

An Essay Concerning the Indictment of Lawyers for their Legal Advice

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***“For purposes of professional discipline, a lawyer may not counsel or assist a client in conduct that the lawyer knows to be criminal or fraudulent or in violation of a court order with the intent of facilitation or encouraging the conduct, but the lawyer may counsel or assist a client in conduct when the lawyer reasonably believes: (a) that the client’s conduct constitutes a good-faith effort to determine the validity, scope, meaning, or application of a law or court order; (b) that the client can assert a nonfrivolous argument that the client’s conduct will not constitute a crime or fraud or violate a court order.*”**

Restatement of the Law Governing Lawyers, Third, at § 94 (2).

“Now it is of great moment that well-drawn laws should themselves define all the points they possibly can and leave as few as may be to the decision of the judges ...”

Aristotle, Rhetoric, Chapter 1.

INTRODUCTION

Can a lawyer go to jail for giving bad advice? As we seek to answer that question, let us ponder the complexity of the world that surrounds us as compared to that of our not-so-ancient ancestors, who burned logs for heat and applied leaches for health. Instead of logs, we harness toxic radioactive isotopes for heat. Instead of paying the barber for leaches, we apply high-technology machinery and pay for it through byzantine and highly-regulated funding mechanisms.

The legislatures and agencies that must regulate within this complexity face a sometimes-insurmountably complex cost-benefit analysis. Consider the Fukushima nuclear power plant disaster. Consider the nexus of fiscal intermediaries, managed care organizations, medical equipment suppliers, physicians, advocacy groups, and numerous other actors who have a piece of the American health care system; some are rent-seekers, some are profit-maximizers, some are cost-minimizers, some are actuaries seeking outcomes through economic incentives. The regulations that emerge from this crucible of competing interests can be byzantine; they do not

often possess an inherent “righteous” or “wrongness.” The payment of referral fees, for example, standing alone, without context, is value neutral. Lawyers pay them all the time in some jurisdictions. Yet a lawyer who advises a physician to accept referral fees could easily face criminal indictment.

It is not just that the regulations themselves often lack an obviously-inherent moral imperative. Our clients must apply these seemingly value-neutral regulations while operating within a cauldron of competing interests and entitlements. Officers and directors must answer to shareholders. Regulators must answer to legislatures. Legislatures must answer to voters. Each of these constituencies has interests and entitlements that dictate a most favorable interpretation of the regulations from among potentially multiple, sometimes competing interpretations. We lawyers advise within this maelstrom of competing interests and entitlements, and it is we who must resolve the inevitable interpretive conflicts. We return to our original question. When can our resolution of those conflicts, as lawyers, land us in jail?

SOME QUESTIONS AND HYPOTHETICALS WITHOUT CLEAR ANSWERS

Before discussing the various cases, we ask some preliminary questions and pose some hypotheticals to guide our thinking. For example, should lawyers giving legal advice behave differently depending upon what industry they are advising? Does context matter? Does it matter whether the regulated industry is engaged in inherently-dangerous conduct as opposed to industries involved in strictly economic behavior? Does the extent to which the statutory and regulatory regime is clear, unambiguous, well established, and entrenched matter? What about the regulation’s political pedigree, say, the Jim Crow laws? Does it matter whether the lawyer’s advice comes during an adversarial proceeding as opposed during the provision of prospective

advice on future conduct that may never be examined by an adversary? Does it matter whether the lawyer personally profited from the substance of the advice?

Let us first pose a hypothetical involving nuclear energy. Assume a regulation mandates the frequency with which nuclear plant water pipes must be inspected for microscopic cracks. Suppose the regulation states that the pipe may not be used, and that it must be repaired or replaced before it can be used, if the cracks exceed tolerances. Violation of that regulation would result in criminal penalties, maybe even strict liability ones. The quarterly inspection in one plant reveals cracks in one of four redundant pipes, so the plant owner shuts down the pipe, as the regulation requires. The operator plans to repair the pipe as soon as possible. The plant can operate without the use of that pipe. A second inspection of another one of the four pipes reveals similar cracks. The other two pipes are fine. The problem is that, even though the plant can operate safely with only two pipes, the regulations require at least three pipes to be operable. If that third pipe is not available for emergency use, then the plant must be shut down until a third pipe is available.

The plant engineers tell the owner that the regulations are extremely conservative, and that it would be safe to leave one of the two pipes with cracks available for an emergency while the other is repaired, so long as the micro-cracked pipe is not used for routine operations. The owner goes to the plant lawyer and asks the question, "Can I legally do that?" The lawyer researches the issue and determines the regulation is ambiguous on this point. It is unclear whether the pipes with microscopic cracks can be taken off-line but remain available for emergency use. The attorney informs the owner accordingly, and suggests they contact the regulator. The owner responds that this course of action would be economic suicide, the

regulators will resolve every such ambiguity against continued operation, and tells the lawyer to give the owner the lawyer's best assessment of whether this course of action would violate the law. How do you advise this owner? What principles govern?

Let us now expand the hypothetical question. The worst has happened. There was an emergency caused by an earthquake. The pipe with the micro-cracks was used for overflow. The earthquake caused the concrete containment over the cracked pipe to collapse onto it and crush it for reasons having nothing to do with the micro-cracks. The government begins its investigation, incident to which it subpoenas documents from the plant. The subpoena is somewhat ambiguous, but because the subpoena was focused on the structural flaw that caused the concrete slab to dislodge during the earthquake, the subpoena was ambiguous on the issue whether providing pipe-inspection documents would be strictly responsive. The owner comes back to the plant lawyer and asks whether the crack-revealing pipe-inspection documents and the documents reflecting that the pipe had been shut down but nonetheless available for emergencies should be produced. "After all," the owner tells the lawyer, "the cracks had nothing to do with the failure, and as I read it, the subpoena doesn't even ask for those records." What should the lawyer advise? What principles govern?

