Chapter 13

Target-at-Law: Instructive Moral Lessons from the New Lawyer Wars

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IV. IN CASE OF EMERGENCY, BREAK GLASS: STRATEGIES FOR AVOIDING PERSONAL EXPOSURE WHEN THE CLIENT IS BEING INVESTIGATED (WHILE STILL FULFILLING RESPONSIBILITIES TO THE CLIENT)

V. CONCLUSION: BURNED ALL MY NOTEBOOKS, WHAT GOOD ARE NOTEBOOKS? THEY WON'T HELP ME SURVIVE

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I. INTRODUCTION: THIS AIN'T NO PARTY, THIS AIN'T NO DISCO, THIS AIN'T NO FOOLIN' AROUND[1]

§ 13:1 Introduction

Ann O. Baskins. Christi Sulzbach. Mark Belnick. William Sorin. W. Jay Lapine. Susan Skaer. Myron Olesnyckyj. David Lubben. John Isselmann, Jr.

These names are not as familiar, perhaps, as Enron, WorldCom, or Fannie Mae. Yet, all of them are names that, in their own way, are reflective of the "corporate crisis" phenomenon that has played out in the media and in the legislative, regulatory, and enforcement arenas since the collapse of Enron Corporation in late 2001. These are the names—and not all of the names, just a sampling—of general counsel who have resigned, retired, been terminated, been sued, been sanctioned, or been indicted in connection with corporate scandals ranging from accounting fraud and Medicare fraud to "pretexting" and stock option backdating.[1] Some of the names are front-page familiar: who (among readers of the business press, at least) has not heard of Ann Baskins, the general counsel who apparently permitted the use of

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[1]David Byrne, Life During Wartime, on Talking Heads, Fear of Music (Sire/Warner Bros. 1979) (hereinafter "Byrne, *Wartime*").

[Section 13:1]

[1]*See, e.g.,* Sue Reisinger, Saw No Evil, Corp. Couns. (Jan. 2007) at 68–77 (hereinafter Reisinger, *Saw No Evil*); Sherry Karabin, Back in the Dock, Corp. Couns. (Jan. 2007) at 15; D.M. Osborne, Exit-of-the-Month Club, Corp. Couns. (Jan. 2007) at 17–18; Complaint, Securities & Exch. Comm'n v. Isselmann, Case No. CV 04-1350 MO (D. Ore.), Sept. 21, 2004, *available at* http://www.sec.gov/litigation/complaints/comp18896b.pdf (hereinafter "Isselmann Complaint"); Miriam Rozen, Losing It All, Corp. Couns. (Feb. 2003) at 66–74; Anthony Lin, A Cautionary Tale, Corp. Couns. (Sept. 2004) at 78–86. For a highly interesting empirical survey of publicly disclosed enforcement cases against inside counsel, *see* John K. Villa, SEC and Criminal Proceedings Against Inside Corporate Counsel (Sept. 2005), available to members from the Association of Corporate Counsel (http://www.acc.com) (copy on file with author).

pretexting in Hewlett-Packard's investigation of its own directors?[2] Others are known mostly to those who track such scandals. For example, as will be detailed below, the unfortunate Mr. Isselmann, formerly general counsel of a fairly obscure electronics company, was fined by the Securities and Exchange Commission for, essentially, blowing the whistle too late on an accounting fraud that he neither participated in nor understood.[3]

The point that these names—and the events surrounding them—illustrate is this: corporate counsel, especially in-house counsel, are not insulated from exposure, ranging from termination to criminal penalties, where their clients are caught up in allegations of wrongful actions. The lessons for counsel in the corporate scandals of recent years can tell us much about the duties of, and expectations placed on, corporate counsel. Further, they can tell us much about the appropriate role of counsel when a scandal erupts, and about the personal dangers facing both inside and outside counsel when an organizational client strays into the grey areas of corporate behavior—or beyond. In an industry as highly regulated as health care, and as fraught with public interest and legislative concern, these dangers can be very real indeed.

Using some specific examples from real life—the names aren't changed, so nobody is protected—this chapter will explore some of the bases for personal liability—civil or criminal—that have been asserted or threatened against counsel in the context of corporate investigations and enforcement activities. It will also attempt to identify relevant professional responsibility issues for counsel who find themselves to be the subjects or targets of such activities, and possible ways to avoid or mitigate such exposure.

II. WHY LAWYERS BECOME TARGETS, PART ONE: SOME BRIEF, YET HARROWING, VIGNETTES

§ 13:2 Generally

As a predicate to exploring both the practical and profes-

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[2]*See* Reisinger, *Saw No Evil*.

[3]*See* Isselmann Complaint, *passim*; Tamara Loomis, Setting an Example, Corp. Couns. (Jan. 20, 2005), *available at* http://www.law.com/jsp/article.jsp?id=1105968930177 (hereinafter "Loomis").

sional responsibility implications of corporate scandals for inside and outside counsel, it is useful to take a brief look at some of the allegations made against lawyers in publicized cases of the recent past and the present. Through these examples, it is possible to discern at least some patterns of behavior and circumstance that can expose lawyers to greater risk of personal liability. The following sections will discuss four cases, involving three lawyers, that provide instructive lessons for health care corporate counsel. Three of the cases arise from the health care industry. The remaining case does not, but is such a perfect example of a particular sort of risk that it is irresistible to include it.

One of the matters outlined below involved criminal charges; the other three involved civil proceedings. In all of them, the lawyers involved, to the extent that they have responded publicly, denied (or at least did not concede) liability. It is thus important to note that, for the most part, what is discussed in this section deals with allegations made by government representatives in prosecutorial or quasi-prosecutorial roles without much regard to the ultimate truth or falsity of such allegations. The purpose of the exercise is simply to look at a few fact situations in which lawyers have been alleged to have engaged in acts or omissions that subjected them to personal liability or that exposed their clients to serious civil or criminal repercussions in order to see what situations pose particularly high risks for lawyers. Accordingly, there is no intent in this chapter to imply that any particular allegation is true or that any lawyer subject to any such allegation is culpable, and no such inference should be drawn.[1]

§ 13:3 Franklin Brown/Rite Aid

Franklin Brown was the longtime general counsel/chief legal officer of Rite Aid Corporation, where he also served for a number of years as a director and as vice chairman, ultimately retiring in 2000. In 2003, Brown, along with Rite

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[Section 13:2]

[1]In one of the matters discussed, the lawyer in question was found guilty at trial, and in one of the others, the lawyer in question entered into a civil settlement agreement without admitting or denying liability. Those cases are identified accordingly in the text.

Aid's former chief executive officer, its former chief financial officer, and another officer, was indicted in the Middle District of Pennsylvania on a variety of securities fraud-related and obstruction of justice charges centering on an alleged scheme to falsify financial information in order to inflate the market value of Rite Aid stock.[1] As a result of the alleged scheme, Rite Aid ultimately took what the indictment characterized as "the largest restatement of corporate income in the history of the United States."[2]

According to the indictment, Brown participated with the CEO and CFO in "devis[ing], organiz[ing] and implement-[ing] the scheme." Further, among many other things, the indictment alleged that: Brown and the CEO "quickly settl[ed a] lawsuit" in order to "silence" a terminated officer whose allegations threatened to expose a portion of the scheme; Brown executed Rite Aid loan guaranties relating to bank loans made to a senior executive and her husband and provided "bogus" excerpts of board minutes approving the guaranties to the lender; Brown and the CEO directed the payout of certain incentive awards based on fraudulent earnings that would not have been paid absent the fraud; Brown created backdated documents that improperly and without authorization enhanced certain incentive awards payable to himself and other officers; Brown and the CEO created other fraudulent documents relating to employee benefits and severance compensation; Brown concealed from Rite Aid's auditors information relating to the timing of a lawsuit settlement; Brown paid a fired employee $5,000 in cash to sign an affidavit supporting a false accounting entry;[3] and Brown

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[Section 13:3]

[1]*See* Indictment, United States v. Grass, et al., Case No. 02 Cr. 146 (M.D. Pa. June 21, 2002), *available at* http://www.usdoj.gov/dag/cftf/chargingdocs/grassetalind.pdf (hereinafter "Brown Indictment"); Eriq Gardner, The Ties That Bind, Corp. Couns. (Oct. 2003) at 17 (hereinafter "Gardner").

[2]Brown Indictment Introduction, ¶ 48. The restatement amounted to $1.6 billion, an amount which unfortunately seems rather pedestrian after the market meltdown of 2008.

[3]*See* Brown Indictment Count One ¶¶ 4, 11, 15 23–24, 25–28, 34, 77–78, 110.

participated in filing or causing to be filed various false reports with the Securities and Exchange Commission.[4]

The indictment further charged Brown with a variety of obstruction charges relating to investigations by the SEC, the FBI, and a federal grand jury. In particular, Brown was alleged to have improperly coached a purported co-conspirator prior to an interview by outside counsel for Rite Aid; to have instructed an employee to delete computer records relating to some of the fraudulent activity; to have provided false and misleading information to lawyers conducting an internal investigation for Rite Aid; to have encouraged other employees to withhold information from the investigators; to have falsified documents; to have conspired with other employees concerning what information would be provided by Brown and such other employees to the investigators; and otherwise to have tampered with witnesses and manipulated evidence to mislead and obstruct the investigations.[5] In a particularly poignant moment, the indictment alleged that Brown (after his formal retirement from Rite Aid) had "[o]n April 1, 2001, . . . met with [Rite Aid's former president, who, infelicitously, was wearing a wire] . . . to discuss [the former president's] upcoming interview with the FBI at the U.S. Attorney's Office. At the outset of the recorded conversation BROWN told [the former president] he pledged 'his life, his trust, and his sacred honor' to [the former president], and that he had put himself totally on the line for you guys.' "[6]

Brown, the only one of the four indicted defendants to go to trial (after he withdrew from an earlier plea agreement), was convicted on 10 counts carrying potential jail time of 65 years. At the time of his sentencing, he was 76 years old.[7]

§ 13:4 John E. Isselmann, Jr./Electro Scientific Industries

By contrast, Jack Isselmann was only in his thirties when

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[4]*See* Brown Indictment, *passim*.

[5]*See* Brown Indictment Count 33, *passim*.

[6]*See* Brown Indictment Count 33, ¶ 22. Later reports indicated that Rite Aid's former CEO was also present at the meeting. *See, e.g.,* Gardner.

[7]*See* U.S. v. Brown, 338 F. Supp. 2d 552 (M.D. Pa. 2004); Stephen Taub, Jury Conviction for Former Rite Aid Exec, CFO.com (Oct. 21, 2003), *available at* http://www.cfo.com/article.cfm/3010659.

he served as general counsel of Electro Scientific Industries (ESI), a publicly traded company that made manufacturing equipment for the electronics industry. According to a civil complaint filed by the SEC, ESI's chief financial officer and controller developed a scheme to "secretly and unilaterally . . . eliminate vested retirement and severance benefits in ESI's Asian offices," something ESI was not legally allowed to do, in order to lower ESI's reported expenses and convert a loss into a profit. According to the SEC, "Isselmann was not involved, present, or consulted when the CFO and the Controller made the accounting decision [to treat the benefits as terminated]."[1]

Subsequently, at a meeting of ESI's audit committee at which Isselmann was present, the CFO informed the audit committee that "the Japanese benefits were not legally required and . . . the decision to eliminate them had been approved by legal counsel." Isselmann did not know that the elimination of the benefits was being used to boost ESI's earnings, but did know that he had neither reviewed nor approved the decision nor referred it to outside counsel. Isselmann thereafter became aware that ESI had provided its auditors with a memorandum stating that ESI had "no legal obligation" to pay the benefits. He allegedly did not inform the auditors that he had neither reviewed the matter nor, as of that time, referred it for review by outside counsel, although there is no allegation that he understood the financial statement impact of the elimination of the benefits.[2]

Isselmann engaged outside counsel, who informed him that ESI could not terminate benefits for its Japanese employees without such employees' consent. He did not at that time provide this information to either the outside auditors or the audit committee. Subsequently, he attempted to raise the issue at a meeting of ESI's Disclosure Committee in preparation for the filing with the SEC of ESI's quarterly report on Form 10-Q. According to the SEC, the CFO "objected," and Isselmann did not further raise the matter during the

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[Section 13:4]

[1]*See* Isselmann Complaint at ¶¶ 8–9.

