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In This Issue…

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"Through a Glass, Darkly"[1] or the Lawyer Who Ends Up a Client[2]

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"[A]fter a case has been tried and the evidence has been sifted […], a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay."[3]

As litigators we pride ourselves on our ability to take the "sand and clay" we are initially given and develop it to persuade others that our client's position is correct. We view it as our professional duty to use our skill and credibility on another person's behalf. Ultimately, through passion and dedication we end up believing in our client's case, even when our friends and colleagues express skepticism.

The difficulty lawyers face is to know when to step back and question the facts and circumstances when immersed in the work of zealous advocacy. Of course, many lawyers say, "If I have to investigate my own clients before acting on their behalf, I don't want them as clients." Or, put another way, "I am entitled to trust my client and what he has told me."

These sentiments are understandable. But, without such investigation, we risk that the opinion letter we draft, the affidavit we provide, the demand letter we

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send, or the recommendation we give to withhold from production privileged documents, will be viewed in a different—even criminal—light. When facts that we represented as true turn out to be false, these routine acts of representation could become the grounds for a criminal indictment (against the lawyer and/or the client) or the basis for a disciplinary action by the Bar.

Generally, under Bar disciplinary rules, attorneys are not sanctioned for statements made in reliance on a client's misrepresentation. However, an attorney may face criminal liability for such statements even when the attorney had no knowledge of the client's deception.

Below is a brief survey of the regulations and criminal doctrines that counsel should be aware of when deciding whether it is necessary to obtain more facts before advocating on a client's behalf.

I. Criminal and Regulatory Proceedings

Even if you have no knowledge that your client has given you false information, you are still at risk of criminal prosecution if you make misrepresentations to the court, opposing counsel or third parties in reliance on false information from your client. Prosecutions of lawyers have been brought absent evidence of deliberate misrepresentations, including prosecutions for mail and wire fraud, money laundering, racketeering, obstruction of justice, and perjury, among others.

For example, in *U.S. v. Beckner*, the government charged a former U.S. attorney and prominent trial lawyer with four counts of aiding and abetting his client's wire fraud, obstruction of justice, and perjury. He was convicted on the aiding and abetting counts based solely on actions that most of us would consider routine representation: an argument in a brief that securities law did not apply to certain notes, rejection of an associate's proposal that the firm interview investors, a decision not to produce documents based on assertion of a Fifth Amendment privilege, and a misquoted comment in a newspaper.[4] Indeed, reversing his conviction on appeal, the Fifth Circuit observed that the conviction was based solely on "what trial counsel is supposed to do."[5]

Joseph Collins, an established transactional lawyer at Mayer Brown, is currently facing similar charges for actions he took during his representation of the now-bankrupt commodities broker Refco. The indictment accuses him of preparing misleading documents sent to investors, filing materially false statements with the SEC, and structuring transactions designed to improperly shuffle debt between Refco and third parties for accounting purposes.[6] Mr. Collins faces charges of securities fraud, wire fraud, and filing false statements with federal regulators.

As *Beckner* illustrates, investigations and prosecutions of lawyers based on their representation of clients are not limited to far-fetched or extreme circumstances. To avoid misuse of such actions, the Justice Department instituted internal procedures that govern the investigation and prosecution of attorneys based on their representation of clients.[7] Worrisome to counsel, these procedures contemplate nonprosecution agreements with clients under investigation in exchange for testimony against their attorneys.[8]

A. Mail and Wire Fraud

Although mail and wire fraud are probably the last thing on your mind when you are preparing a letter, e-mail or filing for a client, these federal crimes carry hefty maximum prison sentences and fines,[9] and, as interpreted, do not require an actual intent to defraud or actual knowledge of the misrepresentation.[10] Under Ninth Circuit precedent, both the intent and knowledge elements of these crimes can be shown by recklessness.[11] Nor is it necessary to show that the perpetrator of the fraud expected to profit or benefit personally from the fraud.[12] As a result, mail and wire fraud present surprisingly low hurdles for prosecution and should concern attorneys who communicate with third parties on behalf of their clients.[13]

Consider the following scenarios:

- A lawyer helps a longtime client prepare a letter to one of the client's lenders. The lawyer knows the letter will be e-mailed to the lender who will rely on information in the letter to decide whether to call certain loans to the client. The lawyer does not fact-check the letter, relying instead on the client and its accountant for the facts.