Let us turn to a less-dramatic hypothetical involving more economically-based regulation. Assume a statute that prohibits a hospital from owning a durable medical equipment company because the legislature determined that hospital ownership of DME companies resulted in overutilization. The legislative findings reveal that hospital-owned DME companies increased utilization by 25% over non-hospital-owned companies. Further, the legislature studied the outcomes of recent prosecutions for overutilization and determined that the government had lost

several of these cases because overutilization is so difficult to prove. As a consequence, the legislature enhanced its criminal penalties for overutilization by imposing a prophylactic rule that criminalizes hospital ownership of DME-companies altogether.

Let us assume further that, before the statute was passed, a hospital owner had been negotiating with a DME company's shareholders for the purchase of the DME-company and was going to close the deal any day. The hospital owner approaches in-house counsel and asks whether the hospital's purchase of the DME-company is still possible given the new statute. Noting that the statute is silent on whether the hospital may set up an affiliate to own the durable medical equipment company, and that it is unclear whether the statute would operate retroactively to a purchase already underway, the lawyer advises the hospital to set up a wholly-owned affiliate company to own the DME company. When the client asks whether this is legal, the lawyer suggests that, to be absolutely certain, the client should get an oral opinion from the state agency regulating these relationships. The hospital owner balks at this advice because, for business reasons, this closing must remain highly confidential. In all events, the regulators would take forever to decide, and time is of the essence.

How should the lawyer advise this owner? What principles govern this situation? Are there multiple potential principles that govern? Where would this hypothetical lawyer begin to come up with an answer to the owner's question? Is the answer to any of these questions different than the answers to the first hypothetical? What if three years hence, the government begins a nationwide fact-finding effort to discover the extent to which the statute has been "violated" through this sort of indirect ownership methodology. The government sends a nationwide letter to hospital providers asking them voluntarily to provide all documents

reflecting any direct or indirect ownership relationships with DME providers. The hospital owner asks the lawyer to draft a letter in response to the government's voluntary inquiry, as follows: "This hospital has never had a relationship with a DME company in violation of the statute." If the lawyer writes such a letter, has the lawyer made a criminally-false statement?

SOME REPRESENTATIVE CASES

At least as to economic regulation, a lawyer may advise a client to take an innovative approach to an unclear regulation, even if that innovative approach is designed to avoid the regulation's purpose, as long as the advice is reasonable and in good faith. But if the tide is going out, the lawyer needs to have a good bathing suit.

United States v. Anderson, No. 98-20030-JWL (D. Kan. Filed July 15, 1998)

In July 1998, a federal grand jury indicted two health care attorneys. The indictment alleges they had "prepared contracts, legal analyses, and other documents designed to fraudulently conceal that ... monetary bribes and other remuneration were being paid to [physicians] for the purpose of obtaining the referral of patients and to aid their co-conspirators in avoiding regulatory scrutiny." Anderson Indictment at 9-10.¹

Oversimplifying significantly, the facts of the Anderson case are these. Robert and Ronald LaHue were two physicians employed by the Blue Valley Medical group (BVM). BVM provided medical services to nursing home patients in Missouri and Kansas. In addition to providing these services, BMV also entered into consultation agreements drafted by the two indicted health care attorneys with a number of Missouri and Kansas hospitals to help develop geriatric clinics. The consulting agreements provided for the hospitals to make payments to the LaHues, purportedly for their guidance in the creation and operation of the hospitals' geriatric clinics.

¹ For an excellent analysis of this case, see Killgore, Surgery with a Meat Cleaver: The Criminal Indictment of Health Care Attorneys in *United States v. Anderson*, 43 St. Louis U. L. J. 1215 (1999).

The government contended that this guidance was really just a sham to permit the hospital to pay bribes to the LaHues in exchange for patient referrals. (This prosecution occurred during the early stages of the anti-kickback act's development, when the primary question was whether the consulting agreements represented fair market value of the services provided, irrespective of patient referrals.)

During the course of the criminal proceedings against the LaHues, before they were convicted, the grand jury subpoenaed the health care attorneys, who had been outside counsel to one of the hospitals, for their work product giving rise to the consulting agreements. The attorneys moved to quash the subpoenas based on attorney-client, work product, and Sixth Amendment grounds. Ultimately, on grounds of the crime/fraud exception to the attorney client and work product privileges, the attorneys had to produce these documents and to testify about the consulting agreements.

Within two months, the grand jury indicted the attorneys for having drafted the consulting agreements between the LaHues and the hospitals. The attorneys were charged with facilitating the offer and payment of monetary bribes and other remuneration by crafting sham agreements to conceal the fact that the hospitals were paying the LaHues for patient referrals. The Indictment also alleged that one of the attorneys had discussed new ways to structure the LaHue-hospital relationships to assure the continued referral of nursing home patients, and to expand their patient referral scheme to other hospitals in other cities. The charges against the other attorney were essentially identical, adding only that the attorney had suggested that the hospitals communicate with the LaHues through attorneys to "conceal information" under the cloak of privilege. *Id.* at 18.

At trial, the defense explained that the arrangements constituted an “innovative attempt to provide appropriate and efficient medical care to underserved nursing home patients.” *Killgore*, Surgery with a Meat Cleaver at 1243 (citation omitted). The trial evidence revealed that the attorneys had “repeatedly warned [the hospital] that it must receive fair market value in its dealings with the LaHues ... [and must also document] any consulting services the LaHues provided ...” *Id.* at 1243. Furthermore, the attorneys’ expert witnesses had testified that, given the state of the anti-kickback act at the time, the advice the attorneys gave met or exceeded the existing standard. *Killgore* at 1244. Importantly, the prosecution never alleged at trial that the consulting agreements themselves did not comply with existing law.

As to the LaHues, the jury ultimately believed the government’s theory that the consulting agreements were shams to funnel payments to the LaHues for patient referrals, and convicted the LaHues for accepting over \$2 million in bribes disguised as consulting fees, which, in turn, resulted in over \$60 million in Medicare reimbursement. These convictions were upheld on appeal. The health care attorneys, conversely, were acquitted. As the district court explained:

The state of the law was in flux; and [Lehr and Anderson] adapted their advice to it as it changed ... The problem here is that a very simple concept [of] “payment for patients is illegal,” became far from simple as Congress, the Executive Branch, and the Courts got more deeply involved.