[2]*See* Isselmann Complaint at ¶¶ 10–11. After the case was settled, Isselmann was reported to have stated that "he thought of the Japanese benefits matter as an employment, not an accounting, issue." *See* Loomis.

meeting. After the meeting, however, he provided the written opinion of outside counsel to the CFO, to the effect that ESI could not unilaterally eliminate the benefits. A member of the audit committee questioned the charge to earnings, but Isselmann allegedly did not provide the director with the legal advice that he had received.[3]

In the following year, on March 31, 2003, Isselmann allegedly learned that the CFO (who had by then become the CEO), had, "late at night," eliminated the accrued liability for the Japanese benefits in response to learning of an accounting error that would reduce earnings. This, apparently, was the first time that Isselmann realized the accounting impact of terminating the benefits and that such termination had been used to inflate ESI's earnings. Isselmann reported this to outside counsel, and thereafter to the audit committee. ESI conducted an internal investigation and restated its results for the quarter in which the termination had been recorded.[4] The SEC thereupon brought a civil complaint against Isselmann for securities fraud. Isselmann, without admitting or denying the allegations, agreed to pay a $50,000 civil penalty and consented to an injunction against future violations of the securities laws. ESI itself was not the subject of any enforcement action.[5] Isselmann himself expressed the view that the SEC had singled him out to make an example of him for other lawyers, a view that has some intellectual appeal.[6]

§ 13:5 Christi Sulzbach/Tenet Healthcare Corporation

Within the health care industry, the highest-profile lawyer who has been the target of government enforcement activities in the recent past is probably Christi R. Sulzbach, the former general counsel and chief compliance officer of Tenet

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[3]*See* Isselmann Complaint at ¶¶ 12–15.

[4]*See* Isselmann Complaint at ¶¶ 16–17.

[5]*See* Securities & Exch. Comm'n Litigation Release No. 18896 (Sept. 23, 2004), *available at* http://www.sec.gov/litigation/litreleases/lr18896.htm.

[6]*See* Loomis.

Healthcare Corporation.[1] Ms. Sulzbach is a defendant in two separate civil actions in federal court: a securities fraud action brought in the Central District of California in April 2007,[2] which nobody much talks about, and a civil False Claims Act suit brought in the Southern District of Florida in September 2007,[3] which everyone in the health care bar talks about. As this chapter is written, months or perhaps years remain before either case will go to trial, and thus the ultimate resolution of the facts at issue is unclear. However, the allegations made in the cases offer many illustrations of the traps that can arise for the supposedly wary.

§ 13:6 Christi Sulzbach/Tenet Healthcare Corporation—The Sulzbach False Claims Act case

In the Florida case, the United States alleges that Ms. Sulzbach is personally liable under the civil False Claims Act for claims for payment submitted by Tenet that were prohibited under the Stark law, for failing to disclose the underlying violations of the Stark law, and, in essence, for obstructing the government's investigation of false claims purportedly submitted by Tenet. Tenet's corporate liability was resolved in the settlement of an earlier qui tam case, but the government asserts a right to recover against Ms. Sulzbach personally in this new litigation.

In 1994, Tenet's predecessor National Medical Enterprises, Inc. (NME) entered into a Corporate Integrity Agreement (CIA), which provided, among other things, that NME would

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[Section 13:5]

[1]*See generally* Sherry Karabin, Critical Diagnosis, Corp. Couns. (Nov. 2007) at 17–18 (hereinafter "Karabin").

[2]*See* Complaint in Securities & Exch. Comm'n v. Tenet Healthcare Corp., et al., No. CV-07-2144 (C.D. Cal.), filed Apr. 7, 2007, *available at* http://www.sec.gov/litigation/complaints/2007/comp20067.pdf ("Sulzbach SEC Complaint"). This is the original complaint; an amended complaint was subsequently filed after the court dismissed some counts of the original complaint, and that amended complaint survived a motion to dismiss and reinstated those counts. However, the distinction between the complaints is not material for the discussion herein.

[3]*See* Complaint in United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), filed Sep. 18, 2007, *available at* http://www.healthlawyers.org/email/pg/070920fraud/USv%20ChristiR%20Sulzbach__Complaint.pdf ("Sulzbach FCA Complaint").

obtain formal approval of outside counsel for contracts involving payments to physicians and preserve opinions of outside counsel approving such contracts, would provide annual compliance reports to the Department of Health and Human Services (HHS), would report to HHS "any credible evidence of misconduct that management had reasonable grounds, after appropriate inquiry, to believe constituted a material violation of [laws governing federal healthcare programs]," would investigate any report of misconduct by NME employees that came to its attention and notify both HHS and the Department of Justice of the outcome of any such investigation, and would take appropriate corrective action with respect to any problems identified in such investigation. Ms. Sulzbach, then NME's associate general counsel, was named as Corporate Integrity Program Officer under the CIA and, according to the government, "was primarily responsible for ensuring . . . compliance with the Corporate Integrity Agreement," which continued to be binding on Tenet, the name taken by the combined corporation after NME's merger with American Medical Holdings (AMI).[1]

North Ridge Hospital, a former AMI hospital in Florida, entered into employment agreements with 12 physicians during 1993–1994 who are specifically identified in the complaint. According to the complaint, all of the contracts involved payments to the physicians that were "well above fair market value," and the physician employment relationships all resulted in significant annual losses unless physi-

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[Section 13:6]

[1]*See* Sulzbach FCA Complaint at ¶¶ 24–26. For a contemporaneous account of the events leading up to the original CIA and Ms. Sulzbach's role in helping Tenet respond to those events, *see* Vera Titunik, NME's Near-Death Experience, Am. Lawyer's Corp. Couns. Mag. (Winter 1994) at 28–42. The closing lines of that article provide, in hindsight, an ominous foreshadowing of the claims now asserted against Ms. Sulzbach:

> Sulzbach . . . responded with ambivalence when asked how she felt personally about the mountain of allegations, especially those of patient abuse [in NME's Psychiatric Institutes of America division]. "You're so focused on saving the company," says Sulzbach, "that you worry less about going to the roots and trying to find out 'Did this actually happen?' "

Id. at 42.

cian hospital admissions and referrals for ancillary services were taken into account.[2]

In February 1997, one Bennett, a Tenet executive familiar with the contracts, sent a memo to his superior, Heinemann, raising questions about potential Stark law issues under certain physician contracts, apparently including the North Ridge contracts. The memo was allegedly forwarded to Ms. Sulzbach, who then met with Bennett and an outside lawyer.[3] Thereafter, in May 1997, allegedly at the direction of Ms. Sulzbach, the firm of McDermott Will & Emery produced a report (which indicated that it relied in part on financial analyses and information provided by Tenet's Internal Audit Division) concluding that the physician contracts identified in the complaint raised serious potential Stark law violations. A revised version of the report, reaching the same general conclusions, was prepared by McDermott in June 1997.[4]

The government's complaint implies that the two McDermott reports were delivered to Ms. Sulzbach or at least to someone within Tenet. That implication has been challenged by Ms. Sulzbach.[5] However, whether as a reaction to such reports or otherwise, Ms. Sulzbach apparently sent a memo-

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[2]The contracts are discussed in detail at section VII of the Sulzbach FCA Complaint.

[3]*See* Sulzbach FCA Complaint at ¶¶ 82–86. The memo is included at App., Tab 3, to Defendant's Memorandum of Law in Support of Rule 12(b)(6) Motion to Dismiss, United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), filed Nov. 20, 2007 ("Sulzbach FCA Dismissal Memo").

[4]*See* Sulzbach FCA Complaint at ¶¶ 32–33, 87–88. The Sulzbach FCA Complaint suggests that the McDermott reports affirmatively concluded that the contracts violated the Stark Law. See ¶ 87. A review of the actual reports, which are at App., Tabs 11 and 12, to Sulzbach FCA Dismissal Memo, indicates that they did not actually express such a conclusion directly, although they did set out "findings" that, if correct, would provide a factual basis for such a conclusion.

[5]*See* Sulzbach FCA Dismissal Memo at 3, 11, and 11 n.5. Ms. Sulzbach's motion to dismiss was based on a statute of limitations defense (which was unsuccessful, at least at the motion-to-dismiss stage; *see* Opinion and Order Denying Motion to Dismiss, United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), entered Apr. 15, 2008 ("Sulzbach FCA 12(b)(6) Order")). However, her counsel asserted in that motion that if the case were to continue, the evidence would show that the McDermott reports were never delivered to Ms. Sulzbach or to anyone else at Tenet, and apparently that they arrived in Tenet's files because the "inexperienced McDermott associate" who prepared them later came to work at

randum dated July 31, 1997, to Heinemann directing that Heinemann "implement the corrective action identified by McDermott . . .. [and] provide [Ms. Sulzbach] with a written report on the status of the corrective action within 30 days."[6]

On or about June 27, 1997, after the dates of the McDermott reports but before the July 31 memo to Heinemann, Ms. Sulzbach signed Tenet's annual compliance report under the CIA, which did not make any reference to the North Ridge physician contracts, and certified that Tenet was in material compliance with the CIA. Tenet's 1998 compliance report, also signed by Sulzbach, likewise did not refer to the North Ridge physician contracts and contained the same certification. According to the complaint, Sulzbach neither disclosed nor caused anyone else to disclose the potential Stark violations to the government, although the contracts continued in effect (and Tenet continued to bill Medicare for referrals from the affected physicians) through various dates in 1998 and 1999.[7]

In May 1997, Sal Barbera, a former Tenet employee, filed

Tenet and either brought the reports with her or "retrieved [them] from McDermott." In her answer to the complaint, Ms. Sulzbach has denied that either version of the McDermott reports was produced to either herself or Tenet. *See* Amended Answer of Defendant Christi Sulzbach to the Complaint of the United States, United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), dated June 23, 2008, and entered on the docket July 2, 2008 ("Sulzbach FCA Answer"), at ¶¶ 32–33, 87–88. *See also* Sulzbach FCA Answer at ¶ 89 (denying that "any McDermott analysis was issued to Tenet or [Ms. Sulzbach] before the [June 27, 1997 compliance report under Tenet's CIA] was submitted").

[6]*See* Sulzbach FCA Complaint at ¶ 90. In her answer, Ms. Sulzbach admitted the existence of the July 31 memo to Heineman and admitted that she signed the memo but denied that she wrote the memo. *See* Sulzbach FCA Answer at ¶ 90.

