Stevens: Is Zealous Advocacy Obstruction of Justice?

By Scott Schumacher


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The government has recently increased criminal enforcement against attorneys and other professionals. With the prosecution of Lauren Stevens for her conduct during the course of a civil investigation by the Food and Drug Administration, the government's enforcement efforts reached a new level. While not a tax case, the *Stevens* prosecution is nevertheless important for all tax lawyers, not just criminal tax specialists. This article discusses *Stevens* and its implications for tax practice.

In May the U.S. District Court for the District of Maryland granted a motion for judgment of acquittal in *United States v. Stevens*.[1] Lauren Stevens, former vice president and associate general counsel of pharmaceutical giant GlaxoSmithKline (GSK), had been charged with obstruction of justice and making false statements during a civil investigation of GSK by the Food and Drug Administration (FDA). In a stinging rebuke of the government's case, the district court held that Stevens should never have been prosecuted. While *Stevens* was a defeat for the government, it is also a cautionary tale for all lawyers, including tax lawyers, who deal regularly with the government. Although Stevens was ultimately acquitted, the acquittal was obtained only after a very public indictment and trial, and only with the help of some of the best legal counsel that money — indeed Big Pharma money — could buy.[2]

This article discusses the criminal implications of the rather uneasy place lawyers occupy between their clients and the government. Although not a tax prosecution, *Stevens* is still a significant case for tax lawyers. The government has been increasingly targeting attorneys as part of its enforcement efforts.[3] Thus, lawyers — and not just criminal defense attorneys — must understand the criminal implications of the professional decisions they make. *Stevens* demonstrates that professional conduct questions, which used to be "merely" ethical in nature, now have far more serious implications.

Competing Duties, Dangers of Defense Attorney

As champions of their client's cause, lawyers must balance their duty to their client with their duty to the system as officers of the court.[4] The rules of professional conduct attempt to balance these interests, but conflicts between these competing duties are often unavoidable. The lawyer's primary duty is to his client. The ethos of the zealous advocate, ingrained in lawyers from law school, is one of the hallmarks of the profession. The classic, if perhaps overstated, rendering of the duty of the zealous advocate was summarized by Lord Brougham in 1821 in his defense of Queen Caroline:

> An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in

[1] *United States v. Stevens*, No. RWT-10-694 (D.C. Md. 2011) ("Order").

[2] Stevens was represented by lawyers from Steptoe & Johnson LLP and Ropes & Gray LLP.

[3] *See, e.g.*, John M. Colvin, "The Tax Professional as the Target du Jour in Criminal Tax Investigations," 2011 ABATAX-CLE 0122023.

[4] *See, e.g.*, Richard Lavoie, "Deputizing the Gunslingers: Co-opting the Tax Bar Into Dissuading Corporate Tax Shelters," 21 *Va. Tax Rev.* 43, 73 (2001); Camilla E. Watson, "Tax Lawyers, Ethical Obligations, and the Duty to the System," 47 *U. Kan. L. Rev.* 847 (1999); Mark H. Johnson, "Does the Tax Practitioner Owe a Dual Responsibility to His Client and to the Government — The Theory," 15 *S. Cal. Tax Inst.* 25, 26 (1963).

performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[5]

This duty is encapsulated in American Bar Association Model Rule 3.1 and its related state rules. However, even in articulating the lawyer-as-advocate duty, Rule 3.1 states it in the negative — that is, where the lawyer should not go: ''A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.''[6] Indeed, the comments to Rule 3.1 note that while an advocate has a duty to use legal procedure for the fullest benefit of the client, there is also a duty not to abuse legal procedure.[7] Likewise, Rule 3.3, which requires candor to the tribunal, prohibits a lawyer from knowingly making a false statement of fact or law to a tribunal and failing to disclose either a material fact or controlling legal authority, and Rule 4.1 prohibits a lawyer from knowingly making a false statement of material fact or law to a third person. Thus, while the duty to one's client is paramount, that duty is not exclusive.[8] The ethical challenge for lawyers is reconciling those competing duties.

