of all, the prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed. . . . . [T]his self-protective psychology operates in noncapital cases as well, and recent studies suggest that this is a widespread problem. For example, the National Registry of Exonerations (a joint project of Michigan Law School and Northwestern Law School) records that of 1,428 legally acknowledged exonerations that have occurred since 1989 involving the full range of felony charges, 151 (or, again, about 10 percent) involved false guilty pleas.

When a defendant enters a plea in federal court, the judge asks him or her questions about the defendant's acknowledgment of guilt. This process is called a "colloquy" under Rule 11 of the Federal Rules of Criminal Procedure. The court must assure itself that "there is a factual basis for the plea" and that "the plea is voluntary and did not result from force, threats, or promises (other than promises in the plea agreement)."

"Now, you're sure this is voluntary and everything?"

But in a system where, as Judge Rakoff puts it, "it is the prosecutor, not the judge, who effectively exercises the sentencing power, albeit cloaked as a charging decision," what constitutes "force"? Who defines "threats"?

Usually, Rule 11 colloquies are perfunctory, although occasionally the pleading defendant balks entirely, and the plea goes out the window.

Rarely, though, you get some actual discussion, as with a former Bechtel executive, accused of taking millions of dollars in kickbacks from energy companies, who entered a guilty plea last week:

During the hearing, Judge Deborah K. Chasanow asked Mr. Elgawhary if he was entering the plea because of threats against him or his family. Mr. Elgawhary laughed. "Not at all," he said.

"Tell me why that caused that reaction?" the judge asked.

"I just want to…ease the life of my family." he responded

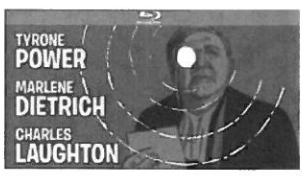
"So you are pleading guilty because you are acknowledging your responsibility and this is the best you think you are going to do for minimizing impact on other people you care about?"

But had anyone threatened him with harm, the judge asked, or was the pressure he felt just from the charges themselves?

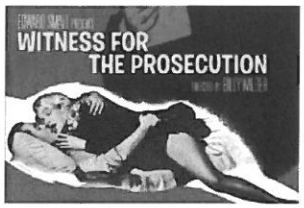
"It's the fact that the charges are there and I don't want to pay something more," he said. "Let us stop here and deal with it"

Pressing further, the judge asked: "The pressure you feel comes from the charges themselves, is that correct, and not because someone else is putting any pressure on you to plead guilty?"

"Most likely, you honor," Mr. Elgawhary said.



A plea often comes with a Government price-tag known as "cooperation." The *Economist* makes a similar point about prosecutors-on-steroids and "cooperating" witnesses in The kings of the courtroom: How prosecutors came to dominate the criminal-justice system:



Another change that empowers prosecutors is the proliferation of incomprehensible new laws. This gives prosecutors more room for interpretation and encourages them to overcharge defendants in order to bully them into plea deals, says Harvey Silverglate, a defence lawyer. Since the financial crisis, says Alex Kozinski, a judge, prosecutors have been more tempted to pore over statutes looking for ways to stretch them so that this or that activity can be construed as illegal. "That's not how criminal law is supposed to work. It should be clear what is illegal," he says.

The same threats and incentives that push the innocent to plead guilty also drive many suspects to testify against others. Deals with "co-operating witnesses", once rare, have grown common. In federal cases an estimated 25-30% of defendants offer some form of co-operation, and around half of those receive some credit for it. The proportion is double that in drug cases. Most federal cases are resolved using the actual or anticipated testimony of co-operating defendants.

Co-operator testimony often sways juries because snitches are seen as having first-hand knowledge of the pattern of criminal activity. But snitches hoping to avoid draconian jail terms may sometimes be tempted to compose rather than merely to sing.

As Robert Mitchum said in *The Friends Of Eddie Coyle* (1973): "If I give you this, I can't do no time."

The Friends of Eddie Coyle - Trailer

Here is an excerpt from our earlier take on all things Eddie Coyle, the worn-out cooperator (or snitch): George V. Higgins and the Archeology of White-Collar Crime:

In popular culture, business-crime is presented cartoon-fashion. In movies, on television or in novels, businesspeople who are corporate targets of government investigations come across as Snidely Whiplashes with French cuffs. This practice is predictable, its results boring. Not so with the work of the late Boston-based novelist and one-time Assistant United States Attorney George V. Higgins (1939 – 1999).

