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Michael M. Mustokoff
Duane, Morris & Heckscher LLP

Jonathan L. Swichar
Duane, Morris & Heckscher LLP

Cheryl Roth Herzfeld
Duane, Morris & Heckscher LLP

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The Attorney/Client Privilege: A Fond Memory of Things Past An Analysis of the Privilege Following *United States v. Anderson*

Michael M. Mustokoff
Jonathan L. Swichar
*Cheryl Roth Herzfeld**

INTRODUCTION

The every day practical importance of the attorney/client privilege was dramatically brought home in the recent prosecution and dismissal of charges in the case *United States v. Anderson.* The *Anderson* indictment alleged that the legal advice provided by two attorney defendants was used to structure arrangements between hospital executives and physicians to assure payments to the physicians for patient referrals in violation of the Anti-Kickback Act.[1] *Anderson* is notable for its 180-degree turn. Pre-trial, the grand jury judge relied upon the government's *ex parte, in camera* evidence to find a *prima facie* demonstration of the crime-fraud exception to the attorney/client privilege. The court used the exception to justify the extension of use immunity to the attorneys compelling their testimony before the grand jury. The attorneys were subsequently indicted, only to have the case against them dismissed on a motion for judgment of acquittal. At trial, the Honorable John W. Lungstrum found that even after "giving the Government every reasonable [inference] to which it is entitled, . . . no reasonable jury could find beyond a reasonable doubt that [the attorneys] . . . willfully committed any of the criminal acts charged in the Indictment."[2]

* Michael M. Mustokoff, J.D., University of Pennsylvania Law School, 1972 is a partner in Duane, Morris & Heckscher LLP and represents health care providers in regulatory, civil and criminal proceedings. Jonathan L. Swichar, J.D., Temple University Law School, 1997 and Cheryl Roth Herzfeld, J.D., University of Pennsylvania Law School, 1999 are associates of the firm and practice in the areas of commercial litigation, white collar criminal defense and investigations, and health care fraud defense.

1. *See* 42 U.S.C. § 1320a-7b(b) (1995).

2. Transcript of Trial Before Honorable Judge W. Lungstrum (3/9/99), Vol. 49, at 7339, lines 14-24, United States v. Anderson (D. Kan. Nos. 98-20030-JWL).

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The significance of *Anderson* and its cross currents are far reaching. The case touches every lawyer who counsels a client whose first question is, "can I get away with it?" *Anderson* also impacts corporate compliance programs and their hotlines. The Justice Department's present policy seeking "voluntary disclosure" of possible false claims is problematic. It flushes up employees' statements made to corporate counsel under the presumptive protection of what was once regarded as the common law's most sacrosanct privilege — communications between attorney and client.

The purpose of this article is to address the rudiments of the attorney/client privilege, its crime-fraud exception, corporate compliance programs, the United States government's quest for voluntary disclosure, and how those principles have been affected by *United States v. Anderson.*

I. *United States v. Anderson*

A. The Alleged Scheme

On July 15, 1998, two physicians, three hospital executives and two health care attorneys were indicted by a federal grand jury in the District Court of Kansas in the case of *United States v. Anderson.* The indictment charged the physicians, executives and attorneys with conspiring to violate the federal Anti-Kickback Act, 42 U.S.C. §1320a-7b, which criminalizes payments for referrals in return for the purchasing, leasing, ordering, or arranging of any good or service paid for by federally funded health care programs. According to the indictment, the physicians provided services to a large number of nursing home residents who were eligible to receive reimbursement from Medicare and Medicaid. When the need arose, the physicians referred those same patients to the conspiring hospitals. In return, the hospitals entered into agreements with the physicians to provide consulting services. The government alleged that the hospital's payments to the physicians were a "sham" in exchange for referrals, and not for the purported consulting services, which were never provided.

The Baptist Medical Center had the most extensive business arrangement with the physicians. Not only did Baptist allegedly execute a "sham agreement" to pay for referrals, it also agreed to refer specimens for testing to a laboratory owned by the physicians and to split the laboratory fees with them. Baptist also extended a substantial line of credit to the physicians and for-

gave the debt by way of the laboratory fee-splitting arrangement. Baptist eventually bought the physicians' interest in the lab.

B. The Attorneys' Involvement in the Alleged Scheme

The indictment alleged that two health care attorneys structured the business ventures to ensure the continued referrals of nursing home patients, and also to conceal the payments by preparing "sham" agreements and modifying existing agreements to eliminate express references to patient referrals. The attorneys were charged with facilitating the kickback scheme.

