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Beware of "Accidental Obstruction of Justice"

Businesses today are subject to more state and federal regulations than ever before. As a result, business owners are required to make countless decisions each day to comply. Seldom does an entry appear on a list of things to do: "Don't obstruct justice today." Yet business owners might be at greater risk than one might imagine. Obstruction of justice doesn't simply mean "witness tampering" or "jury tampering"; nor is it merely something the police say on *Law and Order* to get witnesses to cooperate. Obstruction of justice refers to the crime of interfering with the work of the police, regulatory agencies, investigations, prosecutors, or other government officials. It normally involves one of three types of behavior: (1) communications with the government; (2) communications with third parties; or, (3) the manner in which you handle your documents. Often, business owners are at risk for obstructing justice without ever realizing it.

INSIDE

How does a person accidentally obstruct justice? A good example is found at 18 U.S.C. § 1512, which prohibits Tampering with a Witness, Victim, or Informant. The statute begins with a prohibition against killing or threatening witnesses, but Congress does not stop there. A person violates the statute if he or she: **(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. Obstruction charges may be brought even if a person was under no compulsion to produce such documents. A person found guilty of violating this statute may be fined, imprisoned for not more than 20 years, or both. The government does not need to prove the business owner had in mind which specific "official proceeding" the business owner obstructed. Obstruction can involve government interviews with employees or telling others not to speak to the government. Another culprit, or area of concern, can relate to documents, which are covered by 18 U.S.C. § 1519: *"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."*

This means that the government agency investigating a business matter may discover a violation related to a different agency. It may also create problems if a business owner destroys, fails to produce in response to a subpoena, or alters incriminating information from a document, including an email. Therefore, business owners should never alter documents after an investigation has begun, even if such owner feels the document is incomplete or misleading. Barry Bonds' conviction for obstruction was upheld by a three-judge panel of the U.S. 9th Circuit Court of Appeals, which ruled that someone may be convicted of obstruction for making factually true statements if they are intended to mislead or evade.

The reason this can be of greater concern lies in the zealous prosecution of businesses by regulatory agencies. Often, an investigation into a business will reveal insufficient evidence of wrongdoing in the matter which started the investigation. However, government officials may attempt to save face by prosecuting an obstruction of justice charge relating to statements made during an official proceeding, or documents produced in connection with the proceeding. Often, the charge of obstruction carries a far heavier penalty than the original charge, leading to accusations of prosecutorial "piling on" of charges. The "exculpatory-no" is of particular concern, because it is a natural human instinct. Roger Clemens was prosecuted for denying he used performance-enhancing drugs before Congress. The "exculpatory no" exception is no longer valid after *Brogan v. United States*, 522 U.S. 398 (1998). In *Brogan*, the Supreme Court ruled that the Fifth Amendment does not protect the right of those being questioned by law enforcement officials to deny wrongdoing, if doing so would be a false statement. Justice Scalia reasoned, a person always has the right to say nothing, if an answer would incriminate him.

If you are contacted by a state or federal agency, in furtherance of an investigation, particularly in a regulated industry such as healthcare, banking, finance, etc., always obtain legal representation before communicating with these agencies. At Friedman & Feiger, we have experience representing businesses and business owners, officers, directors, and employees in regulated industries, and can help you navigate these treacherous waters.

Sincerely,

Larry Friedman

Larry Friedman can be reached at (972) 788-1400 or e-mail him at lfriedman@fflawoffice.com

Attorney Spotlight

Martin R. Merritt

Martin Merritt of Dallas is a 25-year Health Lawyer representing physicians, dentists, nurses, hospitals, ambulatory surgery centers, group practices, DME suppliers, drug manufacturers, compounding pharmacies, pharmaceutical companies, and others in healthcare compliance, administrative law, and state and federal litigation. He is a 1986 graduate of Ole Miss Law School.

Martin is a nationally recognized author and lecturer on PPACA, AMA Medical Ethics, state and federal Medicare and Medicaid Fraud, Waste and Abuse law, Stark Law, the Anti-kickback Statute, Civil Monetary Penalties Law, and Safe Harbors, the False Claims Act, RAC Audits, benefit utilization audits, CPT and ICD-9 coding and documentation issues, state and federal FD&C Act drug and device regulations.

Martin writes a weekly column for *Physicians Practice Magazine*, is a Contributing Editor for D Magazine's *D HealthCare Daily*, is a contributor to *Becker's Hospital Review* and *Becker's ASC Review*. Martin was asked in May 2013 to write for *The Federal Lawyer*, which is the official journal of the Federal Bar Association, the definitive article on 12(b)(6) and 9(b) Motions to Dismiss in Healthcare False Claims Act Whistleblower cases. In the summer of 2013 Martin wrote the chapters on Stark Law and AMA Ethics in a highly anticipated book on Accountable Care Organizations published by the ABA Health Law Section. He delivers the annual Fraud and Abuse address to the Health Law Section of the Dallas Bar Association, and the North Texas Healthcare Compliance Association.

