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IMPLEMENTING AN EFFECTIVE COMPLIANCE PROGRAM WHILE IDENTIFYING AND OVERCOMING PERVASIVE ETHICAL AND PRIVILEGE CONCERNS

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I. INTRODUCTION

> As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.[1]

The above quotation from the Preamble to Illinois Rules of Professional Conduct (the "IRPC" or, alternatively, the "Rules") is intended to exemplify the complex interaction between a lawyer's delivery of professional services to a health care client during an internal compliance investigation and the lawyer's ethical obligations to that client as informed by the IRPC. The current IRPC, which became effective on January 1, 2010 with amendments effective January 1, 2016, is substantially derived from the American Bar Association's Model Rules of Professional Conduct and is the product of a collaborative effort by a joint committee of the Illinois State Bar Association and the Chicago Bar

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[1] Ill. S. Ct. Rs. Prof'l Conduct Preamble ¶ 2 (eff. Jan. 1, 2010).

Association as well as the Supreme Court Committee on Professional Responsibility.[2]

The following provisions of the IRPC Scope section provide guidance as to how the IRPC may be utilized by healthcare counsel during the course of the client representation:

> The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion. Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments and the Preamble and Scope do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.[3]

> The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation and are instructive and not directive. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.[4]

As suggested above, numerous provisions of the IRPC along with the Rules interpretive Comments may be applicable to an attorney's participation in corporate compliance activities including the interaction of dual in-house counsel and compliance officer roles, the management of communication between the client and counsel, the diligent performance of internal investigations, the retention of outside counsel and consultants, the preservation of attorney-client and attorney work product privilege and the reporting obligations to corporate clients and others. Note that underlined

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[2] *See generally* Alberto Bernabe, *Recent Developments in the Law of Lawyering: The New Illinois Rules of Professional Conduct*, 42 Loy. U. Chi. L.J. 391 (2011).
[3] Ill. S. Ct. Rs. Prof'l Conduct Scope ¶ 14 (eff. Jan. 1, 2010).
[4] Ill. S. Ct. Rs. Prof'l Conduct Scope ¶ 21 (eff. Jan. 1, 2010).

sections of the Rules of Professional Conduct and Comments reflect amendments effective on January 1, 2016. Also, note that although designated as Rule 1.0 in the IRPC, the Terminology section is presented in this paper at the end of the referenced Rules as a de facto glossary section for the definition of key IRPC terms.

II. THE INTERNAL COMPLIANCE INVESTIGATION GENERALLY

In the hypothetical facts underlying this presentation the compliance officer and general counsel are one and the same person. Consider that the objectives of a compliance investigation for compliance purposes may differ from the objectives of a compliance investigation for legal purposes. For example, a compliance officer may conduct an investigation in a manner consistent with the government's compliance guidance and internal organizational compliance policies to audit a potential billing compliance problem, provide preliminary compliance analysis and impose corrective action, remedial education and discipline on the billing constituent employee participants. An attorney may participate in a compliance investigation for the purpose of marshalling facts to provide legal advice to a health care organizational client necessary for explaining the client's legal obligations, legal risks and alternative choices of responsive action. Indeed, counsel may view a preliminary compliance assessment as subjecting the client to premature and unnecessary legal risk not justified by a more controlled and detailed compliance investigation for legal purposes.

> The goals of an internal investigation are to learn whether the allegations are accurate, and, to the extent they are, to:
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> - evaluate regulatory, civil and/or criminal exposures and defenses;
> - determine whether and how to deal with civil plaintiffs, government regulators, law enforcement agencies and, possibly, the news media;
> - remedy any systemic failures that contributed to the misconduct; and,
> - levy appropriate discipline.[5]

Counsel must also consider that public policy as codified in the Federal Sentencing Guidelines Manual[6] and the OIG Compliance Guidance for

[5] Ronald H. Levine, *Internal Investigations by Healthcare Organizations: Practical Considerations*, American Health Lawyers Association, Member Briefing, Sarbanes-Oxley Act Task Force 2-3 (October 2005).
[6] United States Sentencing Commission, Guidelines Manual, Ch.8 (Nov. 2015).

Hospitals[7] may ultimately yield the conclusion that any and all marshalled facts are potentially subject to timely disclosure based upon the client's informed judgment after assessment of the investigative work product, the legal advice given and the client's perceived risks, benefits and obligations related to mandatory self reporting. Legal counsel will most likely prefer that the documents generated and the factual and legal analysis occur in an environment in which the information remains privileged and confidential and is not disclosed until and unless the client determines that disclosure is necessary based upon competent legal advice and services.

The following edited and annotated litigation-related investigation process recommendations establish a sequential investigation process format and are drawn from David M. Greenwald & Michele L. Slachetka, Jenner & Block, PROTECTING CONFIDENTIAL LEGAL INFORMATION: A HANDBOOK FOR ANALYZING ISSUES UNDER THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE (2015). In addition, comments by the author and references to applicable relevant IRPC citations and related IRPC comments are included to illustrate the interrelationship between recommended practices and ethical standards.

