TRUST, BUT VERIFY?
LEGAL ETHICS IN THE DANCE AMONG INSIDE COUNSEL, OUTSIDE COUNSEL AND THE GOVERNMENT

WILLIAM W. HORTON
JOHNSTON BARTON PROCTOR & ROSE LLP
BIRMINGHAM, ALABAMA

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I. INTRODUCTION: DO YOU NEED A LAWYER (AND DOES YOUR LAWYER NEED YOU)?

Lawyers are, it may be said, a jaded bunch. Indeed, a certain worldly, seen-it-all air is arguably a sine qua non for a lawyer. One does not want one's client to think that one is just as shocked/perplexed/confused/frightened as the client is, after all. Oh, it takes something pretty big to get a lawyer's rapt attention.

Like another lawyer's getting indicted. For doing legal work. Surrounded by still more lawyers.

In late 2010, lawyers sat up and took notice at the federal indictment of Lauren Stevens, formerly a Vice President and Associate General Counsel of GlaxoSmithKline ("GSK"), on a variety of obstruction and false statement charges relating to her alleged actions in connection with a Food and Drug Administration inquiry into GSK's alleged promotion of off-label use of one of its flagship drugs, Wellbutrin SR.[1] According to the government, Ms. Stevens had, in the course of responding on behalf of GSK to a voluntary request for information and documents by the FDA, "signed and sent to the FDA a series of letters, with documents enclosed, in which she made materially false statements and concealed and covered up documents and other evidence" that would have shown the extent of GSK's alleged violations, all in violation of federal criminal laws.[2]

Taking the indictment at face value, it appeared that Ms. Stevens had engaged in plain, old-fashioned lying, and was now being brought into the dock for it. As her defense began to emerge, however, it became clear that there was another version of the

[1] *See* Indictment, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Nov. 8, 2010 ("Original Indictment"). As discussed below, the Original Indictment was dismissed without prejudice, and Ms. Stevens was thereafter reindicted. *See* Indictment, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Apr. 13, 2011 ("Second Indictment").

[2] Original Indictment at ¶ 25; Second Indictment at ¶ 26.

story: from the perspective of Ms. Stevens, she had not only responded appropriately to the FDA's inquiry, but had done so with the advice and concurrence of a variety of other inside and outside counsel to GSK, including multiple former FDA staff attorneys.[3]

Ultimately, this duel of perspectives was resolved in favor of Ms. Stevens. After the close of the government's case in a jury trial, U.S. District Judge Roger W. Titus granted her motion for a judgment of acquittal, and she walked away a free lawyer, none the worse for wear if you ignore the legal fees, mental anguish, and reputational damage.[4] Judge Titus's decision to acquit Ms. Stevens without letting the case get to the jury was viewed in much of the legal trade press and the related blogosphere as a significant slapdown to the government, at least insofar as its strategy of pursuing individual corporate agents – especially lawyers – on criminal charges relating to alleged corporate misconduct was concerned.[5]

Notwithstanding this resolution, however, the case holds much of interest to students of legal ethics.[6] As will be discussed below, in *Stevens*, much of the government's cased hinged on what Ms. Stevens had told GSK's outside lawyers (and other inside lawyers) and on what those lawyers would say she had told them. In turn, those other lawyers presumably had to worry about whether, if they gave the wrong (or at least the unsatisfactory) answers, they might be accused of conspiring with Ms. Stevens in the alleged obstruction of the FDA investigation.

In many respects, the *Stevens* case raises fundamental questions about the relationship and interactions between inside counsel and outside counsel in the context of a government investigation, about the degree to which such counsel may rely on each other's good faith and professional judgment, and about the duty that members of a

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3 *See* Lauren Stevens' Motion under Fed. R. Crim. P. 29 for Judgment of Acquittal, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed May 8, 2011, at 7-11 ("Motion for Acquittal").

4 *See* Transcript, May 10, 2011, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), *available at* http://freepdfhosting.com/53b29eb9a9.pdf (order from the bench granting Motion for Acquittal) ("Acquittal Order").

5 *See, e.g.*, John R. Fleder, *Black Tuesday for the Government: The Lauren Stevens Case is Dismissed*, FDA Law Blog, May 10, 2011, *available at* www.fdalawblog.net/fda_law_blog_hyman_phelps/2011/05/black-tuesday-for-the-government-the-lauren-stevens-case-is-dismissed.html; David Stout, *Lauren Stevens: A Case the DOJ Would Probably Like to Forget*, Main Justice (blog), May 11, 2011, *available at* www.mainjustice.com/2011/05/11/lauren-stevens-a-case-the-doj-would-probably-like-to-forget/; Alicia Mundy & Brent Kendall, *U.S. Rebuffed in Glaxo Misconduct Case*, wsj.com, May 11, 2011, *available at* http://online.wsj.com/article/SB10001424052748703730804576315101670843340.html.

6 Not least because it is one of what must be a fairly small number of cases in which thousands of dollars in legal fees were spent in arguments over the admissibility and relevance of evidence regarding applicable rules of legal ethics and the amount and nature of ethics CLE training received by the defendant. *See* Letter re: Evidence Rules and Ethics Training, dated April 18, 2011, to the Honorable Roger W. Titus from Sara Miron Bloom and Patrick Jasperse and Letter re: Evidence Rules and Ethics Training, dated April 18, 2011, to the Honorable Roger W. Titus from Reid H. Weingarten, William T. Hassler and Brien T. O'Connor, Docket Entries 154 and 155, respectively, in U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.).

counsel "team" may have to go behind factual statements made, and legal advice given, by other members. In particular, the implications of some of the positions taken by prosecutors in *Stevens* – positions which were rebuffed by this judge in this case, but which might find a more comfortable reception before another tribunal – give rise to troubling questions concerning how lawyers who counsel clients under investigation meet their professional obligations and whether their representation may be inhibited by new fears of personal exposure.

This paper will explore some of those questions, and the dynamics of the inside-outside counsel relationship in investigation situations, in the context of both the American Bar Association's Model Rules of Professional Conduct[7] and the publicly available information in the *Stevens* case. In particular, this paper will focus on the ethical and professional responsibilities of inside counsel in working with outside counsel in such situations, and on the degree to which inside and outside counsel may rely on each other without conspiring with each other.

II. TRUTH AND/OR CONSEQUENCES: THE FILE ON LAUREN STEVENS[8]

In order to set the stage, it is helpful first to review the facts (admitted and alleged) of the *Stevens* case, many of which are undisputed (although the legal import of them is not).

