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SPEAK NO EVIL: SETTLEMENT AGREEMENTS CONDITIONED ON NONCOOPERATION ARE ILLEGAL AND UNETHICAL

Stephen Gillers*

I. INTRODUCTION

A company’s former officer sues it. She claims she was fired for bad reasons including discrimination and in retaliation for her insistence that the company cease violating certain environmental laws and correct harm already caused. Within months, the parties agree on a settlement that will include a cash payment to the former employee. The company also wants a promise that the former employee will not voluntarily cooperate, or offer to cooperate, with either government law enforcers (civil or criminal) or lawyers for civil plaintiffs who may thereafter investigate the alleged environmental violations. If questioned, the former employee would have to refuse to reply and could not say why. If the former employee violated this promise, she would be in breach of the settlement contract and she would have to return the money. The promise is not limited to keeping the amount of the settlement secret. It covers all information about the company known to the former employee. However, if subpoenaed, the former employee would be free to comply with any legal obligation and would not thereby violate the

* Vice Dean and Professor of Law, New York University School of Law. This Article is a belated submission to the Hofstra Legal Ethics Conference held September 9-11, 2001. I wish to thank Judge John Gleeson, Professors James Jacobs and Stephen Schulhofer, and Barbara S. Gillers, Esq., for their comments on an earlier draft of this Article. As usual, surviving errors are my responsibility.
agreement. The company asks its lawyers to negotiate for and draft such a provision. Can the company lawfully seek this promise? Can its lawyer assist it in obligating the former employee to refrain from voluntarily providing information of civil or criminal wrongdoing to the government or other persons with a claim? This Article will maintain that under federal law and the ethics rules in most United States jurisdictions, the answer to both questions is no.

Settlements of claims do sometimes have confidentiality promises as broad as the one imagined here. We do not know their extent, of course, because it is in the very nature of the promises that they are meant never to be discovered. Probably many lawyers assume that these promises are perfectly lawful. It is easy to see why. With rare exception, no one has to report to the government or to a prospective civil claimant facts that may reveal civil or criminal wrongdoing. It would seem to follow, then, that as long as the former employee in my example has no legal duty to report what she knows or to cooperate if asked, bargaining for this promise is legitimate. The company and its lawyer are merely

1. Susan Koniak has looked at how the law treats payments for silence outside litigation. She has argued that rules that make these promises unenforceable, and sometimes criminal, should also apply when the promise is in a settlement agreement, although she has not argued that secrecy agreements amount to obstruction of justice. See Susan P. Koniak, Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?, 30 Hofstra L. Rev. 783, 801-02 (2002); see also Alan E. Garfield, Promises of Silence: Contract Law and Freedom of Speech, 83 Cornell L. Rev. 261, 266 (1998), which addresses the enforceability of contractual promises of silence outside litigation and in settlement agreements. Unlike Professors Garfield and Koniak, who mention obstruction of justice in passing, I will here make a focused argument that the federal obstruction laws criminalize a request for a contractually binding noncooperation promise, as well as the promise itself. I will also rely on ABA Model Rule 3.4(f) for the conclusion that a lawyer’s noncooperation request is unethical in jurisdictions with this rule.

2. The most prominent recent example of confidentiality agreements are those now coming to light in connection with allegations of priest sexual abuse. See, e.g., Richard Nangle, Deal Mandated Silence: Accuser Not Allowed to Discuss Abuse Allegations, Worcester Telegram & Gazette, Apr. 1, 2002, at A1 (reporting on a settlement in a priest sexual abuse case that required the victim “and his lawyers [to] ask the diocese for permission before discussing his allegations with any governmental authorities”); Aamer Madhani, Breaking a Vow of Silence on Abuse, Chi. Trib., Apr. 14, 2002, at Cl (“McGowan is still bound by the terms of [a] settlement, under which he and the archdiocese agreed not to talk publicly about his allegations or the money he received.”); Jim Fitzgerald, Archdiocese Frees Priests’ Accusers From Silence Vow, Rec. (Bergen County), Apr. 25, 2002, at A15 (quoting a lawyer who has represented victims of priest sexual abuse for twenty years as saying that in many church cases the confidentiality promise extends to the underlying facts); Elizabeth Mehren, Milwaukee Archbishop Denies Abuse Charges, L.A. Times, May 24, 2002, at A22 (discussing a sexual abuse victim, who chose to speak out and acknowledge that he had accepted $450,000 under a confidentiality agreement that required him “to stay silent, not to speak out about what was going on”); Adam Liptak, Price of Broken Vows of Silence, N.Y. Times, May 26, 2002, at A20 (reporting on settlement with victim of abuse whose claim was barred and therefore “valueless as an economic matter. What he was paid for, then, was silence.”).

asking the plaintiff to do what she may lawfully do. I have made the same assumptions: If an agreement is legal, a lawyer is obligated to attempt to achieve it, and an agreement not to do what a person may legally refuse to do must be legal, even if disreputable. As it happens, however, the question is not quite so simple.4

I conclude that contractually binding noncooperation agreements, when made for the purpose of denying others information that could support civil or criminal liability, obstruct justice under federal law.5 For that reason alone, courts should not enforce them or “so order” them. Lawyers who aid clients in reaching noncooperation agreements may be acting unlawfully.6 While I believe my conclusion is correct under the authorities I discuss, I recognize that the practice of asking for and making noncooperation promises is common, at least in cases in which the defendant is exposed to the risk of additional claims from others who have been harmed (or stand to be harmed) by the conduct that is the subject of the settled claim. I also recognize that no federal case has given a four-square holding on the precise question posed here, although a few cases have come so close that any contrary argument would appear doomed. Therefore, I also talk about risk. Lawyers have a professional obligation to assess the risk of illegality when recommending actions to their clients.7

4. I will speak of the defendant requesting the noncooperation promise and of the defense lawyer assisting it. The defendant has an interest in silencing the plaintiff. The plaintiff is not likely to request a limit on his or her right to cooperate with others. However, for the reasons discussed at note 62, infra, a plaintiff who makes, and a lawyer who helps the plaintiff make, a noncooperation promise may also run afoul of obstruction statutes. One note of caution: A less charitable view of plaintiffs’ motives (or those of their counsel) finds some support in my own discussions. In this view, plaintiffs and their lawyers want to be free to trade noncooperation for higher settlements. A promise of silence can enrich a plaintiff at the expense of those who may yet be harmed or those ignorant of information that could help establish a claim for concluded harm. It should give us pause that the same conduct outside the settlement process may be extortionate. See, for example, N.Y. PENAL LAW § 155.05(2)(e)(vii) (McKinney 1999), defining as extortion obtaining property under threat that a person will otherwise “[t]estify or provide information or withhold testimony or information with respect to another’s legal claim or defense.”