- A lawyer drafts an opinion letter knowing it will be mailed to investors in his client's business. The letter is designed to calm investors' fears. The lawyer relies on facts about the client's business supplied by the client who the lawyer knows is desperate and under extreme stress at the time. The lawyer knows the client will likely go under if the investors balk.

What is the likelihood that the attorney will be held liable for mail or wire fraud when the facts in these scenarios ultimately turn out to be false or misleading? *The issue turns on what is reckless and what can be inferred from the lawyer's relationship with the client.*

Courts define reckless as a conscious disregard of a substantial and unjustifiable known risk.[14] The question then

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is what quantum of information tips a lawyer off that the situation is not what is being represented by the client. In other words, is the lawyer disregarding information that should lead him to doubt the truthfulness and accuracy of the client's statement? Cases in non-attorney contexts suggest that such things as relying on a client's memory of a key date or other detail without checking to see if the client verified the accuracy of her memory could constitute disregarding a known risk that the client's recollection is inaccurate. Relying on a client's extravagant claims without any further investigation may also constitute a reckless disregard for the truth.[15] In such circumstances, if the lawyer proceeds without investigation and it turns out the client's representation is inaccurate, both the client's and the lawyer's credibility are damaged and both may be subject to fraud charges.

In holding that specific intent to defraud may be proved by a showing of recklessness, the Ninth Circuit has also effectively modified the good faith defense generally available to require some level of investigation or diligence (*i.e.,* no recklessness). Other circuits continue to recognize the traditional good faith defense—*i.e.,* an honest belief in the truth or a showing of honest mistake excuses otherwise fraudulent conduct.[16] Courts in the Ninth Circuit, however, have held that a defendant is not entitled to a good faith instruction because it would be duplicative of a proper instruction on specific intent—in other words, if specific intent is proven, good faith is necessarily disproven.[17] Thus, because specific intent can be proven by recklessness alone, good faith is disproven by recklessness.

Of course, the government can prove actual knowledge of the misrepresentation by circumstantial evidence. Reviewing courts have held that evidence that a lawyer had a particularly close relationship with the client was sufficient to prove knowledge of the client's fraud, despite no direct evidence of the lawyer's knowledge. In one wire fraud case, the court suggested that knowledge of a client's misrepresentation may be inferred by the jury from "an intimate association with the client's activities," such as that of an in-house lawyer.[18] But, in that case, where the lawyer was outside trial counsel, the court concluded that the evidence was not sufficient to support an inference that the lawyer knew about the client's fraud. There, the court observed that the lawyer was not a confidant or everyday advisor to the client, that he specifically disclaimed sophistication in the matters later called into question (SEC matters), and that he sought assistance from other lawyers with expertise in those matters.[19] Similarly, another reviewing court held that a lawyer's act of simply "papering a deal" or acting as a mere "scrivener" was insufficient to infer knowledge of a client's misrepresentation.[20] In contrast, a lawyer's acts of vouching for and promoting his client have been sufficient to support a jury's inference of knowledge.[21]

The line between a lawyer who papers a deal and a lawyer who vouches for a client can be murky, however. In *Schatz v. Rosenberg*, where the court held that merely papering a deal could not support inferred knowledge of the client's underlying misrepresentation, the lawyer had drafted a contract that included client misrepresentations but had not participated in contract negotiations or solicitations. Other courts have held that the evidence was insufficient when the attorney's involvement was limited to revising or reviewing documents[22] or drafting documents where general misstatements contained therein could not be "specifically attributed" to the lawyer.[23] On the other hand, the evidence was sufficient to support an inference of knowledge in *Bonavire v. Wampler*, where the lawyer made personal affirmative representations about the client such as vouching that he was an "honest straightforward businessman."[24]