(Read the rest of the post here).

If plea-bargaining and press-ganged cooperation are two legs of the devil's stool for white-collar defendants, the third leg is the evaporation of the presumption of innocence, a point we made in a post about Independence Day:

[T]he "presumption of innocence" about which we all learned (or, at least, used to learn) in civics class has been translated into a presumption of guilt. Most citizens, most of the time, believe that when a person or company is charged with a criminal offense, they are guilty (or perhaps guilty of something pretty close to the charged offense). (We have discussed presumption problems here and here).

A grubby world, plea-bargaining.

In real life, how do I tell a client to not put very many eggs in the presumption-of-innocence basket?

To a businessperson or a professional, I say something like this:

> *"Imagine that you're at breakfast one morning and see a news item. The news item says that someone has been arrested and charged with running a meth lab. To the extent you think about it at all, what do you think? You think the guy's most likely guilty and was in fact running a meth lab, or do you think that he's most likely innocent and is being falsely charged?"*

I pause, watch it sink in and go on:

> *"Now, consider the guy who runs the meth lab. He sees a news item at breakfast that a banker has been charged with fraud; or a doctor has been charged with taking kickbacks; or a defense contractor has been charged with false billing. To the extent he thinks about it all, does he think that the banker or the doctor or the defense contractor is most likely innocent or most likely guilty?"*

I realize that "most likely" is, technically speaking, not the standard in a criminal case. A discussion about the presumption of innocence cannot meaningfully proceed, however, without an appreciation of what I've come to realize over the years: jurors did not really apply (and sometimes do not even understand) the "beyond a reasonable doubt" standard.

Rather, jurors apply what I call "preponderance plus." By "preponderance plus," I mean that they apply the "more likely than not" standard used in civil cases, and then they tighten it. In everyday conversation, we and they use "most likely" constantly, and the words mean something. When was the last time you used the phrase "beyond a reasonable doubt" outside of a legal discussion?

So what, if anything, is to be done?

I love Judge Rakoff's proposal to involve judges in the plea-bargaining process, but that is unlikely to happen.

Perhaps the tonic needed is the self-knowledge articulated by Clamence, the protagonist of Albert Camus's *The Fall* (1956): "I was a lawyer before coming here. Now, I am a judge-penitent."

> *The truth is that every intelligent man, as you know, dreams of being a gangster and of ruling over society by force alone. As it is not so easy as the detective novels might lead one to believe, one generally relies on politics and joins the cruelest party. What does it matter, after all, if by humiliating one's mind one succeeds in dominating every one? I discovered in myself sweet dreams of oppression.*

The Fall

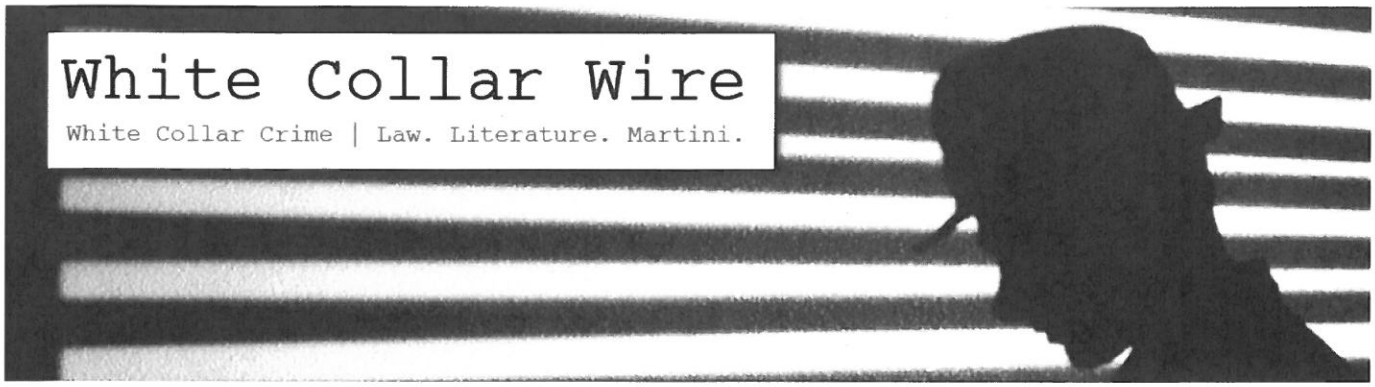
This entry was posted in Cooperation Agreements, Presumption of Innocence, Sentencing and tagged guilty plea, Jed Rakoff, plea-bargaining, presumption of innocence, prosecutorial discretion, Sentencing, Witness For The Prosecution. Bookmark the permalink.