In October 2002, the FDA sent a letter to GSK requesting that GSK voluntarily provide extensive information relating to GSK's marketing of Wellbutrin SR to physicians, with a particular focus on GSK's financial and other relationships with physicians who made presentations to other physicians and professionals about the drug and on the slides, videos and other documentation used in such presentations. The letter indicated that the FDA had received information indicating that GSK might have been promoting off-label use of Wellbutrin as a weight-loss aid, a use for which the drug had not been approved by the FDA.[9]

The requests for information were fairly sweeping in scope: 15 separate categories of information, including both requests for existing documents and requests for

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[7] MODEL RULES OF PROF'L CONDUCT (2011). The Model Rules currently form the basis of the rules of professional responsibility applicable in all U.S. jurisdictions. However, there is significant variation among those jurisdictions as to the actual rules in effect; for example, some states have not adopted all of the amendments to the Model Rules, others have adopted the Model Rules but not the associated commentary, etc. This paper will use the Model Rules as the touchstone for analysis, but the reader should bear in mind that his or her license is governed not by the Model Rules, but by the specific rules in effect in the jurisdiction(s) that issued that license.

[8] *Cf.* THE FILE ON THELMA JORDAN (Hal Wallis Productions 1950), a classic film noir in which Barbara Stanwyck and Wendell Corey have ethical issues of their own with which to grapple.

[9] The letters referred to in this and the succeeding paragraphs are attached as exhibits to Memorandum of Law in Support of Defendant's Corrected Motion in Limine to Exclude Evidence outside the Scope of the Allegations of the Indictment, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed March 31, 2011 ("Stevens MIL Memo"). In the interests of brevity, citations to the letters are omitted here.

the creation of new documents, as well as requests for discrete items of factual information. The FDA requested a response within 10 days.

On October 29, Ms. Stevens responded with a letter recounting the results of two conference calls between the FDA and the GSK team and GSK's understanding of certain limitations on and priorities for the response agreed to by the FDA. In that letter, she noted that certain of the requested documents used at GSK-sponsored promotional programs were not created by, or under the custody or control of, GSK and that there was a possibility that some individuals who did have custody or control of those materials might decline to provide them to GSK.

Thereafter, GSK provided a series of response letters, all signed by Ms. Stevens, describing in some detail GSK's promotional and training activities with respect to Wellbutrin, including the establishment of two "National Advisory Boards" and an unspecified number of "Local Advisory Boards" comprising physicians and other consultants engaged to provide GSK with feedback and advice on issues relating to Wellbutrin, as well as a "Speakers Bureau" authorized to make product-related presentations on behalf of GSK. The responses included spreadsheets, represented as having been created solely for purposes of the responses, containing certain information about Wellbutrin-related speaker events sponsored by GSK.

On May 21, 2003, GSK submitted a letter that it characterized as its "final supplemental response" to the FDA inquiry and its "last submission". The letter concluded, "With this final submission [GSK] complete[s its] production of information and documents" and requested the opportunity to "arrange a teleconference with [the FDA] to discuss any final questions that [the FDA] may have". And there, at least insofar as Ms. Stevens was concerned, the matter lay for a bit.[10]

Wheels had, however, commenced turning behind the scenes. In April 2003, the Department of Justice advised the FDA that the Department had commenced an investigation into GSK's promotional activities. Thereafter, the DOJ asked the FDA for copies of all documents provided by GSK in connection with the FDA investigation, and at some point on or prior to June 30, 2003, the FDA discontinued its own investigation.[11]

In late 2003 or early 2004, the DOJ began a grand jury investigation in Massachusetts "to conduct a wide-ranging investigation into alleged off-label promotion

[10] Actually, there was a final letter from Ms. Stevens, on behalf of GSK, to the FDA in November 2003. Apparently, GSK had become aware that a sales representative had provided to the FDA slide presentations used by two physicians allegedly promoting off-label use of Wellbutrin, and Ms. Stevens sent a letter to the FDA concluding that the sales representative's disclosures "[did] not present any new issues". *See* Second Indictment at ¶¶ 39-42.

[11] *See* Letter, dated Jan. 26, 2011, from Patrick Jasperse to William T. Hassler, attached as Exhibit A to [Redacted] Reply in Support of Defendant's Motion to Compel Discovery and Disclosure of Material and/or Exculpatory Information, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Mar. 31, 2011 ("Stevens Motion to Compel Reply").

of prescription drugs by [GSK]". [12] As part of that investigation, DOJ initially interviewed Ms. Stevens in 2008, and in May 2009, she received a "target letter" from DOJ.[13] In addition, the grand jury apparently heard testimony from other inside and outside counsel who had been involved in GSK's response to the FDA.[14] The original indictment then issued in November 2010.[15]

The basic allegations of the indictment were fairly straightforward. According to the government, Ms. Stevens " made . . . false statements and withheld documents she recognized as incriminating with the goal of curtailing further FDA investigation [of GSK] and avoiding or minimizing any FDA regulatory action against [GSK] and any other potential government investigations or potential enforcement actions against [GSK]."[16] In particular, the government alleged that Ms. Stevens had obtained, but concealed, information tending to show that GSK was actively involved in promoting off-label use of Wellbutrin, both by making affirmative misrepresentations of fact concerning GSK's promotional activities and by failing to produce potentially incriminating documents. According to the indictment, Ms. Stevens knowingly withheld information about GSK's use of "special issue boards" (in addition to the disclosed National Advisory Boards and Local Advisory Boards) to promote off-label uses to physicians, knowingly misrepresented facts concerning whether attendees at promotional meetings were compensated by GSK, and knowingly withheld slide sets and presentation materials used by presenting physicians that may have indicated improper promotion of off-label uses. Of particular significance to the government was a memorandum to Ms. Stevens in March 2003 that was prepared by other lawyers on the GSK response team, and that outlined the supposed "pros and cons" of turning over the physician presentations to the FDA.[17] In any event, the presentations were not provided to the FDA, and, in the government's view, the statements in the May 21 letter that such letter was GSK's "final" response and that it had "complete[d its] production of information and documents" were intended to mislead the FDA and obstruct its investigation.[18]

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12 Stevens MIL Memo at 3.

13 Declaration of Brien T. O'Connor, filed as Exhibit 1 to [Redacted] Defendant's Memorandum of Law in Opposition to United States' Motion to Preclude Advice of Counsel Defense, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Mar. 31, 2011 ("Stevens Advice of Counsel Opp.").