The risk a lawyer will be held to have knowledge of a client misrepresentation increases the more the lawyer is personally involved in the deal. In *Bonavire*, the court noted that the lawyer not only vouched for the client but also acted as the escrow agent for the parties.[25] When a lawyer is also a friend of, investor in, or partner with the client, or receives fees in the form of shares in the client company, the likelihood of inferred knowledge increases even more.[26] It is no surprise that multiple cases have successfully been brought under those circumstances.[27]

In summary, because the mens rea elements of mail and wire fraud may be satisfied by a showing of recklessness or inferences drawn from the lawyer's relationship with the client or the lawyer's acts of promoting or vouching for the client, a lawyer should conduct sufficient independent investigation and analysis of the client's facts to feel confident in them before presenting them to third parties. The greater the lawyer's connection to the client, the higher the risk to the lawyer if the representations turn out to be inaccurate. Lawyers who have a pecuniary interest in the client's venture, a long-term relationship, a friendship or other particularly close relationship with the client are particularly at risk of being deemed to have acted recklessly or to have knowledge of or motive to participate in the fraud.

B. Other Criminal Statutes

a. Securities Fraud[28]

As is the case under the federal mail and wire fraud statutes, a lawyer can face liability under the state and federal securities laws without actual knowledge of the fraud or misrepresentation. Under federal securities law, the accused must

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have the intent to defraud buyers or sellers of securities and knowledge of the misrepresentation.[29] However, as in the mail and wire fraud context, the Ninth Circuit has held that reckless disregard for the truth satisfies these elements.[30]

Oregon law is more expansive than federal securities law in its scope. In Oregon, the attorney who drafts fraudulent securities offering material can be criminally liable under the Oregon Securities Fraud statute, ORS 59.115(3).[31] Although the statute does not specify the culpable mental state required for a criminal conviction, the Oregon Court of Appeals has affirmed a criminal conviction where the prosecution pleaded and proved knowing misrepresentation.[32] However, the far lesser mens rea of negligence may also be sufficient. Arguably, because the securities statute is outside the criminal code and contains no mental state, ORS 161.605(3) applies, which allows criminal liability based on criminal negligence only.[33] Each criminal violation of the Oregon Securities Fraud statute constitutes a Class B felony punishable by up to 10 years in prison and a $250,000 fine.[34]

b. Obstruction of Justice

Consider the following scenario: A client company asks if it can delete some flippant internal e-mails. No action has been filed against the client, but the client and the lawyer are aware of a weblog that has accused the CEO of insider trading and inflating reported revenue. The client assures the attorney that the accusations are unfounded and were made by a disgruntled employee. Concluding that the e-mails are not relevant to the accusations, are highly prejudicial, and deleting them is consistent with the client's document retention policy, the attorney tells the client that it is all right to delete the e-mails. Ultimately both criminal and SEC actions are brought against the client and, in the face of a government subpoena, the client says, "my lawyer told me I could destroy the records."

Is the lawyer guilty of obstruction of justice? If so, the lawyer could face up to 20 years in prison.[35]

