Sarbox Slaps Attorney for Touching Child Porn

Financial institutions, technology/telecommunication organizations, and the energy/environmental sectors experience more claims against in-house counsel than other industries. Though most of the claims are against in-house counsel for negligence in rendering legal advice, there is an unprecedented creep toward criminal liability under the Sarbanes-Oxley Act of 2002. [1]

On February 15, 2007, prominent Stamford attorney Philip D. Russell, 48, became the first attorney indicted on charges under the Sarbanes-Oxley Act for obstruction of justice and destroying evidence. The Sarbanes-Oxley Act of 2002, often referred to as Sarbox, is a United States federal law signed in response to a number of major corporate and accounting scandals. The Act's purpose is to revive investor confidence in the public markets by strengthening corporate accountability, oversight, and disclosure standards. It also increases the responsibilities of corporate counsel and increases their exposure for criminal charges, civil liability, and professional misconduct.

Analysis of Criminal Liability Under Sarbox

Mr. Russell was indicted under two relatively new provisions born from the Sarbanes-Oxley Act; Title 18 U.S.C. § 1512(c)(1) ("Tampering with a Record or Otherwise Impeding an Official Proceeding") and Title 18 U.S.C. § 1519 ("Criminal Penalties for Altering Documents"). The indictment alleges that one day after a federal investigation, nobody outside of the FBI knew began; Mr. Russell who was acting as an in-house lawyer for the Christ Church in Greenwich, CT, confronted Robert F. Tate who at the time was the music director at Christ Church. Mr. Russell asked Mr. Tate about reported images of child pornography on his personal laptop. Mr. Tate admitted ownership of the 150 to 300 pornographic images of young boys and promptly resigned from the Church. Following the confrontation with Mr. Tate, Mr. Russell promptly took the laptop which had been wrapped in plastic by church officials, dismantled it, and destroyed the images. The time frame from the beginning of the federal investigation of Mr. Tate to Mr. Russell destroying the laptop occurred within three (3) days.

Arguments to Dismiss the Case

[1] Friedman, Susan. Most Claims Against In-House Counsel Don't Make the Front Page (*available online at* http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1184956611840)

On March 22, 2007 Philip Russell's attorneys, Robert Casale and Thomas Williams, filed a motion to dismiss count two for the "destruction of a tangible object." One month later, Mr. Russell's attorneys filed a motion to dismiss count one for "obstruction of justice". In the motions, Mr. Russell does not deny he disposed of the computer but argues that his actions were not illegal. The motions also suggest that to retain possession of a computer would be in violation of 18 U.S.C. § 2252A (5)(B), which criminalizes knowing possession of child pornography. Also, the motions argue that the Connecticut Reporting Law that requires a person to inform authorities of suspected child abuse does not apply to the discovery of child pornography because of the difficulty in trying to locate the victim. In addition, the defense team argues that a defendant must have some knowledge of an actual proceeding and that the things destroyed must have a nexus to the proceeding.

On August 22, 2007, the motions to dismiss the two charges were denied. Judge Alan H. Nevas of the U.S. District Court of Connecticut said that there was no merit to Mr. Russell's arguments which ask the Court to make a factual determination. On September 4, 2007 a Motion to continue jury selection to October 2, 2007 was granted. On September 24, 2007 prosecutors filed court documents stating that they intend to offer as evidence an audiotape of a hearing last year in another case in which Russell argued that child pornography should be delivered to law enforcement.

In a turn of events, on September 27, 2007, Philip Russell pleaded guilty to one count of misprision of a felony, which means he was aware that a felony was committed, but failed to report the crime to authorities. According to the plea agreement, at an offense level total 11 and criminal history category I; Mr. Russell's guideline range is 8 to 14 months' imprisonment and a fine range of $2,000 to $20,000. The Government will not argue for an upward departure of the guidelines, but Mr. Russell can argue for a downward departure. The final sentencing decision by the Court has not been determined. By pleading guilty, Mr. Russell's potential punishment is severely reduced in contrast to the two counts he faced under the Sarbanes-Oxley Act. Nonetheless, the charge that he pled to is a felony, so Mr. Russell still faces the possible loss or suspension of his law license.

