When Two Worlds Collide: Legal Ethics, OIG Policy and the General Counsel-Compliance Officer Relationship

By William W. Horton

I. Introduction: What Could Go Wrong, Anyway?

A. How Many Hats?

Picture, if you will, the opulent office of Prudence Wisdom, Executive Vice President, General Counsel, and Chief Compliance Officer of Megalithic Healthcare, Inc., a large, publicly traded provider of diversified healthcare services and the owner of one of the largest hospital chains in the

United States. Prudence, who joined Megalithic years ago after an apprenticeship at the well-known national law firm Upright & Sikorsky, had been elevated to the executive suite after the sudden purging of Megalithic's former general counsel following a massive False Claims Act settlement, as a result of which Megalithic had been compelled to enter into a voluminous Corporate Integrity Agreement, or "CIA," with the Office of Inspector General of the Department of Health and Human Services. In announcing Prudence's appointment as both General Counsel and Chief Compliance Officer, Buckwell M. Dollars, the Chief Executive Officer of Megalithic, cited Prudence's long experience in the healthcare industry, her unblemished professional reputation, and the advantages of combining the legal and compliance functions in one highly qualified individual. "As our general counsel, Prudence is responsible for approving every deal we do," Buck Dollars told the press, "and as our compliance officer, she'll make sure we're doing them right."

Doing things right was particularly important to Megalithic now that it was under a CIA. Under the CIA, Megalithic was required to report to the Department of Health and Human Services "any credible evidence of misconduct that management has reasonable grounds, after appropriate inquiry, to believe constituted a material violation" of federal healthcare laws, a requirement that was backed up by a $5,000-per-day civil penalty for failure to report any such violation in a timely manner. Further, Megalithic was required to file an annual attestation that it had not failed to timely report any such violation. As Megalithic's "Corporate Integrity Officer," Prudence was required to sign such attestations.

On this particular day, Prudence faced a challenge. There, on the other side of her large mahogany desk, sat a very agitated internal auditor, one Gregory Greenstripe. Greenstripe recounted how, in the course of performing a routine internal review of Megalithic's hospitals, he had discovered that all of the hospitals had recently implemented an apparently arbitrary, across-the-board increase in almost all of their chargemaster prices for Medicare Part A services. Greenstripe said that, being puzzled by this change that seemed to have no obvious explanation, he had called three or four of the hospital controllers to inquire. Their responses were uniform: their hospitals had been told by Megalithic's Chief

Financial Officer to effect an across-the-board increase in chargemaster charges because that would result in increased outlier payments to the hospitals, thereby enhancing Megalithic's bottom line so that it would remain the darling of Wall Street. This was, the controllers were told, a harmless way to help offset the tremendous amounts of charity care that Megalithic hospitals provided—since no one ever paid the chargemaster prices anyway, no one would be hurt if they were padded a bit. All that would happen would be that a little more government money—money that the government would have spent somewhere anyway—would accrue to the benefit of Megalithic's hospitals.

Greenstripe was very concerned about this, believing that it could be construed as fraud. "After all," he said, "all we're trying to do is game the system to get more federal money in here—these price increases have nothing to do with what we're actually doing or even what our actual costs are." Prudence assured Greenstripe that she would look into the matter in due course. As he left her office, she noticed the distinctive business card of a local qui tam relator's counsel peeking out of his back pocket.

Thereafter, Prudence met with Buck Dollars. "As Chief Compliance Officer," she said, "I believe we need to go ahead and report to HHS that we've been inflating our chargemaster prices in order to boost our outlier payments. I think that's a very risky strategy, and now that we're on notice of it, we could start accruing per-day penalties that could run into big money. We've told OIG and Wall Street that we're turning over a new leaf, and we need to deal with this proactively right now."

"Hold on just a minute," Buck remonstrated. "In the first place, doesn't the CIA say we only have to report things that we've determined are violations after we've made some sort of 'due inquiry'? Reimbursement is a complicated thing, and I think you need to go out and get an outside law firm to look into this and tell us what they think. Maybe hire some consultants, too. We need a comprehensive report before we start telling the world we're committing some kind of fraud."

"Anyway," Buck went on, "you know we're supposed to go effective on that new stock offering next week, and if you haul off and file something with HHS, we'll have to go into the prospectus and talk about how we're breaking the law.

That'll tank the stock, and your and my bonus right with it. Now, what do you know about outlier payments anyway? Do you know there's something wrong with this?"

"Well, no-o-o-o," Prudence said slowly. "But Greg Greenstripe seemed to know a lot about them, and he seemed pretty sure we shouldn't be doing what we're doing."

"Prudence, we're not going to hang this company out to dry because some scaredy-cat who couldn't even pass the CPA exam gets all lathered up about something he doesn't understand," replied Buck. "You get us some lawyers who can look this up and down and find everything they can to show that what we've been doing is fine. Anyway, if we were doing something wrong, we didn't mean to, and I'm not going to confess to something we didn't even mean to do. You go out and hire those lawyers and tell them we want a full report in three months, four at the outside. And don't breathe a word of this to any government bureaucrat until we know there's no other way."

Duly chastened, Prudence returned to her office, just in time to pick up her ringing phone. On the line was the Chair of the Compliance Committee of Megalithic's Board of Directors. "Prudence, just checking in to see if you had anything on your mind before the Compliance Committee meets next week. You know, we've only got 30 minutes to meet before our tee time, and we don't want any surprises . . . ."[1]

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[1]Astute readers will recognize that the above scenario is based in part on a highly compressed and combined version of the claims asserted against Christi R. Sulzbach, the former General Counsel and Chief Compliance Officer of Tenet Healthcare Corporation, in United States v. Sulzbach, Civ. Action No. 07-61329 (S.D. Fla.), filed Sept. 8, 2007 (asserting claims under the False Claims Act arising primarily out of Ms. Sulzbach's role as Tenet's Chief Compliance Officer and her alleged failure to report certain violations of the Anti-Kickback Statute and the Stark Law under Tenet's Corporate Integrity Agreement), and Securities & Exch. Comm'n v. Tenet Healthcare Corporation, No. CV-07-2144 (C.D. Cal.), filed Apr. 7, 2007 (asserting federal securities fraud claims arising primarily out of Ms. Sulzbach's role as Tenet's General Counsel and her alleged failure to cause Tenet to disclose its outlier payment enhancement scheme in its securities filings). The actual allegations and issues in those cases are discussed in William W. Horton, *Target-at-Law: Instructive Moral Lessons from the New Lawyer Wars*, in Health Law Handbook (Alice G. Gosfield, ed.) (2009 ed.) § 13:5–13:7. Subsequent to the publication of

B. So Close, So Close and Yet So Far Away

The general counsel of a public corporation should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the board of directors.[2]

In today's public company arena, there is an active movement by some to separate the chief legal officer from the compliance function. This forced separation is an unwarranted intrusion into a company's legal risk management and acts to deny the company its right to counsel.[3]

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 . . ., a system of checks and balances is established to more effectively achieve the goals of the compliance program.[4]

The lawyers tell you whether you can do something, and compliance tells you whether you should. We think upper management should hear both arguments.[5]

Apparently, neither Tenet [Healthcare Corporation nor Ms.

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that chapter, the False Claims Act case was dismissed on statute-of-limitations grounds, and Ms. Sulzbach paid a civil money penalty of $120,000 and consented to certain injunctive relief to resolve the securities fraud case. *See* Gregg Blesch, *Judge to end lawsuit against former Tenet counsel*, ModernHealthcare.com, Mar. 25, 2010, available at http://www.modernhealthcare.com/article/20100325/news/303259978; In the Matter of Christi R. Sulzbach, Securities Exchange Act Rel. No 60170 (June 25, 2009).

[2]Am. Bar Ass'n Task Force on Corp. Responsibility, *Report of the American Bar Association Task Force on Corporate Responsibility*, 59 Bus. Law. 145, 161 (Nov. 2003) (hereinafter Cheek Report) (Recommended Policies of Corporate Governance, No. 5).