Traditionally, obstruction of justice required a corrupt intent to obstruct a pending official proceeding.[36] Clearly, the lawyer in the above scenario would not be guilty of traditional obstruction. But, as modified by Sarbanes-Oxley, obstruction in many contexts no longer requires a pending proceeding[37] and, where the obstruction is of a federal agency investigation, it no longer requires a corrupt intent.[38] Under the obstruction actions created by Sarbanes-Oxley, it is sufficient that the defendant contemplated the possibility of a proceeding at the time the obstruction occurred.[39] And, in the context of non-pending federal agency proceedings (*e.g.,* SEC investigations), the defendant need not have acted with corrupt intent.[40] Under this laxer standard, the lawyer in the scenario above could face liability because the lawyer knew a proceeding was theoretically possible (in light of the disgruntled employee's complaint on the weblog) and nevertheless recommended deleting the e-mails. Although the lawyer did not intend to destroy relevant evidence, the lawyer intended to delete prejudicial e-mails, thus possibly satisfying the lesser mens rea (*i.e.,* by intentionally impeding fact finding, albeit of irrelevant facts).[41]

A corrupt intent is still required to prove obstruction in other contexts (*e.g.,* judicial investigations and proceedings and pending agency proceedings).[42] The Supreme Court has defined "knowingly corruptly," the mens rea in Section 1512(b)'s witness and jury tampering prohibition, as consciousness of wrongdoing, where wrongdoing is wrongful, immoral, depraved, and evil acts.[43] Despite this, an Oregon attorney was convicted of obstruction (but granted a new trial) based only on circumstantial evidence of knowledge.[44] There, the attorney received a call from a client who was in jail pending a criminal trial. The client asked the attorney to wind up the affairs of a small business unrelated to his crime. The client provided a list of instructions to relay to one of his employees, which included the location of a hidden envelope that he wanted destroyed. The attorney passed on the information and was subsequently arrested and prosecuted for obstruction of justice. The attorney argued that he thought he was legitimately helping his client secure his property and business assets in anticipation of a lengthy sentence; he testified that "none of the flags were up," that he thought the letter was a love letter. The government's theory of criminal intent was that any reasonable person, especially an attorney, would have known he was being asked to impair or destroy evidence when someone in jail calls him and requests that something be destroyed. The government did not argue that the attorney assisted in the destruction of the envelope to advance any personal interest of the attorney.[45]

A financial stake in the client's business can be particularly problematic if the attorney is later accused of obstruction. Not only can the financial interest provide evidence of corrupt intent, it may provide a basis for viewing otherwise routine acts of representation as obstruction. In *U.S. v. Cueto*, a federal agent working undercover as a corrupt state liquor agent had solicited a bribe from the client as part of a sting operation on the client's illegal gambling operation. The attorney reported the corrupt state agent to the state, asked the state prosecutor to file charges against the agent, and subsequently filed a civil complaint in state court alleging the agent was corrupt. Referring to the attorney's financial interest in the client's illegal gambling

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operation, the court concluded that the attorney's motions and filings constituted obstruction.[46]

The law does provide a safe harbor under 18 U.S.C. § 1515(c): an attorney cannot be prosecuted for providing lawful, bona fide, legal services. But this safe harbor may provide little help when corruptly impeding legal process is by definition unlawful and otherwise legal motion practice can be "corrupt" in the wrong context. Particularly in agency investigations, where corrupt intent is not required, the risk that an attorney's presumably lawful, bona fide advice (*e.g.,* that a client need not produce a privileged document) may constitute obstruction is worrisome.

II. Bar Disciplinary Proceedings

The Oregon Rules of Professional Conduct prescribe the ethical standards for Oregon lawyers. Under the Rules a lawyer cannot assist a client in illegal conduct (Rule 1.2); a lawyer cannot make a materially false statement or omission of fact or law to a third person (Rule 4.1); a lawyer cannot knowingly make a materially false statement to a tribunal (Rule 1.6); and, broadly, a lawyer cannot engage in conduct involving dishonesty or misrepresentation (Rule 8.4).[47]

The Rules of Professional Conduct do not directly address whether or to what extent an attorney must investigate the accuracy of a client's statements. The Rules require actual knowledge of a misrepresentation, but recognize that knowledge may be inferred from the circumstances.[48] Mere recklessness by an attorney as to the accuracy of his own statement will not subject him to discipline, however.[49]