The indictment cited a 1989 letter sent by one of the attorneys to two Baptist executives on "how to draft proposals for other hospitals which would conceal the fact that the hospitals were paying the doctors for the referral of patients."[3] The letter further stated "[y]ou will note that this proposal makes no reference to nursing home patients referrals . . . . It is absolutely essential that there be no documentation of any intent to refer patients for services or items for which Medicare or Medicaid might pay."[4]

The indictment also cited a letter that the second attorney wrote, discussing services that the physicians were already providing their nursing home patients "which could be utilized to justify compensation from the Medical Center to the Medical Group."[5] The attorney was also accused of drafting an employment agreement between Baptist and the physicians, whereby Baptist would forgive certain indebtedness of the physicians in exchange for "charity care"[6] that the physicians were *already* giving to certain nursing home patients. The indictment noted that in 1992, the same attorney informed Baptist that the relationship with the Medical Group needed to be radically restructured, that the terms of the restructuring should be determined in face-to-face meetings, and "that nothing in writing should be exchanged by the parties until the terms of the restructuring have been decided."[7] Further, the indictment cited a conversation between the lawyers wherein they discussed the physicians' compensation arrangements. During this discussion, one attor-

3. Superseding Indictment, at p. 29, ¶ 65, United States v. Anderson (D. Kan. No. 98-20030-JWL).
4. *Id.* at p. 29-30, ¶ 65.
5. *Id.* at p. 21, ¶ 35.
6. *Id.* at p. 26, ¶ 48.
7. *Id.* at p. 30, ¶ 66.

ney allegedly informed the other that the physicians had been selling "old folk referrals" at another hospital, that "they were scum" and that she "did not know what [doctors] did for their money."[8]

C. *Piercing of the Attorney/Client and Work-Product Privileges Before the Grand Jury*

The lawyers were subpoenaed to testify before a grand jury. To foreclose the lawyers from asserting a Fifth Amendment privilege claim, the prosecutor obtained approval to compel their testimony in return for statutory use immunity. Their clients intervened and objected to the testimony based on the attorney/client and work-product privileges. The government responded that the crime-fraud exception vitiates the attorney/client and work-product privileges. The government filed an *in camera, ex parte* good faith statement of evidence regarding the attorneys' involvement in the alleged criminal activity. The grand jury judge, the Honorable Kathryn H. Vratil, found, based on her review of this statement, that "the government has established through substantial and competent evidence a *prima facie* case that [Baptist and its president] have committed a crime," that Baptist and its president used the attorneys' legal services "in furtherance of that crime," and that they were "aware of the criminal conduct."[9]

Judge Vratil found that the crime-fraud exception to the attorney/client and work-product privileges applied, and held that the lawyers could not "avoid testifying as to any act, communication, document or other written matter concerning the relationships and agreements whether formal or informal, written or unwritten, executed or proposed . . . ."[10] Significantly, Judge Vratil also refused to permit the defendants to view the government's evidence or conduct a hearing to rebut such evidence.[11]

The Tenth Circuit upheld the Judge Vratil's order holding that the crime-fraud exception vitiated the attorney/client and work-product privileges between the attorneys and their client.[12] The grand jury judge found that the government had established by substantial and competent evidence a *prima facie* case that the

8. *Id.*
9. In re: Grand Jury Subpoenas, 144 F.3d 653, 660-61 (10th Cir. 1998).
10. *Id.* at 661.
11. *See id.* at 657.
12. *Id.* at 661.

client had committed a crime, and that the attorneys' services had been used to further that crime.[13] The Tenth Circuit rejected the attorneys' claim that the District Court's application of the exception was overly broad. The Tenth Circuit stated that the court was not required to "conduct a detailed review of all questions and answers prior to their presentation to the grand jury. Instead, district courts should define the scope of the crime-fraud exception narrowly enough so that information outside the scope of the crime-fraud exception will not be elicited before the grand jury."[14] Finally, the Tenth Circuit rejected the contention that the District Court was required to disclose the government's *ex parte, in camera* submission and hear rebuttal evidence. The Tenth Circuit stated that the "determination of whether the government shows a *prima facie* foundation in fact for the charge which results in the subpoena lies in the sound discretion of the trial court . . . that determination can be made *ex parte* and a 'preliminary minitrial' is not necessary."[15]