[7]*See* Sulzbach FCA Complaint at ¶¶ 91–93. In connection with her motion to dismiss, Ms. Sulzbach's counsel suggested that the evidence to be presented at trial would show that "the lack of disclosure, and Ms. Sulzbach's certification that Tenet was in material compliance with its obligations under the CIA notwithstanding the lack of disclosure, were based upon her legitimate belief that the North Ridge issues, involving a discrete group of doctors at 1 of the 128 hospitals owned by Tenet in 1997, were not sufficiently material to trigger [Tenet's] disclosure obligations." *See* Sulzbach FCA Dismissal Memo at 6 n.2. In her answer, Ms. Sulzbach denied "the existence of Stark Statute violations at North Ridge as alleged [in the complaint]." *See* Sulzbach FCA Answer at ¶ 93. Her counsel has subsequently indicated that she would testify that "she was aware of the existence of potential Stark Law issues with respect . . . to the North

a sealed qui tam complaint alleging Stark violations arising out of the North Ridge physician contracts. The government intervened in the case (the "*Barbera* case") in 2001, and the case continued in litigation until 2004, during which period Tenet suggested in its litigation filings that it would show that the contracts did not violate the Stark law, or that even if they did, Tenet's employees did not have reason to believe that a violation existed and thus lacked the requisite scienter for False Claims Act liability. According to the government, during the course of the litigation Tenet withheld some 17,000 documents on the basis of privilege, and the Sulzbach complaint alleges that Ms. Sulzbach "participated in the decision" to withhold the documents. While the government sought to overturn Tenet's claims of privilege, the case settled before that issue was decided.[8]

In 2006, Tenet entered into a wide-ranging $920 million settlement with the government relating to various claims of Medicare fraud and overpayments. As part of the settlement, Tenet agreed to provide the government with a variety of documents that had been withheld as privileged, including the two McDermott reports and Ms. Sulzbach's July 31, 1997, memo to Heinemann. The complaint asserts that prior to such production, "the Government had no knowledge of the contents of the McDermott Reports, and no knowledge of what advice [Ms.] Sulzbach had received from McDermott regarding the Stark problems at North Ridge."[9] As a result, the government claims that it is entitled to re-

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Ridge physician agreements." *See* Memorandum of Law in support of Defendant's Motion to Compel, United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), Oct. 14, 2008, at 3.

[8]*See* Sulzbach FCA Complaint at ¶¶ 94–99. In her answer, Ms. Sulzbach "denie[d] that she was involved in deciding which documents to produce or withhold on grounds of privilege." *See* Sulzbach FCA Answer at ¶ 97.

[9]*See* Sulzbach FCA Complaint at ¶ 100. In arguing that the government's claims were time-barred, Ms. Sulzbach's counsel asserted that the government's allegations in the *Barbera* case clearly indicate that it was aware of the fundamental facts surrounding Ms. Sulzbach's alleged knowledge of the potentially illegal contracts, including her knowledge of the Bennett memorandum and her meeting with Bennett, and that the government in fact alleged in the *Barbera* case that Ms. Sulzbach had "direct personal involvement" in the matters that were the subject of that litigation and had signed the allegedly false compliance certifications in 1997 and 1998. *See* Sulzbach FCA Dismissal Memo, *passim*. While the

cover damages from Ms. Sulzbach with respect to some 70,000 payments made pursuant to purported false claims, with the basis for such liability being "[Ms.] Sulzbach's submission of false certifications, her failure to stop Tenet from violating the Stark [Law], and her failure to report Tenet's violations . . . because (1) her actions permitted Tenet to receive payments that it was not entitled to receive, and (2) her actions obstructed the Government's efforts to discover and recover past improper payments."[10] Ms. Sulzbach's total exposure under the complaint has been estimated at up to $31.5 million.[11]

§ 13:7 Christi Sulzbach/Tenet Healthcare Corporation—The Sulzbach securities fraud case

In April 2007, the Securities and Exchange Commission filed a securities enforcement action against Tenet and four of its former executives, including Ms. Sulzbach. Two of the executives entered into simultaneous settlements with the SEC; Ms. Sulzbach and the remaining defendant did not. The key thesis of the complaint was that Tenet had violated the federal securities laws by failing to disclose a scheme to "aggressively increase gross charges" at its hospitals in order to inflate Medicare outlier payments to those hospitals, thus enabling Tenet to increase its revenues and meet its earnings targets.[1]

According to the complaint, in 1999 and again in 2001 and

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court denied Ms. Sulzbach's motion to dismiss, it did so on the basis that the question of what the government knew and when it knew it was a factual question not susceptible of resolution on a 12(b)(6) motion. *See* Sulzbach FCA 12(b)(6) Order at 3–4. If the case goes to trial, it appears fair to say that a key issue will be whether the McDermott reports, assuming Ms. Sulzbach to have been aware of them, somehow provide a basis for liability that was not apparent at the time of the *Barbera* case.

[10]*See* Sulzbach FCA Complaint at ¶¶ 100–102.

[11]*See* Karabin, at 18.

[Section 13:7]

[1]*See* Sulzbach SEC Complaint at ¶¶ 4–12. As alluded to above, in 2006, Tenet entered into a massive settlement agreement with the government to resolve the outlier payment claims, among many others, with the Department of Justice and HHS. It is important to note that what is at issue in the Sulzbach SEC litigation is not (at least directly) the propriety of the outlier payment strategy as a matter of health care regulatory law,

2002, Tenet managers had raised questions with Ms. Sulzbach and others about the legality of the outlier payment scheme. In early 2002, a Tenet manager allegedly gave Ms. Sulzbach a binder of information relating to the dramatic increase in Tenet hospitals' outlier ratio, which Ms. Sulzbach retained and labeled as attorney-client privileged. At around the same time, Tenet's internal audit department began a review of outlier payments, and upon learning of the review, Ms. Sulzbach allegedly contacted the head of internal audit and directed him to send the report directly to her. The complaint asserts that she also labeled that report as privileged and kept the only copy of the report in her office. In addition, the complaint alleges that Ms. Sulzbach attended a March 2002 dinner meeting of Tenet's board of directors at which Tenet's chief operating officer made a presentation on Tenet's strategy to increase gross charges, and that she collected the COO's notes and presentation materials after the presentation and "claimed that they were privileged attorney-client communications."[2]

During the course of these events, Tenet filed various reports with the SEC, some of which were also incorporated by reference into a Tenet securities offering document. According to the complaint, Sulzbach had "supervisory responsibility for drafting Tenet's [Annual Report on] Form 10-K" and was also provided with drafts of its quarterly reports on Form 10-Q. In her review of the 2001 10-K, she made a marginal note on a draft which the SEC read to imply that she was aware that Tenet's disclosures concerning its outlier revenues were inadequate. She also served on the disclosure committee formed by Tenet to formalize the review process for SEC filings, but allegedly did not raise any issues regarding the outlier payment strategy in disclosure committee meetings, and she signed "sub-certifications" attesting to the completeness and accuracy of Tenet's filings, which subcertifications allegedly formed some of the basis for the Sarbanes-

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but whether Tenet had an obligation under the securities laws to disclose the significance of its outlier payment strategy to its results of operations. For a somewhat provocative discussion about the legal propriety of the outlier payment strategy itself, *see* Elizabeth A. Weeks, *Gauging the Cost of Loopholes: Health Care Pricing and Medicare Regulation in the Post-Enron Era*, 40 Wake Forest L. Rev. 1215, *passim* (2005).

[2]*See* Sulzbach SEC Complaint at ¶¶ 67–74, 158–163.

Oxley-required certifications of Tenet's chief executive officer and chief financial officer that accompanied such filings.[3]

The SEC's complaint alleges that Ms. Sulzbach knew, or was reckless in not knowing, that Tenet's public filings were misleading because of their failure to disclose the outlier scheme and that she had both primary liability and aiding-and-abetting liability for various violations of the securities laws because of her role in preparing, reviewing, and approving those filings. The complaint also alleges that Ms. Sulzbach, along with the other defendants, received financial benefits that were enhanced by the impact of the purported fraud.[4] In October 2007, the court granted Ms. Sulzbach's motion to dismiss one of the counts against her for failure to state a claim on which relief could be granted, declined to dismiss the remaining counts, and gave the SEC leave to amend its complaint as to the dismissed count.[5] Thereafter, the SEC filed its amended complaint as to the dismissed count, Ms. Sulzbach's motion to dismiss with respect thereto was denied, and Ms. Sulzbach filed her answer on February 1, 2008.[6]

III. WHY LAWYERS BECOME TARGETS, PART TWO: MAPPING OUT SOME DANGER ZONES

§ 13:8 Generally

The vignettes outlined above briefly describe four high-profile matters having rather disparate facts. Further, as noted, the current posture of those matters likewise varies considerably: a criminal conviction after trial in the *Brown*

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[3]*See* Sulzbach SEC Complaint at ¶¶ 13–17, 87–91, 96–111, 164–65.

[4]*See* Sulzbach SEC Complaint at ¶¶ 184–87, 231–40.

[5]*See* Minute Order Granting in part and Denying in part Defendant Christi R. Sulzbach's Motion to Dismiss Plaintiff's Complaint, Securities & Exch. Comm'n v. Tenet Healthcare Corp., et al., Case No. DV 07-2144 DSF (RZx) (C.D. Cal. Oct. 2, 2007).

[6]*See* Order, dated Jan. 17, 2008, Securities & Exch. Comm'n v. Tenet Healthcare Corp., et al., Case No. DV 07-2144 DSF (RZx) (C.D. Cal.); Answer of Christi R. Sulzbach to First Amended Complaint for Violations of the Federal Securities Laws, Securities & Exch. Comm'n v. Tenet Healthcare Corp., et al., Case No. DV 07-2144 DSF (RZx) (C.D. Cal. Feb. 1, 2008) ("Sulzbach SEC Answer"). Unsurprisingly, the answer challenges many of the assertions in the complaint that have been described above, or at least the SEC's interpretations thereof.

case, a settled civil enforcement action for Mr. Isselmann, and two highly contested, potentially big-ticket civil actions involving Ms. Sulzbach.

Despite this broad scope of factual contexts, however, it is possible to discern some common threads and thus identify some high-risk areas for counsel representing organizations that are accused of engaging in inappropriate or illegal behavior. Some of these are outlined in this section. The following section will then attempt to identify some strategies for mitigating risk to the lawyer while still allowing for appropriate protection of client interests.

§ 13:9 The lawyer's Stockholm Syndrome—The distinction between representing a client and identifying with the client

According to Wikipedia, the preeminent research tool available today, the term "Stockholm Syndrome" refers to "a psychological response sometimes seen in an abducted hostage, in which the hostage shows signs of loyalty to the hostage-taker, regardless of the danger (or at least risk) in which the hostage has been placed."[1] It is, of course, sensationalistic to use that term to describe the relationship that a lawyer may develop with his or her client. However, particularly where a lawyer has a long, symbiotic relationship with a client, whether as inside counsel or outside counsel, there may be a tendency for the lawyer to blur the lines between being an objective professional advisor and a "team player." Sometimes, that may play out as loyalty to the organization itself; in other cases, it may play out as loyalty to particular managers, executives, or other leaders within the organization.

This is not necessarily a bad thing. A lawyer is obliged, within the bounds of professional responsibility, to be loyal to his or her client.[2] Further, subject to certain limitations of law and professional responsibility, a lawyer is generally

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[Section 13:9]

[1]*See* http://en.wikipedia.org/wiki/Stockholm_syndrome (last visited Nov. 22, 2008).

[2]*See* Model Rules of Prof'l Conduct R. 1.7, cmt. 1 (2008) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client.").

required to defer to the client's decision as to what goals the client seeks to accomplish, even if the lawyer would not necessarily make the same decision.[3] However, where the lawyer's identification with the client blurs the lines of independent judgment and objective advice, both client and lawyer may pay the price.