Clearly, an attorney has actual knowledge when the client has informed the attorney of a fact.[50] The question is what circumstances trigger an inference of knowledge. In the following two examples, actual knowledge was not inferred from the circumstances:

- Upon hearing his client's mother testify that his client was not the father of her child, an attorney got "an inkling" that paternity was in question and believed further investigation was warranted. Later, without conducting any independent investigation, the lawyer prepared and filed an affidavit for his client, in which the client averred that he was the father. The court concluded that the evidence did not establish that the lawyer knew he was making a misrepresentation and therefore the conduct did not constitute disciplinable conduct.[51]
- After conducting only a "cursory" review of a filing, an attorney filed bankruptcy schedules that contained material errors. The attorney considered his role in the filing to be minimal; he did not prepare the filing, sign it, or review the attached bankruptcy schedules for accuracy. He also had not participated in the client's business operations. The court concluded that the evidence did not establish that the attorney acted "knowing that his conduct was culpable" and therefore the conduct was not disciplinable.[52]

However, the court did conclude that the following evidence was sufficient circumstantial evidence of a knowing misrepresentation in a letter drafted by an attorney to constitute disciplinable conduct: (1) the lawyer had participated in the negotiations underlying the representations in the letter; (2) the lawyer personally vouched for the information in the letter (the letter began with a statement that the accused lawyer's signature was intended to confirm the representations contained in the letter); and (3) the lawyer admitted that he had read the letter in its entirety with an eye toward confirming the truth of the legal matters it contained and the representation at issue was conspicuously listed and legal in nature.[53]

In summary, a mere suspicion or inkling of a client misrepresentation is not sufficient to trigger a duty to investigate under the Rules. Nor do the Rules generally sanction reckless or careless reliance on client representations.[54] As in the criminal context, however, knowledge may be inferred where a lawyer has vouched for the client or the representation at issue.

III. Practice Tips

Traditionally, the Oregon Bar has enjoyed a congenial relationship with state and federal prosecutors. Many of the cases discussed above come from other jurisdictions. However, to protect both themselves and their clients, lawyers should undertake reasonable precautions to assure that the representations they make to third parties on their clients' behalves are accurate.

In relying on your client's statements, especially under exigent circumstances and tight time constraints, you will provide the maximum protection to your client and yourself if you step back and question the facts, viewing them as critically as the lawyer on the other side would. Talk to the key players, review the main documents and determine for yourself if what you are being asked to say or do on your client's behalf makes sense in terms of the big picture. This assessment does not undercut the lawyer's duty of zealous advocacy. Rather, it allows the lawyer to better serve the client. Your client may not always have the clearest sense of the facts or what statements are in their best interest, especially when they are betting their company's or their financial future. It is easy to rush in and advocate for a factual position that—with time to investigate—turns out to be inaccurate. Such misrepresentations imperil both the client's and the lawyer's credibility and create possible criminal exposure. It is best in the words of the old

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cliché to "Stop, Look and Listen" to all the facts before crossing the street.

Of course, even after taking the precaution of stopping, looking and listening to the facts, a lawyer may still unwittingly act as a spokesperson for a client misrepresentation—whether in court or to the press, shareholders, potential investors, or some other third party. Recent fraud and obstruction cases provide examples of steps lawyers can take to minimize the risk that routine acts of representation will result in prosecution and conviction. For example, you should keep detailed log notes of your clients' statements, the investigations you conduct, and the expert opinions you obtain. You should carefully avoid stepping over the line from advocacy to vouching. If you do become aware your client has implicated you as the lawyer in a fraud or has committed perjury or violated a discovery rule, you must counsel your client of the need to immediately correct the misrepresentation or violation and you must insure the misrepresentation or violation has in fact been corrected. If your client refuses to grant you authority to correct the misrepresentation or violation, you should withdraw. In any event, if you believe your client intentionally used you to perpetrate a fraud, there is a conflict of interest that warrants withdrawal. During a judicial proceeding, when a misstatement occurs, counsel must take steps to immediately correct the misstatement or move to withdraw. If not allowed by the court to withdraw, counsel must ensure that the misstatement is not integrated as part of trial counsel's advocacy. Lawyers with personal, financial, long-term, or other close relationships with their clients should undertake these steps with extra care. ❐

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Endnotes

1 1 Corinthians 13:12.