What the evidence unassailability demonstrated is that [Lehr and Anderson] steadfastly maintained to their clients that if fair market value [was] paid for the [LaHues’] practice or for legitimate consulting services, the relationship passed legal scrutiny. Nothing in the evidence or the law suggests otherwise ... [E]ach time it came to their attention that there was a potential compliance problem, they urged their clients to make sure that fair market value for real services was being required.

Killgore at 1245 (quoting from transcript, March 9, 1999); *see also* J. Cohen & N. Bloch, Can Lawyers Be Prosecuted For the Advice They Give? 206 N.Y.L.J. 1 (1991).

A lawyer may always advise a client to advance constitutional entitlements, even if it causes potential for avoidable harm

Vinluan v. Doyle, 60 A.D. 3d 237 (NY 2009)

In an effort to fill gaps in long-term-care nursing coverage, the Sentosa Recruitment Agency, a Philippines-based company, promised a group of Philippine nurses that, if they came to work in the United States, they would be hired directly by individual nursing home within the Sentosa network. Each nurse signed an employment contract with the specific Sentosa nursing home where the nurse would be working. These employment contracts promised the nurses free travel to the United States, two months of free housing and medical coverage, training, and assistance in obtaining legal residency, and nursing licenses. In return, the nurses promised a three-year commitment with \$25,000 in liquidated damages for failure to honor their commitment. The nurses involved in this litigation were assigned to a rehabilitation and health care center among whose patients were chronically ill children who needed the assistance of ventilators to breathe.

The employer almost immediately breached the nurses' employment agreements. First, the employer had not obtained their limited nursing licenses. This required the nurses to work as clerks for \$12 per hour. Additionally, the employer housed the nurses in substandard group housing with only one bathroom, inadequate heat, and no telephone service. The nurses complained in writing to the Philippine consulate, which referred the nurses to Felix Vinluan, an attorney specializing in immigration law. The nurses told Vinluan they wanted to resign.

Vinluan advised the nurses that New York law prevented them from resigning during a shift when they were on duty, but that they could resign after their shifts.

On the following day, April 7, 2006, the nurses resigned from their employment either at the end of their shift or in advance of their next shift. Both the nurses and Vinluan were indicted for conspiracy to violate a New York law that prohibited endangering the welfare of a child or of a physically-disabled person. The indictment alleged that Vinluan and the nurses had behaved "without regard to the consequences that their pursuit would have on [the rehabilitation center's] pediatric patients," and that the nurses had resigned without notice despite "knowing that their resignations . . . would render it difficult for [the rehabilitation center] to find, in a timely manner, skilled replacement nurses for [rehabilitation center] pediatric patients." The second count of the indictment charged Vinluan with criminal solicitation in that he "requested and otherwise attempted to cause the nurses to resign immediately from [the rehabilitation center]."

The New York State trial court denied Vinluan's and the nurses' motions to dismiss. The nurses and Vinluan had predicated these motions to dismiss, respectively, on the nurses' Thirteenth Amendment rights not to be subjected to involuntary servitude, and on Vinluan's First Amendment rights to provide legal advice to his clients. Reversing the state trial court, the New York Court of Appeals found that the prosecution "impermissibly violates Vinluan's constitutionally protected rights of expression and association in violation of the First and Fourteenth Amendments. It cannot be doubted that an attorney has a constitutional right to provide legal advice to his clients within the bounds of the law. . . The First and Fourteenth Amendments require a measure of protection for 'advocating lawful means of vindicating legal rights' . . . including 'advis[ing] another that his legal rights have been infringed'" *In re Primus*,

436 US 412, 432 (1978) (an attorney's letter communicating an offer of free legal assistance by ACLU attorneys to a woman with whom she had previously discussed the possibility of seeking redress for an allegedly unconstitutional sterilization procedure was constitutionally protected free speech); *NAACP v Button*, 371 US 415, 429 (1963)(actions of NAACP staff lawyers in advising African Americans "of their constitutional rights [and] urging them to institute litigation of a particular kind" was constitutionally protected).

More importantly, irrespective whether Vinluan's legal assessment as to whether the nurses could resign was accurate, it was objectively reasonable. In effect, the court was concerned with the chilling effect such a rule would have on attorneys rendering good faith legal advice:

“We cannot conclude that an attorney who advises a client to take an action that he or she, in good faith, believes to be legal loses the protection of the First Amendment if his or her advice is later determined to be incorrect. Indeed, it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy and solicitation whenever a District Attorney disagreed with that advice. The potential impact of allowing an attorney to be prosecuted in circumstances such as those presented here is profoundly disturbing. A looming threat of criminal sanctions would deter attorneys from acquainting individuals with matters as vital as the breadth of their legal rights and the limits of those rights. Correspondingly, where counsel is restrained, so is the fundamental right of the citizenry, bound as it is by laws complex and unfamiliar, to receive the advice necessary for measured conduct. Moreover, by placing an attorney in the position of being required to defend the advice that he or she has provided, the State compels revelation of, and thus places within its reach, confidential communications between attorney and client. Such communications have long been held to be privileged in order to enable citizens to safely and readily secure "the aid of persons having knowledge of the law and skill[] in its practice" (*Hunt v Blackburn*, 128 US 464, 470 (1888)). A prosecution which would compel the disclosure of privileged attorney-client confidences and

potentially inflict punishment for the good faith provision of legal advice is, in our view, more than a First Amendment violation. It is an assault on the adversarial system of justice upon which our society, governed by the rule of law rather than individuals, depends. The respondent Thomas J. Spota, District Attorney, is prohibited from prosecuting the petitioners.

60 A. D. 3d at 251.

An attorney giving advice in an adversarial setting has wide latitude to advocate. But again, if the tide is going out, have a good bathing suit.

United States v. Lauren Stevens, No. 10-cr-694-RWT (D. Md.)

Lauren Stevens was the vice-president and associate general counsel of GlaxoSmithKline. Stevens was indicted for the manner in which she orchestrated a response to a voluntary FDA letter requesting information concerning GSK's off-label marketing of Wellbutrin for weight loss. The FDA had not approved the use of Wellbutrin as a weight-loss drug, and so GSK's alleged marketing of that drug for that unapproved use constituted off-label marketing. Although physicians may permissibly prescribe pharmaceuticals for off-label uses, the pharmaceutical companies are not allowed to market those off-label uses to physicians.

