

THE BOUNDARY BETWEEN ZEALOUS ADVOCACY AND OBSTRUCTION OF JUSTICE AFTER SARBANES-OXLEY

GRETA FAILS

Introduction	397	R
I. The Legal Framework—Ethical Duties and the Sarbanes-Oxley Criminal Law Overlay	400	R
II. Key Elements and Ambiguities of Sections 1512(c) and 1519	406	R
A. Aguilar and the “Nexus Requirement”	406	R
B. Arthur Andersen and “Corruptly”	407	R
C. Aguilar, Arthur Andersen, and Sections 1512(c) and 1519	409	R
III. Lawyers Charged with Violations of the Sarbanes- Oxley Obstruction of Justice Provisions	413	R
A. The Prosecution of Lauren Stevens	416	R
B. The Broader Implications of <i>United States v.</i> <i>Stevens</i> for Lawyers	419	R
1. Overcriminalization	421	R
2. Overdeterrence	423	R
3. Prosecutorial Overreach	428	R
IV. Potential Solutions to the Problems Created by the Sarbanes-Oxley Obstruction of Justice Provisions	430	R
A. The Broad Reach of Section 1519 Must Be Constrained	431	R
1. Section 1519 Should Be Interpreted to Only Reach Conduct Endeavored with Dishonest Intent	431	R
2. Section 1519 Should Be Interpreted to Implicitly Contain a Nexus Requirement	433	R
B. Steps Lawyers and Courts Can Take to Avoid the Harsh Consequences of a Broad Interpretation of the Obstruction Provisions	434	R
Conclusion	439	R

INTRODUCTION

When does a lawyer cross the boundary between zealous advocacy and obstruction of justice? Traditionally this boundary was clear, with lawyers only prosecuted for obstruction for covering up

their own crimes or for taking their clients' cases too far, e.g., intimidating witnesses or destroying documents.¹ Lawyers had leeway to aggressively represent their clients up to this boundary pursuant to their ethical duty of zealous advocacy.² This landscape was significantly changed, however, when Congress enacted the Sarbanes-Oxley Act of 2002 and created two new obstruction of justice regulations.³ Because Congress implemented the Act in response to corporate scandals in which lawyers had played integral roles,⁴ it intended for the new obstruction provisions to bolster the arsenal of prosecutors, to ferret out obstructive conduct that previously was not policed, and to remove constraints imposed by the Supreme Court.⁵ The broad and ambiguous language of the statute, coupled with unsettled legal doctrine interpreting the scope of the new provisions, has created a gray area in which lawyers are vulnerable to prosecution for conduct that was previously only characterized as zealous advocacy.⁶

The breadth of the Sarbanes-Oxley obstruction provisions was tested in 2011 when prosecutors charged a lawyer with obstruction of justice for conduct that would have previously been characterized as permissible lawyering on behalf of her client. The Department of Justice prosecuted Lauren Stevens, an attorney for GlaxoSmithKline, based on her voluntary response to a government inquiry into her client's marketing practices.⁷ *United States v. Stevens* is noteworthy because it entails the prosecution of a lawyer who was neither out for personal gain nor using the legal system to her personal advantage; this was a case in which a lawyer was simply advocating on behalf of her client. Stevens would not have been prosecuted for this conduct under the traditional obstruction of justice scheme, but Sarbanes-Oxley created a gray area, and in their discretion prosecutors determined that Stevens fell on the wrong side of the line. Stevens was ultimately acquitted,⁸ but the mere fact that prosecutors brought this case is troubling. The threat of similar future prosecutions against lawyers, coupled with the harsh penal-

1. See *infra* notes 79–82 and accompanying text.

2. See *infra* notes 11–12 and accompanying text.

3. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002). The two new obstruction provisions are codified at 18 U.S.C. § 1512(c) (2006) and 18 U.S.C. § 1519 (2006).

4. See *infra* notes 20–26 and accompanying text.

5. See *infra* Part II.C.

6. See *infra* Part III.B.

7. *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011).

8. See Transcript of Oral Argument at 10, *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011) (No. 10-694).

ties Sarbanes-Oxley obstruction prosecutions entail,⁹ will lead lawyers to be more risk averse in the representation of their clients, to the detriment of client representation generally. If courts and prosecutors interpret these provisions broadly, three negative consequences will inevitably result. First, traditionally innocent conduct considered zealous advocacy will be punishable, resulting in overcriminalization of attorney conduct. Second, lawyers will be disincentivized to fight for their clients when their careers and livelihoods could be jeopardized by an obstruction prosecution, resulting in overdeterrence of legitimate advocacy. Third, prosecutors will push the boundaries of their discretion and charge lawyers for pretextual or coercive reasons, resulting in prosecutorial overreach. Courts should construe these Sarbanes-Oxley obstruction provisions narrowly so that lawyers may continue to advocate for their clients without fear of criminal prosecution.

Part I lays out the ethical and legal framework with which lawyers must comply. It describes how the Model Rules create a duty to zealously advocate on behalf of clients while external regulation qualifies this duty and delineates the boundaries of permissible advocacy. It also outlines the Sarbanes-Oxley obstruction of justice provisions at issue in this Note. Part II analyzes the key elements and ambiguities of the Sarbanes-Oxley obstruction provisions based on their text and on the major Supreme Court precedent interpreting other obstruction of justice statutes. Part III delves into prosecutions of lawyers for Sarbanes-Oxley obstruction violations, focusing specifically on the prosecution of Lauren Stevens. It then discusses the implications of Sarbanes-Oxley and *United States v. Stevens* for lawyers generally, explaining that a broad interpretation of the Sarbanes-Oxley provisions will lead to overcriminalization, overdeterrence, and prosecutorial overreach. Ultimately, the incentive structure created by harsh penalties and vague obstruction provisions will lead to risk-averse lawyer behavior and less effective client representation. Part IV concludes with a discussion of how courts should construe the Sarbanes-Oxley obstruction of justice provisions in the future and, alternatively, what lawyers and courts can do to stave off negative consequences if the provisions remain broadly applicable to their conduct.

9. See *infra* notes 30 and 32 and accompanying text.

I.
THE LEGAL FRAMEWORK—ETHICAL DUTIES AND
THE SARBANES-OXLEY CRIMINAL
LAW OVERLAY

The legal profession is both internally and externally regulated. Internally the profession is governed by ethical rules promulgated by the bar and the states' highest courts.¹⁰ These ethical rules set the boundaries of permissible lawyer behavior and describe the lawyer's role in the profession. Included within this role is "the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."¹¹ A lawyer's ethical role can thus be seen as client-centered;¹² he has an ethical *duty* not only to advocate for his client,

10. See Ted Schneyer, *How Things Have Changed: Contrasting the Regulatory Environments of the Canons and the Model Rules*, 2008 J. PROF. LAW. 161, 161–62 (2008) [hereinafter Schneyer, *How Things Have Changed*] ("In internal regulation (often called 'professional self-regulation'), the bar, in tandem with the states' highest courts, develops, interprets, and enforces practice norms. When the ABA drafts a model legal ethics code, bar associations or court-created agencies administer the disciplinary process, and bar or court-created committees render advisory ethics opinions, they engage in internal regulation."). While the ABA Model Rules of Professional Conduct are not binding, and many states' rules differ dramatically from the Model Rules, this Note will focus on the general precepts and several specific provisions from the Model Rules when discussing ethical duties and internal regulation of the legal profession.

11. MODEL RULES OF PROF'L CONDUCT Preamble [9] (2012). The "zealously" advocate language is only found in the Preamble of the Model Rules, and the "zeal" descriptor has gradually been phased out of state ethical rules across the country. See, e.g., Paul C. Saunders, *Whatever Happened To 'Zealous Advocacy'?*, 245 N.Y. L.J., no. 47, Mar. 11, 2011, at 1, 2 (discussing the disappearance of the language "zealous advocacy" from the New York Rules of Professional Conduct). The debate over the role of "zealous" advocacy in the legal profession is beyond the scope of this Note. To the extent that this Note discusses the existence of an ethical duty of zealous advocacy, that duty is derived both from the explicit mention of zeal in the Preamble of the Model Rules, and from as the general duties across all states' codes of professional conduct to maintain client confidences and to avoid conflicts of interest. The concept of "zealous" advocacy in this context is used more as a rhetorical device to represent the general ethical duties to advocate competently, loyally, and diligently in a client's best interests within the bounds of the law.

12. See, e.g., Susan D. Carle, *Power as a Factor in Lawyers' Ethical Deliberation*, 35 HOFSTRA L. REV. 115, 116 (2006) (discussing the client-centered and justice-centered conceptions of legal advocacy). See also MODEL CODE OF PROF'L RESPONSIBILITY Canon 7 (2007) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"). While the Model Rules describe additional roles for lawyers, the lawyer's ethical duty to his client is predominant. MODEL RULES OF PROF'L CON-

but to do so zealously. This duty, however, is not boundless. Lawyers may not forcefully advocate for their clients to the detriment of all other interests. Lawyers are internally constrained in their advocacy by competing ethical obligations,¹³ as well as externally constrained, namely in that they may not break the law to further the interests of their clients.¹⁴ A lawyer's duty to his client is thus a delicate balance between zealous advocacy and staying within the bounds of the law.

Lawyers are increasingly governed by external rules.¹⁵ General civil and criminal laws enacted at both the state and federal levels are being used to police lawyer conduct,¹⁶ and laws specifically targeting attorney conduct are also being implemented.¹⁷ While these external constraints ensure that lawyers are held to the same legal standards as other citizens and help to promote the rule of law within the legal industry, they also limit a lawyer's ability to advocate on behalf of his client. The relationship between internal and external regulation of lawyers can therefore be a rocky one, with the two

DUCT Preamble [1] (2012) (describing a lawyer's roles as "a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice").

13. An example of internal constraints can be seen in the confidentiality rules. On the one hand, lawyers have a duty to safeguard all information relating to the representation of a client. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2012). On the other, they are required, in some circumstances, to reveal confidential information to further other interests. *See, e.g., id.* R. 4.1(b) (requiring a lawyer to disclose material confidential client information to third parties "when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client").

14. This prohibition is found within the Model Rules themselves, as well as in external regulations. *See id.* Preamble [9] (describing a lawyer's duty to "zealously . . . protect and pursue a client's legitimate interests, *within the bounds of the law*") (emphasis added).

15. *See* Schneyer, *How Things Have Changed*, *supra* note 10, at 162 ("The external sector consists of statutes, regulations, and judicial doctrines that are primarily interpreted and enforced outside the realm of professional discipline. External law has been growing at an accelerating rate since 1970, both in the states and especially at the federal level."); Ted Schneyer, *An Interpretation of Recent Developments in the Regulation of Law Practice*, 30 OKLA. CITY U. L. REV. 559, 566-67 (2005) [hereinafter Schneyer, *An Interpretation of Recent Developments*] ("[F]ederal regulation has expanded markedly . . . appears to be accelerating and is likely to gain momentum with further globalization of the legal services market.").

16. *See, e.g.,* James M. Fischer, *External Control over the American Bar*, 19 GEO. J. LEGAL ETHICS 59, 97-98 (2006) (discussing cases in which consumer protection laws were applied to lawyers).

17. *See, e.g.,* Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. No. 109-8, § 226, 119 Stat. 23, 45 (2005) (codified at 11 U.S.C. §§ 101 et seq. (2006)) (including lawyers in the regulated category of "debt relief agencies").

regulatory frameworks seeking to achieve different goals and potentially conceptualizing the role of the lawyer in fundamentally different ways.¹⁸

One external constraint that is becoming increasingly relevant to lawyers is Sarbanes-Oxley.¹⁹ Enacted in 2002, Sarbanes-Oxley was a response to the corporate scandals of Enron, Arthur Andersen, and WorldCom, among others, and it was an attempt by Congress to “legislate[] ethical behavior for both publicly traded companies and their auditor firms.”²⁰ The Act included provisions requiring more transparency within publicly traded corporations and accounting and auditing firms.²¹ The goal was to hold corporations responsible to their shareholders and the public and to prevent future corporate scandals by making it harder for fraud and misconduct to persist unnoticed.²²

Although Sarbanes-Oxley was particularly aimed at accountants and corporations, Congress did not overlook lawyer involve-

18. See Schneyer, *How Things Have Changed*, *supra* note 10, at 163 (“Since at least the mid-1970s, just before the ABA began to draft the Model Rules, the relationship between the internal and external sectors has been an uneasy one. . . . [T]he sectors are in considerable tension, so much so that Susan Koniak has argued that the ‘bar’s law’ (internal) and the ‘state’s law’ (external) are grounded in very different conceptions of the lawyer’s proper role.”) (citing Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1409–27 (1992)); Schneyer, *An Interpretation of Recent Developments*, *supra* note 15, at 566–67 (“Shifting the regulatory center of gravity toward Washington is significant largely because it entails a shift toward legislative and administrative regulation, which may feature a different balance of policy concerns than has prevailed in the states, where the supreme courts, acting in tandem with the ABA and state and local bar associations, have held sway for a century.”).

19. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2006).

20. Howard Rockness & Joanne Rockness, *Legislated Ethics: From Enron to Sarbanes-Oxley, the Impact on Corporate America*, 57 J. BUS. ETHICS 31, 31 (2005). See also H.R. REP. NO. 107-414, at 19 (2002) (“The Committee’s hearings on the Enron matter, the collapse of Global Crossing LLC, and the operations of the Nation’s capital markets all indicated that reforms were necessary both for the regulators and the regulated.”). The stated purpose of the Act was “[t]o protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws, and for other purposes.” Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2006).

