

LEGAL ETHICS FOR THE HEALTH LAWYER

RICHARD SIEHL

BAKER & HOSTETLER LLP

ORLANDO, FLORIDA

MARCH 6, 2009

- I. PRACTICE OF LAW
 - A. RULES OF PROFESSIONAL CONDUCT
 - B. WHO IS THE CLIENT
 - C. CONFLICTS OF INTEREST
 - D. CONFIDENTIALITY
 - 1. ATTORNEY CLIENT PRIVILEGE
 - a. EVIDENTIARY APPLICATION
 - b. CRIME FRAUD EXCEPTION
 - 2. ATTORNEY WORK PRODUCT

- II. SPECIAL HEALTH LAW ISSUES
 - A. CORPORATE INTEGRITY
 - B. STATE & FEDERAL CRIMINAL LAWS
 - C. PHYSICIAN HOSPITAL CONTRACTING
 - D. FEDERAL TAX LAW
 - E. END-OF-LIFE
 - F. RELIGIOUS & ETHICAL DIRECTIVES
 - G. SARBANES-OXLEY

- III. CASE STUDIES
 - A. U.S. v. ANDERSON
 - B. MOTION TO DISQUALIFY
 - C. GOVERNMENT INVESTIGATIONS AND LEGAL OPINION LIABILITY

RULES OF PROFESSIONAL CONDUCT

LAWYER ETHICS AND PROFESSIONALISM

ABA Model Rules of Professional Conduct

<http://www.abanet.org/cpr/ethicsearch/home.html>

<http://www.abanet.org/cpr/professionalism/home.html>

<http://www.abanet.org/cpr/mrpc/home.html>

Rules Regulating The Florida Bar

<http://www.floridabar.org/tfb/TFBETOpin.nsf/EthicsIndex?OpenForm>

<http://www.floridabar.org/tfb/TFBETOpin.nsf/ca2dcdaa853ef7b885256728004f87db/93ef72ee39a1d7fb85256b2f006cc837?OpenDocument>

I. Model Rules of Professional Conduct

II. Table Of Contents

[Preface](#)

[Commission on Evaluation of Professional Standards Chair's Introduction](#)

[Commission on Evaluation of the Rules of Professional Conduct \("Ethics 2000"\) Chair's Introduction](#)

[Preamble and Scope](#)

Rules

[Rule 1.0](#) Terminology

Client-Lawyer Relationship

[Rule 1.1](#) Competence
[Rule 1.2](#) Scope of Representation and Allocation of Authority Between Client and Lawyer
[Rule 1.3](#) Diligence
[Rule 1.4](#) Communications
[Rule 1.5](#) Fees
[Rule 1.6](#) Confidentiality of Information
[Rule 1.7](#) Conflict of Interest: Current Clients
[Rule 1.8](#) Conflict of Interest: Current Clients: Specific Rules
[Rule 1.9](#) Duties to Former Clients
[Rule 1.10](#) Imputation of Conflicts of Interest: General Rule
[Rule 1.11](#) Special Conflicts of Interest for Former and Current Government Officers and Employees
[Rule 1.12](#) Former Judge, Arbitrator, Mediator or Other Third-Party Neutral
[Rule 1.13](#) Organization as Client
[Rule 1.14](#) Client with Diminished Capacity
[Rule 1.15](#) Safekeeping Property
[Rule 1.16](#) Declining or Terminating Representation
[Rule 1.17](#) Sale of Law Practice
[Rule 1.18](#) Duties to Prospective Client

Counselor

[Rule 2.1](#) Advisor
[Rule 2.2](#) (Deleted)
[Rule 2.3](#) Evaluation for Use by Third Persons
[Rule 2.4](#) Lawyer Serving as Third-Party Neutral

Advocate

[Rule 3.1](#) Meritorious Claims and Contentions
[Rule 3.2](#) Expediting Litigation
[Rule 3.3](#) Candor toward the Tribunal
[Rule 3.4](#) Fairness to Opposing Party and Counsel
[Rule 3.5](#) Impartiality and Decorum of the Tribunal
[Rule 3.6](#) Trial Publicity
[Rule 3.7](#) Lawyer as Witness

- [Rule 3.8](#) Special Responsibilities of a Prosecutor
[Rule 3.9](#) Advocate in Nonadjudicative Proceedings

Transactions with Persons Other Than Clients

- [Rule 4.1](#) Truthfulness in Statements to Others
[Rule 4.2](#) Communication with Person Represented by Counsel
[Rule 4.3](#) Dealing with Unrepresented Person
[Rule 4.4](#) Respect for Rights of Third Persons

Law Firms and Associations

- [Rule 5.1](#) Responsibilities of a Partner or Supervisory Lawyer
[Rule 5.2](#) Responsibilities of a Subordinate Lawyer
[Rule 5.3](#) Responsibilities Regarding Nonlawyer Assistant
[Rule 5.4](#) Professional Independence of a Lawyer
[Rule 5.5](#) Unauthorized Practice of Law; Multijurisdictional Practice of Law
[Rule 5.6](#) Restrictions on Rights to Practice
[Rule 5.7](#) Responsibilities Regarding Law-related Services

Public Service

- [Rule 6.1](#) Voluntary Pro Bono Publico Service
[Rule 6.2](#) Accepting Appointments
[Rule 6.3](#) Membership in Legal Services Organization
[Rule 6.4](#) Law Reform Activities Affecting Client Interests
[Rule 6.5](#) Nonprofit and Court Annexed Limited Legal Services Programs

Information About Legal Services

- [Rule 7.1](#) Communication Concerning a Lawyer's Services
[Rule 7.2](#) Advertising
[Rule 7.3](#) Direct Contact with Prospective Clients
[Rule 7.4](#) Communication of Fields of Practice and Specialization
[Rule 7.5](#) Firm Names and Letterhead
[Rule 7.6](#) Political Contributions to Obtain Legal Engagements or Appointments by Judges

Maintaining the Integrity of the Profession

- [Rule 8.1](#) Bar Admission and Disciplinary Matters
[Rule 8.2](#) Judicial and Legal Officials
[Rule 8.3](#) Reporting Professional Misconduct
[Rule 8.4](#) Misconduct
[Rule 8.5](#) Disciplinary Authority; Choice

WHO IS THE CLIENT

You are outside counsel to a large non profit tax exempt hospital system. The in-house general counsel is a former associate in your law firm. A partner of your law firm serves on the system board of directors and another partner serves on the system's foundation board. The system CEO is a long time friend and is also a client of your law firm for his personal tax and estate planning.

You also represent several physician groups whose members are on the medical staff of the system hospitals. You have personal relationships with many of these physicians and have frequently advised them regarding a variety of individual legal matters involving business relationships, real estate ventures as well as tax and estate planning.

What are the potential ethical issues regarding these relationships?

I. **Lawyer Regulation**

II. **Rules Regulating The Florida Bar**

4 RULES OF PROFESSIONAL CONDUCT

4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.13 ORGANIZATION AS CLIENT

(a) Representation of Organization. A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) Violations by Officers or Employees of Organization. If a lawyer for an organization knows that an officer, employee, or other person associated with the organization is engaged in action, intends to act, or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization or a violation of law that reasonably might be imputed to the organization and is likely to result in substantial injury to the organization, the lawyer shall proceed as is reasonably necessary in the best interest of the organization. In determining how to proceed, the lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization. Such measures may include among others:

- (1) asking reconsideration of the matter;
- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

(c) Resignation as Counsel for Organization. If, despite the lawyer's efforts in accordance with subdivision (b), the highest authority that can act on behalf of the organization insists upon action, or a refusal to act, that is clearly a violation of law and is likely to result in substantial injury to the organization, the lawyer may resign in accordance with rule 4-1.16.

(d) Identification of Client. In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(e) Representing Directors, Officers, Employees, Members, Shareholders, or Other Constituents of Organization. A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders, or other constituents, subject to the provisions of rule 4-1.7. If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Comment

The entity as the client

An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders, and other constituents. Officers, directors, employees, and shareholders are the constituents of the corporate organizational client. The duties defined in this comment apply equally to unincorporated associations. "Other constituents" as used in this comment means the positions equivalent to officers, directors, employees, and shareholders held by persons acting for organizational clients that are not corporations.

When 1 of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by rule 4-1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by rule 4-1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by rule 4-1.6.

When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows that the organization may be substantially injured by action of a constituent that is in violation of law. In such a circumstance, it may be reasonably necessary for the lawyer to ask the constituent to reconsider the matter. If that fails, or if the matter is of sufficient seriousness and importance to the organization, it may be reasonably necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. Clear justification should exist for seeking review over the head of the constituent normally responsible for it. The stated policy of the organization may define circumstances and prescribe channels for such review, and a lawyer should encourage the formulation of such a policy. Even in the absence of organization policy, however, the lawyer may have an obligation to refer a matter to higher authority, depending on the seriousness of the matter and whether the constituent in question has apparent motives to act at variance with the organization's interest. Review by the chief executive officer or by the board of directors may be required when the matter is of importance commensurate with their authority. At some point it may be useful or essential to obtain an independent legal opinion.

The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions highest authority reposes elsewhere; for example, in the independent directors of a corporation.

Relation to other rules

The authority and responsibility provided in this rule are concurrent with the authority and responsibility provided in other rules. In particular, this rule does not limit or expand the lawyer's responsibility under rule 4-1.6, 4-1.8, 4-1.16, 4-3.3, or 4-4.1. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, rule 4-1.2(d) can be applicable.

Government agency

The duty defined in this rule applies to governmental organizations. However, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful official act is prevented or rectified, for public business is involved. In addition, duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulation. Defining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these rules. Although in some circumstances the client may be a specific agency, it may also be a branch of the government, such as the executive branch, or the government as a whole. For example, if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of this rule. Moreover, in a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. This rule does not limit that authority.

Clarifying the lawyer's role

There are times when the organization's interest may be or becomes adverse to those of 1 or more of its constituents. In such circumstances the lawyer should advise any constituent whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest that the lawyer cannot represent such constituent and that such person may wish to obtain independent representation. Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent and that discussions between the lawyer for the organization and the constituent may not be privileged.

Whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of each case.

Dual representation

Subdivision (e) recognizes that a lawyer for an organization may also represent a principal officer or major shareholder.

Derivative actions

Under generally prevailing law, the shareholders or members of a corporation may bring suit to compel the directors to perform their legal obligations in the supervision of the organization. Members of unincorporated associations have essentially the same right. Such an action may be brought nominally by the organization, but usually is, in fact, a legal controversy over management of the organization.

The question can arise whether counsel for the organization may defend such an action. The proposition that the organization is the lawyer's client does not alone resolve the issue. Most derivative actions are a normal incident of an organization's affairs, to be defended by the organization's lawyer like any other suit. However, if the claim involves serious charges of wrongdoing by those in control of the organization, a conflict may arise between the lawyer's duty to the organization and the lawyer's relationship with the board. In those circumstances, rule 4-1.7 governs who should represent the directors and the organization.

Representing related organizations

Consistent with the principle expressed in subdivision (a) of this rule, a lawyer or law firm who represents or has represented a corporation (or other organization) ordinarily is not presumed to also represent, solely by virtue of representing or having represented the client, an organization (such as a corporate parent or subsidiary) that is affiliated with the client. There are exceptions to this general proposition, such as, for example, when an affiliate actually is the alter ego of the organizational client or when the client has revealed confidential information to an attorney with the reasonable expectation that the information would not be used adversely to the client's affiliate(s). Absent such an exception, an attorney or law firm is not ethically precluded from undertaking representations adverse to affiliates of an existing or former client.

[Updated: 05-22-2006]

© 2005 The Florida Bar | [Disclaimer](#) | [Top of page](#) | [PDF](#)

I. Model Rules of Professional Conduct

II. Client-Lawyer Relationship

Rule 1.13 Organization As Client

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.

(c) Except as provided in paragraph (d), if

(1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and

(2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,

then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

(d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

CONFLICTS OF INTEREST

- I. **Lawyer Regulation**
- II. **Rules Regulating The Florida Bar**

4 RULES OF PROFESSIONAL CONDUCT

4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.7 CONFLICT OF INTEREST; GENERAL RULE

(a) Representing Adverse Interests. Except as provided in subdivision (b), a lawyer shall not represent a client if:

- (1) the representation of 1 client will be directly adverse to another client; or
- (2) there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

(b) Notwithstanding the existence of a conflict of interest under subdivision (a), a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a position adverse to another client when the lawyer represents both clients in the same proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing or clearly stated on the record at a hearing.

(c) Explanation to Clients. When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.

(d) Lawyers Related by Blood or Marriage. A lawyer related to another lawyer as parent, child, sibling, or spouse shall not represent a client in a representation directly adverse to a person who the lawyer knows is represented by the other lawyer except upon consent by the client after consultation regarding the relationship.

(e) Representation of Insureds. Upon undertaking the representation of an insured client at the expense of the insurer, a lawyer has a duty to ascertain whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation. All other Rules Regulating The Florida Bar related to conflicts of interest apply to the representation as they would in any other situation.

Comment

Loyalty to a client

Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person, or from the lawyer's own interests. For specific rules regarding certain conflicts of interest, see rule 4-1.8. For former client conflicts of interest, see rule 4-1.9. For conflicts of interest involving prospective clients, see rule 4-1.18. For definitions of "informed consent" and "confirmed in writing," see terminology.

An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined. If such a conflict arises after representation has been undertaken, the lawyer should withdraw from the representation. See rule 4-1.16. Where more than 1 client is involved and the lawyer withdraws because a conflict arises after representation, whether the lawyer may continue to represent any of the clients is determined by rule 4-1.9. As to whether a client-lawyer relationship exists or, having once been established, is continuing, see comment to rule 4-1.3 and scope.

As a general proposition, loyalty to a client prohibits undertaking representation directly adverse to that client's or another client's interests without the affected client's consent. Subdivision (a)(1) expresses that general rule. Thus, a lawyer ordinarily may not act as advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients. Subdivision (a)(1) applies only when the representation of 1 client would be directly adverse to the other and where the lawyer's responsibilities of loyalty and confidentiality of the other client might be compromised.