D. Relief for Some but Not for All

At the close of the government's case, the trial judge granted a Rule 29 motion for judgment of acquittal in favor of the attorneys. Judge Lungstrum held that it was undisputed that the lawyers who dealt with or reviewed that transactions had a good faith belief that it was possible to facilitate some legal business relationship between the hospitals and the physicians. According to the court: "[g]iving the Government every reasonable [inference] to which it is entitled, pursuant to the very stringent legal standard applicable to motions for judgment of acquittal, no reasonable jury could find beyond a reasonable doubt that [the attorneys] . . . willfully committed any of the criminal acts charged in the Indictment."[16] The court further wrote that it was:

> firmly convinced from the evidence presented that the only reasonable inference a jury could draw is that the lawyers, each in their own turn, attempted to advise their clients to engage in legal transactions and that these two Defendants did not prepare sham agreements to paper over a fraud, but,

13. *Id.* at 660-61.
14. *Id.* at 661.
15. *Id.* at 662 (quoting In Re September 1975 Grand Jury, 532 F.2d 734, 737 (10th Cir. 1976)).
16. Transcript of Trial Before Honorable Judge W. Lungstrum (3/9/99), Vol. 49, at 7339, lines 14-24, United States v. Anderson (D. Kan No.98-200030-JWL).

> rather, tried their best to prepare agreements that would reflect what they intended to be legal transactions into which they believed their clients desired to enter. The state of the law was in flux; and the lawyers adapted their advice to it as it changed.[17]

Four of the five remaining defendants were found guilty of giving and receiving kickbacks.

II. The Attorney-Client and Work Product Privileges

A. *Privileged No More*

Despite the acquittal of the *Anderson* attorneys, the case is alarming for both health care attorneys and their clients. The government's case was made by piercing what was previously thought to be virtually impenetrable, the attorney/client and work product privileges. *Anderson* demonstrates just how porous the privilege actually is. The case requires both those giving and receiving legal advice to revisit the boundaries of these privileges.

The attorney/client privilege is of critical importance in the health care arena, where the passing of complex compliance issues is routine. Modern health care law is a regulatory swamp. It is made more dangerous by providers being pressured by recent reductions in reimbursement and the need for revenue maximization. Health care attorneys must be alert to the limitations of the clients' privileges even as they provide counsel. A full discussion of the subtleties of the privileges and their exceptions is beyond the scope of this Article. A brief summary of the basic precepts, however, is helpful to a thorough understanding of *Anderson*.

B. *The Attorney/Client Privilege*

The attorney/client privilege is the oldest of the privileges known to the common law that protects confidential communications.[18] The purpose of the privilege is to encourage full and frank communication between attorneys and their clients.[19] The

17. *Id.* at 7342-43 (lines 13-25). The Government's case against the attorneys was severely limited by the absence of any direct testimony concerning their alleged participation in the scheme beyond what could be inferred by the documents described in the indictment.

18. *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

19. *See id.*

privilege only protects communications between the attorney and his or her client, not the underlying facts on which those communications are based.[20] The burden of proving the attorney/client privilege is on the party seeking to claim its benefit.[21]

The privilege attaches when legal advice of any kind is sought and provided by a lawyer. Any communications made in confidence by the client to the lawyer are permanently protected from disclosure unless the client waives the privilege.[22] The client, not the attorney, holds the privilege. A lawyer may not testify about communications made by a client unless released by the client to divulge such communications. Because most clients are not lawyers with knowledge of the intricacies of the privilege or how the privilege must be raised to be preserved, counsel has a professional obligation to advise the client of the existence of the privilege and raise it on the client's behalf. The practical consequence of the privilege, absent any exceptions, is that there cannot be voluntary or compelled disclosure by the lawyer of confidential communications made by the client for the purpose of seeking legal advice. Thus, the privilege exists as protection against testimonial compulsion for the lawyer or client concerning communications made between them for purposes of legal counsel, thereby encouraging the public to seek and be completely forthright with legal counsel.[23]

C. The Work-Product Privilege

The counterpart to the attorney/client privilege is the work-product privilege, which prohibits the disclosure of any documents that reveal an attorney's mental processes, strategies or theories.[24] The work-product privilege has been found applicable in grand jury proceedings and certain administrative proceedings as a matter of federal common law. Either the lawyer or client can invoke the work-product privilege. The privilege, however, can be waived by the client even if the lawyer generating the product continues to assert it. The Supreme Court has held that "such work-product cannot be disclosed simply on a

20. *See id.* at 395.