21. See, e.g., *id.* §§ 401–09 (requiring enhanced financial disclosures from public companies).

22. The Act “will protect investors by improving the accuracy and reliability of corporate disclosures made pursuant to the securities laws. The bill achieves this goal through increased supervision of accountants that audit public companies, strengthened corporate responsibility, increased transparency of corporate financial statements, and protections for employee access to retirement accounts.” H.R. REP. NO. 107-414, at 16.

ment in the scandals that precipitated the Act. The public was made aware of the problem of lawyers acquiescing in and even enabling their clients' misconduct and corporate fraud²³ and responded with outrage, demanding that the law hold lawyers comparably responsible for their wrongdoing. Congress answered by enacting Sarbanes-Oxley, which imposed two new regulations on lawyers. First, the Act clarified that lawyer conduct would be scrutinized on the same level as the actions of accountants and CEOs.²⁴ Second, it deputized corporate lawyers to police the conduct of their clients and their clients' constituents.²⁵ This new federal law thus acted as a constraint on lawyer behavior and it additionally defined a new role for lawyers outside of their traditional ethical obligations.²⁶

23. See, e.g., Editorial, *Enron and the Lawyers*, N.Y. TIMES, Jan. 28, 2002, available at <http://www.nytimes.com/2002/01/28/opinion/enron-and-the-lawyers.html> ("In the Enron scandal, the accounting industry has been the profession taking the most heat. Before the dust settles, however, it seems inevitable that more questions will be raised about the role that lawyers played in Enron's alleged misdeeds.").

24. See § 703(a) (codified at 15 U.S.C. § 7201 (2006)) ("The Commission shall conduct a study to determine . . . (1) the number of securities professionals, defined as public accountants, public accounting firms, investment bankers, investment advisers, brokers, dealers, *attorneys*, and other securities professionals practicing before the Commission (A) who have been found to have aided and abetted a violation of the Federal securities laws . . .") (emphasis added); see also Stephen M. Cutler, Dir. of Enforcement Div., SEC, Speech before UCLA School of Law: The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program (Sept. 20, 2004), available at www.sec.gov/news/speech/spch0920045mc.htm ("Consistent with Sarbanes-Oxley's focus on the important role of lawyers as gatekeepers, we have stepped up our scrutiny of the role of lawyers in the corporate frauds we investigate.").

25. See § 307 (codified at 15 U.S.C. § 7245 (2006)) ("Not later than 180 days after the date of enactment of this Act, the Commission shall issue rules, in the public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule (1) requiring 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 (2) 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.").

26. The Sarbanes-Oxley Act only applies to lawyers "appearing and practicing" before the Securities and Exchange Commission. See *id.* This phrase is interpreted broadly and all lawyers doing work for publicly traded companies could come under the reach of these provisions. See Jeffrey W. Stempel, *The Sarbanes-*

This Note will focus on two sections of Sarbanes-Oxley that were enacted for general application but that have been increasingly, and worrisomely, used to police lawyer conduct.²⁷ These sections are the obstruction of justice provisions: 18 U.S.C. § 1512(c) and 18 U.S.C. § 1519.²⁸ Section 1512(c) makes it a crime for anyone to “corruptly” destroy or conceal documents with the intent to make them unavailable in an official proceeding, or to otherwise obstruct any official proceeding.²⁹ A violation of this provision is punishable by a fine and/or up to twenty years in prison.³⁰ Section 1519 makes it a crime to “knowingly” alter, destroy, conceal, or make a false entry in any document with the intent to obstruct a federal investigation or bankruptcy case, “or in relation to or contemplation of any such matter or case.”³¹ A violation of this section is similarly punishable by a fine and/or up to twenty years in prison.³²

These two provisions substantially altered the scope of the federal obstruction of justice scheme. Prior to 2002, the Department of Justice primarily prosecuted obstruction of justice crimes under 18 U.S.C. § 1503(a)³³ and 18 U.S.C. § 1512.³⁴ Both sections are still in force today, but their scope has been significantly cabined by Supreme Court decisions, as will be discussed below.³⁵ Congress en-

Oxley Act: Lawyer Professional Responsibility, and a Heightened Role for Business Lawyers, 11 NEV. LAW. 8, 13 (2003).

27. This Note will not focus on the reporting-up provisions specifically geared toward lawyers in Section 307 of the Sarbanes-Oxley Act. These provisions have been controversial and hotly debated, but they are beyond the scope of this Note.

28. These provisions are found in sections 1102 and 802 of the Sarbanes-Oxley Act, respectively. While section 307 of the Sarbanes-Oxley Act imposes specific requirements on lawyers “appearing and practicing” before the SEC, these obstruction of justice provisions are of general application and apply to anyone, including *all* lawyers.

29. 18 U.S.C. § 1512(c) (2006).

30. *Id.*

31. 18 U.S.C. § 1519 (2006).

32. *Id.*

33. 18 U.S.C. § 1503 (2006) (“Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States . . . or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b).”). Section 1503 is often referred to as the “omnibus” obstruction statute or “catchall” provision because of its general language and broad applicability. *See infra* note 44 and accompanying text.

34. 18 U.S.C. § 1512(b) (2006).

35. *See infra* Part II.

acted sections 1512(c) and 1519 in Sarbanes-Oxley to broaden the reach of the obstruction of justice provisions.³⁶ Previously section 1512 only authorized prosecution for anyone who corruptly persuaded *another person* to destroy or alter documents to make them unavailable in an official proceeding—the Sarbanes-Oxley addition of section 1512(c) criminalizes destruction of documents by persons *acting alone*.³⁷ Section 1512(c) also increases the penalty for a violation of this provision.³⁸ Whereas section 1512(c) could thus be considered a minor expansion of the previous obstruction statutes, section 1519 is a major departure from the previous scheme. Section 1519 significantly broadens the reach of the omnibus obstruction provision by making it clear that it not only applies to obstructive actions taken against formal, pending government proceedings, but that it also applies to actions taken against informal investigations and “in relation to or contemplation of” a future proceeding.³⁹ The changes to the obstruction of justice statutes made

36. S. REP. NO. 107-146, at 14 (2002) (“[T]he current laws regarding destruction of evidence are full of ambiguities and technical limitations that should be corrected. [These] provision[s] [are] meant to accomplish those ends.”). Congress, despite wanting to broaden the reach of the obstruction of justice provisions, maintained a carve-out for the lawful provision of legal services. See 18 U.S.C. § 1515(c) (2006) (the “Safe Harbor Provision”) (“This chapter does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.”). As will be discussed more fully herein, this exception does little to protect lawyers accused of ambiguously unlawful conduct under the broadened obstruction of justice provisions.

37. Compare 18 U.S.C. § 1512(b) (2006) (“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 . . . (2) 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; (C) evade legal process summoning that person to appear as a witness, or to produce a record, document, or other object, in an official proceeding . . . shall be fined under this title or imprisoned not more than *ten years*, or both.”) (emphasis added), with 18 U.S.C. § 1512(c) (2006) (“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.”) (emphasis added).

38. See 18 U.S.C. § 1512(b) (2006) (punishing a violation of the act with a fine and/or ten years in prison).

39. 18 U.S.C. § 1519 (2006) (“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*

by the Sarbanes-Oxley additions are troublesome and require further elaboration.

II. KEY ELEMENTS AND AMBIGUITIES OF SECTIONS 1512(C) AND 1519

The Supreme Court has not yet ruled on the Sarbanes-Oxley obstruction of justice provisions. It did, however, interpret the obstruction of justice framework prior to the Sarbanes-Oxley additions,⁴⁰ and it also interpreted the preexisting provisions post-Sarbanes-Oxley.⁴¹ These Supreme Court precedents define the boundaries of federal obstruction of justice prosecutions and lay the foundation for interpreting the new statutes.

A. *Aguilar and the “Nexus Requirement”*

In *United States v. Aguilar*, the Supreme Court interpreted section 1503 after a judge was convicted of endeavoring to obstruct justice by disclosing a wiretap and lying to FBI agents when questioned about it.⁴² The Court overturned the judge’s obstruction conviction because it held that making false statements to an investigating agent who may or may not testify before a grand jury did not constitute a violation of section 1503.⁴³ It focused on what lower courts had termed a “nexus requirement” implicit in section 1503 that “tended to place metes and bounds on the very broad language of the catchall provision.”⁴⁴ The nexus requirement mandated that the accused’s actions “have a relationship in time, causation, or logic with the judicial proceedings.”⁴⁵ The Court described

contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.”) (emphasis added); S. REP. NO. 107-146, 14–15 (2002) (“This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter. It is also sufficient that the act is done ‘in contemplation’ of or in relation to a matter or investigation. It is also meant to do away with the distinctions, which some courts have read into obstruction statutes, between court proceedings, investigations, regulatory or administrative proceedings (whether formal or not), and less formal government inquiries, regardless of their title. Destroying or falsifying documents to obstruct any of these types of matters or investigations, which in fact are proved to be within the jurisdiction of any federal agency are covered by this statute.”).

40. See *United States v. Aguilar*, 515 U.S. 593 (1995).

41. See *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005).

42. *Aguilar*, 515 U.S. at 595.

43. *Id.* at 600.

44. *Id.* at 599.

45. *United States v. Aguilar*, 515 U.S. 593, 599 (1993).

how this meant that “the endeavor must have the ‘natural and probable effect’ of interfering with the due administration of justice.”⁴⁶ The heart of the requirement is that “if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct.”⁴⁷ In the case of the judge, since he did not know that his lies would affect the grand jury proceeding, the judge could not have intended to obstruct the proceeding.

This nexus requirement is an obligation nowhere enumerated in the statute, created by courts out of concern that the statute would otherwise not provide sufficient warning about what constitutes illegal conduct.⁴⁸ If no nexus between the obstructive conduct and a judicial proceeding was required, a person could be held liable for obstruction for lying to his wife about his whereabouts after committing a crime if he knew about a pending investigation and his wife happened to be subsequently interviewed as part of the investigation.⁴⁹ The scope of what could potentially be considered obstructive conduct absent a nexus requirement would therefore be vast. The Court in *Aguilar* thus placed a significant restraint on the reach of section 1503 by holding that this nexus requirement—that the act must have the “natural and probable effect” of obstructing judicial or grand jury proceedings—would be strictly enforced.

B. *Arthur Andersen and “Corruptly”*

Ten years later, the Court was once again faced with interpreting an obstruction of justice provision. Sarbanes-Oxley had been enacted three years earlier, but neither of its obstruction provisions was at issue. The Court was instead asked to interpret the obstruction of justice statutes as they stood in 2000, specifically section 1512(b).⁵⁰ The corporate scandals that led to the passage of Sarbanes-Oxley’s new obstruction provisions, however, loomed in the background of the Court’s opinion; the petitioner was Arthur Andersen LLP, Enron’s auditor, and the firm had been convicted of violating section 1512(b) by instructing its employees to destroy

46. *Id.* (elaborating on this point that “the defendant’s actions need [not] be successful; an ‘endeavor’ suffices”).

47. *Id.*

48. *See Aguilar*, 515 U.S. at 600 (“We have traditionally exercised restraint in assessing the reach of a federal criminal statute . . . out of concern that ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.’”) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)).

49. *See id.* at 602.

50. *Arthur Andersen LLP v. United States*, 544 U.S. 696, 698 n.1 (2005).

documents related to Enron's collapse.⁵¹ The Court was focused on resolving a circuit split over the meaning of section 1512(b), particularly "what it means to 'knowingly . . . corruptly persuade' another person 'with intent to . . . cause' that person to 'withhold' documents from, or 'alter' documents for use in, an 'official proceeding.'"⁵²

In a unanimous decision, the Court interpreted the terms "knowingly . . . corruptly persuade" in section 1512(b) to encompass "only persons conscious of wrongdoing."⁵³ It rejected the lower court's jury instructions because they charged the jury to convict even when the petitioner "honestly and sincerely believed that its conduct was lawful" and even when the petitioner's sole intent was to "impede" a government proceeding without any dishonest purpose (i.e., a lawyer instructing a client to assert his legitimate attorney-client privilege and not answer a question).⁵⁴ Furthermore, the Court picked up the *Aguilar* nexus requirement and held that a "knowingly . . . corrupt persuader" [sic] cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material.⁵⁵ It specifically questioned whether a proceeding needed to be pending for the nexus requirement to be applicable and it determined that a proceeding "need not be pending or about to be instituted at the time of the offense,"⁵⁶ but that the defendant must have "foreseen" a potential future proceeding for the nexus requirement to be satisfied.⁵⁷

The *Arthur Andersen* Court therefore narrowed the reach of section 1512(b) in two important ways. First, it imported into section 1512(b) the nexus requirement it had found in *Aguilar* with section 1503. Second, and more importantly, it drew a sharp distinction between the mere intent to impede a proceeding and the dishonest intent to obstruct justice. The Court was clear that unless the reach of section 1512(b) was abruptly cut off at the line of dishonest intent, the provision would impermissibly sweep up innocent conduct

51. *Id.* at 698.

52. *Id.* at 702, 703.

53. *Id.* at 706.

54. *Id.*

55. *Id.* at 708.

56. *Arthur Anderson LLP v. United States*, 544 U.S. 696, 707–08 (2005) (quoting 18 U.S.C. § 1512(e)(1) (2006) (current version codified at 18 U.S.C. § 1512(f)(1) (2006)), which makes it clear that proceedings need not be pending for section 1512 violations to occur).