The government did not allege that Stevens herself had participated in the off-label marketing efforts or that she had rendered legal advice on the legality of those efforts. Indeed, it appears Stevens had made every effort to put a stop to off-label marketing efforts whenever she was confronted with them. Rather, the government accused Stevens of obstructing an FDA investigation by her legal advice to GSK as to how to respond to the informal and voluntary FDA letter inquiry.

At trial, the prosecution introduced evidence of Stevens' communications (obtained by reference to the crime fraud exception) with King & Spalding, the outside counsel GSK had

retained to assist in responding to the FDA inquiry. To its everlasting credit, King & Spalding, which had assisted Stevens in crafting her responses, stood by her at trial. (King & Spalding's conduct should form the basis for another article about honorable lawyering. The author hopes that this kind of lawyering is not in short supply.)

In short, the indictment against Stevens alleged she had failed to reveal certain information regarding gifts and entertainment to physicians attending GSK promotional events even though she knew physician attendees had received these gifts and entertainment. (Stevens had responded to the FDA letter by creating a responsive spreadsheet of physician speaker events that listed physicians and events, but omitted any mention of gifts or entertainment.)

The indictment also alleged Stevens' correspondence to the FDA had falsely asserted that GSK had not promoted Wellbutrin for off-label purposes when, in fact, she knew certain physicians at these presentations were touting Wellbutrin as appropriate for off-label uses such as weight loss. (Stevens had taken the position that GSK policy did not permit off-label marketing, that physicians who did so were acting on their own, and that anytime Stevens had been confronted with allegations of off-label marketing, she had put a stop to it.)

Next, the indictment alleged that, in a May 21, 2003, letter to the FDA, Stevens had written: "With this final submission, we complete our production of information and documents in response to the requests" made by the FDA. In fact, Stevens had provided some information to the FDA, but had not provided all of it. She had not, for example, supplied certain slide decks used by doctors to promote Wellbutrin, even though she had apparently agreed to provide those documents to the FDA. Those slide decks showed that doctors had indeed promoted Wellbutrin for non-approved uses. The indictment alleged that by withholding and concealing the slide

decks and related information, Stevens had obstructed an official proceeding conducted by the FDA.

Finally, the indictment alleged that statements regarding GSK's marketing of Wellbutrin were false and misleading. For example, Stevens wrote in a letter to the FDA: "Although there were isolated deficiencies, the objective evidence clearly demonstrates that GSK has not developed, maintained, or encouraged promotional plans or activities to promote, directly or indirectly, Wellbutrin SR for weight loss, the treatment of obesity, or any other unapproved indication." The indictment alleged that this statement was false in that GSK's deficiencies were not "isolated" and that GSK maintained extensive promotional plans that promoted Wellbutrin for non-approved uses.

Based on these allegations, the government charged Stevens with one count of obstructing an official proceeding in violation of 18 U.S.C. § 1512(c)(2), one count of falsification and concealing of documents with intent to obstruct an FDA investigation in violation of 18 U.S.C. § 1519, and four counts of making false statements to the FDA in violation of 18 U.S.C. § 1001.

At the close of the government's case, Stevens moved for a judgment of acquittal. In its motion, the defense made several arguments. First, the defense asserted that the responses to the FDA were not misleading or false and did not conceal anything. The defense contended that the FDA knew about the numerous speakers who had made promotional presentations that Stevens had never said she was providing all the slide decks, and that the FDA had known she was not providing them. The defense argued that the spreadsheet regarding compensation to attendees did not conceal information about gifts and entertainment provided to attendees because the

spreadsheet did not purport to provide information about gifts given to attendees. Indeed, the letter from GSK told the FDA that the spreadsheet would provide "databases listing all speaker events including the date, location, speaker, and where available, the number of attendees." Thus, according to the defense, GSK provided the FDA with exactly what it had promised: information about date, location, speaker, and the number of attendees. The letters made no representation that any and all information about entertainment activities would be included.

Regarding the alleged false statements (to the effect that GSK had not promoted Wellbutrin for off-label uses when, in fact, Stevens knew certain physicians were promoting it), the defense asserted that, taken in context, the statements were not false; the letters from GSK to the FDA had admitted speakers had engaged in off-label marketing. The allegedly-false statements were, according to the defense, merely legal arguments and well within the bounds of effective advocacy. Stevens also argued that she was entitled to the protection of the 18 U.S.C. § 1515(c) safe harbor, because the letters and documents were provided during the course of her *bona fide* legal representation of her client, GSK. Finally, the defense argued that Stevens had acted in good faith in making her responses and therefore did not have the requisite mental state necessary for conviction of any of the charged offenses. All the responses had been, the defense argued, made after consultation with outside counsel, and all her actions were done innocently.

Granting Stevens' motion for judgment of acquittal after the close of the government's case, the district court first questioned whether the Massachusetts court crime/fraud-exception order to disclose Stevens' communications with outside counsel had been an appropriate one. The court noted that "prosecutors were permitted to forage through confidential files to support an argument for criminality of the conduct of the defendant." Order on Motion for Judgment of

Acquittal at 5. Based on those records, though, the district court went on to note that “this was a client that was not engaged to assist a client to perpetrate a crime or fraud. Instead, the privileged documents in this case show a studied, thoughtful analysis of an extremely broad request from the Food and Drug Administration and an enormous effort to assemble information and to respond on behalf of the client. The responses that were given by the defendant in this case may not have been perfect; they may not have satisfied the FDA. They were, however, sent to the FDA in the course of her bona fide legal representation of a client and in good faith reliance of both external and internal lawyers for GlaxoSmithKline.” *Id.* For this reason, the safe harbor provision was an absolute bar to prosecution on counts 1 and 2, the obstruction of justice counts, leveled against Stevens.

