Chapter 7

In the Eye of the Beholder: Physician Transactions, Professional Responsibility, and the Winding Road from *Anderson* To *Tuomey*

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§ 7:1 Introduction: I don't think we're in Kansas City anymore, Toto

"Sit down," I repeated, "and listen carefully . . .."

. . .

[I] was making ready to deliver the Lecture.

And what is the Lecture?

The Lecture is an ancient device that lawyers use to coach their clients so that the client won't quite know he has been coached and his lawyer can still preserve the face-saving illusion that he hasn't done any coaching. For coaching clients, like robbing them, is not only frowned upon, it is downright unethical and bad, very bad. Hence the Lecture, an artful device as old as the law itself, and one used constantly by some of the nicest and most ethical lawyers in the land. "Who, me? I didn't tell him what to say," the lawyer can later comfort himself. "I merely explained the law, see." It is good practice to scowl and shrug here and add virtuously: "That's my duty, isn't it?"

Verily, the question, like expert lecturing, is unchallengeable.

. . .

[When the Lecture was over,] he looked at me. "Maybe," he said, "maybe I was insane . . .."

. . .

"My, my," I said, blinking my eyes, contemplating the wonder of it all. "Maybe you've got something there."

— Defense attorney Paul ("Polly") Biegler, Anatomy of a Murder[1]

The trouble with being a lawyer these days is that people are constantly asking you about things they want to do—or worse, things that they already have done—that may be, well, *illegal.* Now, this has always been the case, or else the demand for lawyers would have become seriously constrained; few clients feel the need to pay a few hundred dollars an hour to get advice on whether they can help little old ladies cross the street or join the Kiwanis Club. No, for lawyers to survive and prosper, there must be clients who are concerned with the potential illegality of their actual or proposed actions.

It's different now than it was in the old days, though. There is more law, and it's more complicated. When a fellow killed someone, as the (perhaps insane) Lieutenant Manion did to Barney Quill in *Anatomy of a Murder*, the questions for his lawyer were fairly simple: Did he do it? Was it self-

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[Section 7:1]

[1]Robert Traver, Anatomy of a Murder 35, 46–47 (1958; Macmillan 1983).

defense? Was it justified? Was he insane? There was no particular dithering about whether the killing enhanced competition in the local market or whether Manion knew the State of Michigan had a statute criminalizing homicide and intended to violate that statute. When the evil banker, twirling his waxed mustache ends, asked his lawyer whether he could foreclose on Widow Murphy and her lovely granddaughter, the lawyer did not generally find it necessary to ask whether the banker had set the interest rate at the 50th percentile of interest rates reflected in the most recent survey published by the American Association of Evil Bankers or whether the mortgage would be deemed to take into account the volume or value of other business done by Widow Murphy with the bank if the banker did not foreclose on similarly situated widows at the same time.

Nowadays, though, things have changed. With the rise of the regulatory state, a client may find itself accused of illegal acts based on small variations of fact—for example, whether a contract provides for automatic renewal unless terminated or automatic termination unless renewed—that in turn hinge upon a few words buried within a 2,000-page piece of legislation or an "interim final rule with comment period." In many cases, clients in a regulated industry are required to be aware of, and comply with, highly technical requirements that are nonintuitive, even counterintuitive, and that are frequently drafted by persons with limited knowledge of ordinary practices in the industry they regulate or of the practical costs of compliance. Furthermore, it is not enough to be able to pick up a book and read the regulations; clients are expected to be aware of, and to comply with, an increasingly broad range of sub- and extra-regulatory guidance, some of which may or may not be readily accessible or accessible in any organized form, and some of which may be inconsistent with, and even in conflict with, the related regulation text and other available guidance.

This is particularly true in the health care industry, and nowhere more so than in the context of transactions with physicians. Consider the Stark Law:[2] the law is a strict liability statute—if a financial relationship between a physician and a provider of designated health services is covered

[2]42 U.S.C.A. § 1395nn.

by the Stark Law and does not fit within the letter of an exception, the law is violated if there is any Medicare or Medicaid referral by the physician to the provider. The exceptions, in turn, are often convoluted and complex (and frequently counterintuitive as well), and an understanding of their application commonly requires a knowledge of the various regulatory preambles, comment responses, differences between proposed regulations and final regulations, and in some cases regulators' remarks on seminars and teleconferences. As a subset of the bar in general, the number of lawyers who have a reasonably comprehensive knowledge of Stark Law and lore is not especially large; the number of nonlawyer clients who have such knowledge is rounding error.[3] Yet, a client who embarks upon a financial relationship with a physician is charged with just such arcane knowledge, for if the client in all innocence fails to dot every "i" and cross every "t" in the manner required by the Stark Law, the client may face thousands, even millions of dollars in liability.

Or take the Anti-Kickback Statute.[4] There, surely, the client has some relief, for violation of the statute requires some sort of intent (exactly what sort remains a subject of debate), and there are safe harbors that may at least support an argument of "substantial compliance" even for those who fail to drop anchor squarely within them. On the other hand, the federal government remains enamored of the so-called *Greber* rule: "[I]f one purpose of the payment [to a physician] was to induce future referrals, the [Anti-Kickback S]tatute has been violated."[5] In real life, business entities ordinarily do not make payments to anyone unless they believe that they will be better off by doing so than by not doing so. Thus, it is fairly unlikely that a health care organization will enter into a financial arrangement with a physician without giving at least an itsy-bitsy thought to whether that physician will be more likely to favor the organization with new (or continued) referrals than if the organization did nothing. Having an informed legal assessment of whether a particular arrange-

[3]The number of nonlawyer clients who believe they have such knowledge, especially physician clients, is considerably larger, however.

[4]42 U.S.C.A. § 1320a-7b(b).

[5]U.S. v. Greber, 760 F.2d 68, 69, 9 Soc. Sec. Rep. Serv. 242 (3d Cir. 1985).

ment is more or less likely to draw fire under the Anti-Kickback Statute is thus going to be important to the organization and to the physician as well.

Thus, in transactions with physicians, intelligent health care clients are going to want to consult with knowledgeable health care lawyers (and a very good thing that is, too). Those lawyers will want to explore with the client what its goals and objectives are, what homework it has done in structuring the transaction at hand (e.g., obtaining fair market value or community need analyses), and what legally permissible justifications it has for the transaction. They will likely also want to spend time going through what may be highly technical descriptions of the particular legal requirements that affect the transaction and to ensure that the client understands that the transaction must be structured, documented, and executed in compliance with those requirements.

As reasonable, and even salutary, as this process sounds, it may be fraught with peril as well. Clients do not typically speak in lawyerly language, nor are they necessarily cognizant of all of the legal baggage that ordinary language may carry. As a result, they may characterize their motivations for entering into a transaction in ways that could be construed as suggesting an improper purpose. In some circumstances, this may taint the lawyer's ability to continue to represent the client in the transaction or even to represent the client at all: under the Model Rules of Professional Conduct, "[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent,"[6] and "a lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law."[7] Conversely, a lawyer who provides a detailed explanation of the regulatory technicalities governing a particular transaction may be perceived—by the client or by others—as having provided instruction on how to "paper up" a questionable transaction so as to give it a false air of legitimacy.

This problem is especially acute in the health care industry

[6]Model Rules of Professional Conduct Rule 1.2(d) (2010).

[7]Model Rules of Professional Conduct Rule 1.16(a)(1).

(and in physician transactions in particular) because, as a practical matter, a good bit of legal analysis and advice is necessarily framed in terms of enforcement risk rather than black-and-white legality/illegality. Some 15 years ago, a prominent health law professor characterized the state of the world in this way:[8]

> The modern American medical center has the legal status of a speakeasy because lawless conduct is being ignored. Though illegal, conduct deemed harmless by enforcement authorities is being countenanced. Enforcement authorities refuse to provide legal safeguards because of their perception that such safeguards would insulate abusive as well as appropriate conduct. Prosecutorial discretion—trust us—has replaced the rule of law. Thus, innovative participants in the marketplace can follow the law and be condemned by the realities of the market, or they can participate in the health care speakeasy and hope for the best-a prospect made more risky by the potential availability of private-party (*qui tam*) actions under the [False Claims Act].

Despite the intervention of the supposed "bright line" tests of the Stark Law[9] in the ensuing years, this perspective continues to be an accurate description of the dilemma often faced by health care lawyers. Where a transaction or relationship neither fits precisely within a regulatory mold nor falls substantially outside of one, the legal advice related to the transaction or relationship almost invariably involves some assessment as to how it is likely to be perceived by the authorities. That assessment, in turn, may sometimes be characterized as evidence of scienter on the part of the client—and perhaps on the part of the lawyer as well.

This risk first came broadly to the attention of the health care bar in the so-called "Kansas City" (or "*Anderson*") case

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[8]James F. Blumstein, The Fraud and Abuse Statute in an Evolving Health Care Marketplace: Life in the Health Care Speakeasy, 22 Am. J.L. & Med. 205, 224–225 (1996).

[9]On introducing the original physician self-referral legislation, Congressman Stark said that he intended to provide a "bright line rule" and "clear and unequivocal guidance [to providers and physicians]." See Sanford V. Teplitzky, Stark and the Anti-Kickback Laws: Conflicts and Concerns in Structuring Transactions, contained in the program materials from the American Health Lawyers Association Annual Meeting, June 27-30, 1999.

in the late 1990s,[10] in which federal prosecutors obtained a criminal indictment against two lawyers for allegedly conspiring with their hospital clients to create sham agreements designed to cover up a payment-for-referrals scheme.[11] More recently, questions of lawyers' entanglement in their client's alleged kickback scheme bobbed just below the surface in the qui tam case brought against Tuomey Health System in rural South Carolina.[12] Between those two dramatic extremes, however, there is a less public tension that is present in many attorney-client conversations about physician transactions. How much information may the lawyer get about arguably impermissible motives before the lawyer loses the ability to rehabilitate the deal? How much can the lawyer probe before the client accuses the lawyer of trying to kill the deal and shuts up? How much can the parties and their counsel talk about enforcement risk before a prosecutor argues that the discussion itself proves the existence of an illegal scheme?

This chapter explores some of the challenges—for clients and for lawyers—posed by the need to communicate and counsel in an area where (a) the law is complex, (b) the law is frequently arbitrary, (c) the penalties for violating the law are potentially enormous, and (d) the presence of the most common and basic commercial motivation—the desire to influence those who can help one make money to do so—may serve to prove (in some eyes, at least) the illegality of the transaction in question. Those challenges have, if anything, become more complex in the years since *Anderson*; while that case at least involved the intent standard inherent in claims under the Anti-Kickback Statute (and the "beyond a

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[10]The case, a complex one involving many defendants and multiple appeals, generated a number of published opinions and many unpublished ones. Perhaps the most straightforward and detailed recounting of the basic facts is at U.S. v. Anderson, 85 F. Supp. 2d 1047, 1052–1061, 67 Soc. Sec. Rep. Serv. 350, 53 Fed. R. Evid. Serv. 1255 (D. Kan. 1999), rev'd, in part sub nom. U.S. v. McClatchey, 217 F.3d 823 (10th Cir. 2000) (reinstating jury verdict of conviction as to one defendant), and aff'd, in part sub nom. U.S. v. LaHue, 261 F.3d 993, 57 Fed. R. Evid. Serv. 254 (10th Cir. 2001) (affirming convictions of three defendants).