21. *See* Colonial Gas Co. v. AETNA Cas. & Sur. Co., 144 F.R.D. 600, 604 (D. Mass. 1992).

22. *See* United States v. Kovel, 296 F.2d 918, 921 (2d Cir. 1961).

23. *See Upjohn*, 449 U.S. at 391 (quoting ABA CODE OF PROFESSIONAL RESPONSIBILITY, Ethical Consideration 4.1).

24. *See* FED. R. CIV. P. 26(b)(3).

showing of substantial need and inability to obtain the equivalent without undue hardship."[25]

III. The Exceptions to the Privileges

A. *The Crime-Fraud Exception*

The most disturbing aspect of *Anderson* was its requirement that the attorneys testify and produce documents concerning their client communications. *Anderson* serves as notice to both attorneys and their clients that the exceptions to the privileges deserve special attention. In *Anderson*, many of the documents introduced by the government to prove the alleged conspiracy were attorney's notes, attorney/client letters and memoranda.

Although most lawyers are cognizant of the crime-fraud exception, the point at which it may be used to pierce the privilege is not easily determined. The crime-fraud exception is intended to deter clients from using the attorney/client relationship for improper purposes. "It is the purpose of the crime-fraud exception to the attorney/client privilege to assure that the 'seal of secrecy' . . . between lawyer and client does not extend to communications 'made for the purpose of getting advice for the commission of a fraud' or crime."[26] The crime-fraud exception applies to both the attorney/client and work-product privileges.[27] The application of the crime-fraud exception is contingent on whether the communications relate to past or future wrongs. Communications remain privileged when the lawyer is consulted with respect to past wrongdoing, and only lose their privileged character when the attorney is consulted in order to further a continuing or contemplated criminal or fraudulent scheme.[28]

The crime-fraud exception does not require a completed crime or fraud, but rather only requires that the client consulted the attorney in an effort to complete one.[29] The crime-fraud exception does not require that the attorney be aware of the illegality involved. Any communication between client and attorney can be "in furtherance of" the client's criminal conduct,

25. *Upjohn*, 449 U.S. at 401.

26. United States v. Zolin, 491 U.S. 554, 563 (1989) (quoting Clark v. United States, 289 U.S. 1, 15 (1933) and O'Rourke v. Darbishire, 1920 A.C. 581, 604 (P.C.)).

27. *See* In re Grand Jury Proceedings (Vargas), 723 F.2d 1461, 1467 (10th Cir. 1983).

28. *See* In re Grand Jury Subpoena 92-1(SJ), 31 F.3d 826, 831 (9th Cir. 1994).

29. *See* In re Grand Jury Subpoena Duces Tecum (Marc Rich & Co. A.G.), 731 F.2d 1032, 1039 (2d Cir. 1984).

even if the attorney does nothing after the communication to assist in the client's commission of a crime, and even though the communication turns out not to help (and perhaps even hinders) the client's completion of the crime.[30] In order for the exception to apply, however, the party seeking application of the exception must make a *prima facie* showing of intent to commit a crime.[31] Accordingly, it is the *client's* knowledge and intentions that are of paramount concern when applying the crime-fraud exception.

B. Application of the Crime-Fraud Exception: All Ties in Favor of the Government

Anderson sheds light on the government's leverage to overturn assertions of the privilege. A party seeking to invade the attorney/client or work-product privileges, pursuant to the crime-fraud exception, must make a *prima facie* case that the client was engaged in or planning a criminal or fraudulent scheme when the client sought the advice of counsel to further that scheme.[32] The party must also show that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.[33] The *exact* quantum of proof necessary to meet the *prima facie* standard is without a universal definition.[34] Mere allegations of criminality are insufficient to warrant application of the exception.[35] The government cannot successfully allege that it has a "sneaking suspicion that the client was engaging in or intending to engage in a crime

30. *See* In re Grand Jury Proceedings of the Corp., 87 F.3d 377, 382 (9th Cir. 1996).

31. *See* Sound Video Unlimited, Inc. v. Video Shack, Inc., 661 F. Supp. 1482, 1487 (N.D. Ill. 1987).

32. *See* In re Grand Jury Invest., (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987).