← Title IX, University Discipline, Sexual Assault and Parallel Proceedings

Naughty? Nice? "Reasonable doubt at a reasonable price." →

Dude, That's My Lighter.

Jack Sharman



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Dude, That's My Lighter: Lacrosse, Suspensions, the Fourth Amendment and the White-Collar Thanatos of Zero Tolerance

Posted on January 28, 2014 by Jack Sharman

Early adopters.

The relationship between lacrosse and white-collar crime is not obvious, although for much of its 20th century history the sport was powered by mid-Atlantic and New England prep-school products whose high schools also provided several All-American rosters of white-collar defendants. And even for perfectly lawful activities, there has long been a close relationship between lacrosse and Wall Street, as shown in this 2008 *Wall Street Journal* article about how On Lacrosse Fields, A Battered Bank Is Still a Player

The story of how these Maryland lacrosse players' case moves into court raises some curious insights, though, into matters of compliance and internal policing, not to mention Fourth and Fifth Amendment issues that can figure prominently in white-collar trials:

> *Families of two former Maryland high school lacrosse players have filed a federal civil rights lawsuit against school officials alleging that the teens were suspended for having dangerous weapons after an unconstitutional search of their equipment bags turned up two small knives and a lighter.*
>
> *The lawsuit alleges that school officials in Talbot County, on Maryland's Eastern Shore, violated the students' constitutional rights to due process and their protections against unreasonable search and seizure in 2011 when they boarded the team bus to investigate a tip about alcohol and took action against the teenagers for items the students said they used to maintain their lacrosse equipment.*

The Leatherman.

The items were a lighter and a knife.

The suspensions were reversed by the state board of education, and the players filed a federal civil rights action:

The Maryland State Board of

- June 2014
- May 2014
- April 2014
- March 2014
- February 2014
- January 2014
- December 2013
- November 2013
- October 2013
- September 2013
- August 2013

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- Leadership
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- Obstruction of Justice
- Organized Crime
- Parallel Proceedings
- Poetry
- Ponzi
- Presumption of Innocence
- Prison
- Privacy
- Privilege
- Public Corruption
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- Securities Fraud
- Sentencing
- Social Media
- Style and Grammar
- Surveillance
- Tax
- Technology
- Theology

Education ruled against the school system in 2012 and ordered that the students' records be cleared of the incident. The state's decision was a rare reversal of student punishment and appeared to be in opposition to the zero-tolerance policies that have taken hold in schools across the country.

Left over from a Doobie Brothers concert (1978).

Lawyers with the nonprofit Rutherford Institute, a civil liberties advocacy firm, filed the lawsuit last month in U.S. District Court in Baltimore, seeking monetary damages from the Talbot County school board and four current or former school officials. It comes at a time when U.S. Education Secretary Arne Duncan has urged that out-of-school suspensions be used as a last resort for school-related incidents.

Before we recoil from the lighter and the knife, and begin to mutter about terrorism, consider this:

No alcohol was found, but during the search, Graham Dennis, then a 17-year-old junior, volunteered that he had a small knife, which he used to fix his lacrosse sticks, inside his gear bag.

School officials took the knife as well as a Leatherman tool they found and called police. The teenager was led away in handcuffs and suspended for 10 days.

A teammate, Casey Edsall, also a 17-year-old junior at the time, was suspended for having a lighter in his gear bag. The teenager said it was used to seal the frayed ends of strings on his lacrosse stick.

In its 2012 ruling, the Maryland board [i.e., the panel that reversed the school's decision] *said knives and lighters don't belong at school but concluded that "this case is about context and about the appropriate exercise of discretion."*

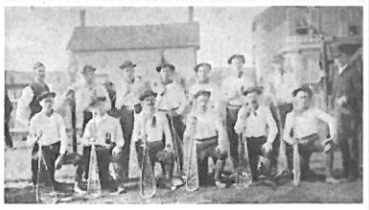
The state board said the coaching staff had tacitly approved the use and possession of the items and that players had openly used them on the bus.

