Part IV. Professionalism

Here Be Dragons: Navigating Dangerous Territory with A "Challenging" Client

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I. AN INTRODUCTORY VIGNETTE: IT'S BETTER TO SEEK FORGIVENESS THAN PERMISSION. BUT THEN, ONLY THE LITTLE PEOPLE REALLY NEED FORGIVENESS ANYWAY.

As our scene opens, we see Prudence Blackstone, general counsel of Megalithic Healthcare, Inc., hunched over her computer. This was, perhaps, one of the most important drafting jobs of her modestly illustrious career. The message had to be just right. There would be no second chances.

Just over a year ago, you see, Prudence had been served with a massive document request from the United States Attorney's Office (USAO) in Metropolis, the glittering city where Megalithic maintained its lavish headquarters. It quickly became apparent that the USAO was investigating claims asserted against Megalithic in a sealed complaint under the False Claims Act, claims alleging that the healthcare giant had engaged in a variety of activities that, to a jaundiced eye, might have been construed as violations of the Anti-Kickback Statute and the Stark Law.

For months now, Prudence had been hard at work with a crack team from Upright & Sikorsky, Megalithic's outside general counsel, responding to voluminous requests for documents and witness interviews while trying to persuade the government lawyers that the case was not worthy of intervention. It had been an uphill battle, but there had finally been small signs that the government's resolve was weakening. Lawyers from Main Justice, the Metropolis USAO and the Office of Inspector General (OIG) had agreed to postpone a final intervention decision to allow Prudence and the Upright team to submit a detailed "white paper," setting forth their best legal analysis of why the claims asserted by the False Claims Act relator were insufficient to support liability. That white paper would be Megalithic's last, best shot at resolving the matter before the government intervened.

Sadly, Megalithic's legal position was somewhat less than ironclad, but it was at least respectable, and Prudence believed that, at a minimum, the white paper would position Megalithic to negotiate a reasonable settlement while the case remained under seal. There would still be a bit of a hit to the company's reputation, as well as to its treasury, but if the company were able to announce a relatively low-dollar settlement at the same time the case was publicly disclosed, the fallout would likely be minimized. It was, therefore, vital that the white paper be succinct but persuasive—the government lawyers had made it clear that the district judge who had the case was unlikely to grant any further extensions before lifting the seal. Thus, Prudence was feverishly polishing the Upright team's work, with the aim that the white paper be on the desks of the government lawyers before they had finished their second cups of coffee tomorrow morning.

Prudence's concentration was so intense that it was a moment before she realized that the annoying noise she kept hearing was the agitated cry of her assistant, Jeeves Wooster. "Prudence! Ms. Wisdom! You have to turn on CNBC right now!" Within moments, Prudence had found the remote and turned up the volume on the 72-inch plasma television that had been glowing, muted, on her spacious office wall. As she focused on the screen, the color drained from her face as she gazed, riveted with horror, through wide, unblinking eyes.

For there, on the larger-than-life screen, was Buckwell "Buck" Dollars, Megalithic's flamboyant Chief Executive Officer. A phalanx of microphones stood in front of him. By his side, wearing a wide-striped charcoal grey suit and a sincere red tie, was a figure that Prudence dimly recognized as Randy Mavis, celebrity lawyer and counselor to embattled Presidents and minor dictators.

"That's right," Buck Dollars was saying, "Some lowlife ex-employee, some guy we fired because he didn't have what it takes to make it at Megalithic, is trying to talk the government into suing us! Telling lies about kickbacks and paying doctors! Well, we're not going to take that, not for one minute. We've hired the best lawyers anywhere, and we're going to sue that little jerk for everything he owns and everything his family owns and everything he ever thought about owning! Furthermore, we're inviting the OIG in to look at everything we've got! We're an open book at Mega-

lithic! Nothing to hide! And if the OIG thinks we've done anything wrong, we'll sue them too!"

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A few hours and a broken television screen later, Prudence found herself in the palatial office of Buck Dollars. "Boss," she asked, "Why did you do that press conference? You know the Upright lawyers and I were getting ready to try to settle this whole thing with the government before it hit the press. Now there's no chance of doing that."

Her CEO replied brusquely, "Now, Prudence, you know I trust you, but this really isn't your skill set, you know. And those Upright & Sikorsky vultures have been milking us dry. They've probably had 20 people spinning their wheels on this, and we're in the same place we were a year ago. We can't have this hanging over our heads forever when we've done nothing wrong. I'm putting Randy Mavis in charge of our whole response. He knows how to handle the press and the government. Remember how he turned that whole intern scandal with Senator Claghorn around?"

Ex-Senator Claghorn, Prudence thought to herself. "But boss, we talked about all this. Remember how I told you that we had found some stuff that might be a little in the, well, grey areas with those doctors? Remember how I told you how we needed to try to keep the government from intervening in the case so they wouldn't suspend our Medicare payments? Remember I told you how we needed to be very careful in how we responded to the government's information request so we knew exactly what they were looking at? I thought we had agreed on a plan, and you know we had the best people at Upright working on this."

"Yes, yes, of course I remember all that," Buck Dollars replied. "But Prudence, we've been talking about that for a year and all I've done is pay legal bills. We're still in the same place we were when we first heard about this thing. Randy Mavis tells me what we need to do is take the game to the OIG and make sure they know this whistleblower is just a lying piece of—well, you know. It's time to play offense. We have to make this go away before we do that stock offering in a few months. Randy's going to take charge of the litigation, our public relations, everything, until we get rid of this."

"But, boss, we agreed on a plan! You said it was a great plan! You didn't even talk to me before you called this press conference!" Prudence said, with a sound like despair.

"I know, Prudence, and I thought it was a great plan at the time. But we're paying Randy Mavis so much money and he feels so strongly about this . . . I've just got to listen to him! And after all, I'm the boss around here!"

II. SITUATIONS THEY DON'T REALLY COVER IN ETHICS CLASS

A. True Life, Ripped from the Headlines

1. Too Many Lawyers

The challenge for President Trump's attorneys has become, at its core, managing the unmanageable—their client.

He won't follow instructions. After one meeting in which they urged Trump to steer clear of a certain topic, he sent a tweet about that very theme before they arrived back at their office.

He won't compartmentalize. With aides, advisers and friends breezing in and out of the Oval Office, it is not uncommon for the president to suddenly turn the conversation to Russia—a subject that perpetually gnaws at him—in a meeting about something else entirely.

And he won't discipline himself. Trump's legal team, led by Marc E. Kasowitz of New York, is laboring to underscore the potential risk to the president if he engages without a lawyer in discussions with other people under scrutiny in widening Russia inquiries, including Jared Kushner, his son-in-law and senior adviser.[1]

By tradition, almost every President of the United States comes into office with a promise to create jobs and boost employment. Usually, that is interpreted to mean something broader and less personal than the President hiring lots of lawyers on his or her own behalf. That has, however, not been the case during the early months of the Trump Administration, as the President, and many in his entou-

[1]Philip Rucker, Ashley Parker and Devlin Barrett, *Trump's legal team faces tensions—and a client who often takes his own counsel*, WASH. POST, July 13, 2017, *available at* https://www.washingtonpost.com/politics/trumps-legal-team-faces-tensions—and-a-client-who-often-takes-his-own-counsel/2017/07/13/07361fc6-67eb-11e7-8eb5-cbccc2e7bfbf_story.html?utm_term=.0c01c1df8547.

rage,[2] have been caught up in a wide-ranging investigation concerning alleged Russian influence in the 2016 election.

President Trump's approach to this situation has followed the model used from time to time by private-sector chief executives caught in legal crosshairs:[3] he has hired, shuffled and reshuffled a lot of personal lawyers, apparently in search of the one with the magic bullet.[4] Adding further complexity to the mix, the President has yet another lawyer, selected by him but accountable to him only in his official capacity as

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[2]Including, among others, his longtime personal lawyer Michael Cohen. *See, e.g.,* Mark Moore, *Trump lawyer will testify over Russian election meddling*, N.Y. POST, Sept. 17, 2017, available at http://nypost.com/2017/09/17/trump-lawyer-will-testify-over-russian-election-meddling/. (Cohen's planned interview, referenced in the story was delayed after he released a statement to the press in advance of the interview and in apparent defiance of the Senate Intelligence Committee's request. *See, e.g.,* Erin Kelly, *Senate intel panel scraps interview with Trump lawyer Michael Cohen in Russia probe*, USA TODAY, Sept. 19, 2017, *available at* https://www.usatoday.com/story/news/politics/2017/09/19/senate-intel-panel-cancels-interview-trump-lawyer-michael-cohen/680778001/.)

[3]*See, e.g.,* Carrick Mollenkamp, *Behind Scrushy's Courtroom Defense, Shifting Teams and Feuding Lawyers*, WALL ST. J., Feb. 2, 2005, *available at* https://www.wsj.com/articles/SB110729833785942929; Nathan Vardi, *Ex-Tyco Boss Dennis Kozlowski Has Become a Cottage Industry for Lawyers*, FORBES.COM, July 1, 2010, *available at* https://www.forbes.com/forbes/2010/0719/outfront-tyco-dozlowski-prison-forbes-jailhouse-law.html.

[4]*See* Rucker, Parker & Barrett, *supra*; Maggie Haberman & Matt Apuzzo, *Trump Hires Veteran Lawyer with Deep Experience in Washington*, N.Y. TIMES, June 17, 2017, *available at* https://www.nytimes.com/2017/06/16/us/politics/trump-lawyer-russia-investigation.html (addition of John Dowd to legal team, with Marc Kasowitz still heading the team); Glenn Thrush, *Trump's Legal Team Adds Lawyer Amid Expanding Russia Investigation*, N.Y. TIMES, July 14, 2017, *available at* https://www.nytimes.com/2017/07/14/us/politics/ty-cobb-trump-legal-team.html (Lawyer Ty Cobb added to team to "coordinate the response" to the Russia investigation; Kasowitz still in charge); Josh Siegel, *Marc Kasowitz to take reduced role in Trump's legal team as part of shakeup of Russia probe defense team*, WASH. EXAMINER, July 21, 2017, *available a*t http://www.washingtonexaminer.com/marc-kasowitz-to-take-reduced-role-in-trumps-legal-team-as-part-of-shakeup-of-russia-probe-defense-team/article/2629313 (Dowd replaces Kasowitz as leader of the legal team); Eliana Johnson, *Haley's former chief of staff to join Trump's legal team*, POLITICO.COM, Sept. 18, 2017, *available at* http://www.politico.com/story/2017/09/18/trump-legal-team-steven-groves-nikki-haley-242855 (Steven Groves joins team as "deputy" to Cobb).