[3]R. William "Bill" Ide & Crystal J. Clark, *The Chief Legal Officer's Critical Role in the Compliance Function*, 12 Corp. Accountability Rep. (BNA) No. 26, at 1 (June 27, 2014) (hereinafter Ide & Clark, *Critical Role*).

[4]U.S. Dep't of Health & Human Services, Off. of Inspector Gen., *OIG Compliance Program Guidance for Hospitals*, 63 Fed. Reg. 8987, 8993 n. 35 (Feb. 23, 1998) (hereinafter "Hospital Compliance Guidance").

[5]Lewis Morris, then Chief Counsel to the Office of Inspector General of the Department of Health and Human Services, commenting on the 2009 Corporate Integrity Agreement between the Department and Pfizer Inc. (which, among other things, required the company's compliance officer to report to its chief executive officer and essentially excluded the general counsel from any substantive role in the compliance function), as

[Christi R.] Sulzbach saw any conflict in her wearing two hats as Tenet's general counsel and chief compliance officer. As general counsel, Ms. Sulzbach zealously defended Tenet against claims of ethical and legal non-compliance, e.g., the April 2001 qui tam suit, while as chief compliance officer, she supposedly ensured compliance by Tenet's officers, directors and employees. It doesn't take a pig farmer from Iowa to smell the stench of conflict in that arrangement.[6]

The rise of the "modern" compliance officer over the past 20 years or so[7] has brought with it vigorous theoretical and practical debates about the relationship of the legal and compliance functions within corporate organizations. Many organizations seem to have assumed, as a matter of course, that the compliance officer should be a lawyer, on the theory that in order to promote and monitor legal compliance, it was necessary to have someone with formal training in the law.[8] Indeed, in the public company setting, an influential report by a task force of the American Bar Association

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quoted in Roy Snell, *Letter from the CEO: Should the Compliance Officer Report to the General Counsel?*, Compliance Today (Dec. 2009) at 18.

[6]Press Release, dated Sept. 7, 2003, of Sen. Chuck Grassley (R-Iowa), *Grassley Investigates Tenet Healthcare's Use of Federal Tax Dollars*, available at http://www.grassley.senate.gov/news/news-releases/grassley-investigates-tenet-healthcares-use-federal-tax-dollars.

[7]This time period is admittedly arbitrary, but not unreasonably so. The elevation of the compliance function in healthcare organizations to a level of prominence within the organization is probably traceable to the implementation of CIAs as a standard requirement of any settlement of healthcare fraud cases beginning in the early 1990s. After the significant number of corporate scandals in the early 2000s, particularly the Enron and Worldcom scandals, there came to be an increasing focus on the doctrinal questions of the proper role, status, and reporting relationships of the compliance officer, not just in traditional areas like healthcare and financial services but in larger corporations in general. For a high-level historical survey of factors leading to the rise of the modern corporate compliance officer function, *see* Susan Lorde Martin, *Compliance Officers: More Jobs, More Responsibility, More Liability*, 29 Notre Dame J.L. Ethics & Pub. Pol'y 169, 171–184 (2015).

[8]*See, e.g.,* Ide & Clark, *Critical Role*, at 2 ("The vast majority of all compliance activities involve prevention and education activities, where a lawyer's role in interpreting, explaining and performing risk assessments is critical."). Note that the proposition that having a lawyer in the compliance officer role is ideal is, in itself, a debatable proposition for healthcare organizations. Many compliance issues for healthcare organizations involve issues of billing, coding, medical necessity, and other things that are outside the knowledge and expertise of many lawyers, even those who

unequivocally stated that the general counsel should have "primary responsibility" for overseeing the corporate compliance function,[9] and a prominent commentator on corporate governance has asserted on multiple occasions that the chief compliance officer should report to the general counsel or to the general counsel and the chief financial officer.[10]

In the healthcare industry, however, the Office of Inspector General of the Department of Health and Human Services (the "OIG") has become increasingly outspoken in its position that it is highly preferable, if not mandatory, that the corporate compliance function be "independent" of the internal legal function, with compliance not reporting to the general counsel (much less being the general counsel).[11] Indeed, while some commentators debate whether the general counsel is, or should be, the (or at least "a") "conscience of the company,"[12] the OIG's statements have, more and

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have focused on the healthcare industry, unless they have undertaken specialized technical training in healthcare operational and reimbursement matters. The relative merits of lawyers vs. nonlawyers in the compliance officer function is a topic beyond the scope of this discussion, but it is a topic worth careful analysis in staffing the compliance function.

[9] *See* text accompanying note 2.

[10] *See* Ben Heineman, Jr., *Don't Divorce the GC and The Compliance Officer*, *available at* http://belfercenter.hks.harvard.edu/publication/20612/dont__divorce__the__gc__and__compliance__officer.html (originally published as an op-ed in Corp. Counsel, Dec. 14, 2010); Ben Heinemann, Jr., *Can the Marriage of the GC and Chief Compliance Officer Last?*, *available at* http://www.law.harvard.edu/programs/corp__gov/articles/Heineman__CorpCon__03-30-12.pdf (originally published as an op-ed in Corp. Counsel, Mar. 30, 2012).

[11] *See* discussion at section III below.

[12] *Compare* Robert C. Weber, Keynote Address to the N.Y. State Institute on Professionalism in the Law and New York State Judicial Institute Convocation on Lawyer Independence Challenges and In-House Corporate Counsel 16 (Nov. 9, 2012), *available at* https://www.nycourts.gov/ip/jipl/pdf/Keynote-nov-2012.pdf ("Few concepts could be as destructive to the lawyer's right to sit at the senior table as it is to place around the lawyer's neck the millstone of being the company's 'conscience.' And even more debilitating to the effectiveness of a general counsel would be the senior team's belief or perception that [she] actually believed she was the conscience of the company, or even worse, acted like it.") *and* Ben Heineman, Jr., *General Counsel are* One *Conscience of the Company: A Response to IBM's Robert Weber*, *available at* http://www.law.harvard.edu/programs/corp__gov/articles/Heineman__CorpCon__01-24-13.pdf (originally pub-

more, seemed to adopt the view that the general counsel and other lawyers acting in a legal function—as opposed to a distinct, discrete, "independent" compliance function—are mechanics, if not hired guns, focused only on the technical questions of what the law permits. Underlying this position seems to be an implicit concern that the general counsel is somehow subject to conflicts of interest or other disabling factors that prevent the general counsel from advising an organization's management and, in particular, its board of directors on compliance matters.

As a practical matter, a significant number of healthcare organizations continue to have a single person serve both as general counsel and chief compliance officer or to have the compliance function housed within the legal department, reporting to the general counsel, despite the OIG's apparent resolve on this issue.[13] The reasons for this may be a function of philosophy, economics, or both. In light of that fact, this article explores certain issues of (legal) ethics that may be presented in circumstances where a lawyer who has a

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lished as an op-ed in Corp. Counsel, Jan. 24, 2013) ("General counsel are clearly *one* conscience of the company in a process sense, along with other staff and business leaders. They raise issues for debate and discussion about what the company should do (*a normative question!*) in many evolving situations where neither law nor ethics are clear . . . . And, as the law is applied morality, GCs also have a role, along with other key staff, in generating options about what the company should do 'beyond what the law requires.' ") (emphasis in original).

[13]A recent survey by the Society of Corporate Compliance and Ethics found that in 18% of the responding organizations, the "person with overall responsibility for the compliance program" reported to the general counsel or chief legal officer; in 21% of the respondents, the "person with day-to-day operational responsibility for the compliance program" reported to the general counsel or chief legal officer; and in 8% of the respondents, the general counsel or chief legal officer had "overall responsibility" for the organization's compliance and ethics program (in 40% of the respondents, such overall responsibility was placed with the "Chief Compliance and/or Ethics Officer, and in 16%, with the "Compliance and/or Ethics Officer"; it is not entirely clear how the survey dealt with an organization where the responsible person held, say, both the "general counsel" and "chief compliance officer" titles). *See* Soc'y of Corp. Compliance & Ethics & NYSE Governance Services, 2014 Compliance and Ethics Environment Report (2014), at 8–13. The survey encompassed a variety of industries, but "health care and social assistance" was the most heavily represented, at 31% of the respondents. 2014 Compliance and Ethics Environment Report at 4.

formal compliance role within an organization also serves as a "traditional" lawyer for the organization and/or reports to the organization's general counsel. In addition, this article will offer some practical observations about the challenges that may arise when a single lawyer has both a compliance function and a legal function and some implications of the OIG's stated positions on the issue.

