

1999

The "Knowingly and Willfully" Continuum of the Anti-Kickback Statute's Scierter Requirement: Its Origins, Complexities, and Most Recent Judicial Developments

Douglas A. Blair
BJC Health System

Follow this and additional works at: <http://lawcommons.luc.edu/annals>

 Part of the [Health Law and Policy Commons](#)

Recommended Citation

Douglas A. Blair *The "Knowingly and Willfully" Continuum of the Anti-Kickback Statute's Scierter Requirement: Its Origins, Complexities, and Most Recent Judicial Developments*, 8 *Annals Health L.* 1 (1999).
Available at: <http://lawcommons.luc.edu/annals/vol8/iss1/2>

This Article is brought to you for free and open access by LAW eCommons. It has been accepted for inclusion in *Annals of Health Law* by an authorized administrator of LAW eCommons. For more information, please contact law-library@luc.edu.

The "Knowingly and Willfully" Continuum of the Anti-Kickback Statute's Scienter Requirement: Its Origins, Complexities, and Most Recent Judicial Developments†

*Douglas A. Blair**

INTRODUCTION

The purpose of this article is to analyze the caselaw that has emerged in recent years regarding the correct interpretation and application of the Anti-Kickback Statute's¹ scienter requirement. Following the introduction, Part I provides a brief history of the Anti-Kickback Statute, noting the changes in statutory language instituted by a series of amendments. Part II begins with a discussion of the two landmark cases in this area, *United States v. Greber*² and *Hanlester Network v. Shalala*.³ It then proceeds to fill in the incremental additions to the *mens rea* continuum made by other courts, including the most recent decision by the Fifth Circuit Court of Appeals in *United States v. Davis*.⁴ Part III proposes that, without further guidance from either Congress or the Department of Health and Human Services ("HHS"), the conflict among courts as to the proper definition of the Anti-Kickback Statute's scienter requirement causes it to

† An earlier version of this article, entitled, "*United States v. Davis: Another Addition to the 'Knowingly and Willfully' Continuum of the Anti-Kickback Statute's Scienter Requirement*," was awarded second place in the 1998-99 Epstein Becker & Green Health Law Writing Competition.

* Douglas A. Blair received his Bachelor of Arts from Cornell University; his Juris Doctor *cum laude* from Indiana University-Bloomington and his Master of Laws (Health Law) from Saint Louis University. Mr. Blair is admitted to the State Bar of California and currently serves as a staff attorney with BJC Health System in Saint Louis, Missouri. The author dedicates this article to his parents, John M. Blair and Joanne I. Blair, who continue to offer their love and support despite the fact that their son voluntarily chose to become an attorney. Additionally, the author would like to recognize Professor Thomas L. Greaney of the Saint Louis University School of Law for critiquing earlier versions of this article.

1. See 42 U.S.C. § 1320a-7b(b) (1998).
2. See 760 F.2d 68 (3d Cir. 1985).
3. See 51 F.3d 1390 (9th Cir. 1995).
4. See 132 F.3d 1092 (5th Cir. 1998).

be a matter ripe for review by the United States Supreme Court. The article concludes with a few remarks as to how this controversy hampers the efficient delivery of health care in our country.

The Anti-Kickback Statute,⁵ originally enacted in 1972, provides criminal penalties for individuals or entities that knowingly and willfully offer, pay, solicit or receive bribes, kickbacks or other remuneration in order to induce business reimbursed by Medicare, Medicaid and other federal health care programs. The requirement that this prohibited conduct must be engaged in “knowingly and willfully” has generated considerable controversy and will be the focus of this article.