57. *Id.*

and would, in essence, be limitless.⁵⁸ Traditionally protected assertions of attorney-client privilege, marital privilege, and the right against self-incrimination, as well as compliance with valid document retention policies, could all be considered obstructive conduct under a broader reading of the intent requirement.⁵⁹ Because withholding testimony or documents from a judicial proceeding is not necessarily corrupt, a more malicious intent was necessary to trigger a violation of the obstruction provisions.⁶⁰ After *Aguilar* and *Arthur Andersen*, it is clear that in order to violate the pre-Sarbanes-Oxley obstruction provisions a person must (1) be conscious of wrongdoing, (2) have a dishonest intent, and (3) have foreseen a judicial proceeding which his actions could materially impact.

C. *Aguilar, Arthur Andersen, and Sections 1512(c) and 1519*

The requirement that a person must possess a dishonest intent to obstruct justice, embodied in the modifier “corruptly” in the *Arthur Andersen* decision, may not apply to both of the Sarbanes-Oxley additions. Section 1512(c) only slightly modifies the language of section 1512(b) from “knowingly . . . corruptly persuade” to “corruptly,”⁶¹ doing away with the knowledge requirement and making the statute applicable to individuals acting alone. This modification likely does little to affect the applicability of the *Arthur Andersen* analysis, and section 1512(c) has been interpreted to require the same awareness of wrongdoing and dishonest intent that section 1512(b) necessitates.⁶²

The construction of section 1519 is a different matter. Section 1519 does not contain the same “corruptly” language as the other

58. *See id.*

59. *See id.* at 703–04.

60. *See id.*

61. 18 U.S.C. § 1512(c) (2006).

62. *See, e.g.,* *United States v. McKibbins*, 656 F.3d 707, 711 (7th Cir. 2011) (“The intent element is important here because the word ‘corruptly’ is what ‘serves to separate criminal and innocent acts of obstruction.’ . . . Without a showing of a willful, corrupt *mens rea* that has a nexus to an official proceeding, the government cannot meet its burden.”) (citation omitted) (citing *Arthur Andersen*, 544 U.S. at 704–08). Furthermore, the Supreme Court is unlikely to require a lesser standard for individuals acting alone than it does for individuals persuading others to obstruct justice. *See* A. Michael Warnecke & George W. Morrison, *Responding to Allegations of Improper Corporate Conduct*, HAYNES & BOONE LLP (Oct. 31, 2005), <http://haynesboone.com/files/Publication/d9877913-2a6c-4681-84a1-62c5af91e8b2/Presentation/PublicationAttachment/54c0ab6e-aeef0-49af-9059-968f9969f787/Warnecke%20-%20Responding%20to%20Allegations%20-%202011-28-06.pdf> (“Given the scope of SOX’s main new section 1519 . . . and preexisting law, section 1512(c) is of relatively little practical importance.”).

obstruction of justice provisions.⁶³ Instead, section 1519 states that a violation occurs when someone “knowingly” obstructs justice.⁶⁴ The conspicuous absence of the modifier “corruptly” in section 1519 was not unintentional; Congress specifically meant to extend the government’s ability to prosecute obstruction of justice crimes by enacting a broadly worded and widely applicable provision.⁶⁵ The legislative history shows that Congress did not intend for section 1519 to contain a dishonesty requirement; it intended that the mere intent to impede a proceeding was sufficient to constitute a violation of the section.⁶⁶ Congress thus sent a clear signal to the judiciary, both in the text and legislative history of section 1519, that it wanted this provision to be treated differently than previous obstruction of justice statutes. Even if a court were to overlook this expression of legislative intent when construing section 1519, it would still need to distinguish the Supreme Court’s parsing of language signaling the level of intent in obstruction statutes in *Arthur Andersen*, which rather straightforwardly appears to indicate that section 1519’s language elucidates a different intent requirement than section 1512(b).⁶⁷

The courts that have analyzed the level of intent necessary to find a section 1519 violation have failed to coalesce on one definitive interpretation of the provision. Some courts have firmly read

63. 18 U.S.C. § 1519 (2006).

64. *Id.*

65. *See* S. REP. NO. 107-146, at 14 (2002).

66. *Id.* (“Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence so long as they are done with the intent to obstruct, impede or influence the investigation or proper administration of any matter, and such matter is within the jurisdiction of an agency of the United States, or such acts done either in relation to or in contemplation of such a matter or investigation.”).

67. *See* Elkan Abramowitz & Barry A. Bohrer, *The ‘Andersen’ Decision: Its Effects on 18 USC §1519 and Attorneys*, 234 N.Y. L.J., July 5, 2005, at 3, 6 (“[A]lthough both sections have a requirement that the destruction be done ‘knowingly,’ §1519 does not require that it be done ‘corruptly.’ Section 1519 also specifically refers to ‘imped[ing]’ an investigation. Thus the government may argue that the language in *Andersen*—indicating that impeding an investigation is not sufficient grounds for a conviction under §1512—may be distinguishable under §1519. Courts that have any doubt about how to interpret ‘impede’ under §1519 may look to the court’s dissection of the term in *Andersen*: “‘impede’ has broader connotations than “subvert” or even “undermine” . . . and many of these connotations do not incorporate any “corrupt[ness]” at all.’ The court equated ‘to impede’ with “‘to interfere with or get in the way of the progress of” or “hold up” or “detract from.””). It might be possible to argue that section 1519 should be narrowed pursuant to the *Arthur Andersen* opinion based on the broad language in the case about the need to confine the obstruction statutes so that people know when they might be violating it. *See id.*

an *Arthur Andersen* “corruptly” requirement into the “knowingly” language of section 1519, requiring knowledge of conscious wrongdoing as opposed to the mere honest intent to impede a proceeding.⁶⁸ Many courts, however, have neglected to fully flesh out the requirement, simply stating that section 1519 requires intent to obstruct.⁶⁹ These precedents are vulnerable to the interpretation that the removal of “corruptly” from the text of section 1519 makes a difference in the level of intent required to find a violation. Too few courts have addressed this issue to comfortably say that section 1519 falls in line with the Supreme Court’s previous elucidation of obstruction of justice intent requirements, especially given Congress’ stark move in utilizing different language in section 1519. If section 1519 ultimately is not found to contain a dishonest intent requirement comparable to that in other obstruction of justice provisions, the reach of section 1519 will be vast and the fears announced in *Arthur Andersen* about innocent conduct being swept up under the statute will be realized.⁷⁰ Whether section 1519 includes an implicit nexus requirement thus becomes an extremely important question, as that is one final avenue by which to constrain the reach of the otherwise limitless provision.

68. See *United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012); *United States v. Stevens*, 771 F. Supp. 2d 556, 560–61 (D. Md. 2011); *United States v. Hayes*, No. 3:09-cr-397, 2010 U.S. Dist. LEXIS 67446, at *12–13 (M.D. Pa. July 7, 2010); *United States v. Nestor*, No. 3:09-CR-00397, 2010 U.S. Dist. LEXIS 67097, at *18 (M.D. Pa. July 6, 2010); *United States v. Moyer*, 726 F. Supp. 2d 498, 506 (M.D. Pa. 2010); *United States v. Fumo*, No. 06-319, 2009 U.S. Dist. LEXIS 51581, at *172 (E.D. Pa. June 17, 2009); *United States v. Russell*, 639 F. Supp. 2d 226, 240 (D. Conn. 2007). Recently, in *United States v. Maury*, the Third Circuit referenced section 1519 in a string cite discussing the dishonest intent requirement of another obstruction of justice provision, seemingly implying without elaborating that section 1519 contains a dishonest intent requirement. No. 09-2305, 2012 U.S. App. LEXIS 19474, at *87–88 (3d Cir. Sept. 17, 2012).

69. See *United States v. Yielding*, 657 F.3d 688, 711 (8th Cir. 2011); *United States v. Gray*, 642 F.3d 371, 376 (2d Cir. 2011); *United States v. Moore*, No. 10-213 Section “L”(2), 2011 U.S. Dist. LEXIS 55817, at * 3 (E.D. La. May 23, 2011), *aff’d*, No. 11-30877, 2013 WL 512342, at *6-7 (5th Cir. Feb. 11, 2013); *United States v. Kun Yun Jho*, 465 F. Supp. 2d 618, 636 (E.D. Tex. 2006), *rev’d on other grounds*, 534 F.3d 398 (5th Cir. 2008).

70. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 703–04 (2005) (discussing the invocation of the right against compelled self-incrimination, the right not to disclose marital confidences, the right not to turn over documents protected by attorney-client privilege, and compliance with valid document retention policies under ordinary circumstances as legitimate, innocent conduct that would be swept up under a broader interpretation of section 1512(b)).

Courts have interpreted section 1512(c) to contain a nexus requirement,⁷¹ but it is becoming increasingly settled that section 1519 does not contain such a requirement. In enacting section 1519, Congress provided that no proceeding need be pending for the section to be applicable,⁷² and it also specifically made clear that it did not intend for the provision to contain a nexus requirement.⁷³ By relying on the legislative history and language of the section, the Second, Third, Fifth, Sixth, and Eighth Circuits have determined that section 1519 does not contain a nexus requirement.⁷⁴ The Second and Third Circuits, however, did so by overturning district court opinions that had followed the *Aguilar-Arthur Andersen* line of precedent and read a nexus requirement into section 1519,⁷⁵ requiring that the obstructive conduct bear some rela-

71. See *United States v. Johnson*, 655 F.3d 594, 605 (7th Cir. 2011); *United States v. Friske*, 640 F.3d 1288, 1292 (11th Cir. 2011); *United States v. Phillips*, 583 F.3d 1261, 1264 (10th Cir. 2009); *United States v. Carson*, 560 F.3d 566, 584 (6th Cir. 2009); *United States v. Ortiz*, 220 F. App'x 13, 16 (2d Cir. 2007). As of the time of the *Friske* decision, no circuit had rejected the nexus requirement for section 1512(c). See *Friske*, 640 F.3d at 1292 n.4.

72. See 18 U.S.C. § 1519 (2006).

73. S. REP. NO. 107-146, at 14–15 (2002) (“This statute is specifically meant not to include any technical requirement, which some courts have read into other obstruction of justice statutes, to tie the obstructive conduct to a pending or imminent proceeding or matter.”). The Senate did express concern that section 1519 could be interpreted more broadly than intended, and specifically stated that it should not be construed to prosecute individuals complying with normal document retention policies. See *id.* at 27 (“In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the specific intent to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case. It should not cover the destruction of documents in the ordinary course of business, even where the individual may have reason to believe that the documents may tangentially relate to some future matter within the conceivable jurisdiction of an arm of the federal bureaucracy.”).

74. See *United States v. Moore*, No. 11-30877, 2013 WL 512342, at *7 (5th Cir. Feb. 11, 2013); *United States v. Moyer*, 674 F.3d 192, 209 (3d Cir. 2012); *United States v. Kernell*, 667 F.3d 746, 754–55 (6th Cir. 2012); *Yielding*, 657 F.3d at 712; *Gray*, 642 F.3d at 377–78 (“[I]n enacting § 1519, Congress rejected any requirement that the government prove a link between a defendant’s conduct and an imminent or pending official proceeding. The defendants therefore are incorrect in assuming that because the Supreme Court has required a nexus to an official proceeding for purposes of other obstruction statutes, the same nexus requirement must apply to prosecutions under § 1519. . . . By the plain terms of § 1519, knowledge of a pending federal investigation or proceeding is not an element of the obstruction crime.”).

75. See *United States v. Piekarsky*, No. 3:09-CR-396, 2010 U.S. Dist. LEXIS 81360, at *14 (M.D. Pa. Aug. 11, 2010); *United States v. Hayes*, No. 3:09-CR-397, 2010 U.S. Dist. LEXIS 67446, at *19 (M.D. Pa. July 7, 2010); *United States v. Nestor*, No. 3:09-CR-00397, 2010 U.S. Dist. LEXIS 67097, at *18 (M.D. Pa. July 6,

tion to a contemplated proceeding or investigation.⁷⁶ These earlier district court opinions looked past Congress' expression of intent in the legislative history of the section and saw strong similarities between section 1519 and *Arthur Andersen's* clarification that no proceeding need be pending for a cognizable section 1512 violation.⁷⁷ It thus appears that, despite earlier opinions emphasizing the importance of reading a nexus requirement into section 1519, a trend toward eliminating that requirement has developed. How other courts interpret this aspect of section 1519 going forward will be extremely consequential; if future courts follow the trend and find that section 1519 does not contain a nexus requirement, the category of conduct that could be considered obstructive will greatly expand, as was discussed in *Aguilar*.⁷⁸

Overall, while section 1512(c) falls neatly into the pre-Sarbanes-Oxley obstruction of justice scheme, section 1519 is a radical departure. Both in its text and legislative history, Congress made clear that it was doing something different with this provision, and that it was attempting to provide prosecutors with additional ammunition. While it might be seen as a good thing, in light of the Enron and Arthur Andersen scandals, that prosecutors are better equipped post-Sarbanes-Oxley to combat obstruction of justice with these new provisions, the breadth of section 1519 could have unintended collateral effects, policing conduct Congress did not intend to deter, if it is not constrained by established obstruction of justice precedents.

III. LAWYERS CHARGED WITH VIOLATIONS OF THE SARBANES-OXLEY OBSTRUCTION OF JUSTICE PROVISIONS

Obstruction of justice prosecutions brought against lawyers illustrate the problems with the potential breadth of section 1519.

2010); *United States v. Moyer*, 726 F. Supp. 2d 498, 506 (M.D. Pa. 2010); *United States v. Russell*, 639 F. Supp. 2d 226, 240 (D. Conn. 2007).

76. *See Hayes*, 2010 U.S. Dist. LEXIS 67446, at *11–12, 19 (“Without the requirement of a nexus, the public may not know that their actions are illegal because they would not be aware of the federal proceeding they were obstructing. . . . Therefore, § 1519 requires a nexus between the alleged obstruction and the matter within United States jurisdiction which the action is contemplated to obstruct.”).