President and not in his personal capacity, White House counsel Donald McGahn.[5]

Presumably, the President's intention was to create a "Dream Team" of all-star lawyers, like the Dream Team put together 20 years ago for the defense of O.J. Simpson.[6] However, execution of the plan has not been without its challenges:

- As noted in the excerpt above, the President has a tendency to make public statements, often via Twitter, on subjects his lawyers would prefer that he not discuss publicly.
- The President's legal team apparently sought to limit communications between the President and his son-in-law, Jared Kushner, concerning the Russia investigation, without success.[7] Ultimately, some of the team sought to have Kushner removed from his official position, although that proposal did not seem to make it all

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[5]*See, e.g.,* Matt Zapotosky & Sari Horwitz, *Who is Donald McGahn, the fiery lawyer at the center of virtually every Trump controversy?*, WASH. POST, Feb. 14, 2017, *available at* https://www.washingtonpost.com/world/national-security/who-is-donald-mcgahn-the-fiery-lawyer-at-the-center-of-virtually-every-trump-controversy/2017/02/14/7dd185b4-f2cd-11e6-8d72-263470bf0401_story.html?utm_term=.f96d22f13cbc. Note that such precedent as there is suggests that there is no attorney-client privilege protecting communications between a President and a White House Counsel from being disclosed in a federal investigation. *See* In re Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997); In re Lindsey, 158 F.3d 1263 (D.C. Cir. 1998) (per curiam); *see generally* Arthur B. Culvahouse, Jr., *Has Attorney-Client Privilege Departed the White House*?, 63 N.Y.U. ANN. SURV. AM. LAW 139 (2007). *See also* Allison Frankel, *Can White House Counsel McGahn claim privilege in Mueller probe*?, REUTERS.COM, Sept. 18, 2017, *available at* https://www.reuters.com/article/us-otc-privilege/can-white-house-counsel-mcgahn-claim-client-privilege-in-mueller-probe-idUSKCN1BT2MX.

[6]*See, e.g.,* Joel Achenbach, *O.J. Simpson's Defensive Linemen*, WASH. POST, Jan. 21, 1995, at D1.

[7]*See, e.g.,* Jonathan Swan, *Scoop: Trump lawyers want wall between Kushner, President*, axios.com, July 12, 2017, *available at* https://www.axios.com/trump-lawyers-demand-wall-between-kushner-president-2458146483.html.

the way up the ladder, at least according to some members of the team.[8]

- The President's personal lawyers and his White House Counsel have disagreed, apparently sharply, on the degree to which the President should cooperate with the Russia investigation.[9] This disagreement, in turn, was brought to light at least in part because of an indiscreet conversation between two of the senior lawyers on the team at a Washington restaurant.[10]
- Shortly after the revelation of that conversation, reports also emerged suggesting that Donald McGahn, the White House Counsel, was sufficiently exercised about the Trump-Kushner meetings that he considered resigning from the post.[11]
- One of the President's private lawyers took to the morning talk shows to declare that the President had no involvement in drafting a statement by his son Donald

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[8]*See, e.g.,* Peter Nicholas, Rebecca Ballhaus, Erica Orden & Anton Troianovski, *Some Trump Lawyers Wanted Kushner Out*, WALL ST. J., Sept. 11, 2017, *available at* https://www.wsj.com/articles/some-trump-lawyers-wanted-kushner-out-1505175772; Carol D. Leonnig, *Trump's legal team debated whether Kushner should leave White House*, WASH. POST, Sept. 12, 2017, *available at* https://www.washingtonpost.com/politics/trumps-legal-team-debated-whether-kushner-should-leave-white-house/2017/09/12/a3324764-9767-11e7-87fc-c3f7ee4035c9_story.html?hpid=hp_hp-more-top-stories_kushner-105am%3Ahomepage%2Fstory&utm_term=.fdacf55dbcba.

[9]*See, e.g.,* Peter Baker & Kenneth P. Vogel, *Trump Lawyers Clash Over How Much to Cooperate With Russia Inquiry*, N.Y. TIMES, Sept. 17, 2017, *available at* https://www.nytimes.com/2017/09/17/us/politics/trump-lawyers-white-house-russia-mcgahn-ty-cobb.html?_r=0.

[10]*See* Kenneth P. Vogel, *'Isn't that the Trump Lawyer?': A Reporter's Accidental Scoop*, N.Y. TIMES, Sept. 19, 2017, *available at* https://www.nytimes.com/2017/09/19/us/politics/isnt-that-the-trump-lawyer-a-reporters-accidental-scoop.html; *see also* Joe Patrice, *Maybe Ty Cobb Just Doesn't Get This Whole 'Client Confidentiality' Thing*, Above the Law (blog), Sept. 18, 2017, *available at* https://abovethelaw.com/2017/09/maybe-ty-cobb-just-doesnt-get-this-whole-client-confidentiality-thing/.

[11]*See, e.g.,* Peter Nicholas, Michael C. Bender & Rebecca Ballhaus, *Officials Expressed Concerns White House Counsel Would Quit Over Donald Trump-Jared Kushner Meetings,* WALL ST. J., Sept. 29, 2017, *available at* https://www.wsj.com/articles/white-house-counsel-weighed-quitting-over-donald-trump-jared-kushner-meetings-1506727150.

Trump, Jr. about that son's meeting with a Russian lawyer—a declaration that seems to have been false.[12]

- Later in the fall, the President put out a tweet relating to his February 2017 firing of National Security Adviser Michael Flynn that suggested that he "had to fire General Flynn because he lied to the Vice President and the FBI".[13] Alert journalists and critics were quick to point out that if the President had known at the time of Flynn's firing that Flynn had made false statements to the FBI (which is a crime), the President would arguably have been committing obstruction of justice in later urging then-FBI Director James Comey to drop the FBI's investigation of Flynn. In response to this, the President's lead personal lawyer, John Dowd—an old Washington hand at government investigations—first advanced the credibility-defying assertion that he himself had written (or maybe dictated) the offending tweet.[14] Dowd then moved on to an even more incredible assertion, that being that the "President cannot obstruct justice because he is the chief law enforcement officer [of the United States],"[15] and therefore, presumably, gets to decide what justice is.
- Indeed, the overall pressure on the legal team has argu-

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[12]*See* Ashley Parker, Carol D. Leonnig, Philip Rucker &Tom Hamburger, *Trump dictated son's misleading statement on meeting with Russian lawyer*, WASH. POST, July 31, 2017, *available at* https://www.washingtonpost.com/politics/trump-dictated-sons-misleading-statement-on-meeting-with-russian-lawyer/2017/07/31/04c94f96-73ae-11e7-8f39-eeb7d3a2d304_story.html?utm_term=.d37fea7f4b6b; Aaron Blake, *Trump's lawyer repeatedly denied Trump was involved in Trump Jr.'s Russia statement. But he was*., WASH. POST, July 31, 2017, *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/07/31/trumps-lawyer-repeatedly-denied-trump-was-involved-in-trump-jr-s-statement-but-he-was/?utm_term=.a18baaaad467.

[13]https://twitter.com/realDonaldTrump/status/937007006526959618?ref_src=twsrc%5Etfw.

[14]*See* Andrew Prokop, *The tweet in which Trump maybe admitted to obstruction of justice, explained*, VOX.COM, Dec. 4, 2017, *available at* https://www.vox.com/policy-and-politics/2017/12/4/16730290/trump-tweet-obstruction-justice.

[15]*See* Mike Allen, *Exclusive: Trump lawyer claims the "President cannot obstruct justice"*, AXIOS.COM, Dec. 4, 2017, *available at* https://www.axios.com/exclusive-trump-lawyer-claims-the-president-cannot-obstruct-justice-2514742663.html.

> ably resulted in a variety of unforced errors, missed opportunities and, frankly, just plain weirdness, extensive enough that even the mainstream media has remarked upon it.[16]

Having many lawyers can be a good thing or a bad thing, depending on a variety of circumstances. However, having dueling lawyers, overlapping lawyers and a client who only hears what he or she wants to hear may be a recipe for disaster . . . .

2. Acting on Advice of Counsel

> *He's been called a "morally bankrupt sociopath," a "scumbag," a "garbage monster," and "everything that is wrong with capitalism." And those are some of the tamer comments.*[17]

Of course, President Trump's lawyers are not the only ones who have to worry about their client's tweets. They would undoubtedly find a sympathetic ear from the lawyers for Martin Shkreli, the infamous "Pharma Bro" who achieved public notoriety when his company, Turing Pharmaceuticals, acquired a drug used to treat infections in AIDS patients and increased its price by 5,000%.[18] That maneuver brought Shkreli to the public's attention, but an earlier business venture led to his ultimate indictment, conviction and imprisonment—and left his lawyer facing the same fate.

Before Turing, Shkreli had run another pharma company,

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[16] *See* Aaron Blake, *Trump's lawyers just can't stop stepping in it*, WASH. POST, Sept. 28, 2017, *available at* https://www.washingtonpost.com/news/the-fix/wp/2017/09/18/whats-the-matter-with-trumps-lawyers/?utm_term=.d3469f51129d.

[17] Zoe Thomas & Tim Swift, *Who is Martin Shkreli—'the most hated man in America'?*, BBC News, Aug. 4, 2017, *available at* http://www.bbc.com/news/world-us-canada-34331761.

[18] *See generally, e.g.,* Dan Diamond, *Martin Shkreli Admits He Messed Up: He Should've Raised Prices Even Higher*, FORBES.COM, Dec. 3, 2015, *available at* https://www.forbes.com/sites/dandiamond/2015/12/03/what-martin-shkreli-says-now-i-shouldve-raised-prices-higher/#d1a5e0713627; Matthew Herper, *My Lunch With Shkreli: What We Should Learn From Pharma's Latest Monster*, FORBES.COM, Sept. 24, 2015, available at https://www.forbes.com/sites/matthewherper/2015/09/24/my-lunch-with-shkreli-what-we-should-learn-from-pharmas-latest-monster/#1f8d081ca042; Bethany McLean, E*verything You Know About Martin Shkreli Is Wrong—Or Is It?*, VANITYFAIR.COM, Dec. 18, 2015, *available at* https://www.vanityfair.com/news/2015/12/martin-shkreli-pharmaceuticals-ceo-interview.

Retrophin, Inc., and before that he had run two hedge funds, MSMB Capital Management and MSMB Healthcare, that focused on investments in the biotech and pharmaceutical industries.[19] Sadly for Shrkeli and his investors, these hedge funds were not altogether successful and were closed in what seemed to some to be a rather abrupt manner.[20] Not unexpectedly, this left fund investors clamoring for their money. The funds had no more money, but now Retrophin—ah, Retrophin was a public company, which had cash, and the stock of which had value.