A. Selecting Counsel and Authorizing the Investigation:

1. Counsel Should Request Formal Authorization and Corporate Management Should Formally Authorize the Investigation.

Prior to commencement of an investigation, General Counsel or other corporate counsel should request formal authorization to conduct an investigation from the Board of Directors or other high level management. Counsel's written request should establish that communications generated in the course of the investigation will be privileged. The request should state that the purpose of the investigation is to render legal advice to the corporation and, to achieve that purpose, confidential communications between the attorney and client are necessary. In addition, the request should detail the forms of litigation that corporate counsel anticipates, such as civil and criminal proceedings and subpoena compliance.[8]

For the most significant and sensitive investigations, the Board of Directors should officially direct the General Counsel to initiate an investigation, authorize the General Counsel to take the

[7] Publication of the OIG Compliance Program Guidance for Hospitals, 63 Fed. Reg. 8,987 (Feb. 23, 1998); OIG Supplemental Compliance Program Guidance for Hospitals, 70 Fed. Reg. 4858 (Jan. 31, 2005).

[8] DAVID M. GREENWALD & MICHELE L. SLACHETKA, JENNER & BLOCK, PROTECTING CONFIDENTIAL LEGAL INFORMATION: A HANDBOOK FOR ANALYZING ISSUES UNDER THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 377 (2015).

> steps necessary to conduct the investigation (e.g., hire outside counsel and consultants), and clearly state that the purpose of the investigation is to obtain sufficient information to enable counsel to render legal advice to the Board. The Board should articulate that the investigation is being commissioned in anticipation of litigation, identifying the specific forms of litigation anticipated to the extent possible. For less sensitive or smaller matters, high level management may provide formal authorization.[9]

The initial recommendation of General Counsel implicates choices as to who should perform the investigation and the initial known scope of the investigation. General Counsel must consider whether inside counsel or outside counsel should be utilized in the course of the internal compliance investigation.[10]

On a continuum from low risk through medium risk to high risk internal compliance investigations, it would generally be reasonable for inside counsel to supervise the low risk and some less complicated medium risk situations. For more complex medium risk situations and high risk situations, inside counsel may wish to consider recommending the retention of competent outside counsel and, potentially, other consulting experts to support the compliance investigation.[11]

While investigations conducted by inside counsel may be more economically reasonable and create efficiencies based on inside counsel's familiarity with the client organization's structure, management, employees and culture[12], in situations where potential violations of the Stark Law, the Anti-Kickback Statute, the False Claims Act, a potential Qui Tam action, a significant government investigation or the significant potential for self-reporting government overpayment are involved, General Counsel may wish to consult with and utilize the services of experienced outside counsel.[13]

Even when outside counsel is retained pursuant to a well-crafted retention letter delimiting the scope of the retention, it can be important for inside counsel to stay closely involved with the investigation process. General Counsel can help outside counsel locate and preserve relevant documents,

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[9] *Id.*
[10] *See* Jamie W. Katz et al., *A. Best Practices for Conducting Internal Investigations*, 3-4, Paper Presented at AHLA In House Counsel Program, June 29, 2014.
[11] *See id.*
[12] *See id.* at 4.
[13] *See id.*

identify significant involved employees and managers and understand and work within the existing organizational culture and structure.[14]

Also, note that while the investigative process should focus on maximizing confidentiality, health care compliance investigations may ultimately yield an organizational decision to self-report based upon the federal organizational sentencing guidelines, compliance guidance and federal and state over-payment reporting policies which favor prompt investigation and time-bound reporting obligations.[15]

Particularly relevant to the selection of counsel including utilization of General Counsel, outside counsel and expert consultants and well as appropriately determining the scope of an internal compliance investigation is IRPC Rule 1.1 Competence.

2. Relevant IRPC and IRPC Comments

RULE 1.1: COMPETENCE[16]

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Legal Knowledge and Skill

[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include 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. In many instances, the required proficiency is that of a general

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[14] *See id.*; *id.* at fn. 9.

[15] *See generally* Michael H. Cook, *V. Legal Ethics: Issues in Internal Investigations and Multiple Party Representations*, Paper presented at AHLA Long Term Care and the Law, New Orleans, LA, February 23-25, 2015; Leah B. Guidry et al., *E. Legal Ethics: Who Owns Compliance in an AMC/University? Professional Responsibility and Organizational Considerations*, Paper presented at AHLA Legal Issues Affecting Academic Medical Centers and Other Teaching Institutions, Washington D.C., January 22-23, 2015.

[16] Ill. S. Ct. Rs. Prof'l Conduct R. 1.1 (eff. Jan. 1, 2010).

practitioner. Expertise in a particular field of law may be required in some circumstances.

Retaining Or Contracting With Other Lawyers

[6] Before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client. See also Rules 1.2(e) and Comment [15], 1.4, 1.5(e), 1.6, and 5.5(a). The reasonableness of the decision to retain or contract with other lawyers outside the lawyer's own firm will depend upon the circumstances, including the education, experience and reputation of the nonfirm lawyers; the nature of the services assigned to the nonfirm lawyers; and the legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.

[7] When lawyers from more than one law firm are providing legal services to the client on a particular matter, the lawyers ordinarily should consult with each other and the client about the scope of their respective representations and the allocation of responsibility among them. See Rule 1.2. When making allocations of responsibility in a matter pending before a tribunal, lawyers and parties may have additional obligations that are a matter of law beyond the scope of these Rules.