II. Foundation Stones: Rules of Professional Conduct Relevant to the Lawyer Serving as a Compliance Officer (and Vice Versa)

A. "The Rules" (and Why to Worry About Them)

Lawyers, of course, are licensed by one or more jurisdictions, and one of the requirements of licensure is that a lawyer comply with the professional responsibility rules applicable in his or her jurisdiction(s) of licensure. If a lawyer is licensed anywhere other than California, the rules applicable to that lawyer are based on the American Bar Association's Model Rules of Professional Conduct.[14] The Model Rules prescribe, in some detail, the dimensions of a lawyer's duties to clients, former clients, prospective clients, unrepresented persons, tribunals, and the public and discuss how a lawyer may deal with conflicts of interests, disclosures of client information, and other thorny issues.

Implicit in most of the Model Rules is the principle that they apply in the context of an attorney-client relationship where the lawyer is serving as an advisor, an advocate in an adversary proceeding, or a negotiator seeing to advance a client's position.[15] However, the drafters observe that "there are [Model] Rules that apply to lawyers who are not active

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[14]Am. Bar Ass'n, Model Rules of Prof'l Conduct (2015) (hereinafter "Model Rules"). The Model Rules form the basis of the professional responsibility rules in every jurisdiction except California, which keeps toying with adopting them but never quite closes the deal. However, the specific version of the Model Rules in effect in one state may differ significantly from the version in effect in another state, as well as from the current official version. Readers are cautioned to consult the specific professional responsibility rules in effect in the jurisdiction(s) where they are licensed.

[15]*See* Model Rules Preamble, para. [2].

in the practice of law or to practicing lawyers even when they are acting in a nonprofessional capacity," citing the prohibition (in Model Rule 8.4) on lawyers "engaging in conduct involving dishonesty, fraud, deceit or misrepresentation."[16]

That having been said, a nonlawyer compliance officer is, obviously, not subject to the ethics rules that govern lawyers. Is a lawyer who fulfills the same compliance functions subject to those rules, at least when he or she is acting in a "pure" compliance capacity? That is a question that does not have a fully settled answer. It has been argued that the functions of a compliance officer are not "the practice of law," an argument that is empirically (if not doctrinally) supported by the existence of substantial numbers of nonlawyers in compliance positions.[17] At the same time, it is fairly undeniable that a significant part of a compliance officer's work typically involves the same types of functions that are often done by lawyers, both internal and external—reviewing and interpreting laws and regulations and advising organizations on what those laws and regulations require, how to comply with them, and what to do when potential violations occur.[18]

Further, whether what a compliance officer does is "the practice of law" is not the only question. Even a lawyer who is undeniably practicing law still owes attorney-client obligations only to those persons who are, unsurprisingly, clients. Is the organization employing a compliance officer that person's "client"? Is it feasible, or desirable, to answer that question by means of an employment contract or job description that expressly states that the compliance officer is not acting as a lawyer and is not engaged to provide legal advice

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[16]Model Rules Preamble, para. [3]. Thus, for example, lawyers who are convicted of felonies unrelated to the practice of law are routinely subject to bar discipline.

[17]For a somewhat irascible discussion of this phenomenon, *see Alternative Careers: The Myth of Compliance*, Constitutional Daily (blog) (Oct. 11, 2011), http://www.constitutionaldaily.com/index.php%3Foption=com_content%26id=1195%3Aalter. . .

[18]*See, e.g.,* Michele DeStefano, *Creating a Culture of Compliance: Why Departmentalization May Not Be the Answer*, 10 Hastings Bus. L.J. 71, 91–97 (2014); Michele DeStefano, *Compliance and Claim Funding: Testing the Borders of Lawyers' Monopoly and the Unauthorized Practice of Law*, 82 Fordham L. Rev. 2961, 2976–2980 (2014).

to his or her employer (or by means of a Corporate Integrity Agreement that purports to prevent the compliance officer from "acting in any capacity as legal counsel" for the subject organization)? That is simply not clear. In general, the attorney-client relationship is a volitional one, and if a lawyer and a sophisticated client expressly agree that no such relationship is being formed, that agreement should ordinarily be respected. However, when the putative client is the full-time employer of the lawyer and the nature of the lawyer's job function is to advise on the legal requirements applicable to the client and to ensure compliance with those requirements, the relationship between the parties may make the efficacy of that disclaimer doubtful.[19]

Beyond that, if the lawyer in question holds a "mixed" position—that is, the lawyer is both the general counsel and the compliance officer, or the lawyer is a member of the organization's legal department who directly or indirectly reports to the general counsel—it would be very difficult to argue that the lawyer was not subject to the applicable rules of professional responsibility even when performing compliance-oriented functions. Simply put, it would be hard for a lawyer advising on matters relating to the law to argue that he or she was not functioning in an attorney-client relationship, and as a practical matter, it would be very difficult to parse through what the lawyer has said or done to say, "This was done as a legal advisor, and this was done as a compliance officer and not as a legal advisor" in a way that will be respected.[20]

For purposes of the following discussion, then, it will be assumed that the Model Rules would apply to a lawyer serving in a compliance officer role, whether or not that lawyer had a formal position within the client organization's legal department. In some cases, that may prove to be an incor-

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[19]*See* Model Rules R. 1.2(c), which provides that "[a] lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent." Is it a reasonable limitation to say, in effect, "If I happen to give you any legal advice, you're not going to treat it as legal advice"?

[20]Although, should the lawyer's organization get in trouble with the government, enforcement authorities will likely argue that almost everything the lawyer did was in a compliance role and therefore not subject to attorney-client privilege and work product protection.

rect assumption, but it is usually the better part of valor to take a conservative position when discussing issues that affect the retention of one's license.

B. Key Ethics Rules Affecting Lawyer-Compliance Officers

What, then, are the Model Rules most relevant to a lawyer who also serves as a compliance officer? Or more cynically perhaps, what are the Model Rules most likely to raise troublesome issues for a lawyer-compliance officer? The following sections offer some thoughts.

1. Model Rule 1.1: The Rule of Competence

The number one rule of professional responsibility—quite literally—is a very fundamental one. Model Rule 1.1 provides that a lawyer must "provide competent representation to a client," which requires the lawyer to possess "the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."[21] The commentary to that rule requires the lawyer to take into account:

> the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question.[22]

Obviously, a lawyer functioning in either a "pure legal" role or a "pure compliance" role in a healthcare organization must have a strong working knowledge of the complex web of regulation that surrounds the industry and an honest enough assessment of his or her personal fund of knowledge to know when to bring in more specialized help.

Competence is arguably more difficult to obtain and maintain in the healthcare compliance arena than it is in some other settings because of the volume of regulation that exists, because that regulation is extensive at both the federal and state levels, and because of the somewhat curious way in which interpretations of healthcare regulatory

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[21]Model Rules R. 1.1.

[22]Model Rules R. 1.1, cmt. [1].

requirements tend to manifest themselves, among other things. A lawyer—or anyone else, for that matter—seeking to determine whether a particular arrangement complies with the Stark Law[23] or the Anti-Kickback Statute[24] must go beyond looking at the text of the United States Code and the Code of Federal Regulations to look at regulatory preambles, advisory opinions, subregulatory compliance guidance, and, often enough, speeches and articles by relevant agency staff in order to have any confidence in how that text is interpreted in practice.

Realistically speaking, given the heightened awareness of the importance of appropriately informed and qualified legal counsel and compliance personnel for healthcare organizations in today's aggressive enforcement environment, it seems fairly unlikely that a healthcare organization of any sophistication would employ a lawyer in either a legal or compliance role who was not at least generally competent as to the applicable legal principles. However, at least two other competence-related issues suggest themselves when the legal and compliance functions are embodied in the same person, and perhaps even when they are embodied is in different lawyers in the same department.