According to allegations by the government (which were accepted by a jury of Shkreli's peers), Shkreli caused Retrophin to enter into fraudulent "settlement agreements" with a number of disgruntled hedge fund investors, issuing those investors shares of Retrophin stock purportedly in exchange for the settlement of non-existent claims those investors had against Retrophin but in fact to compensate them for their losses in the funds. Retrophin's auditors were apparently not that slow on the uptake, however, and insisted that Retrophin was not responsible for the claims that the settlement agreements professed to resolve. Thereafter, Shkreli initiated a modified approach, dropping the settlement-agreement idea and instead entering into "consulting agreements" between Retrophin and former hedge fund investors, whereby the investors would be paid cash (from Retrophin) and issued Retrophin stock as

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[19] *See generally* Indictment, U.S. v. Martin Shkreli & Evan Greebel, No. CR15-637 (E.D.N.Y Dec. 14, 2015) ("Shkreli-Greebel Indictment"). *See also* Complaint, Sec. & Exch. Comm'n v. Martin Shkreli, Evan Greebel, et al., Civ. Act. No. 15-cv-07175 (E.D.N.Y. Dec. 17, 2015).

[20] *See, e.g.,* Dan Mangan, *Martin Shkreli kept hedge-fund investor in dark about botched short trade, misled him on auditors: testimony*, CNBC.COM, July 6, 2017, *available at* https://www.cnbc.com/2017/07/06/martin-shkreli-kept-hedge-fund-investor-in-dark-about-botched-trade.html; Patricia Hurtado & Misyrlena Egkolfopoulou, *'Pharma Bro' Martin Shkreli's hedge fund went from boom to bust in 31 minutes*, SYDNEY MORNING HERALD, June 30, 2017, *available at* http://www.smh.com.au/business/world-business/pharma-bro-martin-shkrelis-hedge-fund-went-from-boom-to-bust-in-31-minutes-20170629-gx1qdu.html.

consideration for sham consulting services supposedly to be provided to Retrophin.[21]

But Shkreli could not execute these schemes alone. As alleged by the government, he needed the help of his longtime outside counsel, Evan Greebel, who was charged in the same indictment (and sued in the same Securites and Exchange Commission enforcement proceeding) as was Shkreli. That indictment alleged that Greebel had played an integral role in developing the scheme to use Retrophin stock and Retrophin's cash to pay off the unhappy hedge fund investors and that he had prepared or directed the preparation of the sham settlement agreements and consulting agreements to facilitate the scheme.[22]

This turn of events caused some friction between Shkreli and Greebel, it is fair to say.[23] In moving to sever his trial from that of Greebel, Shkreli's defense lawyer argued that Shkreli would assert that he had relied in good faith upon the advice of Greebel, his company's counsel,[24] every step of the way:

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[21]*See generally* Shkreli-Greebel Indictment at ¶¶ 26-35; *see also* Matt Levine, *Martin Shkreli Accused of Being Surprisingly Good at Fraud*, BLOOMBERG.COM, Dec. 17, 2015, *available at* https://www.bloomberg.com/view/articles/2015-12-17/martin-shkreli-accused-of-being-surprisingly-good-at-fraud.

[22]*See, e.g.,* Ashby Jones & Sara Randazzo, *Lawyer Linked to Martin Shkreli Arrested on Fraud Charge*, WALL ST. J., Dec. 17, 2015, *available at* https://www.wsj.com/articles/lawyer-linked-to-martin-shkreli-arrested-on-fraud-charge-1450393836; Alfred Branch, *Scarsdale Lawyer Charged in Martin Shkreli Fraud Case*, PATCH.COM, Dec. 18, 2015, *available at* https://patch.com/new-york/scarsdale/scarsdale-lawyer-charged-martin-shkreli-fraud-case-0.

[23]*See generally, e.g.,* Katie Savadski, *Martin Shkreli Locks Horns With His Own Company's Lawyer*, THEDAILYBEAST.COM, Apr. 7, 2017, *available at* https://www.thedailybeast.com/martin-shkreli-locks-horns-with-his-own-companys-lawyer; Emily Jane Fox, *Martin Shkreli May Blame His Old Lawyer for His Alleged Crimes*, VANITYFAIR.COM, July 14, 2016, *available at* https://www.vanityfair.com/news/2016/07/martin-shkreli-trial-lawyer; Peter J. Henning, *In Case of Shkreli and Lawyer, Finger-Pointing Comes First*, N.Y. TIMES, Feb. 27, 2017, *available at* https://www.nytimes.com/2017/02/27/business/dealbook/in-case-of-shkreli-and-lawyer-finger-pointing-comes-first.html?_r=0.

[24]One lurking issue in the facts of the Shkreli/Greebel case is a common professional responsibility challenge—the difficulty that arises in separating the interests of the lawyer's corporate client from that client's

> Martin Shkreli paid almost $10 million dollars in legal fees to Evan Greebel and his law firm. Shkreli met, spoke and emailed with his lawyers virtually every day, often dozens of times per day, on every topic facing Shkreli's businesses. Greebel was the acting secretary at Retrophin Board meetings; he directly communicated with many of the company's investors on a regular basis; he "pitched" the company to potential investors in Shkreli's absence; he drafted a code of ethics and other important policy documents; and he was intimately involved in every decision Shkreli made. In turn, Greebel provided legal advice and insight to Shkreli, which Shkreli followed faithfully. Because Shkreli relied closely on his experienced legal counsel and other attorneys at the firm, Shkreli has a valid "reliance on counsel" defense. To the extent that his lawyer, Evan Greebel, will take an antagonistic position, such position is in clear contradiction of the tens of thousands of emails between Shkreli and Greebel, and is inconsistent with Shkreli having paid 10 million dollars to a well-respected and widely known firm for what should be accurate legal advice, not advice that Mr. Shkreli relied on, only to find himself indicted for crimes he did not commit.
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> . . .
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> Shkreli's relationship with Greebel extended far beyond one particular matter. Greebel was a critical component of every legal decision Shkreli made. Not only did Shkreli fully inform Greebel of all the relevant facts, but Greebel had detailed knowledge of the innermost aspects of Shkreli's business from a variety of other sources, as well as Greebel's own direct involvement in most of the events on which his advice was sought.
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> . . .
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> Shkreli and Greebel spoke or emailed with each other virtually every day for several years. Some days they emailed each

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management team, especially the chief executive officer. Greebel's clients were, at various points, the MSMB hedge funds and Retrophin. However, a good bit of the paper trail in the case fairly strongly suggests that Greebel's advice was often focused on what was in the best interests of Shkreli, even if that was not necessarily in the best interests of his actual corporate client(s). *See* Daniel Fisher, *Shkreli's Lawyer Indicted for Representing the Wrong Client*, FORBES.COM, Dec. 17, 2015, *available at* https://www.forbes.com/sites/danielfisher/2015/12/17/shkrelis-lawyer-indicted-for-representing-the-wrong-client/#3ccf548b4d5d. Retrophin apparently agreed that its interests were not coextensive with those of Shkreli, since it sued Shkreli for alleged breaches of fiduciary duty, among other things, some months before Shkreli was indicted. *See* Retrophin, Inc., Current Report on Form 8-K dated Aug. 17, 2015 (SEC File No. 001-36257) (reporting lawsuit and attaching complaint).

> other numerous times and then also spoke by telephone. There are tens of thousands of emails between the two, far too many to submit with this motion. By way of example, on October 8, 2011, Shkreli discussed intricate details of a potential transaction with a professional in the finance industry and introduced Greebel onto the email chain, explaining, **"I am CCing Evan Greebel who is my right-hand-man (and legal counsel)."**
>
> Email traffic between Shkreli and Greebel generally shows that the first thing Shkreli does when confronted with a potential new investor is refer the matter directly to Greebel. . . .
>
> . . .
>
> Defendant Martin Shkreli maintains his complete innocence. The evidence will show that he did not defraud, steal, lie, or cheat anyone out of money, and that he devoted his best efforts to bringing value to his investors. The evidence, including the tens of thousands of emails between Shkreli and Greebel, as well as other documents maintained by Greebel's firm, is overwhelming that Shkreli ensured that his counsel was fully aware **of all relevant information,** and that his counsel provided legal advice on all topics. The evidence is clear moreover that Shkreli and his legal counsel at all times had a relationship of good-faith, meaning that Shkreli's lawyers had all the information they needed to render appropriate and accurate advice, and that he followed that advice, believing it to be proper and correct.[25]

As might be expected, although Greebel likewise wanted to sever his trial from that of Shkreli, his view of the world was somewhat different:

> We will present strong evidence that Mr. Shkreli repeatedly lied to, misled, and omitted material information from Mr. Greebel and other attorneys at [Greebel's then-law firm,] Katten Muchin Rosenman LLP ("Katten Muchin"). Indeed, we will demonstrate that Mr. Greebel was an unknowing pawn in a fraud about which Mr. Greebel was unaware. We will also demonstrate through the evidence obtained during discovery that Mr. Shkreli is seeking to have Mr. Greebel found responsible for his misconduct in the same way that, over the years, he has repeatedly shifted the blame from himself to anyone and everyone around him.
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> . . .

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[25]Memorandum of Law in Support of Defendant Martin Shkreli's Motion for a Severance from Evan Greebel, Dkt. No. 161-2, U.S. v. Martin Shkreli & Evan Greebel, No. 15 CR 637(S-1)(KAM), E.D.N.Y., Feb. 17, 2017, at 1, 8–9 and 15 (emphasis in original).