Addressing the non-obstruction counts to which the section 1515(c) safe harbor did not apply, the court noted that Stevens had made full disclosure to her outside counsel. “Every decision that she made and every letter she wrote was done by consensus.” *Id.* at 7. [E]ven if some of these statements were not literally true, it is clear that they were made in good faith which would negate the requisite element required for all six of the crimes charged in this case.” *Id.* The court noted the government’s concern with the letter Stevens had written to the FDA stating that GSK was not engaged in the promotion of Wellbutrin for weight loss. This concern, the court determined, took this statement out of context. “It is clear that while that statement was made, the same or other communications clearly disclosed to the FDA that . . . approximately 75 speaker presentations had off-label topics.” *Id.* Further, Stevens had also disclosed that the company had become aware of certain off-label activities that were inconsistent with company policies and had instituted appropriate and necessary corrective actions. “I conclude on the basis

of the record before me that only with a jaundiced eye and with an inference of guilt that's inconsistent with the presumption of innocence could a reasonable jury ever convict this defendant." *Id* at 8.

The court also determined that the Stevens prosecution raised "serious implication for the practice of law. . . Lawyers can never assist a client in the commission of a crime or a fraud, and that's well established. Lawyers do not get a free pass to commit crimes. . . [A] lawyer should never fear prosecution because of advice that he or she has given to a client who consults him or her, and a client should never fear that its confidences will be divulged unless its purpose in consulting the lawyer was for the purpose of committing a crime or a fraud. There is enormous potential for abuse in allowing prosecution of an attorney for the giving of legal advice. I conclude that the defendant in this case should never have been prosecuted and she should be permitted to resume her career. . . [T]he Court should be vigilant to permit the practice of law to be carried on, to be engaged in, and to allow lawyers to do their job of zealously representing the interests of their client. Anything that interferes with that is something that the court system should not countenance." *Id.* at 10.

A lawyer who gives specious advice to advance unreasonable client interests can successfully be prosecuted

United States v. Daugerdas, No. 1:09-cr-00581-WHP (S.D.N.Y.)

The indictment against attorney/CPA Paul Daugerdas alleged that Daugerdas had designed, marketed, and implemented tax shelters designed to assist his clients in tax evasion. In a nutshell, Daugerdas had applied a highly tortured interpretation of the tax laws to justify transactions that had no business substance whatsoever. The only reason for the transactions was to generate a tax loss for very high income clients.

Without going into the detail of these highly complex transactions, the *Daugerdas* Indictment alleged that Daugerdas had designed the tax shelters to appear legitimate, even though he understood that the “IRS would disallow the claimed tax benefits [] and seek to impose substantial penalties” if the true nature of the transactions were revealed. In implementing the tax shelters, Daugerdas (i) drafted fraudulent opinion letters attesting to their legality and business purpose; (ii) backdated transactions to ensure deductibility of losses in certain years; (iii) fabricated transactional documents to “maximize the appearance that each tax shelter was an investment undertaken to generate profits, and to minimize the likelihood that the IRS would learn that the tax shelters were actually designed to create tax losses; and (iv) prepared fraudulent tax returns reporting the benefits received under the tax shelters.

Daugerdas challenged his indictment on grounds that he and the other professionals had technically adhered to a tax ruling that arguably, if hyper-technically, justified the scheme. The district court rejected this argument because of the clearly-established economic substance doctrine, which was designed to ferret out improper conduct despite literal compliance with tax laws. Nor was there, the district court determined, a due process violation for lack of notice that Daugerdas’s conduct was illegal. The district court noted that the various defendants’ intentional backdating of documents and issuance of bogus opinion letters in the tax shelters were sufficient evidence that they were on notice that their conduct was illegal. It also bears noting that Daugerdas was paid on the basis of some percentage of the client’s desired tax loss. Ultimately, of course, Daugerdas was convicted.

SOME PHILOSOPHICAL MUSINGS

Having discussed the more recent cases, it is not difficult to define a rule, at least one with very wide margins, for predicting when legal advice might constitute a crime. On one end of the spectrum are the public interest cases such as *Vinluan* and the NAACP or ACLU cases where lawyers were advising clients to vindicate their constitutional rights. Prosecutors may not prosecute lawyers who give this sort of advice. At the other end of the spectrum, it is not controversial that a lawyer may not counsel a client to break the law.² One thinks of the lawyer in the *Godfather* who, having negotiated unsuccessfully with the Hollywood mogul to hire the *Godfather's* nephew, arranged to have the bloody head of the mogul's prize horse delivered to the mogul's bed while he slept. The nephew was hired. The client's interests were advanced.

Between these two extremes are cases where lawyers provide advice in litigation or in providing prospective advice where the lines are blurrier. When an adversarial situation is involved, it seems, it should be much more difficult for an attorney to be subjected to criminal prosecution. Take the *Stevens* case. The FDA was well aware of at least two core facts relevant to whether Lauren Stevens should have been subjected to criminal prosecution. First, the FDA was investigating GSK for off-label marketing. The FDA knew the substance of the problem, if not its contours. Stevens certainly had not hidden that fact. Second, Stevens was acting as a lawyer. As her able defense counsel pointed out, her responses to the FDA should appropriately have been considered within the context of advocacy. Certainly Stevens was entitled to treat the FDA lawyers requesting the documents as competent adversaries who could refine their document requests to obtain what they wanted. Stevens simply took a reasonably aggressive position and "pushed back" on FDA document requests. With a little more push back by the

² This article has not discussed the manifold cases where lawyers themselves were the law breakers.

FDA, there is no evidence whatsoever to suggest that Lauren Stevens would not have provided everything they requested.

Further, we learn from the *Anderson* case that, even in the non-adversarial context, lawyers may take positions that are reasonable, even if the government does not like the result, and even if the position may run contrary to some statutory purpose. If there is no statute or regulation dictating the answer to a specific question of what is permissible, the lawyer may advise the client to take an aggressive position so long as that position is not specious, as it was in *Daugerdas*.

So we return to the hypotheticals with which we began this article. We have, fortunately for our country, found no cases along the lines of our cracked-pipe-in-the-nuclear-power-plant example, though in a moment we will discuss its opposite analogue, the so-called “Torture Memos,” authored by John Yoo and Jay Bybee, where lawyers may have provided illegal advice to prevent what they believed to be a greater catastrophic harm. Certainly it stands to reason that a lawyer rendering legal advice in a very high-stakes arena must be extraordinarily careful. One might posit a rule that, in examples where the consequences of a lawyer’s advice could result in catastrophic public harm, any advice other than that which accounts for the worst case scenario might be viewed as unreasonable and legally specious such as to render the lawyer criminally liable if the client follows the advice.