Tax practice is no exception. For tax lawyers, conflicts arise when giving tax advice, dealing with related parties to a transaction, and dealing with the IRS. Perhaps the most dangerous setting is the so-called eggshell audit — when the tax professional knows the client has committed a crime or engaged in fraudulent conduct, but the IRS has yet to discover it. The lawyer must investigate the case, including speaking with potential witnesses, and provide information to IRS agents that is accurate, not misleading, and yet does not incriminate the client. In the back of a lawyer's mind should always be the concern, ''Am I going too far?'' with the specter of obstruction or conspiracy charges looming in the background.[9]

The rules of practice set out in Circular 230 are in some ways quite similar to state bar rules, which apply in all roles a lawyer serves.[10] Circular 230 prohibits conflicts of interest,[11] restricts the kinds of advertising a practitioner may engage in,[12] and prohibits practitioners from endorsing or negotiating any refund check that has been issued to a taxpayer.[13] However, because the rules were drafted by the IRS, Circular 230 also contains explicit requirements for how practitioners deal with the IRS. For example, a practitioner must ''on a proper and lawful request by a duly authorized officer or employee of the Internal Revenue Service, promptly submit records or information in any matter before the Internal Revenue Service unless the practitioner believes in good faith and on reasonable grounds that the records or information are privileged.''[14] Another section provides: ''No practitioner shall unreasonably delay the prompt disposition of any matter before the Internal Revenue Service.''[15]

A violation of these requirements can result in sanctions, including disbarment from practice before the IRS. Section 10.50 of Circular 230 allows the director of the Office of Professional Responsibility to suspend or disbar any practitioner from practice before the IRS if the practitioner is ''shown to be incompetent or disreputable . . . refuses to comply with any regulation in this part . . . or with intent to defraud, willfully and knowingly misleads or threatens a client or prospective client.'' The term ''disreputable conduct'' includes giving false or misleading information to Treasury.[16]

As *Stevens* demonstrates, the government need not settle for disbarment or other sanctions under state bar rules or Circular 230. Chapter 73 of Title 18 contains several broad and overlapping criminal statutes that punish as a felony the obstruction of justice. For example, 18 U.S.C. section 1505 prohibits obstructing or impeding ''the due and proper administration of the law under which any pending proceeding is being had before any department or agency of the United States''; section 1519 sanctions anyone who knowingly alters, destroys, conceals, or falsifies any document with the intent to obstruct or impede the investigation of any matter within the jurisdiction of any department or agency of the United States; and section 1520 (enacted after the Supreme Court's decision in *Arthur Andersen*[17]) prohibits the destruction of corporate audit records.

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[5]John Wesley Hall Jr., *Professional Responsibility in Criminal Defense Practice* 342 (2005) (citing Gerald F. Uelmen, ''Lord Brougham's Bromide: Good Lawyers as Bad Citizens,'' 30 *Loy. L.A. L. Rev*. 119, 120 (1996)).

[6]Model Rules of Prof'l Conduct R. 3.1 (2009). *See also* Fred C. Zacharias, ''Integrity Ethics,'' 22 *Geo. J. Legal Ethics* 541, 557 (2009) (Rule 3.1 ''reminds lawyers that they have a secondary set of functions'').

[7]Model Rules of Prof'l Conduct R. 3.1 cmt 1.

[8]Nor is it necessarily the best professional strategy to heed Brougham's call to ''save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself.''

[9]John Townsend et al., *Tax Crimes* 217 (2008).

[10]31 C.F.R. section 10.35.

[11]31 C.F.R. section 10.29.

[12]31 C.F.R. section 10.30.

[13]31 C.F.R. section 10.31.

[14]31 C.F.R. section 10.20.

[15]31 C.F.R. section 10.23.

[16]31 C.F.R. section 10.51.

[17]*Arthur Andersen LLP v. United States*, 544 U.S. 696 (2005), *Doc 2005-11896*, *2005 TNT 104-15*.

Stevens was indicted under 18 U.S.C. section 1512(c), which prohibits corruptly obstructing, influencing, or impeding any official proceeding.[18] The term ''official proceeding'' is defined as ''a proceeding before a Federal Government agency.''[19] Significantly for tax lawyers, similar language to section 1512(c) is contained in section 7212, which punishes corruptly obstructing or impeding the due administration of the code.[20]

These omnibus obstruction statutes have been construed to prohibit a broad range of conduct.[21] Indeed, the Justice Department Tax Division's Criminal Tax Manual asserts that section 7212 ''applies broadly to the variety of conduct used to attempt to prevent the IRS from carrying out its lawful functions and to avoid the proper assessment and payment of taxes.''[22] While obstruction of justice is a serious crime that should not be tolerated, the expansive language of these statutes has the potential to sweep in conduct that is or should be considered perfectly legal.