Consider the evidence in the *Brown* case above. Where a lawyer feels obliged to tell a client executive under government scrutiny that the lawyer has "put himself totally on the line for you guys," that would tend to suggest that the lawyer might have difficulty separating himself from those for whom he has put himself on the line, even where those persons were acting inconsistently with the organizational client's best interests, or with the law.

It is not clear what the evidence will show in the *Sulzbach* cases, when or if they go to trial, but certainly there is a fact pattern there that suggests at least the possibility of similar dangers. Ms. Sulzbach's association with Tenet extended for over a decade. During that time, it is fair to say that the company bounced from crisis to crisis with some regularity. In responding to those crises, Ms. Sulzbach did not only function as a lawyer, or even as a lawyer-cum-compliance officer; instead, she was frequently called upon to be the public face of Tenet as well. Did the need to wave the flag for her employer-client cloud her ability to objectively assess legal risks and advise management and the board about them? It is impossible to say that, but a dispassionate view of the facts at least raises that as a possibility.

Lawyers need to understand their clients and what their clients' goals and objectives are. While it is not legally necessary or always feasible, it is certainly more pleasant for the relationship if the lawyer can actually be enthusiastic about the client's goals. However, where a lawyer's loyalty to, or identification with, a client has become such that the lawyer cannot offer objective legal advice or cannot recognize when client personnel are pursuing their own interests at the expense of the client organization's interest, the lawyer's position can be severely compromised.

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[3]*See* Model Rules of Prof'l Conduct R. 1.2(a), R. 1.13 cmt. 3.

§ 13:10 The wrong kind of gatekeeper—The lawyer as Roach Motel®[1]

In the post-Enron era, there has been much discussion and debate about the role of corporate lawyers, both internal and external, as "gatekeepers."[2] Those who use that term seem usually to mean that lawyers have or should have, under certain circumstances, duties to disclose information relating to actual or threatened illegal or improper acts by corporate agents. However, gates swing both ways, and lawyers should not overlook the risk that may arise for them when they act as gatekeepers to keep information from relevant constituencies within their client organizations.

This was precisely the case with the ill-starred Mr. Isselmann: according to the SEC's complaint, Isselmann "[failed] to fulfill his gatekeeper role" by "fail[ing] to provide important information to ESI's Audit Committee, Board of Directors, and auditors regarding a significant accounting transaction that enabled ESI to report a profit rather than a loss."[3] As described above, taking the complaint at face value, Isselmann was not a party to the fraudulent scheme, apparently lacked the accounting background to understand its significance, and made some effort, if a stunted one, to raise questions about it with his employer-client's disclosure committee, its auditors, and its outside counsel. In the SEC's view, though, this was not enough; Isselmann had "bad knowledge," and did not do enough to make sure that it was brought to the attention of those who might have used it to prevent or expose the fraud.

[Section 13:10]

[1]Where "Roaches Check In . . . But They Don't Check Out!®," of course. *See* http://www.blackflag.com/products/roach__motel.php.

[2]*See, e.g.*, Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 Rutgers L. Rev. 9 *passim* (2003) (arguing for greatly expanded duties of lawyers to corporate shareholders, rather than to the corporation as an entity). *Cf.* John C. Coffee, Jr., *The Attorney as Gatekeeper: An Agenda for the SEC*, 103 Colum. L. Rev. 1293 *passim* (2003) (noting that the organized bar has resisted imposition of a gatekeeper role for lawyers and that the SEC had not directly asserted such a role with any persistence (at the time), and describing arguments for and against enhancing any such gatekeeper role).

[3]*See* Isselmann Complaint at ¶ 1.

Both of the *Sulzbach* cases illustrate this same sort of concern, in arguably more dramatic circumstances. In the *Sulzbach* False Claims Act case, a linchpin of the government's argument is that Ms. Sulzbach had knowledge from both the Bennett memo and the McDermott reports (which, as noted, Ms. Sulzbach's counsel have suggested she did not see or receive) of likely Stark law violations at North Ridge, but failed to disclose those to the government or to take appropriate steps internally to cease and remedy the violations.[4] In the SEC complaint, much of the argument centers around allegations that Ms. Sulzbach was presented with information from several quarters about the questionable outlier payment scheme but sealed off that information from others at Tenet and did not take steps to prevent Tenet from making misleading public disclosures that were tainted by the scheme's financial impact. There are different principles at work in the different fact settings of the two cases, and this is far from the only spin that could be put on either set of allegations. However, it appears clear that a significant thrust of the government's arguments in both cases is that Ms. Sulzbach had credible information about corporate misbehavior but failed to disseminate such information in ways that would have been in the corporation's best interest.

Obviously, in all three of these cases—even the *Isselmann* complaint, which was settled simultaneously with the filing of the complaint and so never contested on the public record—we have only the allegations of the government. There may be legitimate questions about whether the "non-disclosing" lawyers had defensible legal analyses that caused them to believe that alleged problems were not actual problems, or that actual problems were not material problems. There may be questions about what those lawyers actually did with the information, or what information they

[4]Indeed, in the *Barbera* case itself, the government suggested that Tenet maintained "a 'compliance program' that function[ed] as a 'Black Hole,' sucking in evidence of unlawful conduct and then preventing the light of that evidence from ever escaping the Legal Department (while allowing the unlawful conduct to continue)." *See* United States' Reply Brief in Support of Revised Motion to Compel, dated August 18, 2003, in United States ex rel. Barbera v. Amisub (North Ridge Hospital), Inc., Case No. 97-6590-CIV-JORDAN/BROWN (S.D. Fla.), at 7. The brief is included at App., Tab 8, to the Sulzbach FCA Dismissal Memo.

even had, and certainly about what their professional and legal duties were. The government has a point of view, and that point of view is not always accurate on either law or facts. However, it is clear that when an organization is accused of wrongdoing and an investigation suggests that the organization's counsel had credible information about the underlying facts and failed to get that information out to appropriate personnel within the organization—or even took affirmative steps to keep the information away from such personnel—such counsel will be in the government's sights.

§ 13:11 Called for the blocking foul—The lawyer as alleged obstructer

It is common for people who set out to be lawyers to have some interest, at least in the beginning, in justice. Accordingly, it may be tempting for lawyers to assume that someone who was not an active participant in a scheme to violate the law, and who perhaps did not even become aware of the scheme until well after it had been implemented, is unlikely to become the target of an investigation. You have to do something wrong before they can punish you, right? It is likewise common for lawyers, particularly those who came to the field through the vehicle of television dramas, to understand a lawyer's job to be defending his or her client, and using every lawful strategy to do so. Doing your job as a lawyer can't paint a bull's-eye on you, after all, can it?

Of course, as most leading questions are designed to do, these questions lead one into a trap. In fact, one of the great areas of exposure for lawyers under modern enforcement theory is the claim that the lawyer obstructed the investigation:

> The government prefers to bring cases which it can win easily and is particularly focused on actions which could be perceived as perverting the course of justice. Document destruction and witness tampering are paradigms of this sort of case. It is much easier to prove the commission of a lie to a jury than it

is to prove a more sophisticated or complicated securities case. Just ask Martha Stewart.[1]

Simply put, lawyers—especially in-house lawyers—who play a significant role in their clients' response to a government investigation relating to matters with which they were in any way connected, or as to which they became aware of culpability-implying information before the investigation commenced, can see their role in the proceedings shift dramatically. Once fraud or misconduct has been exposed—for example, by a cooperating defendant—its component parts tend to appear obvious, and counsel who has helped orchestrate the organization's response to the investigation may well be cast instead as one who has helped to obstruct the investigation.

The *Brown* allegations provide a textbook example of activities that expose a lawyer to obstruction charges (and indeed, if one takes the allegations at face value, which a jury apparently did, activities that actually constituted obstruction). Brown, according to the complaint, tampered with witnesses, sought to have records destroyed or deleted, lied and encouraged others to lie, and in general coached other employees so that their stories were in harmony. There is no particular lesson to be learned in this regard from the *Brown* case, except that lawyers whose professional judgment becomes wholly compromised are likely to meet harsh results.

More interesting are the allegations in the two *Sulzbach* cases, both of which seem to have an underlying subtext as obstruction cases even though neither of them was pled that way.[2] The complaints in both cases make a number of assertions that, to a greater or lesser degree, suggest obstruction theories, and the allegations in those complaints illustrate in

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[Section 13:11]

[1]Randy S. Segal & Richard K.A. Becker, Through the Looking Glass: Ten Lessons from In-House Counsel on Trial, ACC Docket (May 2004) 22–39, at 28.

[2]*See, e.g.,* Michael Z. Gurland, From the Sideline to the Front Line: United States v. Sulzbach (In-House Counsel and Compliance Officers at Risk for Corporate Fraud Prosecutions), Neal, Gerber & Eisenberg LLP White Collar — Health Law Compliance Case Study (Nov. 28, 2007), at 5 ("The novel use of the [False Claims Act in the Sulzbach FCA Complaint] may well be explained by the fact that, given the passage of time, this was

a more useful way than the *Brown* case does some difficulties that may arise in drawing the lines between analysis, defense, and obstruction.

The *Sulzbach* False Claims Act case was brought under a "false certification" theory. However, in their limitations-based argument in support of Ms. Sulzbach's motion to dismiss, her counsel argued fairly persuasively that the government's pleadings and arguments in the *Barbera* case indicate that the government had enough information about Ms. Sulzbach's knowledge of the underlying issues with the North Ridge physician contracts to have brought a false certification-based claim against her at that time.[3] The *Sulzbach* FCA Complaint apparently sought to anticipate and avoid this argument by strongly implying, without actually saying, that Tenet's decision to withhold the McDermott reports and the July 31, 1997, memo from Ms. Sulzbach to Heinemann from Tenet's discovery responses in the *Barbera* case (on the basis that such documents were privileged) was both inappropriate and orchestrated, at least in part, by Ms. Sulzbach. In the government's apparent view, had those documents been disclosed, the case that Ms. Sulzbach had falsely certified compliance with its CIA in 1997 and 1998 would have been clear, and the government could have pursued her individually in the *Barbera* case and/or held out for a larger corporate settlement in that case (because the withheld documents would have tended to make it easier to show that Tenet had acted with the requisite scienter to support corporate False Claims Act liability).[4]

That theory in turn seems to be based on the unarticulated premise that the decision to withhold those documents as privileged was improper. In that regard, it is interesting to note the government's apparently generalized resentment toward Tenet's defense of the *Barbera* case. In the *Sulzbach* FCA Complaint, the government seems almost to have had

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the only alternative left for the government to pursue. The crime of obstruction of justice, for example, would have been time barred.").

[3] *See* Sulzbach FCA Dismissal Memo at 7–12, 15–19.

[4] *See, e.g.,* David O'Brien, Christine Rinn & Michael Paddock, United States v. Sulzbach: Government Theories, Potential Defenses, and Lessons Learned, PowerPoint presentation prepared for Crowell & Moring LLP HOOPS 2007 seminar (Oct. 15–16, 2007), *available at* http://www.crowell.com/documents/DOCASSOCFKTYPE__PRESENTATIONS__865.pdf, at 13.

its feelings hurt that, in its trial memorandum and other briefs and pleadings filed in the *Barbera* case, Tenet denied liability and indicated its intent to argue (i) that the North Ridge physician contracts did not violate the Stark Law and (ii) that, in any event, the government and the relator would not be able to prove the elements of a False Claims Act violation. The government then goes on to note with righteous indignation the 2,300-plus pages of privilege logs identifying some 17,000 documents that Tenet had withheld on the basis of privilege, a decision that Ms. Sulzbach allegedly "participated in."[5]

A lawyer has an obligation of "candor toward the tribunal;" that is, among other things, a lawyer may not make a false statement of law or fact to a tribunal, offer evidence that the lawyer knows to be false, or knowingly allow a person to engage in "criminal or fraudulent conduct" relating to the proceeding at bar.[6] On the other hand,

> A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.[7]

It is impossible from a distance, and effectively with only the government's side of the argument on display, to evaluate whether the positions taken by Tenet in defending the *Barbera* case and, in particular, withholding 17,000 documents on the basis of privilege were taken in good faith.[8] It is also impossible to determine on the current record what

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[5]*See* Sulzbach FCA Complaint at ¶¶ 95–98.