First, there is the lawyer's potential failure to recognize the limits of his or her "compliance competence" and to bring in additional lawyer or nonlawyer resources when necessary. Some compliance issues fall squarely within the sorts of things that the general run of healthcare lawyers deal with: physician-hospital financial arrangements, joint ventures, medical staff issues, even basic tax exemption issues. Other things, however, are less likely to fall within even an experienced healthcare lawyer's knowledge base: technical billing and coding issues, cost report issues, medical necessity issues—these sorts of matters involving relatively narrow but relatively highly specialized areas are often subjects about which healthcare law generalists are only marginally knowledgeable about. In those types of situations, the lawyer's failure to appropriately enhance his or her competence by calling in reinforcements may be a professional responsibility shortfall with serious consequences.

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[23]42 U.S.C. § 1395nn and the regulations promulgated thereunder.

[24]42 U.S.C. § 1320a-7b(b).

The second "competence" issue that arises is the difficulty that a single lawyer may have in assessing a particular compliance situation from the different perspectives inherent in the lawyer-*qua*-lawyer and lawyer-*qua*-compliance officer roles. This conflict is not necessarily all that likely to arise in evaluating a potential transaction or arrangement at the planning stages. Indeed, having both the legal and compliance functions centered in a single lawyer may have some advantages in that circumstance, since the lawyer can assess and advise on the technical requirements applicable to the arrangement and on the likely perspectives of regulators and enforcement authorities if the arrangement is scrutinized, thereby helping the business client avoid unintended consequences. The conflict may, however, become quite acute when what is at issue is the evaluation of (and related course of action with respect to) something that has already happened.

For example, assume the client is a hospital that has just discovered that a longstanding arrangement with a group of referring physicians may have failed to meet one of the technical requirements of the relevant Stark Law exception. The available facts suggest that it is fairly clear that the noncompliance did not affect the referral patterns of the physicians or the amount of federal reimbursement resulting from such referrals, and indeed that neither hospital personnel nor the physicians were aware that the arrangement arguably did not meet the exception. However, because the arrangement has been in place for some years, the amount of Medicare reimbursement that the hospital has received—and would have to repay if the error were discovered—as a result of potentially tainted referrals from the physician group is substantial.

Here, the "legal" and "compliance" responses may diverge. A lawyer functioning as a legal advisor may well say, "Okay, let's analyze this and see how we would defend this claim if it were discovered. What arguments do we have that we did in fact comply with the exception even though it appears we didn't? Is there another exception that would work? Are there facts that would support a defense position that we didn't owe everything back? We don't need to do anything until we've established our best position as to how we would respond to a lawsuit or investigation." A lawyer functioning as a compliance officer may well say, "We know we have a

problem here. If we quantify it and self-disclose it, we enhance the likelihood that we can resolve it on a financially favorable basis, and we cut off the risk that some disgruntled employee is going to figure this out and file a qui tam suit. If we can show that we promptly self-reported and immediately took remedial steps to ensure that the error did not recur, we'll look like good guys trying to do the right thing and ultimately be better off."

Now, depending on the specific facts in question, neither of those positions is frivolous, and both of them should be taken into account by the organization in deciding on its course of action. However, it is likely to be quite difficult for a single lawyer to effectively advise the organization on the merits and risks of each approach; no matter how assiduously objective the lawyer is, it is going to be difficult to avoid slanting the presentation in accordance with the lawyer's particular bias.[25] That in itself is not an ethical issue. However, if the organization's ultimate decision proves to be the wrong one, the lawyer may find himself or herself in for criticism—or even personal liability—if it is perceived that the lawyer steered the organization away from what, in the event, proved to be the better course of action because of conflict inherent in his or her multiple job roles. In this sort of circumstance, it is likely to be advisable for the lawyer-compliance officer to bring in another voice to ensure that both perspectives are perceived to have been effectively presented.

2. Model Rule 1.2: Lines of Authority

Model Rule 1.2 sets out important rules concerning the allocation of authority between client and lawyer:[26]

> (a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on

[25]Admittedly, this issue might be ameliorated by having two lawyers from the same reporting chain offer up the two different analyses. However, if one of those is subordinate to the other, there is still a risk that the views presented by the subordinate lawyer will, if a bad result occurs, be alleged to have been muted because of that lawyer's concern about getting crosswise with his or her superior.

[26]Model Rules R. 1.2.

> behalf of the client as is impliedly authorized to carry out the representation . . . .
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> . . .
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> (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
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> (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.

Paragraph (a) of the rule establishes what might be referred to as a rule of deference, or "the boss may not always be right, but the boss is always the boss"—that is to say, once the lawyer has rendered advice, it is up to the client to determine whether and how to take it. The commentary to the rule offers further color on this relationship:[27]

> On occasion . . . a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. . . . Conversely, the client may resolve the disagreement by discharging the lawyer . . . .

Paragraph (d) of the rule goes on to establish what may seem like a fine distinction: a lawyer may not help a client commit a crime or a fraud but "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

[27]Model Rules R. 1.2, cmt. [2].

determine the validity, scope, meaning or application of the law."[28] In the arena of healthcare regulation, it may not always be clear whether what a client has done or proposes to do is criminal or fraudulent. Depending upon intent and other factors, particular conduct may be innocent and salutary, or it may constitute a felony under the Anti-Kickback Statute. Stark Law violations may be quite serious, but Stark is a civil statute, and because Stark is a strict liability statute that proscribes certain behaviors without regard to intent, violations of the Stark Law may occur that are not at all "fraudulent," in the conventional sense of the word. Thus, a great deal of what healthcare lawyers serving in a legal or compliance role do tends to involve "discuss[ions] of [potential] legal consequences" and "determin[ing] the validity, scope, meaning or application of the law."

The associated commentary refines the rule's distinctions further:[29]

> [9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent in and of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
>
> [10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter . . . .

These comments suggest, again, an area where the ethical responsibilities of the lawyer functioning in a pure legal role may diverge from those of the lawyer functioning in a compli-

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[28]Model Rules R. 1.2(d).

[29]Model Rule 1.2, cmts. [9] to [10].

ance role. Comment [9]'s comforting assurance about the ethical propriety of giving the client "an honest opinion about the actual consequences that appear likely to result from a client's conduct" seems to describe what a lawyer functioning in either role should be prepared to do. Comment [10], on the other hand, suggests the potential for the type of conflict discussed above. Obviously, in neither role can the lawyer discover criminal or fraudulent conduct and assist the client in continuing it or covering it up. But a lawyer looking through the prism of "compliance" may more quickly reach the conclusion that particular conduct is—or at least is likely to be perceived as—criminal or fraudulent while a lawyer looking with "defense" glasses on may see greater freedom to analyze and assess the risks before moving to a remedy such as self-disclosure.

Further, there is another potential challenge presented by Rule 1.2's allocation of authority. Ultimately, as discussed above, the rule defers to the client as to the course of action to take once the lawyer has given his or her advice. But who speaks for the client in making that decision? The general counsel is, in most circumstances, going to look to the chief executive officer as the final authority—that is the way the organizational chart generally works. The compliance officer, on the other hand, may have different reporting responsibilities, either as a function of the corporate organizational structure or as a result of requirements imposed by a CIA. Thus, this rule of deference may play out differently for different lawyers in the same organization, depending on which position they hold.

3. Model Rule 1.7: There Are Conflicts, and Then There Are *Conflicts* . . .

Rule 1.7 sets forth the basic rule regarding conflicts of interest. As relevant to this discussion:[30]

> (a) Except as provided in paragraph (b) [relating to a client's ability to waive certain conflicts by informed consent], a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or

[30]Model Rules R. 1.7(a).

> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

This last clause of paragraph (a)(2) suggests where the potential for conflict arises when the general counsel and compliance officer functions reside with the same lawyer. As explained by the commentary, "The lawyer's own interests should not be permitted to have an adverse effect on representation of a client. For example, if the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice."[31] Although it is not the usual state of affairs, there are going to be occasions in which a compliance investigation must be initiated with respect to a transaction or arrangement in which the general counsel or a subordinate lawyer has been involved. It may be as simple as reviewing the circumstances behind a medical director agreement that has come under scrutiny. It may be as serious as determining whether the company has committed securities fraud in public filings that the general counsel has reviewed. In either such case, however, a single lawyer who serves as both general counsel and compliance officer, or a compliance officer who reports to the general counsel, may plausibly have his or her independence questioned. In such a circumstance, Rule 1.7 will likely compel the result that the compliance review must be handed off to someone outside the general counsel's sphere of influence.

4. Model Rule 1.13: The Organization Client and the Discovery of Wrongdoing

Rule 1.3 establishes the basic rule that a lawyer engaged to represent a corporation or other organization represents that organization and not its officers, directors, shareholders, or other constituents and owes his or her professional duties to the entity and not to any individual.[32] From that

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[31] Model Rules R. 1.7, cmt. [10].

[32] *See* Model Rules R. 1.13(a).

fundamental truth, the rule goes on to establish the duties of a lawyer who discovers that mischief is afoot:[33]

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessarily in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if
>
> (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
>
> (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization,
>
> then the lawyer may reveal information relating to the representation whether or not Rule 1.6 [the basic rule of confidentiality] permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.
>
> (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.

Rule 1.13 reiterates the basic premise that, as discussed above, the lawyer ordinarily has a duty to defer to the lawful decisions of those in authority over the organization, even where the lawyer may question the wisdom of those decisions: "When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions

[33]Model Rule R. 1.13(b) to (d).

concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province."[34] However, the rule imposes a "reporting up" obligation where the lawyer *knows* that a corporate agent's action (or inaction) constitutes a violation of a duty to the organization or a violation of law attributable to the organization and where either of those violations is likely to result in "substantial injury" to the organization. The rule even provides, in paragraph (c), for a limited "reporting out" option in certain circumstances where the highest authority in the organization has refused to act on the report of a violation, and such reporting out is reasonably necessary to prevent (but not to remediate) substantial injury to the organization. (In that regard, note that the "reporting out" provision is permissive, not mandatory, and is circumscribed so tightly that the number of situations in which it would clearly be applicable and available is quite small. Note also that Rule 1.13(d) eliminates the availability of Rule 1.13(c) where the lawyer has been engaged to investigate an alleged violation or defend the organization in connection with such a violation.)

The lawyer's rights and obligations under Rule 1.13(b) are based on the lawyer's reasonable determination as to what is in the best interests of the client organization. Here again, however, the lawyer who is functioning as a legal advisor or advocate for the organization may have a different perspective on where the organization's best interests lie than the lawyer who is functioning as a compliance officer. Bear in mind that 1.13(b) only has application where the lawyer has become aware of a potential violation. The lawyer's assessment of whether that violation is likely to result in a substantial injury to the organization may well depend on whether the lawyer approaches the analysis from a defense-oriented standpoint (gathering all relevant facts and assessing the likely outcomes of available strategies) or from a compliance-oriented standpoint (focusing on prompt remediation and mitigation of adverse consequences). To the extent Rule 1.13(b) is applicable to a lawyer in a compliance role—and subsection (d) of the rule may mean that it is not applicable in any meaningful way, at least a good bit of the time—there is likely to be significant value in having the

[34]Model Rule 1.13, cmt. [3].

compliance analysis undertaken by a lawyer who is solely responsible for offering the "compliance perspective"; it is likely to be difficult for a lawyer who is focused on a more traditional legal analysis to effectively articulate both views.

5. Model Rule 2.1: The Lawyer as Professional

In each role, and contrary to the implied dichotomy reflected in the Lew Morris quote set forth above, Rule 2.1 sets forth a unifying rule that applies to both the lawyer-qua-lawyer and the lawyer-qua-compliance officer:[35]

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

In other words, regardless of job title or function, the lawyer is expected to be—has a duty and obligation to be—an independent, objective professional offering the client the best advice he or she can in the circumstances even when the client may prefer not to hear it. The accompanying commentary expands upon these concepts:[36]

> [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
>
> [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.
>
> . . .
>
> [5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a cli-

[35]Model Rules R. 2.1.

[36]Model Rules R. 2.1, cmt.s [2], [3], and [5].

> ent proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client . . . may require that the lawyer offer advice if the client's course of action is related to the representation. . . . A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.

The nature of the advice offered and the considerations taken into account may appropriately be different when the lawyer is functioning in a compliance role rather than in a traditional role as a legal advisor or advocate. Further, it may be difficult for a single lawyer to effectively communicate the full relevant range of advice in a particular situation if that advice encompasses materially different practical considerations, as may often be the case when the matter at hand is considered from a risk analysis perspective and from a compliance/remediation perspective. From either perspective, however, the lawyer has an obligation to consider the other perspective and to consider how the appropriate messages may best be delivered to the client so that the client may be fully informed and fully advised. As a practical matter, that may often require that the messages come from different sources so that there is no question that the relevant views have been effectively presented. Certainly, as alluded to above and discussed more fully below, that concern represents the default position of the OIG.

III. Separate, But (at Least) Equal: the OIG's Increasingly Insistent Demand for Separation

Over the past 15 years or so, the OIG has made a number of pronouncements about what, in its view, are the proper roles and relationships of the legal and compliance functions in healthcare organizations. Those pronouncements, it is fair to say, have become increasingly detailed and dogmatic.

The first such pronouncement was rather modest in nature. In its 1998 Compliance Program Guidance for Hospitals document, the OIG observed, in a footnote rather unobtrusively placed about halfway through the document, that it believed "that there is *some risk* to establishing an independent compliance function if that function is subordinance [*sic*] to the hospital's general counsel, or comptroller

or similar hospital financial officer."[37] As quoted above, the OIG offered its view that separating the compliance function from the legal and financial functions "where the size and structure of the hospital of the hospital make this a feasible option" established a "system of checks and balances . . . to more effectively achieve the goals of the compliance program."[38] The text accompanying the footnote focused on the importance of having a compliance officer with direct access to the hospital governing body and the chief executive officer, but the tone and placement of the discussion of the relative desirability of a compliance officer's reporting to the general counsel suggested that the OIG's views were hortatory, rather than prescriptive, and that in any event, the OIG took into account the possibility that a hospital might simply not have the resources to separate the legal and compliance functions.

Soon enough, though, that rather pragmatic view began to erode. In the mid-2000s, the OIG published a series of compliance guidance documents in conjunction with the American Health Lawyers Association (AHLA), in which the OIG began to focus considerable attention on the role and status of the compliance officer within the corporate infrastructure. The first such publication, *Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors*,[39] was released in April 2003. In that relatively brief document, the OIG spoke clearly of the need for organizations to have a compliance officer to have appropriate authority and human and financial resources to implement an effective compliance program. However, the OIG guidance did not specifically address the relationship between the compliance officer and the general counsel, and in fact seemed to accommodate a fair amount of flexibility as to how an organization established responsibility for its compliance program, so long as the board ensured that management had developed an effective system: "The Board should satisfy itself that management has developed a

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[37]Hospital Compliance Guidance, 63 Fed. Reg. 8987, 8993 n. 35 (emphasis supplied).

[38]63 Fed. Reg. at 8993.

[39]Off. of Inspector Gen., U.S. Dep't of Health & Human Services, and Am. Health Lawyers Ass'n, Corporate Responsibility and Corporate Compliance: A Resource for Health Care Boards of Directors (2003).

system that establishes accountability for proper implementation of the compliance program."[40]

By July 2004, however, the OIG's focus shifted squarely to the interaction of the legal and compliance functions in an organization. Although characterized as "a supplement" to *Corporate Responsibility and Corporate Compliance*,[41] the follow-up guidance document, *An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors*, was over twice the length of the original and focused intensely, and rather prescriptively, on what the OIG viewed as the proper roles and reporting relationships of the general counsel and the compliance officer.[42]

Integrated Approach begins by citing the OIG's statements in the Hospital Compliance Guidance and Senator Grassley's complaint about the dual role of Christi Sulzbach as Tenet Healthcare Corporation's general counsel and chief compliance officer and contrasting those with the ABA "Cheek Report" view that the implementation of a legal compliance program was a "primary" responsibility of the general

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[40]A Resource for Health Care Boards of Directors at 6.