The application of these omnibus statutes is limited by the mental state the government is required to prove. The obstruction statutes do not prohibit every endeavor to obstruct or impede a federal investigation. Only corrupt endeavors to obstruct or impede are subject to criminal sanctions.[23] However, the term ''corrupt'' has not been given a consistent application, and it does not provide the protection it might suggest. ''Corruptly'' has been defined as acting ''with the intent to secure an unlawful benefit either for oneself or for another.''[24] Other courts have held that it ''really means unlawful.''[25] Some courts have held that guilt depends on the presence of an improper, wicked, or evil motive,[26] while some have held that a showing of willfulness, knowledge, or intent is sufficient.[27] The Tax Division interprets corruptly under section 7212(a) to mean ''to act with the intent to secure an unlawful advantage or benefit either for oneself or another.''[28] Thus, in the Tax Division's view, there is no requirement of evil intent. Acting with the intent to secure an unlawful advantage may be wrong, but it is not necessarily evil.[29]

The problem with many of these definitions is that they are circular. An action is corrupt if it is designed to secure an unlawful benefit. At least one court has gone as far as to hold that ''to obstruct or impede the due administration of justice is per se unlawful and tantamount to doing the act corruptly.''[30] Thus, an action is corrupt because it is illegal, and it is illegal because it is corrupt. If the government believes an attorney is improperly standing in its way or providing statements that are misleading, those actions are thus designed to provide an improper advantage to the client and are corrupt. Stated another way, from the government's point of view, attorneys who zealously represent their clients in a federal investigation almost by definition obstruct or impede the government in its investigation. Given the paltry protection the term ''corruptly'' provides, omnibus obstruction statutes are prime for abuse, which should give any professional pause.

This potential for abuse certainly caused concern for Congress, which had received complaints of prosecutors harassing defense attorneys. As a result, in 1986 Congress added a legal services safe harbor in 18 U.S.C. section 1515(c),[31] which provides: ''This chapter 32 does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.''[32] In enacting the provision, Congress made plain that ''vigorously and zealously representing a client'' is not a basis for charging an offense under the obstruction of justice chapter.[33]

The Eleventh Circuit in *United States v. Kloess*,[34] one of the few courts to interpret section 1515(c),

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[18]18 U.S.C. section 1512(c)(2). She was also charged under 18 U.S.C. section 1519 for allegedly providing altered and falsified records.

[19]18 U.S.C. section 1515(a). *See also United States v. Ramos*, 537 F.3d 439, 462-463 (5th Cir. 2008) (term ''official proceeding'' contemplates a ''formal environment in which persons are called to appear or produce documents'').

[20]Section 7212.

[21]*See, e.g., United States v. Silverman*, 745 F.2d 1386, 1393 (11th Cir. 1984) (obstruction statute ''reaches all corrupt conduct capable of producing an effect that prevents justice from being duly administered, regardless of the means employed'').

[22]*Criminal Tax Manual* para. 17.02 (2008).

[23]Some of the obstruction statutes require knowing conduct with the specific intent to obstruct or impede. *See, e.g.*, 18 U.S.C. section 1519.

[24]*United States v. Winchell*, 129 F.3d 1093, 1098 (10th Cir. 1997), *Doc 97-32210*, *97 TNT 227-25*.

[25]*United States v. Ogle*, 613 F.2d 233, 238 (10th Cir. 1979).

[26]*See United States v. Frank*, 354 F.3d 910, 921 (8th Cir. 2004).

[27]*United States v. Barfield*, 999 F.2d 1520, 1525 (11th Cir. 1993).

[28]*Criminal Tax Manual* para. 17.04, citing *United States v. Reeves*, 752 F.2d 995, 998 (5th Cir. 1985).

[29]Townsend et al., *supra* note 9, at 68.

[30]*Reeves*, 752 F.2d at 999, quoting *Ogle*, 613 F.2d at 238; *see also* Eric J. Tamashasky, ''The Lewis Carroll Offense: The Ever-Changing Meaning of 'Corruptly' Within the Federal Criminal Law,'' 31 *J. Legis*. 129, 147 (2004).