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests. The conflict in effect forecloses alternatives that would otherwise be available to the client. Subdivision (a)(2) addresses such situations. A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client. Consideration should be given to whether the client wishes to accommodate the other interest involved.

Consultation and consent

A client may consent to representation notwithstanding a conflict. However, as indicated in subdivision (a)(1) with respect to representation directly adverse to a client and subdivision (a)(2) with respect to material limitations on representation of a client, when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved cannot properly ask for such agreement or provide representation on the basis of the client's consent. When more than 1 client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the disclosure necessary to obtain consent. For example, when the lawyer represents different clients in related matters and 1 of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Lawyer's interests

The lawyer's own interests should not be permitted to have adverse effect on representation of a client. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee. See rules 4-1.1 and 4-1.5. If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice. A lawyer may not allow related business interests to affect representation, for example, by referring clients to an enterprise in which the lawyer has an undisclosed interest.

Conflicts in litigation

Subdivision (a)(1) prohibits representation of opposing parties in litigation. Simultaneous representation of parties whose interests in litigation may conflict, such as co-plaintiffs or co-defendants, is governed by subdivisions (a), (b), and (c). An impermissible conflict may exist by reason of substantial discrepancy in the parties' testimony, incompatibility in positions in relation to an opposing party, or the fact that there are substantially different possibilities of settlement of the claims or liabilities in question. Such conflicts can arise in criminal cases as well as civil. The potential for conflict of interest in representing multiple defendants in a criminal case is so grave that ordinarily a lawyer should decline to represent more than 1 co-defendant. On the other hand, common representation of persons having similar interests is proper if the risk of adverse effect is minimal and the requirements of subdivision (c) are met.

Ordinarily, a lawyer may not act as advocate against a client the lawyer represents in some other matter, even if the other matter is wholly unrelated. However, there are circumstances in which a lawyer may act as advocate against a client. For example, a lawyer representing an enterprise with diverse operations may accept employment as an advocate against the enterprise in an unrelated matter if doing so will not adversely affect the lawyer's relationship with the enterprise or conduct of the suit and if both clients consent upon consultation. By the same token, government lawyers in some circumstances may represent government employees in proceedings in which a government agency is the opposing party. The propriety of concurrent representation can depend on the nature of the litigation. For example, a suit charging fraud entails conflict to a degree not involved in a suit for a declaratory judgment concerning statutory interpretation.

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. Thus, it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.

Interest of person paying for a lawyer's service

A lawyer may be paid from a source other than the client, if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty to the client. See rule 4-1.8(f). For example, when an insurer and its insured have conflicting interests in a matter arising from a liability insurance agreement and the insurer is required to provide special counsel for the insured, the arrangement should assure the special counsel's professional independence. So also, when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide funds for separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer's professional independence.

Other conflict situations

Conflicts of interest in contexts other than litigation sometimes may be difficult to assess. Relevant factors in determining whether there is potential for adverse effect include the duration and intimacy of the lawyer's relationship with the client or clients involved, the functions being performed by the lawyer, the likelihood that actual conflict will arise, and the likely prejudice to the client from the conflict if it does arise. The question is often one of proximity and degree.

For example, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, but common representation is permissible where the clients are generally aligned in interest even though there is some difference of interest among them.

Conflict questions may also arise in estate planning and estate administration. A lawyer may be called upon to prepare wills for several family members, such as husband and wife, and, depending upon the circumstances, a conflict of interest may arise. In estate administration the identity of the client may be unclear under the law of some jurisdictions. In Florida, the personal representative is the client rather than the estate or the beneficiaries. The lawyer should make clear the relationship to the parties involved.

A lawyer for a corporation or other organization who is also a member of its board of directors should determine whether the responsibilities of the 2 roles may conflict. The lawyer may be called on to advise the corporation in matters involving actions of the directors. Consideration should be given to the frequency with which such situations may arise, the potential intensity of the conflict, the effect of the lawyer's resignation from the board, and the possibility of the corporation's obtaining legal advice from another lawyer in such situations. If there is material risk that the dual role will compromise the lawyer's independence of professional judgment, the lawyer should not serve as a director.

Conflict charged by an opposing party

Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation. In litigation, a court may raise the question when there is reason to infer that the lawyer has neglected the responsibility. In a criminal case, inquiry by the court is generally required when a lawyer represents multiple defendants. Where the conflict is such as clearly to call in question the fair or efficient administration of justice, opposing counsel may properly raise the question. Such an objection should be viewed with caution, however, for it can be misused as a technique of harassment. See scope.

Family relationships between lawyers

Rule 4-1.7(d) applies to related lawyers who are in different firms. Related lawyers in the same firm are also governed by rules 4-1.9 and 4-1.10. The disqualification stated in rule 4-1.7(d) is personal and is not imputed to members of firms with whom the lawyers are associated.

Representation of Insureds

The unique tripartite relationship of insured, insurer, and lawyer can lead to ambiguity as to whom a lawyer represents. In a particular case, the lawyer may represent only the insured, with the insurer having the status of a non-client third party payor of the lawyer's fees. Alternatively, the lawyer may represent both as dual clients, in the absence of a disqualifying conflict of interest, upon compliance with applicable rules. Establishing clarity as to the role of the lawyer at the inception of the representation avoids misunderstanding that may ethically compromise

the lawyer. This is a general duty of every lawyer undertaking representation of a client, which is made specific in this context due to the desire to minimize confusion and inconsistent expectations that may arise.

Consent confirmed in writing or stated on the record at a hearing

Subdivision (b) requires the lawyer to obtain the informed consent of the client, confirmed in writing or clearly stated on the record at a hearing. With regard to being confirmed in writing, such a writing may consist of a document executed by the client or one that the lawyer promptly records and transmits to the client following an oral consent. See terminology. If it is not feasible to obtain or transmit the writing at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. See terminology. The requirement of a writing does not supplant the need in most cases for the lawyer to talk with the client, to explain the risks and advantages, if any, of representation burdened with a conflict of interest, as well as reasonably available alternatives, and to afford the client a reasonable opportunity to consider the risks and alternatives and to raise questions and concerns. Rather, the writing is required in order to impress upon clients the seriousness of the decision the client is being asked to make and to avoid disputes or ambiguities that might later occur in the absence of a writing.

[Updated: 11-07-2006]

© 2005 The Florida Bar | [Disclaimer](#) | [Top of page](#) |

I. **Model Rules of Professional Conduct**

II. **Client-Lawyer Relationship**

Rule 1.8 Conflict Of Interest: Current Clients: Specific Rules

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules.

(c) A lawyer shall not solicit any substantial gift from a client, including a testamentary gift, or prepare on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client. For purposes of this paragraph, related persons include a spouse, child, grandchild, parent, grandparent or other relative or individual with whom the lawyer or the client maintains a close, familial relationship.

(d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.

(e) A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that:

(1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and

(2) a lawyer representing an indigent client may pay court costs and expenses of litigation on behalf of the client.

(f) A lawyer shall not accept compensation for representing a client from one other than the client unless:

(1) the client gives informed consent;

(2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and

(3) information relating to representation of a client is protected as required by Rule 1.6.

(g) A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients, or in a criminal case an aggregated agreement

as to guilty or nolo contendere pleas, unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims or pleas involved and of the participation of each person in the settlement.

(h) A lawyer shall not:

(1) make an agreement prospectively limiting the lawyer's liability to a client for malpractice unless the client is independently represented in making the agreement; or

(2) settle a claim or potential claim for such liability with an unrepresented client or former client unless that person is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel in connection therewith.

(i) A lawyer shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client, except that the lawyer may:

(1) acquire a lien authorized by law to secure the lawyer's fee or expenses; and

(2) contract with a client for a reasonable contingent fee in a civil case.

(j) A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced.

(k) While lawyers are associated in a firm, a prohibition in the foregoing paragraphs (a) through (i) that applies to any one of them shall apply to all of them.

I. **Model Rules of Professional Conduct**

II. **Client-Lawyer Relationship**

Rule 1.10 Imputation Of Conflicts Of Interest: General Rule

(a) While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.

(b) When a lawyer has terminated an association with a firm, the firm is not prohibited from thereafter representing a person with interests materially adverse to those of a client represented by the formerly associated lawyer and not currently represented by the firm, unless:

(1) the matter is the same or substantially related to that in which the formerly associated lawyer represented the client; and

(2) any lawyer remaining in the firm has information protected by Rules 1.6 and 1.9(c) that is material to the matter.

(c) A disqualification prescribed by this rule may be waived by the affected client under the conditions stated in Rule 1.7.

(d) The disqualification of lawyers associated in a firm with former or current government lawyers is governed by Rule 1.11.

CONFIDENTIALITY

Attorney Client Privilege

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications and has been codified in almost every jurisdiction. This privilege is intended to ensure full disclosure by clients. The right to assert the privilege belongs to the client and exists for the client's benefit. The privilege may be invoked any time during the attorney-client relationship and even after the relationship is terminated. As a practical matter it falls on the attorney to assert the privilege on the client's behalf. The attorney-client privilege can be asserted by a corporation or other legal entity where the communication is made by an authorized officer or employee of the company for the purpose of obtaining legal advice for the company.

The attorney-client privilege applies when a client seeks professional legal advice from licensed practitioner who is acting in the capacity as a legal advisor and communications relating to that purpose made in confidence by the client are at the client's insistence permanently protected from disclosure by the legal advisor unless the client waives the privilege, either voluntarily or by implication.

Evidentiary Application

The Attorney-client privilege is distinguished from the ethical obligations regarding confidential communications. The evidentiary privilege applies to testimony only; the ethical rule applies in all situations where a client's confidences might be disclosed.

The evidentiary privilege applies generally to information communicated by the client; the ethical rule applies to all information received by the attorney relating to the representation of the client regardless of its source.

Crime Fraud Exception

If the client communication is in furtherance of contemplated or ongoing criminal or fraudulent conduct, then the communication is generally not privileged to the extent the communication is in some way intended to facilitate or conceal the crime or fraud. This limited exception to the ethical rule of confidentiality permits the lawyer to reveal information that would otherwise be confidential to the extent necessary to prevent the client from committing the crime or fraud.

The Work Product Doctrine

The work product doctrine is designed to protect a lawyer's trial preparation by immunizing certain information and materials from discovery. The work product immunity is held by the lawyer and, unlike the attorney-client privilege can not be asserted independently by the client.

For example, Federal Rule of Civil Procedure 26(b)(3)(B) *Protection Against Disclosure*, provides: "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. "

I. **Lawyer Regulation**

II. **Rules Regulating The Florida Bar**

4 RULES OF PROFESSIONAL CONDUCT

4-1 CLIENT-LAWYER RELATIONSHIP

RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

(a) Consent Required to Reveal Information. A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client gives informed consent.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to prevent a client from committing a crime; or
- (2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

- (1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;
- (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;
- (3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;
- (4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

This rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See rule 4-1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, rule 4-1.9(b) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client, and rules 4-1.8(b) and 4-1.9(b) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See terminology for the definition of informed consent. This contributes to the trust that is the

hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d), because to

"counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

A lawyer's confidentiality obligations do not preclude a lawyer from securing confidential legal advice about the lawyer's personal responsibility to comply with these rules. In most situations, disclosing information to secure such advice will be impliedly authorized for the lawyer to carry out the representation. Even when the disclosure is not impliedly authorized, subdivision (b)(5) permits such disclosure because of the importance of a lawyer's compliance with the Rules of Professional Conduct.

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish

the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated. See rule 4-1.9 for the prohibition against using such information to the disadvantage of the former client.

[Updated: 05-22-2006]

© 2005 The Florida Bar | [Disclaimer](#) | [Top of page](#) |

I. **Model Rules of Professional Conduct**

II. **Client-Lawyer Relationship**

Rule 1.6 Confidentiality Of Information

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules;
- (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (6) to comply with other law or a court order.

SPECIAL HEALTH LAW ISSUES

Corporate Integrity

The Office of Inspector General (OIG) often negotiates compliance obligations with health care providers and other entities as part of the settlement of Federal health care program investigations arising under a variety of civil false claims statutes. A provider or entity consents to these obligations as part of the civil settlement and in exchange for the OIG's agreement not to seek an exclusion of that health care provider or entity from participation in Medicare, Medicaid and other Federal health care programs. See <http://oig.hhs.gov/fraud/cias.html>

The negotiation and ongoing enforcement of Corporate Integrity Agreements may pose ethical conflict of interest issues for lawyers advising health care providers, particularly when the lawyer has previously advised the client regarding compliance issues. The attorney may even end up being named a co-conspirator. See, *U.S. v. Anderson* 199WL 84290 (D. Kansas, Jan 8, 1999).

In house counsel also has special ethical issues in this context involving Medical Staff relationships and reporting obligations to top management and the Board.

State and Federal Criminal Laws

A variety of state and federal criminal laws are often implicated in connection with compliance activities. Both outside counsel and in house counsel should be sensitive to the particular ethical issues involving the representation of clients in potential criminal matters and immediately seek special expertise from experienced criminal defense lawyers upon becoming aware of potential criminal conduct. Ethical issues arise when a lawyer provides legal advice in a specialized area where the lawyer may not be competent to handle. Avoid giving advice on any criminal implications to individuals when your client is the organization with whom the individual is associated.

Physician Hospital Contracting

State and federal anti-kickback laws and Stark and state anti-referral laws create serious ethical issues for Health Lawyers when advising clients in hospital physician business relationships. In addition to regulatory and administrative compliance issues and potential criminal implications, conflict of interest concerns are frequently present. In addition to physician referral issues, non standard compensation, non competition issues, tax exempt concerns and securities law issues may result in ethical dilemmas when representing either side of a proposed business arrangement.

Because meeting a specific Stark exception usually gives comfort with respect to the antikickback implications even if a safe harbor is not fully met there is the risk of how confident a lawyer can be in giving a "green light" to any suspect arrangement. The prudent Health Lawyer must carefully tread this minefield of ethical temptations to avoid possible enforcement sanctions and penalties for both client and lawyer.