77. These courts also believe that the policy goals justifying restraint in interpreting the reach of the pre-Sarbanes-Oxley obstruction provisions apply equally when interpreting section 1519. *See, e.g., id.* at *14.

78. *See supra* note 49 and accompanying text.

Although there are many straightforward prosecutions of clear misconduct on the part of lawyers, the Lauren Stevens prosecution pushes the line marking the boundary between criminal conduct and zealous advocacy further back to prosecute conduct previously only considered zealous advocacy.

The traditional obstruction prosecutions of lawyers arise out of three scenarios. First, lawyers are prosecuted for obstruction violations in the context of a large underlying criminal scheme in which the lawyers were intimately involved for their own personal gain and actively obstructed a proceeding to cover their tracks.⁷⁹ These prosecutions focus on lawyers' personal actions and their personal involvement in criminal schemes like fraud and money laundering, not necessarily their advocacy on behalf of their clients. Second, lawyers are prosecuted for obstruction violations when an underlying crime in which the lawyers were involved is difficult to prove and it is easier for prosecutors to meet their burden of proof on the obstruction charge.⁸⁰ Third, lawyers are prosecuted for obstruction of justice on its own, not connected to any underlying crimes, when they clearly leap over the line from zealous advocacy into criminal behavior.⁸¹ For example, lawyers who bribe or threaten witnesses

79. *See, e.g.*, *United States v. Blair*, 661 F.3d 755, 775 (4th Cir. 2011) (affirming the attorney's conviction for laundering drug proceeds he obtained from a client and reversing his § 1503 obstruction conviction due to the prosecution's failure to meet the nexus requirement); *United States v. Reich*, 479 F.3d 179, 192 (2d Cir. 2007) (affirming the lawyer's conviction for forging a judge's order during an arbitration proceeding against a brokerage firm he alleged had mishandled his account); *United States v. Ellis*, 419 F.3d 1189, 1191 (11th Cir. 2005) (vacating the lawyer's sentence enhancement for his guilty plea to having sex with his criminal defendant in a then-pending case); *United States v. Stoll*, No. 10-60194-CR-COHN/SELTZER, 2011 U.S. Dist. LEXIS 18906, at *6 (S.D. Fla. Feb. 16, 2011) (denying the lawyer's motion to dismiss the 34-count indictment arising out of a mortgage fraud conspiracy); *United States v. Maze*, No. 5:06-CR-155-S-JMH, 2007 U.S. Dist. LEXIS 6694, at *14 (E.D. Ky. Jan. 30, 2007) (denying the lawyer's motion to dismiss his indictment arising from his conspiracy to rig an election); *United States v. Kaplan*, No. 02 Cr. 883 (DAB), 2003 U.S. Dist. LEXIS 21825, at *3, *47-48 (S.D.N.Y. Dec. 5, 2003) (discussing the lawyer's eleven-count indictment arising out of a health care fraud scheme).

80. *See, e.g.*, *United States v. Crawford*, 60 F. App'x 520, 532-34 (6th Cir. 2003) (affirming the lawyer's obstruction conviction arising out of a failed attempt to convict him of possessing and distributing controlled substances).

81. *See, e.g.*, *United States v. Simels*, 654 F.3d 161, 167-68 (2d Cir. 2011) (affirming the lawyer's obstruction convictions arising out of his attempts to bribe and threaten potential witnesses against his client); *United States v. Mintmire*, 507 F.3d 1273, 1274-75 (11th Cir. 2007) (affirming the lawyer's obstruction convictions arising out of his attempts to obstruct grand jury and SEC investigations of his clients); *United States v. Kennon*, No. 3:08CR42, 2009 U.S. Dist. LEXIS 30801, at *15-16 (W.D.N.C. Mar. 24, 2009) (refusing to join three separate incidents of

are unmistakably vulnerable to prosecution. These three types of prosecutions are typical obstruction of justice cases, and they are also instances in which lawyers' ethical duties align with their legal obligations.⁸² Furthermore, these cases display both a clear nexus between the obstructive behavior and a judicial proceeding and evident dishonest intent, and thus do not raise any of the issues or ambiguities discussed above.

If these types of prosecutions were the only cases brought against lawyers under the obstruction provisions, the bar would have no reason to worry about the breadth of the Sarbanes-Oxley obstruction provisions. Truly reprehensible, dishonest conduct would be prosecuted and zealous advocacy would be allowed to flourish unscathed; prosecutors would be drawing a bright line between advocacy and criminality and lawyers would know when they were about to cross it. Not all prosecutors, however, have focused solely on these clear cases. Instead, at least one prosecutor recently went after a lawyer for more ambiguously inappropriate conduct.⁸³

alleged witness tampering and obstruction of justice committed by an attorney advocating for his clients in three different criminal cases); *United States v. Coren*, No. 07-CR-265 (ENV), 2008 U.S. Dist. LEXIS 71564, at *1-2 (E.D.N.Y. Aug. 29, 2008) (denying the lawyer's motion to dismiss the seventeen-count indictment arising out of the scheme he developed for his clients to defraud various government entities relating to construction contracts).

82. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2012) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); *id.* R. 3.3(b) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."); *id.* R. 3.4 ("A lawyer shall not: (a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act . . .").

83. See *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011). See generally Lisa Kern Griffin, *Criminal Lying, Prosecutorial Power, and Social Meaning*, 97 CALIF. L. REV. 1515, 1516 (2009) [hereinafter Griffin, *Criminal Lying*] ("Process offenses that arise during white collar investigations rather than from the commission of the crime itself have increasingly been the focus of federal prosecution."); Lisa Kern Griffin, *Wanting the Truth: Comparing Prosecutions of Investigative and Institutional Deception*, 7 INT'L COMMENT. ON EVIDENCE, no. 1, 2009 at 7 [hereinafter Griffin, *Wanting the Truth*] ("[B]ecause the criminal lying prohibitions can be stretched to cover very ordinary human behavior, and because lying is an everyday occurrence, there is an obvious gap between statutory over-deterrence and on-the-ground under-enforcement. Recent cases suggest that whether and when prosecutors choose to close that gap by prosecuting investigative lies has little to do with truth-seeking in the false statements context and more to do with the need for efficiency where those statements are pretexts for more serious but unprovable

When prosecutors charge lawyers with obstruction violations unconnected to any underlying criminal activity, related solely to the lawyers' advocacy for their clients, and for debatably ethical behavior, they enter a gray area where lawyers do not know whether their conduct is permissible or criminal. How courts construe the breadth of the Sarbanes-Oxley provisions in this gray area will have vast import for the regulation of the legal profession and for lawyers' incentives to zealously advocate for their clients.

A. *The Prosecution of Lauren Stevens*

Prosecutors delved into this gray area to police lawyer conduct in 2011 with the prosecution of Lauren Stevens. Stevens was Vice President and Associate General Counsel for GlaxoSmithKline at the time of her indictment, and she was accused of making false statements and obstructing a Food and Drug Administration investigation into her client's alleged illegal drug marketing.⁸⁴ She was not charged with involvement in any of her client's alleged criminal activity; she was prosecuted solely for purportedly overstepping the bounds of permissible lawyering in her voluntary response to a government inquiry. Stevens was targeted by prosecutors as "part of the government's long-promised crackdown on individual executives for their roles in pharmaceutical company cases"⁸⁵ and because of the "mounting complaints from consumer groups and Congress that companies are paying nine-figure fines as a cost of doing business while executives are almost never held accountable."⁸⁶ Prosecutors were thus using Stevens's indictment to send a warning signal to other pharmaceutical executives that they were not immune to prosecution for their involvement in their companies' wrongdoing.⁸⁷

crimes, with the assertion of authority where defendants are recalcitrant, and with the desire for apology where defendants have failed to take responsibility.").

84. See Duff Wilson, *Former Glaxo Lawyer Indicted*, N.Y. TIMES (Nov. 9, 2010, 2:25 PM), <http://prescriptions.blogs.nytimes.com/2010/11/09/former-glaxo-lawyer-indicted>.

85. *Id.*

86. *Id.* Interestingly, none of the executives at GlaxoSmithKline who were allegedly involved in the underlying criminal activity were indicted and the company had not been formally charged with any crimes at the time Stevens was prosecuted. See Christina Pazzanese, *DOJ lawsuit could dampen future role of in-house counsel*, NEW ENGLAND IN-HOUSE, Jan. 2011, <http://newenglandinhouse.com/2011/02/02/doj-lawsuit-could-dampen-future-role-of-in-house-counsel>.

87. See Duff Wilson, *Ex-Glaxo Executive Is Charged in Drug Fraud*, N.Y. TIMES (Nov. 9, 2010), <http://www.nytimes.com/2010/11/10/health/10glaxo.html> ("This is absolutely precedent-setting—this is really going to set people's hair on

The indictment⁸⁸ alleged that Stevens, through her advocacy, played an integral role in attempting to cover up her company's wrongdoing and obstruct the FDA's investigation into off-label marketing of the antidepressant Wellbutrin.⁸⁹ Specifically it accused her of violating both sections 1512 and 1519 by sending signed letters to the FDA in response to its investigatory requests "in which she made materially false statements and concealed and covered up documents and other evidence that showed the extent of K-Corp.'s promotion of W-Drug for unapproved uses."⁹⁰ She allegedly withheld slide presentations, handouts, and audio cassettes from the government that included potentially incriminating information and instead produced false, misleading, and incomplete information to the government in an attempt to obstruct its investigation.⁹¹

In an unprecedented move by the judge, the court granted Stevens's motion for a judgment of acquittal on May 10, 2011 at the close of the prosecution's case-in-chief.⁹² The court homed in on the boundary between zealous advocacy and criminal conduct and stated that this prosecution pushed the boundary too far. What Stevens did was simply zealous advocacy on behalf of her client,⁹³ and she "should never have been prosecuted and she should be permit-

fire . . . This is indicative of the F.D.A. and Justice strategy to go after the very top-ranking managing officials at regulated companies.").

88. Indictment, *United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011) (No. 10-694). Ms. Stevens was first indicted on November 8, 2010. On March 23, 2011, the indictment was dismissed without prejudice after the court learned that the prosecutors misstated the law during the grand jury proceedings. *See United States v. Stevens*, 771 F. Supp. 2d 556 (D. Md. 2011). On April 14, 2011, Ms. Stevens was re-indicted with the same charges. *See Adam Ramirez, Feds Re-Indict Ex-Glaxo In House Lauren Stevens for Corporate Duty*, FINDLAW (Apr. 18, 2011, 5:49 AM), http://blogs.findlaw.com/in_house/2011/04/ex-glaxo-in-house-is-reindicted.html.

89. *See Wilson, supra* note 87.

90. Indictment, *supra* note 88, ¶ 25.

91. *Id.* ¶¶ 26–41, Counts One and Two.

92. Transcript of Oral Argument, *supra* note 8, at 8, 9 ("I conclude on the basis of the record before me that only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury ever convict this defendant. . . . In my seven and a half years as a jurist I have never granted one. There is, however, always a first. . . . I believe that it would be a miscarriage of justice to permit this case to go to the jury.").

93. *See Sue Reisinger, Crossing the Line: The Trial of GlaxoSmithKline Lawyer Lauren Stevens*, CORPORATE COUNSEL (June 23, 2011), <http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202497750428>; Alicia Mundy & Brent Kendall, *U.S. Rebuffed in Glaxo Misconduct Case*, WALL ST. J. (May 11, 2011), <http://online.wsj.com/article/SB10001424052748703730804576315101670843340.html>.

ted to resume her career.”⁹⁴ The court focused on two facts in coming to this conclusion. First, Stevens consulted outside counsel, who assured her that the responses she planned to make to the FDA’s requests were both legally and ethically permissible, before voluntarily responding to the FDA’s inquiry.⁹⁵ Because she relied on outside advice, the court held that she was acting in good faith, negating the *mens rea* required in both sections 1512 and 1519.⁹⁶ Additionally, Stevens’s conduct fit squarely into the Safe Harbor Provision of the obstruction of justice statutes.⁹⁷ Second, the court noted the strong negative consequences of finding Stevens liable for her conduct, specifically focusing on the “serious implications for the practice of law generated by this prosecution.”⁹⁸ It stated that “a lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her.”⁹⁹ Noting the “enormous potential for abuse in allowing prosecution of an

94. Transcript of Oral Argument, *supra* note 8, at 10.

95. *Id.* at 7 (“[T]he evidence in this case can only support one conclusion, and that is that the defendant sought and obtained the advice and counsel of numerous lawyers. She made full disclosure to them. Every decision that she made and every letter she wrote was done by a consensus.”).

96. *Id.* (“[E]ven if some of these statements were not literally true, it is clear that they were made in good faith which would negate the requisite element required for all six of the crimes charged in this case.”). In its order dismissing the first indictment on March 23, 2011, the court discussed the *mens rea* requirement for section 1519 actions. *See United States v. Stevens*, 771 F. Supp. 2d 556, 561 (D. Md. 2011). It determined that section 1519, despite omitting the term “corruptly,” still required the same dishonest intent as the other obstruction provisions. *Id.* The court reasoned that:

To hold otherwise would allow § 1519 to reach inherently innocent conduct, such as a lawyer’s instruction to his client to withhold documents the lawyer in good faith believes are privileged. Any other interpretation of § 1519 would ignore the admonition of the Supreme Court in *Arthur Andersen* that criminal liability ordinarily may only be imposed on those with consciousness of their wrongdoing.

Id. By construing section 1519 in this way, the court found that it was a specific-intent crime for which proof of good faith reliance on advice of counsel negated wrongful intent. *Id.* at 562.