33. *See id.* The second prong requires that there be some causal connection between the crime or fraudulent conduct and the legal advice sought. "The second prong is satisfied by a showing that the communication is related to the criminal or fraudulent activity established under the first prong." *Id.* at 1227. Like the first prong, courts have enunciated different formulations for the degree of relatedness necessary to meet that standard. *See, e.g.*, In re Int'l Sys. and Controls Corp. Securities Litigation, 693 F.2d 1235, 1243 (5th Cir. 1982) (noting the sought-after "work product must reasonably relate to the fraudulent activity"); In re Sept. 1975 Grand Jury Term, 532 F.2d 734, 738 (10th Cir. 1976) (requiring, in a grand jury proceeding, only that a "potential relationship" exist between the work-product and the conduct being investigated.). Nonetheless, the different formulations share a common purpose: identifying communications that should not be privileged because they were used to further a crime or fraud. *See Schroeder*, 842 F.2d at 1227.

34. *See Zolin*, 491 U.S. at 563, n.7.

35. *See Schroeder*, 842 F.2d at 1226.

or fraud when it consulted the attorney."[36] Such a threshold might effectively discourage many potential clients from consulting an attorney about entirely legitimate legal dilemmas.[37]

C. *Procedure for Evaluating a Prima Facie Showing*

In *Anderson*, the government was permitted to present *ex parte* evidence to the district court regarding the alleged involvement of the lawyers in the criminal activity. The defendants, however, were denied the opportunity to rebut this evidence. The leading case discussing the procedures to be followed in evaluating the evidence required to make a *prima facie* showing is *United States v. Zolin*.[38] In *Zolin*, the IRS, as part of its investigation of L. Ron Hubbard, filed a petition to enforce a summons directing the production of certain documents.[39] The intervenors, the Church of Scientology and Hubbard's wife, opposed the production of the materials based upon the attorney/client privilege.[40] The IRS argued that no such privilege attached as a result of the crime-fraud exception, and requested an *in camera* review of the documents.[41] The Supreme Court held that a district court may, in appropriate circumstances, conduct an *in camera* review of privileged documents to assess whether they fall within the crime-fraud exception.[42] Noting that *in camera* review is "a smaller intrusion upon the confidentiality of the attorney/client relationship than is public disclosure,"[43] the *Zolin* Court concluded that the evidentiary showing

36. *In re: Grand Jury Proceedings of the Corp.*, 87 F.3d at 381.

37. *See id.* The circuits that have attempted to delineate what is *prima facie* evidence have devised different standards. *See, e.g., In re: Grand Jury Proceedings of the Corp.*, 87 F.3d at 381 (defining *prima facie* as "reasonable cause to believe" that the attorney was used in furtherance of an ongoing unlawful scheme); In re: Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995) (defining *prima facie* as "probable cause to believe that a crime or fraud has been attempted or committed, and that the communications were in furtherance thereof"); Haines v. Liggett Group Inc., 975 F.2d 81, 95-96 (3d Cir. 1992) (defining *prima facie* evidence as evidence that if believed by the fact finder would be sufficient to support a finding that the elements of the crime-fraud exception were met); In the Matter of Feldberg, 862 F.2d 622, 625-26 (7th Cir. 1988) (explaining the *prima facie* test is "not whether the evidence supports a verdict but whether it calls for inquiry.").

38. 491 U.S. 554 (1989).

39. *See id.* at 557-58.

40. *See id.* at 558.

41. *See id.* at 558-59.

42. *See id.* at 565.

43. *See id.* at 572 (citing Fried, *Too High a Price for Truth: The Exception to the Attorney/client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443-467 (1986)).

necessary to trigger *in camera* review "need not be a stringent one."[44]

Zolin thus requires a district court to conduct a two-step analysis. First, the court must "'require a showing of a factual basis adequate to support a good faith belief by a reasonable person' that *in camera* review of the materials may reveal evidence to establish the claim the crime-fraud exception applies."[45] Once this threshold showing is made, the court must make a discretionary decision whether to order *in camera* review. Courts subsequent to *Zolin* have inconsistently reviewed challenges to the crime-fraud exception. In *Haines v. Liggett Group, Inc.*,[46] the Third Circuit held that the district court erred in finding the crime-fraud exception to the attorney/client privilege sufficient to order the production of documents without according the companies an opportunity to rebut.[47] The court stated where a fact finder undertakes to weigh evidence in a proceeding seeking an exception to the privilege, the party invoking the privilege has the "*absolute* right to be heard by testimony and argument."[48] Other courts have not agreed. In these cases, courts have held that motions to quash subpoenas served upon lawyers should not turn into minitrials.[49]