I. HISTORY OF THE ANTI-KICKBACK STATUTE

The Anti-Kickback Statute was originally enacted as part of the Social Security Amendments Act and made it a misdemeanor to solicit, offer or receive “any kickback or bribe in connection with” furnishing Medicare or Medicaid services or referring a patient to a provider of those services.⁶ Congress’ objective was to prohibit “certain practices which [had] long been regarded by professional organizations as unethical . . . and which contribute[d] appreciably to the cost of the [M]edicare and [M]edicaid programs.”⁷ Despite this effort to reduce fraud and abuse within these two federal health care programs, studies

5. See 42 U.S.C. § 1320a-7b(b) (1998). The predecessor to the current statute, as well as other related provisions, was codified at 42 U.S.C. §§ 1395nn(b) (Medicare) and 1396h(b) (Medicaid). In 1987, the Anti-Kickback Statute was reenacted and codified in present form at 42 U.S.C. § 1320a-7b(b). See discussion in Part I *infra*.

6. See Pub. L. No. 92-603 §§ 242(b), 242(c). The substantive provisions of this law were codified at 42 U.S.C. §§ 1395nn(b) (Medicare) and 1396h(b) (Medicaid), respectively, until the 1987 amendments were enacted. See *infra* note 20 and accompanying text. The operative language of the two statutory sections was identical. Section 1396h(b) read:

Whoever furnishes items or services to an individual for which payment is or may be made in whole or in part out of Federal funds under a State plan approved under this subchapter and who solicits, offers, or receives any (1) kickback or bribe in connection with the furnishing of such items or services or the making or receipt of such payment, or (2) rebate of any fee or charge for referring any such individual to another person for the furnishing of such items or services shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than \$10,000 or imprisoned for not more than one year, or both. 42 U.S.C. § 1396h(b).

7. H.R. Rep. No. 108-231 (1972), *reprinted in* 1972 U.S.C.C.A.N. 5093.

showed that the problem continued to proliferate.⁸ As a consequence of this "crisis,"⁹ five years later, in 1977, Congress amended the statute.¹⁰ Congress was "concerned with the growing problem of fraud and abuse in the [Medicare] system, [and] wished to strengthen the penalties to enhance the deterrent effect of the statute."¹¹ Moreover, it wanted "to give a clear, loud signal to the thieves and the crooks and the abusers that [Congress] mean[s] to call a halt to their exploitation of the public and the public purse."¹² In order to achieve this goal, Congress amended the statute to incorporate the following changes:

1. Upgrading the penalty for a violation from a misdemeanor to a felony.

8. See Theodore N. McDowell, Comment, *The Medicare-Medicaid Anti-Fraud and Abuse Amendments: Their Impact on the Present Health Care System*, 36 EMORY L. J. 691, 718 (1987).

9. See Harvey E. Pies, *Control of Fraud and Abuse in Medicare and Medicaid*, 3 AM. J.L. & MED. 323, 326 (1977).

10. See Pub. L. No. 95-142, 91 Stat. 1175 (1977). 42 U.S.C. § 1396h(b) was amended as follows:

(b)(1) Whoever solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

Similar changes were made to 42 U.S.C. § 1395nn(b).

11. See *United States v. Greber*, 760 F.2d 68, 70-71 (3d Cir. 1985); see also *Hanlester Network v. Shalala*, 51 F.3d 1390, 1396 (9th Cir. 1995).

12. 123 CONG. REC. S31767 (daily ed. Sept. 30, 1977) (statement of Senator Talmadge).

2. Broadening the scope of prohibited payments from simply “kickbacks,” “bribes,” and “rebates” to “any remuneration” *including* “any kickback, bribe or rebate.”¹³
3. Including within the scope of “remuneration” payments made “directly or indirectly, overtly or covertly, in cash or in kind.”¹⁴

After these amendments, “the trend in interpretation of the Anti-Kickback [S]tatute was toward liberal construction of the language.”¹⁵ In fact, it became so easy for courts to find a violation,¹⁶ Congress became “concerned that criminal penalties [would] be imposed under [the 1977 version of the Anti-Kickback Statute] to an individual whose conduct, while improper, was inadvertent.”¹⁷ Therefore, in 1980, it again amended the statute, providing a scienter requirement that would “assure that only persons who *knowingly and willfully* engage in the proscribed conduct could be subject to criminal sanctions.”¹⁸ Accordingly, the words “knowingly and willfully” were added to the statute.¹⁹