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Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

B. Conducting the Investigation:

1. General Counsel Should Instruct Counsel Who Will Be Conducting the Investigation and Counsel Should Provide Guidelines for the Specific Investigation.

> General Counsel should retain outside counsel or instruct in-house counsel to conduct the investigation for the purpose of obtaining information necessary to render legal advice to the company. General Counsel should authorize counsel to interview personnel who have necessary information to enable the rendering

> of legal advice. The retention letter to outside counsel and the instruction to in-house counsel should state that the investigation is being conducted in anticipation of litigation, identifying the specific forms of litigation anticipated to the extent possible, and should state that the purpose of the investigation is to provide legal advice. Use of outside counsel to conduct an investigation may reduce the likelihood that communications will be perceived as business advice rather than legal advice.[17]
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> To maintain confidentiality of the investigation, particularly a large-scale investigation, counsel should prepare guidelines identifying the nature and scope of the investigation and its purpose (e.g., obtaining information necessary to provide legal advice to the company anticipation of litigation). The guidelines should state that they are for the use of attorneys in the investigation, that only attorneys and necessary support staff at counsel's office and client's senior management should discuss the investigation, and that any discussions should not take place in public. In addition, the guidelines should require that all confidential documents be marked with the appropriate privilege designation and distributed in envelopes marked "Confidential." The guidelines should also state that all investigation files should be stored in a secure place and maintained personally by the attorneys and their secretaries and that, for employee interviewing purposes, information about the investigation should be revealed to employees only to the extent that is necessary to conduct the interviews.[18]

The organizational response recommended above constitutes an early buy-in for the internal compliance investigation at the highest levels of the health care organization. In addition it contemplates providing General Counsel with authority to hire both outside counsel and outside consulting experts. Again the Board authorization should explicitly suggest that the compliance investigation is being authorized for the purpose of providing legal advice from both General Counsel and outside counsel to the Board related to the compliance subject matter.

The scope of investigation is determined broadly by the Board but with greater specificity by General Counsel and can be memorialized in well-crafted retention letter with outside counsel. To the extent protected health information ("PHI") may be present in documents reviewed, outside counsel

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[17] DAVID M. GREENWALD & MICHELE L. SLACHETKA, JENNER & BLOCK, *supra* note 8, at 377-8.
[18] *Id.* at 378.

should be required to execute the health care organization's Business Associate Agreement. Likewise, to the extent both the corporate entity and individual constituent employees are represented by counsel in the investigation, it is reasonable to consider execution of joint defense or joint interest agreement between separate counsel involved in the investigation to specifically delineate the terms and conditions for protecting and sharing privileged and confidential information, attorney work product, mental impressions, theories, strategy, witness statements, interview reports, research, memoranda and other documents between counsel during the term of the investigation.[19]

Further, in the event outside consultants are utilized such consultants should be retained by either General Counsel and/or by outside counsel and directed to report initially to counsel.[20] Well-crafted retention letters to consultants should require lines of reporting communication to counsel, the fact that the expert's judgment will be utilized in providing legal advice to the client and the importance of confidentiality in providing the expert analysis. Likewise, in the event that PHI is provided to the consultants by counsel, the consultant's should be required to execute Sub-Contractor Business Associate Agreements with counsel.

In the problem under consideration it would be reasonable to hire both billing process consultants to advise counsel as to the propriety internal billing procedures and physician consultants to advise counsel as to whether specific physician conduct in question appropriately complied with medical necessity requirements. Again, such consultants should be directed to report to counsel so that counsel can evaluate the compliance matters at issue and also evaluate the utility of the experts initially selected. Counsel might retain (and dismiss) multiple consulting experts with a view to engaging consultants most supportive of the organizational client's best defensive posture. However, each expert consulted will provide counsel with an informed view of the issues under consideration in order to best provide legal advice to the client.[21]

Particularly relevant to the investigation scope is Rule 1.2 Scope of Representation and Allocation of Authority between Counsel and Client as well as the Rules relevant Comments referenced below. In addition, Rule 1.3 Diligence is also referenced as time is clearly of the essence in investigations which may ultimately yield a self-reporting obligation.

2. Relevant IRPC and IRPC Comments

[19] *See generally* COOK, *supra* note 15, at 21-23.
[20] *See* LEVINE, *supra* note 5, at 7.
[21] *See generally* COOK, *supra* note 15; GUIDRY, *supra* note 15; KATZ, *supra* note 10.

RULE 1.2: SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER[22]

(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(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

(1) discuss the legal consequences of any proposed course of conduct with a client,

(2) ~~and may~~ counsel or assist a client to make a good-faith effort to determine the validity, scope, meaning or application of the law, and

(3) counsel or assist a client in conduct expressly permitted by Illinois law that may violate or conflict with federal or other law, as long as the lawyer advises the client about that federal or other law and its potential consequences.

Comment

Allocation of Authority between Client and Lawyer

[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. The decisions specified in paragraph (a), such as whether to settle a civil matter, must also be made by the client. See Rule 1.4(a)(1) for the lawyer's duty to communicate with the client

[22] Ill. S. Ct. Rs. Prof'l Conduct R. 1.2 (eff. Jan. 1, 2010).

about such decisions. With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.

[2] On occasion, however, 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. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).