14 *See* Peter D. Hardy & Matthew T. Necomer, *Obtaining Federal Grand Jury Materials: Lessons from the* Stevens *Decision*, THE LEGAL INTELLIGENCER, May 9. 2011.

15 The indictment was issued by a federal grand jury in Maryland, notwithstanding that the investigation-in-chief was being conducted by a federal grand jury in Boston. The United States Attorney for the District of Maryland did not sign the indictment, a fact that excited considerable comment when it emerged after the conclusion of the case. *See, e.g.*, David Stout, *Maryland U.S. Attorney Wouldn't Sign Indictment of GSK Counsel*, Main Justice (blog), June 20, 2011, *available at* www.mainjustice.com/2011/06/20/maryland-u-s-attorney-wouldnt-sign-indictment-of-gsk-counsel/.

16 Original Indictment at ¶ 26.

17 *Id.* at ¶¶ 27-35.

18 *Id.* at ¶¶ 36-37.

Once the indictment had issued, the role of counsel – Ms. Stevens, GSK's other inside counsel, and GSK's outside counsel – quickly became a central focus in the criminal case. Early on in the process, it became apparent that Ms. Stevens intended to rely in part on the defense that, contrary to the government's apparent contention that she had unilaterally engaged in a pattern of obstruction and deceit, she had in fact been simply giving voice to the unanimous decisions of the entire GSK legal team with respect to how to respond to the FDA.[19] According to Ms. Stevens, it was the shared conclusion of the entire legal team that GSK "had no centralized corporate strategy to promote Wellbutrin off-label to treat obesity"[20] Further,

> The legal team discussed at length whether to produce the [omitted physician] presentations to [the] FDA absent the context necessary to assess the presentations. The team was concerned that simply producing the presentations with no explanation could create a misleading impression. The team reached a consensus not to produce the presentations immediately but instead to seek a meeting with [the] FDA at which GSK would discuss the presentations. [Despite calls from Ms. Stevens in May and June 2003 to arrange such a meeting, no meeting occurred.] At no time did King & Spalding [GSK's outside counsel in the matter] advise GSK that its nonproduction of the presentations was unlawful.[21]

In short, Ms. Stevens alleged, if she had done wrong, she had done so in reliance upon the advice of qualified inside and outside counsel, therefore lacking the *mens rea* to have committed the crimes of which she was accused.

The government sought to undercut that argument early in the proceedings through a motion to prohibit, or at least to strictly limit, the introduction of evidence supporting an advice-of-counsel defense.[22] Ignoring certain technical aspects of the motion relating to specific charges and procedural issues that are not relevant to this discussion,[23] the government offered three basic contentions:

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[19] *Cf.* the Carl Reiner-Mel Brooks comedy recording about the (fictitious) pop singer Fabiola, who says of his fans, "I am them, they are me, we are all singing, I have the mouth." (Quoted in GARY GIDDINS, RIDING ON A BLUE NOTE: JAZZ AND AMERICAN POP (1981) (Da Capo Press edition, 2000), at 19.)

[20] Stevens Advice of Counsel Opp. at 4.

[21] *Id.* at 5. The defense went on to note that "[n]o other members of the legal team have been charged".

[22] *See* United States' Motion to Preclude Advice of Counsel Defense to 18 U.S.C. § 1519 and for Hearing Regarding Applicability of the Defense to Other Charges, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Dec. 17, 2010 ("Gov't Advice of Counsel Mot.")

[23] Parts of the motion dealt with whether 18 U.S.C. § 1519 constituted a specific-intent crime and whether the advice-of-counsel defense were available with respect to it and with procedural prerequisites for asserting the defense.

- That Ms. Stevens had not provided GSK's other counsel with all relevant facts known to her;
- That she had not sought the advice of counsel in good faith (and correlatively, that she could not have reasonably relied on such advice if, in essence, the advice was rendered by counsel who were conspiring with her to conceal documents and information from the FDA); and
- That she could not rely on the defense if the advice on which she purportedly relied were rendered by counsel for GSK who did not represent her personally.[24]

The issue then became a turning point in the case, as Judge Titus found not only that the advice-of-counsel defense was available to Ms. Stevens, but that the prosecutors had, in response to a direct question from a grand juror, misinstructed the grand jury on the relevance of the defense at the charging stage and that such faulty instruction had tainted the original indictment. Accordingly, the court dismissed the indictment without prejudice, allowing the government to seek to re-indict before a different grand jury.[25]

Which is exactly what happened, as a chastened but undaunted DOJ team obtained a substantially identical new indictment from a new grand jury, and the case proceeded to trial.[26] The government's case-in-chief took around two weeks to present, at which time Ms. Stevens filed a motion for judgment of acquittal under Rule 29 of the Federal Rules of Criminal Procedure. In many respects, that motion seems driven by semantics: arguments that "not producing" something is not the legal equivalent of "concealing" that something, especially in the context of a voluntary response to a government inquiry that does not have the force of a subpoena behind it; arguments that

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[24] *See* Gov't Advice of Counsel Mot. at 12-17. As pointed out by the defense, this last argument is highly questionable as a matter of law and ridiculous as a matter of policy; were that to be the law, no individual charged with committing a crime as a corporate agent could ever raise an advice-of-counsel defense unless that individual had engaged a personal lawyer to advise him or her with respect to acts or omissions on behalf of the corporation, even if the corporation had expressly directed corporate counsel to communicate with and/or through the individual agent, or if the individual agent were the instrument through which the corporation could take action in the matter. *See* Stevens Advice of Counsel Opp. at 14-16.

[25] *See* Memorandum Opinion, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Mar. 23, 2011 ("Original Dismissal").