13. Congress wished “to make it clear that even if the transaction was not considered to be a ‘kickback’ for which no service had been rendered, payment nevertheless violated the Act.” *Id.* During Congressional hearings, United States Attorneys in charge of prosecuting Anti-Kickback Statute cases told Congress that the language of the statute as it currently existed was “unclear and needed clarification.” H.R. Rep. No. 95-393, pt. 2, at 53 (1977), *reprinted in* 1977 U.C.C.A.N. 3039, 3055; *see also Greber*, 760 F.2d at 71. Congress also heard testimony that “physicians often determine which laboratories would do the test work for their medicaid [sic] patients by the amount of the kickbacks and rebates offered by the laboratory . . . Kickbacks take a number of forms including cash, long-term credit arrangements, gifts, supplies and equipment, and the furnishing of business machines.” 1977 U.S.C.C.A.N. 3048-3049; *see also Greber*, 760 F.2d at 71 and *Hanlester Network*, 51 F.3d at 1398.

14. Pub. L. No. 95-142, 91 Stat. 1175 (1977).

15. *United States v. Neufeld*, 908 F. Supp. 491, 496 (S.D. Ohio 1995) (citations omitted).

16. *See, e.g., United States v. Perlstein*, 632 F.2d 661 (6th Cir. 1980); *United States v. Ruttenberg*, 625 F.2d 173 (7th Cir. 1980); *United States v. Hancock*, 604 F.2d 999 (7th Cir. 1979). “Congress viewed [this] trend of . . . caselaw as failing to give physicians sufficient guidance and thus the 1980 amendments to the Anti-Kickback [S]tatute proposed limiting prosecutions under the statute to defendants who had acted with some degree of deliberation.” *Neufeld*, 908 F. Supp. at 496.

17. H.R. Rep. No. 96-1167, at 59, *reprinted in* 1980 U.S.C.C.A.N. 5526, 5572; *see also United States v. Jain*, 93 F.3d 436, 440 (8th Cir. 1996); *Neufeld*, 908 F. Supp. at 494.

18. H.R. Rep. No. 96-1167, at 59, *reprinted in* 1980 U.S.C.C.A.N. 5526, 5572 (emphasis added).

19. *See* Pub. L. No. 96-499, Title IX, § 917, 94 Stat. 2599, 2625 (1980); *see also Jain*, 93 F.3d at 440; *Neufeld*, 908 F. Supp. at 494. Although Congress did not define “knowingly and willfully” for purposes of the Anti-Kickback Statute, these words are generally considered synonymous with “consciously” and “deliberately.” *See BLACK’S LAW DICTIONARY* 872 (6th ed. 1990). Still, the problem that subsequently

In 1987, Congress consolidated the anti-kickback laws for the Medicare and Medicaid programs into section 1128B(b) of the Social Security Act, which was subsequently codified at 42 U.S.C.A. § 1320a-7b.²⁰ Congress also authorized the administrative remedy of exclusion from participation in the Medicare or Medicaid programs for individuals or entities found by the Secretary of HHS to have committed an act prohibited by the Anti-Kickback Statute.²¹ No longer were violations limited to criminal prosecution by the Department of Justice ("DOJ").²² Finally, Congress hoped to relieve some of the health care industry's continued uncertainty by directing the Secretary of HHS to develop regulations that would specifically exclude certain arrangements from the statute's purview. These regulations have come to be known as "safe harbors."²³

The current version of the Anti-Kickback Statute reads as follows:

emerged in judicial interpretation was: What must an individual have done knowingly and deliberately? Is it sufficient if the individual was only conscious of, and only intended to engage in, the proscribed conduct? Or, is the government required to do more and prove, in addition, that the individual knew his actions were unlawful and performed them with the intent to violate the law? As discussed in Part II *infra*, Mr. Blair fails to see how anyone could reasonably conclude that the latter is the proper interpretation of "knowingly and willfully" for purposes of the Anti-Kickback Statute. Considering the statute's unambiguous language, generally accepted rules of statutory interpretation and the statute's legislative history, such a position is untenable. Nonetheless, as discussed throughout this article, one court after another has succeeded in weaving a shroud of confusion that currently cloaks an area of the law where little, if any, complexity should exist.