[3] At the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation. Absent a material change in circumstances and subject to Rule 1.4, a lawyer may rely on such an advance authorization. The client may, however, revoke such authority at any time.

Agreements Limiting Scope of Representation

[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client. When a lawyer has been retained by an insurer to represent an insured, for example, the representation may be limited to matters related to the insurance coverage. A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.

[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely. Although an agreement for a limited representation does not exempt a lawyer from the duty to provide competent representation, the limitation is a factor to be considered when determining the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation. See Rule 1.1.

[8] All agreements concerning a lawyer's representation of a client must accord with the Rules of Professional Conduct and other law. See, *e.g.*, Rules 1.1, 1.8 and 5.6, and Supreme Court Rules 13(c)(6) and 137(e).

Criminal, Fraudulent and Prohibited Transactions

[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 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.

[11~~0~~] 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. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1. In such situations, the lawyer should also consider whether disclosure of information relating to the representation is appropriate. See Rule 1.6(b).

RULE 1.3: DILIGENCE[23]

A lawyer shall act with reasonable diligence and promptness in representing a client.

Adopted July 1, 2009, effective January 1, 2010.

C. Privilege and Confidentiality Generally

In brief summary, in Illinois attorney and client privilege is not statutory but is defined within the common law. The privilege applies when i) legal advice or services are sought by the client; ii) from an attorney in the attorney's professional capacity; iii) with the intention that client information provided and attorney advice given remain confidential; unless, iv) confidentiality is waived by the client.[24]

As a practical matter, the represented client should memorialize the fact that the client intends that all communications with the attorney and all attorney advice to the client concerning the subject matter of the internal compliance investigation are intended to be kept confidential at all times. As noted above, the client should consider authorizing the investigation by counsel in a writing to counsel for the purpose of providing legal representation and with the admonition that all information gathered and advice given is expected by the client to be kept confidential. Counsel should confirm in writing counsel's understanding of the client's instructions in that regard.

The attorney and client privilege can also apply to corporate clients. In Illinois, the Illinois Supreme Court has adopted the so-called "control group test" under which an attorney's communication with a corporate employee is privileged only if the employee is a member of top corporate management or an advisor to such top corporate management in a role "such that a decision would not normally be made without his advice or opinion."[25]

Accordingly, as a practical matter counsel should be very careful to identify the organizational control group and control group representative with whom

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[23] Ill. S. Ct. Rs. Prof'l Conduct R. 1.3 (eff. Jan. 1, 2010).
[24] *See Illinois Educ. Ass'n v. Illinois State Bd. of Educ.*, 204 Ill.2d 456, 467, 791 N.E.2d 522, 274 Ill.Dec. 430 (2003); *see also Pietro v. Marriott Senior Living Serv., Inc.*, 348 Ill.App.3d 541, 551, 810 N.E.2d 217, 284 Ill.Dec. 564 (1st Dist. 2004).
[25] *Consolidation Coal Co. v. Bucyrus-Erie Co.*, 89 Ill.2d 103, 118-20, 432 N.E.2d 250, 59 Ill.Dec. 666 (1982).

counsel provides confidential information and legal advice. The client and counsel should seek to limit the scope of such contacts in the most reasonably restricted manner possible including, without limitation, a designated executive level managerial contact, a special investigative committee of the board or even the board itself. The breadth of the privilege will become particularly difficult to manage in the selection of corporate constituent employees interviewed as a part of the investigative process. Additional comments with respect to counsel's position as a representative of the corporate entity, delimiting the pool of employee witnesses interviewed and counsel's interaction with such witnesses appears below.

Further, attorney work product privilege generally protects against the disclosure of an attorney's written work product which discloses, inter alia, the attorney's mental impressions, conclusions, opinions, legal theories or litigation plans.[26]

Each of the referenced rules is subject to a variety of common law exceptions too nuanced and voluminous to be a part of the discussion here. As a general proposition all privileged and confidential communication, documentary information, attorney work product, mental impressions, theories, strategy, witness statements, interview reports, research, memoranda and other documents should be marked or stamped with legend similar to the following: "CONFIDENTIAL/ATTORNEY AND CLIENT PRIVILEGED/ATTORNEY WORK PRODUCT PRIVILEGED".

The privileges would apply to the efforts of both General Counsel and outside counsel on behalf of the client. However, please note the important contrary case, *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, in which a federal court distinguished between presumed privileged legal advice from outside counsel and mixed business and legal advice provided by General Counsel to the corporate health care client.[27]

Particularly relevant to confidentiality generally is IRPC 1.6 Confidentiality of Information. More importantly relevant to confidentiality in the context of counsel's representation of a health care corporate entity and counsel's interaction with the entity's constituent employees is IRPC 1.13 Organization as Client.

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[26] *See generally* FED. R. CIV. P. 26(b)(3)(A); Ill. S. Ct. R. 201(b)(2) (eff. July 1, 2014).
[27] *United States ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr.*, No. 6:09–cv–1002–Orl–31TBS, 2012 WL 5415108 (M.D. Fl. Nov. 6, 2012).