[11]See generally, e.g., Cadwalader, Wickersham & Taft LLP, Indicting of Lawyers in a Medicare Kickback Case, N.Y.L.J. (Sept. 30, 1998), available at http://library.findlaw.com/1998/Sep/1/128563.html.

[12]U.S. ex rel. Drakeford v. Tuomey, 2010 WL 4000188 (D.S.C. 2010).

reasonable doubt" criminal burden of proof), it is more likely today that a physician transaction will be scrutinized under the less demanding strict liability standard of the Stark Law. Likewise, when lawyers were indicted in *Anderson*, most of the bar viewed that as a remarkable event, a violation of the universal understanding that lawyers only advised their clients and were generally shielded from allegations of culpability, especially criminal culpability. Now, civil and criminal actions against lawyers relating more or less directly to their advice have become, if not commonplace, at least familiar.[13] Indeed, enforcement authorities have in some contexts suggested their intention to expressly target lawyers for a variety of alleged misdeeds.[14]

In exploring such challenges in this new world, this chapter will review, for illustrative purposes, selected facts and factual allegations from real cases, including *Anderson*, in which various relevant attorney-client communications have been made public and in which, to one extent or another, the role of lawyers in their clients' alleged wrongdoing has been put under a spotlight. It will then move on to consider some lessons learned from those cases as to both relevant professional responsibility concepts and practical aspects of how lawyers may interact with their clients (and other players) on physician transactions without either (i) taking on inappropriate personal exposure or (ii) failing to provide competent advice and counsel to their clients.

Because this discussion uses publicly available information about the cases discussed, the names have not been changed to protect the innocent, or for that matter the less innocent; there is no particular purpose in doing that when the information is readily accessible. It is important, then, for the reader to remember that this chapter does not purport to be a full, accurate, or complete account of all relevant facts in the cases discussed, or even of all facts contained in the public record, and likewise that it does not

[13]See, generally, e.g., William W. Horton, Target-at-Law: Instructive Moral Lessons from the New Lawyer Wars, in Health Law Handbook (Alice G. Gosfield, ed.) (West 21st ed. 2009).

[14]See, e.g., Stephen M. Cutler, Speech by SEC Staff: The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program (Sept. 20, 2004), available at http://www.sec.gov/news/speech/spch092004smc.htm.

purport to pass judgment on the acts, omissions, or advice of the lawyers who are mentioned. As anyone who has ever had the experience of having his or her decisions scrutinized in hindsight by a prosecutor or tribunal knows, judgment calls are easy to attack once all the facts—including those not available at the time the calls were made—are available and capable of being viewed in isolation. Instead, some details of these cases are presented here on a highly selective basis, essentially as real-life hypotheticals, because those details illustrate some important points in a very concrete way.

§ 7:2 Three (un)easy pieces: true stories of lawyers caught in the crossfire—The *Anderson* imbroglio

As noted above, the 1998 indictment of two lawyers, Ruth Lehr and Mark Thompson, as part of a multifaceted, multidefendant criminal case under the Anti-Kickback Statute, sent a shockwave through the health care bar. This was not a traditional " 'criminal' lawyer" case in which, for example, a lawyer was accused of laundering money for a client, bribing a witness or a juror, or fabricating evidence. Instead, the claim was that the lawyers, knowing of their clients' wrongful intent, instructed them in how to document a fraudulent business arrangement so that it appeared to comply with the law. Indeed, as will be discussed below, part of the government's argument seemed to be that a lawyer's advice to a client that a written contract should reflect compliance with the law was evidence that the lawyer knew that the underlying transaction did not so comply.

Anderson centered on the relationships of a number of Kansas City-area hospitals with two osteopathic physicians, Robert and Ronald LaHue, and Blue Valley Medical Group (BVMG), a medical practice entity that was owned by Robert LaHue and that employed Ronald LaHue.[1] The brothers LaHue focused on treating nursing home patients, traveling

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[Section 7:2]

[1]The background facts in the next few paragraphs are summarized from U.S. v. Anderson, 85 F. Supp. 2d 1047, 1052–1061, 67 Soc. Sec. Rep. Serv. 350, 53 Fed. R. Evid. Serv. 1255 (D. Kan. 1999), unless otherwise indicated. To avoid nonmeaningful footnote noise, specific citations within that portion of the case have been omitted from the text in this section

from facility to facility in the Kansas City metropolitan area to treat patients on a "house-call" basis. By 1984, the brothers had approximately 2,500 patients under their care and, among other things, exercised substantial influence over where those patients were admitted for hospital care when necessary. At that point, the brothers apparently reached a conclusion similar to that later attributed to former Governor Rod Blagojevich in the neighboring State of Illinois: they had something golden, and they were not inclined to give it away for nothing.[2]

Their initial effort was directed at University Hospital, with which they had a teaching affiliation. They allegedly sought a significant salary increase from University, accompanied by a threat to move their patients to Baptist Medical Center if it were not forthcoming. University declined to bite. At the same time, Ronald Keel, a Baptist executive, began to explore the possibility of an affiliation between Baptist and the LaHues. As part of a preliminary proposal to purchase BVMG's clinical laboratory, one Clem Fairchild, a corporate lawyer "inexperienced in the complexities of health care law," prepared a draft agreement that "specifically linked the purchase of the laboratory with patient referrals" to Baptist. Ruth Lehr, Baptist's health care counsel, "vetoed the idea as a blatant violation of [the Anti-Kickback Statute]." Eventually, Baptist named the LaHues "Co-Directors of Gerontology" at annual compensation of $75,000 each. Thereafter, BVMG referrals shifted dramatically from University Hospital to Baptist. In 1985, Baptist also entered into a management and marketing arrangement whereby they assigned a Baptist employee, Tom Eckard, to assist the LaHues in running the BVMG practice. Ms. Lehr prepared an agreement under which BVMG would

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discussing the case, and the reader should assume that any factual statements in such text that are not specifically cited to other sources are derived from this portion of Anderson, and all material identified as direct quotes are quotes therefrom unless specifically attributed to another source.

[2]Cf. Indictment, United States v. Rod R. Blagojevich, et al., Case No. 08-CR-888, N.D. Ill., filed Dec. 7, 2008, at ¶ 96 ("In regards to the Senate seat [vacated upon the election of Barack Obama as President of the United States], ROD BLAGOJEVICH stated 'I've got this thing and it's [expletive] golden, and, uh, uh, I'm not just giving it up for [expletive] nothing.' ").

pay for these services, but the LaHues objected, and the arrangement continued until 1993 with no compensation paid from BVMG to Baptist.

Sometime later, Keel asked Ms. Lehr to explore a consulting arrangement with the LaHues, which would supersede the gerontology directorship arrangement, in order to avoid a potential medical staff bylaws issue. Ms. Lehr advised that such an arrangement was permissible only if the LaHues "perform[ed] valid services for [Baptist] . . . and the compensation must be reasonable." Various negotiations and discussions among the parties ensued, and ultimately Ms. Lehr drafted a consulting agreement calling for the LaHues to "perform specified consulting services both within the hospital and . . . in nursing homes," which all parties signed in 1986. Notwithstanding this new agreement, the LaHues "actually performed only minimal services under the contract."

In 1991, Baptist began merger discussions that eventually led to its becoming a subsidiary of Health Midwest. Health Midwest engaged Mark Thompson to review Baptist's physician contracts, and he "identified the BVMG relationship as a problem area." He spoke with Ms. Lehr, noting that she expressed some concern as to whether the LaHues were actually rendering the specified services, but also expressed her view that if the services were being rendered, the compensation was fair.

The Office of Inspector General of the Department of Health and Human Services released the final rule containing its initial Anti-Kickback safe harbors in July 1991.[3] Shortly thereafter, Mr. Thompson advised Baptist management that the LaHues' 1986 agreement did not meet the requirements of the safe harbors and "recommended making good faith efforts to bring the contract into compliance." Over the next year, the parties engaged in substantial negotiations over a new contract, with Mr. Thompson preparing "numerous contract drafts and revisions." This process was interrupted in November 1992 by a visit from FBI agents who interviewed Baptist management about the BVMG relationship. Baptist then associated lawyers from the Ober

[3]U.S. Dep't of Health & Human Services Off. of Inspector Gen., 42 C.F.R. Pt. 1001, Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952.

Kaler firm who specialized in health care fraud cases.[4] Those lawyers strongly advised that Baptist "document[] actual performance of consulting duties" by the LaHues, which would "move the contract issue 'out of the criminal arena and into the civil side,' " as well as that Baptist discontinue the Eckard management services arrangement.

The appearance of the FBI did not seem to create the sense of urgency that might have been expected. The parties did not enter into a new agreement regarding Eckard's services until April 1, 1993. By late November 1993, the LaHues notified Baptist of the termination of the consulting agreement and the marketing arrangements effective in February 1994. In March 1994, the parties entered into a new, short-term agreement, but despite ongoing negotiations, the relationship finally ended in January 1995.[5]

The relationship ended, but the government's interest did not, and in June 1997, a federal grand jury indicted the LaHues for alleged violation of the Federal Anti-Bribery Act.[6] That indictment was dismissed on the basis that the statute was inapplicable to the facts, and the Tenth Circuit affirmed that dismissal.[7] That apparently sufficed only to make the prosecutors angry, and just over a year later, they returned to court with a superseding indictment under the Anti-Kickback Statute and criminal conspiracy statutes,

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[4]In the ensuing criminal case, the prosecutors identified the Ober Kaler lawyers, as well as a Health Midwest internal lawyer, by name as "unindicted coconspirators" in pretrial pleadings. The district court found that this action violated the lawyers' due process rights even though the government might have been entitled to make such an identification at trial in order to invoke the coconspirator exception to the hearsay rule. See U.S. v. Anderson, 55 F. Supp. 2d 1163, 1168–1170 (D. Kan. 1999).

[5]The LaHues and Baptist also entered into a variety of other relationships between 1986 and 1992, some of them of more questionable legality and some of them of less questionable legality. In addition, BVMG entered into or proposed consulting arrangements with a variety of other hospitals outside Kansas City, generally with the involvement of Eckard (primarily during the time he was being paid by Baptist) and allegedly with a fairly overt linkage between consulting agreement payments and referrals. These relationships and arrangements are described at U.S. v. Anderson, 85 F. Supp. 2d 1047, 1059–1061, 67 Soc. Sec. Rep. Serv. 350, 53 Fed. R. Evid. Serv. 1255 (D. Kan. 1999).

[6]18 U.S.C.A. § 666(b), relating to bribery in connection with benefits received from federal programs.