97. The court stated, “As to Counts One and Two, the Safe Harbor Provision of Section 15(c) is an absolute bar. GlaxoSmithKline did not come to Ms. Stevens and say, assist us in committing a crime or fraud. It came to her for assistance in responding to a letter from the FDA. I conclude on the basis of this record that no reasonable juror could conclude otherwise beyond a reasonable doubt. . . . [T]he Safe Harbor Provision is designed specifically to protect an attorney who is acting in accordance with the obligation that every lawyer has to zealously represent his or her client and place their position in the most favorable possible light.” Transcript of Oral Argument, *supra* note 8, at 6.

98. *Id.* at 9.

99. *Id.*

attorney for the giving of legal advice,” the court avowed that its decision did not immunize lawyers from prosecution or mean that their conduct is unreviewable.¹⁰⁰ It instead carved out a specific role for the judiciary: “[T]he Court should be vigilant to permit the practice of law to be carried on, to be engaged in, and to allow lawyers to do their job of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not countenance.”¹⁰¹ With this admonishment of prosecutorial overreach, the court acquitted Lauren Stevens.¹⁰²

B. The Broader Implications of United States v. Stevens for Lawyers

United States v. Stevens may be one of the first examples of prosecutors wielding the Sarbanes-Oxley obstruction provisions to police arguably legitimate lawyering, but it is most certainly not the last.¹⁰³ The vagueness of the provisions, the lack of substantial case law in this area, and the growing public discontent with corporate executives escaping legal action for their companies’ misdeeds¹⁰⁴ all point toward broader use of these obstruction provisions in the future. As the court intuited, the issues raised by *United States v. Stevens* have implications for lawyers that reach beyond the individual livelihood of Lauren Stevens. The fact that prosecutors brought this indictment in the first place (not only once, but twice) shows that they believe the Sarbanes-Oxley obstruction of justice provisions

100. *Id.* at 10.

101. *Id.*

102. Because of the procedural posture of the case, this disposition is unreviewable.

103. While the *Stevens* case could arguably be a one-off—an example of rogue prosecutorial overreach that is unlikely to be repeated, *see infra* note 105—the prosecution’s legitimate arguments, the instability of interpretations of section 1519, and the policy goals underlying Sarbanes-Oxley counsel that this may be the first in a line of cases in which prosecutors attempt to police lawyer conduct. *See also* Debra Cassens Weiss, *Acquitted In-House Lawyer Warns of the ‘Criminalization’ of Law Practice*, A.B.A. J. (Oct. 3, 2012), http://www.abajournal.com/news/article/acquitted_in-house_lawyer_warns_of_the_criminalization_of_law_practice/ (“I think the criminalization of the practice of law is here, and I don’t think it’s necessarily going away. . . . The government will continue to be aggressive in looking at in-house counsel.”) (quoting Lauren Stevens).

104. *See, e.g.*, Edward Wyatt, *Obama Urges Tougher Laws on Financial Fraud*, N.Y. TIMES, Jan. 24, 2012, http://www.nytimes.com/2012/01/25/business/obama-urges-tougher-laws-on-financial-fraud.html?_r=1&nl=todaysheadlines&emc=th24 (discussing how President Obama’s 2012 State of the Union Address set forth “proposals [which] seek to acknowledge the continuing frustration among many Americans—exemplified by the Occupy Wall Street movement—that few financial executives have been prosecuted for their actions leading up to the crisis”).

stretch far enough to cover this type of conduct.¹⁰⁵ This discretionary judgment, as well as the threat that prosecutors could target more attorney conduct traditionally considered advocacy in the future, are worrisome. Even though the court was quick to rebuke the prosecution's attempts to convict Stevens,¹⁰⁶ the opinion will not necessarily deter future prosecutors from bringing similar cases against other lawyers. First of all, it is a lone opinion from a Maryland district court. Second, the facts of the case were very favorable for the defense. Lauren Stevens was sixty years old at the time of the indictment and well-loved by her co-workers and peers.¹⁰⁷ She also relied on the advice of outside counsel who told her that her response to the FDA complied with the law.¹⁰⁸ Future cases with less sympathetic defendants who do not rely on outside legal advice and who do not have favorable facts on their side may not garner the same fortunate result.

If prosecutors continue to bring obstruction cases against lawyers for crossing the vague boundary between zealous advocacy and obstruction, the ramifications for individual lawyers will be immense. Those charged will shoulder the burden of defending years-long lawsuits, reputational harms, massive expense, and potential job loss. If convicted, or if they take a plea deal to avoid a drawn out suit, they will face the harsh penalties imposed by the Sarbanes-Oxley provisions: fines and/or up to twenty years in prison.¹⁰⁹ Additionally, if they are convicted or plead guilty, they will be disbarred, potentially permanently.¹¹⁰ Furthermore, a broad interpretation of

105. See Reisinger, *supra* note 93 (“[T]he stunned prosecutors privately complained that the jury would have found Stevens guilty had the judge let the trial continue.”). But see Sue Reisinger, *Why Didn't the Maryland U.S. Attorney Sign the Lauren Stevens Indictment?*, CORPORATE COUNSEL (June 20, 2011), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202497761188&Why_Didnt_the_Maryland_US_Attorney_Sign_the_Lauren_Stevens_Indictment&slreturn=20121020110158 (“Maryland U.S. attorney Rod Rosenstein refused to sign the Lauren Stevens indictments because he didn't think there was enough evidence to support the charges. . .”).

106. See Transcript of Oral Argument, *supra* note 8, at 6 (“The Subcommittee on Criminal Justice had received complaints of prosecutors harassing members of the defense bar, and that vigorously and zealously representing a client is no [sic] a basis for charging an offense under the Obstruction of Justice chapter.”).

107. See Wilson, *supra* note 84; Reisinger, *supra* note 93.

108. See Reisinger, *supra* note 93.

109. See 18 U.S.C. § 1512(c) (2006); 18 U.S.C. § 1519 (2006).

110. See, e.g., *In re Libby*, 945 A.2d 1169, 1169 (D.C. 2008) (disbarring a lawyer because an obstruction conviction per se involves moral turpitude, which mandates disbarment in the state); *In re Laudumiey*, 849 So. 2d 515, 524–25 (La. 2003) (permanently disbarring two lawyers after they pled guilty to obstruction of justice); *In re Finneran*, 919 N.E.2d 698, 703–07 (Mass. 2010) (finding that lawyer

section 1519 wielded against lawyers will have three major consequences on the legal profession as a whole: (1) it will result in overcriminalization of previously innocent conduct; (2) it will lead to overdeterrence of legitimate lawyering; and (3) it will open the door to prosecutorial overreach. Each of these effects will lead to impaired client representation, both on an individual and systemic basis, by creating an incentive structure that pits lawyers' interests in self-preservation against their clients' interests.

1. Overcriminalization

Overcriminalization will result if courts interpret section 1519 broadly. Faced with judicial constraints on the reach of its obstruction statutes, Congress enacted section 1519 using broad language and stated its intent that the provision be uninhibited by those prior legal rules.¹¹¹ Attempting to give prosecutors room to police more conduct, Congress failed to take into account the broader reasons behind the Supreme Court's actions. When the Supreme Court cabined the reach of the pre-Sarbanes-Oxley obstruction provisions in *Aguilar* and *Arthur Andersen*, it specifically did so to prevent overcriminalization of innocent conduct the legal system strives to promote.¹¹² By imposing a dishonest intent requirement, the Court drew a line between situations in which lawyers intended to impede a proceeding and those in which they dishonestly wished to obstruct it.¹¹³ The Court realized that intent to impede a proceeding could be found whenever a lawyer counseled his client to withhold documents under exercise of his attorney-client privilege or to refuse to answer a question because of a marital privilege or a Fifth Amendment right.¹¹⁴ If section 1519 is construed to require the mere intent to impede, this traditionally innocent conduct will be swept up as obstruction.¹¹⁵ Furthermore, the Supreme Court mandated a nexus requirement to avoid criminalizing otherwise innocent document retention policies and to ensure that the public

pleading guilty to obstruction of justice warranted disbarment); *Miss. Bar v. De-Laughter*, 38 So. 3d 631, 631 (Miss. 2010) (permanently disbarring a lawyer after he pled guilty to one count of obstruction under section 1512(c) because a felony conviction in the state warrants automatic and permanent disbarment); *In re Coren*, 905 N.Y.S.2d 62, 63 (N.Y. App. Div. 2010) (disbarring a lawyer after he pled guilty to a sixteen-count indictment, including section 1512(c), because a felony conviction in the state requires automatic disbarment).

111. *See supra* Part II.C.

112. *See supra* Parts II.A and II.B.

113. *See supra* notes 53–54 and accompanying text.

114. *See supra* note 59 and accompanying text.

115. *See supra* notes 53–54, 58–60 and accompanying text.

knows when its actions cross the line.¹¹⁶ If no nexus is required, normal destruction of documents in the ordinary course of business will be vulnerable to obstruction prosecutions and lawyers will not know when they will be indicted for destroying something.¹¹⁷ Additionally, otherwise innocent statements by lawyers could be policed as obstructive in the absence of a nexus requirement if those statements, although unconnected to any judicial proceeding when uttered, later become relevant to a judicial proceeding.¹¹⁸

Overcriminalization punishes the innocent, wastes precious judicial resources, and, more importantly, “dilutes the moral force of the criminal justice system.”¹¹⁹ Overcriminalization also spawns the two related consequences of overdeterrence and prosecutorial overreach. As lawyers realize that their previously innocent conduct is now exposed to prosecution and severe penalties, they will be disincentivized to advise their clients to do anything that could be interpreted to impede a proceeding.¹²⁰ This will not only impact clients on a case-by-case basis, but it will also damage the quality of legal representation across the profession. The valid policy goals behind privilege and other doctrines that would be swept up under the obstruction provisions would be undermined by a broad interpretation of section 1519, and the apprehensions expressed in *Agui-lar* and *Arthur Andersen* would be brought to life.¹²¹ Additionally, by expanding the boundaries of criminal law, overcriminalization cre-

116. See *supra* notes 48–49 and accompanying text.

117. In enacting the Sarbanes-Oxley obstruction provisions, Congress exempted document retention policies from the reach of the statute in its legislative history. See *supra* note 73. Congress did not similarly carve out exceptions for assertions of privilege.

118. See *supra* note 49 and accompanying text.

119. Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 726, 727 (2005).

120. See *infra* Part III.B.2.

121. See *supra* notes 48–49, 58–60 and accompanying text. Amicus briefs filed in the *Andersen* case also discussed the negative implications of broadly interpreting the obstruction provisions. See Abramowitz & Bohrer, *supra* note 67, at 6 (“[E]xpanding the definition of ‘corruptly persuades’ to encompass persuasion ‘having an improper purpose’ to impede the fact-finding of an official proceeding would ‘potentially criminalize’ a broad range of legitimate attorney advice and appropriately zealous advocacy. It would ‘chill zealous legal representation, create potential conflicts between counsel and client, and undermine faith in the privacy of attorney-client communications.’”) (quoting Brief for New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner at 2, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435901; Brief for National Association of Criminal Defense Lawyers as Amicus Curiae Supporting Petitioner, *Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005) (No. 04-368), 2005 WL 435903).

ates greater scope for the discretionary enforcement of criminal laws, opening the door for abuse of that discretion by prosecutors.¹²²

2. Overdeterrence

The Sarbanes-Oxley obstruction provisions create a conflict of interest for lawyers that will lead to overdeterrence of legitimate lawyer behavior. Faced with the threat of criminal charges if they overstep the boundaries of zealous advocacy, lawyers are confronted with a dilemma. Take Lauren Stevens, for example. When the FDA began investigating her client's practices, she was forced to choose between voluntarily turning over potentially incriminating documents to the government, which could leave her client vulnerable to civil and criminal charges and herself to a malpractice claim, and maintaining her fidelity to her client and zealously advocating on its behalf, which would leave her personally vulnerable to criminal obstruction charges. Her allegiance was pulled in three different directions: to her client, to the public, and to herself.¹²³

122. See Luna, *supra* note 119, at 724–25.

123. Another example of a lawyer prosecuted under the Sarbanes-Oxley obstruction provisions for making the wrong choice (in prosecutors' eyes) between irreconcilable options is *United States v. Russell*, 639 F. Supp. 2d 226 (D. Conn. 2007). Philip Russell was charged with violating sections 1512(c) and 1519 after he destroyed a laptop containing child pornography that belonged to the choirmaster of his client church. *See id.* at 230. Russell had been retained by the church after it discovered the contents of the laptop, and he took possession of the laptop after the choirmaster resigned. *See* Evan T. Barr, 'Russell': Prosecuting Defense Counsel for Obstruction, 238 N.Y. L.J., Nov. 21, 2007, available at <http://www.steptoe.com/assets/attachments/3254.pdf>. The church made clear that it did not wish to press charges, and Russell had no reason to believe that the government was investigating the church or the choirmaster. *See id.* Believing there would be no future proceedings in which the evidence on the laptop would be necessary, Russell had several options for what to do with it: he could keep the laptop in his possession; he could return it to his client; or he could destroy it. If he kept the laptop, he could personally be prosecuted for possession of child pornography. *See* 18 U.S.C. § 2252 (2006). If he returned it to his client, he would leave the church vulnerable to the same prosecution. Because he reasoned that no future proceedings would be initiated that would ever need the laptop, and because destroying the laptop was the best way to protect himself and his client from child pornography prosecutions, Russell chose the third option. Unbeknownst to him, the government had already commenced an investigation into the choirmaster, and when it learned that Russell had destroyed key evidence in the investigation, it charged him with obstruction of justice. *See* Barr, *supra*. After unsuccessfully attempting to dismiss his indictment, *see* Russell, 639 F. Supp. 2d at 230, Russell pled guilty to a lesser charge of misprision of a felony. STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 462 (8th ed. 2009). He was sentenced to community service and home confinement for six months, and he was suspended from practice for six

This divided duty is a direct result of the Sarbanes-Oxley criminal law overlay to lawyers' ethical duties. How is a lawyer supposed to choose which allegiance to honor? A traditional feature of the attorney-client relationship is undivided allegiance to the client.¹²⁴ But the "reporting up" obligations in Sarbanes-Oxley show that Congress intended to deputize lawyers¹²⁵ after the Enron scandal, requiring them to police their clients' conduct for the benefit of the public.¹²⁶ Congress also made a strong statement that it would hold lawyers personally accountable for their involvement in corporate fraud and misconduct.¹²⁷ By imposing these external regulations, Congress became directly involved in regulating lawyers and formulated additional ethical duties for them.¹²⁸ Congress legislated what zealous advocacy "within the bounds of the law" means in this context.¹²⁹ Because it created harsh penalties for going be-

months. *Id.* Cases like *Russell* and *Stevens* show the conflicting positions lawyers confront when charged with zealously advocating for their clients in the face of the Sarbanes-Oxley obstruction provisions.