20. See Pub. L. No. 100-93, 101 Stat. 680 (1987); see also *Hanlester Network*, 51 F.3d at 1396.

21. See Pub. L. No. 100-93, 101 Stat. 680, 681-82, 689 (1987); see also *Hanlester Network*, 51 F.3d at 1396.

22. Congress found the Anti-Kickback Statute's full enforcement potential blocked by the DOJ's lack of sufficient resources to bring a substantial number of prosecutions. See Richard P. Kusserow, *The Medicare and Medicaid Anti-Kickback Statute and the Safe Harbor Regulations — What's Next?*, 2 HEALTH MATRIX 49, 51 (1992).

23. As of the date of this writing, HHS has promulgated two sets of final rules, establishing a total of 13 safe harbors. See Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35,952 (1991); Medicare and State Health Care Programs: Fraud and Abuse; Safe Harbors for Protecting Health Plans, 61 Fed. Reg. 2,122 (1996). In addition, in January 1998, two new safe harbors were proposed to respond to the growing presence of managed care and other risk sharing arrangements among health care providers. However, these safe harbors have not yet been finalized by HCFA. For a discussion of these proposed safe harbors, see Douglas A. Blair, *The New Proposed Safe Harbors for Certain Managed Care Plans and Risk Sharing Arrangements: A History, Analysis, and Comparison With Existing Safe Harbors and Federal Regulations*, 9 HEALTH MATRIX 37 (Winter 1999).

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind-

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person-

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program, shall be guilty of a felony and upon conviction thereof shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.²⁴

II. THE ETERNAL QUEST TO FIND THE ONE TRUE DEFINITION OF “KNOWINGLY AND WILLFULLY”

Frustratingly, nowhere in the Anti-Kickback Statute are the words “knowingly and willfully” defined. In reflecting upon this fact, one commentator has opined that “perhaps the legislature and the courts desire to keep them ambiguous to permit flexible application of the statute in light of the specific circumstances of a particular case.”²⁵ This remark, though, seems contrary to Congress’ intent in adding “knowingly and willfully” to the statute, which was to avert prosecution of “inadvertent” conduct

24. 42 U.S.C. § 1320a-7b(b) (1998).

25. Andrea T. Vavonese, Comment, *The Medicare Anti-Kickback Provision of the Social Security Act — Is Ignorance of the Law an Excuse for Fraudulent and Abusive Use of the System?*, 45 CATH. U. L. REV. 943, 949-50 (1996).

that had resulted from the "liberal construction" of the statutory language.²⁶

In trying to attach concrete definitions to these two words, there are a number of sources to which one can look for guidance. First, as indicated *supra* at note 19, *Black's Law Dictionary* equates "knowingly and willfully" with "consciously and deliberately."

Second, the *Model Penal Code* defines "knowingly" as follows:

A person acts knowingly with respect to a material element of an offense when:

- (i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and
- (ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.²⁷

The *Model Penal Code* also defines "willfully," but in such a manner that it is virtually indistinguishable from "knowingly" — with one important caveat: "[W]illfully is satisfied if a person acts knowingly with respect to the material elements of the offense, *unless a purpose to impose further requirements appears.*"²⁸ This last clause of the definition leaves open the possibility that a specific law can require that an individual not only consciously engage in the prohibited conduct, but, *in addition*, that he or she do so with the *intent* to violate the law. If one relies upon the *Model Penal Code* for guidance in interpreting the Anti-Kickback Statute, it becomes evident from the Anti-Kickback Statute's lucid language and legislative history²⁹ that no "purpose to impose further requirements appears."³⁰ Thus, the statute does not require that the government prove an individual intended to violate the law, only that the individual was aware of what he or she was doing and was acting intentionally.