1. Relevant IRPC and IRPC Comments

RULE 1.6: CONFIDENTIALITY OF INFORMATION[28]

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b) or required by paragraph (c).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent the client from committing a crime in circumstances other than those specified in paragraph (c);

(2) to prevent the client from committing fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(e) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comment

[3] The principle of client-lawyer confidentiality is given effect by related bodies of law: the attorney-client privilege, the work product doctrine and the rule of confidentiality established in professional ethics. The attorney-client privilege and work product doctrine apply in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose

[28] Ill. S. Ct. Rs. Prof'l Conduct R. 1.6 (eff. Jan. 1, 2010).

such information except as authorized or required by the Rules of Professional Conduct or other law. See also Scope.

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Authorized Disclosure

[5] Except to the extent that the client's instructions or special circumstances limit that authority, a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation. In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure Adverse to Client

[6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (c) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows from information relating to a representation that a client or other person has accidentally discharged toxic waste into a town's water must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

[7] Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or appropriate authorities to prevent the client from committing fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the client-lawyer relationship by the client forfeits the protection of this Rule. The client can, of course, prevent such disclosure by refraining from the wrongful

conduct. Like paragraph (b)(1), paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, but the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Rule 1.2(d). See also Rule 1.16 with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances, and Rule 1.13(c), which permits the lawyer, where the client is an organization, to reveal information relating to the representation in limited circumstances.

[8] Paragraph (b)(3) addresses the situation in which the lawyer does not learn of the client's crime or fraud until after it has been consummated. Although the client no longer has the option of preventing disclosure by refraining from the wrongful conduct, there will be situations in which the loss suffered by the affected person can be prevented, rectified or mitigated. In such situations, the lawyer may disclose information relating to the representation to the extent necessary to enable the affected persons to prevent or mitigate reasonably certain losses or to attempt to recoup their losses. Paragraph (b)(3) does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

[12] Other law may require that a lawyer disclose information about a client. Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules. When disclosure of information relating to the representation appears to be required by other law, the lawyer must discuss the matter with the client to the extent required by Rule 1.4. If, however, the other law supersedes this Rule and requires disclosure, paragraph (b)(6) permits the lawyer to make such disclosures as are necessary to comply with the law.

RULE 1.13: ORGANIZATION AS CLIENT[29]

(a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.

(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 crime, fraud or other 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 necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization,

[29] Ill. S. Ct. Rs. Prof'l Conduct R. 1.13 (eff. Jan. 1, 2010).

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 crime or fraud, and

(2) the lawyer reasonably believes that the crime or fraud 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 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 crime, fraud or other 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 crime, fraud or other violation of law.

(e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

(f) In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

(g) A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7. If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders.

Adopted July 1, 2009, effective January 1, 2010.

Comment

The Entity as the Client

[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.

[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the represe2ntation or as otherwise permitted by Rule 1.6.

[3] 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 concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows that the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is a crime, fraud or other violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.

[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the misconduct and its consequences, the responsibility in the organization and the apparent motivation of those involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority

would be necessary. In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter; for example, if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization. If the matter is of sufficient seriousness and importance or urgency to the organization, referral to higher authority in the organization may be necessary even if the lawyer has not communicated with the constituent. Any measures taken should, to the extent practicable, minimize the risk of revealing information relating to the representation to persons outside the organization. Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.

[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. The organization's highest authority to whom a matter may be referred ordinarily will be the board of directors or similar governing body. However, applicable law may prescribe that under certain conditions the highest authority reposes elsewhere, for example, in the independent directors of a corporation.

Relation to Other Rules

[6] The authority and responsibility provided in this Rule are concurrent with the authority and responsibility provided in other Rules. In particular, this Rule does not limit or expand the lawyer's responsibility under Rules 1.8, 1.16, 3.3 or 4.1. Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b). Under Paragraph (c) the lawyer may reveal such information only when the organization's highest authority insists upon or fails to address threatened or ongoing action that is clearly a crime or fraud, and then only to the minimum extent the lawyer reasonably believes necessary to prevent reasonably certain substantial injury to the organization. It is not necessary that the lawyer's services be used in furtherance of the crime or fraud, but it is required that the

matter be related to the lawyer's representation of the organization. If the lawyer's services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(1), 1.6(b)(2) or 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required. Because the lawyer may reveal information relating to the representation outside the organization under paragraph (c) only in circumstances involving a crime or fraud, the lawyer may be required to act under paragraph (b) in situations that arise out of violations of law that do not constitute a crime or fraud even though disclosure outside the organization would not be permitted by paragraph (c).

[7] Paragraph (d) makes clear that the authority of a lawyer to disclose information relating to a representation in circumstances described in paragraph (c) does not apply with respect to information relating to a lawyer's engagement by an organization to investigate an alleged violation of law or to defend the organization or an officer, employee or other person associated with the organization against a claim arising out of an alleged crime, fraud or other violation of law. This is necessary in order to enable organizational clients to enjoy the full benefits of legal counsel in conducting an investigation or defending against a claim.

D. Constituent Employee Related Interview Issues

As proscribed by IRPC 1.13, Organization as Client, the attorney, be it General Counsel or outside counsel, represents the health care corporate entity but not individual constituent employees. Rule 1.13's comments provide as follows:

> **The Entity as the Client**
>
> An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client. The duties defined in this Comment apply equally to unincorporated associations. "Other constituents" as used in this Comment means the positions equivalent to officers, directors, employees and shareholders held by persons acting for organizational clients that are not corporations.[30]

[30] Ill. S. Ct. Rs. Prof'l Conduct R. 1.13 cmt 1 (eff. Jan. 1, 2010).