> Mr. Greebel's core defense will be based, in substantial part, on the following arguments that are antithetical to Mr. Shkreli's defense: (1) Mr. Shkreli lied to Mr. Greebel and other attorneys at Katten Muchin; (2) Mr. Shkreli failed to disclose material information to Mr. Greebel and other attorneys at Katten Muchin; (3) Mr. Shkreli misrepresented on multiple occasions to third-parties that Mr. Greebel had offered or provided certain advice when in fact Mr. Greebel provided the opposite advice; (4) Mr. Shkreli misrepresented to others that he had obtained certain legal advice from Mr. Greebel when, in fact, Mr. Shkreli had not conferred with Mr. Greebel at all; (5) Mr. Shkreli deceived Mr. Greebel and other attorneys at Katten Muchin and misused them as pawns in fraudulent schemes unbeknownst to them; and (6) Mr. Shkreli has a long-term, pattern and practice of blaming others, including Mr. Greebel, for his own misconduct.[26]

As it became clear that both men's trials (the proceedings were in fact severed from each other) would turn significantly on issues concerning the relationship between Shkreli and Greebel (and other lawyers working with Greebel), what might fairly be described as "juicy tidbits" began coming out about the way in which that relationship worked (or did not work). Trial evidence revealed some fascinating email exchanges between Shkreli and the lawyer on whom he claimed to place utmost reliance, as well as from Shkreli to others about Greebel and his team:

- "We can call it a settlement agreement, but given [the auditor's] recent behavior they may require it to be disclosed in the financials. I was trying to prevent that issue."—Greebel to Shkreli, regarding the structure of the settlement/"consulting" agreements

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[26]Mr. Greebel's Memorandum of Law in Support of His Motion for Severance, Dkt. No. 3, U.S. v. Martin Shkreli & Evan Greebel, No. 15 CR 637)(KAM), E.D.N.Y., Feb. 17, 2017, at 1 and 9. In addition to arguing that Shkreli had generally not done those things necessary for an advice-of-counsel defense (providing complete and honest information to counsel and following counsel's advice, among other things, Greebel also argued that he would be prejudiced by the fact that "Mr. Shkreli [was] purposely creating a circus-like atmosphere pursuant to an improper and prejudicial plan to disrupt the trial and achieve jury nullification along the lines of, in Mr. Shkreli's own words, 'OJ Simpson [and] Casey Anthony.' . . . [Shkreli's] conduct creates an unacceptable risk of irreversible prejudice and harm to Mr. Greebel[,] who wants a jury focused on the evidence and not the tornado of chaos swirling around Mr. Shkreli." *Id.* at 3.

- "Take from anyone, I don't care, do the math."—Shkreli to Greebel, re: the "consulting agreements"
- "My lawyers are lazy and stupid and paid too much."—Shkreli to an investor, about why documents had not been forthcoming
- "FIX THE ******* ISSUE. THERE IS NO ISSUE. HOW MANY TIMES DO WE HAVE TO TALK ABOUT THIS. Why can't you do your job, it's incredible."—Shkreli to Greebel (capitalization and punctuation as in original; obscene participle omitted)
- "How long does it take to edit a consulting agreement prepared three weeks ago? I am really starting to feel you are inept."—Shkreli to Greebel
- "You are the director and CEO of a public company, you have a duty of loyalty . . . Getting stock at a discount could be problematic."—Greebel to Shkreli, about Shkreli's proposed purchase of Retrophin stock from a disgruntled hedge fund investor
- "F that."—Shkreli to Greebel, in reply to the above[27]

As noted above, the two men's trials were severed. Shkreli went to trial in the summer of 2017 and was convicted on three counts of securities fraud (out of eight counts charged), ultimately (and bizarrely) sent to jail for an unrelated incident while he was out on bail pending sentencing: he offered $5,000 cash to anyone who could get him a strand of Hillary Clinton's hair while she was conducting a book tour. His sentencing is scheduled to occur in January 2018.[28]

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[27]The first email is quoted in Henning, *supra*. The second through fourth emails are quoted in Emily Saul, *Shkreli had a meltdown as alleged Ponzi scheme unraveled*, N.Y. POST, July 25, 2017, *available at* https://nypost.com/2017/07/25/shkreli-had-a-meltdown-as-alleged-ponzi-scheme-unraveled/. The final two emails are quoted in Stewart Bishop, *Shrkeli Slams Katten Atty in Emails, As Trial Wraps Up*, LAW360.COM, July 25, 2017, *available at* https://www.law360.com/articles/947906/shkreli-slams-katten-atty-in-emails-as-trial-wraps-up.

[28]*See* Merrit Kennedy, *'Pharma Bro' Martin Shkreli Convicted of Securities Fraud*, NPR.ORG, Aug. 4, 2017, *available at* https://www.npr.org/sections/thetwo-way/2017/08/04/541658697/pharma-bro-martin-shkreli-convicted-of-securities-fraud; Abby Ohlheiser, *Martin Shkreli was convicted of securities fraud. Then, he live-streamed to his fans.*, WASH. POST, Aug. 4, 2017, *available at* https://www.washingtonpost.com/news/the-intersect/wp/2017/08/04/martin-shkreli-was-convicted-of-securities-fraud-then-he-livest

Greebel's case went to trial in October 2017[29] and went to the jury just before Christmas 2017.[30] (In the latest in the series of odd events that have characterized the Shkreli saga, the trial judge halted proceedings in the penultimate week of the trial so that the parties could address "potentially career-ending allegations" apparently relating to interactions between a defense witness and "an unnamed government official" assumed to be a prosecutor involved in the investigation of the claims against Shkreli and Greebel. As it transpired, the government official was a prosecutor in the Eastern District of New York who allegedly demanded that the witness, a hedge fund investor, change his testimony and drop an arbitration against Retrophin relating to shares issued to him pursuant to one of the "consulting agreements." The allegations were denied by the government, and the judge barred the proffered testimony.)[31] As this chapter is being written, the outcome of the Greebel trial cannot be predicted.

Certainly, even the most difficult lawyer-client relationship is unlikely to manifest the rather rococo dysfunctionality of the Shkreli-Greebel tandem. On the other hand, more

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reamed-to-his-fans/?utm_term=.03f074b3dcc2; Stephanie Clifford, *Martin Shkreli Is Jailed for Seeking a Hair From Hillary Clinton*, N.Y. TIMES, Sept. 13, 2017, *available at* https://www.nytimes.com/2017/09/13/business/dealbook/martin-shkreli-jail.html?_r=0.

[29]*See* Brendan Pierson, *Lawyer charged alongside Martin Shkreli goes on trial*, REUTERS.COM, Oct. 20, 2017, *available at* https://www.reuters.com/article/us-usa-crime-shkreli-greebel/lawyer-charged-alongside-martin-shkreli-goes-on-trial-idUSKBN1CP2LR.

[30]*See* Andrew Strickler, *With Another Flap, Greebel Fraud Trial Heads to Closings*, LAW360.COM, Dec. 19, 2017, *available at* https://www.law360.com/articles/996794/with-another-flap-greebel-fraud-trial-heads-to-closings; Andrew Strickler, *Greebel 'Greased Wheels' For Shkreli, Feds Say At Closing*, LAW360.COM, Dec. 20, 2017, *available at* https://www.law360.com/articles/996991?scroll=1; Christine Simmons, *Jury Will Decide If Shkreli Lawyer Is 'Co-Conspirator' or Victim*, N.Y.L.J., Dec. 22, 2017, *available at* https://www.law.com/newyorklawjournal/sites/newyorklawjournal/2017/12/21/jury-will-decide-if-shkreli-lawyer-is-co-conspirator-or-victim/.

[31]*See* Stewart Bishop, *Ex-Katten Atty Trial Halted Over 'Career-Ending' Claims*, LAW360.COM, Dec. 13, 2017, *available at* https://www.law360.com/articles/994563/ex-katten-atty-trial-halted-over-career-ending-claims; Stewart Bishop, *Gov't Misconduct Claims Blocked From Ex-Katten Atty Trial*, LAW360.COM, Dec. 14, 2017, *available at* https://www.law360.com/articles/995213?scroll=1.

mundane dysfunctionalities may ultimately pose just as many challenges . . . .

3. How Can I Miss You If You Won't Go Away?

The documents mistakenly sent to the Journal *include a copy of a 2012 memo Gibson Dunn worked on for Smith that was intended for—but never got to—the PepsiCo board, according to the report. That memo accused company executives in Europe of not vetting the Wimm-Bill-Dann deal correctly. Smith left the company eight days after the memo was drafted "to pursue other opportunities," PepsiCo said at the time.*[32]

For 13 months, from May 2011 until June 2012, Maura Smith served as the general counsel of PepsiCo, the global food-and-beverage conglomerate. Smith came to Pepsico with a distinguished resume: she had served as general counsel at both International Paper and Owens-Corning, and had been a division general counsel in the fabled legal department of General Electric, among other high-profile experience.[33]

In contrast to her eight-year run at International Paper and her five years at Owens-Corning, Ms. Smith's time at PepsiCo was brief, and it ended rather abruptly,[34] albeit in a rather lucrative fashion, with her landing softened by severance payments aggregating just shy of $6 million.[35] PepsiCo rehired Ms. Smith's predecessor, former Deputy Attorney

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[32]Katelyn Polantz, *Wilmer 'Inadvertently' Leaks Pepsi Client Secrets to Wall Street Journal*, INSIDE COUNSEL, Sept. 28, 2017, *available at* http://www.insidecounsel.com/2017/09/28/wilmer-inadvertently-leaks-pepsi-client-secrets-to.

[33]*See* Press Release, "PepsiCo Names Maura Abeln Smith EVP of Government Affairs, General Counsel and Corporate Secretary", Mar. 25, 2011, *available at* http://www.pepsico.com/live/pressrelease/PepsiCo-Names-Maura-Abeln-Smith-EVP-of-Government-Affairs-General-Counsel-and-Co03252011.

[34]*See* PepsiCo, Inc., Current Report on Form 8-K dated June 15, 2012 (SEC File No. 1-1183) ("On June 15, 2012, Maura Abeln Smith, Executive Vice President, PepsiCo General Counsel, Public Policy & Government Affairs, and Corporate Secretary, notified PepsiCo, Inc. ('PepsiCo') of her decision to resign from PepsiCo, effective immediately.")

[35]*See* PepsiCo, Inc., Current Report on Form 8-K dated Oct. 18, 2012 (SEC File No. 1-1183) (reporting separation agreement between PepsiCo and Ms. Smith).

General Larry Thompson,[36] and after a year's sabbatical and a brief period as the general counsel of an international food retailer, Ms. Smith opened a solo, "by appointment only" law practice based in New York and Connecticut.[37] And there the story of the Maura Smith era at PepsiCo might have ended, but for two things.

The first of these was a broad-ranging review by the Securities and Exchange Commission (SEC) on whether confidentiality provisions in executive employment agreements and separation agreements had the effect of discouraging such employees from communicating with the SEC staff about possible securities law violations under the SEC's "whistleblower protection" rule, Rule 21F-17.[38] The second was one of the most unfortunate email errors ever committed by a major law firm, at least one of the most unfortunate ones that ever became public.

In early 2017, Ms. Smith was apparently subpoenaed by the SEC to answer questions regarding the circumstances of her departure from PepsiCo and the confidentiality provisions of her separation agreement. In her (non-public) testimony to the SEC, Ms. Smith apparently indicated her belief that she was fired in retaliation for her handling of an

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[36]*See* Press Release, "PepsiCo Names Larry Thompson Executive Vice President, Government Affairs, General Counsel and Corporate Secretary", June 18, 2012, *available at* http://www.pepsico.com/live/pressrelease/PepsiCo-Names-Larry-Thompson-Executive-Vice-President-Government-Affairs-General06182012.

[37]*See* https://maurasmithlaw.com/attorney-profiles/; https://www.linkedin.com/in/maura-smith-895a9bb3/.