Third, one can assess how courts have defined the words "knowingly and willfully" in other statutory contexts. Gener-

26. See H.R. Rep. No. 96-1167, at 59, *reprinted in* 1980 U.S.C.C.A.N. 5526, 5572; see also *Neufeld* at 496.

27. MODEL PENAL CODE § 2.02(2)(b) (1995); see also *Ratzlaf v. United States*, 510 U.S. 135, 151 (5-4 decision) (Blackmun, J., dissenting).

28. MODEL PENAL CODE § 2.02(8) (emphasis added).

29. See *supra* notes 16-19 and accompanying text.

30. See *supra* note 28 and accompanying text.

ally, courts only require that the proscribed conduct be performed consciously and intentionally,³¹ except in the rare instances in which there is a clear legislative intent to impose more stringent requirements.³² As a corollary, juries are usually instructed that “knowingly” means an act of which the individual is conscious and which is performed voluntarily and not through “ignorance, mistake, or accident.”³³ Similarly, juries are commonly instructed that “willfully” refers to conduct that was intentional and deliberate rather than careless, *inadvertent*, or negligent.³⁴ Furthermore, they are usually told that they need not find that the defendant intended to disobey the law for the conduct to have been willful.³⁵ These definitions of “know-

31. See, e.g., *United States v. Hayden*, 64 F.3d 126, 130 (3d Cir. 1995) (statute prohibiting felons from receiving firearms) (18 U.S.C. § 922(a)(1)(D)); *United States v. Daughtry*, 48 F.3d 829, 831 (4th Cir.) cert. granted and judgment vacated on other grounds, 516 U.S. 984 (1995) (statute prohibiting false statements to the government) (18 U.S.C. § 1001); *Ratzlaf v. United States*, 510 U.S. 135, 150 (1994) (5-4 decision) (Blackmun, J., dissenting) (see Part II.A.2.b. *infra*); *United States v. Cochran*, 17 F.3d 56, 61 (3d Cir. 1994) (statute prohibiting possession of child pornography) (18 U.S.C. § 2252(a)); *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985) (statute prohibiting transportation in interstate commerce of stolen property and its receipt and disposition) (18 U.S.C. §§ 2314, 2315); *Browder v. United States*, 312 U.S. 335, 341 (1941) (statute prohibiting the use of passports obtained through false statements) (22 U.S.C. § 220).

32. See, e.g., *Ratzlaf*, 510 U.S. at 140-141; *Cheek v. United States*, 498 U.S. 192, 202-203 (1991) (statute penalizing the failure to pay income taxes) (26 U.S.C. §§ 7201, 7203); *Liparota v. United States*, 471 U.S. 419, 424, 433 (1985) (statute prohibiting unlawfully acquiring or possessing food stamps) (7 U.S.C. § 2024(b)); *United States v. Pomponino*, 429 U.S. 10, 12 (1976) (see Part II.A.2.a. *infra*).

33. See *United States v. Lawson*, 780 F.2d 535, 542 (6th Cir. 1985) (trial court did not err in instructing the jury that “[t]he word knowingly means that a defendant realized what he was doing and was aware of the nature of his conduct. It means that he did not act through ignorance, mistake or accident”); see also *United States v. Arambasich*, 597 F.2d 609, 612 (7th Cir. 1979) (trial court was correct to instruct the jury that “[t]he word knowingly. . . means that the act was done voluntarily and purposely, and not because of mistake or accident”); DEVITT, EDWARD J., ET AL., FEDERAL JURY PRACTICE AND INSTRUCTIONS § 17.04 (1992).

34. See, e.g., *United States v. Falk*, 605 F.2d 1005, 1010 n.9 (7th Cir. 1979); see also DEVITT, *supra* note 33, § 17.05. Recall that one of the purposes of the 1980 amendments to the Anti-Kickback Statute was to avoid the application of this statute to “inadvertent” conduct. See Part I *supra*. Consequently, Congress added the words “knowingly and willfully” to make clear the level of scienter it deemed necessary for a violation to stand. Reexamining this language in light of *Falk*, one can reason that Congress wanted to ensure that only individuals who consciously and intentionally engaged in the prohibited conduct were prosecuted. A finding that such a *mens rea* existed is the only amount of culpability that is required. By adding these words to the statute, Congress was not mandating that a violation of the Anti-Kickback Statute is only justified if it is also found that the individual intended to disobey the law as well.