Martin has served as a Special Disciplinary Counsel to the Texas Commission for Lawyer Discipline, prosecuting ethics complaints. Martin is a member of the Health Law Section of the Texas Bar Association and the Health Law Section of the Dallas Bar Association. Martin is available to address small or large groups in need of help understanding state and federal health law regulatory compliance. Martin can be reached at (972) 788-1400 or email him at mmerritt@fflawoffice.com.

Covenant Not To Sue Negates Article III Standing By John Sokatch

According to the recent Supreme Court ruling in *Already, LLC. v. Nike, Inc.*, 133 S. Ct. 721 (2013), a broadly-drafted, unilaterally-issued "Covenant Not to Sue" may now provide defendants with alternative measures to combat cancellations of their federally-registered trademarks.

In July of 2009, Nike, Inc. ("Nike") filed a complaint against Already, LLC. d/b/a Yums ("Yums") generally alleging claims of trademark infringement of the design of Nike's Air Force 1 shoe product line. Known for its distinctive stitching and numerous color combinations, Nike had originally obtained the registration for the Air Force 1's shoe design in June of 2008 (U.S. Reg. No. 3,451,905). In response, Yums filed a counter-claim challenging the validity of the mark's registration and seeking cancellation.

Four months later, Nike delivered to Yums a comprehensive "Covenant Not to Sue," whereby Nike "unconditionally and irrevocably covenant[ed] to refrain from making any claim(s) or demand(s) . . . against [Yums] . . . on account of any possible cause of action based on or involving trademark infringement, unfair competition, or dilution, under state or federal law . . . relating to the [Air Force 1 mark] based on appearance of any of [Yums'] current and/or previous footwear product designs, and any colorable imitations thereof . . .." Nike also dropped the remainder of its claims against Yums.

Amid investors' prospective concerns for potential lawsuits from Nike and fear of tarnishment of its reputation in the shoe industry, Yums ignored Nike's efforts to dismiss the matter in its entirety and continued to maintain its counter-claims to cancel Nike's design mark.

But according to Nike's attorneys, Yums' federal claims had been rendered moot vis-à-vis Nike's unilateral "Covenant Not to Sue"—*i.e.*, Yums no longer possessed Article III standing as there was no longer a "case" or "controversy" between Nike and Yums. Yums countered with evidence of investor concerns and statements that Nike had intimidated other retailers into refusing to carry Yums' products, but to no avail. The district court dismissed Yums' counter-claims and the issue was appealed to the United States Supreme Court.

Reviewing the issue in light of the "voluntary cessation" doctrine, the Court determined that the breadth of Nike's unconditional and irrevocable Covenant Not to Sue sufficiently demonstrated that it "could not reasonably be expected" to resume its enforcement efforts again Yums. In other words, once Nike asserted that it would permit Yums to produce all of its existing footwear designs, or any "colorable imitations" of the Air Force 1's design, such assurances made it "absolutely clear" that Nike would no longer seek to enforce its mark against Yums.

As a result, the Court held that Yums lacked any "legally cognizable interest in the outcome" of the litigation and that the district court had been divested of subject-matter jurisdiction over Yums' cancellation proceedings. The Court additionally noted, however, that in any future trademark proceedings Nike would be bound by the Covenant's broad language; therefore, Nike was precluded from initiating any suit against Yums for alleged infringement unless the shoe was "an exact copy or counterfeit version of the Air Force 1 shoe."

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The Future of Alternative Dispute Resolution By Jason Friedman

Recently, some courts have begun using a new alternative dispute resolution technique that provides each party with a "sneak peak" at what an unbiased jury thinks of their case -- it's called a summary jury trial.

The summary jury trial is an effective method of alternative dispute resolution sometimes used to bring closure to complex or highly contentious cases that failed to settle in mediation. Unlike mediation or arbitration, a summary jury trial turns the biggest unknown - a juror's reaction to the case - into a highly effective case valuation and settlement tool.

The summary jury trial is basically a non-binding, condensed version of the real trial. It is conducted before a jury of 6 to 12 members which are selected from the regular jury pool that would have otherwise been used to seat jurors in a real trial on that day (although the jurors don't know that the trial is not real) and it is presided over by a judge.

The format of the summary jury trial is the same as it would be in a real trial. There is a voir dire, opening statement, evidence is presented by each side, there is closing argument, and then the jury deliberates. Each side splits the cost of the acting Judge who typically is a practicing lawyer, mediator, or former judge.