[38]17 C.F.R. § 240.21F-17. *See generally, e.g.,* Shearman & Sterling LLP, *SEC Says Confidentiality Agreements May Impede Whistleblowers*, Apr. 2, 2015, *available at* http://www.shearman.com/~/media/Files/NewsInsights/Publications/2015/04/SEC-Says-Confidentiality-Agreements-May-Impede-Whistleblowers-LIT-04022015.pdf (client news publication); John F. Savarese & Wayne M. Carlin, *The SEC and Whistleblowers: A Spotlight on Severance Agreements*, Harv. L. Sch. Forum on Corp. Governance & Fin. Reg., Aug. 23, 2016, *available at* https://corpgov.law.harvard.edu/2016/08/23/the-sec-and-whistleblowers-a-spotlight-on-severance-agreements/; David M. Stuart & Kyle S. Gazis, *The SEC as the Whistleblower Program's Advocate: Severance Agreements and FCPA Investigations*, FCPA Rep., Oct. 12, 2016, available at https://www.cravath.com/files/uploads/Documents/Publications/3625776_1.PDF.

internal investigation into potential wrongdoing relating to PepsiCo's acquisition of a Russian company in 2011.[39]

As it emerged, the story seemed to be as follows: In 2011, PepsiCo acquired a Russian dairy company called Wimm-Bill-Dann, first acquiring a majority stake in February and then taking full control of the Company in September. In August of that year, a Wimm-Bill-Dann employee made a call to a PepsiCo hotline, alleging various financial irregularities at the company. When the matter came to the attention of senior PepsiCo management, the company engaged Gibson, Dunn & Crutcher LLP ("Gibson Dunn") to conduct a full internal investigation of Wimm-Bill-Dann, which investigation "unearthed evidence of theft, improper land deals and millions of dollars in questionable consulting contracts and gratuities," some of which practices had apparently continued after PepsiCo's acquisition of the company and constituted potential violations of the Foreign Corrupt Practices Act.[40]

During the investigation, Ms. Smith asked Gibson Dunn to help her prepare a memorandum to the PepsiCo board of directors concerning the findings, and a 33-page draft of that memorandum, dated June 7, 2012, was prepared. However, one of the Gibson Dunn lawyers was concerned that Ms. Smith's focus was to identify and place blame on various current and former PepsiCo employees while protecting her own position. That lawyer raised those concerns with PepsiCo's Chief Financial Officer, who directed Ms. Smith to stop work on the memorandum (which was apparently never sent to the board). By June 15, Ms. Smith's employment with PepsiCo was over.[41]

All of this was, of course, non-public, and it would have remained that way but for the unfortunate confluence of the SEC's probe of employee confidentiality agreements and simple human error. After Ms. Smith's visit to the SEC, the SEC began an investigation focused specifically on the cir-

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[39]Andrew Ackerman, Joe Palazzolo & Jennfer Maloney, *SEC Probes Departure of Pepsico's Former Top Lawyer*, WALL ST. J., Sept. 27, 2017, *available at* https://www.wsj.com/articles/departure-of-pepsico-lawyer-is-focus-of-sec-probe-1506504603.

[40]*Id.*

[41]*Id. See also* Polantz, *supra*.

cumstances of the termination of her PepsiCo employment. PepsiCo engaged outside counsel from Debevoise & Plimpton LLP and WilmerHale to assist it in responding to the investigation, with which it has indicated it is cooperating. Through a "there but for the grace of God" email error, a WilmerHale lawyer apparently sent a privileged memorandum prepared by WilmerHale that recounted the above facts, along with other documents, to a *Wall Street Journal* reporter as part of an email to other lawyers working on the case (presumably as an email address "autofill" error). The *Journal* published a detailed story based on the email, causing not only the current SEC investigation but also the history of the PepsiCo internal investigation to come to light in a very public way.[42]

When friction arises between an organization and its general counsel, it is never a pretty thing, and significant professional responsibility issues may arise in such a circumstance.[43] These issues may become even more acute when the friction centers around a potential violation of law. Not that that would ever happen, of course . . . .

B. But We're Healthcare Lawyers! What Does All This Have to Do with Us?

All of the above is interesting, and some of it even a bit *outré*. But with the tangential exception of the Shkreli-

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[42] *See* Ackerman, et al., *supra*; Polantz, *supra*; Debra Cassens Weiss, *Oops! WilmerHale email to reporter reveals apparent SEC probe into PepsiCo GC's departure*, ABAJOURNAL.COM, Sept. 27, 2017, *available at* http://www.abajournal.com/news/article/oops_wilmerhale_email_reveals_apparent_sec_probe_into_departure_of_pepsico/; William Vogeler, *Lawyer Mistakenly Sent SEC Memo to Reporter*, FINDLAW.COM, Sept. 28, 2017, *available at* http://blogs.findlaw.com/in_house/2017/09/lawyer-mistakenly-sent-sec-memo-to-reporter.html; Joe Patrice, *WilmerHale And The Terrible, Horrible, No Good, Very Bad Day Of Leaking Client Whistleblower Docs To The WSJ*, ABOVETHELAW.COM, Sept. 28, 2017, *available at* https://abovethelaw.com/2017/09/wilmerhale-and-the-terrible-horrible-no-good-very-bad-day-of-leaking-client-whistleblower-docs-to-the-wsj/?rf=1.

[43] *See generally* William W. Horton and Andrew J. Demetriou, *Up the Ladder or Under the Bus? Legal Ethics Issues When Management and Counsel Become Adversaries*, contained in the program materials from Am. Health Law. Ass'n, Institute on Medicare and Medicaid Payment Issues 2012, *available at* https://www.healthlawyers.org/Events/Programs/Materials/Documents/MM12/papers/DD_demetriou_horton.pdf.

Greebel relationship, none of it really has to do with healthcare in any obvious way. So why are these stories here?

Well, perhaps because there is more universality to these stories than meets the eye, and because some of the risks they raise may have particular acuity in the healthcare industry. In the first place, of course, healthcare is a heavily regulated field, with many restrictions—and even criminal prohibitions—on activities that in another setting would represent sound business decisions, such as providing gifts and rewards to those who benefit the business.[44] That is exactly the sort of thing that tends to send chief executive officers and the like into a rage, which rage is not infrequently directed toward their lawyers.

But it is not enough that the myriad laws and regulations that surround the healthcare industry are, to the hardened business mindset, impediments to progress. On top of that, they are often unclear, ambiguous and subject to interpretation. Thus, a client may seek and obtain advice from a knowledgeable and competent lawyer on, say, an issue relating to a Stark Law exception, and then get an inconsistent—occasionally even diametrically opposed—answer from another knowledgeable and competent lawyer. Even if the client limits itself to seeking legal advice from a single lawyer, that lawyer often has at least two hands, so what the client views as a simple and straightforward question gets an "on-the-one-hand, on-the-other-hand" answer that leaves the client questioning why it is paying legal fees if it cannot get answers to what seem to be the simplest questions.

Still further, the stakes for "getting it wrong" in healthcare—whatever "it" may be—can be very high indeed. Alleged violations of even arcane and technical regulatory requirements can, if the requisite scienter is present, result in enforcement actions under the civil False Claims Act,[45] with its Draconian damage multipliers and per-claim

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[44]*See generally* William W. Horton, *The Past, Present and Future of the Anti-Kickback Statute: A Practical History*, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (Linda A. Baumann, ed.), Ch. 9, *passim* (3d ed. 2013 and Supp. 2017).

[45]31 U.S.C. §§ 3729-3733.

penalties.[46] False Claims Act violations, along with violations of a variety of other laws affecting healthcare providers and suppliers, may also trigger mandatory or permissive exclusion from participation in federal healthcare programs—often, the "death penalty," as a practical matter, for excluded persons and entities.[47] Knowledgeable lawyers are aware of such things, and take them into account in advising their clients. Clients, however, may be more attached to the notion that the law is about justice—"Surely," they say to themselves, "the government can't put me into penury because I had a few unsigned contracts with referring physicians. That wouldn't make any sense at all. My lawyer is always telling me the sky is falling, but I'll just explain that we didn't mean to do anything wrong and everything will be okay. Heck, my lawyer would understand that too, if she weren't so busy running up legal fees for me to pay."

In this rather perilous setting, the somewhat flamboyant examples cited above can be translated fairly readily into scenes more familiar to healthcare lawyers. For example, assume that, instead of a President of the United States accused of conspiring with the Russians, we had instead a health system CEO whose company had been accused of conspiring with referring physicians to "reward" them for their loyalty to the system and was now being sued under the False Claims Act. The system's lawyers have strongly advised the CEO to "let the process work" and to avoid making any public statements that might be inconsistent with the factual record. Perhaps the CEO would follow that advice, but it would certainly not be novel in human experience if the CEO instead called a press conference and insisted loudly that, "We haven't done anything wrong, and we fully expect this nonsense to go away by next week!"

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[46] *See generally* Robert Salcido, *The False Claims Act in Health Care Prosecutions: Application of the Substantive,* Qui Tam *and Voluntary Disclosure Provisions*, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (Linda A. Baumann, ed.), Ch. 3, *passim* (3d ed. 2013 and Supp. 2017).

[47] *See generally* U.S. Dep't of Health & Human Svcs., Off. of Inspector Gen., *Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs* (May 8, 2013), *available at* https://oig.hhs.gov/exclusions/files/sab-05092013.pdf; Linda A. Baumann, *An Introduction to Health Care Fraud and Abuse*, in HEALTH CARE FRAUD AND ABUSE: PRACTICAL PERSPECTIVES (Linda A. Baumann, ed.) 100-106 (3d ed. 2013 and Supp. 2017).

Chastised (gently, of course) by the lawyers afterward, the CEO might patiently explain that something had to be done before the system's competitors ate it for breakfast amid all the bad publicity, and of course he or she would never do it again—at least until tomorrow, when more-or-less the same thing would happen again. Indeed, if the crisis did not resolve quickly enough, the CEO might well seek out additional lawyers, perhaps ones who understood the sorts of things that a CEO had to do in a crisis and would support them, not the sorts of nervous-Nellie lawyers who were telling the CEO to keep quiet and not do anything to help the situation.[48]

Even without taking into account the fact that it relates to a pharmaceutical company, the Shkreli-Greebel situation really does not need much translation to make it relevant in the healthcare setting. Indeed, it is an example that, while somewhat extreme in its specific facts, illustrates an all-too-common risk in almost any business setting: the lawyer who (arguably) fails to fully grasp the distinction between what is in the best interests of his or her corporate client and what is in the personal interests of one or more of the client's executives.[49] Healthcare is an industry that has arguably produced more than its share of larger-than-life chief executives with larger-than-life (and sometimes larger-than-law) visions, and it is sometimes all too easy to lose sight of the

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[48]*Cf.* Tom Bassing, *The struggle for Scrushy's ear*, BIRMINGHAM BUS. J., Oct. 26, 2003, available at https://www.bizjournals.com/birmingham/stories/2003/10/27/story2.html. As a note, the author appears as a minor character in that story; however, in citing it here, the author is not endorsing the accuracy or completeness of the story but simply offering it as an example of the phenomenon being discussed in the text.