[7]See U.S. v. LaHue, 170 F.3d 1026, 1026–1027 (10th Cir. 1999).

directed not only to the LaHues but also to three Baptist executives, Ms. Lehr, and Mr. Thompson.[8]

The fact of the Lehr and Thompson indictments, as well as the subsequent public identification of three other lawyers as unindicted coconspirators, was noted not only in the trade press but also in more general media.[9] More troubling than the fact of the indictment was the nature of the alleged crimes. Among the allegations made in the indictment were these:

- Ms. Lehr had told Mr. Thompson that the consulting agreement between Baptist and the LaHues was a "clean-up deal," that the LaHues' motive at another hospital had been to "sell old folk referrals," that the LaHues "were scum," and she did not know what they did for their money.
- Ms. Lehr and Mr. Thompson prepared "contracts, legal analyses, and other documents designed to fraudulently conceal" kickbacks to the LaHues.
- Mr. Thompson had written a letter to another lawyer discussing services being provided by the LaHues that "could be utilized to justify compensation" from Baptist to BVMG.
- Mr. Thompson and a Baptist executive had "developed a mechanism" whereby Baptist purchased the assets of a laboratory owned by the LaHues.
- Ms. Lehr had written a letter to Baptist executives in which she had said, "[I]t is absolutely essential that there be no documentation of any intent to refer

[8]One of the executives was Dan Anderson, Baptist's former president and chief executive officer, from whom the litigation draws its common short name. Prior to the July 1998 superseding indictment, (a) Baptist had settled with the government and had begun cooperating with the government in its pursuit of the individual defendants, and (b) the government had sought various documents and testimony from Ms. Lehr and Mr. Thompson. The district court addressed issues relating to the attorneys' Fifth Amendment rights, their attempts to assert the attorney-client privilege and work product doctrine, and the government's use of documents obtained before and after the lawyers had been granted use immunity against the lawyers in U.S. v. Anderson, 1999 WL 84290, *1–*5 (D. Kan. 1999) (denying attorneys' motions to dismiss for alleged violation of court-ordered statutory immunity and attorneys' Fifth Amendment rights).

[9]See, e.g., Janet Novack, First, Indict All the Lawyers, Forbes, Jan. 25, 1999, at 62.

patients for services or items for which Medicare or Medicaid might pay," language that the indictment characterized as "[advice] . . . about how to draft proposals for other hospitals which would conceal the fact that the hospitals were paying [the LaHues] for the referral of patients."

- Mr. Thompson and others "would cause communications concerning [the LaHues] to be made through attorneys in order to conceal information under an ostensible claim of attorney/client privilege."[10]

At trial, the prosecution followed this up with several arguments based on the lawyers' alleged knowledge that the proposed arrangements with the LaHues were intended to be a cover-up for a kickback scheme:

- The prosecution argued, in essence, that the original Clem Fairchild-prepared draft contract, which expressly provided for referrals from the LaHues to Baptist, tainted the entire transaction and implicitly made it impossible for the parties to structure a compliant deal. Further, the prosecution essentially argued that Ms. Lehr's and Mr. Thompson's awareness of that original "explicit for referrals" draft put them on notice of the parties' allegedly illegal intent, and thus that their involvement in drafting purportedly compliant contracts demonstrated that they were part of a conspiracy to violate the Anti-Kickback Statute.
- The prosecution argued that a memorandum from Mr. Thompson to Baptist management, which expressly advised Baptist about the Anti-Kickback Statute issues, offered suggestions for possible legitimate justifications for the arrangements and stressed the need to avoid presenting to the Baptist board of directors information

[10]These provisions of the indictment are condensed and paraphrased from some of those quoted in Mark R. Thompson, What I Learned as a Criminal Defendant, contained in the program materials from the American Health Lawyers Association Fraud and Compliance Forum, 1999, at § II.B. A version of that paper is available at http://archive.healthlawyers.org/google/health_law_archive/program_papers/1999_FA/%5B1999_FA%5D%20What%20I%20Learned%20as%20a%20Criminal%20Defendant.pdf(subscription required) (copy on file with author). All information contained within quotation marks is directly quoted from the indictment, which is also in some cases purportedly a direct quote from the original source.

that would suggest that potential referrals were a relevant foundation for their approval of the transaction, in reality constituted instructions to "[m]ake sure that the referral intentions are not documented" and "don't leave a paper trail for the auditors."

- The prosecution argued that an internal memorandum from Mr. Thompson to his partners summarizing advice given by specialized counsel, which advice emphasized that it was important for the hospital to document the services provided by the LaHues so that any enforcement issue would be more likely to be pursued as a civil dispute over the fair market value of those services rather than a criminal kickback case, constituted advice by Mr. Thompson to Baptist that its activities were "in the criminal arena and need[ed] to be moved to the civil arena."
- In general, the prosecution characterized all legal advice rendered to Baptist concerning the requirements of compliance with the Anti-Kickback statutes as advice on how to paper over or cover up a fraudulent transaction.[11]

The lawyers filed a motion for acquittal at the conclusion of the government's case. In connection therewith, the lawyers argued, among other things, that they had no knowledge of any allegedly unlawful activity and no intent to engage in unlawful activity; that they had in fact made substantial efforts to advise their clients on the applicable law, to document arrangements that complied with the law, and to advise their clients that the arrangements had to be carried out in practice in a manner consistent with the law (including verifying that the LaHues were performing agreed-upon services); and that there were legitimate justifications for the transactions, assuming that they were carried out in accordance with their terms.[12]

On March 9, 1999, the district court granted a judgment of acquittal in favor of both Ms. Lehr and Ms. Thompson. The

[11]See Thompson, What I Learned as a Criminal Defendant, at § III.C.

[12]See Thompson, What I Learned as a Criminal Defendant, at §§ 4.A to 4.B.

words of that order, delivered in open court, rang out across the health care bar:[13]

> . . . The Court is firmly convinced from the evidence presented that the lawyers, each in their own turn, attempted to advise their clients to engage in legal transactions and that [Ms. Lehr and Mr. Thompson] did not prepare sham agreements to paper over a fraud but, rather, tried their best to prepare agreements that would reflect what they intended to be legal transactions into which they believed their clients desired to enter. The state of the law was in flux; and the lawyers adapted their advice to it as it changed.
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> . . . It is undisputed that all the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was possible to facilitate some business relationship that was legal between the hospitals and [BVMG]. Even if patient referrals were devoutly hoped for and anticipated; even if the volume of patients could be large; even if the parties might never have come together but for Baptist having embarked on a long-range plan that depended on attracting nursing home patients, there is nothing in the evidence or the law that would have apriori precluded a legal relationship from being entered into. . . .
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> The problem here is that a very simple concept, "payment for patients is illegal," became far from simple as Congress, the Executive Branch and the Courts got more deeply involved. . . . Judicial catch phrases like "one purpose rule" or "primary purpose rule," the reversals of field by the Office of Inspector General concerning its own interpretation and positions that it would take, the checkered history of the *Hanlester [Network v. Shalala]* case and the reservation by Congress of the safe harbor provision in the [Anti-Kickback Statute], the promulgation of regulations concerning which were delayed for a considerable time, all invite lawyers to attempt to devise legal ways for parties to have a relationship which has as a component hoped-for and anticipated referrals.
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> . . . [T]he evidence shows that the lawyers relied on their clients, were not engaged to monitor the activities of the consultants, and each time it came to their attention that there was a potential compliance problem, the urged their clients to make sure that fair market value for real services was being required.

"Oh yeah!" the health care bar shouted out in one voice,

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[13]U.S. v. Anderson, Case No. 98-20030-01, Trial Transcript Mar. 9, 1999, at 7342–7346 (D. Kan.) (Lungstrum, J.) (copy on file with author).

"Here's a judge who understands what we have to live with every day! And did you catch that part about 'reversals of field' by the OIG?" Joy abounded. Nonetheless, it was joy tempered with foreboding.

The ordinary work of transactional health care lawyers is almost invariably overshadowed by the notion that much of what their clients want to do—at least as far as physician relationships go—would not survive a strict application of the *Greber* one-purpose test. Some version of what Polly Biegler called "the Lecture" was in every health care lawyer's briefcase—a way of instructing the attentive client how to describe a proposed transaction in ways that reinforced its legitimacy so that the client did not unwittingly jeopardize a legitimate or defensible arrangement by articulating motives that would irrevocably taint the transaction or the lawyer. In *Anderson*, two reputable lawyers were indicted and tried (and other reputable lawyers had their names dragged around in the muck) for telling their clients what they needed to do and say to make their deal work, and for providing straightforward and honest, and apparently pretty unvarnished, advice about potential enforcement risk. Moreover, they had the revolutionary idea of trying to conduct those communications under the cloak of (wait for it) *the attorney-client privilege*. All of those facts had been presented by prosecutors in such a way as to make it appear that the lawyers were not courageous and competent advisors, but were instead health care *consiglieri*, Midwestern Tom Hagens helping the Don Corleones of Baptist make their operation look legit.

For forward-thinking lawyers, the potential risks appeared even greater. *Anderson* played out in the course of a criminal trial under the Anti-Kickback Statute when the relevant question for lawyer liability was whether the government could prove beyond a reasonable doubt that the lawyers had knowingly and intentionally conspired with their client and its agents to engage in criminal conduct. Further, much of the underlying action dated to a period when Anti-Kickback Statute enforcement was in its relative infancy and where it had seemed to be tacitly accepted that health care industry players would be scuttling around to reform arrangements that had been called into question by the original round of safe harbors. The strict liability, civil burden-of-proof standard of the Stark Law had scarcely become applicable (except

in its limited, clinical-labs-only phase) before the LaHues had left the building at Baptist. The question had to be asked: how would a case against lawyers play out in the new, no-forgiveness world that had arisen by the time of the *Anderson* acquittals? How could a lawyer explain the increasingly technical (and sometimes arbitrary) requirements of legal compliance without the risk of being accused of offering a client a roadmap to covering up a fraud?

§ 7:3 Three (un)easy pieces: true stories of lawyers caught in the crossfire—The UMDNJ monitor morass

As it transpired, one contributing factor to the indictment of the attorneys in *Anderson* was the fact that Baptist had entered into a corporate settlement with the government before the individual indictments and agreed, as part of its cooperation with the investigation, to turn over attorney-client privileged materials. This in turn gave the government access to some of the information that it used to assert that the attorneys were in a conspiracy to violate the Anti-Kickback Statute. This has become something of a paradigm in cases where lawyers are exposed to civil or criminal liability as a result of their involvement in corporate transactions: an organization under investigation enters into an entity-level settlement or deferred prosecution agreement and then begins coughing up individual targets, including lawyers, in an effort to satisfy the government as to the organization's enthusiastic and diligent cooperation.[1]

The potential consequences of this approach in the context of an investigation of suspicious physician transactions became apparent in the high-profile federal investigation of the University of Medicine and Dentistry of New Jersey (UMDNJ). In 2005, the Department of Justice brought a

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[Section 7:3]

[1]For an example that, if the allegations prove true, reflects that approach on steroids, see Complaint, Kent H. Roberts v. McAfee, Inc., No. CV09-4303, N.D. Cal., filed Sept. 16, 2009. Roberts, the former general counsel of McAfee, claimed that McAfee's board of directors and its outside counsel had "fingered" Roberts as the culprit in a stock option backdating scheme in an effort to divert the Securities and Exchange Commission from investigating McAfee's chief executive officer, a plan allegedly referred to at McAfee as "Project Shield."

criminal complaint against UMDNJ, alleging that UMDNJ's teaching hospital[2] and its associated faculty practice plan were each billing Medicaid for the same physician services and had taken no action to remedy that situation despite receiving multiple analyses and recommendations from outside counsel.[3] To resolve that complaint, UMDNJ entered into a deferred prosecution agreement with the Department of Justice and agreed to the appointment of a federal monitor with broad authority over university administration and the UMDNJ legal department.[4] As a condition of the deferred prosecution agreement, the United States Attorney for the District of New Jersey required that UMDNJ replace Vivian Sanks King, who had been its general counsel for 12 years. As a result, Ms. Sanks King resigned her position.[5]

This in turn led to an extensive investigation by the monitor, former United States District Judge Herbert J. Stern, which gave rise to other issues concerning UMDNJ's relationships with physicians, and in particular, the involvement of UMDNJ's internal and external counsel in a particular transaction that is discussed below. Ms. Sanks King was never charged with any wrongdoing in any civil or criminal proceeding. In fact, she ultimately received written confirmation from the New Jersey U.S. Attorney's Office that she was neither a subject nor a target of any investigation. However, three years after her discharge, her forced departure still hung over her; in 2009, she reported that she had been unable to find subsequent employment and that she was suing UMDNJ for wrongful termination.[6]

While the UMDNJ saga had many facets and took many

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[2]For convenience, UMDNJ and its primary teaching hospital, University Hospital, are collectively referred to herein as "UMDNJ."

