BARNES & THORNBURG LLP

Honest Services Fraud, Ray Nagin & "Big Easy" Money

March 28, 2014 | Government Investigations, The GEE Blog

George E. Horn, Jr.
Partner

Through appellate and trial court decisions in United States v. Ring[1] and United States v. Nagin[2] , federal prosecutors have been given greater power to charge and obtain convictions for Honest Services Fraud. They are not bound to prove the existence of either an explicit *quid pro quo* or the actual acceptance of bribes to achieve conviction. Emboldened by these cases, prosecutors are more likely to pursue businesses, lobbyists and individuals who operate in our complicated political world.

On February 12, 2014, a federal jury convicted former New Orleans Mayor Ray Nagin on 20 of 21 counts contained in a federal corruption indictment. Included among the charges on which Nagin was found guilty were nine (9) counts of Honest Services Wire Fraud. Nagin was indicted in January of 2013 amid allegations that he accepted hundreds of thousands of dollars in bribes, vacation trips to Jamaica and Hawaii, along with multiple truckloads of free granite in exchange for supporting the interests of local businessmen, Frank Fradella, Rodney Williams and Mark St. Pierre. Fradella and Williams, both awaiting sentencing, each testified at trial that they had bribed Nagin. St. Pierre did not testify. He was convicted in the case during 2011 and sentenced to 17 ½ years in prison. At trial, prosecutors alleged that Nagin's corruption spanned time before and after Hurricane Katrina struck New Orleans in 2005. Nagin, who testified at trial, claimed key prosecution witnesses lied and that prosecutors misinterpreted evidence linking him to business associates who alleged they bribed the Mayor. Nagin served as the 60th Mayor of New Orleans from 2002 to 2010. He was swept into office with 59% of the vote in a runoff election amidst promises to fight political corruption, while expressing disgust with traditional Louisiana politics. He gained fame in 2005 during the aftermath of Hurricane Katrina. Nagin becomes another in the line of Louisiana politicians who have transgressed the law. In 2001, four (4) term Democratic Governor Edwin Edwards was sentenced to 10 years on racketeering charges, extortion, money laundering, mail and wire fraud. Nine (9) term Congressman William Jefferson was sentenced to 13 years following a bribery conviction in 2009. In Ring, the defendant worked as a lobbyist for Jack Abramoff. In 2010, Ring was charged in a multi-count indictment with counts alleging Honest Services Fraud, paying illegal gratuities and conspiracy to commit those offenses. Ring's trial took place mere months following the Supreme Court's rulings in Skilling v. United States[3] and Black v. United States.[4] Following trial, Ring was convicted on five (5) counts including Honest Services Fraud and conspiracy to commit same. During trial, the prosecution tendered evidence showing Ring had provided meals, drinks, travel, concerts, sporting events and other forms of entertainment to public officials. These "contributions"

RELATED PRACTICE AREAS

Financial and Regulatory Litigation
Government Litigation
Securities and Capital Markets
White Collar and Investigations

were, according to the Government, improperly linked to official acts by public officials which served to benefit Mr. Ring and his clients. On appeal, the D.C. Circuit found that an implicit *quid pro quo* was sufficient to sustain an Honest Services conviction. The Court further held the mere offer of a bribe, even absent acceptance, could lead to a finding of guilty, reasoning that bribery does not require completion of an exchange for ill-gotten gain, only the offer of same.[5] The Nagin court, approximately one (1) year later, endorsed the concept that an implicit *quid pro quo* and the mere offer of a bribe, even without acceptance, may be sufficient to sustain a conviction under § 1346. The Nagin jury was instructed that "the public official and payor need not state the *quid pro quo* in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods." The Court further instructed that "public bribery occurs when a public official accepts or **offers to accept**, directly or indirectly, anything of apparent present or prospective value, and does so in return for being influenced in his performance of an official act."[6] (Emphasis added.) While significant individually, Ring and Nagin may have greater impact as part of a continuum of cases breathing new life into the Honest Services statute, 18 U.S.C. § 1346. In 1988, Congress enacted 18 U.S.C. § 1346 "overruling" the Supreme Court's 1987 decision in McNally v. United States.[7] In McNally, the Court expressed concern for the broad reading various Courts of Appeal had given the mail fraud statute (18 U.S.C. § 1341). These interpretations had allowed the federal government to encroach on the traditional state duty to regulate its public officials. The Court also observed what it believed to be an ambiguity arising in the law over what actually violated the duty of Honest Services. Its ruling was designed to reign in the broad use of Honest Services prosecutions under 18 U.S.C. § 1341. [8] Through § 1346, Congress specifically added to the definition of a "scheme to defraud" the language, "a scheme… to deprive another of the intangible right of Honest Services."[9] McNally's narrowing approach to Honest Services prosecutions under § 1341 was, thus, brought to a swift and effective end. The Supreme Court's decisions in Skilling and Black once again severely narrowed the reach of Honest Services prosecutions. In Skilling, the Court found the right to Honest Services violated only when those who perpetrate fraud receive a bribe or kickback from a third party.[10] When applying this test to Black, the Court found his acts, fraudulently paying himself "non-competition" fees and failing to disclose such fees, did not violate § 1346 as there were no bribes or kickbacks from a third party.[11] A "bribe" is generally defined as a payment to or from a third party in exchange for unlawful or fraudulent services. The concept of a "kickback" refers to a scenario where an individual uses his or her position to enrich a third party in return for some type of profit to him or herself or, perhaps, an associate. The roller coaster ride resulting in the narrowing (McNally, Skilling and Black) and the broadening (§1346, Ring and Nagin [12]) of Honest Services liability is now leaning to the government. Those who hover in and around the political sphere should be mindful of the principles set forth above and take great care moving forward.

---

[1] 706 F. 3d 460 (D.C. Cir.), cert. denied, 134 S.Ct. 175 (2013).
[2] U.S. Dist. Ct., E.D. La., Criminal No. 13-011 (2013).
[3] 130 S.Ct. 2896 (2010).
[4] 130 S.Ct. 2963 (2010).
[5] Ring, 706 F.3d at 465-67.
[6] See Nagin, Final Jury Instructions at 11.
[7] 480 U.S. 350 (1987).
[8] 483 U.S. at 360.
[9] 18 U.S.C. § 1346 (2006).

[10] Skilling, 130 S.Ct. at 2928.
[11] Black, 130 S.Ct. at 2068.
[12] Nagin has filed his notice of appeal.