[49]For another example, consider the sad tale of Franklin Brown, longtime general counsel of Rite Aid Corporation, who was convicted of a variety of securities fraud and obstruction-of-justice claims arising out of the investigation and prosecution of a number of Rite Aid executives who were alleged to have engaged in a substantial scheme to enrich themselves while committing fraud on Rite Aid investors. Brown was accused of, among other things, backdating documents in order to enhance incentive awards payable to himself and other officers, conceling information from Rite Aid's auditors, and providing fraudulent documents to support a bank loan to a senior Rite Aid executive. *See* William W. Horton, *Target-at-Law: Instructive Moral Lessons from the New Lawyer Wars*, in HEALTH LAW HANDBOOK (Alice G. Gosfield, ed.) § 13.3 (21st ed. 2009).

fact that those visions may be focused on enhancing personal interests more than corporate ones.

The facts in the case of Ms. Smith's departure from PepsiCo and her indirect re-entry into her former client's corporate life via the SEC are not yet fully clear. However, the concern that has led to the SEC's interest certainly is—the concern that employees who discover potential wrongdoing and pursue it are encouraged to leave (with a generous severance and a locked-down non-disclosure agreement). That concern leads, more generally, to the circumstance where a lawyer communicates bad news to a healthcare client—for example, that the client appears to have entered into an arrangement that violates the Stark Law or the Anti-Kickback Statute—and is suddenly on the outside looking in.[50] Even if the lawyer is not excused from further employment by the client, he or she may become isolated from information, or shuttled off to another assignment without any clear resolution to the issues he or she raised.

There are, of course, many other examples that could be given, but the bottom line is simply this: clients do not always follow their lawyer's advice. And the corollary to that is that clients who do not follow their lawyer's advice may shop around among other lawyers until they find advice that they would prefer to follow, which raises its own set of issues. Facing those realities, a couple of questions arise. First, what can the lawyer do, as a practical matter, to manage such circumstances and minimize the risk to the client (and the lawyer, on occasion)? And second, what are the ethical and professional boundaries within which the lawyer must operate in working with a client who does not ask for permission, and may not even ask for forgiveness?

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[50] *Cf.* Thomas Francis, *Broward Health Hit With Whistleblower Lawsuits*, BROWARDPALMBEACH.COM, Nov. 11, 2009, *available at* http://www.browardpalmbeach.com/news/broward-health-hit-with-whistleblower-lawsuits-6439509 (discussing allegedly pretextual termination of employment of public health system general counsel and associate general counsel after they raised serious compliance issues with the system's board).

III. PROFESSIONAL RESPONSIBILITY AND PRACTICAL REALITY: DEALING WITH THE ETHICAL AND PRACTICAL ISSUES THAT ARISE IN A "CHALLENGING" ATTORNEY-CLIENT RELATIONSHIP

A large part of the practice of law entails giving clients advice that they do not necessarily like. Oh, sometimes the lawyer gets to say, "Yes, what you propose to do is perfectly fine, and you can download all the forms you need for free off the Internet." More often, the client hears something a bit less cheerful—ranging from, "You can't do it that way, but you can get pretty close by doing it this way" to, "Well, you can do it that way, but it will take three months and cost you six figures in legal fees" to, "You cannot do it that way. In fact, you will go to jail if you try." The end result is, as noted above, that clients sometimes do not take that advice. Sometimes that may work out okay, or at least well enough. On other occasions, that decision by the client may make a good situation bad or a bad situation worse. And in some unfortunate circumstances, that decision may lead the client, the lawyer or both off the precipice and into the rocky shoals.

Whenever such a situation arises, the lawyer must be aware of at least two important things: the practical strategies available to minimize or mitigate adverse consequences, and the ethical rules that govern both the advice the lawyer can give and the lawyer's duties and rights when the differences become irreconcilable. The rest of this chapter will utilize some of the issues illustrated by the factual scenarios described above to try to shed some light on both of those considerations.[51] What follows is not an exhaustive discussion of every issue potentially raised by such scenarios, but

[51]In that regard, it is appropriate to offer two disclaimers. First, the factual situations referred to are being used for illustrative purposes only, and no conclusion that any real-life lawyer who happens to get discussed has behaved in an unethical or illegal manner is intended or implied. Second, all references to ethics rules are to the current (2017) edition of the American Bar Association's MODEL RULES OF PROFESSIONAL CONDUCT (the "Model Rules"). The Model Rules form the basis for the professional responsibility rules in effect in every state but California, but each state's rules vary from each other and from the current text of the Model Rules and the associated comments. In other words, the version of any particu-

rather a somewhat arbitrary and idiosyncratic selection of a few of the more interesting ones.

A. First Principles (and First Problems)

Before moving to that arbitrary and idiosyncratic selection, though, it is probably useful to reiterate some of the basic principles of professional responsibility that, at least in broad strokes, circumscribe the attorney-client relationship in ways relevant to this discussion. The Model Rules and their associated commentary tell us these things, among many others:

- The client gets to decide what objectives the client wants to pursue, and the lawyer then advises the client on the available legal means to pursue those objectives.[52] (And where the client is an organization, the decisions that are made for it by the appropriate constituents of the organization "must be accepted by the lawyer even if their utility or prudence is doubtful.")[53]
- The lawyer may limit the scope of his or her representation, as long as the limitation is reasonable and the client provides informed consent.[54]
- The lawyer cannot counsel a client to engage in (or assist the client in engaging in) conduct that the lawyer knows is criminal or fraudulent. However, the lawyer 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," which "does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct." And if the client has already started down a path involving criminal or fraudulent conduct, the lawyer must "avoid assisting the client, for example, by drafting or delivering docu-

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lar rule discussed in this chapter may not be the same version as is in effect in the state where any particular reader is licensed. *Caveat lector*.

[52]Model Rules R. 1.2(a).

[53]Model Rules R. 1.13, cmt. [3].

[54]Model Rules R. 1.2(c).

ments that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed."[55]

- If the lawyer's client is an organization, the lawyer owes his or her duties to the organization, "acting through its duly authorized constituents" (such as officers, directors, managers and so on), but the lawyer's client is the organization and not the individual constituents[56] (except in certain circumstances where there is no disabling conflict and all clients give informed consent).[57]
- And if the lawyer knows that an agent of the client 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 must act as reasonably necessary in the best interest of the organization. That may involve referring the matter "up the ladder" within 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."[58]
- If that highest authority "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" that the lawyer reasonably believes is "reasonably certain to result in substantial injury to the organization," then the lawyer may disclose information outside the organization (even if Rule 1.6, the general ethical obligation of confidentiality, would not permit such disclosure), "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization."[59]
- A lawyer's obligations to a client include the duty to "exercise independent professional judgment and render

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[55]Model Rules R. 1.2(d) and cmts. [9] and [10].

[56]Model Rule R 1.13(a).

[57]*See* Model Rules R. 1.13(f)-(g).

[58]Model Rules R. 1.13(b).

[59]Model Rules R. 1.13(c). Note that this "reporting out" subsection has not been widely adopted.

candid advice," even if that advice "involves unpleasant facts and alternatives that a client may be disinclined to confront." The lawyer is not limited to providing "[p]urely technical legal advice," but in appropriate circumstances may also refer "to other considerations[,] such as moral, economic, social and political factors, that may be relevant to the client's situation."[60]

- A lawyer may not "knowingly . . . make a false statement of material fact or law to a third person . . . or . . . fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client," unless Rule 1.6 prohibits such disclosure.[61]
- And, as a happy by-product of working in a self-regulated profession, a lawyer may disclose information even where the Model Rules would otherwise prohibit such disclosure when necessary "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."[62]

There are, of course, other rules, a good many of them in fact, that may be relevant to situations of the type discussed here based on the specific circumstances present. However, the rules summarized above have particular relevance in matters like the ones discussed in the following subsections.

B. A Surfeit of Lawyers

As has already been noted, healthcare is surrounded by a veritable thicket of laws, regulations, policies and standards. For the client looking for guidance in a confusing and inconsistent world, that in itself would give rise to trouble enough. Beyond that, though, it's not as if assimilating those authoritative and quasi-authoritative sources would lead the client to a definitive answer as to whether what the client wanted to do was legal, in any sort of absolute sense. The reason for

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[60]Model Rules R. 2.1 and cmts. [1]-[3].

[61]Model Rules R. 4.1.

[62]Model Rules R. 1.6(b)(5).

that is simple, if sometimes frustrating: in the area of healthcare regulation, "the law" is often just a starting point, and what is critical is how laws, regulations, policies, etc., have been and are currently being interpreted and enforced by regulatory agencies, enforcement authorities and courts.[63]

In part for that reason, the advice given by one healthcare lawyer on the application of the law to a given set of facts may differ significantly from the advice another lawyer would give in the same circumstance, even if both lawyers were of equivalent experience and standing. For example, some lawyers take a very conservative position on arrangements that are not strictly in compliance with a safe harbor under the Anti-Kickback Statute, while other lawyers may

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[63]For example, OIG advisory opinions under the Anti-Kickback Statute seldom say that an arrangement does not violate the statute, even if the advisory opinion is regarded as a "favorable" one. Instead, they tend to say that an arrangement might violate the statute if the requisite bad intent were present, but that the OIG would not pursue enforcement action because it perceives the risk of harm to be low. *See, e.g.,* U.S. Dep't of Health & Human Svcs. Off. of Inspector Gen Advisory Opinion No. 17-05 (Sept. 7, 2017) ("[A]lthough the Proposed Arrangement could potentially generate prohibited remuneration under the anti-kickback statute if the requisite intent to induce or reward referrals of Federal health care program business were present, the [OIG] would not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the [Social Security] Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with the Proposed Arrangement."). Somewhat similarly, the so-called two-midnight rule under 42 C.F.R. § 412.3(d) has been on the books for several years, but for much of the time since it was promulgated, CMS has either limited enforcement of it or declined to enforce it at all, due in part to widespread provider and Medicare contractor confusion about what the rule actually required. *See* Centers for Medicare & Medicaid Svcs., "Inpatient Hospital Reviews: End of Temporary Suspension of the BFCC-QIO Short Stay Reviews—Update", *available at* https://www.cms.gov/research-statistics-data-and-systems/monitoring-programs/medicare-ffs-compliance-programs/medical-review/inpatienthospitalreviews.html. *See also* Centers for Medicare & Medicaid Svcs., "Reviewing Short Stay Hospital Claims for Patient Status: Admissions On or After January 1, 2016", *available at* https://www.cms.gov/research-statistics-data-and-systems/monitoring-programs/medicare-ffs-compliance-programs/medical-review/inpatienthospitalreviews.html (RAC reviews limited to "those providers that have been referred by the QIO as exhibiting persistent noncompliance with Medicare payment policies, including, but not limited to: . . . consistently failing to adhere to the Two Midnight rule, or . . . failing to improve their performance after QIO educational intervention").

take a more aggressive stance on the same factual situation. That does not mean that one of those lawyers is objectively wrong and the other is objectively right, at least not necessarily; rather, it means that different lawyers interpret unclear or ambiguous standards and risks differently based on their own particular experience and perspectives.