[3]See Complaint, U.S. v. Univ. of Medicine & Dentistry of New Jersey, Mag. No. 05-3134 (PS) (D.N.J), available at http://www.usdoj.gov/usao/nj/press/files/pdffiles/UMDNJ%20Revised%20Complaint.pdf; see generally David Kocieniewski & John Sullivan, Medical School Double-Billed U.S. for Years, N.Y. Times (July 6, 2005).

[4]See Deferred Prosecution Agreement between Univ. of Med. & Dentistry of N.J. and U.S. Attorney's Office for the District of N.J., available at http://www.usdoj.gov/usao/nj/press/files/pdffiles/UMDNJFINALDPA.pdf.

[5]See generally Sue Reisinger, Fallen Star, Corp. Couns. at 100 — 109 (Oct. 2006).

[6]See Inadmissible: Not a Target, N.J.L.J., Sept. 29, 2008, at 3; Matt Dowling, Federal authorities quietly close probe of former UMDNJ chief

twists and turns, for present purposes the relevant focus is on Judge Stern's November 2006 interim report to then-U.S. Attorney (and now Governor) Christopher J. Christie, in which the monitor alleged that "UMDNJ's administration, in coordination with its Office of Legal Management, devised an illegal scheme to pay cardiologists for patient referrals," involving "disguised . . . 'salaries' [that] were nothing more than referral fees paid to doctors in order to induce them to bring their patients to UMDNJ."[7] This alleged scheme and its aftermath, in turn, demonstrate a number of risks for lawyers that may arise in the gap between the recognition that a fact situation has legal compliance implications and the way in which that fact situation plays out in the hands of real people.

According to the monitor's report, in 2002, UMDNJ faced the imminent shutdown of its cardiac surgery program because its case volume fell short of the volume requirements imposed under state law. Ultimately, the state regulator gave UMDNJ a deadline of December 31, 2003, to meet all applicable requirements; failure to meet that deadline meant that UMDNJ would lose its license to perform cardiac surgery. UMDNJ thereupon developed a plan to recruit certain community cardiologists to its faculty as part-time clinical associate professors (CAPs) with the apparent hope (at a minimum) that this exposure to UMDNJ's programs would cause the cardiologists to become more favorably disposed toward admitting cardiac patients to UMDNJ. (The monitor took a more cynical view, as will be seen below).[8]

Somewhat unfortunately for future scrutiny of the arrangements, some of the UMDNJ players tended to focus fairly overtly on the need to generate referrals through the

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attorney, July 6, 2009, available at http://www.nj.com/news/index.ssf/2009/07/federal_authorities_quietly_cl.html; Josh Margolin, Feds clear aide ousted at UMDNJ, Newark Star-Ledger, July 7, 2009, available at http://www.nj.com/news/ledger/jersey/index.ssf?/base/news-14/1246938987287740.xml&coll=1.

[7]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey (Nov. 13, 2006), available at http://www.umdnj.edu/home2web/federalmonitor/pdf/report111406c.pdf, at 1.

[8]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at 2–4.

proposed CAPs program. As an example, the then-president and chief executive officer of University Hospital e-mailed Ms. Sanks King in September 2002 as follows:

> [T]oday eight community cardiology names came forward requesting that [UMDNJ] pay $100,000+/MD, with limited time spent at the hospital but with the understanding they would refer their cardiac cases to [UMDNJ]. Ron [Pittore, another UMDNJ lawyer] was present and can fill you in on the details. You know my concern. Each request and agreement needs to be reviewed by a legal person who fully understands the Stark Law.

Ms. Sanks King responded that she shared this concern and "[could] tell you without an outside consultation that the arrangement as proposed will not withstand scrutiny," further undertaking to "seek advice on what might be permissible to allow [UMDNJ] to benefit from the services of these community cardiologists." This in turn drew a somewhat testy response from the chief administrative officer/chief financial officer of UMDNJ's cardiothoracic surgical services:[9]

> As I stated in the meeting where this conversation took place, we are certainly not looking to violate any compliance laws or open the door to an [OIG] investigation. Dr. Ellner [chair of the Department of Medicine at UMDNJ] has very serious intentions on making these cardiologists part of the Division of Cardiology. There was language read at the meeting that clearly delineates their roles and what will be expected of them. We even went so far as to reassure Katherine Gibbons [a UMDNJ administrator] that the Medicare Effort Reports would be completed as well should the appointments be made and the salaries offered be considered as fair market. We need to move these initiatives forward. Do you have any helpful suggestions that we can explore[?]

Further e-mail discussions show a continuing tension between UMDNJ's stated intention to comply with the Stark Law and its perceived urgency in getting a deal closed with the cardiologists:

- Dr. Barry Esrig, UMDNJ's chief of cardiothoracic surgery, e-mailed Ms. Sanks King recommending a full-time employment arrangement for the cardiologists and

[9]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 6.

requesting a draft contract that "is in compliance with Stark."[10]

- An e-mail exchange between UMDNJ attorney Ron Pittore and Craig Evans, in which Pittore noted the need "not [to] pay physicians more than fair market value for their services so that it appears that we are paying referrals" and in which Evans noted that the proposed salaries seemed reasonable and that "no volume is associated with the commitment" but simultaneously worried that the cardiologists would "lose interest" without a contract to review soon.[11]
- When a draft contract was circulated for review, Nancy Dean, another UMNDJ in-house lawyer, e-mailed Pittore questioning whether the proposed compensation was fair market value and noting that the proposed form contained "an awful lot of you may be asked to with much less you may be required to."[12]
- In November 2002, Ms. Sanks King e-mailed a variety of UMDNJ administrators, referring to "the mixed legal advice provided from outside counsel" on the issue, and committing that "[the UMDNJ Office of] Legal Management will make sure that outside counsel has looked at every aspect of an issue before [advice] is provided that sends everyone down one road that is not the right one" and that "counsel will now provide you with written guidance, parameter if you will, that [will] focus you on what you can do, rather than on what can't be done."[13]

(As to the last point, it is unclear what "mixed legal advice" was provided, or by whom, or for that matter when. The monitor's report cites deposition testimony of James V. Hetzel, a lawyer with an outside firm, given in connection with a case brought by a physician against UMDNJ with respect

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[10]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 8.

[11]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 9.

[12]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 12.

[13]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 11.

to the CAPs arrangement (the "Arora litigation"). In that deposition, Mr. Hetzel indicated that he had had an initial meeting with either Mr. Pittore or Ms. Sanks King, followed by a telephone conversation with Ms. Sanks King in which she had asked for a "memo or opinion . . . or other written guidance outlining the parameters of . . . permissible . . . recruitment arrangements soon," but he was vague as to the exact timing of that request (and whether or when there had been any follow-up on it) and acknowledged that he had never produced such written guidance.[14] The monitor characterized this, apparently, as Ms. Sanks King's "allow-[ing] UMDNJ to move forward with [the CAPs] plan without any final or written guidance from outside counsel," and interpreted Ms. Sanks King's "mixed legal advice" e-mail as her attempt "to create an appearance of legal uncertainty when, in fact, no such uncertainty of illegality exist[ed]."[15] Despite that conclusion, the public record is, at best, ambiguous on what legal analysis was provided by what lawyers with regard to the proposed arrangements.)

In the event, UMDNJ proceeded with the plan, entering into part-time employment agreements with some 18 cardiologists between late 2002 and July 2006 (well after the arrangements had been called into question).[16] Objectively speaking, if the monitor's findings are taken at face value, those agreements are challenging to defend. They are two-to-three-page letter agreements, typically listing out a variety of duties without an express time commitment (either per-duty or in the aggregate, except for the general proviso that the duties were expected to account for 48% to 49% of a full-time position) or particular clarity as to how it would be determined what duties would actually be performed; the duties also tended to be duplicative among the contracts,

[14]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at Exhibit 10 (deposition of James V. Hetzel in Rohit Romesh Arora, M.D. v. Univ. of Med. & Dent. of N.J., et al., Case No. C-322-03, N.J. Super Ct. (Essex County) (deposition given April 14, 2005).

[15]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at 13–14.

[16]The agreements are included at Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, Exhibit 13.

raising some question as to the need for so many part-time faculty members to provide the same services. According to the monitor's findings, the compensation for the part-time cardiologists approximated 87% of the compensation for full-time faculty members.[17] Further, in deposition testimony given in the Arora litigation, a number of the cardiologists indicated that they had provided very limited services under the contracts, that they had been paid for periods prior to the execution of the employment agreements, and that their "academic" activities had been limited or nonexistent.[18] Unhelpfully, UMDNJ also apparently maintained what the monitor characterized as a "referral score sheet" tracking the procedure referrals received from the cardiologists on a doctor-by-doctor, month-by-month basis.[19]

The monitor's report demonstrates Judge Stern's conclusion that UMDNJ's legal department, headed by Ms. Sanks King, was at a minimum insufficiently diligent in trying to ensure that UMDNJ did not enter into physician arrangements that, in the eyes of the monitor—and objectively speaking, probably in the eyes of most knowledgeable observers with the benefit of hindsight—raised significant questions under the Stark Law. The report creates the strong implication that Ms. Sanks King, and perhaps other UMDNJ lawyers, knew that the proposed arrangement was a sham intended to cover up kickbacks and were at least passively complicit in letting the arrangement move forward.

On the other hand, the written record adduced by the monitor demonstrates a recurring concern on the part of UMDNJ's counsel that any arrangement with the cardiologists comply with applicable legal requirements. The monitor draws inferences that those concerns became, at best, beaten down by pressure from UMDNJ administration and even suggests that Ms. Sanks King's e-mail referring to

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[17]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at 20.

[18]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at 14–17.

