

# HONEST SERVICES

BY ROSS H. GARBER

## Many Questions Remain for Honest Services Doctrine

The Supreme Court has now limited the scope of the “honest services” provision of the federal mail and wire fraud laws, 18 U.S.C. § 1346.<sup>1</sup> In *Skilling v. United States*,<sup>2</sup> the Court held that the honest services statute, which had become a sort of prosecutorial Swiss Army knife, is now applicable only to bribery and kickback schemes and does not criminalize more amorphous unseemly conduct such as undisclosed self-dealing. Given that limitation, the Court determined that the honest services provision is not unconstitutionally vague. According to the Court in *Skilling*, “[a] criminal defendant who participated in a bribery or kickback scheme ... cannot tenably complain about prosecution under § 1346 on vagueness grounds.”<sup>3</sup> So the Supreme Court has brought clarity to honest services issues? Maybe not so much. The following are some initial reflections on the state of honest services law.

### Bribery and Kickbacks in State Government, Local Government And the Private Sector

In a footnote in *Skilling*, the Supreme Court noted that § 1346 provides for federal criminal liability in cases of bribery and kickbacks in state government, local government, and the private sector. These types of situations, which may not be covered by other federal criminal statutes, are likely to continue to be prosecuted as honest services cases. It is unclear whether prosecutors will routinely charge honest services fraud in cases already covered by federal bribery and kickback statutes.

### Bribery Plus

As discussed below, there will still be substantial confusion about the precise elements of an honest services case. Nevertheless, it seems clear that to prove honest services fraud, the government must establish a bribery or kickback

scheme *plus* satisfy all the other elements of mail or wire fraud.

### What Are Bribery and Kickback Schemes for Purposes of § 1346?

While the Supreme Court has now limited the application of § 1346 to bribery and kickback schemes, it did not specifically define what is required to establish these schemes. In *Skilling* the Court cited federal bribery and kickback statutes, but it also noted that the terms drew “content” from earlier honest services case law. There is a good argument that to prove a § 1346 bribery or kickback case, the government must satisfy all the substantive elements of a federal bribery or kickback statute. The government may take the position that something less (or different) is required.

### Breach of Fiduciary Duty

Earlier Supreme Court decisions established that a § 1346 case must be based on a breach of fiduciary duty. The recent Supreme Court decisions did not provide any clarity as to the source or scope of the required fiduciary duty. For example, must such a duty be imposed by federal law? Can it be derived from state laws? Or municipal or corporate ethics codes? Can the fiduciary duty be derived from general moral principles? The government will no doubt argue that a public official who receives a bribe is, by definition, breaching a fiduciary duty to the public. While courts may be receptive to this argument, the analysis becomes more difficult in private sector honest services cases, where it may be challenging to identify the existence and contours of a fiduciary relationship.

In addition, there will likely continue to be substantial confusion about what must be proven to convict the person who provided a bribe or kickback since that person had no fiduciary duty. For example, must the government establish that the person who provided the thing of value knew about the recipient’s fiduciary duty?

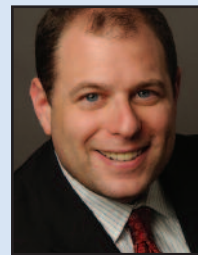


### Material Misrepresentations

Earlier Supreme Court honest services cases made clear that to estab-

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lish a § 1346 case, the government must prove a material misrepresentation. How such material misrepresentations must be proven is an open question. For example, must the government prove that there was a specific duty to disclose the receipt of things of value, such as one imposed by a code of conduct or ethics code? Or may the gov-

ernment rely on the concealment of the receipt of something of value in the absence of a specific disclosure requirement?

### Quid Pro Quo

Bribery requires a quid pro quo — an agreement or understanding between the participants that something will be

given in exchange for official action. The government may argue that no such agreement is necessary in honest services cases. The government could contend that an honest services case may be maintained based only on one party's corrupt intent and may even be based on the giving of a gratuity.

### DOJ Guidance?

As reflected above, questions about honest services fraud still abound, and some of these questions are quite complex. There are also strategic issues for prosecutors, such as whether to charge honest services fraud in cases where a federal bribery or kickback statute already applies. This is clearly an area in which prosecutors would benefit from Department of Justice guidance. It would be unfortunate if DOJ left these decisions to the discretion of individual U.S. Attorneys.

### Congressional Action?

In *Skilling* the Supreme Court said that if Congress wishes to expand honest services law beyond bribery and kickback schemes, it will have to employ standards of definiteness and specificity to overcome due process concerns. Even before the Supreme Court issued last term's honest services decisions, congressional staffers were reportedly drafting amendments to § 1346. Expect to see proposals to expand the honest services law. These proposals will inevitably generate much debate about whether they pass constitutional muster.

In the final analysis, while the Supreme Court has made the honest services statute less amorphous, the law's contours are far from precise. It is safe to predict that this is not the last time the Supreme Court will have occasion to evaluate the honest services doctrine.

### Notes

1. *Skilling v. United States*, 561 U.S. \_\_\_, 2010 WL 2518587 (2010); *Black v. United States*, 561 U.S. \_\_\_, 2010 WL 2518593 (2010); and *Weyhrauch v. United States*, 561 U.S. \_\_\_, 2010 WL 2518696 (2010).

2. 561 U.S. \_\_\_, 2010 WL 2518587 (2010).

3. *Id.* ■

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