Federal Tax Law

Tax exempt organizations have many special and complicated requirements that again require highly specialized and experience legal guidance. Compliance with Internal Revenue Service regulations when representing tax exempt organizations, particularly at the Board level, raises important ethical concerns for Health Lawyers with respect to competency and reliance on legal

opinions in bond obligations. Giving tax advice is also subject to the restrictions of IRS Circular 230 Rules, 31 CFR parts 10, with respect practicing before the Internal Revenue Service. There are severe sanctions for encouraging a client to violate any federal tax law.

End-of-Life

End-of Life Treatment in institutional settings has become an area of ethical concern for Health Lawyers who are sometimes thrust into the middle of “right to die” situations... The recent case of Terri Schiavo illustrates the many ethical issues that have become the subject of moral, religious, judicial and legislative concern. The 1976 case of Karen Quinlan had long set the baseline for important decisions for patients in persistence unconscious states, surrogate decision makers and the removal of life-supporting treatment. On a state by state basis legislatures and courts had established basic ground rules to guide medical decision making for patients who could not make decisions for themselves. In 1990, the United States Supreme Court seemed to recognize a constitutionally protected right to refuse lifesaving hydration and nutrition in a carefully worded 5 to 4 decision in the *Curzan* case.

In the Schiavo case both the Florida Legislature, and eventually Congress, attempted impose a legislative solution over the judicial process involving a tragic intrafamilial controversy. For the Health Lawyer the pull of professional legal ethics is often challenged by personal and moral concerns. Again, the Health Lawyer must consider these fundamental questions: who do you represent and what are your professional obligations to your client.

Religious and Ethical Directives

All Catholic Hospitals must abide by the Directives promulgated by the National Conference of Catholic Bishops; see, <http://www.usccb.org/bishops/directives.shtml>. These Directives prohibit a Catholic entity from performing certain services including, abortions, sterilizations, cloning, artificial insemination and the restriction of nutrition and hydration at the end-of life. A health Lawyer who represents a catholic entity must beware of these restrictions when advising a Catholic entity as an overlay on the lawyer’s professional obligations.

Sarbanes- Oxley

Compliance with the requirements of the federal Sarbanes-Oxley Act Of 2002 regarding Standards of Professional Conduct for Attorneys Appearing and Practicing before the Securities and Exchange Commission in the representation of an issuer of securities is another specific obligation of Health Lawyers who advise for profit and even in some instances non profit companies, see <http://www.sarbanes-oxley.com>.

CASE STUDIES

The following are some common practice scenarios in counseling a nonprofit board of directors which will be discussed by all in the session:

- You serve as in-house counsel in a nonprofit hospital. You have enjoyed a six-year working relationship with the hospital's president, a man who you admire and respect and believe to be an excellent administrator. The board chair wants to make sure that the president is adequately compensated and incentivized to stay at the hospital for the long term. After a board meeting the chair pulls you aside and tells you that you and he are going to come up with a new contract for the president and negotiate it with him. He does not want to involve the full board and believes it is his prerogative as chair to pursue this as he sees fit. Under the hospital's bylaws, there is a compensation committee on the board which is authorized to review and establish compensation for the chief executive officer. How do you proceed?
- You are outside counsel for a nonprofit health care system. In the process of reviewing a material transaction for the system, you learn from one of the system's directors that the sister of one of the other directors owns a 42% interest in the parent company of the entity on the other side of the transaction. You determine that no one has disclosed this to the board. How do you proceed?
- You represent a rural hospital. The president of the hospital has directed the chief financial officer to invest the hospital's funds with a local bank that is owned by the vice chair of the board. There are only three banks in the community. After a preliminary review, it appears to you that the investments were properly made, have average risk, and are earning at least a fair market value return. This is likely known by most members of the board but it has never formally been discussed or approved by them. What obligation do you have to bring this action before the board? Should you go directly to the board chair or go through the president?
- You are the newly retained legal counsel to a large, tax-exempt physician clinic. You anticipate that the clinic will soon become your biggest client. You are asked by the new chief financial officer of the clinic to assist her in reviewing the Form 990 filing for the clinic. In the process, you learn that the previous administrator of the clinic, who retired two years ago, received a retirement bonus of a two-week trip to Hawaii that was never reported as income to him on a Form W-2 or 1099. The clinic's board wanted it to be a gift to him in recognition of his long years of service. You are aware that under the IRS's intermediate sanctions rules, this would likely be viewed as an automatic excess benefit transaction subject to immediate sanctions penalties. You are also aware that there is an affirmative obligation to report excess benefit transactions on the Form 990. How do you proceed?
- You are approached by the chair of the audit committee of a nonprofit hospital that you represent. The chair has learned of some financial improprieties that may involve both senior staff and one or more members of the board of directors. The audit committee chair knows that you have represented the hospital for a long time and have worked closely with senior staff and with the board. The audit committee chair would like to retain independent counsel to advise it as it continues its review of this matter. You notify the board chair of this request and the board chair opposes it, believing that having independent counsel for a board committee would create a schism in the organization that could be very damaging. How do you proceed?

- You meet with the chief executive officer of a hospital and advise her of several changes that you recommend be made to the bylaws of the hospital to reflect new best practices in the governance of nonprofit organizations. After reviewing them, the CEO decides that they would tilt the balance of power into the hands of the board and that they would micromanage her staff. She does not want to present these recommendations to the board for consideration.

The following are some common practice scenarios in counseling a nonprofit board of directors which will be discussed by all in the session:

- You serve as in-house counsel in a nonprofit hospital. You have enjoyed a six-year working relationship with the hospital's president, a man who you admire and respect and believe to be an excellent administrator. The board chair wants to make sure that the president is adequately compensated and incentivized to stay at the hospital for the long term. After a board meeting the chair pulls you aside and tells you that you and he are going to come up with a new contract for the president and negotiate it with him. He does not want to involve the full board and believes it is his prerogative as chair to pursue this as he sees fit. Under the hospital's bylaws, there is a compensation committee on the board which is authorized to review and establish compensation for the chief executive officer. How do you proceed?
- You are outside counsel for a nonprofit health care system. In the process of reviewing a material transaction for the system, you learn from one of the system's directors that the sister of one of the other directors owns a 42% interest in the parent company of the entity on the other side of the transaction. You determine that no one has disclosed this to the board. How do you proceed?
- You represent a rural hospital. The president of the hospital has directed the chief financial officer to invest the hospital's funds with a local bank that is owned by the vice chair of the board. There are only three banks in the community. After a preliminary review, it appears to you that the investments were properly made, have average risk, and are earning at least a fair market value return. This is likely known by most members of the board but it has never formally been discussed or approved by them. What obligation do you have to bring this action before the board? Should you go directly to the board chair or go through the president?
- You are the newly retained legal counsel to a large, tax-exempt physician clinic. You anticipate that the clinic will soon become your biggest client. You are asked by the new chief financial officer of the clinic to assist her in reviewing the Form 990 filing for the clinic. In the process, you learn that the previous administrator of the clinic, who retired two years ago, received a retirement bonus of a two-week trip to Hawaii that was never reported as income to him on a Form W-2 or 1099. The clinic's board wanted it to be a gift to him in recognition of his long years of service. You are aware that under the IRS's intermediate sanctions rules, this would likely be viewed as an automatic excess benefit transaction subject to immediate sanctions penalties. You are also aware that there is an affirmative obligation to report excess benefit transactions on the Form 990. How do you proceed?
- You are approached by the chair of the audit committee of a nonprofit hospital that you represent. The chair has learned of some financial improprieties that may involve both senior staff and one or more members of the board of directors. The audit committee chair knows that you have represented the hospital for a long time and have worked closely with

senior staff and with the board. The audit committee chair would like to retain independent counsel to advise it as it continues its review of this matter. You notify the board chair of this request and the board chair opposes it, believing that having independent counsel for a board committee would create a schism in the organization that could be very damaging. How do you proceed?

- You meet with the chief executive officer of a hospital and advise her of several changes that you recommend be made to the bylaws of the hospital to reflect new best practices in the governance of nonprofit organizations. After reviewing them, the CEO decides that they would tilt the balance of power into the hands of the board and that they would micromanage her staff. She does not want to present these recommendations to the board for consideration. Do you have an obligation to take them directly to the board?
- You have an obligation to take them directly to the board?

Real Estate Case Study

Paradise, USA, has two hospitals, Mission Medical Center and Paradise Community Hospital. The real estate market for medical office buildings has been depressed for the past two years. Mission and Paradise Community each own two medical office buildings. Paradise Community's medical office buildings are fully leased. Mission's medical office buildings are 80% leased. Paradise Community's CEO, Mr. Jack Runright, has noticed that physicians who lease space from a medical office building adjacent to a hospital tend to refer more patients to that hospital. Mr. Runright has decided to build a new medical office building on his campus and hopes to attract many of Mission's current tenants. Mr. Runright understands that Hearts-Are-Us, a major cardiology group in Paradise Community, has a lease for space at one of Mission's medical office buildings that will expire in one year. Hearts-Are-Us' President, Dr. Stent, met with Mr. Runright when the plans for Paradise Community's new medical office building were revealed. Mr. Runright told Dr. Stent that Paradise Community would like Hearts-Are-Us to lease space in the new medical office building. Dr. Stent, whose spouse is a real estate agent, knows and understands that Paradise's real estate market is depressed. When Paradise Community developed its business plan for the new medical office building, it was determined that a rate of \$20 per square foot was required for Paradise Community to experience a reasonable rate of return on its investment. Hearts-Are-Us, however, was leasing space from Mission at \$18 per square foot and was planning on using the depressed market to its advantage when negotiating a new lease with Mission. Dr. Stent told Mr. Runright that Hearts-Are-Us would be interested in leasing space from Paradise Community at \$15 per square foot.

Mr. Runright contacts you for advice.

Physician Employment Case Study

Dr. Loyal is a primary care physician who has practiced in Paradise for the past 35 years. Dr. Loyal is the only physician in Paradise willing to perform abortions. Dr. Loyal was upset by the purchase of Paradise Community Hospital by General Health Systems, an out-of-state health care behemoth. After General's purchase, Dr. Loyal shifted all of his business, except for abortions, to Mission Medical Center. Dr. Loyal has been very pleased with the service provided to his patients by Mission Medical Center.

Dr. Loyal and Mission Medical Center's CEO, Weldon Care, had dinner last night. Dr. Loyal expressed an interest in winding down his private practice. Mr. Care asked whether Dr. Loyal would be interested in becoming an employed physician with Mission Medical Center. Dr. Loyal replied that he would be interested in becoming Mission's employee. Upon inquiry from Mr. Care, Dr. Loyal said he would not perform abortions at Mission, but continue to perform abortions at Paradise Community Hospital.

Dr. Loyal had recently attended a compliance seminar where fair market value and commercially reasonable compensation was discussed. Dr. Loyal stated that he was aware that national surveys exist and believes that primary care physicians at the 90th percentile are paid \$200,000. Dr. Loyal would like to be compensated at that amount and be given control over the business operations of his practice. Dr. Loyal also stressed that he does not intend to work as hard as he has in the past, hoping to make a smooth transition into retirement.

Mr. Care reviewed the financial performance of Dr. Loyal's practice. Dr. Loyal currently makes \$150,000 (50th percentile). According to Dr. Loyal's RVU production, he is at the 50th percentile. Mr. Care notes that if expenses are reduced, the practice may break even if Mission Medical Center pays Dr. Loyal \$200,000.

Mr. Care calls you for advice.

Medical Directorship Case Study

Dr. DoMore, a cardiologist with Hearts-Are-Us, who is currently under investigation by the OIG for billing Medicare for medically unnecessary angioplasties, has recently returned from a seminar where he learned about a new procedure called Angioplague Elimination. Dr. DoMore contacts his local hospital administrator, Mr. Runright, and explains that he would like to begin performing Angioplague Elimination procedures at Paradise Community Hospital. Dr. DoMore explains that Medicare has recently recognized Angioplague Elimination procedures and will pay \$20,000 for each procedure. Mr. Runright is excited about offering this new procedure to the Paradise Community Hospital community, and the revenue this new procedure will generate for the hospital. Dr. DoMore explains that he would like to limit his Angioplague Elimination procedures only to Paradise Community Hospital. However, Dr. DoMore would like to be appointed as Paradise Community Hospital's Angioplague Elimination Medical Director. Dr. DoMore explains that a medical directorship is warranted because of the training of Paradise Community Hospital's staff and monitoring of quality. Dr. DoMore asks for \$50,000 per year for the medical directorship services. Mr. Runright tells Dr. DoMore that he will contact Paradise Community Hospital's General Counsel and "paper the deal."

Mr. Runright comes to you to develop the medical director agreement.

Physician Recruitment Case Study

Dr. Loyal contacts Mr. Care and talks about his granddaughter, who is finishing a general vascular residency in Hawaii. Dr. Loyal explains that he is very close with his granddaughter and would enjoy having his granddaughter as a surgeon in Paradise. Dr. Loyal explains that his granddaughter has \$150,000 of student debt. Dr. Loyal would be very pleased if Mission Medical Center could assist his granddaughter in relocating to Paradise and to pay off her student debt.

Mr. Care meets with Ms. Compliant, Mission's Compliance Officer. Ms. Compliant explains that in order to provide financial incentives to Dr. Loyal's granddaughter, Mission would have to prove that there was a community need for an additional general vascular surgeon. After conducting some research, Ms. Compliant has determined that the population ratio for general vascular surgeons can support one additional surgeon. However, Ms. Compliant is also aware that Paradise Community Hospital is to sign a relocation agreement the next day with another general vascular surgeon to relocate to Paradise. To the best of Ms. Compliant's knowledge, however, the negotiations have not been completed.

Ms. Compliant comes to you for advice.

- **Discovery of Privileged Information, Anderson Case, Round I -In re Grand Jury Subpoenas, 144 F.3d 653 (10th Cir. 05/18/1998)**

[12] Intervenor-Appellant [*fn2](#) appeals from the district court's order compelling the testimony of two attorneys, John Doe and Jane Roe, before a federal grand jury. He argues that the district court erred by: (1) applying the crime-fraud exception to attorney-client privilege to compel the attorneys' testimony; (2) applying the exception too broadly and refusing to review the questions to be asked of the attorneys before the grand jury; (3) refusing to disclose or to allow rebuttal of the government's in camera, ex parte showing that the crime-fraud exception applied; and (4) prohibiting the attorneys from invoking Intervenor's Fifth Amendment right against self-incrimination. The government challenges Intervenor's standing to bring the present appeal. We affirm.