2 Thanks and credit also go to Erin J. Snyder and Adam Gibbs for their assistance with preparation of this article.

3 *Nix v. Whiteside,* 475 U.S. 157, 190 (1986) (Stevens, J. concurring).

4 *U.S. v. Beckner,* 134 F.3d 714 (5th Cir. 1998). Donald Beckner's client was under investigation by the SEC for fraudulently soliciting investments. The SEC obtained a preliminary injunction preventing the client from soliciting funds unless he used his own assets for security. In apparent compliance, the client continued fund raising by granting collateral mortgages on his residence. In response to suggested irregularities, Mr. Beckner took corrective action, but did not interview investors. Later, after learning that his client was improperly withholding investor files from the SEC, Mr. Beckner withdrew from the representation.

5 134 F.3d at 721. Mr. Beckner was tried *three times* for wire fraud based on these actions before his conviction was reversed on appeal.

6 Indictment, *U.S. v. Collins,* Cr. 01170-LBS-1 (S.D.N.Y. Dec. 17, 2007).

7 *See, e.g.,* United States Attorney's Manual (USAM) at 9-2.032, 9-13.420 (notice, search warrant and subpoena requirements); Dec. 10, 1999 Blue Sheet from Assistant Attorney General James K. Robinson (recusal considerations); Department of Justice Criminal Resources Manual at §§ 2306-2307 (civil and criminal forfeiture requirements related to attorneys' fees).

8 USAM at 9-2.032. *See U.S. v. Wallach,* 935 F.2d 445, 458 (2d Cir. 1991) (overturning conviction of lawyer based on perjured client testimony).

9 18 U.S.C. §§ 1341 and 1343. The statutory maximum for mail and wire fraud is 20 years and/or a $250,000 fine (30 years and/or $1 million fine if a bank is involved).

10 The mail and wire fraud statutes expressly require a scheme to defraud using the mails or wires and a specific intent to defraud. *Id.* §§ 1341 and 1343.

11 *See, e.g., U.S. v. Munoz,* 233 F.3d 1117, 1136 (9th Cir. 2000); *U.S. v. Beecroft,* 608 F.2d 753, 757 (9th Cir. 1979). Of course, evidence of willfulness would also suffice for conviction. Such willfulness is found where there is a "high probability" of fraudulent conduct coupled with a deliberate avoidance of the truth. *U.S. v. McDonald,* 576 F.2d 1350, 1358 (9th Cir 1978).

12 *See, e.g., DeMier v. U.S.,* 616 F.2d 366, 369 (8th Cir. 1980) (*citing Calnay v. U.S.,* 1 F.2d 926 (9th Cir. 1924)).

13 In *Collins*, the four counts of wire fraud are based on four e-mails: one from the law firm's Chicago office to its New York office, attaching a redline version of a letter from the client to an investor, and three others from the law firm to representatives of investors. Indictment at 51-52, *supra* note 6. Although the indictment alleges intent to defraud and knowledge of misrepresentations, it does not reveal what facts the government will rely on to prove those elements.

14 *U.S. v. Albers,* 226 F.3d 989, 995 (9th Cir. 2000) (recklessness is deliberate disregard of a substantial and unjustifiable known risk); *Farmer v. Brennan,* 511 U.S. 825, 837 (1970) ("The criminal law, however, generally permits a finding of recklessness only when a person disregards a risk of harm of which he is aware.").