Applying this proposal to the lawyer advising the nuclear power client seems to suggest the lawyer might think long and hard before advising the client not to shut the plant down. That lawyer will be weighing potentially catastrophic economic consequences to the client against potentially massive catastrophic consequences to innocent humans who live within a hundred-

mile radius. One harkens back to Learned Hand's BPL formulation where the burden of engaging in any given activity must be measured against the probability and the magnitude of the potential loss. Lawyers, good ones, have internalized that formulation and render legal advice accordingly. Answering our first question, how does a lawyer even begin to formulate the advice to the client? As one of my mentors once taught me, it depends on the context.

Though not a criminal case, the "Torture Memos" represent the clearest recent example where lawyers were disciplined for providing what many people thought was illegal legal advice. *See Memorandum of Decision Regarding the Objections to the Findings of Professional Misconduct in the Office of Professional Responsibility's Report of Investigation into the Office of Legal Counsel's Memoranda Concerning Issues Relating to the Central Intelligence Agency's Use of "Enhanced Interrogation Techniques" on Suspected Terrorists.*" (Margolis Memorandum) The Margolis Memorandum reversed findings of the Department of Justice's Office of Professional Liability (OPR). OPR had determined former Office of Legal Counsel attorneys John Yoo and Jay Bybee had committed professional misconduct by failing to provide "thorough, candid, and objective" analysis in memoranda regarding the interrogation of detained terrorist suspects.

The technical reason for Mr. Margolis's reversal of OPR's findings was that OPR had failed to tether its findings to an "intentional violation or act in reckless disregard of a known, unambiguous obligation imposed by law, rule of professional conduct, or Department of Justice regulation or standard." Margolis Memorandum at 11. Careful analysis of the Margolis Memorandum, though, reveals a real concern for OPR's failure to consider the context within which these OPR attorneys gave the advice. Without going into unnecessary detail (although

the Margolis Memorandum is a must-read for anyone representing lawyers), the context was best captured in a letter by former Attorney General Michael Mukasey and then-Deputy Attorney General Mark Filip:

We respectfully but strongly believe that any review of the Bybee and Yoo OLC opinions for professional competence must be informed by th[e] context [of the 9/11 attacks]. It is one thing for people, including us personally, to evaluate in a period of relative calm whether the analysis in the OLC opinions is more sound than subsequent analyses (and criticisms) offered by OLC or other legal commentators. It is quite another to be asked to address such matters alone, and to begin writing without the benefit of extensive subsequent review and commentary, for an Executive Branch and Nation trying to formulate a plan to ensure that the September 11 attacks would not be repeated.

Margolis Memorandum at 16 (quoting Letter, Mukasey and Filip to OPR, January 19, 2009, at 5.) Ultimately, of course, Margolis, on behalf of the Department of Justice, agreed. Context matters, and it may matter deeply. The Yoo/Bybee situation is, in a way, the mirror image of our nuclear industry example, but it certainly gives us a roadmap for how a lawyer might weigh the potential for catastrophic results arising from the legal advice they give.

What, then, are we to make of the *Vinluan* case? Vinluan's legal advice put disabled children living on ventilators at mortal risk. How does this square with our hypothetical nuclear power hypothetical or the Yoo/Bybee situation? It would be a mistake to make our nuclear power hypothetical and the Yoo/Bybee situation stand for the proposition that lawyers must, in giving advice, weigh the competing harms to the public in rendering advice. If that were the rule, then the *Vinluan* case might have come out differently given the competing harms. However Vinluan's clients were being subjected to slavery—a violation of a fundamental human right. It seems advice rendered pursuant to securing such fundamental rights is sacrosanct,

possibly excluding compelling competing circumstances. Perhaps the results of the *Vinluan* case would have been different had Vinluan advised his clients to engage in a meltdown-causing walkout at a nuclear power plant. One wonders, parenthetically, how Yoo and Bybee would have fared had they come to an opposite conclusion and another 9/11 had ensued. Finally, isn't it probable that our hypothetical nuclear power plant owner has no fundamental right to run a nuclear power plant, let alone to run it with a most-liberal interpretation of safety regulations?

In his excellent book, *Lawyers and Fidelity to Law*, Cornell University Law School Professor Bradley Wendel provides a framework for thinking about such situations. He draws a distinction between clients' interests and their legal entitlements, and posits that attorneys must consider the latter, but are not necessarily bound to advance the former. Before getting to that, Wendel first analyzes what he refers to as the Standard Conception of legal ethics, which consists of two principles that guide the action of lawyers. The first principle, the Principle of Partisanship, he posits, states that the lawyer should seek to advance the interests of her client within the bounds of the law. The second principle, the Principle of Neutrality, states that the lawyer should not consider the morality of the client's cause, nor the morality of the particular actions taken to advance the client's cause, as long as both are lawful. From these two principles arise a third principle that is supposed to inform the normative evaluation of the actions of lawyers. That third principle, the Principle of Non-accountability, posits that a lawyer who adheres to the first two principles should not be considered a wrongdoer. Wendel, *Lawyers and Fidelity to Law* at 6. Wendel's Standard Conception of legal ethics is nicely captured in *Boswell's Life of Johnson*, which was James Boswell's epic biography of the eminent Samuel Johnson, LL.D.

BOSWELL: But what do you think of supporting a cause which you know to be bad?

JOHNSON: Sir, you do not know it to be good or bad till the Judge determines it., I have said that you are to state facts fairly; so that your thinking or what you call knowing, a cause to be bad, must be from reasoning, must be from your supposing your arguments to be weak and inconclusive. But, Sir, that is not enough. An argument which does not convince yourself, may convince the Judge to whom you urge it; and if it does convince him, why then, Sir, you are wrong, and he is right. It is his business to judge; and you are not to be confident in your own opinion that a cause is bad, but to say all you can for your client, and then hear the Judge's opinion.