[31]Added by section 50(b)(3) of the Criminal Law and Procedure Technical Amendments Act of 1986, P.L. 99-646.

[32]Chapter 73 of Title 18, *i.e.*, the obstruction of justice statutes in sections 1501 through 1521.

[33]H.R. 5241 (132 *Cong. Rec.* 32802, 32805 (1986)).

[34]251 F.3d 941 (11th Cir. 2001).

held that to convict a defendant-lawyer of obstruction of justice, the government must prove that he acted with an improper purpose.[35] The court held that section 1515(c) provides a complete defense to an obstruction charge because a lawyer who is performing bona fide legal representation does not, by definition, have an improper purpose. For the safe harbor to apply, the defendant-lawyer must affirmatively show that he is a licensed attorney who was validly retained to perform the legal representation that constitutes the charged conduct.[36] The safe harbor applies, and the defendant-lawyer is entitled to be acquitted, unless the jury finds that the government proved beyond a reasonable doubt that his conduct did not constitute lawful, bona fide legal representation.[37]

Notably, there is no such legal services safe harbor in or applicable to section 7212. Thus, if an attorney were charged with obstructing or impeding the IRS under section 7212, there is no statutory exception for attorneys providing bona fide legal services. That said, if any attorney were in fact charged, the logic of section 1515(c) and *Kloess* would be applicable. If a lawyer is undertaking bona fide legal representation on behalf of a client, he cannot have acted corruptly.[38]

Stevens

Lauren Stevens was charged in a six-count indictment with two counts of obstruction of justice[39] and four counts of making false statements.[40] The indictment stems from her representation of GSK in a civil investigation by the FDA. The FDA began investigating GSK's marketing of the drug Wellbutrin in 2002. The FDA had approved the marketing and use of Wellbutrin as an antidepressant. However, the FDA suspected that the drug was also being marketed as a weight-loss and anti-obesity drug, uses for which it did not have FDA approval — so-called off-label marketing. As GSK's associate general counsel, Stevens was the representative of GSK who dealt most directly with the FDA.[41]

Under an informal request for information (that is, not under a subpoena), GSK provided the FDA with information regarding its promotional and marketing efforts of Wellbutrin, including its marketing of the drug to doctors. Believing that Stevens's responses on behalf of GSK contained misleading and false information and that she falsified and altered documents in an effort to conceal GSK's promotional and marketing efforts, the DOJ indicted Stevens for obstruction and making false statements.

Stevens was charged with obstruction of justice in violation of 18 U.S.C. section 1512 for allegedly making false and misleading statements to the FDA and for allegedly withholding and concealing documents and other information about the GSK's promotional activities for Wellbutrin. In several letters, Stevens had informed the FDA of GSK's marketing and promotional activity. She provided some information but did not provide the slide decks used by doctors to promote Wellbutrin, even though she had apparently agreed to provide those documents to the FDA. Those slide decks showed that doctors had indeed promoted Wellbutrin for non-approved uses. In a May 21, 2003, letter to the FDA, Stevens wrote: ''With this final submission, we complete our production of information and documents in response to the requests'' made by the FDA. The indictment alleged that by withholding and concealing the slide decks and related information, Stevens obstructed an official proceeding conducted by the FDA.[42]

Stevens was also charged with obstruction for providing a spreadsheet that was redacted to remove information regarding gifts and entertainment provided to attendees at GSK promotional programs. The indictment alleged that attendees received gifts, entertainment, and other compensation as part of Wellbutrin promotional activities. The indictment alleged that in providing documents that were altered and that covered up evidence that GSK's promotional activities included gifts and entertainment to attendees, Stevens intended to impede the FDA's investigation.[43]

The allegedly obstructive conduct was also the basis of the false statement charges. The indictment alleged that Stevens made false statements in saying that ''GSK has not developed, devised, established, or maintained any program or activity to promote, either directly or indirectly, the use of Wellbutrin SR to achieve weight loss or treat obesity.'' According to the indictment, this statement was false and misleading in that Stevens knew its

[35]*Id.* at 948. The defendant in *Kloess* was charged with a violation of 18 U.S.C. section 1512(b)(3).

[36]*Id.*

[37]*Id.* at 949.

[38]This defense, like the definition of corruptly, is circular. But sauce for the goose. . . .