[41]Off. of Inspector Gen., U.S. Dep't of Health & Human Services, and Am. Health Lawyers Ass'n, An Integrated Approach to Corporate Compliance: A Resource for Health Care Organization Boards of Directors (2004), at 1 (hereinafter "*Integrated Approach*").

[42]In fairness, and in accuracy, this and the related "board guidance" documents discussed in this section were drafted collaboratively by the OIG and the AHLA (with additional organizations involved in the most recent pronouncement, as noted below). Accordingly, it is arguably misleading, or even tendentious, to describe the statements in those document as simply "the OIG's view." On the other hand, the views of volunteer, private-sector members of a drafting task force, even if those persons are AHLA members, may not appropriately be ascribed to the AHLA as a whole; the views of OIG members of such a task force may, more persuasively, be ascribed to the OIG, and indeed, the OIG has apparently "officially" adopted such views, publishing the documents on its website as part of its compliance resources. *See* http://oig.hhs.gov/compliance/alerts/guidance/index.asp. Accordingly, it does not seem too much of a stretch to ascribe the views and positions expressed in those documents to the OIG, without referring to the collaborative origins of the documents except in this note.

counsel, at least a public company general counsel.[43] It then goes on to summarize what it viewed as the state of play in 2004:[44]

> In light of the OIG position regarding the separation of the compliance function from the General Counsel, some health care organizations and advisors reportedly have taken a stringent view of this concept of separation, treating it more in the nature of a "requirement." Some have even gone so far as to view an otherwise independent compliance officer with a law degree as potentially undercutting the effectiveness of the compliance program. On the other hand, in light of recent developments in the area of lawyer professional responsibility, some may now believe that persons in the position of General Counsel are mandated to assume responsibility in the compliance area. [¶] In reality, a variety of structures for organizing the compliance function is in place in health care organizations . . . .

This statement itself is a bit curious. The OIG's 1998 statement that there was "some risk" in having a compliance function that was subordinate to a hospital's legal or financial officers has, by 2004, become a "position" of the OIG—by implication, separation of the legal and compliance roles was not simply a desirable approach, where an organization's resources made that feasible, but had shifted more toward a default approach, one that an organization presumably should follow absent a compelling reason not to do so. In the same sentence, however, the OIG disavows the idea that separation of the roles is "a 'requirement.' " Thus, this introductory discussion seems to be walking a line between the expression of a significantly more hardened view than the OIG had put forward in 1998 and providing reassurance that there was still some room for flexibility.

The remainder of the document, however, showed fairly clearly the direction in which the OIG was headed. Acknowledging the position of the American Bar Association Task Force on Corporate Governance as expressed in the Cheek Report, the OIG first sought to distinguish the healthcare industry from the more general run of businesses. It cited the heavy level of regulation in the healthcare industry, the

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[43] *Integrated Approach* at 1-2. The references cited by the OIG are set out at the text accompanying notes 2, 4, and 6 above.

[44] *Integrated Approach* at 2.

relative maturity of compliance programs in healthcare organizations in comparison to other business organizations, the greater likelihood that a healthcare organization might have a mandatory disclosure/reporting obligation when it discovered a compliance violation, and the risk that compliance failures might give rise to False Claims Act violations.[45] In other words, compliance officers in healthcare organizations might, in the OIG's view, have more to do than compliance officers in other types of organizations and require more specialized knowledge and, presumably, a greater level of independent to act on that knowledge.

Moving on from there, the OIG acknowledged that "the General Counsel is an essential resource to the Board for understanding the organization's legal risks and the adequacy of the compliance program in addressing those risks."[46] However, the OIG made it very clear that it viewed the functions of the general counsel and the compliance officer as distinctly different, albeit complementary, and reiterated its concern about the "wisdom" of having the compliance officer report to either the general counsel or the chief financial officer:[47]

> The Chief Compliance Officer and the General Counsel may have different, and yet ultimately complementary, responsibilities in the operation of the organization's compliance program. The responsibilities of the Chief Compliance Officer are detailed in the OIG's Compliance Program Guidances. Although the Chief Compliance Officer may have a legal background, typically he or she is not acting in the capacity as counsel for the organization.
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> The amendments to the [United States] Sentencing Guidelines make clear that, as part of an effective compliance program, the Chief Compliance Officer must periodically report to the Board on the status of the compliance program, the resources required to maintain its vitality, and the organization's response to identified compliance deficiencies. A direct reporting relationship helps avoid any potential filtering or censoring influence of senior organization managers. As previously discussed, the OIG has expressed concern about the wisdom of the Chief Compliance Officer being subordinate to the General Counsel or Chief Financial Officer. The OIG

[45] *Integrated Approach* at 3–4.

[46] *Integrated Approach* at 5.

[47] *Integrated Approach* at 6 (footnotes omitted).

> believes that the independence and objectivity of legal and financial analyses of the corporation's activities are enhanced through a system of checks and balances, which includes separating the compliance function from key management positions, including the General Counsel.
>
> As noted earlier, however, the [Cheek Report] suggests that the active involvement of the General Counsel in the compliance program is essential to provide the Board with the information and analysis needed for the directors to discharge their oversight responsibilities. The Task Force also suggests that "counsel . . . should have primary responsibility for assuring the implementation of an effective legal compliance system under the oversight of the [B]oard."
>
> The General Counsel's primary responsibility is to represent the legal interests of the organization by acting as a legal counselor to the organization (through its board of directors, officers, and managers) on a wide variety of topics, including compliance with relevant legal obligations. In the context of the compliance program, the General Counsel serves as an important resource to the compliance staff, as well as to the Board in its exercise of oversight over the organization's compliance systems.
>
> It is the Board's responsibility to reconcile these potentially conflicting views into a complementary set of responsibilities and reporting relationships. Ultimately, the interaction between the General Counsel and the Chief Compliance Officer must support the Board in its oversight responsibilities by ensuring that the Board receives accurate information and candid advice.

Thus, *Integrated Approach* made it clear that the OIG had strong views about which professional "box" general counsel and compliance officers, respectively, should fit in, drawing a not entirely well-articulated distinction between "represent-[ing] the legal interests of the organization by acting as a legal counselor to the organization"—what, in the OIG's view, the general counsel was supposed to do—and on providing the organization's board with "objective information, analyses, and recommendations"[48] concerning the organization's compliance program—the role of the compliance officer. This distinction is not entirely clear, where both officers are in fact lawyers; Model Rules 1.13 and 2.1 pretty expressly state that a lawyer functioning as a lawyer for an organization is ultimately responsible to the board of directors and

[48] *Integrated Approach* at 7.

that such a lawyer is required to exercise independent professional judgment, which sounds a lot like objective information, analyses, and recommendations. However, there was now no doubt that the OIG viewed the two roles as necessarily distinct and potentially in conflict.

Nonetheless, *Integrated Approach* stopped well short of any sort of mandate to separate the roles. The last portion of the guidance provided "summary considerations that might enhance a system of checks and balances" to ensure an effective compliance program with effective board oversight. Those considerations expressly addressed circumstances where the general counsel and the compliance officer were the same person or where the compliance officer reported to the general counsel and included recommended safeguards to address potential conflicts that might arise.[49] One might argue that the OIG was not suggesting any particular tolerance for such arrangements but simply recognizing that they existed out in the world and needed to be addressed. Be that as it may, though, this portion of the guidance may be fairly read to indicate that there were acceptable ways to skin the compliance cat without a total separation of the roles so long as there were adequate procedures to ensure that conflicts were identified and avoided or addressed in a prudent manner.

More recently, however, the OIG's position on the separation of what might be thought of as the compliance "church" and the legal "state" seems to have hardened. In its most recent "board guidance" publication, *Practical Guidance for Health Care Governing Boards on Compliance Oversight*,[50] the OIG advocated "functional boundaries" among five differ-

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[49] *Integrated Approach* at 7.

