

Advising the Business Client and Avoiding Trouble

By

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If an attorney was asked which members of the legal profession are most apt to face ethical dilemmas that carry with them the possibility of prosecution for legal advice, it is probable the attorney would pick litigators, particularly criminal defense lawyers. Prosecutors and criminal defense lawyers spar inside and outside of the courtroom and their respective specialized bar organizations periodically severely criticize the actions of their opponents. On the other hand, if a lawyer was asked which group among us is most insulated from the likelihood of ethical quandaries combined with the possibility of criminal liability, I suspect for most the answer would be transactional lawyers.

A recent high profile federal prosecution of a midwestern transactional attorney shatters these assumptions.^{Ftn 1} The two and a half years of legal proceedings reveal the pitfalls of an otherwise lucrative and quiet practice: advising health care clients.^{Ftn 2} At the same time, the case reminds us that in meeting our ethical obligations to our clients, we may nevertheless run afoul of government regulators and prosecuting authorities.

One Attorney's Story

Mark Thompson, a partner at a law firm in Kansas City, Missouri, drafted a contract between his client--a medical facility--and two physicians. His intent was to create a consulting agreement that would reflect a completely legal transaction, that is, payment for the fair market value of the physicians' services. Instead he found himself indicted as a coconspirator in a scheme to "solicit, receive, offer and pay monetary bribes and other remuneration in return for the referral of Medicare and Medicaid eligible patients for outpatient and inpatient hospital services." The indictment went on to charge that he had helped prepare "contracts, legal analysis, and other documents designed to fraudulently conceal the monetary bribes and other remuneration" that were being paid to the defendant physicians "for the purpose of obtaining the referral of patients and to aid the coconspirators in avoiding regulatory scrutiny." Finally, the government claimed that Thompson had created "sham consulting agreements" and had caused communications concerning the defendants to "be made through attorneys in order to conceal information under an ostensible claim of attorney/client privilege."^{Ftn 3} Facing up to ten years in prison, Thompson eventually succeeded in having the indictment dismissed but only after spending years protesting his innocence to the federal government.

While Thompson's troubles arose from his representation of a health care provider, the lessons to be learned from his experience offer guidance to transactional attorneys in other fields.

In this day and age of highly regulated industries, in-house compliance officers^{Ftn 4} and outside counsel must be conversant with the many regulations governing their field. In advising their clients, it is important to create a bright line of advice to dispel any confusion over the role of the lawyer. Discussions with the client should be documented carefully. The respective responsibilities of the attorney and client

should be spelled out in writing, including the duty to monitor compliance. Finally, the advising attorney must be prepared to tell his client that what is proposed is either illegal or potentially illegal and that such a course of conduct should not be followed. Simply drafting transactional documents, leaving open the question of respective duties and follow-up, can cause confusion and misperception on the part of others, including the government.

Recommended Ethical Steps

To the extent possible, know your client. If your client is an organization, become familiar with those who set policy. If and when the client proposes an activity you either know or suspect will be illegal, you should not counsel the client to engage in such conduct but you "may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."Ftn 5 If the client, against your advice, engages in illegal activity, advise the client in writing to cease illegal activity. Do not participate in meetings or conferences if the client refuses your advice. Make sure that your actions do not appear to be in furtherance of a scheme or a conspiracy (do not knowingly assist the client in fraudulent conduct in violation of 1.2(c), MRPC). Be aware that at least in some instances, the government has taken the position that if the attorney has advised his client to communicate primarily with counsel, apparently to keep as many communications privileged as possible, and if the client engages in a pattern of wrongdoing, the government will argue that such advice constitutes an "overt act" in furtherance of a scheme of wrongdoing.

Keep in mind that 1.6(b)(3), MRPC, permits a Minnesota lawyer to disclose confidences and secrets to reveal the "intention of a client to commit a crime and the information necessary to prevent a crime," while 1.6(b)(4) also permits Minnesota lawyers to reveal confidences and secrets necessary to "rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used."Ftn 6 However, remember that a lawyer is *not* permitted to disclose a client's criminal or fraudulent act committed *prior to* the client's retention of the lawyer's services. In some instances, the government may argue that the attorney has improperly kept information confidential and privileged that conceals wrongdoing. If the wrongdoing was committed prior to the client's retention of the lawyer's services, the lawyer is ethically bound not to reveal such information without client consent, which is unlikely. If the client persists in pursuing a course of action that the lawyer reasonably believes is criminal or fraudulent while using the lawyer's services, the lawyer *must* withdraw from the representation of the client.Ftn 7 On the other hand, a lawyer *may* withdraw (with permission of the tribunal under 1.16(c)) if the client has "used the lawyer's services to perpetuate a crime or fraud" and the lawyer learns this after the fact.Ftn 8