J. Boswell, *Boswell's Life of Johnson at 189* (Signet Paperback, Frank Brady Edition 1968).

Professor Wendel posits a slightly different perspective within which to analyze the behavior of counsel. Wendel suggests that lawyers should act to protect the legal *entitlements* of clients, rather than necessarily seeking to advance their *interests*. Wendel defines legal entitlements as claims of right, as distinct from assertions of interest that can be obtained using power, trickery, or influence, albeit legally-applied power, trickery, or influence. The Standard Conception, as Wendel posits it, does not make this distinction; the lawyer's job is zealously to protect the client's interests, using means that are not unlawful, even if those means actually damage the objects and purposes of the laws being interpreted.

Professor Wendel gives more leeway to a lawyer involved in an adversary context, especially in the criminal context, than he does to lawyers engaged in providing prospective advice. In litigation, lawyers are permitted to err on the side of asserting perhaps even specious legal entitlements, leaving it to the adversary system to evaluate the position. In the advising context, where no institutional mechanism exists to ensure that the lawyer's proposed interpretation of the law is reasonable, Professor Wendel would apply a higher standard. In this

latter case, the reasonableness of a legal position to be advanced must be leavened with the knowledge that there is, at least at that point, no adversarial method by which to test it.

Wendel refines the argument further. A deconstructionist can view almost any statute as being subject to an infinite number of interpretations. This is how Daugerdas viewed the tax code. However the plausibility of those interpretations narrows dramatically when understood against the backdrop of what Wendel describes as its “immanent rationality.” *Id.* The rationality immanent in these interpretations depends in large measure on the purpose for having and regulating the activity. Structured financing, for example, “is designed to have certain economic benefits, most notably enhancing access to capital markets for institutions that are not investment banks, reducing transaction costs by eliminating certain intermediaries from the financing process, while all the while remaining relatively transparent from the point of view of managers and investors. A proposed interpretation of law that would permit a transaction that does not reduce transaction-costs, that does not enhance access to capital markets, and that requires transparency-reducing complexity should be viewed with suspicion, as being more likely within the zone of colorable, but not plausible interpretations. This conclusion is justified, not just by the text of the relevant statutes and regulations, because in many cases the language is ambiguous or susceptible to manipulation. Rather, a lawyer would regard some interpretations as implausibly aggressive because they go against the whole point of the law of structured finance.” *Id.* at 194-95. Conversely, Wendel goes on to note, “if a multitude of reasons bear on any interesting interpretative question, it is unlikely that there will be only one obviously right answer.” *Id.* at 195.

Turning then to our hypothetical hospital seeking to purchase the DME-company, the statute proscribing hospitals from purchasing DME companies seeks to drive a certain economic outcome—reducing over-utilization of durable medical equipment. Leaving aside these instrumental goals, the statute seeks to regulate activity that has no intrinsic moral value; neither hospitals nor DME companies nor their combination is intrinsically good nor evil. Overutilization is a social ill, but so are corporate officers’ or directors’ failure, within the bounds of the applicable rules and regulations, to maximize corporate opportunity. Against this backdrop of corporate law and fiduciary duty to shareholders, coupled with the absence of a concomitant fiduciary duty owed by the hospital to regulators, it should be clear that statutory concerns with overutilization would not trump-as-a-matter-of-law the hospital’s entitlement to maximize corporate opportunity by taking an aggressive approach to the statute. One senses no overriding countervailing public interest in indicting the lawyer who advises the hospital client to buy the company through an affiliate, and to not seek permission from regulators to do so. The hospital/regulator dispute really reflects little more than a competition over economic outcomes. One suspects Professor Wendel would agree with a lawyer’s advice to complete the sale through an affiliate without getting the regulator’s permission. That lawyer is, after all, choosing the best (for his client) interpretation of the statute “from a multitude of reasons [that] bear on . . . the interpretive question.” Wendel at 195

Moreover, the hospital regulators are not without recourse, as nuclear power regulators might be after a meltdown. Certainly the regulators can take into account the hospital’s efforts to circumvent the statute, perform the appropriate fact-finding, and enact rational legislation to prevent indirect ownership interests between hospitals and DME companies in the future if that

is what is rational and not capricious. One might even argue that a lawyer advising the hospital client not to undertake this effort to circumvent the statute is committing malpractice (though surely that lawyer must consider the current *in terrorem* health care enforcement zeitgeist and warn the client of the consequences of potential investigations, particularly against the backdrop of cases such as *Anderson* and *Stevens*). The lawyer for the hospital should feel free as well to advise the client that the hospital need not seek advance approval to purchase the DME-company through the wholly-owned subsidiary absent some express statutory or fiduciary duty to do so.

What about our hypothetical nuclear power plant attorney's response to subpoenas asking for documents arguably responsive to the earthquake investigation? The situation has become adversarial as in the *Stevens* case, and the investigators are certainly at least constructively aware of the requirement that the plant inspect for micro-cracks. Is that attorney not entitled to assume that the attorneys for the investigators (1) are aware of the crack-inspection regulations (2) know how to draft subpoenas designed to produce the documents they want and (3) generally understand that the pipe failure has nothing to do with the micro-crack, and everything to do with why the earthquake was able to dislodge the concrete slab that fell on the pipe? The *Stevens* case suggests the attorney could permissibly advise the company not to provide the documents, at least not yet. But such an attorney renders such advice at the lawyer's peril given the inherent danger present in the harnessing of the atom.

What about the obligation of the hospital attorney responding to the government's nationwide fact-finding effort to discover the extent to which the statute has been "violated" through indirect ownership methodologies? Recall in our hypothetical that the government has

sent a nationwide letter to hospital providers asking them voluntarily to provide all documents reflecting any direct or indirect ownership relationships with DME providers, to which counsel for our hypothetical hospital has answered, “this hospital has never had a relationship with a DME company in violation of the statute.” If the lawyer writes such a letter, has the lawyer made a criminally-false statement? Again, we are in an adversarial context. Should the hospital’s attorney not be entitled to assume that the attorneys for the investigators (1) are aware that hospitals have taken the position that the use of affiliates falls within a reasonable reading of the statute (2) know how to draft subpoenas designed to produce the documents they want, and (3) generally understand that corporations are represented by counsel who are trained to write letters that advocate their client’s position? The hospital did not believe it had violated the statute. The response embodied that legitimate legal position. All the government had to do was to ask specific questions about affiliates. Again, the *Stevens* case tells us that the attorney’s response to the investigative letter should not subject the attorney to indictment. Professor Wendel might agree that the client, at least in this instance, is entitled to resist the government and take an aggressive position in what is, after all, an adversarial context.