5. This Article will address the question it raises under the federal obstruction statutes. These statutes envision obstruction of a federal entity—a court, an agency, the Congress. Noncooperation agreements that keep information from nonfederal entities will be subject to local obstruction laws. These may or may not parallel the federal statutes and the conduct discussed here may or may not violate those local laws. This Article is limited to confidentiality promises in settlement agreements. Broader issues arise from the intersection of legal services and criminal law. Two excellent discussions of those issues are Bruce A. Green, The Criminal Regulation of Lawyers, 67 FORDHAM L. REV. 327 (1998); and Charles W. Wolfram, Lawyer Crimes: Beyond the Law?, 5 VAL. U. L. REV. 73 (2001).

6. Whether they are or not will depend on their specific intent. See infra text accompanying notes 72-109.

7. See infra text accompanying notes 55-71.
II. PRELIMINARY DISTINCTIONS

It is critical at the outset to make certain distinctions in light of the confusion that sometimes besets these issues. The first distinction is among the techniques for imposing secrecy obligations. A second distinction is among the various kinds of information a litigant may wish to keep secret through these techniques. This Article addresses only one technique and only one category of information. Regarding the first distinction, a court may seal its own file. The effect is to prevent third persons from seeing whatever may be in the file. A court that routinely (i.e., without some justification) seals its files at the request of the parties acts contrary to policies that inform the common law presumption of public access to court records. Separately, a judge may order the parties to abide by a secrecy provision in their settlement agreement. The effect is to make breach of the agreement a violation of the court order and to subject the violator to sanctions, including contempt. Last, whether or not a court will cooperate in either of these ways, the parties can contract for confidentiality as part of their settlement. Those contracts are the subject of this Article. Regarding the second distinction, my focus is solely on those noncooperation agreements whose purpose is to prevent the plaintiff from voluntarily communicating information about conduct to third persons in order to prevent discovery of the conduct and reduce the risk of liability. That is how the term "noncooperation agreement" should be understood in this Article. (It should be clear that a prohibition on noncooperation agreements does not create an obligation to volunteer information. It merely frees a person from contractual limitations.) Excluded from my analysis are promises to protect other kinds of information, for example trade secrets, personal privacy, and amounts paid in settling a claim. Confidentiality promises encompassing such information ordinarily have a proper purpose under the obstruction statutes and, in any event, generally do not describe information tending to establish civil or criminal liability.

9. See, e.g., Littlejohn v. Bic Corp., 851 F.2d 673, 677-78 (3d Cir. 1988) ("The public’s common law right of access to judicial proceedings and records . . . is beyond dispute" and "encompasses the right of the public to inspect and to copy judicial records . . . which antedates the Constitution" and "promotes public confidence in the judicial system") (citations omitted).
11. See Garfield, supra note 1, at 314-16; see also infra text accompanying notes 44-54 on the statutory requirement of an "improper purpose."
III. OBSTRUCTION OF JUSTICE UNDER FEDERAL LAW

The federal criminal code describes several ways in which justice may be obstructed. Unfortunately, the obstruction statutes do not present a single coherent vision. They overlap and are frustrating in their lack of specificity and use of general terms.

Sections 1503(a), 1505 and 1512(b) of Title 18 most concern us here. These sections can all be read to apply to the conduct of a person who asks another party to a settlement agreement to refrain from voluntarily cooperating with others. Section 1512(b) may be the most instructive because its sole focus is the situation in which one person acts in a way that does or could affect the behavior of another person with the result that information is kept from an official proceeding or law enforcement. To pose the questions as precisely as possible in terms of the language of these three statutes—and ignoring important but, for my purposes, irrelevant differences between them with regard to timing of the request and the governmental functions they protect—

12. Section 1503(a), the most litigated of the obstruction statutes, provides in relevant part that it is a crime if a person "corruptly ... influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice ..." 18 U.S.C. § 1503(a) (2000). Section 1505 has a parallel provision whose focus is protection of agency and congressional activity. See id. § 1505. Section 1512(b), in relevant part, makes it a crime if a person "corruptly persuades another person, or attempts to do so, ... with intent to ... influence, delay, or prevent the testimony of any person in an official proceeding; ... cause or induce any person to ... withhold testimony ... from an official proceeding; ... or ... hinder, delay, or prevent the communication to a law enforcement officer ... of information relating to the commission or possible commission" of a violation of federal law. Id. § 1512(b)(1)-(3). Although § 1503 is most obviously directed at the person who impedes the administration of justice by, for example, lying or destroying documents, it can also be used to cover the conduct of a person who causes a second person to impede the administration of justice, as by suggesting that the second person lie to a grand jury. See United States v. Ladum, 141 F.3d 1328, 1338 (9th Cir. 1998), cert. denied, 525 U.S. 1021 (1998) (both § 1503 and § 1512 can apply to "witness tampering"). Contra United States v. Masterpol, 940 F.2d 760, 762 (2d Cir. 1991) (holding that witness tampering must now be charged under § 1512). Sections 1503 and 1512(b) protect both criminal and civil judicial proceedings. See United States v. Lundwall, 1 F. Supp. 2d 249, 251 (S.D.N.Y. 1998) (§ 1503 forbids obstruction of civil as well as criminal cases); see also infra note 14, for the definition of "official proceeding" in § 1512(b).