35. See, e.g., *United States v. Berardelli*, 565 F.2d 24, 30 (2d Cir. 1977).

ingly" and "willfully" are in accord with the general rule that ignorance of the law is not a defense to a criminal charge.³⁶

A. Greber and Hanlester Network: *Opposite Ends of the Spectrum*

1. *United States v. Greber*

In 1985, the Third Circuit delivered the first reported opinion in which a tribunal confronted the scienter requirement of the Anti-Kickback Statute. *Greber*³⁷ involved a cardiologist (Dr. Greber) who formed his own business (Cardio-Med, Inc.). Cardio-Med provided diagnostic services for physicians, including the use of a medical device called a Holter-monitor.³⁸ Cardio-Med's practice was to bill Medicare for the monitor service and, upon receiving payment, forward a portion to the referring physician as an "interpretation fee" for his or her consultation and for explaining the test results to the patient.³⁹ These fees amounted to forty percent of the Medicare payment with a maximum amount of \$65 per patient.⁴⁰ The fixed percentage paid to the physicians was more than Medicare allowed for such services.⁴¹ Moreover, there was evidence that the physicians received these fees even though Cardio-Med itself actually evaluated the data.⁴² As a result of this activity, the federal government charged Dr. Greber with violating the Anti-Kickback Statute.⁴³

At trial, the judge instructed the jury "that even if the physician interpreting the test did so as a consultant to Cardio-Med, that fact was immaterial if a *purpose* of the fee was to induce the ordering of services from Cardio-Med."⁴⁴ Heeding this instruction, the jury easily convicted Dr. Greber of violating the Anti-Kickback Statute.⁴⁵

On appeal, Dr. Greber argued that the trial court's instruction was erroneous because, according to him, "absent a showing

36. See *Cheek v. United States*, 498 U.S. at 199.

37. See *Greber*, 760 F.2d at 68.

38. See *id.* at 70.

39. See *id.*

40. See *id.*

41. See *id.*

42. See *Greber*, 760 F.2d at 68.

43. See *id.*

44. *Id.* at 71 (emphasis added).

45. See *id.* at 69-70. Dr. Greber was also convicted of mail fraud and making false statements to the government.

that the *only purpose* behind the fee was to improperly induce future services, compensating a physician for services actually rendered could not be a violation of the statute.”⁴⁶ The Third Circuit, however, ardently disagreed:

Even if the physician performs some service for the money received, the potential for unnecessary drain on the Medicare system remains. The statute is aimed at the inducement factor.

The text refers to “any remuneration.” That includes not only sums for which no actual service was performed but also those amounts for which some professional time was expended. “Remunerates” is defined as “to pay an equivalent for service.” By including such items as kickbacks and bribes, the statute expands “remuneration” to cover situations where no service is performed. That a particular payment was a remuneration (which implies that a service was rendered) rather than a kickback, does not foreclose the possibility that a violation nevertheless could exist.⁴⁷

Simply stated, the rule that emerges from *Greber* is that “if *one purpose* of the payment was to induce future referrals, the [Anti-Kickback Statute] has been violated.”⁴⁸ In reaching this decision, the court also relied on the legislative history of the 1977 amendments to the statute. Based on the “impetus” for Congress’ decision to broaden the scope of the Anti-Kickback Statute’s coverage, it determined that a “more expansive” reading of the statute was now appropriate.⁴⁹ The court concluded its discussion of this issue by reaffirming that “[i]f the payments [to the referring physician] were intended to induce the physi-