In sum, if the client insists on pursuing an illegal course of conduct, the lawyer must withdraw if his services are being used to aid in this course of conduct and the attorney may reveal the intention of the client to commit a crime and the information necessary to prevent a crime. On the other hand, if the client has used the lawyer's services in the past to perpetuate a crime or fraud but ceases to continue in that course of conduct, the attorney may withdraw (with court permission), but is not required to, and may reveal confidences and secrets if doing so is "necessary to rectify the consequences of the client's criminal or fraudulent act." Finally, if the lawyer represents an organization and becomes aware that an officer or employee may be violating a legal obligation to the organization or violating the law in a manner that may be imputed to the organization, he must follow the steps outlined in 1.13(b), MRPC,Ftn 9 before resigning or revealing the criminal or fraudulent violation under 1.13(c).

When the Lawyer Stays

As one commentator has noted, "a company seldom faces greater pressure than during the 48 hours after it learns that it is a potential target of a fast-moving investigation by a government enforcement agency or prosecutor." ^{Ftn 10} When the lawyer represents an organization, and is responding to a grand jury subpoena or search warrant, she must be aware of her ethical obligations as well as her obligation to her client. While 1.13(e), MRPC, allows an attorney to represent both officers and employees of a company, the lawyer must keep in mind that this joint representation is limited by 1.7, MRPC, governing conflicts of interest. If a conflict arises after representation has commenced, joint representation may be continued in most cases, but the best practice is to get written consent (where proper) from both the employee and the company after discussion of the advantages and risks involved in a joint representation. When there is adversity of interest such that a disinterested lawyer would conclude that the client should not agree to representation under the circumstances, the employee should be advised that he may wish to obtain independent counsel, that the lawyer for the organization cannot provide representation for that individual, and that "discussion between the lawyer for the organization and the individual may not be privileged." The corporation may provide funds for the separate legal representation if the client consents after consultation and "the arrangement ensures the lawyer's professional independence." Also, although 3.4(f), MRPC, allows the company's lawyer to ask employees to refuse to talk voluntarily with government investigators, this may be done only if the employees' interests will not be adversely affected by refraining from giving such information. For those employees with personal liability, the attorney should be careful as to whose interests she is protecting, if she attempts to prevent the employee from talking to the government.

Lastly, once a subpoena or a search warrant has been served, 1.2(c), MRPC, prohibits a lawyer from counseling a client to engage in conduct that the lawyer knows to be criminal, and that would include the destruction of records that are clearly subject to legal process. Related to this prohibition is 3.4(a), MRPC, which specifically prohibits a lawyer from obstructing access to evidence or destroying such evidence or advising others to do so. This obligation exists prior to the issuance of a subpoena or even the commencement of a formal proceeding. Again, it is best for attorneys to err on the side of caution by not being a party to the destruction of possibly relevant documents.

CONCLUSION

Most attorneys will practice their entire professional lives without being faced with a situation that combines ethical dilemmas and criminal liability. As more industries become highly regulated, and as more attorneys advise providers in those industries, whether as in-house compliance officers or as outside counsel, the potential for such ethical and legal exposure increases. Both litigators and transactional attorneys should be aware that in some instances, it is necessary to plan for the worst and practice defensively, thus not only meeting their ethical obligations, but also protecting themselves from investigation and possible prosecution.

Notes

¹ U.S. v. Anderson, *D. Kan.*, No. 98-20030-JWL.

² See John W. Lundquist & Laurie Nesseth, "Between A Rock And A Hard Place," *Bench & Bar* (June 1999) p. 31.

³ See Peter Aronson, "Out of the soup," *National Law Journal*, Nov. 29, 1999, A1 and "Health Care Attorney Who Was Acquitted Cautions Others About Fraud Prosecutions," *ABA/BNA Lawyer Manual On Professional Conduct*, Dec. 12, 1999, p. 606.

⁴ There are an increasing number of attorneys becoming in-house corporate compliance officers. See Peter Aronson, "Watchful eyes in-house,"

⁵ 1.2(c), MRPC.

⁶ For an examination of debate over 1.6, see Michael D. Goldhaber, "Blowing a whistle on client misdeeds," National Law Journal, *Oct. 25, 1999, A1.*

⁷ 1.16(a)(4), MRPC. See also ABA Formal Opinion 92-366.

⁸ 1.16(b), MRPC.

⁹ 1.13(b), MRPC:

(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 which reasonably might be imputed 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 all 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.

¹⁰ Paul J. Lambert, "Allegations of misdeeds call for caution," National Law Journal, *Nov. 1, 1999, B9.*