14. With regard to timing, both § 1503(a) and § 1505 require a then pending event. See United States v. Price, 951 F.2d 1028, 1030-31 (9th Cir. 1991) (there must be a then pending proceeding before a department or agency of the United States for § 1505 to apply). Section 1512, by its terms, does not require a pending proceeding. See 18 U.S.C. § 1512(c)(1) ("[A]n official proceeding need not be pending or about to be instituted at the time of the offense" under "this section"); United States v. Frankhauser, 80 F.3d 641, 652 (1st Cir. 1996) (conviction affirmed where defendant "in fact expected a grand jury investigation and/or a trial in the foreseeable future"). With regard to the focus of the governmental function that the several sections are meant to protect, § 1503 is aimed at civil and criminal judicial proceedings and grand juries. See Lundwall, 1 F. Supp. 2d at 253. Section 1505, by its terms, is aimed at proceedings before federal agencies or
they are: If a person, in settling a claim, requests that the claimant make a noncooperation promise on the subject of the claim for the purpose of keeping evidence of actionable conduct from (seriatim) a civil opponent, prosecutor, agency, Congress, or law enforcer, will that person (or the lawyer who aids him) violate:

a. section 1503(a) because the request or securing the promise “corruptly . . . influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice?”

b. section 1505 because the request or securing the promise “corruptly . . . influences, obstructs, or impedes or endeavors to influence, obstruct, or impede the due and proper administration of the law” in a proceeding pending before an executive agency or department or a congressional inquiry or investigation; or

c. section 1512(b) because by making the request or securing the promise the person thereby “corruptly persuades another person, or attempts to do so, [in order to] influence, delay, or prevent the testimony of any person in an official proceeding”; or to “cause or induce any person to . . . withhold testimony”; or to “hinder, delay, or prevent the communication to a law enforcement officer or judge of the United States of information relating to the commission or possible commission of a Federal offense . . . .”

Congress and § 1512(b), by its terms, is aimed at preventing information from reaching “an official proceeding” or a law enforcement officer or a judge of the United States. See 18 U.S.C. §§ 1505, 1512(b). 18 U.S.C. § 1515(a)(1) defines “official proceeding” for purposes of § 1512 as a proceeding before a United States judge or magistrate or other United States judicial officers; a proceeding before Congress; a proceeding before a federal agency; or certain proceedings involving the business of insurance.

15. See id. § 1503(a).
16. Id. § 1505.
17. Id. § 1512(b)(1)-(3). The recently enacted Sarbanes-Oxley Act of 2002 amends the obstruction statutes in two ways relevant here. See Pub. L. No. 107-204, 116 Stat. 745 (2002). Both amendments expand the potential punishment for obstruction from five or ten years in most cases to twenty years. However, both largely duplicate conduct already proscribed in existing statutes. A new § 1512(c) provides:

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.

Id. at § 1102, 116 Stat. at 807. A new § 1519 provides:
Even a quick look at these questions should reveal the centrality of the word "corruptly" in fashioning answers. The acts of influencing, persuading, even impeding are not themselves criminal acts unless accompanied by something additional. I put aside intimidation, threats, and force because my question envisions no such conduct. It envisions only a contractually binding promise to refrain from voluntary cooperation as part of the settlement of a civil claim. So the issue comes down to this: Is such a promise, or the request for it, "corrupt," as that word is used in these statutes, if the purpose is one of those the obstruction statutes forbid?

It is useful to begin (indeed we could almost end) with the First Circuit's broad interpretation of the word "corrupt" as used in § 1503. The court distinguished between means—what the defendant did—and the defendant's motives. The same means may or may not be corrupt depending on the actor's motive. Even lawful means may be corrupt if the ends are improper.

Once it is conceded that the existence vel non of intent under § 1503 is a question of fact for the jury, it remains to define the parameters of behavior that can fairly be labeled as "corrupt," ergo, criminal under the statute.... Courts have tended to interpret the requirement broadly, holding that it applies to the ends of an actor's conduct rather than merely the means.... Thus, any act by any party—whether lawful or unlawful on its face—may abridge § 1503 if performed with a corrupt motive.

Our sister circuits have spoken to this subject with a single voice. "Any corrupt endeavor whatsoever, to 'influence, intimidate or impede any... witness,...' whether successful or not, is proscribed by the obstruction of justice statute." These formulations sound a common theme: they uniformly signal that means, though lawful in themselves, can cross the line of illegality if (i) employed with a corrupt motive,

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 [dealing with bankruptcy], or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both.

Id. at § 802, 116 Stat. at 800.
19. See id.
20. See id.
21. Id. (internal citations omitted).
(ii) to hinder the due administration of justice, so long as (iii) the means have the capacity to obstruct.22

Despite this broad language, two circuit court cases have found the word “corruptly” particularly troublesome.23 Both cases were decided by 2-1 majorities and both have been criticized in other courts. The holdings of both cases are narrow and while neither holding bears directly on the questions here, each deserves attention as a prelude to the broader discussion.

United States v. Poindexter24 was a prosecution under § 1505 for, among other crimes, lying to Congress. The court held that the word “corruptly” in the statute “is too vague to provide constitutionally adequate notice that it prohibits lying to the Congress.”25 The court stressed that “corrupt” can be used in a transitive or intransitive sense.26 In the transitive sense, a person may corrupt another.27 In the intransitive sense, “corruptly” may denote immoral conduct or the corruption of the actor.28 The court allowed that if “corrupting” were read to mean influencing another to violate his legal duty, the statute would avoid vagueness problems.29 But those were not Poindexter’s facts.

Poindexter construed § 1505. But in light of Poindexter, it was reasonable to assume, at least in the District of Columbia Circuit, that “corruptly” might present the same vagueness problems in other obstruction statutes. After Poindexter, Congress amended 18 U.S.C. § 1515 to give “corruptly” a specific definition, though only for purposes of § 1505.30 The amendment defined the word to mean “acting with an improper purpose, personally or by influencing another, including making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.”31

22. *Id.* at 991-92 (internal citations omitted); *see also* United States v. Cueto, 151 F.3d 620, 631 (7th Cir. 1998), *cert. denied*, 526 U.S. 1016 (1999) (quoting *Cintolo*). *Cintolo* upheld the conviction of a criminal defense lawyer who, first, advised a nominal client to assert a Fifth Amendment privilege before a grand jury, and then advised him to refuse to testify after receiving immunity. *See Cintolo*, 818 F.2d at 988. The government charged and the jury found that the lawyer’s motive was to protect others whom the government was investigating. *See id.* at 989.