124. For example, the duty of confidentiality and the conflict rules in the Model Rules place allegiance to the client above other interests. See, e.g., *id.* R. 1.8(a)–(d), (h), (i) (protecting the client's interests over the lawyer's interests when they conflict). While exceptions to these rules allow promotion of the public interest or the lawyer's views over the client's interests, the default position articulated in the Model Rules is allegiance to the client. See, e.g., *id.* R. 1.6(a)–(b) (generally prohibiting disclosure of client confidences and permitting disclosure to benefit the public interest only in very limited circumstances).

125. Congress intended to deputize at least those lawyers "appearing and practicing" before the SEC, which could be interpreted to include all lawyers doing work for public companies. See *supra* note 26.

126. See *supra* note 25 and accompanying text.

127. See *supra* note 24 and accompanying text.

128. After Sarbanes-Oxley, the Model Rules were amended to reflect this new reporting up obligation and to stave off any additional congressional attempt at legislating mandatory ethical requirements. See GILLERS, *supra* note 123, at 12, 583–84. Specifically, Rule 1.13 "strengthen[s] the reporting-up obligation. Although reporting up is not obligatory, it is now presumptively required 'unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so.' Previously, reporting up was simply one option available to the lawyer. Of greater consequence, Rule 1.13 now contains its own exception to confidentiality. It permits, but does not require, reporting out if, after reporting up, 'the highest authority insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law,' and if, in addition, 'the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization.'" *Id.* at 584. While the Sarbanes-Oxley Act only applies to lawyers "appearing and practicing" before the SEC, Rule 1.13 applies to "all lawyers for organizational clients, whatever the nature of the work." *Id.*

129. See *supra* notes 11–14 and accompanying text.

yond the boundaries of the law,¹³⁰ the weight of the duty has now tipped away from zealous advocacy toward strict compliance with the boundaries imposed by Sarbanes-Oxley.¹³¹

This shift toward compliance with law after Sarbanes-Oxley's imposition of new duties and harsh penalties is exacerbated because of the vagueness of the obstruction provisions. The ambiguity of these provisions and the lack of coherent precedent analyzing them add to the confusion surrounding where lawyers' allegiances lie and what conduct is permissible advocacy.¹³² When the laws are vague and could be interpreted broadly, lawyers will tend to be more risk averse in the hopes of avoiding potential criminal sanctions. Zealous advocacy for clients is sacrificed as lawyers must abandon previously permissible conduct occurring on the margins of obstruction of justice law to protect their own livelihoods.

The change imposed by Sarbanes-Oxley thus pits multiple interests against one another, resulting in a quintessential conflict of interest. In describing the "tempted lawyer problem" embodied in Model Rules 1.7 and 1.8, Stephen Gillers writes, "Since client trust is crucial in enabling lawyers to pursue their clients' goals and protect the clients' autonomy, the rules and law governing lawyers should forbid lawyers (absent client consent) ever to occupy a position in which they are tempted to betray their clients, without regard to whether any particular lawyer would actually succumb to

130. See *supra* notes 30, 32 and accompanying text.

131. Cf. Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 *HOFSTRA L. REV.* 353, 395 (2007) ("Maybe criminal defense lawyers need to be cut some slack, in order to revivify an idea of 'zealous [] [advocacy] within the bounds of the law' that places as much emphasis on zealous advocacy as on the legal bounds.") (citation omitted). But see Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley—Has the Landscape Changed?*, 3 *WYO. L. REV.* 371, 373 (2003) (arguing that Sarbanes-Oxley has not changed the regulatory landscape, that "the promulgation of SEC standards in this context will not greatly impact counsel's obligations under applicable state ethical rules as well as liability exposure under federal and state law," and that the incentive structure for lawyer behavior has not shifted).

132. See also Ilya O. Podolyako, *The Law of Unintended Consequences: A Critique of the Dilutive Effects and Efficiency Costs of Multilayer Regulation* 6 (Yale Law Sch. Student Scholarship Papers, Paper 91, 2009) ("[I]f a prosecutor charges a defendant with obstruction every time the latter violates a provision of Sarbanes-Oxley, the obstruction category subsumes any substantive prescriptions of the statute. Simultaneously, concepts of justice and the rule of law demand that the acts that are punished carry some logical similarity that allows a citizen to identify prohibited behavior and the accompanying punishment *ex ante*. When certain business decisions count as a breach of positive requirements while others fall into a catchall category, executives are bound to get confused.").

the temptation.”¹³³ Sarbanes-Oxley, however, incentivizes lawyers to “betray their clients” in order to protect their own livelihood.¹³⁴ Risk-averse attorneys faced with a Lauren Stevens-type dilemma will be incentivized to turn everything over to the government when they suspect their client may be engaged in a crime or fraud; they will turn in their clients to avoid the harsh Sarbanes-Oxley obstruction punishments and their collateral effects.¹³⁵ Even when lawyers may reasonably believe their conduct in refusing to disclose information is both ethical and lawful, or that their clients’ conduct is lawful, if there is a fear that the lawyers could be prosecuted they will be incentivized to turn any and all potentially material information over to the government.¹³⁶ This incentive is exactly what the

133. GILLERS, *supra* note 123, at 4.

134. See Dan Reidy & James Burnham, *Federal Criminal Investigations of Lawyers: Risks and Consequences*, JONES DAY, 19 (Mar. 17, 2011), <http://www.jonesday.com/files/Publication/049833b4-8375-439a-8c1d-f3f5a18ad60e/Presentation/PublicationAttachment/e9c84cfd-70cd-4ddc-9e82-9ef61c75457d/FederalCriminalInvest.pdf> (“If prosecutions of lawyers increase, no matter how justified each individual prosecution, lawyers will more often consider their personal exposure when giving advice or otherwise acting on a client’s behalf—a consideration that can be fundamentally at odds with their obligation to zealously advocate for their clients’ interests. And of course, the more lawyers fear punishment for their advocacy or for their advice, the more pressure there is for them to prioritize covering their backs over serving their clients.”).

135. While the law should arguably encourage truth-seeking, promote prosecution of guilty conduct, and incentivize lawyers to reveal evidence of their clients’ clear misdeeds, the real impact of the Sarbanes-Oxley Act will be on the boundaries. It will primarily harm those clients whose conduct is questionable, borderline unlawful, who would most benefit from the zealous protection of their attorneys. It is with those clients, those who are most in need of legal counsel, that lawyers will be most incentivized to be risk averse.

136. See Green, *supra* note 131, at 395 (“[B]oth [the blurriness of the legal and ethical lines and the fallibility of fact findings] encourage risk-averse lawyers to temper their advocacy, avoiding conduct that they believe is lawful and that may well be, but that may be construed differently by prosecutors, disciplinary authorities, and courts. In some regulatory areas, we have no concern about telling people to stay well back from the edge and about punishing them when they stray over it. But legal representation, particularly on behalf of a criminal defendant, is an area where over-deterrence comes at a cost.”); Thomas D. Morgan, *Comment on Lawyers as Gatekeepers*, 57 CASE W. RES. 375, 377–78 (2007) (“Most corporate wrongdoers do not wear signs saying ‘Criminal.’ The normative view [of the role of lawyers as gatekeepers] is sometimes expressed as a preference that we set up a kind screener group [sic] who will certify, or give a ‘Good Housekeeping seal,’ to disclosure documents. . . . [T]hat is virtually impossible to do unless one assumes perfect knowledge or sufficient imagination to anticipate where most of the hidden problems are. I think we can all look back at Enron, and say people should have known something was wrong. But there are many circumstances that are not remotely that clear.”).

Model Rules and internal ethical regulations attempt to avoid.¹³⁷ Additionally it is evidence of the conflicts that arise when external regulation is imposed on lawyers' ethical duties and different regulating bodies have conflicting visions about the role lawyers play.¹³⁸ This is also a client's worst nightmare: at the time when they need their lawyers most, their lawyers will not be able to help them.

The overdeterrence of legitimate lawyering resulting from the Sarbanes-Oxley provisions will have a significant deleterious effect on client representation. Once clients are aware that their lawyers may feel compelled to turn over potentially incriminating information to the government in order to avoid a personal prosecution for obstruction,¹³⁹ clients will be less likely to consult them about potentially incriminating matters.¹⁴⁰ The crux of the protection of the attorney-client relationship is that clients will feel safe and comfortable discussing sensitive matters with their lawyers; the moment clients fail to trust their lawyers, client representation suffers.¹⁴¹ Lawyers will be unable to adequately advocate for their clients if they are unaware of information material to the representation.

In addition, the purposes of Sarbanes-Oxley are not advanced by this risk averse behavior and subsequent client distrust. As clients pull away from their lawyers, lawyers can no longer perform an ade-

137. See MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. [10] (2012) ("The lawyer's own interests should not be permitted to have an adverse effect on representation of a client.").

138. See *supra* note 18 and accompanying text.

139. Lawyers will want to discuss their conflicting interests with their clients, both because it will help to protect their clients and keep them aware of future actions the lawyer may need to take and because lawyers have an ethical obligation to secure their clients' informed consent to their conflicted representation. See MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(4) (2012); see also *id.* R. 1.7 cmt. [22] (discussing the nuances of obtaining sufficient informed consent to potential future conflicts in the representation).

140. See generally GILLERS, *supra* note 123, at 37 (discussing the policy goals behind the privilege and confidentiality rules and stating that "[t]hey will encourage the client to trust her lawyer and to be forthcoming with information (and sources of information) that the lawyer may need to represent her").

141. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. [2] (2012) ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.").

quate gatekeeping function.¹⁴² When they are not included in major decisions or not privy to information about wrongdoing, they will be unable to identify legal problems for their clients or take any remedial action for the benefit of their clients and the public.¹⁴³ Sarbanes-Oxley meant to encourage the free-flow of information within corporations and with the public so that future corporate scandals could be discovered quickly and prevented sooner.¹⁴⁴ By imposing such harsh changes, the Act has instead driven information about misconduct further underground, incentivizing corporations to keep incriminating information buried deep within their recesses, far from their lawyers and the public.

3. Prosecutorial Overreach

When laws are vague and broad, they leave room for prosecutors to abuse their reach. Prosecutors can push the boundaries of the Sarbanes-Oxley obstruction provisions to police all kinds of lawyer conduct because the boundaries are blurry and malleable. Prosecutors may also be motivated to target lawyers for obstruction violations because they want to punish lawyers whom they perceive to be breaking the rules.¹⁴⁵ If lawyers will not adhere to the rules of

142. See Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609, 613 (2003) (“A central premise underlying Section 307 and the SEC’s implementing rules is that lawyers are, and will continue to be, essential to corporate activity and to the interpretation and implementation of the laws relating to corporate governance and transactions.”); GILLERS, *supra* note 123, at 533 (“‘[D]eputizing’ [lawyers] to be the eyes and ears of government . . . will lead to less, not more compliance, because the company’s officers may then exclude lawyers from learning about questionable behavior for fear that the lawyer will then have a duty or authority to turn them in. As a consequence . . . the lawyers will never learn about the behavior in time to stop it.”).

143. See Geralyn M. Presti, *Current Ethical Issues for Securities Lawyers—A Comment on Humes*, 57 CASE W. RES. L. REV. 357, 363 (2007) (“I think the worst thing that could happen is that I would be excluded from sensitive corporate discussions, due to a fear that I might disclose privileged information to the SEC. It would be very distressing for me, and it would not be a good consequence for the client. It is critical that I am able to give the client appropriate legal advice and that the client can trust the privilege between us and give me complete information.”).