What the Government and the SEC Believe Mr. Russell Should Have Done

The Government's application of §§ 1512 and 1519 against Mr. Russell, will allow the Government to criminalize a broad range of traditionally legitimate attorney advice and

appropriately zealous advocacy. The Sarbanes-Oxley Act emphasizes with §307, codified as 15 U.S.C. 7245, that "an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors." When §307 was drafted, "evidence of a material violation" referred to financial documents and to report the violation to the SEC if the company failed to address the issue.

Representation of an organization under §307 coincides with the ABA Model Rules of Professional Conduct Rule 1.13 that requires "a lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents. If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the that an attorney represents the entire corporation."

Sarbox §307 as applied to Mr. Russell requires him to *report-up the ladder* within the Church. However, the Church Officials were already aware of the child pornography and in fact reported it to him in search of guidance to avoid a public scandal. The Indictment alludes to the opinion that Mr. Russell should have made a *noisy withdrawal*, terminate his representation of Christ Church in writing, and give the computer to the Government.

<u>The Effect of The Sarbanes-Oxley Act</u>

The Sarbanes-Oxley Act makes it a crime to tamper with potential evidence in "contemplation" of a federal investigation. Sarbox now makes it easier to prosecute an attorney

for obstruction of justice by requiring only that an investigation was *foreseeable* rather than *already pending*. This means it does not matter when the federal investigation of Mr. Tate began, only that an investigation could possibly occur at some time because of the child pornography possession. Furthermore, prosecutors no longer have to show that the defendant acted with corrupt intent to keep evidence from investigators. This revision self-deputizes attorneys requiring them to preserve their client's potentially incriminating evidence. Failure to do so could lead to an attorney facing criminal charges for tampering with *evidence before it even becomes evidence* in an investigation.

How is an attorney supposed to determine if the *evidence* should be preserved or destroyed? A simple answer is to preserve everything. As it stands, the Government appears to rely on a reasonable prudent attorney standard to determine if the *evidence* was "in-fact" foreseeable evidence.

The Government's implementation of the Sarbanes-Oxley Act shifts an attorney's role from being a zealous advocate for their client to becoming a quid pro quo tattle-tale for the Government. Without any formal amendment to the Sarbanes-Oxley Act, the Philip Russell case shows that preservation of evidence no longer applies to only financial documents and the duty to report now extends beyond how the SEC intended. The act is supposed to apply only to public companies, but instead it establishes new or enhanced standards of accountability for all organizations…publicly traded and privately held…profit and non-profit." [2]

Additionally, the Government's application of §§ 1512 and 1519 means that if an in-house counsel attorney were to find potentially incriminating evidence within the corporation, even if it poses no potential financial harm, he/she should report the evidence to the Board or Directors. Interpretations of Sarbox suggest that if the Company fails to take the initiative in exposing the evidence to the SEC, the attorney should preserve the incriminating evidence for the Government, terminate their employment with the company, and violate the Rules of Professional Conduct or else face criminal charges. In theory the Sarbanes-Oxley Act seems imperative in order to promote the ethical behavior of attorneys and corporations, but with its first application to a real-life situation, problems arise showing that things are never as they appear.

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[2] Timothy Floyd and Mitchel Winick. *Your Role as In-House Counsel*, 28 (*available online at* www.txethics.org/TCLEPCOURSE2005/R-ch-2-V.pdf)

Additional Points of Interest Not Addressed in the Russell Case

In a securities case, when reporting information to the U.S. Securities Exchange Commission, 17 C.F.R. 205.3 (d)(2) states that giving information to the SEC without the client's knowledge does not breach attorney-client privilege. However, a problem arises with Part 205.3(d)(2) because reporting information without the client's knowledge would violate Rule 1.6 of the Rules of Professional Conduct when the incriminating information was discovered through communications with the client, and had no relation to any type of financial fraud or physical bodily injury.

Furthermore, under § 1515(c), in-house corporate counsel attorneys cannot be certain of what activities are considered "legal representation services" because attorneys represent clients' interests in many non-traditional forums. Corporate general counsel often makes decisions and takes action that serve both legal and business purposes. In each of these circumstances, there is an unanswered question of whether or not the attorney's conduct is "legal representation."