24. 951 F.2d 369 (D.C. Cir. 1991) (2-1 decision).

25. *Id.* at 379.

26. *See id.*

27. *See id.*

28. *See id.*

29. *See id.*


31. *Id.*
United States v. Kanchanalak, the district court held that this amendment removed any doubt about the congressional desire to reach corruption whether intransitive ("personally") or transitive ("or by influencing another"). The defendant in Kanchanalak argued, however, that the amendment still did "not provide sufficiently specific content to the word 'corruptly' for the reasons articulated by the Court in Poindexter." The court disagreed because "the statute goes on to list the kinds of specific conduct proscribed by Section 1505: 'making a false or misleading statement, or withholding, concealing, altering, or destroying a document or other information.'

The Third Circuit has also had trouble defining "corruptly." United States v. Farrell construed the word as it appears in § 1512(b). The defendant's conviction rested on his request that an alleged co-conspirator not cooperate with the government. The question before the court was whether this request violated the statutory prohibition against "corruptly persuad[ing] another person, or attempt[ing] to do so, ... with intent to ... prevent the communication to a law enforcement officer ... of information relating to the commission or possible commission" of an offense. Was simply asking someone not to cooperate a crime?

The court had no doubt that attempting to "bribe" someone to withhold information or attempting to persuade someone to provide false information would violate the language. But it concluded that the statute "does not include a noncoercive attempt to persuade a coconspirator who enjoys a Fifth Amendment right not to disclose self-incriminating information about the conspiracy to refrain, in accordance
with that right, from volunteering information to investigators. Central to the court’s holding was the fact that the request was made to an alleged co-conspirator with a Fifth Amendment privilege.

It can be argued that discouraging another who possessed no privilege from honoring this civic duty [to provide information about the commission of a crime] involves some culpability not present when coconspirators with Fifth Amendment privileges converse. For this reason, we express no opinion on the applicability of [the statute] to efforts to dissuade someone who is not a participant in a conspiracy, and accordingly has no Fifth Amendment right, not to reveal information about the conspiracy to federal law enforcement officials.

The court subsequently reiterated what Farrell had not decided.

In Farrell, the government argued that a person acted "corruptly" within the meaning of § 1512(b) if he acted with an improper purpose. Nothing more was required. The court disagreed. While accepting this definition of "corruptly" for purposes of § 1503, the court’s remarkably close textual analysis of § 1512(b) led it to conclude that the statute’s structure did not permit a similar definition of the word there. It required something more. In reaching this conclusion, the Third Circuit

40. Id.
41. See id. at 489.
42. Id. at 489 n.3. Evidence at the trial, which was without a jury, would also have supported a conclusion that the defendant asked his co-conspirator to lie. However, the trial judge did not rely on this evidence in convicting the defendant. After the Third Circuit reversed for the reasons discussed in the text, it remanded the case to the trial court to determine whether the evidence supported the government’s claim that the defendant had asked the co-conspirator to lie. See id. at 491. On remand, the trial court held that the evidence did support this theory and reinstated the guilty verdict. See United States v. Farrell, No. CRIM.A. 95-453, 1998 WL 404518, at *2 (E.D. Pa. July 14, 1998).
43. See United States v. Davis, 183 F.3d 231, 249 n.5 (3d Cir. 1999). Davis also held that a "malicious purpose" may not be "corrupt" within the meaning of the statute. See id. at 250. Other courts have held that advising someone to assert the Fifth Amendment privilege may be corrupt depending on motive. See United States v. Cintolo, 818 F.2d 980, 992-93 (1st Cir. 1987) (collecting cases and concluding that such advice may be corrupt even if the advisor is the lawyer for the advisee).
44. See Farrell, 126 F.3d at 489.
45. See id. at 490. The Second Circuit’s interpretation of “corruptly” for purpose of § 1503 was "entirely appropriate given the structure of that statute,” the court wrote. Id. If the word “were not so construed in § 1503, the statute would have no element of mens rea.” Id. In § 1512(b), however, other words fulfilled the mens rea requirement. Reading “corruptly” as requiring only “‘an improper purpose’” would therefore “render[] the term surplusage.” Id. In other words, because the balance of § 1512(b), without the word “corruptly,” already required “an improper purpose,” the court reasoned that addition of the word “corruptly” as a further element of the crime meant that the government had to prove more than that the defendant had an improper purpose in order to establish a violation of this statute. Even if this was not an inescapable conclusion, the court wrote, “the rule of lenity requires its adoption in this case.” Id. at 489. Offering “to reward financially a
disagreed with the Second Circuit\textsuperscript{46} and the Eleventh Circuit later disagreed with it.\textsuperscript{47} Both the Second and Eleventh Circuits have defined “corruptly” as used in § 1512(b) to mean “motivated by an improper purpose.”\textsuperscript{48} But in both circuits, the conduct of the “corrupt persuader” went beyond merely asking another person to withhold information. In \textit{Shotts}, the defendant’s statement to his secretary could be heard as “an attempt to frighten [her] into not talking to the FBI.”\textsuperscript{49} In \textit{Thompson}, the jury could have found that the defendant asked another person to lie to the grand jury.\textsuperscript{50} In other words, while both circuits disagree with the textual analysis that led the Third Circuit to read the word “corruptly” in § 1512(b) as requiring more than “an improper purpose,” and while both circuits (the Eleventh explicitly and the Second by implication) rejected \textit{Poindexter}’s conclusion that “corruptly” in § 1505 was unconstitutionally vague, at least as used in § 1512(b),\textsuperscript{51} neither circuit’s...
opinion goes so far as to hold that merely asking someone not to cooperate would be "corrupt" within the meaning of the obstruction statutes. That is the question that the Third Circuit left open in Farrell and Davis. Nevertheless, the broad language of both Thompson and Farrell endorse the conclusion that making such a request could be an "improper purpose" and therefore corrupt. This is how the Ninth Circuit has read the cases.