[26] The only substantive difference between the Original Indictment and the Second Indictment was the inclusion of a paragraph purporting to reproduce Ms. Stevens' handwritten notes relating potential issues regarding the promotional activities of a specific physician, noting potential arguments that might be made by the FDA and by the Office of Inspector General of the Department of Health and Human Services. See Second Indictment at ¶ 22. As an observation, this and other documents in the case suggest that Ms. Stevens might have been rather more obsessive about making notes than would be ideal, at least if one is concerned about whether such notes might someday be discoverable; another note written by Ms. Stevens shortly after the original FDA inquiry reads, in the government's edited version, "N2S [presumably, "Note to Self"]: We already have probs w/ [three doctors paid by GSK to speak at promotional events]; FDA doesn't have to dig deeper & rather than open up everything, let's admit probs & take lump – reform practices." United States' Opposition to Defendant's Motion in Limine, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed Mar. 4, 2011, at 3. Other such notes are referenced in Motion for Acquittal at 9 – 10, indicating a particular habit of writing down pros and cons that, it might be suggested, would be a good habit to break.

the deletion of a column from a specially-created spreadsheet (which column reflected entertainment expenditures by GSK in connection with physician programs) did not make the spreadsheet "false"; arguments that "gifts and entertainment" for speakers were not "compensation" to those speakers; arguments that GSK's knowledge of (what may fairly be characterized as pretty routine and recurring) violations of its policy concerning promotion of off-label usage did not support the inference that GSK had a "plan" to engage in such promotion.[27]

Amidst these somewhat precious arguments, however, were three recurrent major themes:

- Other inside counsel at GSK and outside counsel at King & Spalding (including, in both camps, former in-house lawyers from the FDA) advised Ms. Stevens at every step of the way, and all of her actions were undertaken only after consensus was reached among the counsel team;
- Ms. Stevens did not knowingly and intentionally make false statements to, or conceal information from, the FDA; and
- Ms. Stevens would not have repeatedly requested to meet with the FDA after the May 21, 2003 if she had intended to conceal anything, and the FDA's failure to schedule such a meeting was the primary reason that it was not made aware of the information intentionally omitted from GSK's production.[28]

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27 *See* Motion for Acquittal, *passim*.

28 This last point brings up an interesting sidelight on the defense strategy. In many ways, the weak link in the defense is the language in the May 21 letter that seemed clearly to imply that GSK did not have further responsive materials to provide: "final response", "completes our production", etc. Although the letter requested a teleconference, that request indicated that the purpose of the teleconference would be "to discuss any final questions [the FDA] may have", not "to tell the FDA what we didn't produce and why" or something like that.

In pretrial filings, the defense suggested that it would offer evidence that, at a proposed meeting with the FDA, "Ms. Stevens and other members of the GSK legal team assumed that [the] FDA would question GSK about why certain 'slide decks' had not yet been produced." [Redacted] Memorandum in Support of Defendant's Motion to Compel Discovery and Disclosure of Material and/or Exculpatory Information, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed March 31, 2011, at 5 – 6 ("Stevens Motion to Compel Memo"). More or less in so many words, the defense suggested that the GSK team believed that the FDA must have known that GSK had not handed over all relevant slide decks, that the burden was on the FDA to ask for them, and that the FDA's failure to ask for them was a (presumably welcome) surprise to GSK. *Id.* at 8. Only on the eve of trial, according to the defense, did Ms. Stevens become aware that the FDA had discontinued its investigation in favor of the DOJ investigation, which her defense team viewed as accounting for the FDA's apparent lack of interest in a meeting. *Id.* Running through this argument (which is amplified in Stevens Motion to Compel Reply, *passim*) seems to be a subliminal argument that someone in the FDA or the DOJ had an obligation to tell GSK that the FDA had discontinued its investigation by the summer of 2003 so that GSK would have been on notice that it should not rely on the FDA's silence as a justification for not producing the slide decks.

The government suggested that Ms. Stevens's arguments that she fully intended to discuss the slide decks were retrofitted to the facts, citing

> . . . a meeting in mid-May 2003 [at which] Stevens and the other [GSK lawyers] discussed how to respond if the FDA asked about doctor-speaker slide sets. Stevens' own notes from that meeting say: "let them come back despite 10/29/02 stmt." The

The government's response was hurried and brief, basically asserting that it had introduced evidence sufficient to withstand a Rule 29 motion and that, in any event, the court should not rule on the motion until after the jury had deliberated and rendered its verdict.[29]

Judge Titus, however, was having none of it. In an order from the bench, he first noted that the government's case was largely predicated on information obtained from attorney-client privileged documents that a Massachusetts magistrate had determined were discoverable under the crime-fraud exception, a determination with which Judge Titus disagreed.[30] As a result of that determination, in Judge Titus's words, "the prosecutors were permitted to forage through confidential files to support an argument for criminality of the conduct of the defendant". However, in the judge's view, the privileged documents "show that [Ms. Stevens] was a client [*sic*; presumably "lawyer" was meant] that was not engaged to assist a client to perpetrate a crime or fraud. Instead, the privileged documents . . . show a studied, thoughtful analysis of an extremely broad request from the [FDA] and an enormous effort to assemble information and respond on behalf of the client." Further, "[t]he responses that were given by the defendant may not have been perfect . . . . They were, however, sent to the FDA in the course of her bona fide legal representation of a client and in good faith reliance [on] both external and internal lawyers for [GSK]."[31]

After concluding that Ms. Stevens was entitled to acquittal on all counts as a matter of law, Judge Titus went on to summarize the basis for his holding:

> [T]here are serious implications for the practice of law generated by this prosecution. Lawyers can never assist a client in the commission of a crime or a fraud . . . . [¶] However, a lawyer should never fear

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> notes of another participant at the meeting state: "find a way to not provide." If Stevens truly wanted to discuss the slide sets with the FDA, she could have stated in one of her letters that GSK had collected off-label slide sets but did not want to produce them until it had a chance to discuss the materials with the FDA. Instead, Stevens concealed the off-label materials and called her May 2003 submission "final" and "complete."

[Redacted] Government's Opposition to Defendant's Motion to Compel, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed March 31, 2011, at 12. The government went on to note that "[o]ne may not make false statements to the government and obstruct a government investigation on the assumption that there will be a chance to take a different position later if the initial approach does not succeed." *Id.* at 15. Although that argument is logically flawed in that it assumes its premises, it is difficult not to have a least a bit of sympathy for the government on this point. Ms. Stevens and the rest of the GSK team may, in good faith, have planned to discuss the omitted materials at the meeting that never happened, but the May 21 letter seems, in substance and in literal language, to have been designed to minimize the importance of the requested "teleconference" and to discourage the FDA from pursuing additional production of documents.

[29] *See* United States' Initial Response to Defendant's Motion for Judgment of Acquittal, U.S. v. Stevens, Case No. RWT-10-CR-0694 (D. Md.), filed May 9, 2011.

[30] *See* Acquittal Order at 3, 5.

[31] *Id*. at 5.