Based on *Zolin* and its progeny, the government need only make a *prima facie* showing that the legal advice was sought in furtherance of a crime or fraud. There is no need to show that the lawyer knew of, or was a participant in, the crime or fraud. During grand jury proceedings, this showing is made *ex parte* to the judge supervising the grand jury. The lawyers and clients involved can ask for an opportunity to submit evidence on the issue, but it is not error for the supervising judge to deny them that opportunity. The lawyer and client have no legal right, however, to: (1) know what the government told the judge in order to make the showing; (2) to present any rebuttal evidence to the government's showing; or (3) present other evidence of a *legitimate* reason that the client sought the lawyer's advice.

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44. *Id.* at 572.

45. *Id.* (quoting Caldwell v. District Court, 644 P.2d 26, 33 (Colo. 1982)).

46. 975 F.2d 81 (3d Cir. 1992).

47. *See id.* at 94.

48. *Id.* (emphasis added).

49. *See, e.g.*, In re Grand Jury Investigation (Schroeder), 842 F.2d 1223, 1226 (11th Cir. 1987).

IV. The Relationship Between the Privileges and A Lawyer's Ethical Obligations

A. Other Confidentiality Considerations

Confidentiality of client communications is not governed solely by the attorney/client privilege. Lawyers also have ethical obligations to maintain client confidences, even if they are not privileged. Disciplinary Rule 4-101 of the Model Code of Professional Responsibility provides that a lawyer shall not knowingly: (1) reveal a confidence or secret of his client; (2) use a confidence or secret of his client to the disadvantage of the client; and (3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.[50] Furthermore, Rule 1.6 of the Model Rules of Professional Conduct provides that, subject to certain stated exceptions, "[a] lawyer shall not reveal information relating to representation of a client."[51]

There are exceptions to the general rules of confidentiality. A lawyer has an ethical duty to never advise a client to engage in conduct that is criminal or fraudulent.[52] Rule 1.2(d) states that:

> 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.[53]

Difficult questions may arise when it is not clear to the lawyer if the client intends to commit a criminal or fraudulent act. When the client's objectives are clearly unlawful, a lawyer will not be able to avoid disciplinary action or other liability by simply professing ignorance. A lawyer is generally justified in assuming that the client is using the lawyer's counsel for lawful purposes. However, if the lawyer knows facts which, viewed objectively, would suggest the client seeks legal representation to assist it in perpetrating a fraud or committing a crime, the lawyer must make further inquiry before proceeding.[54] The lawyer must de-

50. *See* Model Code of Professional Responsibility DR 4-101(B) (1969).
51. Model Rules of Professional Conduct Rule 1.6 (1995).
52. *See* Model Rules of Professional Conduct Rule 1.2(d) (1995).
53. *Id.*
54. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 1470 (1981).

termine whether he or she has a duty to inquire about the client's intent.

If the lawyer perceives the representation will violate Rule 1.2(d), then Rule 1.16(a)(1) mandates the lawyer to withdraw from or to decline the representation. Rule 1.16(a) provides that "a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if . . . the representation will result in violation of the rules of professional conduct or other law."[55] On the other hand, Rule 1.16(b)(1) provides that an attorney *may* withdraw from representation, if the client persists in a course of action involving the lawyer's services which the lawyer *believes* is criminal or fraudulent.[56]

B. Confidentiality in Counseling Health Care Clients

Application of these rules in the context of health care representation poses perplexing issues. The intent of parties to an agreement to induce referrals may not be clear. The fair market value of services may not be easily determined. Rule 1.2(d) provides, however, that a lawyer asked to draft an agreement for a client cannot do so if the facts would suggest the client's objectives are illegal or fraudulent. The lawyer must either decline to assist the client, withdrawing from the representation if necessary, or make sufficient inquiry to establish the legitimacy of the transaction. If a client advises the lawyer that it has identified past overbilling, there does not appear to be a violation of Rule 1.2(d). If the client, however, states that it will not make reimbursement, Rule 1.2(d) dictates that while the attorney need not withdraw, he may not advise on matters relating to the violation. In that regard, ABA Formal Opinion 92-366, dated August 8, 1992 seems to control:

> We do not believe that knowledge of a client's ongoing fraud necessarily requires the lawyer's withdrawal from representation wholly unrelated to the fraud, even if the fraud involves the lawyer's past services or work product. On the other hand, complete severance may be the preferred course in these circumstances, in order to avoid any possibility of the lawyer's continued association with the client's fraud. We would simply point out, however, that withdrawal from matters totally unrelated to the fraud is more likely to be permissive, and gov-

55. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (a)(1) (1995).
56. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.16 (b)(1) (1995).

erned by Rule 1.16(b), than mandatory under Rule 1.16(a)(1).[57]

If, despite the lawyer's advice, the client advises he will proceed in criminal conduct with or without the lawyer, then the lawyer must resign. The next question is whether the lawyer must inform regulatory agencies and other parties of impending conduct. The answer depends on each state's ethics rules. In most states, the attorney has discretion to disclose, while in some states, he must disclose the client's intent to commit a crime.[58]

V. Complications in Applying the Attorney/Client Privilege in the Corporate Context

Anderson also raises questions concerning the application of the attorney/client and work-product privileges in the corporate context. In general, the corporate client includes not only the chairman of the board, the CEO or others in control, but also employees with authority to act on behalf of the corporation. The privilege extends to confidential communications between corporate counsel and an employee who, as an agent of the corporation, is seeking legal advice on a matter *of interest to the corporation.*

Anderson illustrates how complications can arise when an employee seeks to invoke the attorney/client privilege based upon a communication with corporate counsel. In *Anderson*, one of the key issues was whether Anderson, Baptist's president, had standing to assert the attorney/client privilege.[59] By the time the case reached the Tenth Circuit, however, Baptist had reached a settlement agreement with the government, and no longer asserted the attorney/client privilege for itself or its officers. The Tenth Circuit stated that any privilege resulting from communications between corporate officers and corporate attorneys concerning matters within the scope of the corporation's affairs *belongs to the corporation and not to its officers.*[60] Once the hospital waived the privilege, the court found that an intervenor had no power to assert privileges other than those relating to his *individual capacity.*[61]

57. *See* ABA Comm. on Ethics and Professional Responsibility, Informal Op. No. 92-366 (1992).

58. *See* Model Rules of Professional Conduct Rule 1.6 (1995); Model Code of Professional Responsibility DR 4-101 (1969).

59. *See In re: Grand Jury Subpoenas*, 144 F.3d at 658.

60. *See id.*

61. *See id.*

The *Anderson* court recited several factors necessary to determine whether an employee may assert a personal privilege with respect to conversations with corporate counsel: (1) the employee must approach counsel for the purpose of seeking legal advice; (2) when the employee approaches counsel, he or she must make it clear the legal advice is sought in their individual, rather than in their representative, capacities; (3) counsel must see fit to communicate with the employee in his or her individual capacity, even though a possible conflict could arise; (4) the conversation with counsel must be confidential; and (5) the substance of the conversation with counsel cannot concern matters within the company or the general affairs of the company.[62] Adopting this rather unworldly test, the Tenth Circuit found that a *limited* attorney/client privilege existed between Baptist's president and the attorneys.[63] "It include[d] only that very small portion of communications in which Intervenor sought legal advice as to his personal liability without regard to any corporate considerations."[64]

Anderson raises the issue of "whom" the lawyer represents. Does the representation encompass the corporation alone or the individual corporate officers as well? If the lawyer represents both, one cannot waive the privilege for the other. Each has the right to assert the privilege independently. Representing a corporation thus poses difficult ethical problems. Where a lawyer seeks information from an uninformed corporate employee who may believe the lawyer is representing him, that subjective belief does not create an attorney/client relationship. Thus, where there is a risk that the employee being interviewed may have personal liability, the attorney must warn the employee before a question is asked that legal advice from another lawyer may be appropriate.

Careful consideration should also be given to determining who within the organization has authority to waive the privileges. All employees and witnesses interviewed during the course of the investigation should be advised that although the interview is covered by the attorney/client and work-product privileges, the employer may decide to waive the confidentiality of their communications without seeking their consent.

62. *See id.*
63. *See id.* at 659.
64. *See id.*

VI. Hotlines, Voluntary Self-Disclosure and the Death of Privilege

If *Anderson* raises complications in corporate representation, those difficulties are compounded by the government's insistence on corporate compliance and the threat of program preclusion. Viewed in the harsh light of retrospect, seemingly innocent inquiries about billing practices and provider relationships are subject to misinterpretations by the government. The limits of the privileges, as defined in *Anderson*, affect corporate compliance initiatives.