[6]*See* Model Rules of Prof'l Conduct R. 3.3.

[7]Model Rules of Prof'l Conduct R. 1.3, cmt. 1.

[8]For a philosophical consideration of the government's attitude toward assertion of the attorney-client privilege in criminal and quasi-criminal enforcement cases during the general time of the *Barbera* case, *see generally* William W. Horton, *A Transactional Lawyer's Perspective on the Attorney-Client Privilege: A Jeremiad for* Upjohn, 61 Bus. Law. 95 (2005). That article predates the subsequent changes arising from the Department of Justice's "McNulty Memorandum" and the still more recent "Filip principles." *See* Department of Justice Press Release, *Justice Department Revises Charging Guidelines for Prosecuting Corporate Fraud*, Aug. 28, 2008, *available at* http://www.usdoj.gov/opa/pr/2008/August/08-odag-757.html.

role Ms. Sulzbach played in those positions. Assuming arguendo, however, that she pulled all the strings like a master puppeteer (a thesis that, as noted, she has denied), it would still appear that the McDermott reports would in fact have been subject to the attorney-client privilege and thus properly withheld, and arguably that the July 31 memo would have been so as well.[9] Nonetheless, if the *Sulzbach* False Claims Act case is recharacterized as an obstruction-of-justice case, which it seems to be in fact and in implication even if not in the nature of the specific violations pled,[10] it raises the interesting and difficult question of when a lawyer's participation in the aggressive defense of an enforcement action may be deemed to cross the line into obstruction.[11]

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[9]In the *Barbera* case, the government sought production of some privileged documents, apparently including the McDermott reports, pursuant to the crime-fraud exception to the attorney-client privilege. *See* Sulzbach FCA Dismissal Memo at 8–9. Even so, however, the privilege would still be properly asserted with respect to the documents (assuming the privilege had not otherwise been waived) unless and until a court had actually determined that the crime-fraud exception applied. *See, e.g.*, Prudential Ins. Co. of America v. Massaro, 2000 WL 1176541 (D.N.J. 2000), aff'd, 47 Fed. Appx. 618 (3d Cir. 2002) (in lawsuit by insurer against former in-house counsel, court found that crime-fraud exception to attorney-client privilege did not apply to unauthorized, voluntary disclosures of confidential information to third parties where there had been no judicial finding that exception applied and that such disclosures "inexcusably contravened [former counsel's] ethical duties as an attorney"). Thus, it is difficult to see how the identification of such documents on a privilege log could itself be asserted to be obstruction. The status of the July 31 memo is less clear. The attorney-client privilege relates only to communications between an attorney and a client with respect to a request for legal services or the rendition of legal advice. Ms. Sulzbach, however, functioned both as a lawyer and as a compliance officer, and communications to or from her in her compliance officer function would not necessarily be privileged. If the July 31 memo were read as being written for compliance officer purposes rather than lawyer purposes, the assertion of privilege might be seen as inappropriate.

[10]*See* Sulzbach FCA Complaint at ¶ 102 ("The United States was injured and suffered damages . . . because . . . [Ms. Sulzbach's] actions obstructed the Government's efforts to discover and recover past improper payments.")

[11]*See, e.g.,* Thomas F. O'Neil III & Melinda H. Waterhouse, *Chief Compliance and Legal Counsel Caught in the Cross-Hairs of the False Claims Act*, DLA Piper Government Controversies Alert (Dec. 6, 2007), *available at* http://www.dlapiper.com/files/upload/Govt__Controversies__Al

The allegations in the *Sulzbach* securities fraud case do not focus so directly on obstruction issues, but they do illustrate a particular obstruction theme also implicit in the False Claims Act case: the wrongful assertion of attorney-client privilege in order to conceal evidence of a fraud or violation. The *Sulzbach* SEC Complaint implicitly calls into question three separate incidents involving the claim of attorney-client privilege. First, the government asserts that in January or February of 2002, a "manager in Tenet's government programs department" gave Ms. Sulzbach "a binder of outlier data summarizing the outlier ratio received by Tenet's hospitals individually and collectively," which showed that Tenet's outlier ratio had "substantially increased [from 12.9% to 26.9%] since fiscal year 2000," that "Tenet's hospitals' outlier ratio significantly exceeded the outlier ratios for competing hospitals during the same period," and that "Tenet's total outlier payments had substantially increased since fiscal year 2000." Ms. Sulzbach allegedly labeled the binder as attorney-client privileged.[12]

In the same general time period, according to the complaint, "Tenet's internal audit department began a review of outlier payments received by Tenet because outlier payments continued to be listed as part of the annual OIG work plan." The SEC asserts that upon learning of the internal audit report that was being prepared, Ms. Sulzbach "instructed Tenet's head of internal audit to send the report directly to her," a call that was purportedly "unusual and surprising to the head of internal audit because [Ms.] Sulzbach rarely, if ever, had initiated a call to him before." Upon receiving the report, Ms. Sulzbach allegedly "labeled it as a privileged attorney-client communication" and kept it in her office, so that no one else received a copy of the report.[13]

Finally, the complaint alleges that in March 2002, Tenet's

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ert__Dec07.html ("DOJ's ardor in [the Sulzbach False Claims Act] case quite clearly was fueled by the alleged failure to follow through on the corrective measures and by the vigorous defense of the [*Barbera* case].").

[12]*See* Sulzbach SEC Complaint at ¶ 72. Ms. Sulzbach contends that the binder was prepared "for the purpose of Sulzbach['s] obtaining outside legal advice" and was thus appropriately labeled as privileged. Sulzbach SEC Answer at ¶ 170.

[13]*See* Sulzbach SEC Complaint at ¶ 74. Ms. Sulzbach has admitted that the report was addressed to her and labeled as privileged, but has denied that she reviewed the report, asserted that a copy was also retained

then-chief operating officer and copresident made a presentation at a dinner meeting "attended by most of Tenet's board members and various senior officers" that provided information about Tenet's strategy to increase gross charges and the accompanying increase in outlier payments. According to the complaint, Ms. Sulzbach attended this meeting and afterwards "collected notes and materials that [the COO] used during his presentation[,] . . . kept [the] notes and presentation materials and claimed that they were privileged attorney-client communications."[14]

These allegations, taken at face value, present issues. In general, the attorney-client privilege in the corporate setting "exists to protect . . . the giving of professional advice to those who can act on it . . . [and] the giving of information to the lawyer to enable him to give sound and informed advice."[15] Treating the allegations as factually correct, it is at least possible that the documents in question in the first item above—the binder from the government programs department manager—might have been privileged, if it were the case that the manager had prepared it for the purpose of

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in the internal audit department, and asserted that the report was "on lists presented to the auditors and Tenet's Audit Committee of the Board of Directors" and was not "treated differently than other Tenet audit reports that involved issues being addressed by the legal department." *See* Sulzbach SEC Answer at ¶ 171.

[14]*See* Sulzbach SEC Complaint at ¶ 156, 162–163. Ms. Sulzbach has asserted that the COO "provided his handwritten notes to her," but has denied either reviewing them or being aware of whether he "presented some or all of the information in the notes" at the dinner meeting. She has also asserted that she provided privileged information to the Tenet board at the meeting concerning pending litigation, and that the COO's "presentation was intended to provide additional information to assist the [b]oard in evaluating Tenet's legal position in the lawsuit, and on that basis the notes were then considered privileged and maintained as confidential." *See* Sulzbach SEC Answer at ¶ 173. It might be noted that this explanation does not, on its face, seem to provide a basis for applying the attorney-client privilege either to the COO's notes or to any other presentation materials he used, given that the privilege would not ordinarily apply to communications by a nonlawyer to other nonlawyers, rather than to the lawyer whose advice was being sought or provided. Since Ms. Sulzbach disclaims having reviewed the notes or being aware of their relationship to the information presented, it seems a stretch to assert that they constitute privileged communications. On the other hand, misunderstanding the privilege is not itself a violation of the federal securities laws.

[15]Upjohn Co. v. U.S., 449 U.S. 383, 390, 101 S. Ct. 677, 66 L. Ed. 2d 584, 7 Fed. R. Evid. Serv. 785, 30 Fed. R. Serv. 2d 1101 (1981).

seeking Ms. Sulzbach's legal advice or if Ms. Sulzbach had requested the manager to prepare it in order that she might assess the company's legal position in order to provide legal advice. The same might be true of the internal audit report, but that appears less likely; the allegations suggest that the head of internal audit was having the report prepared for other purposes, and was "surprise[d]" when Ms. Sulzbach asked that it be sent to her.[16] As to the COO's presentation materials and notes, any assertion of privilege appears highly suspect based on the alleged facts. Leaving aside any question as to whether the dinner audience included any persons who were outside the scope of the attorney-client relationship (and whose presence would thus have caused a waiver of the privilege), it simply does not appear from the allegations that those documents were prepared for the purpose of seeking legal advice. Just as having a lawyer present at a meeting does not necessarily make the discussions at the meeting privileged, simply having a lawyer take possession of a document, or even copying a lawyer on a document, does not make that document privileged if it does not relate to the provision of legal advice. While the answer to the complaint raises issues in this regard, the answer is not entirely compelling on those points.

The inappropriate assertion of privilege in anticipation of a government investigation or during the course of an enforcement proceeding may be deemed by the government to constitute obstruction. Likewise, activities that might be construed as influencing witnesses' testimony, encouraging witnesses not to testify or to testify falsely or facilitating the destruction of records or evidence might also be asserted to be obstruction. Particularly where a lawyer's own work in connection with a matter or knowledge of a matter may be a key issue, that lawyer assumes responsibility for decisions relating to discovery or defense strategy at some peril. Activities undertaken in good faith may be susceptible of being characterized as obstruction, and activities undertaken in bad faith will almost certainly be so characterized.

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[16]Of course, the factual allegations may be true, but incomplete, which could change the answer. For example, if the internal audit department had been preparing the report for or at the direction of a subordinate attorney and Ms. Sulzbach simply intervened over that attorney's head, the report might still be privileged.

§ 13:12 The truth? You can't handle the truth! That legal opinion in the back of the file drawer

Still another theme that appears in some claims asserted against lawyers, especially in-house counsel, is the failure to act upon (or to cause client agents to act upon) advice of counsel that proves to be not what the client wanted to hear. Where prosecutors or investigators seek to implicate lawyers in an illegal scheme, the fact that the lawyer was aware of contrary advice from other lawyers may be used to support culpability, even where there may be a range of opinions that competent lawyers could reach on the same facts.[1] It may be argued that this risk has become even more acute with the increasing prevalence of legal-analysis-by-e-mail, where off-the-cuff responses based on assumed or incomplete facts may be given weight that is disproportionate to their thoughtfulness.