> 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 an 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. [¶] The institutional problem that causes me a great concern is that while lawyers should not get a free pass, the 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 interest of their client. Anything that interferes with that is something the court system should not countenance.[32]

It is interesting, if not terribly productive, to speculate on why Judge Titus took what he acknowledged to be the highly rare step of taking this particular case from the jury and rendering a judgment of acquittal on what it must be said are somewhat dodgy facts. Admittedly, the prosecution had quite the air of a witch-hunt about it. Ms. Stevens was singled out from all the other lawyers involved in representing GSK, and even from GSK itself. The prosecution developed much of its evidence through a grand jury investigation conducted in another district from the grand jury issuing the indictment, and was found by the court to have misled the indicting grand jury on a key question of law. Further, the prosecution made aggressive, and as to one aspect (the "she couldn't have relied on King & Spalding's advice because King & Spalding was not her personal counsel" argument) even specious, arguments as to why Ms. Stevens should not even have been allowed to argue that she was relying on the advice of (indisputably competent) counsel, essentially an absolute defense to the specific-intent crimes with which she was charged. It is not clear why the government sought to demonize this one lawyer out of all those involved, and one might also question the arguable attempts by the government to influence the testimony of those other lawyers with veiled threats of prosecution.

At the same time, even allowing for the 20/20 quality of hindsight, Ms. Stevens appears to have made some questionable calls, and aspects of her defense seem to have been based on somewhat retroactive justifications. It may be true that Ms. Stevens and the rest of the team intended to discuss with the FDA why they had not produced certain documents that, in their view, would have been misleading out of context. However, it is simply disingenuous to suggest that the May 21 letter should have put the FDA on notice that it needed to have a meeting with the GSK team to obtain such documents, or even that such documents might exist; the letter appears to have been clearly designed to suggest that GSK had nothing more to say.[33] Similarly, the defense seems to have relied

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[32] *Id.* at 9 – 10.

[33] And while the government ultimately conceded that Ms. Stevens did contact the FDA on multiple occasions to discuss such a meeting, the defense does not seem to have suggested (and the government has not indicated) that in any of such calls did Ms. Stevens give any indication that GSK might provide or discuss additional documents at such a meeting.

fairly heavily on somewhat fine semantic distinctions to explain why various affirmative statements about GSK's involvement in the promotion of off-label use of Wellbutrin were accurate and not misleading; some of the statements made by Ms. Stevens in her letters were, if not misleading, not forthcoming either.

That is not to say that these questionable calls constituted crimes. Further, although the government repeatedly suggested that Ms. Stevens had culpable information that she did not share with the rest of the legal team, the public documents in the case do not seem to offer any evidence contradicting Ms. Stevens's assertion (through counsel) that everything she did (or omitted) was done with the knowledge, approval and advice of the team. Even if the team were wrong, giving or believing bad legal advice is not a criminal act.

On the other hand, giving bad legal advice does have implications under the rules of professional responsibility, and the purpose of this paper is not to second-guess the guilt, or ratify the innocence, of Ms. Stevens, but instead to explore some of the professional responsibility challenges raised – or at least suggested – by the facts in *Stevens*. To do that, this paper will identify some relevant ethics rules, and then consider their application to those facts and to variations on those facts.

III. WHOM DO YOU TRUST? INSIDE COUNSEL, OUTSIDE COUNSEL AND ETHICAL QUANDARIES

A. Establishing the Ground Rules: Relevant Ethics Principles

Before beginning the analysis, it is useful to consider and summarize some of the Model Rules that are most relevant in the context of a response to a government investigation.[34] These include:[35]

- Preamble, ¶ [9]: A lawyer must "zealously . . . protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system".
- Rule 1.1: A lawyer must represent a client competently

[34] While the author believes he would have identified most of the Model Rules discussed in the succeeding paragraphs on his on, his thought process was greatly aided by reviewing the PowerPoint slides from Katy Meisel, William Gould & Patrick O'Brien, *United States v. Lauren Stevens: The Federal Prosecution of a Company Attorney* (May 11, 2011), an educational webcast presented by the Association of Corporate Counsel. Those slides are available, at least at the moment, at http://webcasts.acc.com/handouts/5.11.11_Webcast_Slides_ACC.pdf (ACC materials are generally available only to members, but this one does not seem to be behind a firewall, or at least not a very effective one).

[35] The following items are quoted, paraphrased or summarized from the 2011 edition of the Model Rules. In the interests of brevity, footnotes have been pretermitted, but were they present, they would all simply reference the indicated rules.

- Rule 1.2(a): A lawyer must "abide by a client's decisions as to the objectives of the representation" and consult with the client on the means of achieving those objectives.
- Rule 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."
- Rule 1.3: A lawyer must represent a client with "reasonable diligence and promptness".
- Rule 1.6: In general, a lawyer may not reveal confidential information about a client obtained in the course of representing that client (whether from the client or from other sources) without the client's consent. However, a lawyer may reveal information without the client's consent, inter alia, "to prevent the client from committing a crime or 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" or "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". In addition, a lawyer may reveal such information "to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client".
- Rule 1.13: A lawyer representing an organization represents the entity, and not individual officers, directors, shareholders or other constituents of the entity. "If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization", including reporting the matter up the ladder to higher authority within the organization. If the highest authority that can act on the organization's behalf fails or refuses to do so, and "the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization", then the lawyer may make a disclosure outside the organization (even if not permitted under Rule 1.6), "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization". However, that "reporting out" right does not apply "with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law".

- Rule 3.4: A lawyer has a duty of fairness toward opposing parties and their counsel, including a duty not to "unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value . . . [or] counsel or assist another person to do any such act", and a duty not to "falsify evidence, counsel or assist a witness to testify falsely".
- Rule 4.1: "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 to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."
- Rule 8.3: "A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority", but not if disclosure is prohibited by Rule 1.6.
- Rule 8.4: It is an ethical violation for a lawyer to, inter alia, "violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another" or "engage in conduct involving dishonesty, fraud, deceit or misrepresentation".

"Whew! That sure is a lot of rules!" one might reasonably think. "And whose responsibility is it to follow them when you have a whole team of lawyers involved?" Good questions, those. Some potential answers may be suggested by applying those rules to fact patterns present in *Stevens*, and some hypothetical variations suggested by *Stevens*.