[39]Indictment, *United States v. Stevens*, No. RWT-10-CR-0694 (D.C. Md. 2011). Stevens was charged with obstruction of an official proceeding, in violation of 18 U.S.C. section 1512 and falsification and concealment of documents in violation of 18 U.S.C. section 1519. Each count also contained an aiding and assisting charge under 18 U.S.C. section 2.

[40]*See* 18 U.S.C. section 1001.

[41]But other representatives included other in-house lawyers at GSK and outside counsel from King & Spalding.

[42]Indictment, *supra* note 39, at 6-13.

[43]*Id.* at 14.

speakers had made numerous presentations during which the non-approved uses of Wellbutrin were discussed. Finally, the indictment alleged that statements regarding GSK's marketing of Wellbutrin were false and misleading. For example, Stevens wrote in a letter to the FDA: ''Although there were isolated deficiencies, the objective evidence clearly demonstrates that GSK has not developed, maintained, or encouraged promotional plans or activities to promote, directly or indirectly, Wellbutrin SR for weight loss, the treatment of obesity, or any other unapproved indication.'' The indictment alleged that this statement was false in that GSK's deficiencies were not ''isolated'' and that GSK maintained extensive promotional plans that promoted Wellbutrin for non-approved uses.[44]

At the close of the government's case, Stevens moved for a judgment of acquittal.[45] In its motion, the defense made several arguments. First, it asserted that the responses to the FDA were not misleading or false and did not conceal anything. The defense contended that the FDA knew about the numerous speakers who made promotional presentations, that Stevens never said she was providing all the slide decks, and that the FDA knew she was not providing them.[46] The defense argued that the spreadsheet regarding compensation to attendees did not conceal information about gifts and entertainment provided to attendees and that it was not misleading, because the spreadsheet did not purport to provide all information about everything given to attendees. Indeed, the letter from GSK told the FDA that the spreadsheet would provide ''databases listing all speaker events including the date, location, speaker, and where available, the number of attendees.'' Thus, according to the defense, GSK provided the FDA with exactly what it promised: information about date, location, speaker, and the number of attendees. The letters made no representation that any and all information about entertainment activities would be included.[47]

Regarding the alleged false statements, the defense asserted that taken in context, the statements were not false and that the letters from GSK to the FDA admitted that speakers used off-label marketing. Thus, the statements the indictment alleged were false and misleading were, according to the defense, merely legal arguments and well within the bounds of effective advocacy.[48]

Stevens also argued that she was entitled to the protection of the 18 U.S.C. section 1515(c) safe harbor, because the letters and documents were provided during the course of her bona fide legal representation of her client, GSK. As a result, she could not be guilty of the two obstruction charges. Finally, the defense argued that Stevens acted in good faith in making her responses and therefore did not have the requisite mental state necessary for conviction of any of the charged offenses. All the responses were made after consultation with outside counsel, and all her actions were done innocently, the defense said.[49]

The district court,[50] after stating that it viewed the evidence in the light most favorable to the government, granted the defendant's motion. It held 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'' and that ''it would be a miscarriage of justice to permit this case to go to the jury.''[51] The court therefore concluded that ''the defendant in this case should never have been prosecuted and she should be permitted to resume her career.''[52]

The court's dismissal was based on two failures in the government's case. First, the court held that Stevens was entitled to the benefit of section 1515(c). It concluded that the evidence showed ''a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and respond on behalf of the client.''[53] The court continued:

> The responses that were given by the defendant in this case may not have been perfect; they may not have satisfied the FDA. They were, however, sent to the FDA in the course of her bona fide legal representation of a client and in good faith reliance of both external and internal lawyers for GSK.[54]

The court stated that GSK did not come to Stevens and say, ''Assist us in committing a crime or fraud.'' Rather, the company came to her for assistance in responding to a letter from the FDA. As a result, her actions were in the course of bona fide

[44] *Id.* at 15-20.
[45] *See* Fed. R. Crim. P. 29.
[46] Defendant's Motion for Judgment of Acquittal at 5-7.
[47] *Id.* at 11-14.
[48] *Id.* at 18-30.
[49] *Id.*
[50] Judge Roger W. Titus of the U.S. District Court for the District of Maryland.
[51] Order, *supra* note 1, at 8-10.
[52] *Id.* at 10.
[53] *Id.* at 5
[54] *Id.*

legal representation, and the safe harbor of section 1515(c) was an absolute bar to prosecution.[55]