The lesson of these cases is that a party who requests or makes a contractually binding noncooperation promise as part of a settlement agreement, and a lawyer who assists that party, should recognize that the conduct may be held illegal under one of the obstruction statutes. While this risk may seem modest if a person merely asks another to refuse voluntary cooperation, it is high if the request is made as part of a settlement agreement. A settlement agreement presumes that the plaintiff is getting something of value in exchange for giving up claims or rights. A noncooperation agreement gives up the right voluntarily to provide the government and private parties with information about civil or criminal misconduct. Giving someone a financial reward to induce noncooperation is unlawful. It is therefore but the smallest of steps, and

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Thompson as rejecting Poindexter's analysis in the context of a § 1512(b) prosecution). But even the D.C. Circuit has limited Poindexter to § 1515, see note 32 supra, and Congress appears to have corrected the problem Poindexter identified. See note 17, supra.

52. See Shotts, 145 F.3d at 1300; Thompson, 76 F.3d at 452.

53. See supra text accompanying notes 36-43.

54. The Ninth Circuit identifies "a difference in approach among the circuits about whether merely attempting to persuade a witness to withhold cooperation or not to disclose information to law enforcement officials—as opposed to actively lying—falls within the ambit of § 1512(b)." United States v. Khatami, 280 F.3d 907, 913 (9th Cir. 2002), cert. denied 122 S. Ct. 1940 (2002). Khatami cites Thompson, Shotts, and Farrell, id. at 912, but explicitly contrasts only Shotts and Farrell. See id. at 913. But as stated above, text accompanying note 42, Farrell cannot be said to have gone this far since the court emphasized that the request was made to a co-conspirator; and the facts of Shotts did not require the Eleventh Circuit to reach the issue. See supra text accompanying note 49. In any event, the Ninth Circuit in Khatami concluded that it "need not join in this debate to resolve the case before us" because there was sufficient evidence that the defendant "encouraged the witness to lie." 280 F.3d at 913-14.

55. United States v. Farrell, 126 F.3d 484, 488 (3d Cir. 1997) ("[A]ttempting to bribe someone to withhold information ... constitute[s] 'corrupt persuasion' punishable under § 1512(b).'")); Khatami, 280 F.3d at 913 ("Attempting to persuade a witness to give false testimony and bribing a witness to withhold information are both forms of noncoercive conduct that fall within the reach of § 1512(b)"). In Khatami, 280 F.3d at 912, and in United States v. Kulecyk, 931 F.2d 542, 544 n.2, 546 n.7 (9th Cir. 1991), the Ninth Circuit traced the history of § 1512(b), which prior to a 1988 amendment, had been held not to reach noncoercive and nonmisleading efforts to persuade another person to lie or to bribe another person to withhold evidence. See, e.g., United States v. King, 762 F.2d 232, 236-37 (2d Cir. 1985), cert. denied 475 U.S. 1018 (1986). The 1988 amendments to § 1512(b), which added the words "corruptly persuades," were meant "to address the gap identified by the Second Circuit in King and to provide an explicit textual hook for
logically no distance at all, to conclude that making or asking for a contractually binding noncooperation pledge as part of the consideration in a settlement agreement, or assisting a client in doing so, is also a crime. And if this conduct is unlawful, then it would also be unethical for the lawyer to assist it.\textsuperscript{56}

Consider this example. Strolling in the park, a person sees an assault. To reduce the likelihood of criminal prosecution, the offender offers the eyewitness $10,000 not to report what she saw and to refuse to cooperate if questioned unless subpoenaed. That offer and its acceptance would be unlawful even though the eyewitness is under no obligation to cooperate voluntarily.\textsuperscript{57} The offender would have “corruptly persuaded” the eyewitness to withhold evidence. (The recipient of the money may separately violate § 1503).\textsuperscript{58} Now assume instead that the same offer is made to the victim of the assault as part of a settlement of her civil claim. Is it legal? I suggest that if the payment for the eyewitness’s promise is illegal, so is the payment for the victim’s promise. A response might be that the payment to the victim is part of a package of promises, including a general release of her claims, and not explicitly for the noncooperation promise. But should that matter? Would the conduct become illegal only if part of the payment were earmarked as an exchange for noncooperation? It should not matter how the payment is characterized. We must assume that the agreement will exact a penalty (perhaps disgorgement of some or all of the payment) if the victim violates the noncooperation pledge.\textsuperscript{59} The fact of the disgorgement

\textsuperscript{56} See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.2(d) (2001-02) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .”). See also MODEL RULES OF PROF’L CONDUCT R. 8.4 (2001-02), which makes it professional misconduct for a lawyer to “(b) commit a criminal act that reflects adversely on the lawyer’s . . . fitness as a lawyer . . . .; [or] (d) engage in conduct that is prejudicial to the administration of justice.” Separately, the conduct would run afoul of Model Rule 3.4(f). See MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2001-02) and infra text accompanying notes 64-66.

\textsuperscript{57} See supra note 55.

\textsuperscript{58} Section 1503 makes it a crime if a person “corruptly . . . obstructs, or impedes . . . the due administration of justice.” 18 U.S.C. § 1503 (2000). The term “corruptly” has been interpreted “to mean motivated by an improper purpose” in the context of §§ 1503 and 1512(b). See United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996). Financially rewarding silence is corrupt and therefore for an improper purpose within the meaning of § 1512(b). See supra text accompanying note 39 and 55; United States v. Walasek, 527 F.2d 676, 679 n. 9 (3d Cir. 1975). If the party making the payment is corrupt and violates § 1512(b) then surely the recipient who agrees to withhold his or her testimony for money violates § 1503.

\textsuperscript{59} See Laurie Goodstein, Albany Diocese Settled Abuse Case For Almost $1 Million, N.Y. TIMES, June 27, 2002, at B1 (reporting on the settlement in a priest sex abuse case in which the
necessarily means that the victim has been paid for the pledge. In any event, I am presuming that the noncooperation promise is part of what purports to be a binding contract, giving the defendant a breach of contract claim and attendant remedies if the promise is broken.