(In that regard, note that the purpose of this exercise is not to suggest a conclusion that Ms. Stevens or any other member of the GSK legal team acted otherwise than ethically. Rather, the purpose is to use the case as something of a "living hypothetical". In that regard, some of the illustrations below are phrased to suggest that Ms. Stevens, or sometimes another member of the legal team, made a decision or took an action unilaterally. The defense asserted that all actions of the legal team were done by consensus, and there appears to be no reason to assume that not to be the case. However, some of the issues are easier to see if the decisions are "individualized" and ascribed to a single person, usually Ms. Stevens, and so artistic license has been taken below.)

B. The Rules in Context: Some Thoughts on *Stevens*

1. <u>Preamble, Rule 1.1 and Rule 1.3: The Duties of Zealousness, Competence and Diligence</u>

There appears to be little reason to question the zealousness, competence and diligence of the inside or outside lawyers on the facts of *Stevens*, even if (as discussed below), there may be reason to question some of the judgments they made. Both the inside and outside teams appear to have been quite competent by reason of experience and industry and agency knowledge. The process by which responsive information was assembled and reviewed seems appropriately diligent, and whatever else may be said, the team appears to have worked together assiduously to formulate a response that they believed served GSK's interest.

In the context of this type of investigation, though, one might also consider different circumstances where the "diligence" duty might come into play. In pursuing Ms. Stevens, the government alleged that she withheld information from outside counsel (and perhaps from other inside counsel), thereby undercutting her ability to raise an advice-of-counsel defense (which is predicated on providing such counsel with full and complete information). Judge Titus did not bite at that, but it is fairly easy to construct a hypothetical where the duty of diligence might come into play based on the government's argument.

Suppose, for example, that inside counsel attempted – in the friendliest and most reasonable way – to limit the scope of outside counsel's review by restricting outside counsel's access to files or personnel likely to have responsive information: "I've already personally reviewed the files of our Director of Physician Education and these 17 pages are the only relevant documents; no need to waste your time there." Would outside counsel have satisfied his or her duty to represent the client diligently if he or she accepted that position, or should outside counsel insist on its own, potentially duplicative, review of those files? What if outside counsel took some action to note this limitation for the record – e.g., through a qualification in a report of investigation ("We have relied upon internal counsel for the review of the following files and have not independently reviewed those files") or a "memo to file"?

Conversely, what if inside counsel believes that outside counsel has (by reason of negligence, limitations of time or resources, lack of knowledge of the client's organizational structure, or whatever) failed to conduct certain interviews or review certain files that make outside counsel's conclusions suspect? May inside counsel simply say, "Oh, well, we're paying them to be the experts and if they didn't want to look at the XYZ files, who am I to question them?", or does inside counsel have a duty under Model Rule 1.3 to go behind the work of outside counsel?

Obviously, there are no perfect answers to these questions, even on the oversimplified hypothetical fact patterns outlined above. However, it seems clear that part of the duty of diligence must include taking reasonable steps to verify that the legal conclusions and strategies reached take into account all relevant information and that any response to the government is accurate and complete in accordance with its terms. This does not suggest that one set of counsel needs to duplicate the work of another, but it does suggest that part of the duty of diligence is to ensure that obvious gaps or apparent errors do not go unquestioned.

2. Rule 1.2(d): The Duty to Walk the Tightrope

Rule 1.2(d) is, in some respects, the most significant ethics rule for healthcare law practitioners, for the simple reason that most things in the healthcare world that make business sense are also arguably illegal. Under Rule 1.2(d), a lawyer may not counsel a client to engage in illegal acts – at least those that are criminal or fraudulent – or assist the client in so doing, but a lawyer my help the client to make good faith efforts to determine where the boundary between "legal" and "illegal" may be.

In the ordinary course, the application of this rule in the healthcare setting is fairly easily understood in principle, if not always easy to follow in practice. If the client says, "We need to pay our referring physicians $100 for every patient they send us, and you need to dummy up some sort of contract to make it look legal", the lawyer's obligation is to say no. If the client says, "We need to enter into a business arrangement that does not fit within a safe harbor, and we need you to help us figure out how to do it so we don't get in trouble with the law," the lawyer is free to accept that engagement, and even if the arrangement is ultimately found to be a problem, the lawyer still does not have an ethical problem as long as the client's inquiry and the lawyer's work were in good faith.[36]

The application of this rule to the *Stevens* facts is a bit less straightforward. Here, the GSK legal team withheld information from a voluntary production. So far as was alleged, the information was not destroyed, mutilated, etc., nor was it withheld in response to a subpoena or other compulsory disclosure order. Unless the GSK correspondence contained false statements about the existence or production of such information (as the government alleged), simply withholding that information would not appear to be a violation of the law.[37]

On the other hand, as will be discussed further below, the available facts make it difficult to say that GSK did not at least flirt with misleading the FDA, its primary regulatory agency, about the existence of responsive information that was not being provided. Ms. Stevens's defense indicated that the decision to draft the GSK response letters in that fashion was one made by the entire legal team. Under prevailing circumstances, presumably the team consensus was that there was not a clear legal obligation to either provide the missing information or more clearly disclose that it had been withheld. However, if some members of the team had concluded that there were such an obligation, then Rule 1.2(d) would constrain their actions. This can be a delicate line to walk.

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[36] For more elaboration of this point, *see generally, e.g.,* William W. Horton, *In the Eye of the Beholder: Physician Transactions, Professional Responsibility, and the Winding Road from* Anderson *to* Tuomey, in Health Law Handbook (Alice G. Gosfield, ed.) (West 23rd ed. 2011)

[37] Destroying or otherwise spoliating it might have been a violation under the "anticipatory obstruction of justice" provisions of 18 U.S.C. § 1519, which, among other things, catches "obstruction activities" that are undertaken "in relation to or in contemplation of" a government investigation. *See generally, e.g.,* T. Markus Funk, *'Honey Laundering,' a Toilet Flush, and a Governor's Yahoo Account: The New Age of Anticipatory Obstruction of Justice*, THE CHAMPION (May 2011) 22-26.

3. Rule 3.4: The Duty to Play Fair

Rule 3.4 essentially imposes a duty to preserve evidence, a duty not to obstruct other parties' lawful access to evidence, and a duty not to falsify evidence (or to counsel or assist someone else to do any of those things). There are a couple of important factors to bear in mind in analyzing the rule:

- Rule 3.4 is not a disclosure obligation; it is a non-obstruction obligation. It does not impose upon a lawyer a duty to come forward with information, a duty to create information, or even a duty to make information available in a form more user-friendly than its natural state. Rather, it is in the nature of a duty not to tilt the playing field by concealment, spoliation or just plain lying.
- More or less explicitly, Rule 3.4 assumes the existence of an adversary proceeding with an opposing party, or at least a foreseeably imminent adversary proceeding; it is not a general obligation that prohibits the lawyer from assisting the client to manage potentially damaging information as to which there is no known pending or threatened proceeding (although some activities aimed at managing such information may implicate other applicable ethics rules).