Counsel conducting the internal compliance investigation will wish to preserve confidentiality during the investigatory process to the greatest extent possible. The ability to maintain confidentiality can be attenuated in the organizational environment to the extent the investigation becomes known by organizational constituent employees and, in particular, by employees below the level of senior management. For the purposes of the hypothetical problem here, the focus will be on those constituent employees subject to interview by counsel.

Some commentators suggest that a high level corporate executive send a letter to the identified prospective employee witnesses advising them as to the importance of the investigation, the employees obligation to fully cooperate in the investigation, the confidential nature of the investigation and that the employees will be contacted by counsel for an interview for the purpose of gathering information to provide legal advise the corporation.[31]

More broadly, the organization might wish to assure interviewed employees that the organization is dedicated to compliance with the law and needs counsel to gather facts in order to take the most appropriate action required under the circumstances. The employee witnesses can be assured that the mere fact of an investigation should not suggest wrong doing and any interviews are designed to promptly meet the organizations legal requirements with all participants expected to keep the process strictly confidential.[32]

Counsel should seek to interview all known and potential witnesses at the earliest reasonable time. For those constituent employees actually selected for an interview by organizational counsel, the interview information obtained generally will be generally considered confidential pursuant to IRPC 1.6 Confidentiality of Information. However, because counsel represents the corporate entity and not the entity's constituent employees pursuant to IRPC 1.13 Organization as Client, the employee is entitled to be advised as to the specific role of counsel in the internal compliance investigation. The Employee should not be led to believe that counsel represents the employee's interests in the investigation.[33]

1. Upjohn Warnings

Accordingly it is advisable to provide the constituent employee witnesses with what have come to be known as the Upjohn Warnings[34] or more

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[31] *See* DAVID M. GREENWALD & MICHELE L. SLACHETKA, JENNER & BLOCK, *supra* note 8, at 227.
[32] *See* LEVINE, *supra* note 5, at 8.
[33] *See* COOK, *supra* note15, at 15.
[34] *See Upjohn v. United States*, 449 U.S. 383, 389 (1981).

colloquially the Corporate Miranda Warnings. A sample Upjohn Warning for the hypothetical at issue here would be the following:

- I am an attorney representing the hospital corporation. I represent only the hospital corporation and I do not represent you or your interests personally.
- I am conducting this interview to gather facts for an internal compliance investigation in order to provide legal advice to the hospital corporation. The hospital corporation will utilize the facts and legal advice to determine how best to address the issues raised by the investigation.
- Your communications with me are protected by attorney-client privilege. Any documents memorializing this interview will be marked attorney-client privileged and attorney work product privileged. However, the attorney-client privilege belongs solely to the hospital corporation. The hospital corporation acting through its management or its board may elect to waive the attorney client privilege in its sole and absolute discretion and may disclose the facts revealed in this interview to third parties including state or federal government representatives, investigators or agencies without notifying you.
- This interview will be subject to attorney-client privilege only if it is kept in confidence. Therefore, you should not disclose the substance of this interview with any other persons inside or outside of the hospital (except to your own personal attorney).
- Do you have any questions about the matters I have just explained?
- Do you wish to proceed with our interview?[35]

Practically, counsel should consider reading the Upjohn Warnings from a prepared form and/or providing the employee with an Upjohn Warnings form for the employee's signature to uniformly provide and memorialize the provision of the warnings. In addition, high level constituent employee witnesses (in Illinois the so-called corporate control group) are preferred as they are most likely to possess more reliable and useful information and more likely to cooperate in protecting and maintaining attorney-client privilege for the information provided. If counsel interviews mid or lower-level constituent employees as a part of the compliance investigation, counsel may wish to document that the information was not otherwise available from higher level

[35] *See* COOK, *supra* note 15, at 15-16 (*citing Upjohn Warnings: Recommended Best Practices When Corporate Counsel Interacts with Corporate Employees*, ABA WCCC Working Group (July 17, 2009) https://www.crowell.com/PDF/ABAUpjohnTaskForceReport.pdf).

employees.[36] Further, counsel may wish to limit lower level employee interviews to information within the scope of the constituent employee's specific employment duties.[37] Lastly, any notes memorializing constituent employee interviews should be marked as attorney-client privileged and attorney work product privileged and counsel may wish to add mental impressions and legal analysis to confirm that the document was created to provide legal advice to the corporate client.[38]

In addition, note references below to IRPC Rule 4.1 Truthfulness in Statements to Others, Rule 4.2 Communication with Person Represented by Counsel and Rule 4.3 Dealing with Unrepresented Person which all provide guidance for General Counsel or outside counsel in interaction with constituent corporate employee witnesses.

2. Additional Witness Relevant IRPC and IRPC Comments

RULE 4.1: TRUTHFULNESS IN STATEMENTS TO OTHERS[39]

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Comment

Misrepresentation

[1] A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts. A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Misrepresentations can also occur by partially true but misleading statements or omissions that are the equivalent of affirmative false statements. For dishonest conduct that does not amount to a false statement or for

[36] *See* DAVID M. GREENWALD & MICHELE L. SLACHETKA, JENNER & BLOCK, *supra* note 8, at 227.
[37] *See id.*
[38] *See id.* at 226.
[39] Ill. S. Ct. Rs. Prof'l Conduct R. 4.1 (eff. Jan. 1, 2010).

misrepresentations by a lawyer other than in the course of representing a client, see Rule 8.4.