The above-quoted statement regarding Stevens's reliance on both external and internal lawyers for GSK provided part of the reasoning for the court's second basis for granting the motion for acquittal. The court found that the evidence showed Stevens sought and obtained the advice and counsel of numerous lawyers, including the law firm of King & Spalding. The court also held that Stevens made full disclosure to the lawyers and that every letter she wrote was done by a consensus. The court further said that while some of the statements may not have been 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.''[56]

The court also said that the evidence, taken as a whole, did not demonstrate an attempt by Stevens or GSK to mislead the FDA or to conceal the off-label marketing of Wellbutrin. The court said that communications clearly disclosed to the FDA that speakers had been provided with an off-label slide deck and that numerous speaker presentations had included off-label topics. Thus, the court agreed that taken as a whole and in context, the statements made by Stevens were not false.[57]

This is not a case in which documents were destroyed or evidence was made unavailable to government investigators.[58] With additional questioning and requests, the FDA could have obtained the information. Indeed, according to the defense's motion, Stevens repeatedly asked for and expected to meet with the FDA in which GSK would provide additional documentation, including the slide decks.[59] An in-person meeting would have allowed Stevens and the other GSK lawyers to put the damaging information in context and would obviously have been a preferable way to communicate damaging information. Even in reading the indictment, one is struck that the statements made by or attributed to Stevens were zealous advocacy and not fraudulent statements.[60]

Implications of *Stevens* for Tax Lawyers

During the course of an audit by the IRS, particularly an eggshell audit, tax lawyers face many difficult choices. They have an ethical duty to put their client's case in the light most favorable to the client. But when the client has engaged in improper, and perhaps illegal, conduct, what strategy should be pursued in those circumstances? Should the taxpayer cooperate and come clean with the IRS? Should the taxpayer and his counsel circle the wagons and refuse to provide anything? Should counsel attempt to put the facts and evidence in the light most favorable to the client and hope the revenue agent resolves the matter civilly? These are some of the most difficult questions a tax lawyer faces in practice, and similar issues are confronted in every case in which an attorney represents a client before the IRS or another government agency. Many hours are spent not on researching the law, but on strategy and determining the best course of action.[61] Lawyers should not have to worry about being indicted for obstruction if they are perhaps overzealous in the representation of their clients.

The government has a legitimate interest in pursuing anyone, including an attorney, who has engaged in fraudulent or obstructive conduct. The DOJ has rightly prosecuted attorneys and other tax professionals who have abused the tax system and promoted fraudulent tax schemes.[62] Lawyers *should* fear prosecution if they knowingly engage in criminal conduct. However, as the court in *Stevens* stated:

> A lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud. There is an enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice.[63]

Congress, like the court in *Stevens*, recognized the ''enormous potential for abuse'' that a prosecution of an attorney can raise. Section 1515(c) is the result. As discussed above, that subsection contains a broad prohibition against *any* punishment stemming from the providing of ''lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.''[64]

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[55]*Id.* at 6.
[56]*Id.* at 7.
[57]*Id.* at 7-8.
[58]*Cf. Arthur Andersen*, 544 U.S. 696.
[59]*See* Def. Ex. 200 (June 5, 2003) (E-mail from L. Stevens to GSK/K&S: ''Rebecca Williams responded to my voicemail to her requesting a teleconference to discuss our submissions on the Wellbutrin matter. . . . They will plan to follow up with us as they have additional questions or if there is anything else they need to talk to us about.'').
[60]Quibbling with the phrase ''isolated deficiencies,'' which Stevens used to describe GSK's marketing program, is one thing. Charging a lawyer with a felony for what is obviously legal argument is particularly troubling.
[61]As I tell my students, the law is the easy part. It is all the stuff after you know the law that is the more difficult, and the more interesting, part of law practice.
[62]*See, e.g.*, *United States v. Daugerdas*, No. S309 Cr. 584 (S.D.N.Y.).
[63]Order, *supra* note 1, at 9-10.
[64]18 U.S.C. section 1515(c).