When healthcare lawyers gather, this phenomenon may create interesting discussions over drinks or dinner. When clients enter the mix, however, the same phenomenon may create frustration on the part of the client at the inability to get clear guidance and, even worse, may provide opportunities for opinion-shopping and mixed communications, sometimes with dangerous results.

For some clients confronted with legal advice or a legal opinion that does not please them, the obvious solution is to keep trying to find a lawyer who will provide advice or an opinion that will be more satisfactory. This strategy may not always be unreasonable; there are, after all, situations in which two heads are better than one, two pairs of eyes are better than one, and so forth. Particularly where the second lawyer or law firm offers additional or more specialized expertise than the first, this may be a very sound approach. Planned in advance, the use of multiple sets of counsel with differing specialty-area strengths and different roles and responsibilities may be highly effective (and, where necessary or appropriate, may be spelled out in limited-scope engagement agreements, as contemplated by Model Rule 1.2(c)). However, danger can arise in at least the following circumstances, among others:

- Where the client seeks the same advice from multiple lawyers and appears to ignore the advice it does not like, it opens itself up to a charge of opinion-shopping that will negate, or at least severely limit, its ability to assert that it was acting on advice of counsel if its actions are ever challenged.[64]
- When more than one lawyer or law firm speaks for the

[64]For example, one of the government's arguments in the long-running (and ultimately disastrous, for the defendant) U.S. *ex rel.* Drakeford v. Tuomey Health System (675 F.3d 394 (4th Cir. 2012)) case was that Tuomey sought and claimed to rely on advice rendered by two different law firms at two different points (but both of which supported Tuomey's position) but ultimately fired a third lawyer jointly engaged by

client (whether to the public, to the press, to enforcement and administrative authorities, or what have you), there is an enhanced risk that the spokesperson of the day may not have the latest information on either the facts at issue or the strategic position of the client, with the result that inconsistent messages—and perhaps even diametrically opposing ones—are communicated on behalf of the client.

- And when the client seeks to adopt the "Dream Team" approach, putting together a disparate group of high-profile (at least in context) counsel who are (a) not used to working together and (b) all used to having the ball, the risks of poor coordination and inconsistent positions can become great fairly quickly.[65]

As a practical matter, this means that when the client has engaged multiple law firms without clear lines of authority among them (e.g., lead counsel vs. local counsel) it is critical that there be careful coordination between and among the various sets of counsel to ensure that they are coordinating their advice (and, ideally, working out any differences in legal analysis or strategic recommendations among the lawyers rather than creating inconsistent paper (or electronic) trails between the lawyers and the client) and that there be a clear and agreed-upon communications strategy to ensure that the message sent on behalf of the client is consistent with both the facts known to the whole team and the client's ultimate goals. Further, to the extent that the counsel involved give conflicting (or at least inconsistent) advice, there should be some record of how the client made the decision as to which advice to take. The client is, of course, free to disregard any of its lawyers' opinions, but

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Tuomey and the physician who would become the relator because, the government asserted, Tuomey did not like what they thought they would be told by the third lawyer. *See generally* William W. Horton, *In the Eye of the Beholder: Physician Transactions, Professional Responsibility, and the Winding Road from* Anderson *To* Tuomey, in HEALTH LAW HANDBOOK (Alice G. Gosfield, ed.) § 7.4 (2011).

[65]*See, e.g.,* Ben Hallman, *Pushing His Luck*, AM. LAW., Feb. 2007 (discussion of the two trials of former HealthSouth Chairman and Chief Executive Officer Richard Scrushy, with considerable focus on both the frequently changing defense team leading into the first trial and the conflicts between the prosecutorial teams from the local U.S. Attorney's Office and the Department of Justice in Washington).

without some sort of record of why that decision was made, the client opens itself up to the accusation of opinion-shopping, and as a matter of professional responsibility, the relevant lawyers should advise the client of how to mitigate that risk.

C. "The Lawyers Don't Want Me to Say This, but . . . "

Our opening scenario regarding some of President Trump's interactions with (or against, or around) his numerous counsel illustrates one of the greatest challenges in dealing with a client who will not listen to advice: the risk that the client (or the person who runs the show at a corporate client) will go out and do exactly what the lawyers warned him or her not to do. There are a couple of variations on this theme that pose particular problems in the context of an investigation, an enforcement proceeding, or a piece of high-profile litigation.

One of these, of course, is making public statements about the matter against the advice of counsel. Experienced lawyers recognize that the more a client CEO, for example, talks about the underlying facts in a dispute or investigation, the more likely it is that the CEO will say something that contradicts information contained in discovery materials, undercuts the basis for legal arguments that have been or will be made in the matter, or inadvertently discloses (or at least seems to disclose) information that amounts to an admission against interest (in the practical sense, if not necessarily the evidentiary one).[66]

The second, more specific, issue is making public statements that directly contradict the statements that counsel has made (in public, to the other side, or in front of a tribunal). While certainly not the only relevant factor, the prevalence of social media makes it all too easy to fire back a remark in the heat of verbal battle that suggests that something that counsel has previously represented on behalf

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[66]The President's "I had to fire General Flynn because he lied to the FBI" statement is a perfect example of this last type of problem—an unscripted statement that is totally inconsistent with the position that had been established by the client previously.

of the client was untrue.[67] That sort of thing, in turn, reduces the credibility of the lawyer when he or she claims to speak on behalf of the client, and also has the unfortunate side effect of suggesting that the client is lying to the lawyer or the client is lying to the public, neither of which tends to be useful in the long run.

The standard response of the client in this sort of situation tends to be some variation on, "These people [the press, the plaintiffs, the OIG, whoever] are lying about us, and if we don't fight back, everyone will think it's true." In advanced situations, this may be accompanied by some tetchy statement about "not letting this hospital/this company/my practice/my life be run by lawyers."

There is, of course, an unavoidable tension between the ways in which most business clients think and the ways in which most lawyers think. Lawyers are, in the main, more risk-averse than businesspeople, and certainly more inclined to think of the potential parade of horribles that can follow any given act or decision. It is not unreasonable that a lawyer may err in favor of more caution—perhaps even excessive caution—in counseling a client about public statements. Of course, it is also not unreasonable that a lawyer may be concerned that a client unaccustomed to the particular risks and hazards of government investigations or significant litigation may say things that sound good in the heat of the moment but considerably less so when printed, blown up to a large size and plastered on a trial exhibit.

(There is, it should be noted, a variation on this particular challenge that may be particularly relevant in an area with as much regulatory nuance as healthcare. Sometimes, rather than delivering its message through the CEO or another member of senior management, the client may engage a lawyer in the task of communicating with the media and the public. This lawyer will typically be one who has been engaged because of his or her reputation as a high-powered defense lawyer or as an experienced handler of the media, but who may not have any great understanding of the par-

[67] Although this is one step removed, an example of this would be the comments made by staffers on behalf of the President to the effect that he had been involved in drafting his son's written statement about his meeting with a Russian lawyer, when one of the President's lawyers had previously made an unequivocal denial of that very fact.

ticular, counterintuitive idiosyncrasies of the healthcare arena. That strategy may have its benefits, but it also has its risks. Suppose, for example, that the client is accused of providing unlawful remuneration to referring physicians in violation of the Anti-Kickback Statute and the Stark Law. A spokesperson unfamiliar with the area might announce to the media something like, "There were no kickbacks here. My client was simply rewarding physicians who had been loyal supporters of the hospital through the years! This was a simple show of gratitude, and you can't make a federal case out of gratitude!", heedless of the fact that in this industry, not only can the government make a federal case out of gratitude, but the lawyer has just effectively conceded the merits of that case.)

As with so many aspects of the attorney-client relationship, there is no great pragmatic fix for this except continuing communication between lawyer and client so that each can understand the other's goals and concerns and, with some effort, arrive at an arrangement that each of them can at least tolerate, if not be satisfied with. But what about the lawyer's professional responsibility obligations with respect to a client who won't stop talking (or tweeting)?

First, note that it does not answer the question simply to say that the law does not prohibit what the client is doing. Under Model Rule 2.1, a lawyer is required to "exercise independent judgment and render candid advice," which may take into account moral, political, economic and other factors relevant to the matter at hand. Part of this duty, it would seem, is to help the client identify and avoid or mitigate unintended consequences of its actions. Thus, it is entirely appropriate—and arguably required—that the lawyer take whatever steps seem reasonable under the circumstances to make the client aware of the potential risks and consequences of untoward public statements. But what if the client won't hear, or simply ignores, that advice?

Under Model Rule 1.2, the lawyer may not assist a client in engaging in fraudulent or criminal conduct. Unless the client's statement is made under oath or to a government agent of some sort, it is unlikely that a client's imprudent public statement, even if untrue in whole or in part, is going

to rise to the level of fraudulent or criminal conduct.[68] And the seeming safety valve that is Model Rule 4.1's provision allowing disclosure to a third party of a material fact necessary to avoid assisting the client's criminal or fraudulent act is largely negated by the requirement that such disclosure not be prohibited by Rule 1.6; often, it will be so prohibited.

Depending on the nature of the CEO's (or other corporate client representative's) statements, it is possible that up-the-ladder reporting might be required under Model Rule 1.13(b), if the statement were sufficiently false and material to expose the corporate client to liability for a violation of law or to violate the client representative's duty to the client. As a practical matter, unless the CEO (or other client representative) has become estranged from the board of directors (or senior management), the likely result of that is simply that the lawyer will get a thank-you and things will continue pretty much as they were before.