[13] BACKGROUND

[14] Intervenor, several hospitals, doctors, and others are targets of an ongoing federal grand jury investigation. The Hospital, which employed Intervenor as President and Chief Executive Officer during the relevant time periods, responded to the grand jury's subpoenas duces tecum by producing numerous documents, some of which implicated the use of attorneys John Doe and Jane Roe to effectuate the crimes. Doe and Roe provided legal services to The Hospital during the time of the alleged criminal activity. The Hospital and Intervenor also sought the advice of other attorneys after the FBI initiated its investigation in 1992.

[15] The grand jury issued subpoenas seeking the testimony of Doe and Roe before it on January 21, 1997. The Hospital, Doe, and Roe moved, on January 16, 1997, to quash the subpoenas because of the attorney-client privilege and the work-product doctrine (referred to hereinafter as "privileges" for convenience) and because the testimony would violate The Hospital's Sixth Amendment right to counsel. That same day, Intervenor moved to intervene and to quash the subpoenas, asserting the privileges on the basis of his relationship with the attorneys in his individual capacity, independent of the attorneys' relationship with The Hospital and its officers in their official capacities. On January 30, 1997, the government filed a response to the motions, arguing, inter alia, that the parties had failed to prove entitlement to the privileges, that The Hospital's production of documents waived the privileges, and that the crime-fraud exception vitiates the privileges. In support of its position, the government simultaneously filed an in camera, ex parte good faith statement of evidence as to the alleged criminal activity, which Doe, Roe, The Hospital, and Intervenor have not been permitted to view.

[16] The district court conducted a hearing on the motions on February 24, 1997. The court granted Intervenor's motion to intervene, but found that the crime-fraud exception to the attorney-client privilege applied because the government had established a prima facie case that The Hospital had engaged in criminal or fraudulent conduct, which was furthered by the aid of Roe and Doe. The court accordingly denied the motions to quash, subject to further development of the record, including specific questions and answers before the grand jury. The court refused to permit movants to view the government's good faith statement of evidence or to conduct a separate hearing at which movants could attempt to rebut the evidence, although the court did allow counsel for Intervenor to present arguments intended to rebut the prima facie showing.

- [17] On March 19, 1997, Ms. Roe appeared before the grand jury and asserted the attorney-client privilege and the work-product doctrine in response to virtually every question asked of her. She also vicariously raised Intervenor's Fifth Amendment right against self-incrimination at his request. Mr. Doe appeared before the grand jury on April 2, 1997, and did the same. On March 25, 1997, the government moved to compel Ms. Roe's testimony, and it orally moved to compel Mr. Doe's testimony on April 2, 1997. Mr. Doe and Ms. Roe responded to the motion to compel, and The Hospital and Intervenor moved to intervene.
- [18] The court conducted hearings on the motions on April 2 and 7, 1997, during which the court heard the testimony of Mr. Doe, Ms. Roe, and Intervenor regarding any attorney-client relationship between the attorneys and Intervenor in his individual capacity. The court granted both motions to intervene because "for purposes of the motion to intervene, . . . the attorney-client privilege has been sufficiently established, and the Court would find that at relevant times [Ms. Roe and Mr. Doe] were providing joint representation to [The Hospital and to Intervenor]." Appellee's Supplemental App. at 305.
- [19] At the April 7, 1997, hearing, the government presented further in camera, ex parte evidence of the involvement of Ms. Roe and Mr. Doe in the criminal activity. The district court found that the crime-fraud exception applied, and the court orally sustained the government's motion to compel the testimony of Ms. Roe and Mr. Doe. The Hospital and Intervenor indicated their intent to file an appeal and moved to stay the proceedings pending the appeal. Subsequently, on May 1, 1997, the court entered its written order (1) sustaining the motion to compel testimony of Ms. Roe and Mr. Doe; (2) overruling Intervenor's request that Ms. Roe and Mr. Doe be allowed to assert Intervenor's Fifth Amendment right against self-incrimination; and (3) granting the motion to stay pending appeal. Intervenor appeals the first two decisions. [*fn3](#)
- 22] I. Attorney-Client Privilege and Standing[
- [26] The party seeking to assert the attorney-client privilege has the burden of establishing its applicability. *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1550 (10th Cir. 1995). The privilege is governed by the common law and is to be strictly construed. *Trammel v. United States*, 445 U.S. 40, 47, 50 (1980); *In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244, 245-46 (10th Cir. 1988). "The purpose behind the attorney-client privilege is to preserve confidential communications between attorney and client." *In re Grand Jury Subpoenas (United States v. Anderson)*, 906 F.2d 1485, 1492 (10th Cir. 1990). Where a corporate client is involved, "special problems" arise because, "[a]s an inanimate entity, a corporation must act through agents." *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 348 (1985). Any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs and the officer's duties belongs to the corporation and not to the officer. See *United States v. International Bhd. of Teamsters*, 119 F.3d 210, 215 (2d Cir. 1997); *In re Beville, Bresler & Schulman Asset Management Corp.*, 805 F.2d 120, 124 (3d Cir. 1986); see also *Weintraub*, 471 U.S. at 348-49; *Upjohn Co. v. United States*, 449 U.S. 383, 394-95 (1981). Thus, Intervenor has no power to assert the attorney-client privilege except as to confidential communications with Doe and Roe in his individual capacity, which is unlikely to be anything more than a minute portion of the total communications sought by the grand jury.

- [27] The Second and Third Circuits have employed the following test to determine whether an officer may assert a personal privilege with respect to conversations with corporate counsel despite the fact that the privilege generally belongs to the corporation:
- [28] First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.
- [29] *International Bhd. of Teamsters*, 119 F.3d at 215 (quoting *In re Bevill*, 805 F.2d at 123 (quoting *In re Grand Jury Investigation*, 575 F. Supp. 777, 780 (N.D. Ga. 1983))). A personal privilege does not exist merely because the officer "reasonably believed" that he was being represented by corporate counsel on an individual basis. *International Bhd. of Teamsters*, 119 F.3d at 216. In certain circumstances, reasonable belief may be enough to create an attorney-client relationship, but it is not sufficient here to create a personal attorney-client privilege. See *Cole v. Ruidoso Mun. Sch.*, 43 F.3d 1373, 1384 (10th Cir. 1994) (holding, in context of motion to disqualify counsel, attorney-client relationship exists where party submits confidential information to a lawyer and it does so with a reasonable belief that the lawyer was acting as its attorney).
- [30] The district court heard the testimony of Intervenor, Ms. Roe, and Mr. Doe concerning the existence of a personal attorney-client privilege. Each of them testified that Intervenor sought the advice of the attorneys in his individual capacity and that confidential communications occurred between them as to his personal situation. Doe and Roe testified that they recognized a potential conflict of interest. The court concluded that "for purposes of the motion to intervene, . . . the attorney-client privilege has been sufficiently established, and the Court would find that at relevant times [Ms. Roe and Mr. Doe] were providing joint representation to [The Hospital and to Intervenor]." Appellee's Supplemental App. at 305. In making this finding, the district court necessarily relied on the credibility of the witnesses before it and on facts which have not been demonstrated to us to be clearly erroneous.
- [31] Accordingly, adopting and applying the test employed by the Second and Third Circuits, we conclude that a limited attorney-client privilege exists between Intervenor and Roe and Doe. Our holding is an extremely limited one and does not extend to communications made while third parties were present nor does it extend to communications in which both corporate and individual liability were discussed. It includes only that very small portion of communications in which Intervenor sought legal advice as to his personal liability without regard to any corporate considerations. To the limited extent there is a privilege then, Intervenor has standing.
- [32] II. Application of Crime-Fraud Exception
- [33] Next, we address, whether, in light of the limited attorney-client privilege, that privilege is vitiated by the crime-fraud exception. We review the district court's granting of the motion to compel and its determination that the crime-fraud exception applies for abuse of discretion. *In re Grand Jury Proceedings (Company X)*, 857 F.2d at 712. We will not disturb the court's exercise of its discretion unless we have a "definite and firm

conviction that the lower court made a clear error of judgment or exceeded the bounds of permissible choice in the circumstances." *Moothart v. Bell*, 21 F.3d 1499, 1504 (10th Cir. 1994) (quotation omitted).

- [34] The importance and sanctity of the attorney-client privilege is well established. See *Upjohn v. United States*, 449 U.S. 383, 389 (1981). Yet, the privilege is not worthy of protection "at all costs" as Intervenor suggests. Appellant's Br. at 49. Because it "withhold[s] relevant information from the factfinder," *United States v. Zolin*, 491 U.S. 554, 562 (1989) (citation omitted), the "attorney-client privilege does not apply where the client consults an attorney to further a crime or fraud." *Motley v. Marathon Oil Co.*, 71 F.3d 1547, 1551 (10th Cir. 1995) (quoting *In re Grand Jury Proceedings (Company X)*, 857 F.2d 710, 712 (10th Cir. 1988)). "It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the 'seal of secrecy,' between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime." *Zolin*, 491 U.S. at 563 (citations omitted). The crime-fraud exception applies to both the attorney-client privilege and the work-product doctrine. *In re Grand Jury Proceedings (Vargas)*, 723 F.2d 1461, 1467 (10th Cir. 1983).
- [35] To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact. *Motley*, 71 F.3d at 1551; *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467. The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it. See *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). The exception does not apply if the assistance is sought only to disclose past wrongdoing, see *Zolin*, 491 U.S. at 562, but it does apply if the assistance was used to cover up and perpetuate the crime or fraud. See *In re Grand Jury Proceedings (Company X)*, 857 F.2d at 712; see also *In re Grand Jury Proceedings (Doe)*, 102 F.3d 748, 749-51 (4th Cir. 1996) (applying exception where client used lawyers, without their knowledge, to misrepresent or to conceal what the client had already done); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (noting that exception applies where "communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity"); *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) ("To the limited extent that past acts of misconduct were the subject of the cover-up that occurred during the period of representation, however, then past violations properly may be a subject of grand jury inquiry.").
- [36] Although the exact quantum of proof necessary to meet the prima facie standard has not been decided by the Supreme Court, see *Zolin*, 491 U.S. at 563-64 & n.7, several circuits have attempted to define precisely what the standard requires. See, e.g., *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (probable cause to believe a crime or fraud has been committed); *Haines v. Liggett Group Inc.*, 975 F.2d 81, 95-96 (3d Cir. 1992) (evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982) (evidence such as will suffice until contradicted and overcome by other evidence); *United States v. Davis*, 1 F.3d 606, 609 (7th Cir. 1993) (evidence presented by the party seeking application of the exception is sufficient to require the party asserting the privilege to come forward with its own evidence to support the privilege); *In re Grand Jury Proceedings (Corporation)*, 87 F.3d 377, 381 (9th Cir. 1996) (reasonable cause to

believe attorney was used in furtherance of ongoing scheme); *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987) (evidence that if believed by the trier of fact would establish the elements of some violation that was ongoing or about to be committed); *In re Sealed Case*, 107 F.3d 46, 50 (D.C. Cir. 1997) (evidence that if believed by the trier of fact would establish the elements of an ongoing or imminent crime or fraud). We need not articulate the exact quantum of proof here because under any of these announced standards, the government has made a prima facie showing.

- [37] The court below found that the government had "established by substantial and competent evidence a prima facie case that [The Hospital and Intervenor] have committed a crime, that [The Hospital and Intervenor] used the legal services of Roe and Doe in furtherance of that crime, and that Roe and Doe were aware of the criminal conduct." Appellant's App. Vol. II at 226. We have reviewed the record, including the government's ex parte, in camera submission, and conclude that the district court did not abuse its discretion. The evidence presented constitutes a prima facie showing that the services of Mr. Doe and Ms. Roe were used both to effectuate the crime or fraud and to conceal it. Thus, the crime-fraud exception vitiates the limited attorney-client privilege between Intervenor and Roe and Doe. [*fn4](#)
- [38] III. Scope of the Crime-Fraud Exception
- [39] Intervenor asserts that even if the exception does apply, the district court's application of the exception lacked specificity and was overly broad. The court held that because the exception applies, Roe and Doe could not "avoid testifying as to any act, communication, document or other matter concerning the relationships and agreements (whether formal or informal, written or unwritten, executed or proposed) between [The Hospital and the doctors, two of their companies, its officers or employees] during the time period September 1, 1984 through 1994." Appellant's App. Vol. II at 226-27.
- [40] Intervenor argues that the time period defined by the court is arbitrary and covers too great a period and that, as a result, it may include communications that do not fall within the crime-fraud exception. Given our review of the record, we disagree. The court properly delineated a reasonable time period and further narrowed the focus to questions regarding the relationship at issue. Accordingly, we conclude that the court did not err in defining the scope of the crime- fraud exception.
- [41] Similarly, Intervenor contends that the district court's decision to apply the crime-fraud exception was error because it refused to review, in camera, the government's proposed questions to Doe and Roe. Without such a review, he argues, the court could not have properly determined whether some of the questions-and their answers-would fall outside the scope of the exception.
- [42] In *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467, we held that "once the trial Judge has concluded that the privilege does not apply because the government has made such a prima facie showing, the trial court need only conduct an in camera inspection of the documents if there is a possibility that some of them may fall outside the scope of the exception to the privilege." We have not addressed whether it is appropriate for a similar "inspection" to be made of testimony to be presented to a grand jury.