The issue is tangentially raised in the *Isselmann* case, where Isselman had received information from outside counsel that his employer could not unilaterally terminate the employee benefits at issue but did not persist in trying to

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[Section 13:12]

[1]*Cf.* Letter from Professor Thomas D. Morgan to U.S. Securities & Exch. Comm'n (Dec. 17, 2002), *available at* http://www.sec.gov/rules/proposed/s74502/tdmorgan1.htm ("[R]easonable attorneys, acting reasonably, may act quite differently in given situations. Questions whether conduct would violate securities laws or violate fiduciary duties often do not appear in easy, non-controversial forms. Not all questions are in a gray area, of course, and the zone of reasonable conduct is not always large, but enough answers in life are uncertain that any single attorney's answer may not be the only good one."). *See also* David B. Bayless, Recent SEC Enforcement Actions Against In-House Lawyers: Its Impact on Legal and Compliance, in Advanced Securities Law Workshop 2008 (Practising Law Institute 2008) 611, 622:

> And the *Tenet* [*i.e.*, Sulzbach] and *Enron* [*i.e.*, the SEC's complaint against two former Enron in-house lawyers] cases are extremely aggressive positions by the SEC. First, the claims against the lawyers in those cases — especially in *Tenet* — are based upon the absence of language in the [SEC reports], *i.e.,* non-disclosures. But deciding whether to disclose something, and how to disclose information, are quintessential lawyers' tasks — judgments that lawyers make daily. As practicing attorneys know, determining what does, or does not, go into the [Management's Discussion and Analysis of Financial Condition and Results of Operations, a major part of SEC periodic reports] requires judgment and analysis. Often there are no right or wrong answers. To have such judgments second-guessed after the fact in an enforcement action for securities fraud is truly terrifying.

make appropriate persons aware of outside counsel's advice. However, the issue is not squarely joined there: it is not clear that even after receipt of such advice, Isselmann was aware of the accounting implications if the benefit termination proved invalid, and thus not clear that Isselmann understood the potential consequences of not disclosing such advice.

The problem is more clearly presented in the *Sulzbach* False Claims Act case. As has been discussed at exceeding length above, much of the underpinning of the *Sulzbach* False Claims Act case appears to derive from the premise that Ms. Sulzbach received the McDermott reports but did little or nothing to act upon them. Indeed, this seems to be the primary basis on which the government seeks to prove that Ms. Sulzbach had the necessary scienter to support False Claims Act liability.

In contrast to the *Isselmann* case, the *Sulzbach* allegations illustrate a two-edged sword, or perhaps a two-horned dilemma. It is not difficult to accept that Isselmann lacked the accounting knowledge to understand the implications for the overall financial position of his employer of the legal opinion that he received. In the case of Ms. Sulzbach, however, she was an experienced lawyer who had worked in the health care industry for many years. On the one hand, she could plausibly assert that she had evaluated the legal issues in question and had reached conclusions different from those expressed or suggested by outside counsel, or was able through greater knowledge of relevant facts to understand why the opinions of outside counsel were based on erroneous assumptions and thus reached incorrect conclusions. On the other hand, though, her specific knowledge and experience would make it difficult for her to claim that she did not understand the significance of outside counsel's advice or the gravity of the risks that faced her employer-client if outside counsel were correct. More simply, if outside counsel suggested the existence of a Stark law violation, a lawyer as experienced as Ms. Sulzbach could not reasonably mount a defense of "I didn't understand how serious that was."[2]

Thus, another danger zone for inside counsel in particular:

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[2]In this context, it is interesting to note that Ms. Sulzbach's counsel have implied that, even assuming that Ms. Sulzbach or others at Tenet had been provided with the McDermott reports, the reports should still

when one seeks advice or opinions from outside counsel, the choice becomes either follow the advice or document a qualified analysis rebutting the advice. Simply ignoring the advice, even if that course of action is based on some undocumented conclusion that the advice was incomplete, wrong, or inapposite, sets the opinion-seeking lawyer up for a fall.

§ 13:13 The lawyer who mistook his head for a hatrack—The problems of being a multiposition player

One risk that is peculiar (except in rare circumstances) to the in-house lawyer is the one associated with being too integral a part of the client organization. It is not uncommon for a well-regarded in-house lawyer to be given other positions that are more or less distinct from the legal function: corporate secretary, compliance officer, privacy officer, development officer, human resources officer, in some cases even chief financial officer. Wearing multiple hats can expose a lawyer to a number of risks and difficulties when the organization comes under investigation.

The most obvious, of course, is loss of the attorney-client and work-product privileges. As described above, the attorney-client privilege attaches only to communications between a client and a lawyer when the lawyer is functioning *as a lawyer*. For example, a communication to a director of human resources who happens to be a lawyer but who does not function as a lawyer within the organization is, of course, not privileged. A communication to that same person where he or she functions in the dual role of director of human resources and counsel to the organization may or may not be privileged, depending on the nature of the communication and the hat the individual is wearing at the time. Similarly, the work product doctrine exists to protect the thought processes of lawyers as they analyze a client's legal position; it does not protect the activities of persons acting in nonlawyer roles such as HR director, even if those persons

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properly be viewed as "the work product of a junior [elsewhere in the brief, 'inexperienced'] associate" that did not reflect the "actual conclusions" of the McDermott firm. *See* Sulzbach FCA Dismissal Memo at 18 and at 11 n.5. This raises the intriguing question of how a targeted in-house lawyer might effectively raise the defense that outside counsel's advice was simply no darned good.

are licensed attorneys. As might be expected, when the organization is under investigation, the government is prone to suggest that our hypothetical person wears the human resources hat far more of the time than the counsel hat.[1]

Beyond this fundamental issue, though, is the issue of substantive conflicts—of duties and perspectives—that may arise when a lawyer acts in both counsel and noncounsel capacities. The *Sulzbach* False Claims Act case provides a dramatic illustration of the risks such dual (or more than dual) roles may hold for in-house lawyers. During the period in which the underlying events occurred and the period that encompassed the *Barbera* litigation, Ms. Sulzbach held at least three relevant and somewhat distinct roles: as a senior Tenet lawyer (first as associate general counsel, and then as general counsel), as a senior compliance officer (first as Tenet's Corporate Integrity Director, and then as Chief Compliance Officer), and more specifically within the compliance role, as the person responsible for signing Tenet's annual compliance certifications under the CIA (and, at least in the government's view, the person "personally responsible for investigating any alleged violations by Tenet employees of any federal program legal requirements, and for reporting to the Government the existence and status of any such investigation" as well as the person who "was primarily responsible for ensuring Tenet's compliance with the [CIA]."[2] As one commentator noted with respect to Sulzbach's role in another Tenet compliance crisis,

> [s]he had the conflicting responsibilities of defending the company against accusations leveled by the government . . ., while simultaneously being responsible for finding and curing any legal violations. On top of this, she was also required to

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[1]A number of commentators have suggested that in-house lawyers avoid taking on any "non-lawyer" titles, even generic ones like "vice president," and engage in rather stilted devices to separate legal advice from business functions. *See, e.g.,* Todd Presnell, *A higher standard: Claiming attorney-client privilege is tougher for in-house counsel*, 14 Bus. Law Today (May/June 2005) at 19; Joseph J. Siprut, *An In-House Counsel's Guide to Preserving Attorney-Client Privilege*, 92 Ill. B.J. 586 (2004). The present author tends to view a good bit of this advice as impractical, but one certainly cannot ignore the issues that underlie it.

[2]*See* Sulzbach FCA Complaint at ¶¶ 2, 26.

> attest to Tenet's compliance with the law, or admit non-compliance. She even got involved in the media efforts to diffuse the situation.[3]

The claims in the *Sulzbach* False Claims Act case present in sharp focus the risks that are posed for internal counsel who also serves as the organization's compliance officer, especially when that role is accompanied by a specific affirmative reporting obligation under a CIA.[4] While there are several dimensions to the potential conflicts raised by such a

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[3]Gurland, at 3. The reference was to Ms. Sulzbach's role in responding to the FBI's raid on Tenet's Redding Medical Center in late 2002, in response to allegations of inappropriate and unnecessary cardiac procedures being performed by physicians who had financial incentives to increase utilization of the hospital. For more information on that matter, *see* Stephen Klaidman, Coronary: A True Story of Medicine Gone Awry (Scribner 2007), a book-length account in which the author has, it may be said, a point of view.

[4]The OIG has, of course, been critical of structures in which the general counsel is the compliance officer, or in which the compliance officer reports to the general counsel, although not as dogmatically critical as it is sometimes thought to have been. In its original compliance program guidance for hospitals, the OIG stated that it

> . . . believes that there is some risk to establishing an independent compliance function if that function is subordina[te] to the hospital's general counsel, or comptroller or similar hospital financial officer. Free standing compliance functions help to ensure independent and objective legal reviews and financial analyses of the institution's compliance efforts and activities. By separating the compliance function from the key management positions of general counsel or chief hospital financial officer (where the size and structure of the hospital make this a feasible option), a system of checks and balances is established to more effectively achieve the goals of the compliance program.

Office of Inspector General, U.S. Dep't of Health & Human Services, Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8987, 8993 n.35 (Feb. 23, 1998), *available at* http://oig.hhs.gov/authorities/docs/cpghosp.pdf. In a later publication, the OIG noted that some health care organizations did in fact combine the two positions, implicitly acknowledged that that was not necessarily an inappropriate decision, and stressed that in any event there needed to be significant interaction between the general counsel and compliance officer functions in order to ensure that an organization's compliance programs functioned effectively and that the organization's board was adequately informed on compliance matters. *See* Office of Inspector General, U.S. Dep't of Health & Human Services and American Health Lawyers Ass'n, An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors (2004), *available at* http://oig.hhs.gov/fraud/docs/complianceguidance/Tab%204E%20Appendx-Final.pdf.

In that connection, it will be recalled, for whatever it is worth, that the indefatigable Senator Charles Grassley (R-Iowa) was sharply critical

dual role, some of them are obvious and even, if the cheap pun may be forgiven, stark.

Although a lawyer may not "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, . . . 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."[5] In an area as challenging of legal interpretation as federal health care regulations, a lawyer acting solely in such capacity may have some room to explore, with some deliberation, the existence and materiality of a client's potential violation and the likely scope and nature of any enforcement activities if a violation is determined to exist. A compliance officer operating under a CIA, on the other hand, may be more disposed to err in favor of disclosing a potential violation even if the facts are not fully established or if there are colorable defenses because the compliance officer may view his or her higher responsibility to be cutting off per-day penalties under the CIA and reducing the exposure of the organization to larger claims. This predisposition may be particularly acute if the compliance officer has reason to fear that he or she, like Ms. Sulzbach, may be threatened with significant personal exposure if a violation is not reported at an early stage.

Where the legal and compliance roles are separated, the organization may have the benefit of both perspectives and may be able to balance them. Where those roles are held by one person, or within a superior-subordinate reporting relationship, this balancing act may be much more difficult. In any event, the lawyer who wears both those hats simultaneously faces significant risk that the government will find his or her performance deficient in at least one of the roles, and perhaps in both.

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of Tenet for having Ms. Sulzbach serve simultaneously as general counsel and chief compliance officer. *See Grassley Investigates Tenet Healthcare's Use of Federal Tax Dollars* (press release dated Sept. 8, 2003), *available at* http://www.senate.gov/ grassley/releases/2003/p03r09-08.htm.

[5]Model Rules of Prof'l Conduct R. 1.2(d).

