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Antitrust Division Lawyers' Recent Messaging on Prosecuting Defense Attorneys Should Disappear

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Antitrust Division Lawyers' Recent Messaging on Prosecuting Defense Attorneys Should Disappear

By Matthew D. Segal[1]

In January 2024, the Antitrust Division warned that a subpoena recipient's failure to produce responsive documents from ephemeral messaging services "may result in obstruction of justice charges."[2] In April 2024, at the ABA Antitrust Section's Spring Meeting, a panel speaker from the Front Office went even further, twice telling an audience of defense lawyers that attorneys themselves risk obstruction-of-justice charges if they do not "sufficiently" advise subpoena recipients on the duty to preserve and produce responsive ephemeral messages. Neither the applicable law nor the interests of the Antitrust Division warrant such a personally adversarial approach.

Of course, lawyers are not immune from prosecution for obstruction of justice. Attorneys have been successfully prosecuted for conduct such as coaching a grand jury witness to give false testimony,[3] forging affidavit signatures and counseling a proffer witness to limit answers to what the investigators already knew,[4] destroying a computer containing contraband images,[5] advising a client to hide a witness from a process server,[6] attempting to destroy documents and intimidating a witness into not talking to investigators,[7] and scheming to bribe and threaten witnesses.[8]

Ephemeral messaging services like Snapchat and Signal allow users to set messages to disappear. Such a function can help users secure communications from trade secrets thieves, hackers, domestic abusers, or any other kind of hostile actor that might otherwise use credential theft, malware, or simple coercion to obtain access to a user's old messages. The Antitrust Division views these applications as "designed to hide evidence," and warns ominously that "neither opposing counsel nor their clients can feign ignorance" of its views on preservation.[9] But to this writer's knowledge, no one from the Antitrust Division has explained how "insufficient" legal advice — rather than some affirmative act — could make out the elements of any obstruction-of-justice crime. One struggles to see how the crime's *actus reus* elements could be established by an omission or a failure to do something well enough. Further, the Supreme Court's holding in *Arthur Anderson* would be a substantial impediment to proving up the *mens rea* elements in any prosecution based on corrupt persuasion. "Only persons conscious of wrongdoing can be said to knowingly corruptly persuade. And limiting criminality to persuaders conscious of their wrongdoing sensibly allows § 1512(b) to reach only those with the level of culpability we usually require in order to impose criminal liability."[10]

Perhaps the Antitrust Division imagines that defense counsel's "insufficient" advice to a client could criminally *mislead* that client into continuing to allow deletion of messages responsive to a subpoena. It is obstruction to "knowingly . . . engage[] in misleading conduct toward another person, with intent to . . . cause

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[2] https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations.

[3] *United States v. Lonich*, 23 F.4th 881, 907 (9th Cir. 2022).

[4] *United States v. Farrell*, 921 F.3d 116, 141-3 (4th Cir. 2019).

[5] *United States v. Russell*, 639 F. Supp. 2d 226, 235 (D. Conn. 2007).

[6] *United States v. Schaffner*, 715 F.2d 1099, 1101 (6th Cir. 1983).

[7] *United States v. Shotts*, 145 F.3d 1289, 1302 (11th Cir. 1998).

[8] *United States v. Simels*, 654 F.3d 161, 173-4 (2d Cir. 2011).

[9] https://www.justice.gov/opa/pr/justice-department-and-ftc-update-guidance-reinforces-parties-preservation-obligations.

[10] *Arthur Andersen LLP v. United States*, 544 U.S. 696, 706 (2005) (cleaned up).

or induce any person to . . . destroy . . . an object with intent to impair the object's . . . availability for use in an official proceeding."[11] "Misleading conduct" includes "intentionally omitting information from a statement and thereby causing a portion of such statement to be misleading."[12] But it is very hard to see how a litigation hold letter that contained ordinary general advice about personal devices and suspending *all* deletion could ever be criminally misleading. In particular, one seriously doubts that it could be criminally misleading for a defense attorney not to specifically call out Signal and restate the Antitrust Division's views on ephemeral messaging.

Criminally misleading conduct requires more than just giving bad advice. The *mens rea* elements are demanding. First, "[s]ection 1512(b)(3)'s knowledge element requires that a person knows that his or her conduct toward another person is misleading."[13] Second, section 1512 requires that a person specifically intends to cause or induce someone to destroy a message with intent to make it unavailable in the official proceeding.[14]

An obstruction charge for misleading *legal* advice faces an even higher bar. The entire obstruction of justice chapter "does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."[15] If the Antitrust Division were ever to bring an "insufficient advice" case as obstruction of justice, an attorney defendant would be entitled to an acquittal "unless the jury finds that the government proved beyond a reasonable doubt that the defendant's conduct did not constitute lawful, bona fide legal representation."[16] Of course, the legal profession's range of competence is rather broad, so to fall outside of it, advice would have to be quite poor.[17] Recent case law from the Supreme Court suggests that the government might also have to prove that an attorney defendant subjectively understood that he was acting unprofessionally.[18] In other words, there is plenty of advice that a prosecutor might think was "insufficient" or even bad, especially in hindsight. But that doesn't turn insufficient advice into obstruction of justice, either in *actus reus* or *mens rea*.