- [43] We recognize the need to balance the confidentiality of privileged information outside the scope of the crime-fraud exception and the conservation of judicial resources. We have encouraged the district courts not to allow the determination of the applicability of the crime-fraud exception to turn into mini-trials that would waste resources and delay the grand jury proceedings. See *In re Grand Jury Proceedings (Company X)*, 857 F.2d at 712; *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467. Accordingly, we will not require that the district court conduct a detailed review of all questions and answers prior to their presentation to the grand jury. Instead, district courts should define the scope of the crime-fraud exception narrowly enough so that information outside of the exception will not be elicited before the grand jury. However, if, before ordering testimony in front of the grand jury, the district court, within its discretion, believes an in camera examination of the witness or the questions to be asked of the witness is needed to ensure the scope of the inquiry will not be too broad, it may do so. ^{*fn5} See *In re Richard Roe, Inc.*, 68 F.3d at 41.
- [44] At the April 7, 1997, hearing in this case, the court did hear objections to specific questions that had been asked before the grand jury previously. The court concluded that not only did they fall within the scope of the crime-fraud exception, but also that much of the information sought did not even relate to anything that could be considered privileged. Appellee's Supplemental App. at 309-29. In addition, the court's order makes it clear that it had, in fact, reviewed the questions already asked of Roe and Doe. Appellant's App. Vol. II at 226.
- [45] Given the court's review of the questions and its limited definition of the scope of the crime-fraud exception, we do not believe it abused its discretion in failing to set forth, question by question, what could and could not be asked of Doe and Roe. The court's order appropriately requires Roe and Doe "to answer the questions previously posed [before the grand jury], as well as any other questions on those topics." Appellant's App. Vol. II at 227.
- [54] V. Vicarious Assertion of Intervenor's Fifth Amendment Rights
- [55] Finally, Intervenor claims that Roe and Doe should be allowed to assert his Fifth Amendment right against self-incrimination. We review the district court's denial of this claim de novo because it involves a question of standing. See *United States v. Anderson*, 778 F.2d 602, 606 n.3 (10th Cir. 1985); *United States v. Skolek*, 474 F.2d 582, 584 (10th Cir. 1973); see also *Committee to Save the Rio Hondo v. Lucero*, 102 F.3d 445, 447 (10th Cir. 1996).
- [56] "There is no constitutional right not to be incriminated by the testimony of another. . . . The privilege against self-incrimination is solely for the benefit of the witness and is purely a personal privilege of the witness, not for the protection of other parties." *Skolek*, 474 F.2d at 584. The Fifth Amendment protects against "compelled self-incrimination, not (the disclosure of) private information." *Fisher v. United States*, 425 U.S. 391, 401 (1976) (quoting *United States v. Nobles*, 422 U.S. 225, 233 n.7 (1975)). Thus, a "party is privileged from producing evidence but not from its production." *Fisher*, 425 U.S. at 399 (quoting *Johnson v. United States*, 228 U.S. 457, 458 (1913)). The relevant question for our analysis, then, is whether the information was obtained through compulsion, not whether the information was private.
- [57] In certain circumstances, where an attorney is being compelled to produce documents that his or her client could personally bar from production under the Fifth Amendment, "the attorney to whom they are delivered for the purpose of obtaining legal advice

should also be immune from subpoena." Fisher, 425 U.S. at 396. However, the instant case is different because the information sought is the content of oral statements made by Intervenor that were not compelled. In re Feldberg, 862 F.2d 622, 629 (7th Cir. 1988); In re Grand Jury Proceedings (Wilson), 760 F.2d 26, 27 (1st Cir. 1985). Compulsion of the attorneys' testimony as to voluntary statements made by the client does not, therefore, implicate the Fifth Amendment's protection of the client against "compulsory self-incrimination." Feldberg, 862 F.2d at 629. The statements might be protected by the attorney-client privilege, but not where, as here, the crime-fraud exception applies.

- [58] Thus, because there is no indication that Intervenor's statements to his attorney were compelled and because the crime-fraud exception vitiates any attorney-client privilege, the district court correctly ordered that Ms. Roe and Mr. Doe could not vicariously assert Intervenor's Fifth Amendment rights before the grand jury.
- [62] [*fn2](#) Because Appellant is the subject of a grand jury investigation, he is referred to herein as "Intervenor" pursuant to Fed. R. Crim. P. 6(e). Likewise, the hospital for which he worked will be referred to as "The Hospital." The two attorneys involved will be referred to as "John Doe" and "Jane Roe."
- [63] [*fn3](#) Mr. Doe and Ms. Roe did not appeal the decision. The Hospital appealed, but, upon its motion, the appeal was dismissed. Pursuant to a settlement agreement with the government, The Hospital agreed to waive its prior assertion of the attorney-client privilege and the work-product doctrine as to any document or information concerning contracts between it and the doctors from September 1, 1984, to February 1, 1995. See Appellee's Supplemental App. at 331-32.
- [64] [*fn4](#) We by no means imply that Doe and Roe are guilty of any crimes or that they were, in fact, culpable in any way. Indeed, no charges have been filed against them.
- [65] [*fn5](#) We recognize that in one case, the D.C. Circuit required the district court to engage in a question-by-question determination of the scope of the crime-fraud exception "given the nebulous distinction in this case between prior acts that remain protected by the attorney-client privilege and prior acts forming the basis of the ongoing cover-up." In re Sealed Case, 754 F.2d 395, 402-03 (D.C. Cir. 1985). We believe, as the Second Circuit did in In re Richard Roe, Inc., 68 F.3d at 41, that the narrow scope of the district court's order makes such a mandatory review unnecessary.

Excerpt from
Government Motion to Disqualify Conflicted Defense Counsel

Motion by United States Attorney, Western District of Michigan
Decided by United States District Court, Western District of Michigan

Party Names Redacted

Defendant 1: Health Care System

Defendant 2: CEO of Health Care System Defendant 3:

CFO of Health Care System

Law Firm: Representation of Defendant 1 is the subject of this motion to disqualify.

This motion was successful – Law Firm was disqualified.

ARGUMENT

The government asks this Court to conduct a hearing to determine whether "Law Firm" should be disqualified from representing "Defendant 1" based upon "Law Firm's" prior representation of co-defendant "Defendant 2", potential defendant "Defendant 3", and key witnesses whom the government intends to call to testify against "Defendant 1" at trial, as well as "Law Firm's" prior and current representation of **other corporate entities** ("Corporation 1" and "Corporation 2") involved with and victimized by the very conduct "Defendant 1" has been indicted on. In addition to these classic conflict situations, however, a member of "Law Firm" and a partner of "Law Firm's" trial attorneys will also be a government witness called to testify against "Defendant 1". Moreover "Law Firm" cannot disinterestedly advise "Defendant 1" whether to raise an advice of counsel defense because doing so would require testimony from "Attorney T", and may highlight her previous erroneous advice and/or her earlier conflicts between "Defendant 1", "Corporation 2" and "Corporation 1", all further underscoring the need for disqualification. The government submits that these actual conflicts of interest will impair "Law Firm's" ability to provide effective assistance of counsel to "Defendant 1" and, equally as important, will impair the integrity of the judicial process.

It is well-settled that in criminal cases, the Court is empowered to review conflicts of interests by defense counsel in order to determine whether there is an actual or potential conflict of interest warranting disqualification. See Wheat v. United States, 486 U.S. 153, 162-64 (1988); United States v. Mays, 69 F.3d 116, 121-22 (6th Cir. 1995). Government attorneys and defense counsel both have an ethical obligation to bring such conflicts to the court's attention. See Cuyler v. Sullivan, 446 U.S. 335, 346 (1980)("[d]efense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of a trial"); United States v. Tatum, 943 F.2d 370, 380 (4th Cir. 1991)("when a conflict situation becomes apparent to the government, the government has a duty to bring the issue to the court's attention and, if necessary, move for disqualification of counsel"). The decision whether to order disqualification is left to the sound discretion of the trial court. Wheat, 486 U.S. at 163; Mays, 69 F.3d at 119-20.

The Sixth Circuit summarized the standards to be applied in ruling on a motion to disqualify defense counsel due to a conflict of interest in Mays:

When presented with a motion to disqualify, the district court must make a careful inquiry, balancing the constitutional right of the defendant to representation by counsel of his choosing with the court's interest in the integrity of the proceedings and the public's interest in the proper administration of justice. The inquiry will ordinarily require a hearing at which both parties will be permitted to produce witnesses for examination and cross-examination. United States v. Reese, 699 F.2d 803, 805 (6th Cir.1983). However, when the facts alleged in the motion to disqualify disclose an actual or potential conflict of interest and are uncontested, a hearing is not required.

69 F.3d at 121-22.

In Wheat, the Supreme Court recognized that a defendant's right to waive conflict-free representation is not absolute: "while the right to select and be represented by one's preferred attorney is comprehended by the Sixth Amendment, the Amendment is to guarantee an effective advocate for each defendant rather than to ensure that a defendant will inexorably be represented by the lawyer who he prefers." 486 U.S. at 153. Rejecting the contention that the Sixth Amendment is violated where a trial court disqualifies defense counsel who is faced with the possibility of having to cross-examine a former client, the Court held that "[t]he District Court must recognize a presumption in favor of [a defendant's] counsel of choice, but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of a serious potential for conflict." Wheat, 486 U.S. at 164. Noting that "[f]ederal courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them," the Court stated:

"when a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant. Such representation not only constitutes a breach of professional ethics and invites disrespect for the integrity of the court, but it is also detrimental to the independent interest of the trial judge to be free from future attacks over the adequacy of the waiver or the fairness of the proceedings in his own court and the subtle problems implicating the defendant's comprehension of the waiver."

Wheat, 486 U.S. at 160, 162 (quoting United States v. Dolan, 570 F.2d 1177, 1184 (3d Cir. 1978)).

- A. "Law Firm" Should Be Disqualified Because Of Its Conflicts
Arising Out Of Its Prior Representation of Co-Defendant(s)
and Key Government Witnesses And Its Prior and Current
Representation of Participants/Nictims.

In Mays, the Sixth Circuit upheld the trial court's disqualification of defense counsel without conducting a waiver hearing under facts substantially similar to the facts in this case:

Here, the District Court faced a situation where it was undisputed that Jarrett had represented seven government witnesses before the grand jury and two of Samuel Mays' co-defendants. This situation posed the threat of conflicts of interest not solely to defendant Mays but to several others involved in the case. Given the broad latitude accorded to district courts' decisions with regard to conflicts of interest, and given the recognized potential of conflicts of interest in the representation of multiple codefendants, we cannot say that the District Court abused its discretion by disqualifying Samuel Mays' counsel and failing to hold a waiver hearing where defendant failed to file a brief or evidentiary material in support of his position. Wheat v. United States, 486 U.S. 153, 164, 108 S.Ct. 1692, 1699-1700, 100

L.Ed.2d 140 (1988); See also United States v. Mosconv, 927 F.2d 742, 750 (3d Cir.), cert. denied, 501 U.S. 1211, 111 S.Ct. 2812, 115 L.Ed.2d 984 (1991)(cross-examination of former clients inherently involves a conflict of interest).

69 F.3d at 122.

The Third Circuit reached a similar result in United States v. Mosconv, 927 F.2d 742, 750 (3d Cir. 1991), cited with approval in Mays. In Mosconv, the court of appeals affirmed the district court's decision to disqualify defense counsel where he had represented three of the defendant's former employees during the course of the investigation, each of whom would be called to testify as government witnesses at trial. See also United States v. Stewart, 185 F.3d 112, 122 (3d Cir. 1999)(affirming district court's decision to disqualify law firm, despite waivers by the defendant and potential witnesses, where law firm also represented individuals who had personal relationships with the defendant, who had been named as defendants in a parallel civil proceeding, and who had agreed to testify against the defendant at trial).

Similarly, in United States v. Vasquez, 995 F.2d 40 (5th Cir. 1993), the Fifth Circuit affirmed the district court's order disqualifying defense counsel who was representing a potential government witness in another criminal matter despite waivers by the witness and defendant. The court reasoned:

Although the value of Lore's assistance to the prosecution was disputed, defense counsel could not contest the fact that counsel was representing Lore in another criminal proceeding and Lore was cooperating with the Government in Vasquez's criminal case. The Government's contention that a conflict of interest would arise if [the defense attorney] was required to cross-examine Lore during the trial was a valid and significant concern.

Id. at 42; see also United States v. MillsaDs, 157 F.3d 989, 995-96 (5th Cir. 1998)(affirming district court's order granting government's motion to disqualify defense counsel who had previously represented a government witness in the case, despite the defendant's and witness's waivers, holding that even though the attorney no longer represented the witness, the potential existed that the attorney would have divided loyalties); United States v. Coleman, 997 F.2d 1101, 1104 (5th Cir. 1993) (affirming district court's decision to disqualify defendant's attorney based upon attorney's prior representation of a co-defendant).

Similar results were reached in United States v. Zichettello, 208 F.3d 72, 104 (2d Cir. 2000) (affirming order disqualifying an individual defendant's attorney who had at various times represented co-defendants in the case, the law firm with which the defendant and co-defendants were associated, and an employee of the law firm who would be called to testify at trial, as well as another business that was the subject of other related criminal charges; "The district court had ample basis upon which to conclude that the conflicts in the instant matter were severe and hence disqualification was necessary. Indeed, the conflicts might fairly be described as ubiquitous."); United States v. Rogers, 9 F.3d 1025, 1030-32 (2d Cir. 1993)(affirming district court's decision to disqualify defense counsel who had previously appeared on behalf of co-defendant at civil deposition of co-defendant in case arising out of the same facts and circumstances as the criminal case); and United States v. Baker, 10 F.3d 1374, 1399 (9th Cir. 1993)(affirming district court's order granting government's motion to disqualify defense counsel who had previously represented a key government witness in an unrelated narcotics prosecution based upon district court's determination that there was "reasonable probability that confidences were disclosed which could be used against the client in later, adverse representation."). Cf. United States v. Maleidi, 62 F.3d 465 (2d Cir. 1995)(defendant denied

effective assistance of counsel where district court failed to sua sponte disqualify defense counsel who previously represented key government witness in grand jury proceedings).

' Where a critical aspect of the potential conflict stems from confidential information received from a former client now a prosecution witness, some courts hold that a "screen," which keeps that information away from the particular attorney representing the defendant, can be an appropriate solution. See United States v. Lech, 895 F.Supp 586 (S.D,N.Y. 1995). Here, "Law Firm" refused to

Courts' are reluctant to honor a defendant's waiver of conflict-free representation and/or a witness's waiver of the attorney-client privilege based, in part, on the fact it is difficult to predict the harm which may result from such a waiver prior to trial:

Unfortunately for all concerned, a district court must pass on the issue of whether or not to allow a waiver of conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pretrial context when relationships between parties are seen through a glass, darkly. The likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relationship to the care with which he conveys all the necessary information to them.