§ 13:14 Hanging around with a bad crowd—Why lawyers shouldn't ignore their mother's advice

Finally, there is this blinding glimpse of the obvious: lawyers are more likely to become subjects or targets of civil and criminal enforcement actions when their client's business personnel are engaged in violating the law, and, as well, when the client has a track record that invites government scrutiny. As a general matter, lawyers are not the solo targets of government investigations relating to their client organizations; instead, they are brought in as a result of evidence (or at least theories) developed after the government has already begun investigating alleged misconduct by executive management, financial personnel, or others. For the most part, the claims against lawyers relate to facilitating or concealing illicit schemes, not to crafting them in the first instance. Thus, a lawyer is more likely to become an object of the government's attention when the government already has its sights on other targets, and a lawyer who finds himself or herself surrounded by such targets should be wary.

Once again, perhaps the most poignant example is the *Brown* case. Brown was hired by Rite Aid's founder, Alex Grass, and had over 35 years' association with the company as outside and then inside counsel. When Grass's son Martin took over as CEO in 1995, Brown had known him since his childhood, and reportedly felt a special responsibility for protecting the younger Grass from his predilection for getting into difficulty.[1] It is almost unavoidable to assume that by the time Martin Grass and other senior executives at Rite Aid embarked on the crimes to which they all entered guilty pleas, Brown's loyalty to the company and its founding family led him into the mire—that he had become so protective of his colleagues that his professional judgment became irretrievably clouded.

The *Isselmann* case presents a different, and perhaps more typical, situation. There is no suggestion in the record that Mr. Isselmann was involved in designing the fraudulent accounting scheme, that he profited from it, or even that he

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[1]*See* Gardner.

directly indicated his support or approval of the course of action that facilitated the scheme. Instead, the essence of the allegations is that other officers made false statements to ESI's auditors and audit committee, that Mr. Isselmann became aware of them, and that he failed to cause the statements to be corrected or to disclose their falsity to those who might have prevented or remedied the fraud. In what is probably the most common way in which lawyers become the targets of investigations, Mr. Isselmann came under scrutiny because others in his organization were violating the law, and the information that surfaced in the investigation of those primary violators caused the lawyer to be caught up in the maelstrom because of his perceived ineffectiveness in preventing, stopping, or remedying the primary violations.

Arguably, the "bad crowd" phenomenon is taken to a still more expansive level in the *Sulzbach* False Claims Act case, reportedly the first False Claims Act complaint ever brought against the general counsel of a health care company,[2] and one of the relatively rare cases in which False Claims Act liability has been asserted against an individual who neither had involvement in the provision of the services relating to the underlying claims nor in the submission of the claims themselves. It has been suggested that one reason for the government's decision to proceed against Ms. Sulzbach individually may have been Tenet's history of major health care fraud claims involving large settlements, Ms. Sulzbach's involvement in those matters over the years, and the government's ire at Tenet's apparent corporate recidivism.[3] Whether this theory is correct is a matter of speculation that is unlikely to be resolved; however, it seems likely that lawyers for organizations with a history of significant violations (or at least large financial settlements to resolve allegations of significant violations) may come under close attention from the government, especially if those lawyers have a relationship with the organization that goes back to the time of earlier violations.

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[2] *See* Gurland, at 5.

[3] *See* Gurland, at 5 ("Indeed, the focus on Sulzbach probably has as much to do with the prior cases as it does with her seemingly false statements . . .. Sulzbach is now the target of the government's anger over the apparent games that Tenet managed to play with the regulators who oversaw it because she was the face of Tenet's corporate citizenship.").

IV. IN CASE OF EMERGENCY, BREAK GLASS: STRATEGIES FOR AVOIDING PERSONAL EXPOSURE WHEN THE CLIENT IS BEING INVESTIGATED (WHILE STILL FULFILLING RESPONSIBILITIES TO THE CLIENT)

§ 13:15 Generally

Alright, then. If there are so many danger zones for lawyers—and the list above is not exhaustive—how can a lawyer minimize the risk that he or she will become the target of an investigation or prosecution while still fulfilling the obligations of professional responsibility to the client? There is, as one would expect, no one-size-fits-all answer, but there are certainly some pointers to keep in mind. In considering a few of those, it is useful to look at them in two phases: "preventive medicine" steps that counsel can take to reduce the risk that the client will become a corporate target, and "acute care" strategies where the client is already under investigation or the subject of civil or criminal enforcement actions. The following subsections attempt to identify some of those steps. They are presented primarily from the perspective of in-house counsel, for clarity of illustration, but the general concepts are applicable to outside general counsel and, at least to some extent, to outside counsel with significant responsibility for significant discrete areas of representation.

§ 13:16 Before things hit the fan—Survey the territory

Lawyers taking on new clients or stepping into new roles should, to the extent possible, assess the client's culture, the competitive and regulatory environment, and the overall lay of the land, with a particular focus on determining how the legal function fits into the organization's strategic and operational functions. For example, if the organization's culture is to involve senior inside or outside lawyers in the executive decision-making process, this means that the lawyer may have more opportunity to influence corporate strategies and responses to legal and compliance issues, but it may also make it more likely that the lawyer—especially internal counsel—may be viewed as being co-opted by management rather than as someone who brings independent professional judgment to bear. On the other hand, if

the legal function is diffused through various chains of authority or consulted only on specific, limited matters, the likelihood that there will be incomplete, ineffective oversight of the organization's legal needs is greater.[1]

Obviously, neither model gives rise to a foregone conclusion either that problems will develop or that counsel will be implicated in them. However, counsel who is not alert to the overall dynamics of the interaction between the legal function and other organization functions is likely to be unprepared for such problems as they do develop.

§ 13:17 Before things hit the fan—Review problem areas

Armed with this basic knowledge, the lawyer should then assess particular risks facing the client organization, both from an industry segment standpoint (*e.g.,* imaging centers and laboratories are particularly vulnerable to Stark issues; long-term care facilities, not so much, but on the other hand very vulnerable to patient abuse and neglect issues) and from an organization-specific standpoint (*e.g.*, decentralized management, understaffed compliance department, particularly aggressive managers, etc.). This exercise will allow counsel to (a) focus resources on those areas with relatively higher risk exposures, (b) seek out opportunities to bring management's attention to particular problems or issues,

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[1]*See, e.g.,* Ass'n of the Bar of the City of New York, *Report of the Task Force on the Lawyer's Role in Corporate Governance* (Nov. 2006) ("*ABCNY Task Force Report*") at 100–101:

> According to the WorldCom investigative report [Report of Investigation by the Special Investigative Committee of the Board of Directors of WorldCom, Inc. (Mar. 21, 2003)], its legal department was "not structured to maximize its effectiveness as a control structure upon which the Board could depend." The report states that "at [CEO Bernard] Ebbers' direction, the Company's lawyers were in fragmented groups, several of which had General Counsels who did not report to WorldCom's General Counsel for portions of the relevant period; they were not located geographically near senior management or involved in its inner workings and they had inadequate support from senior management." Ebbers did not include the Company's lawyers in his "inner circle" and appeared to "have dealt with them only when he felt it was necessary"; he "let them know his displeasure with them personally when they gave advice — however justified — that he did not like," and generally "created a culture in which the legal function was less influential and less welcome than in a healthy corporate environment." [Citations omitted.]

and (c) determine areas where additional support and guidance (*e.g.*, from specialized outside counsel) may be necessary. If nothing else, it will make it more likely that the lawyer will be sufficiently sensitized to spot a problem earlier in the process than might otherwise be the case.

§ 13:18 Before things hit the fan—Organize your team and use them wisely

Having identified the areas where particular focus is necessary, the lawyer should focus on optimizing the resources available for that focus. For example, if the client organization is the subject of unusual regulatory complexity in some aspect of its operations, it would be desirable to consider developing a relationship with specialized outside counsel with extensive experience in that area (or, if the need justifies and resources are available, bringing a more specialized lawyer in-house to focus on that area). Especially in an in-house setting, there is always a danger that client management will regard lawyers as fungible, each equally capable (or not) at dealing with any of a wide range of issues. Where there are gaps in the team on the ground, the responsible lawyer needs to figure out a plan for addressing those rather than assuming that they will not present a problem.

Closely related to this concern is the question of legal opinions, as alluded to in some of the illustrative cases above. There is danger in seeking out specialized advice and not acting on it. There is also danger in obtaining specialized advice that is based on incomplete facts or erroneous assumptions. When engaging counsel to provide opinions or other written analysis (including e-mail analysis), care should be taken to ensure that there is agreement on what type of work product is to be provided (formal opinion, preliminary written analysis, oral advice, or what have you) and that all persons involved understand the relevant factual context. If there is a disagreement as to legal analysis, efforts should be made to resolve that disagreement and to act in accordance with the resolution. The damaging opinion that is found in a file drawer can become the smoking gun if it raises issues that have not been resolved "on the record."

§ 13:19 Before things hit the fan—Communicate! (But understand the privilege and be clear on your roles)

As previously noted, a common thread that runs through many of the examples set forth above is the lawyer's failure to communicate either or both of disturbing facts and adverse legal analyses to those client constituents who are in a position to act on the matter in question. Leaving aside the troublesome question of what a lawyer may and should do when client constituents, so apprised, fail to act,[1] this "Cool Hand Luke" problem[2] clearly exposes the lawyer to personal risk and may well expose him or her to risks that reflect an exaggerated perception of the lawyer's role within (or as an advisor to) the client organization. That is to say, a lawyer who does not communicate potentially bad information to those who are in a position to cause the client to prevent, discontinue, or remediate misconduct is likely to find himself or herself accused of violating his or her own obligation to take such action, even where the lawyer's authority within the organization did not extend to actually implementing such action. Accordingly, the lawyer should take steps to ensure that appropriate client decision-makers are brought into the loop at a stage commensurate with the potential importance of the matter.

Where possible, of course, those communications should ordinarily be made under the protection of the attorney-client privilege in order to allow for a diligent and complete assessment of applicable legal issues. Especially where a lawyer also has nonlawyer roles (particularly including, but not limited to, compliance officer roles), the lawyer should take steps to separate those roles to the extent possible in order to avoid compromising attorney-client privilege. At a minimum, it is useful to maintain separate files for "legal"

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[1]For considerable discussion on that topic, *see generally* William W. Horton, *Representing the Healthcare Organization in a Post-Sarbanes-Oxley World: New Rules, New Paradigms, New Perils*, 37 J. Health L. 335 (2004).

[2]Donn Pearce & Frank R. Pierson, Cool Hand Luke (Warner Bros. 1967), shooting draft *available at* http://www.geocities.com/classicmoviescripts/script/cool_hand_luke.html ("What we got here is a failure to communicate.").

and "other," if "other" is a role that involves significant documentation (again, including e-mail), and to put appropriate privilege legends on documents prepared in the lawyer capacity. There, of course, the key is "appropriate." Developing a habit of labeling every document that comes into a lawyer's possession as privileged whether it is or not will tend to erode the distinction between roles where the privilege applies and roles where it does not, and will thus make it less likely that the privilege will be respected.

Finally, where a lawyer serves both as counsel to the organization and as compliance officer for the organization, it will likely be prudent to involve other lawyers in advising the client on the appropriate response to claims or suits resulting from a reported compliance problem. Aside from the privilege issues, the roles and perspectives of compliance officer and defense counsel are just different, and the organization will usually be better served by not requiring one person to do justice to both roles.