[19]See Interim Report [Redacted for Public Review] of the Federally-Appointed Monitor for the University of Medicine and Dentistry of New Jersey, at 17 and Exhibit 17.

"mixed legal advice" was a fabrication designed to cover up her knowledge that the arrangement was illegal. Beyond that, the monitor's ability to determine ex post facto that the cardiologist arrangement proved to be a sham in practice is used in the report to create the impression that Ms. Sanks King, and other counsel, should have known in advance that it would be a sham. Admittedly, serious questions about the arrangement were evident from early on in the process. However, the existence of such questions does not compel the conclusion that no compliant employment arrangement could be structured with the cardiologists, and the monitor's conclusions would likely have been less easily reached if the implementation of the part-time employment program had been better (e.g., better documentation of duties and time spent, fair market value studies supporting the compensation, etc.).

In some limited respects, then, UMDNJ can be seen as a logical extension of the prosecution's arguments in *Anderson*. There, the government's case against the lawyers rested on the proposition that the lawyers had been irrevocably tainted by alleged knowledge of their client's (allegedly) bad intent, and thus that the advice and actions of the lawyers were by definition designed to disguise the fulfillment of that bad intent. In the UMDNJ monitor's report, that position is extended to suggest a duty on the part of lawyers to discern their client's bad intent and prevent them from acting on it and/or to police the implementation of an arrangement to ensure that it is carried out in a compliant fashion. The UMDNJ facts do not present a particularly good setting in which to test the validity of that position, in part because there was no adversarial proceeding in which to pin down the details more precisely and in part because the facts that are known are, frankly, pretty bad as to the physician arrangement itself. Nonetheless, the monitor's position can at least be seen as a warning shot across the bow of the bar, suggesting that simply advising a client to obey the law may not be enough to protect the lawyer where the client is bent on pursuing a questionable course.

§ 7:4 Three (un)easy pieces: true stories of lawyers caught in the crossfire—The *Tuomey* tempest

To some degree, the threads of *Anderson* and UMDNJ may be wound together in the recent, and ongoing, *Tuomey* litiga-

tion making its way up (and down) the federal courts in South Carolina,[1] a case involving part-time physician employment agreements, disputes as to motivation, fair market value and knowledge, competitive pressures, and many, many lawyers.

At the time of this writing, *Tuomey* remains a moving target (an understatement; the case is actually more of a whirling dervish). The underlying litigation began as a qui tam case under the False Claims Act, in which the Department of Justice intervened, against a rural South Carolina health system. The allegedly false claims resulted from referrals by physicians who had part-time employment contracts with subsidiaries of the system, which contracts in turn allegedly violated the Stark Law. In March 2010, after a month-long trial, a federal jury found that the system—Tuomey—had violated the Stark Law but had not violated the False Claims Act, resulting in liability to the government of nearly $45 million (plus interest). In extensive post-trial proceedings, (a) the district court concluded that it had erroneously excluded certain evidence at trial and ordered a new trial on the False Claims Act counts; (b) Tuomey appealed the Stark Law verdict to the Fourth Circuit; and (c) Tuomey sought an interlocutory appeal on the grant of a new trial by the district court, but the Fourth Circuit declined to hear that appeal.[2]

Obviously, until this complex process comes to rest with a final, nonappealable judgment or settlement, it is both difficult and probably inappropriate to state with confidence all of the underlying facts or assess the validity of the parties'

[Section 7:4]

[1]U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., original complaint filed Oct. 4, 2005, amended complaint (after intervention by U.S.) filed Dec. 21, 2007.

[2]See generally Joe Perry, Tuomey must pay $45M-plus, The Item, June 4, 2010, available at http://www.theitem.com/news/article_a10824e6-50c2-5bdb-83e0-701057d1094a.html; Joe Perry, Order denies Tuomey's motion, The Item, Oct. 27, 2010, available at http://www.theitem.com/news/article_7e9c8e54-2722-5a40-8b24-c07ceb30be9c.html; Joe Perry, Tuomey lawyers file petition for ruling review, The Item, Nov. 17, 2010, available at http://www.theitem.com/news/article_0fcc11b1-0629-5d94-9cd4-31a4003f4dc6.html; Joe Perry, Tuomey lawyers' petition denied by court, The Item, Nov. 24, 2010, available at http://www.theitem.com/news/article_cc7c9c7d-e2e7-5e7d-af40-71100839e7b7.html.

legal arguments. However, for present purposes, those things are not particularly relevant. Rather, what is of interest is what the record reveals about the role of lawyers—a veritable surfeit of lawyers—in the circumstances leading up to the trial and how that role was portrayed during the process. *Tuomey* presents an unusual opportunity in that regard. Very few False Claims Act cases make it to trial; because this one did, and because Tuomey relied in part on an advice-of-counsel defense, a great deal of otherwise privileged information and a lot of documentary evidence demonstrating the legal sausage-making process has made it into the public record. Thus, the case provides something of a real-time window into lawyers' involvement in a complex physician transaction that was ultimately challenged by the government.

In order to peer into that window, of course, it is still necessary to look at some of the facts. Briefly, Tuomey operates a nonprofit rural hospital in a medically underserved area (and is also the nearest hospital to an Air Force base).[3] It allegedly faced historical difficulties in recruiting and retaining specialists, including surgeons, and typically had only one group in each surgical specialty. Sometime around 2003, Tuomey was confronted with competition from the local urology group, which opened its own outpatient surgery center. Shortly thereafter, the town's only gastroenterology group advised Tuomey that they "were considering moving their outpatient procedures to their own facility."

Faced with this potential loss of case volume, Tuomey turned to its longtime counsel at the Nexsen Pruet law firm for advice on structuring a relationship with the gastroenterologists that might "more closely integrate the hospital and

[3]The background facts in the next few paragraphs are summarized from 3-12 of Tuomey's Memorandum in Support of Defendant's Motion for Summary Judgment, Docket Entry 302, U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., filed July 31, 2009 ("Tuomey Summary Judgment Memorandum"), unless otherwise indicated. As before, specific citations within that portion of the Tuomey Summary Judgment Memorandum have been omitted from the text accompanying this note through the text accompanying note 13, and the reader should assume that any factual statements in such text that are not specifically cited to other sources are derived from this portion of the Tuomey Summary Judgment Memorandum, and all material identified as direct quotes are quotes therefrom.

its medical staff." Nexsen Pruet recommended that Tuomey pursue full-time employment of the physicians, but they were reluctant to accept that deal. Tuomey then, "on recommendation of Nexsen Pruet," made an alternative proposal: "part-time employment when [the gastroenterologists] performed outpatient surgery at Tuomey, while still allowing them to practice through their existing professional corporation in their office and while treating inpatients." Tuomey also engaged Cejka Consulting, a now-defunct "national consulting firm with expertise in physician compensation," "to assure that the amounts offered and ultimately paid to the gastroenterologists reflected the fair market value of their services."

After negotiating the deal with the gastroenterologists, Tuomey began offering similar part-time employment agreements to other surgeons during 2004 and 2005, ultimately obtaining contracts with surgeons in a variety of specialties. Although the contracts varied as to specific economic terms, they were all of the same general form and structure.[4]

The employment agreements were, it may be said, unusual. "Unusual," of course, is not synonymous with "illegal." Nonetheless, they appear to the casual observer to display a considerable generosity of spirit on the part of Tuomey.[5] The contracts provided for part-time employment, but not on any specified schedule, or even for any particular aggregate amount of time in any period; rather, the contracts essentially provided that whenever the physicians were performing outpatient procedures at Tuomey facilities, they would be employees of Tuomey, but they would not be em-

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[4]The employment agreements were not with Tuomey itself, but rather with subsidiary limited liability companies wholly owned by Tuomey and that had no independent business or assets. In its defense to the government's claims, Tuomey ascribed a fair amount of significance to this "separate subsidiary" structure. Because this chapter is not concerned with evaluating the merits of Tuomey's technical defenses, and because there does not appear to be any dispute that the employment arrangements had as their primary purpose to bind the employed physicians more closely to Tuomey's hospital—whether in a permissible way or not—any distinction between Tuomey and its wholly owned subsidiaries is ignored here even though that distinction may be relevant to the eventual result of the case.

[5]The contracts are included as attachments to the Affidavit of Beth Luebbert, which is in turn Attachments 16-24 to the Tuomey Summary Judgment Memorandum.

ployees when performing any other services. The contracts had a 10-year term (automatically renewing from year to year thereafter unless terminated) and provided for noncompetition restrictions for up to two years after termination or expiration of the contract, restricting the physicians from performing outpatient procedures at any location (other than Tuomey) within a 30-mile radius of Tuomey's hospital. In exchange for these "springing" employee services, the physicians received a handsome financial package:

- Compensation consisting of a base salary (under the gastroenterologist contracts, this could be lowered for each year if the physician did not perform a specified minimum number of procedures in the preceding year and could be increased in each year by any generally applicable annual increase for Tuomey employees; under the other contracts, the base salary for each year could be raised or lowered based on the net cash collections for the professional services performed by the physician as an employee during the prior year), a "Productivity Bonus" equal to 80% of net cash collections for the professional services performed by the physician as an employee, and an "Incentive Bonus" of up to 7% of the Productivity Bonus for meeting certain nonfinancial objectives;
- First-dollar family coverage under Tuomey's health, dental, and vision plans in effect from time to time;
- Malpractice coverage applicable to the physician's practice, both for services rendered as an employee and services rendered independently;
- Allowances aggregating over $10,000 for continuing education, professional materials, license fees, cellular phone, and pager service, etc.; and
- Other employee benefits as generally provided by Tuomey.

Cejka provided fair market value opinions on these compensation arrangements with respect to each employment agreement, which were in turn relied upon by counsel who opined upon this transaction structure for Tuomey.[6]

Tuomey's efforts to sign specialists up under these

[6]Nexsen Pruet, Tuomey's primary counsel, opined on the original transaction with the gastroenterologists. See Memorandum to Tuomey Healthcare System from Nexsen Pruet Jacobs & Pollard, LLC, dated Aug.

contracts met with considerable success, but it was not universal; not all of the physicians approached agreed to the employment arrangements. In particular, the local orthopedic group, headed by Dr. Michael Drakeford, proved difficult. It was at that point that the lawyers really started to multiply like Tribbles.[7]

Dr. Drakeford engaged Greg Smith, a lawyer with the Womble Carlyle firm, to represent the orthopods in negotiations. Mr. Smith then began extensive communications with Tim Hewson, one of Tuomey's lawyers at Nexsen Pruet. In the course of those discussions, Mr. Smith sent Mr. Hewson a lengthy memorandum outlining his "compliance reservations" centering on "the fair market value and commercial reasonableness of the compensation [to be] paid [to] the physicians." In that memorandum, the concerns specifically raised by Mr. Smith included his conclusions that, based on the Cejka-provided numbers, the total compensation and benefits to be paid to the physicians were equal to 122% of their collections, that "the compensation methodology [made] it a mathematical certainty that [Tuomey would] lose money," that Dr. Drakeford himself would actually make over $55,000 in excess of what he would earn if he continued practicing without entering into the employment arrangement, and that the Cejka report was analytically questionable in various respects. He also alleged that Mr. Hewson had "indicated that Tuomey actually doesn't lose money on its physician part-time employment arrangements, and that the arrangements are commercially reasonable, because

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19, 2003, re: Potential Arrangements with Gastroenterologists, included in Exhibit 1 to Deposition of Kevin G. McAnaney in U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., taken Oct. 9, 2008 ("First McAnaney Deposition") (Bates numbers 006-138 through 006-144), and Memorandum to Tuomey Healthcare System from Nexsen Pruet, LLC, dated Jan. 28, 2004, updated Nov. 22, 2004, likewise included in such Exhibit 1 (Bates numbers 006-177 through 006-178). As discussed below, Tuomey later sought and obtained additional opinions from Hall Render Killian Health & Lyman, which had been initially engaged by Tuomey to assist in the development of a potential "under arrangements" joint venture with the local orthopedic physician group.