Even so, is it possible to make the slightly different argument that seeking a noncooperation promise as part of a settlement is not "corrupt" because the dominant purpose is not "improper" but rather to resolve a claim? Settlement of a claim is surely a proper purpose. But a claim can be settled without a noncooperation promise. The first purpose is retrospective and meant to achieve justice. The second purpose is prospective and meant to "deliberately . . . obstruct[]" and interfere[] with the administration of justice." To contend otherwise, one must make a legal distinction between payment to the victim in my park example and the illegal payment to the eyewitness. Money paid for the victim's promise, but not money paid for the witness's promise, would be proper and not corrupt. I do not believe it is possible to distinguish the two situations. In each instance, a person is paid for silence unless legally compelled to speak. So even if we assume that it is undecided whether a request to withhold cooperation unaccompanied by money would be corrupt, that agnosticism is unwarranted when the request is a contractual obligation in exchange for money. Furthermore, even if we are prepared to maintain a level of agnosticism in either case, what lawyer wants to be caught (or to let his or her client be caught) on the wrong side of the argument should the courts eventually decide that seeking or making contractually binding noncooperation promises is criminal?

Yet a different argument in favor of permitting noncooperation agreements is that they promote settlements. They do so, in this view, because the defendant can buy and the plaintiff can sell a commodity—a degree of secrecy—that will disappear if the case goes to trial. In order to get this benefit, a defendant may pay more in settlement than it

settlement agreement required confidentiality and provided that if confidentiality were broken the victim and his lawyer would have to repay the diocese $400,000).

60. Thompson, 76 F.3d at 453.
61. See supra text accompanying notes 45-54.
believes the case is worth. This enhanced offer will in turn make the
plaintiff more willing to settle. Even assuming that this is true, and the
prediction has appeal, the argument is seriously misplaced. If the
conduct is illegal, the fact that it promotes settlement is beside the point.
We do not encourage settlements by allowing plaintiffs to sell conduct
that would otherwise be criminal. Plaintiffs cannot promise to commit
perjury or destroy documents relevant to a pending proceeding even if
those promises facilitate settlement. So the first question to ask, the one
posed here, is whether the conduct is illegal. But even assuming that the
same argument were made to a legislature in an effort to influence the
scope of a pending obstruction statute, or to a court in order to influence
its construction of a vague statute, it is unacceptable. While settlements
are important, justice is more important. That is why we have rather
broad obstruction laws. We do not allow prospective defendants to buy
silence from individuals without claims. Why permit it with individuals
who have claims just so a court can be spared the potentially incremental
burden of having to try a case? Nor has the plaintiff done anything to
merit this reward other than the fortuity of having a claim. Furthermore,
defendants who settle are not giving up secrecy that they would
otherwise enjoy. If the case goes to trial, it will be a public trial, and the
level of exposure will be even greater.63

Noncooperation promises are also problematic under the
profession’s ethics rules. Model Rule 3.4(f), widely adopted, forbids a
lawyer to “request a person other than a client to refrain from voluntarily
giving relevant information to another party.”64 There is a limited
exception if “the person is a relative or an employee or other agent of a
client.”65 The exception will rarely if ever apply in the situation
described here. The claimant will be an injured tort plaintiff or former
employee or agent. So it would seem that a lawyer who assists a client in
securing the noncooperation promise will violate Rule 3.4(f).66

I have said that litigants and their lawyers risk obstruction of justice
in connection with noncooperation agreements if the purpose of the
agreement is to prevent others from discovering information tending to

63. See supra note 9.
64. MODEL RULES OF PROF’L CONDUCT R. 3.4(f) (2001-02).
65. Id. § 3.4(f)(1).
violate Rules 3.4(f) for a defense lawyer to request that a plaintiff promise to “withhold relevant
information from another party.” Separately, the opinion concluded, Rule 8.4(a) forbids the
plaintiff’s lawyer to assist the defense lawyer in this objective by “recommending” that his client
make the promise. See id.; see also the discussion of Model Rules 1.2(d) and 8.4(b) supra at
note 56.
establish the civil or criminal liability of a person. Authors of law review articles should, of course, take a position on the question posed in their articles. My position, already stated, is that contractually binding noncooperation agreements entered as part of the settlement of a claim do obstruct justice if the purpose is as described. I want to explain why it is nevertheless important to think in terms of risk. A defendant charged with obstruction of justice may claim a proper purpose. Assuming the government’s proof could support a finding of guilt beyond a reasonable doubt as a matter of law, a jury will ordinarily decide if the defendant acted “corruptly” under the circumstances. The court’s definition of “corruptly” in its instructions will be brief. If my legal conclusion is correct, a jury will be allowed, relying on these instructions, to find a defendant guilty based on a noncooperation agreement. Looking at the issue from the perspective of an appellate court, that conviction would be upheld. But there is another perspective—the lawyer who is counseling a client in connection with a civil case settlement. That lawyer has to think in terms of risk because the lawyer’s duty of competence (as well as his or her self-interest) requires the lawyer to protect the client from criminal prosecution. Competence also requires the lawyer to alert the client to the possibility that a noncooperation agreement will be held unenforceable. Until such time as the issue is finally resolved at the appropriate appellate levels, risk evaluation must be part of any practicing lawyer’s analysis.

IV. THE MEANING OF SECTION 1515(c)

These conclusions might have ended this Article were it not for one final sentence in the obstruction chapter (which includes the statutes under discussion). That sentence, § 1515(c), provides: “This chapter

67. See supra text accompanying note 62.
68. See United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (citing United States v. Rasheed, 663 F.2d 843, 852 (9th Cir. 1981), for the conclusion that “corruptly” in 18 U.S.C. § 1503 requires that the act in question “be done with the purpose of obstructing justice.” The trial court’s charge in Thompson defined “corruptly” as requiring proof that the defendant acted “deliberately for the purpose of improperly influencing, or obstructing, or interfering with the administration of justice.” Id. at 453. That is all the instruction a jury is likely to get. Should the defendant claim a proper purpose (to avoid embarrassment, to save her marriage, to keep his job), and therefore a lack of specific intent, the jury will have to decide whether the claim is true. If not, the jury will decide whether the true (or perhaps decisive) purpose was to prevent others from getting information that would help establish criminal or civil liability and, if so, whether under the circumstances that purpose was corrupt. The chance that the jury will so conclude is what I mean by risk.
69. See supra text accompanying notes 54-56.
70. See MODEL RULES OF PROF’L CONDUCT R. 1.1 (2001-02).
71. See infra text accompanying note 111.

http://scholarlycommons.law.hofstra.edu/hlr/vol31/iss1/1
does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding.  