Crime or Fraud by Client

[3] Under Rule 1.2(d), a lawyer is prohibited from counseling or assisting a client in conduct that the lawyer knows is criminal or fraudulent. Paragraph (b) states a specific application of the principle set forth in Rule 1.2(d) and addresses the situation where a client's crime or fraud takes the form of a lie or misrepresentation. Ordinarily, a lawyer can avoid assisting a client's crime or fraud by withdrawing from the representation. Sometimes it may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like. In extreme cases, substantive law may require a lawyer to disclose information relating to the representation to avoid being deemed to have assisted the client's crime or fraud. If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.

Adopted July 1, 2009, effective January 1, 2010.

RULE 4.2: COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL[40]

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Comment

[2] This Rule applies to communications with any person who is represented by counsel, including counsel in a limited scope representation pursuant to Rule 1.2(c), concerning the matter to which the communication relates.

RULE 4.3: DEALING WITH UNREPRESENTED PERSON[41]

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When

[40] Ill. S. Ct. Rs. Prof'l Conduct R. 4.2 (eff. Jan. 1, 2010).
[41] Ill. S. Ct. Rs. Prof'l Conduct R. 4.3 (eff. Jan. 1, 2010).

the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

Adopted July 1, 2009, effective January 1, 2010.

Comment

[1] An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. For misunderstandings that sometimes arise when a lawyer for an organization deals with an unrepresented constituent, see Rule 1.13(f).

E. Reporting Investigation Results:

1. In-House and Outside Counsel Should Document Providing Legal Advice, Maintain a Separate Investigation File and Make Summary Reports which Reference Privileges.

When in-house counsel who is working on an investigation has business as well as legal responsibilities, work prepared as part of the internal investigation should reflect that such work was prepared within the scope of counsel's legal duties.[42]

A separate file should be maintained for the investigation. Only those involved in the investigation should have access to the file. Segregate privileged communications from non-privileged business documents. Business advice and legal advice should not be commingled in the same communication. For electronic data, it may be preferable to place privileged data relating to an investigation on one server to avoid later difficulties in separating privileged and non-privileged data. All privileged documents should be clearly labeled with the applicable privilege.[43]

[42] DAVID M. GREENWALD & MICHELE L. SLACHETKA, JENNER & BLOCK, *supra* note 8, at 378.
[43] *Id.* at 379.

> Any report that summarizes the results of an internal investigation should reference the initial request for authorization to conduct the investigation. Rather than merely summarizing the investigation, the report should include legal advice, recommendations, and analyses. Counsel may choose to create separate reports for confidential and non-confidential portions of the investigation.[44]

The above advice provides practical methods for protecting attorney client privilege and attorney work product privilege. Counsel's report providing legal advice to the corporate client will be drafted in a manner to assure confidentiality within the scope of the attorney-client relationship as recognized by IRPC 1.6 Confidentiality of Information. That Rule is of course read in combination with IRPC 1.13 Organization as Client confirming that confidentiality as protected by attorney-client privilege belongs to the corporate client and not to the corporation's constituent employees. Counsel must keep in mind that IRPC 1.13 (b) requires counsel to act in the "best interest of the organization" in reporting investigation results which implicate improper acts by "an officer, employee or other person associated with the organization".[45]

The responsibility of counsel to report to the client in the context of an internal compliance investigation commences at the very beginning of the investigation and continues up through counsel's final legal recommendations to the client based upon a final analysis of the investigation's findings. The investigative process contemplates serial interaction and communication between investigating counsel and the client which should yield an ever changing and improving understanding of the compliance issues and a fluid reporting responsibility compelled by an evolving process as the investigation moves toward completion.

Investigating counsel should advise the client as to the investigative structure and tactics which will be employed and the anticipated level of organizational impact and cooperation which is expected from the investigative process. Counsel and client will need to communicate throughout the investigation concerning such issues as:

- The number of likely interviews of current and former employees, the specific persons who will conduct the interviews and the likely location of the interviews;
- The potential legal exposure of the employees and whether the corporate client might wish to provide the employees with counsel;

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[44] *Id.*

[45] Ill. S. Ct. Rs. Prof'l Conduct R. 1.13(b) (eff. Jan. 1, 2010).

- What documents including computerized documents and communications should the client organization be responsible for identifying and how should the documents be secured, reviewed and organized; and,
- To whom and how (orally or in writing) should the results of interviews and document reviews be reported by counsel to the client.[46]

At the completion of the investigation counsel should prepare report to the client addressing all developed facts, all applicable laws and counsel's final analysis and recommendations based upon the facts developed as informed by the relevant law as to the risks and benefits of specific client action.[47] The client must consider whether counsel's analysis and recommendations compel the client to, without limitation, close the matter without further action, take corrective action to fix identified problems and/or consider self disclosure of the information revealed in whole or in part to an appropriate government representative or entity.[48]

Also referenced below are IRPC Rule 1.4 Communication and Rule 2.1 Advisor along with relevant IRPC Comments which color the presentation of any report by General Counsel or outside counsel to the corporate entity client.