[7]Tribbles, of course, were the cute little fluffy creatures whose rapid reproduction and insatiable appetite for edible items of all types threatened to bring the five-year mission of the starship Enterprise to an inglorious halt near Deep Space Station K7. See generally David Gerrold, "The Trouble with Tribbles" (Ballantine 1973).

Tuomey makes money on its facility charges and ancillary services . . . related to the physicians[']referrals."[8] The Nexsen Pruet analysis, expressed earlier in communications to Tuomey's board and management, obviously differed.

Faced with this impasse—credible lawyers from credible firms reaching diametrically opposite analyses—the parties took a highly logical step. Logical, but in hindsight imprudent, as will be seen below.

After a meeting between Dr. Drakeford and three members of the Tuomey board, the parties agreed that their respective lawyers should select a third lawyer with relevant expertise to review the proposed transaction and provide his or her assessment to the parties. The parties entered into a joint engagement letter with Kevin McAnaney, former Chief of the Industry Guidance Branch of the Office of Counsel to the Inspector General and a nationally recognized practitioner in the area of health care fraud and abuse. After providing various information to Mr. McAnaney, including the proposed contract for the orthopedic surgeons, Messrs. Hewson, Smith, and McAnaney held a conference call.

While the call itself was not recorded in any fashion, there appears to be no dispute that Mr. McAnaney expressed concern that the compensation arrangements—in which the orthopods would be paid more than the collections derived by the hospital from their work—would be a "red flag" for the government. Mr. McAnaney also testified in deposition that he had advised the other participants that the proposed arrangement "had a substantial risk."[9] His deposition testimony also indicated that he had concerns about the noncompetition component of the proposal and the duration of the employment term, as well as about other cases in which the government had successfully asserted False

[8]See Supplemental Appendix in Support of the United States' Opposition to the Defendant's Motion for Summary Judgment, U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C. filed Aug. 31, 2009 ("U.S. Supp. Appx.") at SA272-SA276 (Memorandum to Timothy Hewson from Greg Smith, dated June 18, 2005, re: Tuomey Hospital Part-Time Employment Agreement.).

[9]First McAnaney Deposition at 111, lines 1–2.

Claims Act violations in the context of physician employment arrangements.[10]

The situation continued to deteriorate. Shortly after the conference call, the orthopods delivered a lengthy letter to Tuomey's chief executive officer and board in which they reiterated their purported compliance concerns with the proposed part-time employment arrangement and exhorted Tuomey to join in a request that Mr. McAnaney deliver a written opinion on the transaction.[11] When Tuomey declined to agree, Mr. Smith sent a direct request for such a written opinion to Mr. McAnaney, noting that Tuomey would have to agree before Mr. McAnaney could comply with the request.[12] This was followed by a letter from Mr. Hewson to Mr. McAnaney directing him, on behalf of Tuomey, to stand down until further notice and not to deliver any written opinion.[13] At the end of the day, then, the effort to resolve the parties' differences in legal analysis through recourse to independent expertise resulted, as a practical matter, in creating the impression in some minds—including those of the government's representatives—that Tuomey was engaged in a cover-up of the weaknesses in its position.[14]

Tuomey had still more lawyers, though, and at about this

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[10]See First McAnaney Deposition at 103 to 133.

[11]See U.S. Supp. Appx. at SA519-SA522. Although signed by the physicians, the letter appears to have been drafted by their counsel at Womble Carlyle.

[12]U.S. Supp. Appx. at SA268-SA269 (letter from Greg Smith to Kevin McAnaney).

[13]U.S. Supp. Appx. at SA277 (letter from Tim Hewson to Kevin McAnaney).

[14]In the government's eyes, this argument was bolstered by a variety of e-mail correspondence and other communications among Tuomey's counsel and between such counsel and Tuomey management in which they expressed various reservations about the wisdom of involving Mr. McAnaney because of a concern that his analysis would be predisposed toward excessive conservatism. For example, an e-mail transcription of a voicemail left for Tim Hewson by Steve Pratt of Hall Render included the following: "We've had experiences with third party attorneys very much like this case in two other deals, and it just slows it down and makes it horribly complicated. We get lawyers involved who are not committed to the deal. They're only committed to making the deal safe so we end up stripping out all of the business terms that achieve the intended result." U.S. Supp. Appx. at SA299. In real life, most lawyers understand the inherent tension between having a transaction structure that is legally

same time, it asked its counsel at Hall Render to provide an opinion with respect to the part-time employment agreements that had already been entered into. Hall Render delivered a preliminary opinion in late July 2005 and followed that in September with a more detailed opinion.[15] The Hall Render opinions expressly relied on the Cejka valuation opinions and pointed out a variety of risks that might arise if the transactions were scrutinized, as well as making recommendations that might reduce those risks. Nonetheless, the firm's ultimate conclusion was that the physician employment relationships were "not likely to violate the applicable tax laws, the Anti-Kickback Statute or the Stark Law."[16]

Thus, by the time the situation had reached a critical stage with Dr. Drakeford's group, Tuomey had had the benefit (or burden, perhaps) of legal analysis from many quarters. It had the legal opinions and ongoing advice from Nexsen Pruet and, later in the process, Hall Render. It had the preliminary oral "assessment" from Kevin McAnaney. It also, of

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bulletproof and having a transaction structure that minimizes business risk at the cost of enhanced legal risk. In a world where the legal analysis is almost never black-and-white, resolving that tension requires both effective legal advice and informed risk assessment by the client, and there is no dishonor in saying so. On the other hand, there are ways and ways of saying so, and some of them appear considerably less nuanced when reduced to writing.

[15]See Letter from Steven H. Pratt to Jay Cox re: Physician Employment Arrangement, dated July 25, 2005, Exhibit 1 to Deposition of Mark J. Swearingen in U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., taken Apr. 24, 2009 ("Swearingen Deposition.") (Bates numbers HR-01846 through HR-01849), and Letter from Steven H. Pratt to Jay Cox re: Physician Employment Agreement, dated Sept. 20, 2005, included as Exhibit 6 to that same deposition (Bates numbers HR-00843 through HR-00858).

[16]Sept. 20 Letter from Pratt to Cox at 15. Getting to that opinion was not without internal strife, however. The documents produced in the litigation include multiple e-mails from Mark Swearingen, a Hall Render associate, to partner Steve Pratt indicating Mr. Swearingen's concern that Tuomey's arrangement was vulnerable under the Stark Law, principally because of his concern that the physicians' compensation might be deemed to vary with the volume or value of the technical component referrals resulting from the physicians' personally performed services. This concern was articulated in greatest detail in an e-mail with the infelicitous subject line "Tuomey and Stark, Sittin' in a Tree." See e-mail from Mark Swearingen to Steven Pratt, 8:44 PM, Aug. 24, 2005, included in Exhibit 1 to Swearingen Deposition (Bates numbers HR-02105 through HR-02106).

course, was aware of the analysis from Womble Carlyle, which differed so diametrically from the analysis made by its own counsel. Further, by this point it had also had the experience of negotiating the employment agreements that had been signed by other physicians with counsel representing those physicians, as well as the analyses from Cejka and from its compliance consultant, former Inspector General Richard J. Kusserow's firm Strategic Management Solutions. In short, there was a great deal of information in the mix available to Tuomey. Moreover, for the most part, none of that information came from sources that an objective observer would not reasonably consider to be competent and credible.

What impact, then, did that have on the parties' positions in the ensuing litigation? Unsurprisingly, the divergence between their respective views continued the trend of diametric disagreement. In seeking summary judgment in its favor, Tuomey argued at great length that it could not be liable for violating the False Claims Act because its board relied on the advice of its lawyers in good faith, presenting the work of the lawyers almost in minute-by-minute detail.[17] Tuomey further argued that the board was dependent upon communications from its counsel at Nexsen Pruet for an understanding of what advice Mr. McAnaney did or did not give and essentially argued that the board was likewise reasonable in discounting the legal analysis presented by Dr. Drakeford—characterized as "a physician whom [the Tuomey board] suspected of having ulterior motives"—in favor of that presented by counsel on whom it had relied for years.[18]

In responding to the summary judgment motion, the government suggested that the advice-of-counsel defense was not available to Tuomey because it had not sought advice in good faith and accused Tuomey of " 'attorney shopping' to 'cherry pick' the attorneys and other advisors who would give Tuomey the answer it wanted, rather than impartial advice."[19] In support of that notion, the government argued that Tuomey had deliberately obfuscated the

[17]See Tuomey Summary Judgment Memorandum at 24–36.

[18]See Tuomey Summary Judgment Memorandum at 33–35.

[19]See United States' Opposition to the Defendant's Motion for Summary Judgment, U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C. filed Aug. 31, 2009, at 36.

true purpose behind the employment agreements—to avoid lost revenues and profits that would result from the physicians' moving their outpatient procedures away from the hospital—"in order to try to get legal 'cover' for what [Tuomey] knew were probably illegal contracts," a position very reminiscent of the *Anderson* allegations. In addition, the government argued that Tuomey's unwillingness to allow Kevin McAnaney to render written advice reflected its efforts to avoid being given information that would put it on notice that it was entering into illegal arrangements and that its late-inning solicitation of opinions from Hall Render was more evidence that it was simply using legal advice as a cover for impure deeds.[20]

With so much of the summary judgment action centering on what lawyers did and did not say, one might have expected the lawyers' testimony to occupy days of trial time. Instead, the lawyers by and large played the role of Godot in the Tuomey drama. Tuomey made the strategic decision not to call its own counsel as witnesses, and because of his joint engagement by Tuomey and the relator, Mr. McAnaney was excluded as a witness.[21] Only Dr. Drakeford's lawyer, Greg Smith, testified, although the jury heard tape recordings of some of the Tuomey lawyers. Unsurprisingly, the government argued enthusiastically at trial that the absence of testimony from its lawyers undercut Tuomey's ability to rely on the advice-of-counsel defense.[22] It remains to be seen whether the second trial, if and when it occurs, will provide more of a first-person insight into the role of Tuomey's counsel in the events leading up to the litigation.

Anderson is a closed book, and UMDNJ appears to be so as well at least insofar as its lawyers are concerned. *Tuomey*

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[20]United States' Opposition to the Defendant's Motion for Summary Judgment, U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C. filed Aug. 31, 2009, at 37–40.