Wheat, 486 U.S. at 162-63.

Thus, in United States v. Stewart, 185 F.3d 112, 119-22 (3d Cir. 1999), the Third Circuit upheld the district court's order disqualifying a law firm that also represented four potential witnesses where the district court's decision was based, in part, on its determination that the four witnesses could not comprehend the ramifications of adverse representation. Similarly, the court in United States v. Calabria, 614 F. Supp. 187 (E.D. Pa. 1985), discussed at length the problem created by trying to put limitations on trial strategy, in advance of trial, in order to resolve conflicts so that a defendant's waiver could be honored while insuring the integrity of the trial process:

screen "Attorney T".

The difficulty with [defense counsel's] argument is that he has tailored Calabria's defense in advance of trial in a way that is the only way to avoid his professional disabilities arising out of previous representation of the government's chief witness, Roy Baessler. This simply reverses the priorities that the attorney owes to his client because it puts the lawyer's concerns ahead of the defendant's needs and then shapes the defendant's needs to eliminate the attorney's problems created by a direct conflict of interest. The court must determine whether Calabria's attorney can be independent without considering which tactic is defendant's best tactic. The court has neither the ability nor the authority to pick and choose which strategy is best or will be best in Calabria's case. What the court is sure of, however, is that to have to give up before trial the major traditional strategy of impeaching a key prosecution witness in a criminal case simply because the witness was a former client is a very disturbing development. It is true that in some circumstances the best cross-examination is no cross-examination. It is also true that every adverse witness does not have to be impeached or contradicted. It is not true, however, that these decisions are best made in a case such as this before trial. In preparation for trial, Calabria's attorney should be able to develop all of Calabria's defenses, unhindered by a duty to a former client. [Defense counsel] may be correct that Calabria's best defense is not to impeach Baessler, but he could easily be wrong. In any event, whether he is right or wrong cannot be decided until Baessler testifies, at the earliest.

614 F. Supp. at 193. Accordingly, the district court in Calabria rejected the defendant's waiver, noting that Calabria could not be aware of the foreseeable prejudices his attorney's continued representation would entail and the potentially detrimental consequences of these prejudices. *Id.*

The government believes that "Defendant 1's right to effective representation and the integrity of the judicial process will be impaired by "Law Firm's" continued representation of "Defendant 1" in this case on several grounds. First, as set out above, "Law Firm" not only previously indicated that it represented co-defendant "Defendant 2," but "Law Firm" also represented several important government witnesses, including "Defendant 3", "Witness 1" and "Witness 2". The potential conflict between "Defendant 1" and "Defendant 2" is apparent. At trial, the evidence will show that "Defendant 1" submitted cost reports to Medicare, while "Defendant 2" was CEO of "Defendant 1", that failed to disclose the relationship between "Defendant 1" and "Corporation 1" as required by law. Clearly, one viable defense for "Defendant 1" is to contend that "Defendant 1" expected "Defendant 2" to comply with the law and that the corporation – i.e., the Board of Directors – had no knowledge that "Defendant 2" failed to do so. Although not legally sufficient to absolve "Defendant 1" of liability under principles of corporate criminal liability, such an argument could be made in an effort to convince a jury not to convict the corporation.

Likewise, "Witness 1", "Witness 2" and, possibly, "Defendant 3", will each provide important testimony on behalf of the government which further creates clear conflicts of interest. See Moscony, 927 F.2d at 750 ("Conflicts of interest arise whenever an attorney's loyalties are divided, and an attorney who cross-examines former clients, inherently encounters divided loyalties."); MI Eth. Op. RI-218. Accordingly, attorneys from "Law Firm" will be put in the position of having to cross-examine at least two, and potentially three, individual witnesses whom the firm represented during the course of the government's investigation. Furthermore, if "Defendant 3" does not testify against "Defendant 1" and "Defendant 2", it will likely be because he will become a co-defendant. In that case, "Defendant 1" could simply shift blame on to that former "Law Firm" client, since he is the individual who actually signed the subject cost reports, resulting in an additional actual conflict.

Moreover, as counsel for "Defendant 1", attorneys from the firm will be required, in effect, to cross-examine "Law Firm's" current client, "Corporation 2", and its prior client, "Corporation 1". The government intends to call various members of the Board of Directors for "Corporation 2" and its wholly owned subsidiary, "Corporation 1", to testify concerning certain financial transactions between "Corporation 1", "Corporation 2" and "Defendant 1". Although it does not appear that "Law Firm" represents any of the "Corporation 2" or "Corporation 1" Board members individually, the fact that the firm will be required to cross-examine "Corporation 2's" and "Corporation 1's" legal representatives raises the same concerns that are presented by "Law Firm's" prior representation of individual witnesses. Moreover, the conflict is exacerbated by the fact that "Law Firm" would be in the position of representing both a defendant, "Defendant 1", and the potential financial victims of the Defendant's crimes. See Davis v. Stamler, 494 F.Supp. 339 (D.N.J. 1980)(attorney disqualified where he presently represented criminal defendant and formerly represented alleged corporate victim); United States v. Alex, 788 F.Supp. 359 (N.D.11l. 1992)(same result even if victims waive conflict; though not decisive, lack of "screen" factored into court's analysis).

These potential conflicts are so significant that disqualification is the only remedy. Although "Law Firm" may take the position that "Defendant 1" will not defend itself by casting blame on "Defendant 2" (it's current co-defendant and former client) or "Defendant 3" (a potential co-defendant and former client), or "Corporation 1" (a former client) or "Corporation 2" (its current client) and that impeachment of its former clients, now government witnesses, is not the trial strategy that the firm will pursue, binding "Defendant 1" to those strategies at this early stage in the trial process may amount to ineffective assistance of counsel. See Malpeidi, 62 F.3d at 469-70 (defendant denied effective assistance of counsel where trial counsel agreed to limitations on cross-examination of former client in order to avoid revealing attorney-client communications). More important, the appearance of impropriety in allowing "Law Firm" to continue to represent "Defendant 1" after having previously represented a co-defendant and other government witnesses cannot be overcome by simply obtaining waivers from "Defendant 2" and the witnesses. When the jury becomes aware that "Law Firm" previously represented the witnesses whom "Law Firm" presumably will impeach at trial, the integrity of the proceedings will clearly be called into question, and this court's "independent interest in ensuring that criminal trial are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them" will be impaired. Wheat 486 U.S. at 162.

B. "Law Firm" Should Be Disqualified Because a Member Of the Firm, "Attorney T", Will Be Called as a Government Witness And Because "Law Firm" Cannot Disinterestedly Advise "Defendant 1" Whether To Raise an Advice of Counsel Defense.

"The experience of the bar and its collective voice in the ABA Canons demands the separation of the roles of advocate and witness. Experience shows that one who combines both roles is not likely to be, as an officer of the court, helpful to the court. There is always danger that when he speaks, he will forget whether he speaks as advocate or counsel, to the likely confusion of proceedings, as well as their embitterment." General Mill Supply v. SCA Services, 697 F.2d 704, 712 (6th Cir. 1983).

Rule 3.7 of the Michigan Rules of Professional Conduct ("MRPC") prohibits an attorney from acting as an advocate at a trial in which the attorney is likely to be called as a witness. Even if "Attorney T" has now (post-indictment)² been screened from participating in this matter, the entire "Law Firm" firm is precluded from participation if "Attorney T", or any other "Law Firm" attorney, is precluded from doing so by virtue of MRPC Rules 1.7. or 1.9. See MRPC, Rules 3.7(b) and 1.10. As the comment to Rule 3.7 makes clear, "if there is likely to be a substantial conflict between the testimony of the client and that of the lawyer or a member of the lawyer's firm, the

representation is improper." "If a lawyer who is a member of a firm may not act as both advocate and witness by reason of conflict of interest, Rule 1.10 disqualifies the firm also." Id. See also Virgin Islands v. ZeDD, 748 F.2d 125 (3d Cir. 1984)("We have searched the cases

² "Law Firm's" screening of "Attorney T" in 2003 pursuant to Rule 1.10(b) of MRPC, upon indictment of "Defendant 1", when she joined "Law Firm" in 1996 and thereafter represented clients with interests adverse to "Defendant 1", whom she represented while at her prior firm, and where there was no previous screen and no client consultation or waiver, does nothing to cure "Attorney T's" and "Law Firm's" conflict the past seven years except to demonstrate that it existed all along, even if "Law Firm" just now recognized it. Interestingly, "Law Firm" previously took the position that MRPC 1.10(b) was not even "conceivably involved here." Moreover, this screening does nothing to cure all of "Attorney T's" and "Law Firm's" other conflicts (besides MRPC 1.10(b) conflicts) as outlined herein.

carefully and have found no instance where defense counsel was actually permitted to testify against his own client while purporting to continue in a representative capacity"). In fact, in such a case, where defense counsel appears as a witness and testifies adversely to the client/defendant, ineffective assistance of counsel is automatically established. See United States v. Ellison, 798 F.2d 1102 (7th Cir. 1986).

Besides being an adverse witness to her own client, however, "Attorney T's" personal involvement in events at issue provide "Law Firm" an incentive to downplay those events and thereby distort its representation of "Defendant 1". See United States v. Levy, 25 F.3d 146 152 (2d Cir. 1994)(attorney's "desire to avoid being called as a witness made him willing to sacrifice or compromise certain trial strategies and defenses"). Specifically, in United States v. Taylor, 139 F.3d 924, 932 (D.C. Cir. 1998), the court held that an actual conflict existed where counsel had given the client erroneous legal advice on a commercial transaction, and was thereafter reluctant to raise an advice of counsel defense because doing so would reveal counsel's original error. "[T]rial counsel's interest in avoiding an advice of counsel defense was in competition with [defendant's] interest to be informed of all viable defenses...." *Id* at 933. See also United States v. Timmer, 1995 WL 704186 (6th Cir.)(Defendant required independent counsel in order to make an informed decision on asserting advice-of-counsel defense; willingness to waive advice-of-counsel defense while represented by conflicted attorney not sufficient); United States v. Tatum, 943 F.2d 370, 376 (4th Cir. 1991)(attorney could not develop an advice-of-counsel defense and attempt to shift responsibility to own firm, thereby increasing the risk of civil malpractice liability); FDIC v. (sham), 782 F.Supp. 524, 528(D. Colo. 1992)(If Defendant raised advice of counsel defense, attorney "[would] be in the awkward position of testifying either that he gave proper legal advice to the defendants, which would undercut their defense, or that he gave them improper legal advice, which would harm his professional reputation. This Hobson's Choice impermissibly taints the legal system....").

In addition, courts have held that an actual conflict is inherent where defense counsel is aware that disciplinary charges could stem from their participation in the matter. See United States v. Greig, 967 F.2d 1018, 1024 (5th Cir. 1992) (co-defendant's counsel informed court of unethical meetings between defense counsel, defendant and co-defendant; Defendant's "counsel was preoccupied with his own disciplinary proceeding"); United States v. Iorizzo, 786 F.2d 52, 57-58 (2d Cir. 1986) (Defense counsel decided to forgo relevant inquiry of former client after court questioned ethical propriety of examination; "the specter of a disciplinary hearing was explicitly raised"... The decision to forgo inquiry "was not the result of a tactical judgment by a conflict free lawyer"... but "made solely to protect the interests of defense counsel"). The same is true where the attorney is under investigation for possible criminal charges relating to her representation of the defendant. See United States v. Levy, 25 F.3d 146 (2d Cir. 1994); Virgin Islands v. ZeDD, 748 F.2d 125 (3d Cir. 1984). While "Attorney T" is not under criminal investigation, and the government has repeatedly informed "Law Firm" of that fact, "Law Firm" nevertheless seems concerned that she is. Even that unfounded concern, however, may distort "Law Firm's" representation of "Defendant 1" in ways designed to protect "Attorney T" every bit as much as concerns about prior ethical issues.

Even if "Law Firm", independently, and free from conflicts, determined not to call "Attorney T", she (and "Law Firm" through her) could still be disqualified because her relationship with "Defendant 1" resulted in her having first-hand knowledge of events that will be presented at trial, and she would be an "unsworn witness." That is, her "role as advocate may give [her] client an unfair advantage, because the attorney can subtly impart to the jury [her] first-hand knowledge of the events without having to swear an oath or be subject to cross examination." United States v. Locascio, 6 F.3d 924, 933 (2d Cir. 1993). When an attorney acts

as an unsworn witness, waiver is irrelevant because "the detriment is to the government, since the defendant gains an unfair advantage, and to the court, since the fact finding process is impaired." Id at 934. See also United States v. Orgad, 132 F.Supp. 107, 124 (E.D.N.Y. 2001); United States v. Gotti, 9 F.Supp. 2d 320, 324 (S.D.N.Y. 1998).

Finally, "in a case in which there are myriad conflicts, each cannot be considered in isolation, but rather must be considered together when assessing whether there is a congruence of interests between the lawyer and his client." United States v. Rahman, 861 F. Supp. 266, 274 (S.D.N.Y. 1994); United States v. Lew, 25 F.3d 146, 157 (2d Cir. 1994).³ Accordingly, even if "Law Firm" can satisfy the Court as to one or more of these issues, the Court should look at the totality of conflicts and potential conflicts if "Law Firm" continues representing "Defendant 1". Moreover, the Court should consider that "Law Firm" has from the outset either denied the existence of all these conflicts or trivialized them, engendering no confidence that it will appropriately address any unforeseen future conflicts that arise. See United States v. Rahman, 861 F. Supp. 266, 279 (S.D.N.Y. 1994).

³ While "Defendant 1" may complain that disqualifying "Law Firm" works a hardship on it, the Sixth Circuit has noted that the hardship situation is one where the lawyer-client team comes unexpectedly upon a disqualification situation, against which they neither did nor could have safeguarded against. "We do not think it was meant for a case where a possible disqualification dilemma was visible years before it arose. Yet the parties went right on increasing the helpless dependence of client upon lawyer. The ancient maxim of the law, *volenti non fit injuria* applies. A self-inflicted injury is not a hardship." General Mill SUDDIV V. SCA Services, 697 F.2d 704 (6th Cir. 1983). See also United States v. Messino, 852 F. Supp. 652, 656 (N.D. Ill. 1994)(the government flagged concern regarding potential conflicts as early as one day after grand jury returned indictment). As pointed out above, the government raised the conflict relating to "Attorney T" early on, and "Defendant 1" and its counsel simply disregarded the issue.