Of course, section 1515(c) did not prevent the prosecution of Stevens, just her conviction. And, as indicated, section 1515(c) does not apply to prosecutions brought under section 7212. Thus, as in many instances, the proper administration of justice in these matters is left to the judgment of prosecutors, including high-level appointees within the DOJ.[65] It should be noted that although the case was prosecuted in the district court of Maryland, the indictment was not signed by the U.S. attorney for that district, as would normally be the case. Maryland's U.S. attorney, Rod J. Rosenstein, apparently refused to sign the indictment because he did not believe there was sufficient evidence to support the prosecution.[66] Instead, the indictment was signed on behalf of the first assistant U.S. attorney for the district of Maryland. Moreover, the DOJ's Criminal Division did not approve the indictment either — it was signed on behalf of the assistant attorney general of the Civil Division.[67]

It might be argued that *Stevens* is simply a one-off case and that one should not read too much into the prosecution. However, that does not appear to be the case.[68] *Stevens* was apparently designed to send a message to lawyers and other employees in the healthcare industry.[69] Thus, the enormous potential for abuse cannot be dismissed as mere melodrama.

This potential for abuse requires vigilance by career and appointed prosecutors, who must use sound judgment and discretion in exercising the enormous power they have been given by our system.[70] When that judgment fails, judges must have the courage to dismiss indictments and grant acquittals. As Judge Roger W. Titus in *Stevens* stated:

> There are serious implications for the practice of law generated by this prosecution. . . . The institutional problem that causes me a great concern is that while lawyers should not get a free pass, the 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.[71]

Further reform by Congress may be necessary, and this issue should be championed by the ABA. Lawyers should be mindful of this potential for abuse and protect against it. However, they cannot live in fear or be intimidated. In reaction to *Stevens*, one firm stated:

> Simply put, in the course of fulfilling their corporate and professional responsibilities, in-house counsel may become targets. And in-house counsel responding to government inquiries may find themselves torn between their corporate obligations and the risks they may face as individuals.[72]

This should not be a choice lawyers have to face. For the legal system, including the tax system, to work effectively, lawyers opposing the government must be free to present the facts and law of their client's case in the light most favorable to the client.

Nevertheless, given the uncertainty that prosecutions like *Stevens* create, lawyers dealing with the IRS and other federal agencies must take appropriate precautions. They must memorialize everything provided to the IRS and, more importantly, everything that is not provided. If possible, lawyers should consult with co-counsel on what to give to the IRS and how documents and arguments should be presented. The goal is to demonstrate that the lawyer acted in good faith and made the statements as part of his bona fide legal representation. Although the safe harbor of 18 U.S.C. section 1515(c) does not apply to section 7212 prosecutions, proof that the lawyer acted in good faith in providing legal representation to a client will go a long way to

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[65]*See Wayte v. United States*, 470 U.S. 598, 607-608 (1985) ("In our criminal justice system, the Government retains 'broad discretion' as to whom to prosecute. As long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.") (internal citations omitted).

[66]Sue Reising, "Why Didn't the Maryland U.S. Attorney Sign the Lauren Stevens Indictment?" *Corporate Counsel*, June 20, 2011, *available at* http://www.law.com/jsp/cc/PubArticleCC.jsp?id=1202497761188.

[67]That said, the assistant attorney general of the civil division, Tony West, does have significant experience as a federal prosecutor.

[68]*See, e.g.*, Jonathan N. Rosen, "Deputization of In-House Counsel and the Brave New World of Internal Investigations," 25 *Crim. Just.* 5 (Fall 2010).

[69]Duff Wilson, "Ex-Glaxo Executive Is Charged in Drug Fraud," *The New York Times*, Nov. 9, 2010.

[70]Fortunately, any indictment under the omnibus clause of section 7212 requires the approval of the assistant attorney general or deputy assistant attorney general of the Criminal Tax Division, which should lessen the chance of an inappropriate charge against an attorney. *See* DOJ Tax Division Directive 138 (July 14, 2010).

(Footnote continued in next column.)

[71]Order, *supra* note 1, at 9.

[72]Akin Gump Strauss Hauer & Feld LLP, "Criminal Liability for In-House Counsel," Newsletters and Alerts, *available at* http://www.akingump.com/communicationcenter/newsalertdetail.aspx?pub=2615.

demonstrate the lawyer did not act corruptly. As the court in *Kloess* held, a lawyer who is performing bona fide legal representation does not, by definition, have an improper purpose and cannot have acted corruptly.[73]

[73]*Kloess*, 251 F.3d at 948.