Unfortunately, this provision has slim judicial interpretation. What can it mean?

The Ninth Circuit cited § 1515(c) in United States v. Kellington, which reversed the conviction of a lawyer for violating 18 U.S.C. § 1512(b)(2)(B). Kellington was charged with misleading Young into removing items relevant to an "official proceeding" from his client's home. The client, recently arrested and in jail, asked Kellington, his civil lawyer, to cause the removal of the items. Kellington claimed he did not know that the items were relevant to the client's criminal matter. At trial, a defense expert testified to a lawyer's duty of confidentiality, which the defense sought to use to explain the allegedly misleading conduct toward Young. The expert also testified to a lawyer's duty to carry out his client's instructions unless he knows that they are illegal, which the defense argued would rebut the government's claim that Kellington intended to cause the destruction or concealment of evidence. The trial judge limited the extent to which the jury could consider, or the defense could argue, the expert testimony. Citing § 1515(c), the Ninth Circuit said this was an error. "The evidence of Kellington's ethical obligations was not only admissible and relevant to the question of his intent, Kellington had a fundamental right under the Sixth Amendment to present his theory of the case in closing arguments." The trial court's limitation on defense counsel's argument left Kellington "unable to frame and give content to the core of his defense—that Kellington was attempting (however imprudently in hindsight) to provide his client with bona fide legal representation."
United States v. Kloess was the prosecution of a lawyer under § 1512(b)(3). Kloess was charged with engaging “in misleading conduct ... with intent to ... hinder, delay, or prevent the communication to a ... judge of the United States of information relating to the commission or possible commission of a Federal offense or a violation of conditions of probation.” Kloess’s client was arrested for a traffic violation and found in possession of a pistol. The client was on probation from a federal offense. Possession of the pistol violated his probation. At his arrest, the client gave the arresting officer a driver’s license with a false name. The government charged that Kloess thereafter entered a plea of guilty for his client in absentia, as local law allowed, but used the client’s false name with the intent of misleading the court and concealing the probation violation. Citing § 1515(c), Kloess successfully moved to dismiss the indictment on the ground that the government was required to “plead and prove that his conduct was not protected by this ‘safe harbor’ in the statute.” The Eleventh Circuit reversed, holding that because § 1515(c) was an affirmative defense, it was not an element of the crime and did not have to be pleaded.

Anticipating a trial, the court went on to discuss allocation of the burdens of production and persuasion. A lawyer seeking to assert the defense, the court held, need only meet a burden of production, after which the government retained the burden of persuasion beyond a reasonable doubt to negate the § 1515(c) defense. A lawyer had

[A] minimal burden. Evidence tending to show that the defendant is a licensed attorney who was validly retained to perform the legal representation which constitutes the charged conduct is sufficient to raise an inference of innocent purpose. Any requirement to do more would unconstitutionally shift the burden to the defendant to prove his

84. 251 F.3d 941 (11th Cir. 2001).
85. Id. at 943.
86. See id.
87. See id.
88. See id.
89. See id.
90. See id.
91. Id. at 944.
92. See id. at 945-46. The court recognized the absence of useful legislative history on the section. See id. at 946.
93. See id. at 947-49.
94. See id. at 948-49.
innocence by negating an element of the statute—the required *mens rea*. The court continued: “[h]aving fairly raised the Section 1515(c) defense to culpability under Section 1512(b)(3), the defendant is entitled to an acquittal unless the jury finds that the government proved beyond a reasonable doubt that the defendant’s conduct did not constitute lawful, bona fide legal representation.”

*Kellington* and *Kloess* shed only modest light on our question. *Kloess* dealt only with burdens of pleading, production and persuasion. *Kellington* held that in seeking to avail himself of § 1515(c), the defendant was entitled to introduce the testimony of ethics experts, to have the jury fully consider their testimony as bearing on his state of mind, and to have his lawyers argue that testimony. Both cases concerned allegations of misleading conduct, which is not the subject of this Article. In the context of the issue here, the question of law would be whether § 1515(c) provides a defense to a lawyer who assists a client in attempting to secure a noncooperation promise in exchange for a benefit conferred in a settlement agreement. Or to put it otherwise: Is it “bona fide, legal representation services” to offer that assistance? Or is it corrupt?

Both *Kellington* and *Kloess* treat § 1515(c) evidence as negating the specific intent required to prove the crime. But no statutory provision is needed to enable a lawyer charged with obstruction of justice to introduce evidence of the lack of an element of the offense. With or without the statute, we might expect a lawyer charged with obstruction to introduce testimony about a lawyer’s ethical duties generally, or more specifically, that the particular service was ethically permitted or required. From this testimony, the jury would then be asked to infer, at the very least, that the lawyer had a good faith basis for believing the services to be proper and therefore lacked the *mens rea* for the crime. This is what happened in *Kellington*. The expert testified to the defendant’s duty of confidentiality and his duty to carry out his client’s instructions. From this general testimony, the defense wanted the jury

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95. *Id.*
96. *Id.* at 949.
97. See United States v. Kellington, 217 F.3d 1084, 1099-1100 (9th Cir. 2000).
98. See *Kloess*, 251 F.3d at 943; *Kellington*, 217 F.3d at 1088-89.
100. Both cases held that the crime required proof of specific intent. See *Kloess*, 251 F.3d at 948; *Kellington*, 217 F.3d at 1098.
101. See *Kellington*, 217 F.3d at 1089-90, 1098.
102. See *id.* at 1090.
to have a reasonable doubt about the defendant’s actual intent and the appellate court held that the defense was entitled to use the testimony in that way. The expert could not say, however, and the fact on which the government’s case depended, was whether Kellington knew that he was being asked to participate in the destruction or concealment of evidence. If he did know it, the defense would fail.