[21]The trial judge also excluded testimony about what Tuomey understood Mr. McAnaney's advice to be, a ruling which he later determined to be erroneous. This determination was apparently a central justification for his decision to grant the government's motion for a new trial on the False Claims Act counts. See Joe Perry, Tuomey must pay $45M-plus, The Item, June 4, 2010, available at http://www.theitem.com/news/article_a10824e6-50c2-5bdb-83e0-701057d1094a.html.

[22]See Trial Transcript, U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., at 1960–1966.

is a very different story. It may still be years before the ultimate liability of Tuomey Healthcare System is resolved, and although the role of Tuomey's lawyers has been a major theme of the case so far, what impact the case may have on the way in which health care lawyers interact with and advise their clients is yet to be determined. Nonetheless, there are distinctive linkages between these cases, and important questions that they raise about how health care lawyers do their jobs and what their personal liability exposure may be, as well as about what the implications are for health care clients.

§ 7:5 Two micro questions, two macro questions, and not enough answers

What, then, are these common threads that stretch from the early 1990s all the way through tomorrow? It is perhaps useful to discern that through looking at a handful of questions, some of them rather narrow and discrete and some of them more global in nature.

§ 7:6 Two micro questions, two macro questions, and not enough answers—What are the professional obligations of lawyers in advising on physician transactions?

Suppose a client approaches its lawyer about a proposed physician transaction such as those at issue in the cases described. Realistically, it is unlikely that a transaction, at least as initially proposed, is going to be bulletproof from an Anti-Kickback/Stark perspective, if for no other reason than that clients tend to think about what makes business sense more than what satisfies a safe harbor or a Stark exception down to the last jot and tittle. Even if the client has made an effort to come up with a structure that appears technically compliant, the lawyer still needs to be concerned with the underpinnings of that structure: does the client have questionable intent, running the risk that the transaction may be recharacterized as a sham? Has it obtained credible fair market value support, if relevant? Does the client understand the need to conform real-life behavior to the documented structure? Those types of questions all require some discussion between the lawyer and the client to ensure that they are on common ground.

What about a perhaps more typical situation, where the client simply comes to the lawyer and says, in effect, "We want to figure out a way to keep this doc loyal to us and we want you to tell us what the law will let us do?" There, the lawyer must explore in some detail what the client is trying to accomplish (beyond the stated purpose, which is trouble enough if you apply the *Greber* test) and likely must spend a fair amount of time with the client discussing the structure and documentation of potential transactions that might achieve those goals (including, at some level, the stated purpose). Those discussions may be construed as informing a client about the law. They may also be construed as instructing the client in how to document an impermissible transaction so that it is cloaked in superficial compliance, the charge leveled against the lawyers in *Anderson*.

The same Model Rule that provides that a lawyer may not assist a client in conduct the lawyer knows to be criminal or fraudulent also provides that "a 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."[1] Health care lawyers live in a world where the scope, meaning, or application of the law—and sometimes its validity—is far from clear, much as regulators and prosecutors might argue otherwise. Indeed, the regulators have made it so. In numerous Advisory Opinions, the OIG has expressed its willingness to forgo pursuing potential violations of the Anti-Kickback Statute—that is, the commission of potentially criminal acts—where it has found the arrangement in question to have socially useful aspects and "appropriate safeguards." This continued evolution of Professor Blumstein's "health care speakeasy" makes it highly likely that clients will want to test, and competent lawyers may feel obligated to help them test, the boundaries of laws that routinely purport to prohibit or restrict actions that have no discernible impact on the ultimate question of whether the government has paid an appropriate price for appropriate care rendered to patients who need it.

Where the danger lies, of course, is that in so exploring

[Section 7:6]

[1]Model Rules of Professional Conduct Rule 1.2(d).

those boundaries, lawyers may find that actions that are consistent with applicable professional responsibility standards may still be recast as the acts of a coconspirator. In *Anderson*, the court found that the advice given by the lawyers and the actions they took in helping structure and document the arrangements between Baptist Medical Center and the LaHues all derived from the lawyers' good-faith belief that it was possible to structure a legally permissible relationship between the parties. The prosecutors looked at that same advice and those same actions and apparently concluded that the lawyers were the mechanics who put together the components of the allegedly illegal conspiracy. In *Tuomey*, the record indicates enormous expenditures of time and effort by Tuomey's lawyers in working with valuation consultants and negotiating with other lawyers to develop a structure that, it may be assumed, represented something those lawyers believed could be defended in good faith even if it were ultimately shown to be flawed. The government argued that such time and effort had instead been expended in an effort to provide cover for Tuomey's allegedly illegal pay-for-referrals scheme.

To reduce the risk of exposure for lawyer and client from this sort of Catch-22, these cases suggest some strategies that lawyers would do well to consider, as discussed below.

§ 7:7 Two micro questions, two macro questions, and not enough answers—How can lawyers mitigate the real-world risks for themselves and their clients?

At a simplistic level, each of these cases demonstrates an elementary, but fundamental, truth: lawyers working with clients on physician transactions must heighten their sensitivity with respect to communications in all contexts—communications with clients; communications within a law firm or legal department; and communications with co-counsel, opposing counsel, consultants, and other principals involved. Even leaving aside some of the more sensationalistic statements allegedly made in some of the cases, the records in all of these matters show the ways in which informal statements, even (especially) in e-mail communications, that may represent the kind of shorthand in which practitioners in an area routinely speak can, in the hindsight of a fully developed investigation, be portrayed as incriminating. In

real time, concerns about whether a lawyer is "committed to the deal," commitments to "focus . . . on what you can do, rather than on what can't be done," descriptions of a contract as a "clean-up deal," may seem innocuous, just a way to communicate a concept in easy-to-understand language. Printed out in cold type for a jury, such statements may easily be presented as indicia of a lawyer's culpable state of mind. Similarly, internal debates among members of the same legal team that are memorialized in e-mail may readily be presented as evidence that some lawyers on the team were steamrolling over the legitimate concerns raised by others. When these types of communications are presented in a complaint or argued to a jury, they are typically not given much context; what may be regarded within the team as the normal process of a junior lawyer's being educated by a senior lawyer can fairly easily be presented as the efforts of a compromised senior to divert his or her bloodhound-like associate from the trail of conspiracy. Simply put, lawyers are well-advised to try to prepare every written communication, no matter how brief and no matter what the circumstances, on the assumption that it may someday be made public.

That sounds discouraging, but these cases and others make clear that for better or for worse, that is a valid lesson. But that can't be all there is to derive from these cases, can it? No indeed. There are other practical lessons, some of them less obvious but just as important.

First among these, perhaps, relates to the role of lawyers in dealing with valuation consultants. Fair market value and commercial reasonableness are the touchstone issues in almost any physician transaction. Very commonly, the legal analysis of a proposed arrangement turns on whether the arrangement satisfies those tests. However, most lawyers are not in the business of providing fair market value opinions. Indeed, it sometimes seems as if most lawyers working in the area have written a "macro code" into their word processing systems: just click Alt-F, and like magic, something along the lines of "In rendering the foregoing opinions, we have relied upon the opinion of Acme Consultants that the compensation arrangements constitute fair market value for the services to be provided and are commercially reasonable without regard to the volume or value of referrals. We express no opinion as to whether such arrangements constitute fair market value" appears.

This reflects a right and proper division of responsibility. However, it does not mean that lawyers may adopt a "pure heart, empty head" approach to valuation issues. If counsel has reason to think that the fair market value analysis being used is flawed in some respect, or that the valuation consultants do not seem to be taking a reasonable approach, counsel must raise this concern with the consultants and the client and must be prepared to withhold or modify a legal opinion if those concerns cannot be satisfied. For example, in the *Tuomey* situation, the process by which Cejka reached its valuation opinions had an unfortunate air of "tell us what you want the answer to be and we'll try to support it" about it, probably in part because Cejka seems to have been engaged both to design the compensation structure for the employment agreements and to opine on its fair market value.[1] Admittedly, this does not mean the opinions themselves might not still be objectively reasonable. However, where the lawyer has reason to believe the valuation process itself may be vulnerable to attack, the lawyer should be prepared to advise the client of the risks and consider whether the process has tainted the transaction.

More generally, the lawyer must be sensitive to the overall approach taken in the valuation process. It is neither appropriate nor particularly feasible for the lawyer to undertake a de novo review of the valuation itself. On the other hand, it is highly appropriate—and, it may be argued, essential as a matter of professional responsibility—for the lawyer to raise questions about any obvious red flags raised by the valuation (e.g., a transaction between a physician and a hospital that is guaranteed to result in a loss to the hospital). That does not mean that the lawyer must or should insist that all the red-flag items be stripped from the deal;

[Section 7:7]

[1]See Deposition of Kimberly Hewitt Saccone in U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., taken May 13, 2009, at 333, lines 17-19, included in U.S. Supp. Appx. at SA384. Considerable background on the interactions among Cejka, Tuomey, and Nexsen Pruet is available through reviewing the exhibits to the Deposition of Timothy Hewson in U.S. ex rel. Drakeford v. Tuomey Healthcare System, Inc., Case No. 3:05-CV-02858-MJP, D.S.C., taken Apr. 2, 2009, which include extensive e-mail correspondence discussing the design of the compensation structure and the preparation of the valuation opinions.

rather, it means that the lawyer should identify the issues and work with the client to figure out a way, in advance, to address questions that may later be raised by regulators or prosecutors. In other words, the lawyer cannot simply look at the valuation report as a checklist item that must be completed but rather must study it, understand it, and be prepared to help defend it if the lawyer is going to rely on it.

Another important lesson to be learned, especially from *Tuomey*, is the importance of intelligently managing the process with opposing counsel and cocounsel. One of Tuomey's biggest challenges in responding to the government's claims was the volume and nature of legal advice to which it was privy. It had lots of direct advice from its own lawyers. It was also the unwilling recipient of "advice" from Dr. Drakeford's counsel at Womble Carlyle, input that it did not welcome but that nevertheless entered into the mix of information available to it. Beyond that, it asked for, but appeared to be reluctant to consume, advice from Kevin McAnaney. This concatenation of circumstances created three distinct challenges for Tuomey:

- By consulting with Nexsen Pruet, Hall Render, and Kevin McAnaney on the same set of facts, Tuomey became somewhat vulnerable to the government's argument that it was opinion-shopping and that it may have provided less than complete information to some of its selected counsel in order to increase the likelihood of getting a favorable opinion. In fact, the record does not particularly support that argument, and if you throw out the McAnaney engagement as having had, as its primary purpose, the resolution of a dispute rather than the provision of "original source" legal advice, there is nothing inherently suspicious about seeking, essentially, a second opinion from Hall Render, a firm that apparently had no ties to Tuomey and could thus be perceived as objective and independent.
- The detailed analysis provided by Greg Smith of Womble Carlyle put Tuomey on notice of a number of straight-face legal arguments against its transaction structure. Although Tuomey had its own competent counsel and there was no requirement to defer to someone else's analysis, this put Tuomey in something of a box. Without some type of detailed response, or at least some analysis in the file responding to the specific

concerns raised by Mr. Smith, Tuomey became vulnerable to the argument that it simply ignored interpretations of the law that it did not want to hear.