15 *See U.S. v. Petry,* 67 Fed. App'x 433, 434 (9th Cir. 2003) (defendant's failure to confirm terms of his restraining order prior to buying a handgun was reckless); *U.S. v. Cusino,* 694 F.2d 185, 187 (9th Cir. 1982) (inventor's failure to confirm claim that invention amplified energy by a 9:1 ratio was reckless).

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16 *See, e.g., U.S. v. Alkins,* 925 F.2d 541, 550 (2d Cir. 1991); *U.S. v. Williams,* 728 F.2d 1402, 1404 (11th Cir. 1984) (failure to give jury instruction that good faith is a complete defense is error where any evidentiary basis exists for defense). Where good faith is recognized as a complete defense, the prosecution has the burden of disproving the defendant's good faith.

17 *See, e.g., Cusino*, 694 F.2d at 188; *U.S. v. Shipsey,* 363 F.3d. 962, 967 (9th Cir. 2004).

18 *Beckner*, 134 F.3d at 720.

19 *Id.*

20 *Schatz v. Rosenberg*, 943 F.2d 485, 495 (4th Cir. 1991).

21 *Bonavire v. Wampler*, 779 F.2d 1011, 1014-15 (4th Cir. 1985).

22 *Renovitch v. Kaufman,* 905 F.2d 1040 (7th Cir. 1990).

23 *Friedman v. Arizona World Nurseries, Ltd.,* 730 F. Supp. 521, 533 (S.D.N.Y. 1990)

24 779 F.2d at 1014.

25 *Id.* at 1016.

26 There is no express prohibition on such intermingling of business and professional relations between attorney and client. The Oregon Rules of Professional Conduct prohibit an attorney entering into a business transaction with a client where their interests will be adverse (ORPC 1.8(a)). The Rules also prohibit acquiring a proprietary interest in ongoing litigation (ORPC 18(i)).

27 *See, e.g., U.S. v. Wolf*, 820 F.2d 1499, 1503 (9th Cir. 1987); *U.S. v. Olano,* 62 F.3d 1180 (9th Cir. 1987).

28 For a detailed treatment, *see* Marc I. Steinberg, *The Corporate/Securities Attorney as a "Moving Target,"* 46 WASHBURN L. J. 1 (Fall 2006).

29 15 U.S.C. §§ 78j(b) and 78ff; 17 C.F.R. § 240.10b-5.

30 *U.S. v. Tarallo,* 380 F.3d 1174, 1188-89 (9th Cir. 2004). Attorneys may also be liable under the Securities Exchange Act in SEC enforcement actions and third-party civil actions. 17 C.F.R. § 240.10b-5. Although the Supreme Court reaffirmed last term that there is no private cause of action for aiding and abetting securities fraud, secondary actors such as attorneys can be *primarily* liable under the Act in both the civil and enforcement contexts. *Stoneridge v. Scientific-Atlanta,* 128 S.Ct. 761, 771 (2008). Moreover, attorneys can be liable for aiding and abetting securities fraud in the SEC enforcement context. Primary liability can attach to a lawyer who makes a directly attributable statement (such as in an opinion letter) or who drafts an SEC document that the client subsequently files, even if the filing is not signed by or attributed to the lawyer. *S.E.C. v. Wolfson,* 2008 WL 4053027 at *10 (10th Cir. Sept. 2, 2008). In enforcement actions under section 10b-5, the SEC must prove that the lawyer (or other secondary actor) caused misstatements or omissions to be made with knowledge that those misstatements would reach investors. *Id.*

31 O.R.S. 59.115(3). To prove a violation or civil liability under the Oregon securities fraud statute, the prosecutor or plaintiff need only prove that the defendant made a negligent misrepresentation or omission (as well as the other elements of the offense); no intent to defraud is required. *State v. Pierre,* 30 Or. App. 81, 86 (1977).

32 *State v. Jacobs,* 55 Or. App. 406, 414 (1981).