§ 13:20 Before things hit the fan—Don't audit your own work

Some matters may come to a lawyer's attention that involve that lawyer's own work (or the work of those over whom the lawyer has supervisory authority). For example, a compliance hotline caller may suggest that a particular transaction, either as designed or as implemented, involves a violation of the law with potentially serious impact on the organization (*e.g.*, a transaction that has resulted in a large number of Stark violations). If the allegation is credible and involves material exposure, it is probably unwise for a lawyer who was involved in structuring the transaction to be the person primarily responsible for determining the existence and magnitude of a violation. This is not because that lawyer might not be in a position to fairly assess the issues and take appropriate steps. Rather, it is because the lawyer's determination that there was no violation or that any violation was immaterial will be second-guessed by the government if the same information becomes the subject of a later investigation or enforcement action. At a minimum, the lawyer's conclusions will likely be discounted by the government, but beyond that, the lawyer's determination that no remedial action was necessary (because, in the lawyer's judgment, there was no violation) will be susceptible of being recharacterized

to cast the lawyer as a conspirator with the alleged malefactors.

Of course, this does not mean that a lawyer must abdicate all responsibility for responding to legal issues relating to matters on which the lawyer has previously been involved, nor does it mean that the organization must engage the now-sanctified "independent counsel" to respond to any routine compliance inquiry. Indeed, a lawyer who routinely declined to have anything to do with issues arising from a matter in which he or she had an earlier role would both ineffective and, soon, unemployed. What it does mean is that when circumstances make it clear that a third party could reasonably raise serious questions about the lawyer's objectivity in responding to material legal concerns, it is probably in both the lawyer's and the client's best interests to get a disinterested reviewer involved.

§ 13:21 Before things hit the fan—Don't push a rope forever

The more miles you drive, the more likely it is that you will get a ticket. The more times you spin the chamber in Russian roulette, the more likely it is that you'll shoot yourself in the head.[1] The longer you represent an organization the constituents of which are prone to push the limits on legal compliance, the more likely it is that the organization will come under investigation and that such investigation will turn attention on your work.

It would be unreasonable (and likely unprofitable) for a lawyer to expect to represent clients who never test the limits of the law in a highly regulated and complex area like health care. In large part, laws regulating commercial activity exist to constrain activities that would otherwise be effective, if sometimes unsavory, as business practices, and lawyers and clients are not always going to agree on the application of the law to a particular set of facts. Further, the law is not always clear, and clients are entitled to explore the law's boundaries and decide, within those boundaries,

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[1]The author realizes that neither of these statements is likely to be statistically valid. The author is merely indulging in rhetoric.

what risks they are willing to take.[2] The fact remains, however, that if a lawyer finds himself or herself working for a client whose personnel are consistently willing to go out to the edge and beyond, or who routinely attempt to circumvent and marginalize their legal counsel, the lawyer is eventually likely to face significant professional responsibility challenges and significant personal exposure. Lawyers are and should be loyal to their clients, and most lawyers have a high level of faith in their own abilities as problem-solvers. However, a lawyer faced with a habitually recalcitrant client should not let such loyalty result in the lawyer's being the only one without a chair when the music stops. A lawyer whose client persists in activities against the lawyer's advice must seriously consider resignation from the job or engagement.

§ 13:22 After things hit the fan—Admit that you have a problem

Once a crisis has been set in motion—when the lawyer has become aware of an investigation, when charges have been filed, or even when an internal investigation has exposed significant wrongdoing but there is yet no indication that government action has begun—it is important for the lawyer to understand, and to make client personnel understand, that it is no longer business as usual. All the players must recognize that all actions the organization takes going forward will be scrutinized. At a minimum, attempts to minimize the significance of the problem, much less to cover it up, may be viewed by the government as lack of cooperation, and such attempts may well be viewed as full-blown obstruction of justice. A lawyer involved in such a situation must do whatever he or she can to help the client respond in a thoughtful and useful manner, but the lawyer must recognize that any response must be swift and must advance the client's overall strategy rather than simply being a knee-jerk response to the immediately burning fire.

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[2]*See* Model Rules of Prof'l Conduct R. 1.2(d) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but 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.").

§ 13:23 After things hit the fan—Make a searching and fearless inventory

At an early stage, any lawyer involved in such a situation should try, as objectively as possible, to assess what vulnerabilities that he or she may have in the underlying factual situation. This does not merely reflect self-interest; rather, if there is a material nexus between the lawyer's work and the subject matter of the investigation, any role played by the lawyer in the organization's response may compromise the client's position. Further, any actions in that role that could be construed as impeding the investigation, making false statements, etc., may provide an independent cause of action against the lawyer, which is likely to redound to the detriment of the client as well. A lawyer should put the client's interest first, but part of putting the client's interest first is recognizing any limitations that the lawyer's own position may put on the effectiveness of his or her representation.

Another key question for the lawyer is the fit between his or her own skills and the client's needs in the developing situation. A lawyer may be a perfectly fine counselor on the transactional aspects of fraud and abuse regulations without having any real knowledge or experience of the appropriate response to a search warrant followed by a subpoena duces tecum for 250,000 pages of documents. Even though the client may be accustomed to turning to its primary lawyer for "everything," that lawyer owes it to the client (as well as to himself or herself) to be realistic about the fit between the client's needs and the lawyer's skills and to bring in appropriate reinforcements as needed.

§ 13:24 After things hit the fan—Avoid the appearance of conflict (and real conflict too)

On a closely related point, where the lawyer has determined that the facts relating to his or her own substantive involvement in the matter under investigation will, or might reasonably be construed to, limit his or her effectiveness or raise conflicts between the client's interests and personal interests of the lawyer, the lawyer should advise the client organization to bring in other qualified counsel and appropriately limit his or her own involvement. This does not mean that the lawyer must confess error, or even that the lawyer should necessarily withdraw completely from dealing

with the matter. Rather, it means that the lawyer should recognize that any perceived conflict between the client's interests and the lawyer's personal interests poses dangers for both parties. The best way to deal with that is to ensure that the client gets objective representation that cannot be questioned on the grounds of personal involvement.

Even where the lawyer's acts or omissions do not appear to be directly at issue, the lawyer may still be well-advised to get other counsel involved in subsequent matters that may directly affect the lawyer—*e.g.*, advising the organization's board on providing indemnification and advancement of expenses to any group that includes the lawyer or persons to whom the lawyer reports, or on whether to pursue an action against the lawyer's reporting-chain superiors. Because such decisions involve interests of the lawyer that may not be identical with the interests of the client organization as an abstract enterprise, the lawyer's objective judgment may be perceived as being compromised. Again, in a major investigation situation, all such decisions may be subjected to very high scrutiny, and it is usually best to go the extra mile to avoid potential conflicts.

§ 13:25 After things hit the fan—Don't have a fool for a client

Where a lawyer's own involvement in the underlying subject matter shows any likelihood at all of becoming an issue in an investigation, the lawyer should always obtain competent *personal* legal representation. Perhaps the biggest mistake, in personal terms, that a lawyer can make in an investigation/enforcement situation is to assume that since he or she is a lawyer, he or she will either get deference from the investigators or, through sheer professional skill, be able to avoid any traps the investigators may seek to set. A lawyer who acts as his or her own counsel in an interview with enforcement agents, in grand jury testimony, or in any other setting where the lawyer is speaking or responding on his or her own behalf and not in a representative capacity is, simply put, a fool. The well-advised lawyer should not be a fool.

§ 13:26 After things hit the fan—Use your support system

Investigations and enforcement actions involving one's

employer or major client are stressful things, especially for those who may themselves be or become subjects or targets of the investigation. In general, they involve seeing bad things happen to people who may have been close coworkers or clients; they may jeopardize job or financial security; they require long hours of work and quick, high-risk decision-making; and they may involve personal enforcement risks as well. Lawyers are accustomed to being the people who fix things, the people who stay calm in a crisis. However, maintaining that façade in the face of a major corporate crisis can be very difficult and isolating.

Consistent with the bounds of privilege and professional responsibility, a lawyer in such a situation should not shun the support of friends, family members, and professional colleagues, and should not be reluctant to seek out that support. There may be a reluctance to admit that one needs it, but such reluctance is misplaced. Having the government bring its forces to bear on one's employer, much less on one personally, is an extraordinarily stressful thing; one should not be reluctant to accept emotional support in dealing with such stress, even if it seems somehow unlawyerly to do so.

§ 13:27 After things hit the fan—Do the right thing

Regardless of the lawyer's personal exposure at the outset of an investigation, the proceedings are likely to create a number of new opportunities for such exposure. The lawyer may well have to advise the organization on taking disciplinary action against friends, peers, and supervisors, and even on throwing such persons on the fire to appease the government. The lawyer will likely have to address questions about turning over damaging or embarrassing documents, and make hard calls on asserting or waiving privilege. The lawyer may have to confront mistakes or inadequacies in work that he or she has previously performed or supervised. Any of these may be personally stressful, and the way in which they are handled may determine whether the lawyer faces personal liability arising out of the investigation.

In such a situation, it is critical for the lawyer to be continually conscious of his or her responsibilities under applicable laws and professional responsibility laws. Where the course is unclear, it is prudent for the lawyer to obtain competent advice concerning such responsibilities. Compli-

ance with professional responsibility standards will not necessarily insulate the lawyer from liability; however, failure to act in accordance with such standards will substantially increase the risk of such liability.

V. CONCLUSION: BURNED ALL MY NOTEBOOKS, WHAT GOOD ARE NOTEBOOKS? THEY WON'T HELP ME SURVIVE[77]

§ 13:28 Conclusion

Representing an organization in crisis, especially as internal counsel, can be one of the most stimulating and challenging professional experiences a lawyer can have. In few circumstances are a lawyer's skills at analysis, communication, anticipation, and persuasion as fully utilized as they may be in a corporate crisis, especially one resulting from a criminal or civil investigation directed at the client. In such a situation, the lawyer must not only utilize substantive knowledge of the law; the lawyer also must employ a fairly relentless pragmatism and, unfortunately, must be willing to set aside various considerations of personal relationships where the situation requires. Perhaps more so than in most situations, the lawyer is made aware that this is not the stuff of law school textbooks; this is real life, with real consequences for real people.

At the same time, representing an organization in crisis is a highly stressful experience for a lawyer, again especially if one is in-house with the organization. Aside from the physical and emotional demands and the likelihood that persons with whom the lawyer has strong relationships may be implicated in wrongdoing, the lawyer must also recognize that his or her own acts, omissions, and decisions—both with respect to underlying events and with respect to the organization's response to the investigation itself—will likely come under scrutiny. That scrutiny may or may not take accurately into account the actual facts concerning the lawyer's experience, duties, or scope of authority, and a lawyer who assumes that his or her legal training will allow safe passage through the process is making a serious mistake.

How can the lawyer prepare for such a situation? Today, any corporate lawyer, but particularly any in-house lawyer,

[77]Byrne, *Wartime*.

is well-advised to study the developments in recent publicized crises and scandals, with particular attention to the role of lawyers before and during a crisis.[1] This will help the astute lawyer make at least some mental preparations for the day when he or she has to help guide a client through a crisis, and is time well spent.

Beyond that, though, the lawyer should study those crises and scandals with an eye toward figuring out what lawyers could and should have done to prevent or mitigate the problems that resulted in a crisis's arising in the first place. One thing is surpassingly clear: lawyers are increasingly held to a higher standard in representing corporate clients, and are expected to go beyond mere legalistic lawyering. Lawyers who ignore that are inviting personal exposure; beyond that, however, a lawyer who thinks about those things that give rise to crises is more likely to be able to help his or her clients avoid them.

[Section 13:28]

[1]An interesting recent perspective on the role of lawyers in nine high-profile scandals, suggesting lessons to be learned therefrom, is contained in *ABCNY Task Force Report*. The author, who was interviewed in connection with the preparation of the report, does not necessarily agree with all of it, but it is a thought-provoking and useful document.