144. See *supra* notes 20–22 and accompanying text.

145. See Erin Murphy, *Manufacturing Crime: Process, Pretext, and Criminal Justice*, 97 GEO. L.J. 1435, 1446 (2009) (identifying “obstinacy” as a new motivation for prosecutors to charge obstruction of justice, reflecting “a strain of process crime prosecutions aimed at securing convictions against simply defiant or insubordinate individuals—not because their actions actually threaten the integrity of judicial processes or because they are otherwise difficult to convict—but solely because their acts constitute an affront to the formal dignity or authority of the state”); *cf.* Griffin, *Criminal Lying*, *supra* note 83, at 1533 (arguing that prosecutors use false

the game and cooperate with the government (fellow lawyers), prosecutors may wish to send the message that they will prosecute their colleagues for this affront. For example, Philip Russell, an attorney for a church, was slammed with a twenty-year obstruction violation for destroying child pornography found on a church computer before the government was able to use it to indict Russell's client's constituent.¹⁴⁶ Russell was not aware of the government's pending investigation into the constituent, and because his client had no intention of pressing charges, Russell did not believe he was doing anything wrong when he destroyed the images.¹⁴⁷ Commentators largely condemned his prosecution as retribution and prosecutorial overreach.¹⁴⁸

In addition, prosecutors are using obstruction charges pretextually as tools to negotiate deals in cases involving more substantive crimes.¹⁴⁹ An example of this can be seen in *United States v. Stevens*. Instead of truly trying to police her misconduct, Stevens's prosecution was also a ploy to encourage GlaxoSmithKline to settle with the FDA.¹⁵⁰ The vague Sarbanes-Oxley provisions enable this pretextual use of obstruction prosecutions, which will likely increase as the public demands more accountability from executives in the wake of corporate scandals.

These uses of the obstruction of justice provisions are undesirable. First, unconstrained prosecutorial discretion in this area could

statement charges to assert their authority over defendants and force them to apologize); Griffin, *Wanting the Truth*, *supra* note 83, at 7 ("The government's choice to exercise enforcement discretion as broadly as it does seems, in many false statement cases, to be a symbolic assertion of government power.").

146. See *supra* note 123.

147. See GILLERS, *supra* note 123, at 461-62.

148. See, e.g., *id.*

149. See Murphy, *supra* note 145, at 1450.

150. See Mundy & Kendall, *supra* note 93 ("Pharmaceutical companies have paid billions of dollars to settle various marketing-related charges with the government, but only a few executives have pleaded guilty to any crimes. . . . The government hasn't said whether the prosecution of Ms. Stevens was part of an effort to push Glaxo into a plea deal. It said in court documents in December that the Stevens case was part of an 'ongoing underlying health-care fraud investigation' looking at her and 'potential criminal activity by others.'"). Despite the fact that the government claimed it was not prosecuting Stevens with an eye toward incentivizing GlaxoSmithKline to settle with the FDA regarding its allegations of off-label marketing, this issue was on the minds of all those involved. Shortly after Stevens was acquitted, GlaxoSmithKline agreed to settle with the FDA. See Nate Raymond, *Glaxo Agrees 'In Principle' to Record \$3 Billion Settlement with U.S.*, CORPORATE COUNSEL (Nov. 7, 2011), http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202524804094&Glaxo_Agrees_In_Principle_to_Record_3_Billion_Settlement_with_US.

lead to “prosecutorial abuse” and “procedural injustice,” making it difficult for lawyers to predict when their behavior crosses the line.¹⁵¹ Second, when laws are vague and prosecutors police conduct that most people perceive as legitimate, confidence in the rule of law is eroded.¹⁵² Frequently prosecuting this type of conduct might have counterproductive effects that “detract from a clear focus on the most salient cases of deception and obstruction [and] suggest that lying to the government is both a standard and an understandable response to investigative inquiries.”¹⁵³

All in all, the implications of courts’ broad interpretations of section 1519 and prosecutors’ willingness to push the reach of the Sarbanes-Oxley obstruction of justice provisions to police the zealous advocacy of lawyers, as evidenced by the recent prosecution of Lauren Stevens, are worrisome. *United States v. Stevens* was a warning signal to the bar, and the threat that more lawyers could be prosecuted for their lawyering still remains palpable. The fear of potential prosecution for conduct that was previously considered legitimate advocacy on behalf of their clients creates a divided loyalty between a lawyer’s personal livelihood and the representation of their clients, and incentivizes lawyers to look out for themselves. This incentive structure undermines both the goals of the ethics rules and Sarbanes-Oxley by compromising the sanctity of the attorney-client relationship and encouraging clients to withhold information from their lawyers. The present scheme, with its resulting overcriminalization, overdeterrence, and prosecutorial overreach, is undesirable, both for lawyers and their clients, and must be reevaluated lest the compelling policies underlying the legal profession’s internal ethical regulations be abandoned.

IV. POTENTIAL SOLUTIONS TO THE PROBLEMS CREATED BY THE SARBANES-OXLEY OBSTRUCTION OF JUSTICE PROVISIONS

The Sarbanes-Oxley obstruction of justice provisions tip the balance between zealous advocacy and compliance with law to promote strict legal compliance to the detriment of legitimate advocacy. This jostling of interests leads to the conflicts and undesirable

151. See Murphy, *supra* note 145, at 1498.

152. See Griffin, *Criminal Lying*, *supra* note 83, at 1550 (“There is . . . strong social scientific support for the general proposition that divergence between commonsense views of justice and the conduct of enforcers diminishes compliance.”).

153. Griffin, *Wanting the Truth*, *supra* note 83, at 12.

incentives discussed above,¹⁵⁴ and subjugates the established policy justifications underlying ethical rules¹⁵⁵ to promote the public interest goals of Sarbanes-Oxley.¹⁵⁶ Although it is not a crime to represent a client who may be engaged in criminal behavior, the Sarbanes-Oxley obstruction provisions instruct prosecutors to harshly scrutinize lawyers' advocacy on behalf of potentially blameworthy clients. Sarbanes-Oxley enables prosecutors to go further than simply prosecuting lawyers who are accused of joining in with their clients' misconduct, requiring prosecution of lawyers who are just doing their jobs.¹⁵⁷ Balance between zealous advocacy and "the bounds of the law" should be restored.¹⁵⁸ To do so, it will be necessary to narrowly interpret the Sarbanes-Oxley provisions so that they fall into the scheme elucidated in *Aguilar* and *Arthur Andersen*. Constraining the reach of section 1519 by imposing a nexus requirement and a dishonest intent requirement resolves all three of the problems discussed above. If courts fail to limit these statutes and allow them to be interpreted broadly, there are alternative steps lawyers and courts can take to avoid the severe consequences of overcriminalization, overdeterrence, and prosecutorial overreach in future obstruction prosecutions.

A. *The Broad Reach of Section 1519 Must Be Constrained*

1. Section 1519 Should Be Interpreted to Only Reach Conduct Endeavored with Dishonest Intent

Courts should analyze Section 1519 according to the boundaries set forth in *Arthur Andersen*. Although Congress may have intended to eschew this type of analysis by omitting the modifier

154. See *supra* Part III.B.

155. See *supra* notes 133, 137 and accompanying text.

156. See *supra* notes 142–44 and accompanying text.

157. See generally REPORT OF THE TASK FORCE ON THE LAWYER'S ROLE IN CORPORATE GOVERNANCE, N.Y. CITY BAR ASSOC. (2006), available at <http://www.nycbar.org>.

158. Some commentators perceive the Sarbanes-Oxley Act as a response to problems created by the promotion of zealous advocacy over other interests. See Carle, *supra* note 12, at 135 (describing how the Enron scandal "exacerbated the crisis of confidence about the effectiveness of current client-centered models of legal ethics regulation"). They argue that we need to shift our priorities and promote public interests over strict adherence to client interests. See Deborah L. Rhode, *Legal Ethics in an Adversary System: The Persistent Questions*, 34 HOFSTRA L. REV. 641, 649 (2006) (arguing that "the public has paid a substantial price for the ethic of undivided client allegiance" and that lawyers need to take into account the public effects of their client representation). While promotion of public interests in the wake of corporate scandals is laudable, it must not be advanced to the detriment of all reasonable client interests.

“corruptly” from the text of section 1519,¹⁵⁹ it could not have intended to criminalize the innocent conduct this revised language targets. In both *Aguilar* and *Arthur Andersen*, the Supreme Court recognized that the obstruction of justice provisions could be interpreted to criminalize previously innocent conduct, and in both cases the Court acted to narrow the scope of the obstruction provisions.¹⁶⁰ Courts should engage in a similar type of analysis with section 1519. They should recognize the negative implications of construing the section broadly and they should constrain it despite Congress’ use of different statutory language. Even though the Supreme Court specifically discussed the difference between “corruptly” and “intent to impede” in *Arthur Andersen*¹⁶¹ (a decision handed down after Congress passed section 1519, which employs the “intent to impede” language), the Court’s policy considerations for requiring a showing of dishonest intent should trump this textual analysis.¹⁶² Therefore, individuals should only be found to violate section 1519 if they possessed a dishonest intent to obstruct a proceeding.

The Sixth Circuit recently interpreted section 1519 in this way, and its argument is instructive. In *United States v. Kernell*, the court observed that no court has definitively held that the intent required for a section 1519 violation is anything less than the corrupt intent required in *Arthur Andersen*.¹⁶³ The court reasoned that despite the different language, section 1519 should be read to require the same corrupt intent as previous obstruction of justice provisions.¹⁶⁴ The same argument can be made when reading the legislative history of section 1519. Because Congress did not explicitly discuss a lesser intent requirement (it merely employed different language), section 1519 should be read to fit into the scheme of previous obstruction provisions. Congress could have intended to broaden the

159. See *supra* notes 64–66 and accompanying text.

160. See *supra* Parts II.A and II.B.

161. See *supra* notes 53–54 and accompanying text.

162. See Abramowitz & Bohrer, *supra* note 67, at 6 (“Although the Supreme Court reversed the Fifth Circuit and recognized the potentially chilling affects that a broad application of the obstruction laws may have on legitimate advocacy [in *Arthur Andersen*], courts faced with §1519 cases would be wise to keep these warnings in mind.”). Even though Sarbanes-Oxley was on the books at the time of the *Arthur Andersen* decision, the Court was not evaluating section 1519 in that case. While its specific textual analysis of section 1512(b) could potentially influence a future interpretation of section 1519, the Court’s policy discussion is broadly applicable to all of the obstruction provisions.

163. See *United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012).

164. See *id.*

reach of the obstruction of justice provisions in other ways, such as by eliminating the nexus requirement, and may not have intended to modify the intent requirement. Because Congress did not explicitly address a change in the intent requirement for a violation of the obstruction provisions, courts should not implicitly construe a modification.

This analysis of section 1519 to require dishonest intent will prevent overcriminalization. Innocent actors with an honest intent to impede a proceeding, such as a lawyer encouraging his client to exercise his attorney-client privilege to not speak to the government, will not be swept up into obstruction prosecutions. This analysis will also prevent future prosecutions like that of Lauren Stevens. By setting a clear boundary between innocent and dishonest conduct and drawing a bright line in this otherwise vague area, this construction of section 1519 will also prevent overdeterrence and prosecutorial overreach.

2. Section 1519 Should Be Interpreted to Implicitly Contain a Nexus Requirement

Section 1519 should be construed to contain a nexus requirement, as articulated in *Aguilar* and refined in *Arthur Andersen*. In *Arthur Andersen*, the Supreme Court made it clear that even though no proceeding need be pending for a violation of section 1512 to occur, a nexus requirement was still applicable.¹⁶⁵ Defendants need to have foreseen a potential future proceeding that their conduct could possibly obstruct to have violated the obstruction statutes.¹⁶⁶ Section 1519 should not be held to a different standard; it should be construed to only condemn those who endeavor to obstruct a foreseeable “contemplat[ed]” proceeding or investigation.¹⁶⁷ Interpreted in this way, innocent destruction or alteration of documents in the ordinary course of business will not be prosecuted unless, at the time of the destruction, it was reasonably foreseeable that the documents would be material to a potential future proceeding.¹⁶⁸

165. See *supra* notes 55–57 and accompanying text.

166. See *id.*

167. The language in section 1519 is similar to the gloss that section 1512(f)(1) puts on section 1512 violations. Compare 18 U.S.C. § 1519 (2006), with 18 U.S.C. § 1512(f)(1) (2006). See also Kyle R. Taylor, Note, *The Obstruction of Justice Nexus Requirement After Arthur Andersen and Sarbanes-Oxley*, 93 CORNELL L. REV. 401, 426–27 (2008) (arguing that the language of section 1519 “lends itself to application of the nexus requirement”).

168. This will prevent the prosecution of defendants who had an innocent intent at the time of destruction but whose conduct in hindsight appears questionable. See Barr, *supra* note 123 (“As a matter of discretion, the government should

This interpretation will also restrain the scope of potentially obstructive conduct and ensure that people like the lying husband in the hypothetical discussed in *Aguilar* are not prosecuted for their conduct unrelated to judicial proceedings.¹⁶⁹ This analysis will prevent future prosecutions like that of Philip Russell and solve all three of the problems discussed above. Furthermore, if section 1519 is not construed to contain a nexus requirement, it could be vulnerable to challenge as unconstitutionally vague, as discussed generally in *Aguilar* and *Arthur Andersen*.¹⁷⁰ The public needs to know when it could violate a criminal law, and without a nexus requirement there is no way for anyone to know when they have crossed the line.

Section 1519 more easily fits into the pre-Sarbanes-Oxley obstruction of justice framework's nexus requirement because of the nuances the Supreme Court added to the requirement in *Arthur Andersen*. It will be harder for courts to blend section 1519 into the intent requirement analysis as set forth in *Arthur Andersen* because of the different statutory language employed in section 1519—a difficulty heightened by the fact that *Arthur Andersen*, which discusses the implications of the use of different statutory language, was decided after section 1519 was passed.¹⁷¹ The negative consequences for client representation and corporate transparency, however, should counsel courts to use caution when articulating the breadth of this provision.

*B. Steps Lawyers and Courts Can Take to Avoid the Harsh
Consequences of a Broad Interpretation of
the Obstruction Provisions*

If courts disregard the potentially vast negative implications and broadly construe section 1519, lawyers will be vulnerable to prosecutions, like that of Lauren Stevens, for their advocacy on behalf of their clients. There are solutions beyond a narrow judicial

in the future simply limit these kinds of obstruction prosecutions to defendants whose actual knowledge of an investigation can be established. Otherwise, we may face the possibility of more individuals (and especially lawyers) being charged with impeding merely hypothetical proceedings, surely an odd application of the federal obstruction statutes.”).