The Antitrust Division should consider the effect that such proclamations have at the line level. It helps no one to promote an atmosphere in which government counsel and defense counsel lightly discuss weak theories of personal sanctions against one another. A giant of the criminal antitrust bar recently described how trust issues are undermining the effectiveness of the Leniency Program.[19] It does nothing to solve that problem when government lawyers threaten defense attorneys with indictment on theories that, charitably speaking, are novel and aggressive.

The job of line prosecutors is not made any easier when the atmosphere among counsel is unusually adversarial. In any prosecution, there is a risk that government notes, messages, or other records or recordings will be deleted. Law enforcement is an imperfect, human enterprise. Sometimes even an elite federal law enforcement agency can fail to disclose evidence to the prosecutors in an important

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[11] 18 U.S.C. § 1512(b)(2)(B).

[12] 18 U.S.C. § 1515(a)(3)(B), (C).

[13] *United States v. Sutton*, No. CR 21-0598 (PLF), 2023 WL 8472628, at *21 (D.D.C. Dec. 6, 2023).

[14] 18 U.S.C. § 1512(b)(2)(B).

[15] 18 U.S.C. § 1515(c).

[16] *United States v. Kloess*, 251 F.3d 941, 949 (11th Cir. 2001).

[17] *See, e.g., Strickland v. Washington*, 466 U.S. 668, 689 (1984) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.").

[18] *See Ruan v. United States*, 597 U.S. 450, 467 (2022) (convicting a doctor under the Controlled Substances Act "requires proving that a defendant knew or intended that his or her conduct was unauthorized").

[19] Klawiter, Don, Antitrust Magazine - Summer 2022 (americanbar.org).

case.[20] Even the Antitrust Division itself recently conceded that it had failed to preserve a recording of the interview of a defendant.[21] Now, the Antitrust Division's "whole of government" enforcement approach means that its prosecutors will rely on agencies that may be less familiar with criminal discovery rules. It simply does not serve the Antitrust Division to promote the theory that insufficient advice on evidence preservation can be a crime by counsel, when the Antitrust Division's own line attorneys have their own duties to preserve, collect, and disclose evidence post-arraignment. Today, in every initial appearance, federal courts remind line prosecutors of their disclosure obligations and the consequences for failure, which can be personal.[22] Antitrust prosecutors are subject to State bar rules and State laws applicable to other attorneys.[23] They can be subject to professional discipline if they fail to disclose evidence favorable to the defense, even if that evidence is not material.[24] Prosecutors who in bad faith withhold evidence in California are themselves subject to felony prosecution under a statutory provision that explicitly identifies prosecutors as its concern.[25]

If the Antitrust Division takes this position on obstruction, it could easily be brought up if some future line attorney makes an honest mistake and faces proceedings related to contempt or professional discipline. This is not the world any of us want to live in.

The defense bar gets it: the Antitrust Division wants to incentivize subjects' preservation of ephemeral messages. It still does not serve the Antitrust Division, the profession, or the public for attorneys at the antitrust bar to casually talk about subjecting one another to either prosecution or professional discipline. There is a deep toolbox of powerful tools to bring litigation consequences to any party who fails to comply with obligations to preserve and turn over evidence. Evidence destruction makes an impression on both judges and juries. Knowing that is enough to incentivize competent counsel to strive to have clients preserve evidence. The Antitrust Division can achieve its objectives without promoting the kind of atmosphere in which friends and former colleagues theorize about ruining one another's lives and careers.

[20] *See, e.g., United States v. Bundy*, 968 F.3d 1019, 1037 (9th Cir. 2020) ("To the extent that any government agencies or actors, through their own flagrant misconduct, failed to make known exculpatory information, the flagrant nature of such conduct will be imputed to the prosecution—just as the agencies' or actors' *Brady* violations are imputed to the prosecution . . . Although flagrant misconduct cannot be an 'accidental or merely negligent' failure to disclose, the misconduct need not be intentional.").

[21] *United States v. Hee et al.*, Case No. 2:21-cr-00098-RFB-BNW, Transcript of hearing on Nov. 2, 2021, Motion to Suppress, Dkt. 60 at 8-9.

[22] Fed. R. Crim. P. 5(f); *In re Fed. Rule of Crim. Proc. 5(f)*, No. 1:12-CR-00862-AJN, 2021 WL 260408, at *1 (S.D.N.Y. Jan. 25, 2021).

[23] 28 U.S.C. § 530B.

[24] Cal. RPC 3.8(d).

[25] Cal. Penal Code § 141.