46. *Id.* at 71 (emphasis added). Even if the Third Circuit accepted Dr. Greber’s position on this issue, it would likely still have affirmed his conviction for violating the Anti-Kickback Statute. At trial, the government introduced testimony from an earlier civil case in which Dr. Greber revealed: “. . . if the doctor didn’t get his consulting fee, he wouldn’t be using our service. So the doctor got a consulting fee.” *Id.* at 70. From this admission, one can deduce that the *only purpose* for the fee was to induce future referrals. In Dr. Greber’s own words, if no such fee was paid to the physician, “he wouldn’t be using our service.” Hence, it is difficult to separate out a second purpose of the fee, which Dr. Greber would presumably claim was to pay for the physician’s “interpretation.” The existence of this hypothetical second purpose is wholly dependent on the first purpose being satisfied; if physicians are not using Cardio-Med’s services, then, obviously, they are not performing any “interpretations” that require compensation from Cardio-Med. Furthermore, this prediction seems particularly valid when one considers the additional fact that it was Cardio-Med that interpreted the Holter-monitor data — not the providers who were referring patients. *See id.*

47. *Id.* at 71 (citation omitted).

48. *Id.* at 69 (emphasis added).

49. *See id.* at 72.

cian to use Cardio-Med's services, the statute was violated, *even if the payments were also intended to compensate for professional services.*"⁵⁰

Greber's interpretation of the Anti-Kickback Statute has come to be referred to as the "one purpose" rule.⁵¹ In effect, *Greber* essentially reads out of the statute any scienter requirement, obviating the need for the government to prove anything beyond the *actus reus*. One might even say that, under *Greber*, a violation of the Anti-Kickback Statute is a strict liability offense.

2. *Hanlester Network v. Shalala*

A decade after *Greber* was decided, the Court of Appeals for the Ninth Circuit also grappled with the Anti-Kickback Statute's scienter requirement. In *Hanlester Network v. Shalala*,⁵² the Ninth Circuit interpreted the words "knowingly and willfully" much more restrictively than did the Third Circuit in *Greber*. *Hanlester Network* established the following two-prong test for determining if an individual violated the Anti-Kickback Statute: (1) the defendant knew that the Anti-Kickback Statute prohibits offering or paying remuneration to induce referrals, *and* (2) the defendant engaged in the prohibited conduct with the specific intent to disobey the law.⁵³ In formulating this standard, the court relied primarily on two United States Supreme Court deci-

50. *Id.* (emphasis added.)

51. See Michael J. Tichon, *Structuring Ventures in a Post Hanlester and Safe Harbors World*, 14 WHITTIER L. REV. 169, 174 (1993); see also William R. Kucera, Note, *Hanlester Network v. Shalala: A Model Approach to the Medicare and Medicaid Kickback Problem*, 91 NW. U. L. REV. 413, 422 (1996).

52. See *Hanlester Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995). The facts in *Hanlester Network* involve a complex series of contractual arrangements. Explaining these facts would only serve to confuse the reader with extraneous information not relevant to the scope of this article. Therefore, they have been omitted. Note also that the court mentions this case was the first instance in which the Anti-Kickback Statute was applied to physician self-referrals (i.e., referring patients to entities in which they had an ownership or investment interest). See *id.* at 1396. Since *Hanlester Network* was decided, this problem has been largely resolved (or befuddled, depending on one's perspective) by the *Stark* legislation. See 42 C.F.R. § 411.1 et seq. (1995) (codified at 42 U.S.C. § 1395nn).

53. See *Hanlester Network v. Shalala*, 51 F.3d at 1400. Interestingly, this was not the first time the Ninth Circuit was faced with the issue of interpreting the statute's scienter requirement. In 1989, this court found the following jury instruction to be in accordance with the Anti-Kickback Statute's standards:

The government must prove beyond reasonable doubt that *one of the purposes* for the solicitation of a remuneration was to obtain money for the referral of services which may be paid in whole or in part out of Medicare funds. It is not a defense that there might have been other reasons for the solicitation of a remuneration by the defendants, if you find beyond reason-

sions that interpreted the word “willful”: *United States v. Pomponino*⁵⁴ and *Ratzlaf v. United States*.⁵⁵ Specifically, the court quoted language from *Pomponino* in which the Supreme Court defined “willfully” as “a voluntary, intentional violation of a known legal duty.”⁵⁶ Likewise, it cites *Ratzlaf* for the proposition “that to establish willfulness, the [g]overnment must prove that defendants knew their conduct was unlawful.”⁵⁷ Unfortunately, as will be discussed *infra*, the Ninth Circuit’s reliance on these two cases was misguided.