Health Lawyer
August, 2006

***18** GOVERNMENT INVESTIGATIONS AND LEGAL OPINION LIABILITY

[Robert M. Wolin, Esq. \[FN1\]](#)
Baker & Hostetler Houston, TX

Copyright © 2006 by American Bar Association; Robert M. Wolin, Esq.

In many complex business transactions involving health care providers, counsel are called upon to provide factual confirmations in legal opinions to the effect that there is no claim, action, suit, litigation, proceeding, arbitration, nor investigation of any kind, pending or threatened against their client. Until recently there has been very little litigation with respect to such opinion letters. Aggrieved opinion letter recipients are now more frequently seeking redress from the law firms authoring opinion letters that turn out to be incorrect or misleading. [\[FN1\]](#) This article will discuss a recent case which typifies the emerging trend under which attorneys may be liable for negligent misrepresentation in connection with factual confirmations in their legal opinions.

While the operation of Dunkin Donuts franchise stores would seem to be a distant concern to health lawyers, litigation over legal opinion factual confirmations regarding a governmental investigation of the Donut shop's owner's receipt of kickbacks from a Massachusetts dairy that was subsequently acquired by Dean Foods, the largest processor and distributor of dairy products in the United States, provides insight into the risks associated with rendering legal opinions on behalf of health care providers with on-going governmental investigations.

Dean Foods - Background

The facts of the Donut shop case (*Dean Foods Company* [\[FN2\]](#) v. *Pappathanasi, et al.* [\[FN3\]](#)), are similar, in many respects, to those occurring in health care investigations. The Dean Court found that West Lynn Creamery ("West Lynn") established a "rebate" program for its customers, including a Massachusetts based Dunkin Donuts franchisee, and served as a conduit for its customers to obtain loans through a related credit union. A federal investigation was launched as a result of the donut shop's owner's failure to report the rebates on its federal tax return.

In October 1997 West Lynn received a grand jury subpoena to produce documents related to the rebates. West Lynn retained Boston-based Rubin and Rudman (the "Law Firm") to represent it in responding to the grand jury subpoena. The donut shop appeared to be the target of the grand jury investigation, not West Lynn. However, in the Donut shop investigation the prosecutor discussed with a litigator at the Law Firm that West Lynn's rebates might also be considered illegal kickbacks. The Law Firm also had several conversations with counsel for the donut shop regarding West Lynn's potential liability resulting from the government's investigation. However, the Law Firm heard nothing on the matter from either the government or the Dunkin Donuts franchisee after early December 1997.

As a part of the sale of West Lynn in 1998, the Law Firm provided a legal opinion with a no-litigation/no-investigation factual confirmation. The confirmation was similar in most respects to those routinely provided by counsel on behalf of health care providers. The legal opinion provided that to the Law Firm's:

"knowledge, except as set forth in [a] Schedule ..., there is no claim, action, suit, litigation, proceeding, arbitration or, [sic] investigation of any kind, at law or in equity (including actions or proceedings seeking injunctive relief), pending or threatened against [West Lynn] or any of its subsidiaries and neither [West Lynn] nor any of its subsidiaries is subject to any continuing order of, consent decree, settlement agreement or other similar written agreement with, or continuing investigation by, any Governmental Entity, or any judgment, order, writ, injunction, decree or award of any Governmental Entity or arbitrator, including, without limitation, cease-and-desist or other orders."

The legal opinion further provided that:

with "respect to matters stated to be 'to [the Law Firm's] knowledge,' [the Law Firm] call[s] your attention to the fact that [it has] not made ... any investigations as to the existence of actions, suits, investigations or proceedings, if any, pending or threatened against [West Lynn], except to the extent that any of the above is disclosed in any exhibit or schedule to the Purchase Agreement. However, nothing has come to [the Law Firm's] attention which causes [it] to doubt the accuracy of such exhibits or schedules." The opinion also provided that the Law Firm "relied upon the representations of factual matters contained in the Purchase Agreement and ... made no independent investigation of such factual matters; however, nothing has come to [the Law Firm's] attention which causes [the Law Firm] to doubt the accuracy thereof."

Finally, the Opinion Letter stated that:

"in rendering [its] opinions [the Law Firm] examined such materials as [it] deemed relevant to [the] opinions."

Despite the Law Firm's initial inclination to disclose the subpoena and investigation, neither the existence of the grand jury subpoena nor the investigation were disclosed in the legal opinion or the referenced Purchase Agreement Schedules. [\[FN4\]](#) The lawyers preparing the opinion, after discussions with West Lynn, decided not to disclose the investigation to avoid "inciting" other family shareholders, who might use the information to interfere with the sale's closing.

***19** The lawyers preparing the opinion briefly discussed the government's investigation with the Law Firm's litigation partner who responded to the subpoena, but neglected to tell him they were asking about the investigation and subpoena for purposes of rendering a legal opinion. The litigator advised the opinion preparers that he had not heard from the prosecutor for nearly six months, and that it was his "guesstimate" that the investigation had probably gone away with the donut shop's owner paying a civil fine with heavy penalties for tax evasion. [\[FN5\]](#) This type of result was consistent with the litigator's experience in tax evasion cases. *Id.* Based upon this conversation, the lawyers preparing the opinion concluded that the rebate investigation did not have to be disclosed, as the investigation had probably gone away.

More than two months after the opinion letter was issued, the Law Firm received a letter from the government, advising that the donut shop owners had been criminally charged with a conspiracy to defraud the Internal Revenue Service. [\[FN6\]](#) The criminal information, without

naming West Lynn, clearly referred to West Lynn's rebate program and indicated that West Lynn was a conspirator. In March 2001 West Lynn also received a Criminal Information charging it with conspiracy to defraud the Internal Revenue Service.

More than twenty-eight months after the donut shop owner's guilty plea, West Lynn also pled guilty to violations of [18 U.S.C. § 371](#) related to the donut shop rebates, after extensive negotiations with the government. West Lynn paid a fine and obtained the prosecutor's agreement to help West Lynn avoid debarment from federal programs, such as the National School Lunch Act and the Child Nutrition Act. As a result of the post-closing criminal action, as might be expected, the purchaser, Suiza, brought suit against the Law Firm for negligent misrepresentation, common-law negligence and violations of Massachusetts' unfair trade practices law, Mass. G.L. c. 93A in connection with the preparation of the no-litigation/no-investigation factual confirmation in the legal opinion.

The *Dean Court* [\[FN7\]](#) held the Law Firm liable for negligent misrepresentations in the legal opinion, [\[FN8\]](#) despite the fact that the Law Firm claimed it did not have actual knowledge that the government was still actively investigating West Lynn at the time the opinion was issued. [\[FN9\]](#) The court specifically found that the law firm failed to conduct a factual inquiry sufficient to comport with customary practices and consequently failed to exercise reasonable care or competence in preparing the no litigation/no investigation confirmation opinion, despite the fact that the opinion contained several limitations, including an express disclaimer of a duty to investigate. The Court also found that the Law Firm's opinion preparers' knowledge of the criminal inquiry imposed upon the opinion preparers [\[FN10\]](#) a duty to ascertain and update their knowledge regarding the status of the criminal investigation.

Liability Standard

The Court held that the recipient of a legal opinion may recover under a negligent misrepresentation theory if it can show that the law firm giving the legal opinion: (1) in the course of its practice (2) supplied false information for the guidance of a third party (3) in its business transactions (4) causing and resulting in pecuniary loss to the recipient (5) by its justifiable reliance upon the information (6) if the law firm failed to exercise reasonable care or competence by conforming to customary practices of similarly situated lawyers in obtaining or communicating the information. [\[FN11\]](#) *Dean* at 38. The Restatement (Third) of the Law Governing Lawyers (2000) (the "Restatement") provides that a lawyer must exercise care with respect to non-clients and not make any prohibited false statements. See Restatement, §§ 51(2)(a), 95(1) and 95(3). See also ABA Model Code of Professional Responsibility DR 7-104(A)(5). However, it is important to note that a legal opinion is not a guaranty of an outcome or that the facts will not change over time, but rather is an expression of a law firm's professional judgment based upon factual information gathered in accordance with accepted standards. See TriBar II §1.2(a) at p. 596, and *Dean* at pp. 37 and 43. (The TriBar Report, published in 1998, was an joint effort by special committees of the New York County Lawyers Association, The Association of the Bar of the City of New York, and the New York State Bar Association to develop practical and continuing guidance on customary legal opinion practices). For more information, go to:

<http://www.abanet.org/buslaw/tribar/materials/20050303000003.pdf#search='tribar%20report%20legal%20opinion>.

Investigatory Responsibility

The Court did not focus on whether the Law Firm correctly predicted the future with respect to the government's investigation, but rather focused on whether the Law Firm was required to conduct an investigation and what the scope of the investigation and disclosure should be in light of the investigation. [\[FN12\]](#) A key factor in determining whether a law firm will be held liable for an inaccurate opinion confirmation is whether the law firm satisfied the standards established by the custom and practice of similar lawyers. *Dean* at 33. See also TriBar II §1.4 at pp. 600 - 603. Thus, lawyers providing factual confirmations on behalf of health care organizations must undertake sufficient efforts to constitute the exercise reasonable care or competence in obtaining or communicating information in a legal opinion confirmation, and other factual confirmations such as audit inquiry responses, with respect to governmental investigations.

The Court analyzed the nature of the inquiry the Law Firm was required to make into the government's investigation, given the opinion preparers' knowledge of the status of the subpoena and investigation.

***20 When Must An Opinion Preparer Conduct An Investigation?**

While the Court did not articulate a bright line test for the quantum and type of information that should put a firm on notice of a need to conduct an inquiry, it did provide general guidance. The Court found that no-litigation/no-investigation confirmations are intended to elicit information regarding the existence of pending or threatened actions and proceedings that might be of concern to the opinion recipient and to provide comfort that the opinion preparers do not know that the information provided to the third party is incomplete or unreliable. See *Dean* at 42 and TriBar II §6.8 at p. 664. The Court also found that no-litigation/no-investigation confirmations are typically sought by recipients based on the assumption that the opinion giver has a special awareness of pending or threatened actions, a special ability to verify their existence or nonexistence through client records, or special ability to ask the right questions of the appropriate people to determine that the certificate provided by the officers of the company includes and appropriately describes all pending actions. See *Dean* at 40 - 41.

If an opinion preparer is aware that a client's representations are not accurate and/or complete, and the representations are material in the context of the transaction or opinion, then the opinion preparer has an obligation to investigate further. If, on the other hand, an opinion preparer is not aware that other lawyers within the firm have knowledge of an investigation, then there will be no duty to investigate and while the opinion may be wrong, it should not be actionable. An opinion preparer is not charged with the knowledge of attorneys not involved in the opinion preparation process. See TriBar II §2.2 at pp. 610 - 615 and *Dean* at 47 - 50.

Internal Investigations

When an opinion preparer is aware that a lawyer within his or her firm who is not involved in the preparation of the opinion has relevant information that is likely to have a material bearing on an opinion issue, the opinion preparer must make appropriate inquiries with respect to issues raised. See TriBar II at p. 614. The type and scope of inquiry, however, must be based upon the quantum and scope of information known by the opinion preparer. The timing and content of intra-firm inquiries varies and will usually be informal, as contrasted with the more formal external process. See TriBar II §2.2.1(d) at pp. 612 - 613 and §2.2.(b) at p. 614.. However, the person should be aware that the inquiry is being made for the purpose of rendering a legal opinion. The opinion preparer must then take the responses into account in determining where further investigation is required. See TriBar II at p. 614. The scope, type and quantum of

information sufficient to require further investigation is generally very low. Opinion preparers are charged with their own actual knowledge and can not deliberately avoid knowledge.

External Investigations

While the Court did not articulate a standard for when outside confirmations must or should be sought, it appears that the court weighed the difficulty of the inquiry, the likelihood of an event inconsistent with the opinion occurring and the severity of the potential outcome against the quantum and reliability of information suggesting an inconsistency with the opinion in the lawyer's possession at the time the opinion was prepared. The quantum and type of information that should put a firm on notice of a need to conduct an external inquiry appears to be somewhat higher. In *Dean*, the Court indicated that the Law Firm, as part of its investigation, should have contacted others involved in the investigation before concluding that the investigation was terminated. The Court believed that the information from the litigation partner was unreliable and that if the Law Firm had simply recontacted the donut shop owner's counsel they would have learned that he had recently entered into a plea agreement that included a provision to cooperate in an ongoing investigation. [\[FN13\]](#)

The Court was particularly bothered by the Law Firm's lack of disclosure and investigation after the Law Firm added the phrase "nothing has come to [the Law Firm's] attention which causes [it] to doubt the accuracy" of the factual matters in the Purchase Agreement or the no-litigation schedules to the opinion. [\[FN14\]](#) The Court considered the additional language misleading and believed that the Law Firm should have either disclosed the investigation or refused to give the opinion. *Dean* at 52. The Court believed that the knowledge held by the opinion preparers was actual knowledge that should have caused them to doubt the accuracy of the Purchase Agreement schedules that failed to disclose the investigation.

Finally, the Court held, based upon the parties' expectations and needs, that the phrase "to our knowledge" will not alter the meaning of the no-litigation/no-investigation confirmation in an opinion, nor will such language, by itself, limit the scope of required factual investigations. See also TriBar II at p. 619 and 664.

How Extensive Does the Opinion Investigation Have To Be?

The Court held that the diligence and investigation required for a no-litigation/no-investigation confirmation in a legal opinion must be consistent with the positions set forth in the applicable bar association reports, treatises and articles. *Dean* at 33. See also Restatement §95, comment a. TriBar II provides that lawyers must undertake "customary diligence" to support confirmations. TriBar II at §1.4(c) at p. 601. The Court found the 1998 TriBar II Report on Third Party Legal opinions to be particularly persuasive authority regarding the customary standard. [\[FN15\]](#) Factual confirmations contained within an opinion (e.g. no-litigation/no-investigation) must be *21 established in a way "that meets the needs of the parties to the transaction." TriBar II §1.2(d) at p. 598.