169. See *supra* note 49 and accompanying text.

170. See *Arthur Andersen LLP v. United States*, 544 U.S. 696, 708 (2005); *United States v. Aguilar*, 515 U.S. 593, 600 (1995).

171. Ironically, this does not appear to be the way courts are interpreting section 1519. They are typically instead finding a dishonest intent requirement implied in the statute, but holding that there is no nexus requirement. See, e.g., *United States v. Kernell*, 667 F.3d 746, 754 (6th Cir. 2012).

construction of section 1519, however, to combat the overcriminalization, overdeterrence, and prosecutorial overreach problems that result from the persistent uncertainty of the provision.

First, to prevent overcriminalization, courts could create exceptions for legitimate instances of intent to impede a proceeding that have been traditionally protected. For example they should carve out reasonable, good faith assertions of attorney-client privilege and genuine document retention policies as protected.¹⁷² This could be accomplished by construing the Safe Harbor Provision¹⁷³ to encompass this conduct or by enunciating special exceptions. While creating these exceptions would alleviate some of the pressure on attorneys to be risk-averse in their client representation, the vagueness problems of the statute would remain and the legitimate lawyering previously considered innocent but not protected by an established legal principle like privilege would still be vulnerable to prosecution (i.e., situations like *United States v. Stevens*). This overcriminalization of zealous advocacy is unlikely to be remedied absent a narrow construction of section 1519.

Second, there are ways lawyers can prevent overdeterrence of reasonable zealous advocacy. Lawyers confronted with government investigations can consult outside counsel to confirm the legality of their actions.¹⁷⁴ This was one of the main reasons why Lauren Stevens was able to demonstrate her good faith and escape conviction.¹⁷⁵ If the lawyer can prove that he received all the advice necessary to make his decision, that he relied on the advice in good faith, that his reliance was reasonable, and that he acted on the advice, he may be able to escape conviction.¹⁷⁶ But there are several concerns with relying solely on this defense to escape prosecution.

172. Section 1519 likely would not survive a constitutional challenge if it did not create carve outs for privilege and Fifth Amendment rights.

173. See *supra* note 97.

174. This solution, however, is primarily geared toward aiding in-house counsel. In-house counsel are more likely to be viewed as obstructing prosecutions through their advocacy than other lawyers because of their unique position within their clients' organizations. Outside counsel are not prone to the same self-dealing to which in-house counsel are susceptible. Thus, while in-house counsel may be able to vindicate their legitimate lawyering by proving they relied on consultations with independent, unbiased outside counsel, outside counsel should not have to jump through these hoops. This is a questionable system though, which creates two tiers of burdens of production based on the type of attorney, when all attorneys, no matter their particular career path, are held to the same ethical standards.

175. See *supra* notes 95–96 and accompanying text.

176. See Douglas R. Richmond, *Advice of Counsel as a Defense to Sanctions and Professional Discipline*, 27 *Laws. Manual on Prof. Conduct (ABA/BNA)* 418, 2011 WL 2463403 (June 22, 2011).

First, depending on the situation, consulting outside counsel could entail an additional expense that clients may not be willing to shoulder. If the client refuses to allow his lawyer to consult outside counsel, the lawyer would once again face the dilemma discussed above of choosing between his client and his own livelihood. This solution also raises efficiency concerns by requiring additional layers of legal counsel potentially at multiple and repeated stages of client representation—when we require all lawyers to adhere to ethical standards, why should we demand that one lawyer consult another to ensure good faith compliance with law? Additionally, depending on how section 1519 is interpreted, the prosecution could argue that the defense is inapplicable. The advice of counsel defense only serves to negate the *mens rea* for specific intent crimes.¹⁷⁷ If section 1519 is interpreted to be a general intent crime, as the prosecution argued in *United States v. Stevens*, the advice of counsel defense will be unhelpful to defendant lawyers.¹⁷⁸ Despite the limitations of the advice of counsel defense, consulting outside counsel cannot hurt a lawyer's claims that he was acting in good faith and not seeking to obstruct justice.

177. See *United States v. Stevens*, 771 F. Supp. 2d 556, 560 (D. Md. 2011) (“Good faith reliance on the advice of counsel is only relevant to *specific* intent crimes because such reliance demonstrates a defendant's lack of the requisite intent to violate the law.”) (emphasis added).

178. See *id.* See also Elizabeth R. Sheyn, *Toward a Specific Intent Requirement in White Collar Crime Statutes: How the Patient Protection and Affordable Care Act of 2010 Sheds Light on the “General Intent Revolution”*, 64 FLA. L. REV. 449, 453 (2012) (“A relatively recent trend in the criminal law is the movement away from specific intent to general intent crimes, particularly with respect to white collar crimes.”); Reidy & Burnham, *supra* note 134, at 11–12 (“The government's interpretation means—in theory—that a lawyer can commit obstruction by withholding a document even if that lawyer was advised by outside counsel that the company did not need to produce it. The lawyer need only knowingly not produce the document, at least in part, because the document was harmful to the client. Further, the prosecution of GSK's former in-house counsel even hints at the possibility of the advice of outside counsel forming the basis of a conspiracy between in-house and outside counsel to deceive regulators. . . . This reasoning suggests that if GSK's outside counsel advised GSK's in-house lawyer that certain documents need not be produced, that advice not only failed to insulate GSK's in-house lawyer from liability, but may have exposed the outside lawyers to co-conspirator liability.”). Despite the arguments that could be made that section 1519 is a general intent crime, Congress expressed in the legislative history of the Sarbanes-Oxley Act that it wished for the provision to be a specific intent crime. S. REP. NO. 107–146, at 27 (2002) (“In our view, section 1519 should be used to prosecute only those individuals who destroy evidence with the *specific intent* to impede or obstruct a pending or future criminal investigation, a formal administrative proceeding, or bankruptcy case.”) (emphasis added).

Lawyers can also prevent overdeterrence through education. As more cases are decided in this area, lawyers will be presented with concrete examples of conduct that is permissible and conduct that is prosecutable. They can then strive to educate themselves and their peers about how to simultaneously promote their clients' interests while protecting their own livelihoods.¹⁷⁹ Of course, an inherent dilemma with relying on education to remedy overdeterrence is that the doctrine in this area may be vague and open-ended for quite some time. Additionally, if cases are decided against lawyers so as to constrain zealous advocacy, overdeterrence will increase.

A third way to prevent overdeterrence is to bolster the Safe Harbor Provision of the obstruction statute.¹⁸⁰ The Safe Harbor Provision could be interpreted to encompass all situations in which a lawyer assists his client in legal endeavors, thus protecting all legitimate zealous advocacy.¹⁸¹ The Safe Harbor Provision would not extend to protect legal services administered to help further a client's underlying crime or fraud. While at first glance a bright line rule, however, the Safe Harbor Provision will not necessarily alleviate the broad reach of obstruction prosecutions. As in *United States v. Stevens*, prosecutors could allege that the attorney's "zealous advocacy" was actually an attempt to assist the client in covering up the underlying criminal conduct (or even the lawyer's own misconduct).¹⁸² Reliance on this provision may not provide a complete solution, but it could help to prevent conviction in some cases, as it did in *United*

179. At the 2012 annual meeting of the Association of Corporation Counsel, Lauren Stevens described her experience and advised her fellow in-house counsel, "That is what you do—go back and defend your client zealously and don't back away because you are afraid of my experience." Sue Reisinger, *How Ex-GSK GC Lauren Stevens Fought the Law—and Won*, CORPORATE COUNSEL (Oct. 2, 2012), <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202573330716&thePage=1>.

180. See *supra* note 97 and accompanying text. Recently, the Eastern District of North Carolina did just that when it dismissed an indictment against a lawyer for failing to allege an essential element of the charge, holding that, at least in the Fourth Circuit, "where an attorney or one under his direction is charged with an obstruction offense under § 1512(b)(2)(B) or § 1519, the government must expressly allege as an element of the offense in the indictment that the defendant in engaging in the conduct alleged was not 'providing lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.'" *United States v. Jackson*, No. 2:10-CR-8-FL, 2013 WL 782602, at *21 (E.D.N.C. Feb. 4, 2013) (quoting 18 U.S.C. § 1515(c) (2006)).

181. The court seemed to suggest a similar interpretation of the provision in *United States v. Stevens*. See *supra* note 97 and accompanying text.

182. See *supra* notes 88–91.

States v. Stevens.¹⁸³ This solution is less desirable than a blanket narrow interpretation of section 1519, however, because it would leave non-lawyers vulnerable to broad obstruction prosecutions.

Prosecutorial overreach can be constrained by instituting prosecutorial guidelines that clearly delineate the boundary between legitimate obstruction prosecutions and prosecutorial abuse. This can be done by providing articulable standards for construing the Sarbanes-Oxley obstruction provisions with which prosecutors must comply.¹⁸⁴ Instituting these guidelines could help to prevent prosecutors from believing they have free reign to wield the Sarbanes-Oxley provisions against lawyers in pretextual and coercive ways. While the obstruction doctrine remains broad and unclear, however, it will be difficult to elucidate clear guidelines or to determine when prosecutors have gone too far. This is another area in which the negative effects of Sarbanes-Oxley are unlikely to be resolved absent judicial intervention to cabin the reach of the Act.

Another way in which lawyers can combat prosecutorial overreach and avoid obstruction prosecutions is to cooperate fully with the government during investigations of their clients. Lawyers can be candid in their communications with the government and forthcoming about documents in their possession. For example, if Lauren Stevens had told the FDA that she had produced all documents relevant to the inquiry that she believed, after consulting outside counsel, she was legally obligated to produce, instead of categorically saying that the production was complete, the government may not have been so harsh on her.¹⁸⁵ This solution, however, is riddled with pitfalls. By indicating that he may not have disclosed all the information the government wants, does the lawyer open himself up to harsher sanctions? How far should the lawyer go to cooperate? Should he waive attorney-client privilege? Is he sacrificing zealous advocacy for his client the more he cooperates with the government? The fact that prosecutors will respond more favorably to lawyers who cooperate with them than to lawyers who put up a fight leads to bad incentives; knowing that they could receive more favorable treatment, lawyers will be incentivized to waive privilege

183. See *supra* note 97 and accompanying text.

184. See generally Fred C. Zacharias & Bruce A. Green, *Prosecutorial Neutrality*, 2004 WIS. L. REV. 837 (2004).

185. See Reidy & Burnham, *supra* note 134, at 9, 18 (“[C]ounsel responding to document requests from government agencies should use great care in their communications as to how they describe their production. . . . Every communication matters, and lawyers need to be careful about making overly broad or categorical statements to federal officials.”).

and turn documents over to the government that could prove to be detrimental to their clients.¹⁸⁶ Despite the pitfalls inherent in cooperation with the government, lawyers will be well-served if they recognize the advantages of forthright communication with the government and seek to strike a balance between cooperation and client protection.

As this discussion shows, these various potential solutions are rife with problems and not one is preferable to a narrow judicial construction of section 1519. The only way to truly protect zealous advocacy in the face of the Sarbanes-Oxley obstruction provisions is to cabin the reach of the statute. If courts decline to address the overcriminalization, overdeterrence, and prosecutorial overreach problems created by a broad interpretation of section 1519, lawyers should do all they can to ward off the government's scrutinizing gaze by adhering closely to ethical duties and seeking outside advice. They should try to avoid the temptation to sacrifice their clients' interests to promote their own until courts confine the reach of the obstruction provisions and remove the conflicts created by Sarbanes-Oxley.

CONCLUSION

The obstruction of justice provisions added by Sarbanes-Oxley are extremely broad and could have vast consequences for the ability of lawyers to zealously advocate for their clients. As the prosecution of Lauren Stevens shows, lawyers are vulnerable to prosecution

186. See Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 898 (2006) ("The Department of Justice . . . has adopted guidelines that seem to make waiver of the attorney-client privilege and work product protection a prerequisite for being deemed 'cooperative,' a significant designation that carries with it the prospect for more favorable penal treatment."); Robert C. Hockett, *Valuing the Waiver: The Real Beauty of Ex Ante Over Ex Post*, 57 CASE W. RES. L. REV. 381, 387 (2007) ("[I]n the cases we are talking about—namely, waiver that is undertaken in order to be deemed cooperative in the already commenced investigation of a crime alleged already to have been committed—one is seeking the benefit of lighter sentencing. This is an inherently coercive context. And so, unsurprisingly, corporate counsel often have remarked that even when waiver might be 'voluntary' in some metaphysical sense in these cases, it often does not feel that way in any motivational sense.") (emphasis omitted); William R. McLucas, Howard M. Shapiro & Julie J. Song, *The Decline of Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006) ("The current trend has, at a minimum, eroded our traditional adversarial process and skewed the balance of power between government investigators and their corporate targets. . . . It forces corporate managers to think first of their own liability and not the broader good of the enterprise that should be—and once was—at the core of their professional lives.").

if they place a toe over the line separating zealous advocacy from obstruction of justice. Just where this line is and how bright it is will depend on how courts resolve the ambiguities regarding the *mens rea* and nexus requirements of section 1519. Courts should avoid the negative implications of creating a legal framework that incentivizes lawyers to betray their clients and construe section 1519 narrowly to fit within established Supreme Court obstruction of justice precedent. In doing so they will rectify the present imbalance between zealous advocacy and the “bounds of the law” and return the ethical ideal of undivided loyalty to clients back to where it is balanced with legal constraints and the public interest.