How could Rule 3.4 apply to the facts in *Stevens*? The threshold question is whether it applies at all, given that the FDA's inquiry had not even reached the subpoena stage. However, in light of the fact that the FDA's original request for information clearly specified that it was concerned about potential violations of the FDA statute and regulations and that, logically speaking, the FDA's conclusion that such violations existed could lead to an adversary proceeding, it appears that the spirit of Rule 3.4 would apply to the situation, even if there were an argument that it were not literally applicable.

Assuming the rule did apply, the next question is whether the acts of Ms. Stevens or others on the legal team were consistent with the rule. That question is most clearly applicable to two aspects of the GSK response: the decision not to turn over the physician presentations (and not to make any affirmative disclosure that they had not been disclosed) and the decision to delete from the spreadsheet showing physician relationships and compensation the column showing what GSK had spent on "entertainment" for the physicians.

The defense addressed those issues in the criminal law context, if not the ethics context, in its Motion for Acquittal. As to the physician presentations, the defense argued (successfully, obviously) that they were not "concealed" from the FDA – that the FDA knew or should have known they existed, that Ms. Stevens did not represent to the FDA that she was providing all of the physician presentations, and that "[m]ere nonproduction" was not the same thing as concealment.[38] As to the spreadsheet, the

[38] Motion for Acquittal at 5 – 7. The defense also argued that there could be no concealment absent a duty to disclose, and that a voluntary request for production, as opposed to a subpoena, created no such duty, *id.* at 6 – 7, and that Ms. Stevens's multiple attempts to schedule a meeting with the FDA at which the presentations would purportedly be discussed showed the absence of an intent to conceal them, *id.* at 10 -11.

essence of the defense's argument was that the spreadsheet was not falsified because (i) the information on the spreadsheet was accurate, and (ii) GSK had not represented that the spreadsheet would contain information other than that which it contained.[39] Put another way, the document was not pre-existing "evidence", but was created for the purpose of responding to the FDA and did not need to do anything except contain accurate information of the type it said it contained.

From a professional responsibility standpoint, the spreadsheet argument appears consistent with Rule 3.4; that is, Rule 3.4 does not impose a duty to create evidence, but only to preserve it, and the creation of a document that is accurate as far as it goes does not imply a duty to make it go farther absent an express undertaking to do so. The physician presentations argument appears to be more tenuous. Under the circumstances, there would not seem to be any duty to turn over the presentations as part of a voluntary submission; in other words, it would be a legitimate legal call not to produce the presentations if, in the lawyers' judgment, there were good and sound reasons not to turn them over in the absence of compulsory process. However, a reasonable person might conclude that the completes-our-production language of the May 21 response letter, along with its extensive summary of why GSK believed there was no FDA violation, was designed to induce the FDA not to ask to see anything else, if not to mislead the FDA into thinking that nothing else existed. Under the literal terms of Rule 3.4, that may still not be "concealment", but it may dance rather closer to the precipice of concealment than one would normally like.[40]

4. <u>Rules 1.2(a), 1.6, 1.13 and 4.1: The Duty of Deference, the Duty Not to Disclose, the Duty to Disclose Up-the-Ladder, the Right (but not the Duty) to Disclose, and the Duty Not to Fail to Disclose (unless Disclosure is Forbidden)</u>

Taken together, these rules really present some of the most difficult questions in a *Stevens*-type situation. For example, suppose that other members of the legal team had recommended that the physician presentations be turned over to the FDA and Ms. Stevens had declined to follow that recommendation. Assuming that they were unsuccessful in persuading her of the error of her ways, what recourse would the other members of the team have?

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39 *Id.* at 11 – 14.

40 Paradoxically, one's view of the letter may depend on whether one believes that, as the defense suggested, at the time the letter was written the GSK team actually intended to produce, or at least discuss, the omitted presentation at the to-be-scheduled meeting with the FDA. If one thinks that was the case, then the letter seems more misleading, because the letter seems to be designed to discourage the FDA from thinking any such meeting was necessary. On the other hand, if one believes that this rationale was retroactively created as a part of the defense strategy and was not the team's intent when the letter was written, the letter seems less misleading because it simply says, in effect, "We've given you what we're going to give you and we're not giving you anything else", without affirmatively representing that what has been produced was all the relevant materials there were.

Assuming (as seems to be the case) that the client, GSK, had delegated to Ms. Stevens the authority to make the final decision on the response to the FDA, Rule 1.2(a) would suggest that the team would have to defer to her decisions even if they believed her to be a walking fool, as long as they did not believe that carrying out those decisions would be unlawful.

But suppose they genuinely believed that Ms. Stevens were making a horrible error, e.g., by withholding information that GSK was not under a legal compulsion to disclose, but that would severely impair GSK's negotiating position with the FDA if the FDA were to discover it. Could the legal team go around Ms. Stevens and disclose it anyway? Well, not under Rule 1.6; not unless the team determined that such disclosure were necessary "to prevent the client from committing a crime or 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" or "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".

This is a demanding standard. In the first place, there are lots of bad ideas that are not crimes or frauds, and then one gets into all that stuff about "reasonably certain to result in substantial injury" on top of that. It is not enough to say, "Gee, we have a duty to protect the client, and the client is going to get whacked by the FDA if they figure out we didn't give them the slide decks"; if the decision, e.g., not to give the FDA the slide decks is not a crime or a fraud, then the Rule 1.6 loopho – sorry, exceptions – do not provide any flexibility.

"Okay, but does that mean we have to stand around and do nothing?" the legal team might ask. Not necessarily; indeed, Rule 1.13 might mean that that is not even an option. Under that Rule, if the legal team believed that Ms. Stevens's decision would likely lead to "a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization", then the lawyers have a duty to take it up the ladder within GSK – including, if necessary, to the highest authority that can act on behalf of GSK – unless they reasonably believe it is not in the best interests of GSK to do so. Note that this standard for "up the ladder" reporting is lower than the Rule 1.6 standard for external disclosures: a "violation of a legal obligation to the organization" presumably includes a violation of a fiduciary duty, or even a violation of a compliance plan or employee handbook, and a "violation of law" is a much lower threshold than the "crime or fraud" of Rule 1.6. There is still a "likely to result in substantial injury" threshold, but Rule 1.13 essentially errs in favor of not only permitting, but compelling, internal disclosure.

