Withdrawal of Life Support and Medical Malpractice: The Unethical Dilemma

By Jeffrey Hamlin

Earlier this year, the U.S. Supreme Court, in the much-watched case of former Enron executive Jeffrey Skilling, limited the federal "honest services" statute to traditional or "paradigmatic" bribery and kickback schemes. The criminal statute prohibits "a scheme or artifice to deprive another of something of value," the Court explained, "that in fact has economic substance." The Court concluded that the statute was unconstitutionally vague. The Court's ruling in early 2010 was a blow to prosecutors.

Skilling v. United States, the case involving Joseph Queri, a former executive with Dick's Sporting Goods, and Benjamin Viloski, a former real estate attorney for Dick's, prosecutors alleged that Queri and Viloski defrauded Dick's in connection with the company's development of new stores in Pennsylvania. According to the government, the defendants controlled companies that ostensibly provided brokerage and consulting services to landowners and real estate developers with an interest in the expansion. In August 2009, a federal grand jury returned an indictment, which included 11 counts of mail fraud, wire fraud and related conspiracy charges.

The Skilling Court was concerned with fair notice. If the honest services statute was unconstitutionally vague about whether deprivation of "honest services" encompassed self-dealing, what can be said for the notion that the mail and wire fraud statutes protect an employer's intangible right to potentially valuable information — when that information is itself the fact that the employees are engaged in self-dealing?

After the June 2010 Skilling ruling, the judge dismissed all of the indictment against Queri and Viloski related to honest-services fraud. The judge, however, held that the government could go ahead with its "intangible property rights" theory that Queri and Viloski had defrauded Dick's by failing to disclose their self-dealing. The court relied on 2nd Circuit case law, which recognizes that a business entity has an intangible property interest in controlling the use of its assets. Strictly speaking, the Skilling Court's limiting construction of the honest-services statute is not relevant to whether undisclosed conflicts of interest may be prosecutable under some other statute. That said, the government's next "intangible rights" theory failed based on principles similar to those stated in Skilling.

York decided that now such theory can proceed in court, I am quite dubious that the judge is headed in the right direction. It seems to me the same vagueness that the Court objected to in Skilling is returning. The case involved Joseph Queri, a former executive with Dick's Sporting Goods, and Benjamin Viloski, a former real estate attorney for Dick's. Prosecutors alleged that Queri and Viloski defrauded Dick's in connection with the company's development of new stores in Pennsylvania. According to the government, the defendants controlled companies that ostensibly provided brokerage and consulting services to landowners and real estate developers with an interest in the expansion. In August 2009, a federal grand jury returned an indictment, which included 11 counts of mail fraud, wire fraud and related conspiracy charges.

In early 2010, Queri and Viloski asked the court to dismiss the indictment. In response, the government argued that the "honest services" charges were based on a criminal statute that was unconstitutionally vague, the issue that was then pending in Skilling. The prosecution replied that, even if the "honest services" statute were found unconstitutional, the government had alleged other viable theories of mail and wire fraud, including fraud that involved the deprivation of intangible property. What was that intangible property? It was valuable information that could affect the company's business decisions — specifically, it was the very fact of the defendants' self-dealing. The trial court reserved judgment on this contention pending the U.S. Supreme Court's decision in Skilling.

The Struggle to Revive 'Honest Services'