The *Dean* Court in this case found that the Law Firm was required to conduct a reasonable inquiry of the Law Firm's litigator involved in responding to the subpoena. Merely asking the lawyer "whether he thinks the grand jury investigation has gone away" was insufficient. The lawyer involved with the subpoena should have been asked, according to the Court:

whether the law firm [could] decline to reveal the grand jury investigation in an opinion letter that confirms the absence of pending or threatened investigations, while being embroidered with the nothing has come to our attention which causes us to doubt the accuracy thereof language.

The Court clearly believed that the foundation for a factual confirmation in an opinion must meet a more rigorous test than an off-the-cuff response by a lawyer unaware that the information was sought for the purpose of rendering an opinion confirmation. Law firms can not engage in 'see no evil, hear no evil' behavior in order to avoid speaking any evil. See *Dean* at 48.

The *Dean* Court also evaluated whether the Law Firm's analysis of the investigative information was appropriate. The Court found that a six month quiet period in an investigation, based upon expert testimony, was insufficient for the Law Firm to conclude that the investigation had "gone away." The Law Firm's litigator's "guesstimate" had no documented basis and was not consistent with the standard for white collar criminal attorneys.

The standard for the depth and scope of an opinion factual confirmation investigation is based upon the conduct of similarly situated lawyers. See TriBar II at §1.4 p. 600. Based upon the Law Firm's lack of inquiry, the court found that the Law Firm's opinion preparation failed to meet the customary practices standard. However, the Court's view may have been impacted by hindsight knowledge that Gavriel, the donut shop owner, had entered into a plea agreement just weeks before the opinion was issued that included a provision to cooperate in an ongoing investigation. [\[FN16\]](#)

Confirmation Disclosure Standards

A law firm must present its confirmations and opinions in a manner that avoids misleading the opinion recipient both with respect to affirmative representations and areas excluded from the opinion. TriBar II §1.4(d) at p. 602. If an opinion preparer believes that an opinion is likely to be misleading, the opinion should not be delivered until disclosures are made to cure the problem. *Id.* However, an opinion preparer must obtain its client's consent to the disclosure, specifically or by implication before disclosure or delivery of the opinion. See [Restatement of Torts §552](#) and TriBar II at §1.7 at p. 604. In essence, a law firm can not provide an opinion that will cause the recipient to miscalculate the specific opinions given. TriBar II §1.4(d) at p. 603. It is important to remember that factual confirmations must be fair and objective; an opinion is not a document in which counsel should advocate on behalf of their clients. Counsel have separate duties to their clients and to the recipient of the opinion which must be balanced.

The analysis of whether an opinion is misleading must be based upon both the opinions that are included in the opinion and matters excluded in the context in which the opinion is rendered. See TriBar II §1.4(d) at p. 602-3. TriBar II more specifically provides that a law firm cannot use a standard exception to hide a significant issue from the recipient. TriBar II §1.4(d) at p. 602. As an example, TriBar II provides that an opinion confirmation cannot hide a serious claim asserted orally by limiting the no-litigation confirmation to only those claims which have been asserted in writing. TriBar II §1.4(d) at p. 602.

The Court found the absence of a disclosure regarding the investigation to be misleading given the apparent certainty of the Law Firm's affirmative no investigation confirmation and that the certainty denied the opinion recipient of the opportunity to assess the risk and make business decisions based upon a factually accurate assessment. *Dean* at 53.

Conclusion

While *Dean* is a lower court opinion, it is likely to be followed by other courts because of its persuasive reasoning and resulting professional commentary. In light of the potential liability to a law firm and the cost of undertaking the required level of diligence, health care lawyers must first decide whether they should render factual confirmations. Some law firms refuse to include such factual confirmations in their legal opinions as a result of the *Dean Foods* case. [\[FN17\]](#)

If a law firm provides legal opinion factual confirmations on behalf of clients under investigation, the law firm must assure that when information comes to the attention of opinion preparers that suggests an investigation is pending, they must make diligent inquiries of the law firm's lawyers responsible for responding to the investigation in a manner that assures that the responding lawyers understand how their responses will be used. Where information within the firm is insufficient, the opinion preparers must carefully consider, based on customary practice standards, whether outside inquiries are justified and to what level. Once full information has been obtained, the opinion must be communicated to the recipient in a manner that gives the recipient an opportunity to assess the risks and make business decisions based upon its assessment of the information. The confirmation cannot mislead the opinion recipient with respect to either affirmative representations or areas excluded from the opinion.

***22 Recommendations for No Investigation/No Litigation Opinions:**

1. When matters come to the attention of the opinion preparer, the opinion preparer must conduct a reasonable investigation to ascertain what the law firm knows and then determine whether further investigation is warranted, based upon the needs of the parties to the transaction and whether additional information is required to avoid misleading the opinion recipient, both with respect to affirmative representations and areas excluded from the opinion.

2. Even in the absence of adverse information, an opinion preparer should make general inquiries of other lawyers in the firm who are familiar with the client's affairs, in particular those who are known to have information that may have a material bearing on issues being addressed in the opinion. See TriBar II at 2.2.2(b). However, general polling of a firm's lawyers is not generally required and indeed is probably not practical in many cases.

3. Others within the firm should be explicitly told when information is being sought for purposes of rendering an opinion, so both parties can assure that the inquiry and conclusions reached satisfy the applicable customary practice standards, including TriBar II.

4. Opinions should state accurately and specifically what due diligence was undertaken in preparing the no-investigation/no-litigation confirmations. For example, the opinion should note the scope of the review of the firm's files and internal litigation docket as well as the scope of public record searches. The disclosure should be explicit. Departures from customary practice should be explicitly described in the opinion. TriBar at §1.5(d) at p. 603.

5. The firm should develop, implement, publicize and enforce policies and procedures with respect to the preparation and issuance of opinion letters. The *Dean* Court took the Law Firm to task for not following its own procedures. For example, the Law Firm's opinion reviewing partner failed to countersign the opinion and failed to ask the lawyers handling West Lynn's litigation at the firm whether there were any other issues to be disclosed, in violation of the Law Firm's Approval of Opinions policy. See *Dean* at p. 24 - 25. The procedures should include

independent internal reviews of the opinion and careful structured consideration of the level of investigatory effort required.

6. Consideration should be given to carefully limiting the scope of the confirmation (e.g. limited to litigation affecting the transaction) and the proximity of the threat covered (e.g. litigation that has been overtly threatened). However, one should not rely excessively on limitations contained within an opinion to eliminate the firm's obligation. An opinion can not be misleading. When an opinion giver is on notice of a matter that may be adverse, the opinion giver must look into the matter further - he or she can't simply look the other way. A legal opinion factual confirmation is not an appropriate place for advocacy.

[\[FNa1\]](#). **Robert Wolin**, as a member of the firm's Health Care team, maintains an active health care and business practice with an emphasis on counseling clients in the health care industry. These clients include dialysis providers, long term care providers, assisted living facilities, home health agencies, ancillary service providers, IDTFs, physicians, joint ventures, hospitals, pharmaceutical distributors, pharmacies, medical device distributors and manufacturers and health care-related aviation service providers.

Mr. Wolin has advised clients regarding a variety of business and regulatory issues, ranging from corporate structuring to compliance with the complex regulatory scheme facing clients in the health care industry. Mr. Wolin has served as lead counsel in many complex and substantial business transactions in several states, including the acquisition of First American Home Health, which involved negotiating one of the largest OIG fraud and abuse settlements in history on behalf of First American Home Health Care of Georgia, Inc. and its owner, Integrated Health Services, Inc., for \$215 million, and has negotiated several other OIG and Department of Justice health care compliance agreements. In addition, he has acted as lead counsel in many health care institution acquisition and disposition transactions, including hospitals, nursing homes and HMOs, and has provided regulatory, fraud and abuse advice to numerous health care providers. Mr. Wolin has also represented national distributors of health care products in connection with product distribution, group purchasing organization agreements, manufacturer representation agreements and business purchase agreements. Mr. Wolin has advised clients regarding the organization and structure of health care entities and joint ventures, including surgery centers, imaging centers and renal dialysis facilities. Mr. Wolin has represented general and professional liability insurers in connection with health care organization liability insurance coverage determinations and with respect to fraud in connection with the application for professional liability coverage. He has also served on an interim basis as general counsel for a national laboratory supply company. Mr. Wolin, as a commercially rated pilot with many hours of aerial search and rescue experience, brings unique experience to health care-related aviation matters and has assisted clients in the acquisition and disposition of aircraft, obtaining heliport approvals and dealing with FAA regulatory matters.

Mr. Wolin has been involved in extensive projects relating to consumer credit compliance issues for both health care clients and lenders under federal and state consumer protection laws, including the defense of several consumer credit class action cases.

Finally, Mr. Wolin has represented manufacturers of heavy equipment such as excavators, mining haul trucks, cranes, heavy duty trucks and similar products and manufacturers of aero derivative gas turbines used in power plants and maritime applications. Mr. Wolin has served as the general counsel for a heavy equipment manufacturer. In this area he has handled issues ranging from dealer relationships, trademark protection, gray marketing/transshipping, product liability claims, national account and major product purchase agreement negotiations, vendor contract negotiations, credit and collection matters, international sales compliance with FCPA

and money laundering laws, pricing and customer policies, long-term maintenance arrangement negotiation, operating cost cap agreement negotiation, to business strategy and related matters.

Mr. Wolin has written and spoken extensively on issues affecting clients in the health care industry and served as a member of the Contemporary Long Term Care Magazine Editorial Board from 1988 to 1990. He is a member of the Texas and American Bar Associations and the American Health Lawyers Association. He may be reached at (713) 646-1327 or at rwolin@bakerlaw.com.

[FN1]. This is especially the case when contractual or statutory limitations periods have expired and prevent a direct action against the opinion preparer's client.

[FN2]. Dean Foods Company was formerly known as Suiza Foods Corporation.

[FN3]. [Dean Foods Company v. Pappathanasi, 18 Mass. L. Rptr. 598, 2004 WL 3019442 \(Mass. Super. Dec. 3, 2004\).](#)

[FN4]. See *Dean Foods* at 21.

[FN5]. See *Dean* at 22. Because of the limited nature of the inquiry, the litigator did not disclose additional information to the opinion preparer - e.g. (a) that grand jury subpoenas had been received by West Lynn's related credit union for bank records of certain West Lynn employees and (b) that the checks used by West Lynn for the non-cash rebates did not reveal that West Lynn was the payor.

[FN6]. [18 U.S.C. §371.](#)

[FN7]. While this Court, the Massachusetts Superior Court, is only a trial court, the decision will not be appealed as the parties reached a post verdict settlement.

[FN8]. But see *National Bank of Canada v. Hale & Dorr, LLP* in which another Massachusetts Superior Court held that a law firm can not be held liable for negligent misrepresentation in a third party legal opinion because to do so would potentially conflict with the firm's duty to its client. The Court, however, denied summary judgment on misrepresentation and third party beneficiary claims. [2004 WL 1049072 \(Mass. Super. 2004\).](#) This opinion is out of step with the majority of decisions which allow claims for negligent misrepresentation. See e.g. [McCamish, Martin, Brown & Loeffler v. F.E. Applying Interests, 991 S.W.2d 787 \(Tex. 1999\)](#) citing [Restatement \(Second\) of Torts §552.](#)

[FN9]. Prior to December 1997, however, the prosecutor had told the Law Firm "that it was too early to say whether West Lynn Creamery was a target or a subject of the investigation."

[FN10]. Under the 1998 Third Party Closing Opinions: A Report of the TriBar Opinion Committee (53 Bus. Law. 591 - 679) ("TriBar II"), opinion preparers are only charged with their own actual knowledge. See TriBar II §1.8. The knowledge of other lawyers within the firm is generally not imputed to the opinion preparers, even though an opinion is given under the name of the firm. *Id.* The Court did not impute the litigator's knowledge to the opinion preparers. Rather the Court held that the opinion preparers' limited knowledge required them to investigate further, which may have required further probing of the litigator involved with the matter. This is an important distinction. For example, if the opinion preparer did not have any knowledge of the investigation, the opinion would likely have been incorrect but not actionable.

[FN11]. This formulation is based upon the standards set forth in [Section 552](#) of the Restatement (Second) of Torts and Section 152 cmt. E. of the Restatement (Third) of the Law Governing Lawyers. The Court also cited [Nota Constr. Corp. v. Keyes Assocs., Inc., 45 Mass.App.Ct. 15, 19-20, 694 N.E.2d 401 \(1998\)](#), [Golber v. BayBank Valley Trust Co., 46 Mass.App.Ct. 256, 257, 704 N.E.2d 1191 \(1999\)](#) and [Savers Property & Casualty Insurance Company v. Admiral Insurance Agency, Inc., 61 Mass.App.Ct. 158, 169, 807 N.E.2d 842 \(2004\)](#) in support of this proposition. See also TriBar II Report, p. 604, n.29 and e.g., [Nycal Corp. v. KPMG Peat Marwick, LLP, 426 Mass. 491, 493-99, 688 N.E.2d 1368 \(1998\)](#).

[FN12]. A failure of the client to consent to a necessary factual disclosure may preclude a law firm from rendering a factual confirmation in a legal opinion. TriBar II §1.7 at P. 604 Fn. 33.

[FN13]. However, law firms, absent an express undertaking, generally have no obligation to update an opinion to address subsequent events. See TriBar II §1.2 (b) at p. 597.

[FN14]. This phrase appears to have been added by a litigator at the Law Firm in the erroneous belief that it would limit the scope of the opinion. See *Dean* at 25.

[FN15]. The parties to the case had agreed that customary practice, as defined in the TriBar II Report, was the applicable standard.

[FN16]. See Endnote 11.

[FN17]. See Kathleen McNerny, Due Diligence Required in No-Litigation Opinions, 20 BNA Corporate Counsel Weekly 228 (July 27, 2005).

18 No. 6 HTHLAW 18

END OF DOCUMENT