But what if the board of directors says, "Ms. Stevens is our lawyer, and we're sticking with her call?" Rule 1.13 permits (but does not require) external disclosure, "but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization". Further, such permissive disclosure is not available where it relates to information obtained by the lawyer in the course of investigating (or defending against charges of) an alleged violation of law by the organization – no defense-team whistleblowers here! – so the legal team will likely have to abide by the board's decision or withdraw from the engagement.

But what about Rule 4.1? That rule forbids a lawyer from knowingly making a false statement of material fact or law to a third person (presumably including a regulatory agency like the FDA) and from failing to disclose a material fact where disclosure is necessary to avoid assisting a criminal or fraudulent act by the client. Would that protect a member of the legal team if he or she unilaterally decided to, say, produce the physician presentations to the FDA? Not really, for a couple of reasons. First, there is the "criminal or fraudulent act" threshold. It is certainly not clear that GSK's failure to disclose information was a criminal violation; indeed, Judge Titus said it was not, at least insofar as Ms. Stevens was concerned. Beyond that, Rule 4.1 has a sort of clawback clause: it is not a violation of Rule 4.1 to fail to disclose a material fact if such disclosure would not be permitted under Rule 1.6, and as has already been observed, the Rule 1.6 exceptions really set a pretty high bar for permissible disclosures.

On the other hand, there is another Rule 1.6 exception that may be relevant in this type of case. Ms. Stevens, remember, is a lawyer too, bound by the same ethics rules. Suppose that Ms. Stevens had actually proposed to turn over the physician presentations, produce the unexpurgated spreadsheet, etc., but the powers that be at GSK had overruled her, based on the advice of the other members of the legal team that such disclosures were not required. Ms. Stevens shrugs her shoulders, says "You win some, you lose some", and goes back to work, where she is busily engaged right up until the point where the FBI comes in and arrests her on charges of obstruction and making false statements on the same basis as in the actual indictment. How can Ms. Stevens defend herself, given that all of the internal decision-making that lead to the non-disclosure is confidential client information subject to Rule 1.6?

Fortuitously, the good folks at the ABA House of Delegates thought of that. Rule 1.6 permits a lawyer to disclose confidential information without the client's consent

> . . . to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.[41]

Thus, a lawyer in the position of Ms. Stevens can do just as the defense did in the actual case and unburden herself of such confidential information as is necessary to defend herself and keep out of jail.

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[41] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(5).

5. Rules 8.3 and 8.4: The Duty to Be Your Sibling's Keeper (Unless It's Confidential) and the Duty to Emulate Johnny Cash by Walking the Line

These final two rules will be dealt with in cursory fashion, and are included as a reminder that, in addition to the analysis of one's obligations under "specific detail" rules like the ones cited above, which can sometimes be a counting-the-angels-on-the-head-of-the-pin exercise, one must always be mindful of the "über-rules". Under Rule 8.3, lawyers have a duty to police each other and to disclose to the appropriate licensing/disciplinary authorities ethical violations by other lawyers that "raise[] a substantial question as to the [violator's] honesty, trustworthiness or fitness as a lawyer". However, such reporting is not required or permitted if it would in itself violate Rule 1.6.

Rule 8.4 is, in disciplinary terms, the "rule di tutti rules": it is an ethical violation to commit, or attempt to commit, another ethical violation or to facilitate someone else's ethical violation, and likewise it is an ethical violation to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation". Aside from a sort of existential issue (violating Rule 8.4(c) is in turn a violation of Rule 8.4(a), which is in turn another violation of Rule 8.4(a), and so on until the mirrors grow dim in the distance), this presents another potential problem for a defendant like Ms. Stevens. One may hypothetically be acquitted on a criminal charge relating to fraud or misrepresentation – even acquitted on the merits, as was Ms. Stevens; Judge Titus seems to have concluded she was affirmatively innocent of the charges, not simply that the government did not meet its burden of proof – but then find oneself facing bar disciplinary action, because the threshold is lower ("dishonesty" is not a very demanding standard, when you get right down to it) and the burden of proof is lower.[42] That provides something of a sobering thought for consideration.

IV. CONCLUSION:

What, then, are the professional responsibility lessons from *Stevens*? On the one hand, it is possible to read the case as a resounding victory for the general principle that lawyers should not be prosecuted for representing their clients to the best of their ability or for rendering legal advice, even if the result is less than perfect. Certainly, no one can rationally fail to applaud any decision that pushes back against what seems to be an increasing movement to criminalize differences in judgment, or even bad judgment. The practice of law, especially in a regulated industry like healthcare, involves the delicate balancing of many different factors, and society ought to approach with caution any law enforcement initiative that might reasonably have the effect of discouraging lawyers from deploying their full skills on behalf of their clients because of fear of personal criminal liability.

[42] Just to be perfectly clear, the author is not aware that any disciplinary actions have been brought or threatened against Ms. Stevens and does not suggest – indeed, for what it is worth, would affirmatively deny – that any basis for such action exists.

At the same time, an objective observer might say that the legal team representing GSK, of which Ms. Stevens was at least the public face (or public signature), did not do itself a lot of favors. At a minimum, the GSK team seems to have taken a rather aggressive stance on some of its non-disclosure positions; certainly, it is much less likely that there would be a "Stevens case" at all if the May 21 response letter had simply concluded, "We would like to meet with you to discuss certainly potentially responsive documents that we have not provided to you, because we determined that those documents would not be clearly understood without further discussion of their context" instead of, effectively, "We've completed our production, but we could be available for a conference call if you *still* [sigh!] have any questions." Some of the defense's arguments – the arguments that suggested, in essence, that the burden was on the FDA to figure out that it did not have everything it expected and then ask questions about what was missing – seem like slim, reverse-engineered reeds on which to hang a defendant's guilt or innocence. It would have been much better to have addressed the issue head-on, or at least to have cut back on the "final", "complete", etc., etc., references.

The bar – at least, that part of the bar that does not work for the FDA or the Department of Justice – can breathe a sigh of relief and drink a toast to the wisdom of Judge Titus. However, when it is analyzed, *Stevens* stands as a sobering reminder of the need for lawyers to remain constantly aware of their professional responsibility obligations, and to seek out appropriate counsel on those obligations when the going gets complicated.