[50] Off. of Inspector Gen., U.S. Dep't of Health & Human Services, Ass'n of Healthcare Internal Auditors, Am. Health Lawyers Ass'n and Health Care Compliance Ass'n, Practical Guidance for Health Care Governing Boards on Compliance Oversight (2015) (hereinafter "*Practical Guidance*").

It is slightly interesting to note the evolution of the drafting task force for this series of guidance documents. The original three "board guidance" volumes (one of which, focused on quality oversight, is not discussed in this article) were drafted by a task force consisting of two private-practice lawyers from two different firms; one senior, non-general-counsel in-house lawyer, with no stated compliance role, from a nonprofit system; one general counsel/chief compliance officer from a nonprofit

ent corporate functions (compliance, legal, internal audit, human resources, and quality improvement). The "boundaries" between the legal and compliance functions were laid out this way:[51]

> *The compliance function* promotes the prevention, detection, and resolution of actions that do not conform to legal, policy, or business standards. This responsibility includes the obligation to develop policies and procedures that provide employees guidance, the creation of incentives to promote employee compliance, the development of plans to improve or sustain compliance, the development of metrics to measure execution (particularly by management) of the program and implementation of corrective actions, and the development of reports and dashboards that help management and the Board evaluate the effectiveness of the program.
>
> *The legal function* advises the organization on the legal and regulatory risks of its business strategies, providing advice and counsel to management and the Board about relevant laws and regulations that govern, relate to, or impact the organization. The function also defends the organization in legal proceedings and initiates legal proceedings against other parties if such action is warranted.

The OIG went on to state, unequivocally,[52] that it "believe[d] an organization's Compliance Officer should neither be counsel for the provider, nor be subordinate in function or

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system; and the Chief Counsel to the Inspector General. *Practical Guidance*, on the other hand, added two more contributing organizations besides the OIG and AHLA, but its drafting task force seemed a bit more narrowly constituted, and it involved no one who had served on the task force for the prior three volumes. The identified members of the task force included two senior counsel from OIG, two members of the same law firm, the chief compliance officer of a large nonprofit system, and the general counsel/chief compliance officer of a revenue cycle management firm (who had substantial prior legal and compliance experience at two large nonprofit health systems). The author is personally acquainted with many of the members of both task forces, all of whom are experienced, knowledgeable, and thoughtful professionals, and no aspersions are intended to be cast on any of them; indeed, aspersions are expressly denied. It just seems worth a passing note about what, objectively speaking, appears to be a compression in the scope of perspectives involved in the drafting process for what has become a quasiofficial pronouncement of OIG policy.

[51] *Practical Guidance* at 6.

[52] Sort of unequivocally, at least; Practical Guidance did note that "not all entities may possess sufficient resources to support this [five-distinct-function] structure." *Practical Guidance* at 6.

position to counsel or the legal department, in any manner."[53] Of course, three years earlier, the OIG had been even blunter in a one-page handout entitled "A Toolkit for Health Care Boards": that document admonished board members to "[p]rotect the compliance officer's independence by separating this role from your [organization's] legal counsel and senior management. All decisions affecting the compliance officer's employment or limiting the scope of the compliance program should require prior board approval."[54] In other words, it is not entirely unfair to say that the OIG's position on total separation of the legal and compliance functions had evolved from "a really good idea if your organization has the resources" to "the way your organization is expected to do it unless your organization is a foolhardy group of brigands."

This evolution in the OIG's philosophical pronouncements about the roles of the legal and compliance functions has been echoed in its practice as well, in terms of the structural requirements imposed in Corporate Integrity Agreements enter into in connection with OIG settlements. The seminal 1994 Corporate Integrity Agreement between the OIG and National Medical Enterprises, Inc. required that the company's compliance program be overseen by a "Corporate Integrity Program Management Committee," which was required to include "the Associate General Counsel with responsibility for compliance" (as well as a senior financial officer), and the company's general counsel (in such capacity and not in any indicated compliance capacity) was required to sign annual "Compliance Reports" filed with the government.[55] There was no particular indication that the OIG saw any particular peril in having what appears to have been a significant overlap between the compliance and legal functions.

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[53] *Practical Guidance* at 7.

[54] Off. of Inspector Gen., U.S. Dep't of Health & Human Services and Health Care Fraud Prevention and Enforcement Action Team, "A Toolkit for Health Care Boards", *available at* http://www.oig.hhs.gov/newsroom/video/2011/toolkit-handout.pdf (Feb. 27, 2012).

[55] Corporate Integrity Agreement, dated June 29, 1994, between Off. of Inspector Gen., U..S. Dep't of Health & Human Services, and Nat'l Med. Enterprises, Inc., at §§ 6 and 10, *available at* www.healthlawyers.org/Archive/Program%20Papers/1994__FA/[1994__FA]%20Corporate%20Integrity%20Agreement.pdf.

By the time Tenet Healthcare Corporation, the successor to National Medical Enterprises, had entered into a new Corporate Integrity Agreement in 2006, the OIG's position had become more rigid. That CIA required that Tenet maintain a Chief Compliance Officer who was required to be "a member of senior management of Tenet" and who could neither "be, [n]or be subordinate to, Tenet's General Counsel or Chief Financial Officer." Further, the CIA required that Tenet appoint "Regional Compliance Officers" and "Hospital Compliance Officers" who were to be "independent of Tenet's Legal Department."[56]

More recently, the OIG has become even more prescriptive in its approach to separating the legal and compliance functions. For example, some recent CIAs include language requiring that the Compliance Officer not "be or be subordinate to the General Counsel or Chief Financial Officer or have any responsibilities that involve acting in any capacity as legal counsel or supervising legal counsel functions for" the subject organization.[57] This sort of language seems to reflect the OIG's effort to impose the sort of strict separation between legal and compliance functions described in *Practical Guidance*. At the same time, it appears to overlook some of the practical implications of such separation, to some degree implying the narrow view that an organization's legal counsel is principally responsible for "defending the organization." If a compliance officer advises the organization on whether a proposed arrangement presents compliance risks—which OIG representatives have suggested is a proper role for the compliance officer—is that different from acting as [a] legal counsel for the organization? If a compli-

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[56]Corporate Integrity Agreement, dated Sept. 27, 2006, between Off. of Inspector Gen., U..S. Dep't of Health & Human Services, and Tenet Healthcare Corp., at §§ III.A.1 and III.A.2, *available at* http://oig.hhs.gov/fraud/cia/agreements/TenetCIAFinal.pdf.

[57]*See, e.g.,* Corporate Integrity Agreement, dated Dec. 23, 2014, between Off. of Inspector Gen., U..S. Dep't of Health & Human Services, and SpecialCare Hospital Mgt. Corp. and Robert McNutt., at § III.A.1, *available at* http://oig.hhs.gov/fraud/cia/agreements/SpecialCare_McNutt_12232014.pdf. Note that, for licensure-related ethics purposes, the fact that a CIA purports to prohibit a lawyer-compliance officer from acting as legal counsel for an organization does not mean that the lawyer-compliance officer is not in fact acting within an attorney-client relationship with the organization, subject to associated professional obligations.

ance officer engages outside counsel (or directs inside counsel, for that matter) in a compliance investigation, is that not "supervising legal counsel functions"?

The OIG's views have increasingly become inflexible as to the organizational-structure requirements for the legal and compliance functions. As discussed in section IV below, these views may, in fact, generally lead to the right result. However, one might still question the theoretical basis on which the OIG has developed those views and the degree to which the OIG seems to have abandoned any willingness to entertain the notion that there are circumstances in which it may be impracticable, or at least not compellingly necessary, to implement those views rigidly. Certainly, there are particular aspects of the compliance officer's job that may not be a natural fit with the role of the general counsel—education and training programs, perhaps, or even the practical design of remediation programs. On the other hand, advising an organization as to whether its arrangements are compliant or not is, at the core, the giving of legal advice to the organization, and an artificial division of that sort of activity into "providing legal counsel to the organization" and "not providing legal counsel to the organization" is not particularly realistic and may, in fact, create confusion as to applicability of professional responsibility rules to a lawyer-compliance officer that may lead to difficulties down the line.