The facts are relatively obvious; their implications, less so.

First, students should not have lighters and knives at school.

Second, knives and lighters are frequently necessary to work on lacrosse heads and their stringing. For a YouTube video on the subject by a mildly-hungover guide, try YouTube Burning String Tips

Third, the school — through the actions of the coaches — approved the open use of knives and lighters on the bus.



High school varsity, but lacking Wi-Fi.

The decision of the Maryland state school board is appropriate. For us, though, it is the board's note about "context" and the "appropriate use of discretion" that is pertinent both for the thanatos of internal compliance and for the sometimes over-reaching character of white-collar criminal investigations and prosecutions.

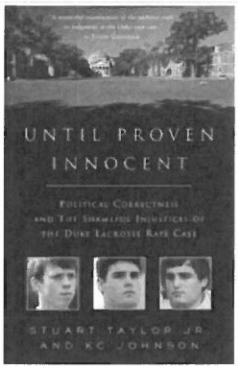
(As a refresher: "Thanatos," a minor Greek deity and the son of Nyx, was the personification of death. The word now refers to an impulse towards death or self-destruction).

Whose street? And, does the defendant live on it?

- Trials, Judges and Jurors
- Twitter
- Uncategorized
- Universities
- Wiretapping
- Witnesses

First, both the sport and Wall Street have had bad press that at times have made them targets for politicians, activists and prosecutors of all stripes — sometimes with justification, sometimes not.

No doubt, lacrosse has had a tumultuous recent history, starting with the Duke lacrosse case in which players were falsely accused of rape.



The burden of proof and a university's shameful behavior.

That case ended with the prosecutor's suspension and surrender of his license to practice law after an ethics complaint against him.

Prosecutor Michael Nifong

Separately, there was later a murder charge against the woman who falsely accused the Duke players, a charge of which she was convicted. More recently, a member of the University of Virginia men's lacrosse team murdered a member of the Virginia women's team.

Second, "zero tolerance" is an antonym to "context." Context — the business, social, cultural and ethical landscape in which a person operates — is precisely what many compliance programs and white-collar investigations lack. As in the Maryland lacrosse-suspensions matter, a policy of "zero tolerance" is a often a cover for something else (especially the fear of civil, administrative or criminal liability) other than solicitude for the people, institutions or values that are offered in justification of the policy.

Third, an appreciation of "context" would introduce the concept of proportionality, whether externally (for example, in grand jury investigations) or internally (for example, in compliance-program investigations). The former investigations are distorted by the fact that many (perhaps most) of the folks at the levers of white-collar investigations have little or no experience of the industries, professions and services being investigated. Without such experience and context, it is understandable that one tends to see a Red under every bed.

The latter investigations are distorted by the business internal impulses and pressures under which they operate. A compliance investigation that leaves significant risk on the table is a failed compliance investigation.

In fairness, though, at times the internal compliance investigation can suffer from over-familiarity, and can fail to see the customary as also potentially criminal.

"Senator McCarthy, the compliance staff is ready to meet."

Alger Hiss at the CrossFit breath-holding competition.

And, of course, there are plenty of actual criminals, some of them of distinguished pedigree, even if those investigating and accusing them are clumsy.

Fourth, just as we have an odd body of Fourth Amendment law within the schoolhouse door, we have too casual a view within the corporate boardroom of Fourth Amendment protections. Much as businesspeople shrink from asserting their Fifth Amendment rights, however wise such an assertion might be, they tend to think of the Fourth Amendment as the province of drug dealers, terrorists,

pornographers and the faculty of Harvard Law School. Both views arise from the otherwise common-sense notion that, "if you have nothing to hide," why not testify, or be searched? The "nothing to hide" rationale fails in the context of most white-collar crime, however, because what incriminates is intent, rather than the object or statement itself. A loan application can contain an error, or it can be a false statement. A check can be a commission or a kickback.

Burn here. And here. And there.

Such considerations come into play in most compliance and white-collar investigations, even those less important than burning the ends of the shooting strings on your lacrosse stick.

Dude.

This entry was posted in Compliance, Fourth Amendment and tagged Fifth Amendment, Fourth Amendment, intent, lacrosse, schools, suspension, zero tolerance. Bookmark the permalink.

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