The author would like to offer some final thoughts from the *Stevens* case, which has been the subject of a tremendous amount of commentary. First, the author applauds Ms. Stevens’ courage because that is what it took to persist through to trial in the face of what must have been very favorable plea offers. The author also applauds the courage of the King & Spalding attorneys who stood by her at the risk of incurring governmental ire. On the other hand, it seems the victory for Stevens may be a pyrrhic one at some level, in the same way the reversal of the

Arthur Andersen conviction was as well. (The United States Supreme Court reversed the conviction only after Arthur Andersen went out of business and scores of people lost their jobs.)

Next, one in-house commentator has observed as to the *Stevens* case that “[t]he attempt by the Department of Justice to prosecute a company lawyer for not voluntarily turning herself into a pseudo-government investigator, initiating a companywide search for internal documents and then handing over anything that turned up regardless of the consequences—all in response to a mere inquiry letter—will damage cooperation between in-house lawyers and regulators for years to come.” Esperne, *Inside Experts: Lessons learned from Lauren Stevens*, available at <http://www.insidecounsel.com/2011/08/05/inside-experts-lessons-learned-from-lauren-stevens> (August 5, 2011). The author’s concern is that the exact opposite will be true. The *Stevens* case, if anything, damages the cooperation between lawyers and their clients themselves. The chilling effect created by Lauren Stevens’ prosecution essentially ensures that lawyers will only reluctantly take aggressive positions to advance their clients’ legitimate entitlements. To be sure, Lauren Stevens was acquitted, but what lawyer wants to take the risk of indictment in the first instance?

Some will say lawyer reticence is a good thing because lawyers will err on the side of not coming close to the legal line. In some industries, the nuclear power industry, this is probably good. What happens, though, to the general counsel who is advising a less dangerous industry, one in which profit margins are tiny and the difference between success or failure of that legitimate company turns on in-house counsel’s willingness to advance a reasonable, but very aggressive interpretation of a statute? Is it really in the public interest in such a situation for counsel to be thinking about what happened to Lauren Stevens or to the *Anderson* attorneys

rather than thinking about and advancing the interests of the company, its shareholders, officers, directors, and the human beings the corporation employs? What happens when the otherwise-viable company fails because the lawyer was unnecessarily timid because of cases like *Stevens* and *Anderson*? Is this really good for America, even if this is what prosecutors think they want?

Esperne goes on to note that the GSK response could, and probably should have been handled differently, Esperne notes that “[w]hile Lauren Stevens was ultimately vindicated as much as any criminal defendant can be, I’m sure Stevens rues the day the FDA inquiry letter came across her desk. . . .” *Id.* Why, he asks, had Stevens repeatedly stated in her letters to the FDA that Glaxo had not established a program to promote Wellbutrin for weight loss, its unapproved use? Was it excessively risky, Esperne asks, to make this statement based on a distinction between off-label promotion, which was going on, and Glaxo pursuing a “corporate strategy” of off-label promotion, which GSK may not have been doing? Was it Stevens’ objective to respond to the FDA by providing promotional materials, Esperne asks? Or did Stevens simply want to make it as difficult as possible to discourage the FDA from further investigation? Esperne suggests that “Stevens followed her agreement to produce anything and everything with a scaled-down effort to produce documents, followed by her discovery that, indeed, Glaxo-hired doctors were illegally promoting Wellbutrin. Faced with a dilemma of her own making, Stevens and the outside law firm engaged in a ‘black eye/feather in your cap’-type analysis of whether or not to follow through on Stevens’ initial commitment, which did nothing to help the situation.” *Id.*

Esperne’s comments are worthy of serious consideration by in house or outside counsel presented with the situation in which Lauren Stevens found herself. The question, though, is

whether, under any view of the facts as the government then knew them, this case should ever have been submitted for criminal prosecution. Esperne's comments certainly *do* reflect the *in-terrorem* effects the Stevens prosecution has already had, and maybe that was the government's point. It now falls to the legislature to assess this case and to weigh, as a factual matter, whether such chilling represents a societal good or a societal detriment.

CONCLUSIONS?

Answering the question with which we began this essay, lawyers can, indeed, go to jail for the legal advice they provide, particularly where the legal advice is not only specious but involves a strong element of self-dealing. For a lawyer giving advice on a question whose answer could give rise to potentially catastrophic consequences, that lawyer should be quite careful not to lose the forest for the trees and to vet quite carefully the consequences of getting it wrong. Perhaps if investigations later reveal that bad legal advice lay at the core of the collapse of the housing market, with its near-existential implications for our economy, we may find our answer to the question whether aggressive legal advice in such a circumstance can give rise to a criminal indictment.

On economic questions where governing regulations are ambiguous, have no immanent moral imperative, and no capacity to cause existential harm, lawyers should not be convicted (though the lawyer might nonetheless be charged) for providing good faith, non-frivolous legal advice consistent with their clients' economic interests. Likewise, in the human rights context, where lawyers are advising their clients to advance constitutional rights, it is highly unlikely that a lawyer would even be charged for giving legal advice, even if it completely misses the mark, and even if it results in a great harm to another. It does seem clear, as the *Stevens* case

demonstrates, that a lawyer's advice given within the context of an adversarial environment should be close to immune, absent destruction of documents or other clearly-obstructive conduct.

As opposed to being convicted, however, there is the question of what sort of advice can get a lawyer indicted. And that appears to depend on the prosecutorial zeitgeist. Health care enforcement and off-label marketing come to mind. The *Anderson* lawyers and Lauren Stevens found themselves at the unfortunate *avant-garde* of these respective prosecutorial initiatives. That they were ultimately acquitted is felicitous, but somewhat pyrrhic. We leave for another day what chilling effect that has, or should have, on those of us who remain. Perhaps the student of this topic should be attuned to future FCPA prosecutions, the zeitgeist *du jour* to see whether any lawyers are indicted.