Corporate compliance hotlines have become essential elements of standard corporate integrity programs. Their purpose is to allow anyone in the organization to make inquiries or report suspicions of wrongdoing without fear of retribution. Hotlines are effective and cost-efficient. Attorneys other than compliance officers are rarely the recipients of calls. Some companies enlist a service to screen the calls. Thus, hotline discussions are also susceptible of becoming evidence.

Despite the potential significance of the reported allegation or the litigation that might follow, the compliance officer's report generally will not be protected under the attorney/client or work-product privileges. The communication is not made in confidence by a client to an attorney for the purpose of legal advice, and does not reveal an attorney's mental processes or theories. Thus, the optimal type of hotline reporting system should only elicit enough information to determine whether counsel is required. If further inquiry is necessary, the more detailed, and often more sensitive, communications will remain confidential and protected by the attorney/client and work-product privileges while the appropriate course of action is determined.

Another component of corporate compliance has been the promotion of voluntary disclosure programs. As part of Operation Restore Trust, the United States Department of Health and Human Services unleashed a voluntary disclosure program encouraging health care providers to self-report matters that adversely affect its programs. Theoretically, past misconduct is to be disclosed in exchange for minimizing the cost and disruption of an investigation, negotiating a monetary settlement in lieu of prosecution and exclusion from federal programs.

The program makes no promises as to the consequences of disclosure. Under the threat that disclosed information may be

used against either the corporate entity or its officers and employees, the decision whether to make a voluntary disclosure, and to what extent, is one of the most difficult decisions for health care lawyers. The client will want to know the consequences of disclosure, and will need advice as to the alternatives. *Anderson* makes clear that the advice provided by counsel, as well as the client's decision about whether to take that advice, can have significant, if not criminal, consequences for both client and attorney.

Anderson demonstrates that attorney/client communications may not be protected from disclosure if the client is later investigated or brought to trial. The viability of the privileges depends on the client's conduct after the communication occurs. If the client stops the inaccurate billing practices, the attorney/client and work-product privileges will apply to a conversation involving past conduct. The privileges will still apply even if the client decides not to voluntarily disclose, because the communication only involved past overbilling. Where the client chooses not to follow counsel's advice, the privilege is extinguished by the crime-fraud exception.

VII. Lessons From *Anderson*

The indictment and subsequent prosecution in *Anderson* illustrates the risks and responsibilities of rendering health care advice. Any sanctity that once may have accompanied the attorney/client privilege is gone. Attorneys can no longer assume that all communications with their clients will be privileged. Advice given to clients that could be construed as assistance in facilitating contemporaneous or future crime will fall within the crime-fraud exception to the attorney/client and work-product privileges, and will not be protected.

Mark R. Thompson, one of the attorneys indicted and then exonerated in Anderson opined that federal prosecutors act on "the original sin theory" — that is, if health care providers and their counsel so much as discuss a provider's questionable course of action, prosecutors will take the position that fraud has been committed. Although there may be some hypersensitivity attributable to Thompson's "close call with the hang man", his warning deserves attention. In light of *Anderson*, health care attorneys and their clients must be proactive in taking steps to protect themselves. There are several measures that, if taken, may prevent the situation that occurred in *Anderson*:

Assume the advice given may eventually be made available for the government's review;

Document one's notes to show that the attorney clearly advised the client as to the boundaries of legal and illegal conduct;

Document transactions to demonstrate that they are aimed at legitimate business purposes and not improper motives;

Take reasonable steps to ensure that the terms of any arrangement about which advice is given are being complied with on an ongoing basis;

Analyze financial relationships to identify how an auditor or prosecutor might seek to portray them;

Make clear to corporate employees of the client that they are not represented individually;

Immediately retain outside counsel for all parties involved if the government launches an investigation of a transaction the attorney helped to structure; and

Realize that if a client fails to take an attorney's advice and then knowingly commits a crime or fraudulent act, then any communication in furtherance of that crime or fraudulent act will not be protected by the attorney/client or work-product privileges.

Despite these precautions, any advice given to a client who is subsequently accused of fraud may be fair game for investigators. Corporate clients and their counsel must be careful about what is said, and even more careful about what is written. Offhand remarks and opinions can have unexpected consequences.