An additional issue not considered in the Russell case, is the type of reprimand that the U.S. Securities and Exchange Commission can take against an attorney. The SEC is not involved in Mr. Russell's case because his actions relate to a criminal investigation, not a securities investigation. An attorney in violation of Sarbox under a securities case not only faces punishment with the Government, but also with the SEC. An attorney's potential reprimand with the SEC is that he/she is subject to the civil penalties and remedies for a violation of the federal SEC. In addition to the civil penalties, the SEC can elect to hold an administrative disciplinary proceeding which can result in an attorney being censured or denied the privilege of practicing.

Questions for the Future of The Sarbanes-Oxley Act

The Government's action against Mr. Russell under 18 U.S.C. §1512(c)(1) for destroying a computer when he had no reason to believe any official proceeding was in progress or would begin removes the nexus of knowledge or foreseeability that was previously required. This poses the threat that destruction of any document could land an attorney in the same situation Mr. Russell is now facing. How §1512(c)(1) is applied in light of the upsurge of corporate scandals remains to be seen.

When drafted, 18 U.S.C. § 1519 was never intended to apply to the destruction or altercation of records that are illegal to possess initially. Does the application of §1519 to Mr. Russell indicate that anyone who possesses contraband and fails to provide it to the authorities

faces a 20 year federal felony if he/she destroys it, thus impeding a possible future investigation? Under the Governments construction of §1519, it appears it is more detrimental to destroy the contraband rather than to hold on to it. This means that an attorney must break one federal law and retain contraband in order to comply with another federal law.

The application of §1519 is hazy because the statute prohibits acts taken "in contemplation of or in relation to" federal investigations which is not defined in the statute. The determination if Congress has reached too far with §1519 to prevent document destruction relies on how the court in the Russell case will ultimately define, "in contemplation of or in relation to." The Government argues that the investigation of Mr. Tate, the former choir master, should have been foreseeable to Mr. Russell because he is a criminal defense attorney. This particular application means that the threshold for foreseeability depends on each particular person.

The Russell case, using the new Sarbanes-Oxley standards, changes how an attorney should advocate for a client in an attempt to avoid their own potential prosecution. The following situations may now pose criminal liability if the Russell case if followed:

1. "Advising a client to invoke [his/her] Fifth Amendment right to withhold testimony – which could be directly incriminating or lead to the discovery of incriminating evidence from a tribunal.
2. Asserting a client's fourth amendment [right] to withhold documents and records from an investigation if police were to attempt to search a home without a search warrant.
3. Asserting a client's Fourth and Fifth Amendment rights by filing motions to suppress statements made by the client or to suppress evidence seized by police in a criminal case.
4. Moving to quash a subpoena that seeks information potentially incriminating to his or her client.
5. Advising a client not to produce a class of documents, or a specific document, that have not been described or identified in a subpoena, even though the attorney recognizes that the documents or document contain information that the investigator would want to see.
6. Advising a client to amend a statement to regulators, memos and press releases to remove content that is unnecessary or to make it more accurate.
7. Attempting to persuade government officials to cease investigating a client.

In each of these instances, the attorney would be advising the client or assisting the client in taking action that the client has every legal right to take and that would be in the client's

interest. The client is entitled to receive unfettered advice to exercise there rights and to have the attorney advocate his position, and our system of justice demands it. Yet, by the Government's application of § § 1512 and 1519 to the conduct at bar, each of these examples would be illegal. Such and interpretation would radically shift the balance in the adversarial system to the detriment of both the individual and out system of justice." [3] Due to the surprise outcome of the Russell case, the issue of whether or not attorneys are now held criminally liable under Sarbanes-Oxley Act for actions lacking any criminal nexus is left unanswered. The only advice that can safely be taken from the Philip Russell case is to practice as carefully and ethically as possible.

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[3] *See* Brief of the Amicus Curiae, Connecticut Criminal Defense Lawyers Association, In Support of the Defendant's Motions to Dismiss the Indictment, 12-13.