The difference between the summary jury trial and a real trial is that the summary jury trial is presented to the jury in a summarized format. This is achieved by restricting questioning during jury selection, relaxing evidentiary rules, omitting marginal evidence, presenting some witnesses by video, summaries of counsel, reading of depositions and curtailing the jury instructions. After each side ceases their evidentiary case, brief closing arguments are presented to the jury and then the judge instructs the jury on the law and submits the case to them for deliberation. After the jurors render their verdict, the parties are given the opportunity to question the jurors about their thought processes to determine what evidence or issues were most compelling or damaging to each party's case. The verdict and deliberation information are then used to drive settlement discussions.

The length of the summary jury trial typically depends on the complexity of the issues and number of parties involved. In many cases each side is given a half a day to present its case including time for cross-examination by opposing counsel.

After the summary jury trial is over the parties then mediate with the agreed upon neutral who presided over the summary jury trial. The summary jury trial is treated like mediation—everything is confidential, and the results of the summary jury trial cannot be used against another party in the case.

However, the results of the summary jury trial will very likely force at least one side to re-examine the merits of its position and the reasonable chances of prevailing at a real trial if the case goes forward.

What are the possible advantages of a summary jury trial?

1. You get to see how a real jury views the other side and their story.
2. There is a clear benefit to determining whether your strategy will resonate with the jurors before, rather than after, a substantial jury award is on the line.
3. It provides the key witnesses in the case with a dress rehearsal for the real trial.
4. The parties can use the summary jury trial as an opportunity to still further prepare their witnesses and to evaluate their performance.
5. The exposure to the courtroom setting and the jurors will also reduce the level of anxiety that the parties and witnesses might have in front of the real jury.

What are the possible disadvantages of a summary jury trial?

1. Relaxed rules of evidence, which means evidence that could be excluded upon objection might be admitted.
2. It is time consuming. Since it is a mini-trial, the attorneys and clients spend a tremendous amount of time not only preparing but consolidating a trial that should take ten (10) days into one (1) day.
3. The presentation of evidence by video, the summaries of counsel, and the extensive reading of deposition transcripts militates against a true result by depriving the jury (and the parties) of the benefit of assessing the credibility of live witnesses.

The summary jury trial should be considered as a viable alternative to simply taking the case to trial. Used properly, it can provide both parties with an accurate impression of how an actual jury might feel about the case. Summary jury trials are not for every case. They are typically for those cases that didn't settle at mediation and will take at least one week to try.

This settlement tool factor might be just the thing needed to bring the parties to resolution where traditional mediation fails and save the parties money in the process. If you think you have a case that could benefit from a summary jury trial, call Jason Friedman.

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Pictured left to right: Larry Friedman, Janelle Friedman, Margot Perot and Ross Perot

CO-CHAIRED BY JANELLE AND LARRY FRIEDMAN
100 YEAR ANNIVERSARY GALA FOR CHILDREN'S MEDICAL CENTER
WAS A MONUMENTAL SUCCESS

Co-chaired by Janelle and Larry Friedman and presented by Alliance Data, Children's Medical Centers' "Celebration Of Our Century" gala was a sold-out success with over 800 prominent guests in attendance and raised millions for the future of Children's Medical Center. The unforgettable evening at the Omni Dallas Hotel featured live performances by Academy Award-winning actress and Grammy-Award winning recording artist Jennifer Hudson, The Pointer Sisters, and New York City's famed Starlight Orchestra. The Friedman & Feiger Foundation supported the gala as a Centennial Partner. Sincere appreciation to all of our clients and friends who attended and supported this memorable event.

Upcoming Events

Friedman & Feiger Calendar

January 20, 2014	Health Care Lawyer Martin Merritt speaks at the Dallas Bar Association's Health Law session on "The False Claims Act," Noon, Belo Mansion, 2101 Ross Avenue, Dallas.
January 22, 2014	Join Health Care Lawyer Martin Merritt to learn the "Secrets of the Affordable Care Act," 11:30 a.m. to 1 p.m., Friedman & Feiger Law Office, 5301 Spring Valley Road, includes lunch. RSVP: rladieu@fflawoffice.com or 972-450-7344.
February 5, 2014	Join Janelle Friedman and Yvette Feiger for an "Essential Energy" female business leaders' networking reception with speaker WFAA's Ron Corning, 6 p.m. to 8 p.m., Arlington Hall at Lee Park, 3333 Turtle Creek Blvd., Dallas. RSVP: clegrand@fflawoffice.com
March 27, 2014	Join Janelle Friedman and Yvette Feiger for an "Essential Energy" female business leaders' networking reception with speaker KLUV Radio Personality Jody Dean, 6 p.m. to 8 p.m., Arlington Hall at Lee Park, 3333 Turtle Creek Blvd., Dallas. RSVP: clegrand@fflawoffice.com

Contact for Info: jfriedman@fflawoffice.com