At some point, then, the question becomes whether the relationship has become so dysfunctional that the lawyer can no longer effectively represent the client and must withdraw.[69] That is, obviously, a drastic remedy, one that may not be immediately available if it would prejudice the client, and one which is likely not in the lawyer's economic self-interest. Accordingly, it is not a decision to be made lightly. But if the lawyer believes that the client's behavior is irremediably detrimental to the client's position and has been unable to persuade the client of that despite diligent effort, it may be time to leave the relationship before it becomes a sinkhole that the lawyer cannot escape.

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[68]In contrast, it is more likely that a private statement—for example, one made in the context of a business negotiation, could rise to that level. Lying to the public is usually not fraud, at least in the legal sense, if the lie is a generalized statement and not an inducement to commercial action (for example, "At Friendly Fred's Used Cars, we'll never lie to you" is probably not legal fraud, even if untrue. "At Friendly Fred's Used Cars, we guarantee you'll never pay more than $10 over our cost" might be fraud if, in fact, that were not true, and the private statement "Bob, I promise you that I will sell you this car at $10 over my cost" is pretty clearly fraud if the price is something more than that.

[69]Model Rules R. 1.16, not discussed here, sets out the professional responsibility requirements for terminating a representation.

D. The Slippery Slope from Counselor to Conspirator

With the exception of those who focus on representing individual practitioners, most healthcare lawyers primarily represent organizational clients—hospitals, device companies, nursing homes, physician practices, laboratories or what have you. In general, Model Rule 1.13 applies to any organizational client, from a two-doctor professional corporation to a multinational conglomerate. And that rule tells us, recall, that if the client is an organization, our professional duties are owed to that organization as an entity and not to its individual owners, officers, directors, and so on.

The problem, though, is that the lawyer's working relationship is with one or more of those individual constituents. Those individuals are the people who give the lawyer work, who make and communicate decisions, who provide the lawyer with facts and information necessary for the lawyer to do his or her job, and who decide what and whether to pay the lawyer. In reality, even though those people are not the lawyer's client, the lawyer sort of needs them to think of him or her as their lawyer, someone whose interest is aligned with theirs.

And that's usually okay in day-to-day life. Where it becomes tricky is when one of those individual constituents—often, but not always, the CEO—starts having problems distinguishing his or her own interests from that of the organization. In that situation, the lawyer must be very careful indeed.

Consider the Shkreli-Greebel case. Despite the rather strained relationship between the two men evidenced by Shkreli's abusive-in-tone emails, it seems pretty clear that Greebel was highly aware of Shkreli's importance to his career and prospects, and even clearer that Shkreli expected Greebel to do his bidding promptly upon demand, regardless of which of his corporate-client hats he was wearing.

Greebel asserts that he was misled and deceived by Shkreli, that he was a victim of a dishonest and deceptive CEO just as the investors who believed in that CEO were victims. And perhaps he was. Nonetheless, it is a bit hard to imagine the volume and creativity of lies that must have been necessary to convince a knowledgeable, intelligent business lawyer that it was alright to draft up paperwork that

(a) involved taking the money of one corporation and using it to pay the debts of another corporation with different ownership and (b) involved what seemed to be a pretty transparent effort to mislead, if not actively deceive, the first corporation's auditors.

That is, however, what happens sometimes. In addition to being risk-averse, lawyers are prone to think they can fix pretty much anything. When a CEO comes to a lawyer whose career the CEO has played a key role in establishing, and says to that lawyer, "I have a situation here and I need your help to clean it up," it can be surprisingly easy for the lawyer to lose sight of the fact that his or her client is not the CEO, but the organization for which the CEO works. If that is what happened to Greebel, he is not the first person to have had that painful experience, nor will he be the last.

How might this have been avoided? The idealistic answer is to say that the lawyer has to make it clear to the CEO—and any other individual constituent of the client organization—that the organization alone is his or her client and that he or she cannot represent the individual if the individual's interests are in conflict with those of the organization (for example, because the individual is committing securities fraud, just as a for-instance). That may or may not be the practical answer, however. It may happen occasionally, but once a corporate CEO has determined to act in his or her own self-interest and contrary to the interests of the organization, a good slap from the lawyer (accompanied by a brisk "Snap out of it!") is unlikely to be enough to cause that CEO to change.

Instead, if the lawyer cannot dissuade the corporate constituent from the wrongful behavior, he or she must consider going to the board or other higher authority, as contemplated by Model Rule 1.13(b). If that is not feasible or proves not to be effective, then the lawyer may face the need to terminate the client relationship.

That is never an easy thing, and is particularly difficult for lawyers in an in-house setting. Certainly, it is not a step that should be lightly taken. But if the choice is between terminating the relationship and becoming an accessory to—or a principal in—a fraudulent or criminal act, then there really is no choice at all.

E. Silence Is Golden . . . ?

Turning now to the allegations in the matter of PepsiCo and Ms. Smith, that scenario offers the least well-developed set of facts of the ones considered here. On the other hand, it is not without its points of interest.

Assuming for the sake of the argument that the version of the facts that is recounted above corresponds reasonably closely to the actual facts, how do we assess Ms. Smith's actions and PepsiCo's reactions? First, note that when Ms. Smith learned of the alleged improprieties originating at Wimm-Bill-Dann, she appears to have taken steps consistent with her obligations under Model Rule 1.13. She mobilized a team to investigate the matter, she prepared a report, and she prepared to submit it to the PepsiCo board. That effort was intercepted and effectively thwarted, or at least stalled, and then her departure brought it to an end, but it looks like a good start while it lasted.

Could Ms. Smith have approached the issue in a different manner and perhaps achieved a different result? It appears that one of the concerns that led the Gibson Dunn lawyer to raise concerns about the draft memorandum with the PepsiCo CFO was what that lawyer perceived as Ms. Smith's attempt both to cast blame on others and to insulate her own position. Because the memo inadvertently disclosed by WilmerHale's error has not itself been made public, it is impossible to evaluate the merits of those concerns. The available information does suggest that Ms. Smith might have had more success, or at least less defenestration, had she framed the memo differently, with perhaps more emphasis on the identification of the potential violations and less emphasis on assigning responsibility to specific individuals involved in the Wimm-Bill-Dann transaction. However, there is simply not enough public information available currently to make any sort of judgment on that. For present purposes, perhaps it is enough simply to note that one pragmatic skill that is critical for lawyers, and particularly for in-house lawyers, is the ability to frame a message in such a way that its intended audience is mostly likely to be receptive to it. That is true not simply as a matter of politics, but also as a matter of reminding the board, senior management, whoever that audience is that the lawyer is working toward a common goal with them and not acting as overbearing adversary to them.

But what about Ms. Smith's termination of employment? It is clear that her superiors, at least, must have felt that the working relationship had broken down in an irreparable way. In that circumstance, is there any problem with Ms. Smith's acceptance of a strong non-disclosure provision as a condition of her severance?

Arguably, there is not. As a matter of professional responsibility, it appears unlikely that Ms. Smith could have made any disclosure of the matter outside PepsiCo anyway without violating her professional responsibility duties. Even if Model Rule 1.13(c) were in effect in the jurisdiction(s) where she was licensed, it appears unlikely that she would have met the requirements for "reporting out" with respect to the Wimm-Bill-Dann matter, if for no other reason than that such disclosure would likely not have "prevent[ed] substantial injury to the organization" (both since any violations had already occurred and because the particular facts here suggest that any resulting sanctions would likely not have caused "substantial injury" to a company the size of PepsiCo). If Ms. Smith were simply agreeing to do that which she was ethically bound to do in the first place, it would be hard to find fault with that. On the other hand, the government seems increasingly concerned about the use of non-disclosure agreements as a means of silencing potential whistleblowers, and if the same situation were to arise today, it might be prudent for the lawyer in Ms. Smith's position to resist such an agreement and, as a matter of professionalism, to explain to the soon-to-be-former client what such an agreement might end up causing trouble in the long run.

Based on the information currently available, there does not seem to be any great ethics lesson to be learned from the Smith-PepsiCo matter. However, there is a fairly significant pragmatic message. Model Rule 1.13 requires an organization's lawyer to act in the best interest of the organization in addressing a known or threatened violation of law or fiduciary duty by a corporate agent, including up-the-ladder reporting as appropriate. The main thrust of the rule is the need to communicate information concerning the violation to the appropriate authorities within the organization. However, part of acting in the best interest of the organization includes doing whatever is reasonably possible to make sure that that information is not only communicated, but received and paid attention to. Thus, a focus on how the disclosure is

framed may be just as significant as its content. A lawyer may have greater or lesser flexibility depending on the specific facts at hand, but the effective discharge of Rule 1.13 duties involves both careful thought as to the message to be delivered and careful thought as to the means and manner by which it is delivered.

IV. CONCLUSION: A DYSFUNCTIONAL RELATIONSHIP IS STILL A RELATIONSHIP

In a perfect world—the sort of world that seems to have been imagined by the drafters of the Model Rules, in some respects—lawyers would give sage advice, clients would gratefully follow it, and if a client proved to be a recalcitrant evildoer, the lawyer would give him or her a stern talking-to in the course of withdrawing virtuously from the engagement. Unfortunately, for most of us, the perfect world apparently filled up before we got there, and there were no rooms to be had.

In the world in which we actually live, the attorney-client relationship is often burdened with significant challenges, especially in a setting as complex and confusing as the healthcare industry. Even when the lawyer and the client are generally on the same page, the relationship can be a stressful one, if for no other reason than that lawyers and clients often have different priorities and different risk tolerances. When the relationship is an actively dysfunctional one—because of lack of trust between the lawyer and the client, because of opinion-shopping and second-guessing, because one of the parties may be engaged in dishonest or even criminal behavior, or for whatever reason—it can be fraught with dangers for both the lawyer and the client. Those dangers are, if anything, magnified in the healthcare industry, where significant penalties may result from conduct that, in other settings, could be innocuous or even highly strategic.

That having been said, once an attorney-client relationship has been formed, it exists until something happens to terminate it, and as long as it exists, the lawyer owes ethical duties to the client, even if the client is unreasonable, unmanageable, or even hostile toward the lawyer. In that circumstance, it is vitally important that the lawyer be aware of those duties and the obligations they create, both to the

client, the profession and the law itself. The Model Rules are far from perfect or comprehensive, but they can provide sometimes surprisingly clear guidance where the path is unclear and the maps suddenly end.

At the same time, the lawyer must be sensitive to the pragmatic realities of the relationship. Indeed, the lawyer must at times serve dual duty as a psychologist, seeking to understand how and where the dysfunction arises from the client's perspective and to develop strategies to mitigate it and serve the client's interests as well as the situation allows.

This exercise can be challenging and frustrating, and indeed sometimes the only available path is the termination of the relationship. But, as noted above, lawyers like to think we can fix things, and sometimes that must be tested in the context of fixing our own attorney-client relationships—never an easy task, but often a necessary one.