One difference between the issue I am addressing and the issues in Kloess and Kellington requires attention. Those cases turned on a question of fact: What was the defendant’s state of mind? The issue in this Article is one of law: Is a settlement agreement conditioned on noncooperation a violation of one or more obstruction statutes? If not, there is no crime. If so, then the application of § 1515(c) is problematic. A jury should not be asked to decide whether in fact particular work was “lawful, bona fide, legal representation services.” That would enable each jury to define the elements of the crime, a question of law that should have a uniform answer nationwide. For that reason, perhaps, both Kloess and Kellington viewed the § 1515(c) defense as bearing on the lawyer’s state of mind, not as an invitation to the jury to decide whether particular legal services were “lawful.” If a lawyer were prosecuted for obstruction of justice based on his role in facilitating a noncooperation agreement, the lawyer might claim that he wrongly but truly believed that these agreements were legal and that he therefore did not act “corruptly”—i.e., that he lacked the specific intent the statute requires. To create a reasonable doubt about his intent, the lawyer might call an expert who would testify that lawyers understand such promises to be legal, even common, or (more broadly) that lawyers have an ethical duty to assist clients in achieving seemingly lawful objectives. The defendant might testify to his good faith belief. The government might call an opposing expert. Further, the government might introduce any ethics rule in the jurisdiction that forbids a lawyer to ask others to “refrain from voluntarily giving relevant information to another party.”

103. See id. at 1099-1100.
104. See id. at 1091.
105. State of mind, or mens rea, is a question of fact. See, e.g., United States v. Johnson, 700 F.2d 163, 174 (5th Cir. 1983) (“The element of intent is usually a subjective view of the state of mind of the accused—a view that belongs within the exclusive domain of the jury”) (citing cases).
106. 18 U.S.C. § 1515(c).
107. See supra notes 97-102 and accompanying text.
108. This is the language of Model Rule 3.4(f). Ethics rules, like expert testimony, are admissible as bearing on state of mind. See United States v. Grubb, 11 F.3d 426, 433 (4th Cir. 1993) (discussing evidence of the judicial canon of ethics offered by prosecutor in case against judge admissible to prove intent and absence of mistake, when coupled with an appropriate limiting instruction); United States v. Reamer, 589 F.2d 769, 770 (4th Cir. 1978), cert. denied 440 U.S. 980...
In the end, it will be a question of fact for the jury whether the lawyer had the specific intent to obstruct justice. "Otherwise lawful conduct, even acts undertaken by an attorney in the course of representing a client, can transgress § 1503 if employed with the corrupt intent to accomplish that which the statute forbids." If courts begin to hold that noncooperation promises in settlement agreements obstruct justice, it will be quite a challenge to support a reasonable doubt about a lawyer's intent, especially if the jurisdiction's ethics rules forbid seeking voluntary noncooperation. If several courts reach the conclusion that noncooperation promises obstruct justice, and especially if those decisions are publicized, as surely they will be, it would be near to impossible to create a reasonable doubt about the lawyer's intent.

V. CONCLUSION

While it is intellectually interesting, and conceptually necessary, to ask whether lawyers can be prosecuted for helping clients enter noncooperation agreements, or whether clients can be prosecuted for entering into them, in fact the legality of these agreements is likely to be tested in other ways, if at all. A person bound by such an agreement may challenge it as illegal and therefore unenforceable. Or a person who has allegedly violated such an agreement may defend an action for return of any benefit received on the ground that the agreement is illegal. Last, a court may explain its refusal to "so order" noncooperation agreements on the ground that they are illegal. It is in a civil context, then, that a court may first address the relationship

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(1979) (holding evidence of state law and Code of Professional Responsibility admissible to prove intent in trial of attorney for mail fraud). Although the client will not enjoy the benefit of § 1515(c), which applies to lawyers only, a client could seek to establish the lack of criminal intent by relying on the advice of counsel that noncooperation agreements are lawful. See United States v. Condon, 132 F.3d 653, 656 (11th Cir. 1998), cert. denied 523 U.S. 1088 (1998) ("To be entitled to a good-faith reliance instruction, a defendant must show that (1) he fully disclosed all material facts to his attorney; and (2) he relied in good faith on advice given by his attorney").


110. See, e.g., Armendariz v. Found. Health Psychcare Servs., Inc., 6 P.3d 669, 696 (Cal. 2000) ("If the central purpose of the contract is tainted with illegality, then the contract as a whole cannot be enforced.").

111. See, e.g., Lulirama Ltd. v. Axcess Broad. Servs., Inc., 128 F.3d 872, 880 (5th Cir. 1997) ("Under Texas contract law, illegal contracts are generally unenforceable."). Whether the unenforceability of a noncooperation provision in a settlement agreement will void the entire agreement is a matter of contract law. In some cases, "a court will sever the illegal portion of the agreement and enforce the remainder if the parties would have entered the agreement absent the illegal portion of the original bargain." Id.; see also Armendariz, 6 P.3d at 696 (stating the principles underlying severability decisions).
between noncooperation agreements and laws against obstructing justice. But the agreements may fall into disuse even without a court test. This can happen if lawyers, fearing prosecution or discipline, refuse to assist clients in achieving a noncooperation agreement, or if lawyers dissuade their clients from entering these agreements after balancing the likelihood of enforceability against the risk of prosecution to the client.

The conclusion that noncooperation agreements are "corrupt" within the meaning of the federal obstruction statutes, where the purpose is to keep helpful information from prosecutors or others who may wish to seek relief in federal court, seems near to irresistible in light of this history. It is also an unremarkable conclusion given the interpretation that to be corrupt an act need only "be done with the purpose of obstructing justice." That is what makes the purpose "improper." To be sure, the desire to settle a claim is not improper. Nor ordinarily is the desire to keep confidential the amounts paid in settlement, trade secrets, or purely private information. Other motives can explain each of these purposes. But requiring blanket secrecy for all information about financial frauds, dangerous products, or dangerous people, where others may also have been (or will be) harmed and have claims, would seem to have only one purpose: To hinder the efforts of others to get justice, which is precisely the purpose that the obstruction statutes forbid.

112. I stress again that I have construed only the federal obstruction statutes. Further, acting "corruptly" is but one element of the obstruction crimes, but the most debated and the only one likely to be at issue in deciding whether noncooperation agreements obstruct justice when they have the purpose I've assumed. See supra, Part III and accompanying notes.