33 *See id.* (observing without further discussion that prosecutor elected to bring criminal charges pursuant to O.R.S. 161.105(3) provision); *see* O.R.S. 165.105(3) ("the culpable commission of [an offense defined by a statute outside the Oregon Criminal Code] may be alleged and proved, in which case criminal negligence constitutes sufficient culpability").

34 O.R.S. 59.991, 59.995, 161.605, and 161.625.

35 *See* 18 U.S.C. § 1519 (providing for fines and a maximum prison term of 20 years); *see also id.* § 1512(k) (penalty for conspiracy to commit Section 1512 obstruction subjects conspirators to same penalties as those prescribed for the underlying offense).

36 Under the traditional obstruction statute, 18 U.S.C. § 1503, a grand jury authorized investigation (*U.S. v. Aguilar,* 515 U.S. 593 (1995)) or civil suit (*U.S. v. Lundwall,* 1 F.Supp.2d 249 (S.D.N.Y. 1998)) must be underway at the time the obstruction occurred. The defendant also has to know or have notice of the proceeding. *U.S. v. Frankhauser,* 80 F.3d 641, 650 (1st Cir. 1996).

37 18 U.S.C. §§ 1512(f) and 1519.

38 *Id.* § 1519 (including knowingly destroying a document with the intent to impede an investigation).

39 *Id.* §§ 1512(f) and 1519 (no pending proceeding required); *see also Arthur Anderson LLP v. U.S.,* 544 U.S. 696, 707-708 (2005) (holding that Section 1512 obstruction, which imposes liability for knowingly corruptly obstructing a non-pending official proceeding, requires that the proceeding must have been contemplated by defendant).

40 18 U.S.C. § 1519.

41 *See id.* § 1512(f)(2) (the document need not be admissible or free from a claim of privilege).

42 *See, e.g., id.* §§ 1503 (corrupt intent required to obstruct pending judicial proceedings), 1505 (corrupt intent required to obstruct administrative and congressional proceedings and inquiries) and 1512(c) (corrupt intent required to obstruct pending or non-pending judicial proceedings).

43 *Arthur Andersen*, 544 U.S. at 705; *see also id.* at 705 n.9 (observing that defini-

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tion of knowingly corruptly may not apply to Section 1503 or 1505, where the word "corruptly" is not modified by the word "knowingly") and 707 ("corrupt" conduct cannot be innocent).

44 *U.S. v. Kellington,* 217 F.3d 1084 (9th Cir. 2000).

45 *Compare U.S. v. Cueto,* 151 F.3d 620, 631 (7th Cir. 1998) (facts showing attorney's financial interest in client's illegal operation established corrupt intent to obstruct investigation of that operation).

46 *Id.*

47 ORPC 1.2, 4.1, 1.6, and 8.4(a)(3) respectively. ORPC 8.4(a)(3) does not specify a mental state. However, this rule—almost identical in substance to former DR 1-102(A)(3) and (4)—has been interpreted to require knowledge. *See, e.g.*, Formal Opinion No. 2005-34, *In re* Hoffman, 14 D.B. Rptr. 121 (2000).

48 ORPC 1.0(h).

49 *See, e.g., In re Skagen,* 342 Or. 183, 203-204 (2006) (recklessness as to accuracy of billing statement not dishonest conduct under ORCP 8.4).

50 *In re Hawkins,* 305 Or. 319, 324 (1988) (client told attorney of factual errors on consent form, which the attorney did not correct prior to filing).

51 *In re Trukositz,* 312 Or. 621, 630-632 (1992).

52 *In re Conduct of Cobb,* 345 Or. 106, 125 (2008).

53 *In re Conduct of Fitzhenry,* 343 Or. 86, 105-06 (2007).

54 *Cobb*, 345 Or. at 125 (discussing DR 1-102(A)(3) and observing that careless or reckless conduct may bring exposure to other forms of liability, but is insufficient to trigger discipline).