2. Relevant IRPC and IRPC Comments

RULE 1.4: COMMUNICATION[49]

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

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[46] *See* Gabriel L. Imperato, Broad & Cassel, *What to Do When the Government Knocks and Conducting Internal Investigations, in* HEALTH CARE COMPLIANCE LEGAL ISSUES MANUAL 94, 106 (Harry R. Silver & Cynthia F. Wisner eds., 4th ed., AHLA 2014).
[47] *See id.* at 108.
[48] *See id.* at 108-109.
[49] Ill. S. Ct. Rs. Prof'l Conduct R. 1.4 (eff. Jan. 1, 2010).

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Adopted July 1, 2009, effective January 1, 2010.

RULE 2.1: ADVISOR[50]

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.

Adopted July 1, 2009, effective January 1, 2010.

Comment

Scope of Advice

[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

[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,

[50] Ill. S. Ct. Rs. Prof'l Conduct R. 2.1 (eff. Jan. 1, 2010).

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.

Offering Advice

[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client 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 under Rule 1.4 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.

3. IRPC Rule 1.O Terminology as an IRPC Glossary

Although the first Rule of the IRPC, Rule 1.0 Terminology is presented here as the Rule essentially serves as a glossary of important terms referenced in certain other Rules discussed above.

RULE 1.0: TERMINOLOGY[51]

(b) "Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of "informed consent." If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

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(d) "Fraud" or "fraudulent" denotes conduct that is fraudulent under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive.

(e) "Informed consent" denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and

[51] Ill. S. Ct. Rs. Prof'l Conduct R. 1.0 (eff. Jan. 1, 2010).

explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

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(n) "Writing" or "written" denotes a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording and ~~e-mail~~ electronic communications. A "signed" writing includes an electronic sound, symbol or process attached to or logically associated with a writing and executed or adopted by a person with the intent to sign the writing.

Adopted July 1, 2009, effective January 1, 2010; amended Oct. 15, 2015, eff. Jan. 1, 2016.

Comment

Confirmed in Writing

[1] If it is not feasible to obtain or transmit a written confirmation, if required, at the time the client gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter. If a lawyer has obtained a client's informed consent, and written confirmation is required, the lawyer may act in reliance on that consent so long as it is confirmed in writing within a reasonable time thereafter.

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Fraud

[5] When used in these Rules, the terms "fraud" or "fraudulent" refer to conduct that is characterized as such under the substantive or procedural law of the applicable jurisdiction and has a purpose to deceive. This does not include merely negligent misrepresentation or negligent failure to apprise another of relevant information. For purposes of these Rules, it is not necessary that anyone has suffered damages or relied on the misrepresentation or failure to inform.

Informed Consent

[6] Many of the Rules of Professional Conduct require the lawyer to obtain the informed consent of a client or other person (*e.g.*, a former client or, under certain circumstances, a prospective client) before accepting or continuing representation or pursuing a course of conduct. See, *e.g.*, Rules 1.2(c), 1.6(a) and

1.7(b). The communication necessary to obtain such consent will vary according to the Rule involved and the circumstances giving rise to the need to obtain informed consent. The lawyer must make reasonable efforts to ensure that the client or other person possesses information reasonably adequate to make an informed decision. Ordinarily, this will require communication that includes a disclosure of the facts and circumstances giving rise to the situation, any explanation reasonably necessary to inform the client or other person of the material advantages and disadvantages of the proposed course of conduct and a discussion of the client's or other person's options and alternatives. In some circumstances it may be appropriate for a lawyer to advise a client or other person to seek the advice of other counsel. A lawyer need not inform a client or other person of facts or implications already known to the client or other person; nevertheless, a lawyer who does not personally inform the client or other person assumes the risk that the client or other person is inadequately informed and the consent is invalid. In determining whether the information and explanation provided are reasonably adequate, relevant factors include whether the client or other person is experienced in legal matters generally and in making decisions of the type involved, and whether the client or other person is independently represented by other counsel in giving the consent. Normally, such persons need less information and explanation than others, and generally a client or other person who is independently represented by other counsel in giving the consent should be assumed to have given informed consent.

[7] Obtaining informed consent will usually require an affirmative response by the client or other person. In general, a lawyer may not assume consent from a client's or other person's silence. Consent may be inferred, however, from the conduct of a client or other person who has reasonably adequate information about the matter. Rule 1.5(e) requires that a person's consent be confirmed in writing. For a definition of "writing" and "confirmed in writing," see paragraphs (n) and (b). Other Rules require that a client's consent be obtained in a writing signed by the client. See Rules 1.5(c), 1.8(a) and (g). For a definition of "signed," see paragraph (n).

III. CONCLUSION

The Illinois Rules of Professional Conduct are instructive and consistent with a best practices approach to the role of counsel in the performance of internal healthcare compliance investigations. The IRPC's use of practical ethical guidelines combined with reasonable attorney discretion in the implementation of certain of the ethical guidelines is likely to yield legal services performed in a manner consistent with the way in which experienced healthcare counsel would

have chosen to deliver such services for the benefit of their healthcare clients even in the absence of the IRPC.