

## ***Trust, but Verify?***

***Legal Ethics in the Dance Among Inside  
Counsel, Outside Counsel and the  
Government***

*William W. Horton  
Johnston Barton Proctor & Rose LLP*

*Jeff Sconyers  
Seattle Children's Hospital*

## **So This Lawyer Walks into a Bar . . . and Gets Indicted**

- Seminar hypotheticals about legal ethics can be fairly abstract things...
- ... As can doom-and-gloom stories about lawyer liability
- But when the story is a real-life one, in which a lawyer gets indicted and goes to trial, things can come into sharper focus

## What We're About

- Over the next hour, we will explore ethics/professional responsibility issues relating to inside/outside counsel relationships in responding to government investigations, using *U.S. v. Lauren Stevens* as a springboard
- Where is the line between legal advice and illegal obstruction?
- How much can inside counsel and outside counsel rely on each other?

## Important Notes

- *Stevens* case information is based on publicly available facts, and has been selected for instructional purposes only – not necessarily the whole, or even the true, story
- References to ethics rules are to ABA Model Rules; your rules may vary

## ***Stevens: Pre-Indictment***

- Stevens was VP/Associate GC of GlaxoSmithKline
- October 2002: FDA requests that GSK voluntarily produce info and documents re: alleged promotion of Wellbutrin SR for weight loss, esp. including financial and other relationships with physicians
- Stevens, along with other GSK inside counsel and outside counsel from K&S (incl. former FDA lawyers) coordinate response

## ***Stevens: Pre-Indictment***

- Five response letters through May 21, 2003
- Stevens informs FDA that some requested documents not under GSK custody or control (i.e., “we don’t control the doctors”)
- The crucial May 21 letter:
  - “Final supplemental response”/ “last submission”/ “we complete our production”
  - Request for “teleconference” to discuss “any final questions you may have”

## ***Stevens: Meanwhile ...***

- April 2003: DOJ commences own investigation and asks FDA for GSK documents
- June 2003: FDA discontinues its investigation in favor of DOJ (but doesn't tell GSK)
- Late 2003/Early 2004: DOJ begins grand jury investigation in Massachusetts
- November 2003: GSK sends a sixth letter to FDA in response to whistleblower disclosures: "No new issues"

## ***Stevens: Meanwhile ...***

- Grand jury hears testimony from other GSK lawyers, but not Stevens
- Various privileged documents released to Mass. GJ under crime-fraud exception
  - Release of records criticized by Judge Titus in the Maryland trial
- November 2010: Stevens indicted by separate GJ in Maryland
- March 2011: Indictment dismissed due to erroneous GJ instruction; Stevens re-indicted ASAP

## **The Indictment and the Government's Claims**

- Stevens made false statements and withheld documents that would have incriminated DOJ
- Particular focus on (a) failure to produce certain physician presentations and (b) elimination of spreadsheet column that would have shown amounts spent on physician entertainment, etc.
- “Final response” letter was intended to obstruct
- Stevens made notes showing conscious decision to withhold the presentations
- The “Pros and Cons” memo

## **The Indictment and the Government's Claims**

- No indictment of GSK
- No indictment of other members of GSK legal team
- Gov't claims Stevens not entitled to advice-of-counsel defense because:
  - Didn't provide legal team all relevant facts
  - Had not sought advice in good faith
  - And anyway, these weren't her personal lawyers (!)

## The Defense

- All actions were by consensus of legal team (inside and outside); reliance on counsel meant no mens rea
- Legal team concluded that there was no corporate strategy to promote off-label use
- Missing documents would have been misleading without context – would have been discussed at the meeting that GSK wanted
- “Not producing” ≠ “concealing”

## The Verdict

- Rule 29 Motion for Acquittal at close of gov’t case
- Judge Titus: “[A] lawyer should never fear prosecution because of advice that he or she has given to a client . . . 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.”
- “[C]ourt system should not countenance” interference with zealous representation

## **Relevant Ethics Rules**

- Model Rules Preamble: Zealous representation
- 1.1: Competence
- 1.2(a): Client decides on objectives
- 1.2(d): May not assist in crime or fraud, but may advise on legal consequences and assist in “good faith effort to determine the validity, scope, meaning or application of the law”

## **Relevant Ethics Rules**

- 1.3: Diligence
- 1.6: Confidentiality (with exceptions)
- 1.13:
  - Represent organization, not constituents
  - Up-the-ladder reporting
  - Permissive disclosure in limited circumstances
  - Exception for investigation/defense

## Relevant Ethics Rules

- 3.4: Fairness to opposing parties and counsel; non-obstruction; non-falsification
- 4.1: No false statement; no non-disclosure where disclosure necessary to avoid assisting crime or fraud (but subject to 1.6)
- 8.3: Disclosure of ethical violations by others (but subject to 1.6)
- 8.4: Violating rules is a violation of the rules; no dishonesty, fraud, deceit or misrepresentation

## Ethics Rules in Context

- *Stevens* case
- Hypotheticals

## **Hypothetical Scenario 1: That Can't Be Right**

- OB-GYN Dep't at BUMS decides to offer elective tubal ligations for low-IQ pre-adolescent girls
- GC Prudence B. Careful: Elective sterilization of minors requires court order
- Disability advocates: Sterilization w/o order = felony of assault
- Chair of OB-GYN: My neighbor, Zell S. Avocat, says it's okay
- Avocat: Written opinion based on "natural law"
- Advice of counsel?

## **Hypothetical Scenario 2: Is That Right?**

- Clinical research project at BOTH involves implanting externally controllable arterial switch devices in health subjects to test wireless remote control. Chick Daney gets one.
- Hackers hack network and reprogram device, endangering Daney's health and embarrassing BOTH.
- Subpoena to BOTH for "all medical records related to . . ."

## **Hypothetical Scenario 2: Is That Right?**

- BOTH GC Innocent N. House is told to keep things quiet.
- Outside counsel Liddy Gatorrh says “HIPAA lets you define what the medical record is”; House reclassifies a buncha stuff as “medical records” and is indicted for obstruction.
- Advice of counsel?

**Questions?**