IV. Making the Best (Sort of) of Both Worlds

As alluded to above, the OIG's position on the separation of the legal and compliance functions may be dogma lacking a sound doctrinal foundation, but at the same time, that position may be correct, both as a practical matter and as a matter of professional responsibility. The fact is that while there is much overlap between the roles of the general counsel and the compliance officer, there are at least two fundamental junctures where their "natural" viewpoints are going to—and arguably should—diverge.

The first is in analyzing a proposed business transaction or arrangement for the organization. The reality of life in the healthcare universe is that, at least as long as the

government clings to the "one-purpose rule" *Greber* dictum,[58] almost any commercially sensible business transaction poses some type of arguable compliance risk. One key task of the general counsel (or lawyers reporting to the general counsel) is to analyze a transaction or arrangement from the standpoint of legal compliance and enforcement risk and to advise the organization of its legal position with respect to the proposed course of action. Often, effectively advising the organization requires an objective assessment of imperfect alternatives, recognizing that the organization may be less risk-averse than the lawyer and that the organization is entitled to make the ultimate decision among the legally available alternatives. Part of the lawyer's function in that case is evaluating how the arrangement might be defended if it were ever challenged.

In the same circumstance, the lawyer-as-compliance officer has a task with somewhat different nuances. If the compliance officer's advice is sought in the same situation,[59] he or she is likely to view the transaction or arrangement from a slightly different perspective: will this arrangement be challenged, and how can the organization remediate the situation if that challenge holds water? These two perspectives—that of the lawyer functioning as a legal advisor and the lawyer in a compliance role—are both valuable and necessary. However, combining those two perspectives in a single voice makes it likely that one perspective or the other will play second fiddle. That, in turn, makes it likely that, if bad things happen down the line with respect to the arrangement, a single lawyer playing a combined role, or even two

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[58]U.S. v. Greber, 760 F.2d 68, 69 (3d Cir. 1985) (Anti-Kickback Statute violated if even one purpose of an arrangement is to induce federal healthcare program referrals).

[59]One might reasonably ask whether the compliance officer ought appropriately to be at the table for the preliminary analysis of a business arrangement, with the concern being that if the compliance officer is involved in the structuring of an arrangement, he or she may be compromised if the arrangement is put in place and compliance issues arise later. Certainly, however, the statement of then-OIG Chief Counsel in connection with the Pfizer CIA, quoted at note 5 above, suggests the OIG's institutional view that the compliance officer should be part of the planning stages of proposed business arrangements, and recent conversations between the author and a senior OIG lawyer suggest that such view continues to obtain at the OIG.

lawyers in a superior-subordinate relationship, may be in for a lot of second-guessing . . . or worse. From a professional responsibility perspective, the lawyer may be competent to render both kinds of advice, but rendering both kinds of advice may not constitute competent representation of the client.

The other point at which the legal and compliance perspectives may diverge uncomfortably is when the bad things in fact do happen. Assume that a compliance problem arises for the organization. Both the general counsel and the compliance officer have a strong interest in gathering the relevant facts and advising the organization on what to do next. However, part of the normal function of the general counsel will be to analyze those facts from the standpoint of whether a violation in fact occurred and what defenses might be available to reduce the organization's liability exposure or avoid liability altogether. The compliance officer's approach is likely to be somewhat different. Upon discovery of what credibly appears to be wrongdoing, the compliance officer's focus is going to be on remediation, any necessary reporting or self-disclosure, and training or other steps to reduce the possibility of recurrence.

These responses are related, they are both of vital importance to the organization, and they may indeed lead the organization to the same place. However, human nature makes it unlikely that a single individual is going to be able to develop and implement them both with equal enthusiasm and effectiveness. Perhaps more significantly, it is unlikely that a single individual is going to be able to communicate them both to the various relevant constituencies in a way that facilitates effective decisionmaking. That is not because of any failing or shortcoming in the lawyer-compliance officer; it is simply because it is hard for one person to be a compelling advocate for divergent positions at the same time. One lawyer who is trying to do both jobs in a potential crisis situation is likely to fall short in his or her ability to perform both of them with the objectivity that professionalism requires, and even if he or she is successful in doing so, after-the-fact scrutiny by third parties may still call that

success into question. That is not a risk that is good for the organization, or the lawyer, to take.[60]

Thus, regardless of whether one thinks the OIG's position is well-supported, its conclusion is hard to argue with. That having been said, it is unfortunate that the OIG has sort of complicated the situation by, in effect, drawing artificial distinctions around what constitutes providing legal representation to an organization and what doesn't and by implying that a lawyer functioning as a lawyer has no role in advising an organization on what it should do and not just what it may do. However, it is, as always, an imperfect world.

But what about the situation where an organization lacks the resources to staff totally separate legal and compliance departments or where the organization has simply concluded that a combined legal-compliance model is what works best for it (and is not under a CIA requiring it to do otherwise? There are still prudent steps such an organization—and its counsel—can take to reduce the risk that such an arrangement will create substantive problems:

- The general counsel-compliance officer should have an established relationship with appropriate outside counsel (or, perhaps, compliance consultants) who are familiar with the organization and can step in quickly in situations where an apparent potential conflict may arise—for example, where a compliance report triggers an inquiry into an arrangement in which the general counsel has had substantive involvement.
- The general counsel-compliance officer should have regularly scheduled meetings with the compliance committee of the board (or whatever committee holds that functions), separate and apart from the chief executive officer or other members of senior management to whom the general counsel-compliance officer reports. This will facilitate open communications with relevant board members that will help mitigate any concern that management is filtering what compliance issues the

[60]The issues are only slightly ameliorated where the general counsel and the compliance officer are different individuals but in a superior-subordinate relationship, because the subordinate will, when stuff hits the fan, likely be assumed to have tempered his or her advice out of deference to the superior.

board hears about, and the use of regularly scheduled meetings will mean that such communications are not automatically assumed to arise from a crisis.

- Where possible, even if the organization believes it is necessary or desirable to house the legal and compliance functions in a similar department, the organization should ensure that the compliance officer role is held by someone other than the general counsel, and that there are means by which the lawyer holding that role may regularly communicate with the compliance committee of the board. In other words, creating the nearest approximation possible to a truly independent compliance function may be an important step in ensuring that the "one department" arrangement is both successful and perceived to be so.

Of course, separating the roles raises its own set of concerns. The legal and compliance functions cannot exist in a vacuum, and one of the worst things that can happen to an organization is to have those two functions working at cross purposes. At a minimum, there is inefficiency in addressing compliance issues. Still worse, there is the possibility of creating "dueling departments" as each function tries to unilaterally control how compliance issues are identified and addressed.

Those risks can be greatly reduced if there is a regular, systematic approach to interdepartmental communication, such as scheduled weekly or monthly meetings between the general counsel and the compliance officer or designated points of contact and coordination within each department. In addition, ensuring that both the general counsel and the compliance officer report to the same level on the organization chart—either to the chief executive officer or to another officer to whom other similarly situated subordinate officers report—will encourage communication and transparency and will reduce any implication that the legal and compliance functions are not on common footing.

Finally, where the roles of general counsel and compliance officer are both held by lawyers—whether one lawyer in both roles or two separate individuals—both roles should be informed by the duties imposed on lawyers by applicable rules of professional responsibility. Ultimately, the question of whether a particular compliance function is "the practice

of law" within an attorney-client relationship may be important for issues of attorney-client privilege, work-product protection, and similar formal concepts. However, that question seems less important in the context of determining big-picture questions of how a lawyer in either role does his or her job. It is both prudent and, it is submitted, socially useful and desirable for a lawyer in whatever role to behave as if he or she were subject to the Model Rules (or whatever rules are in effect in the relevant jurisdiction). A lawyer who remains cognizant of his or her duties of competence, of the duties of independence and objectivity, and of the need to place the interests of the client organization above the interests of any individual constituents will not go far wrong, whether that lawyer is wearing the general counsel hat, the compliance officer's hat, or any other headgear that the task may require.