- Perhaps the greatest challenge was the trap Tuomey created for itself by agreeing to seek "tiebreaker" advice from Mr. McAnaney. Superficially, this must have looked appealing; you have a fight between two lawyers, let a third lawyer—of unassailable expertise and independence—referee it to a conclusion. In fact, though, it placed Tuomey in an almost unwinnable position. If Mr. McAnaney's assessment were that Tuomey's arrangement was reasonably bulletproof, great. If his assessment were otherwise, that presented Tuomey with problems not only for the proposed orthopedic surgery deal but also for the deals it had already done. And if, as proved to be the case, Tuomey instructed Mr. McAnaney to discontinue his analysis and pretty much forget about the whole thing, that would be the worst of all possible worlds: there would be no resolution to the Drakeford dispute, plus Tuomey would inevitably be viewed as having cut off advice that it did not want to hear, providing strong support for an argument that Tuomey was acting with bad intent. Simply put, if Tuomey were not prepared to see the joint engagement through to the end, it would have been far better off to decline to play and rely on its own counsel's advice.

What all this illustrates is really pretty simple. A lawyer does not have to agree with opposing counsel or even with cocounsel (or joint counsel). However, what a lawyer and that lawyer's client hear from those sources is going to be regarded as part of the total mix of information available in the analysis of the transaction, and it is ignored at the lawyer's and client's peril. Where the client and the lawyer reasonably believe that they are right and that the other lawyers are wrong, they will be well-advised to document that analysis in some fashion. To do otherwise is to expose themselves to claims of cover-ups and willful ignorance, claims that may be asserted against the lawyer as well as against the client.

§ 7:8 Two micro questions, two macro questions, and not enough answers—Is the advice-of-counsel defense dead?

Beyond those sorts of relatively narrow and fact-specific

lessons, there are larger ones as well. In Tuomey's defense strategy, advice of counsel took center stage. Essentially, Tuomey's arguments were "we didn't do anything wrong" and "if we did do anything wrong, we did it because our lawyers told us it was okay." Had Baptist Medical Center or UMDNJ gone to trial, it seems likely that they would have raised the same arguments. Given the complexities of health care regulation, it is difficult to imagine that a provider client that had in fact sought legal advice would ever defend against a scienter-based claim without arguing that it was just following instructions from the lawyers.

However, *Tuomey* suggests that such a defense may be more illusory than real—not because it does not make intellectual sense, but because in practice it is in the nature of a doomsday device, as likely to blow up the defendant as it is to blow up the prosecution's case. This is true as a result of the interaction of two phenomena—the way in which legal advice is developed and rendered in the health care transactional setting and the way in which such a defense must be executed.

As alluded to above, the typical physician transaction involves the interplay of a number of complex laws (and interpretations thereof), and the legality of a transaction may hinge on relatively fine distinctions of fact and structure. Further, because it is unlikely that a client is going to communicate its expectations and desires in terms that have been carefully crafted to parrot the relevant statutes and rules, there is often some aspect of "the Lecture" in attorney-client dialogue, as the lawyer reframes the client's "we want to find a legal way to keep this doc on board" into a structure that actually works. If the end result of that process includes a written opinion, it is likely to be hedged in some fashion ("we have assumed that you're going to do things just the way we tell you to and that you don't intend to do anything you shouldn't do") and may well include recommendations as to other actions the client might take to further insulate the transaction.

The problem with this is that such an opinion contains the seeds of a claim that the client was in fact planning to do the wrong thing (or else why would there be any need for "recommendations," and why would the client not have followed them to the letter?) and the seeds of a claim that the lawyer knew that he or she was rendering an opinion to provide

paper cover for an inappropriate transaction (or else why would the lawyer needed to make so many "assumptions" that in hindsight were plainly inconsistent with facts the lawyer should have known?). As was illustrated in both *Anderson* and *Tuomey*, a prosecutor or quasi-prosecutor armed with knowledge of how the deal actually played out to its unhappy end can readily use such an opinion, or research memorandum, or letter of advice, to "prove" that the client intended to perpetrate a fraud and that the lawyer was an enabler, or even a coconspirator, with respect thereto.

But it's not just the final product that will be open to scrutiny. By raising the advice-of-counsel defense, the client essentially opens up its files and those of its lawyers. Any internal disagreement among the lawyers, whether or not well-founded; any imprudent e-mail from the client ("if we don't get her this contract by tomorrow, she's going to pull all her cases"); any question about the bona fides of a valuation ("I don't see how he's getting to the number, but he's the expert"); any failure to implement the lawyer's suggestions regarding the transaction—all these things are subject to being aired out and used as evidence of both client's and lawyer's culpability. Even worse, of course, would be situation where the files reveal that the client got advice from this particular counsel because it rejected the advice of other counsel.

What all of this may mean is that the advice-of-counsel defense is somewhat toothless in any case that is headed for trial. In settlement negotiations, there may still be room to argue that the client relied in good faith upon its lawyers as a way of mitigating their potential culpability. In front of a jury, though, the nuances are likely to go out the window, and every expression of doubt by the lawyers will be held up as proof that, in getting past such doubt, they sold out to their client's evil plans in pursuit of the almighty legal fee.

§ 7:9 Two micro questions, two macro questions, and not enough answers—Can a client ever be innocent? Can a client ever be guilty?

A still larger question is what these cases, considered not in isolation but rather as archetypes, say about the relationship of lawyer and client in the context of physician transactions (and by extension, other health care transactions).

Fundamentally, a client should be entitled to rely on advice received from counsel that the client reasonably believes to be knowledgeable and competent, assuming that the client sought such advice in good faith and with disclosure of all relevant facts. Viewed in a certain light, however, these cases raise questions about whether that fundamental principle has any real application where health care fraud laws are concerned.

In that context, it is useful to consider the context of these cases and the perception of them within the health care bar. When the lawyer indictments in *Anderson* became public, it is probably fair to say that the bar reacted with alarm because these were two respectable lawyers (and later three other respectable "unindicted coconspirators") who were accused of criminal behavior for doing what respectable lawyers do—advising their clients not to do the wrong thing, to do the right thing, and to make sure the paperwork supported the decision to do the right thing. For the most part, there did not seem to be any significant viewpoint that this was anything other than the effort of an overzealous prosecutor to play lawyer off against client and to ensure that someone paid the price for a deal that pushed the envelope too far.

UMDNJ presented a somewhat different scenario. For those who took the time to review the monitor's report, what was at issue seemed less a question of lawyers providing a false veneer of legitimacy to cover up a fraudulent scheme than a question of whether the lawyers did anything meaningful at all by way of advice and whether they were so marginalized in the process that no advice would have stopped the CAPs train from rolling down the track. Alternatively, others saw the situation as a lawyer being scapegoated for reasons of expediency in a fight that was as much political as legal. In either case, those lawyers who thought about the case probably viewed it as an outlier defined by its own peculiar (in multiple senses) facts—a New Jersey version of "Forget it, Jake; it's Chinatown."[1]

Tuomey, though, brought the deep questions to the surface. It is one thing to look at a case where the client engaged

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[Section 7:9]

[1]Robert Towne, Chinatown (Paramount Pictures 1974.).

plainly inexperienced, or even incompetent, legal counsel; the client relies on such counsel's advice at its own risk, and the lawyer who renders advice beyond his or her capacities should expect some trouble as a result. Likewise, it is one thing to look at a case where the client willfully concealed from its counsel information that would have revealed its own evil intent; in some respects, *Anderson* might be that case. There, the client deserves what it gets, and the lawyers should expect (one thinks) at most to be embarrassed by their inability to figure out that they were being fooled.

But what is one to make of *Tuomey?* The scenario is full of lawyers, and there is not one in the mix that could reasonably be said to be lacking in expertise or competence. Likewise, there does not seem to be a plausible case to be made that Tuomey concealed relevant information from its counsel, at least as a general matter. Instead, its motivations and thought processes seem to have been almost aggressively transparent. And yet, we are confronted with a paradox: how could all of these competent, informed lawyers arrive at such diametrically opposite positions? How could the government's lawyers (and those of Dr. Drakeford) argue so clearly and logically that the Tuomey contracts were fatally flawed, while Tuomey's transaction counsel and its trial counsel likewise marshal clearly articulated and intellectually consistent arguments that things were fine, at least to a reasonable level of tolerance?

It is certainly possible for lawyers to look at the Tuomey employment arrangements and conclude that they were far too aggressive if not plainly beyond the pale. At the same time, the arguments raised on Tuomey's behalf are not frivolous, even if some may not find them persuasive. Further, even if one finds it credible that Tuomey's long-standing local lawyers had their judgment compromised by fear of losing the client (and nothing herein should be read as expressing a view on that), the question remains as to why a reputable law firm from halfway across the country, with no prior ties to Tuomey and no economic dependence on Tuomey's continuing business, would compromise their own position to bless an arrangement that they did not believe to be defensible (and nothing herein should be read as expressing a view on that either).

Thus, *Tuomey* raises two unanswerable questions. If it may be agreed that the laws regulating relationships among

providers and referral sources have become so complex that a client must rely on expert counsel, the first question is whether a client who seeks out competent advice in good faith and receives advice from objectively competent counsel can ever reasonably be determined to have the scienter necessary for False Claims Act liability (assuming the client behaves in accordance with that advice, of course). Put in more straightforward terms, if a client's board of directors cannot insulate itself from liability from any scienter-based claim by getting a well-reasoned opinion from indisputably competent counsel, how can it ever insulate itself?

The second question essentially inverts the first. If a lawyer cannot educate a client on what the law permits and what it prohibits without risking the accusation that the lawyer is simply providing the client with the tools to provide legal cover for its illegal acts, how can the client ever act on the lawyer's advice or even take the risk of seeking such advice in the first place? If the attorney-client dialogue carries with it the risk that each party may be tainted by too much information from the other party, does "advice of counsel" even have any theoretical viability as a defense?

This may appear to be a needlessly apocalyptic way of looking at things, and the answers to these questions are far from clear. What is clear, however, is that health care lawyers and health care clients increasingly live in a world where the ways in which they communicate, and the words with which they do so, may entangle each of them in a dangerous web if and when their transactions face prosecutorial or regulatory scrutiny. This is nowhere more evident than in the treacherous landscape of physician transactions where the stakes are high and the rules highly convoluted.

§ 7:10 Epilogue: in which we eavesdrop on a brief chat

"Sit down," I said, "and listen carefully." I was making ready to explain the Stark Law.

"I understand how important it is for you to keep Dr. Welby at your hospital. I know that it's important to keep these high-reimbursement procedures at a level that lets you offset the loss you incur on your charity-care clinic. But no, there's really no way to provide an income guaranty to a surgeon who's already in the community and even already on your medical staff."

I furrowed my brow to look more thoughtful. "Now, under the Stark Law there is a way to pay a doctor for work she does under a 'personal services agreement.' If only there were some sort of service you needed that Dr. Welby could perform, then you could pay her for that. Of course, you'd need a fair market value analysis. . . ."

The hospital administrator looked at me. "Maybe," he said, "maybe I could make Dr. Welby a medical director. . . ."