a. United States v. Pomponino

The defendants in *Pomponino* were charged with “willfully” filing false income tax returns in violation of 26 U.S.C. § 7206(1).⁵⁸ Section 7206 reads, in pertinent part, as follows:

Any person who . . . willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony. . .⁵⁹

At trial, the judge instructed the jury that the defendants “were not guilty of violating [section] 7206(1) unless they had signed the tax returns *knowing* them to be false, and had done

able doubt that one of the material purposes for the solicitation was to obtain money for the referral of services.

United States v. Kats, 871 F.2d 105, 108 (9th Cir.) (emphasis added).

In maintaining this jury instruction, the *Kats* court did not *implicitly* adopt *Greber*’s “one purpose” rule; it *explicitly* adopted the *Greber* rule. Granted, *Kats* refers to “a material purpose” rather than simply “a purpose.” However, the implications of this distinction (assuming one exists) are questionable. In fact, the court even goes so far as to say that “*Greber*’s interpretation is consistent with the legislative history” of the Anti-Kickback Statute. *Id.* at 108. Amazingly, though, the Ninth Circuit makes no mention of its earlier (not to mention contradictory) decision anywhere in *Hanlester Network*. Why the Ninth Circuit made such a radical change in its interpretation of the Anti-Kickback Statute’s scienter requirement during the six intervening years between *Kats* and *Hanlester Network* remains a mystery. See also *infra* notes 78-82 and accompanying text (discussing another case in which the Ninth Circuit interpreted “willfully” as not requiring an intent to violate the law).

54. 429 U.S. 10 (1976).

55. 510 U.S. 135 (1994).

56. *Pomponino*, 429 U.S. at 12, quoted by *Hanlester Network*, 51 F.3d at 1400. Recall that this definition of willfulness is the exception rather than the rule. See Part II *supra*. “Willfulness” usually only requires that an individual voluntarily and intentionally engaged in the prohibited conduct, not that he or she also intended to violate the law. See *id.*

57. *Hanlester Network*, 51 F.3d at 1400, citing *Ratzlaf*, 510 U.S. at 136-137.

58. *Pomponino*, 429 U.S. at 10.

59. 26 U.S.C. § 7206 (1998).

so *willfully*.”⁶⁰ The trial court defined a willful act as one done “voluntarily and intentionally and with the specific intent to do something which the law forbids, that is to say with (the) bad purpose either to disobey or to disregard the law.”⁶¹ The jury was also informed that “good motive” was not a defense. Even under this heightened *mens rea* standard, the jury convicted each of the defendants.⁶²

On appeal, the Fifth Circuit ruled that the instruction as to “good motive” was improper because it was incongruous with the implicit requirement of section 7206(1) that the defendants have a “bad purpose or evil motive.”⁶³ Consequently, contrary to the trial court, the Fifth Circuit interpreted the statute as including a defense for “good motive.”⁶⁴ It reversed the convictions and remanded for a new trial whereupon the United States filed for, and was granted, a writ of certiorari by the Supreme Court.⁶⁵

In reviewing this matter, the Supreme Court disagreed with the Fifth Circuit’s interpretation of 42 U.S.C. § 7206(1). Specifically, the Court discerned that the Fifth Circuit misread its earlier opinion in *United States v. Bishop*.⁶⁶ It reasserted that *Bishop* did not require a finding of anything beyond a specific intent to violate the law — references in the opinion to “evil motive” notwithstanding.⁶⁷ As a result, *Pomponino* conclusively defined “willfulness,” for purposes of the criminal tax statutes *only*, as “a voluntary, intentional violation of a known legal duty.”⁶⁸ Any reference in *Bishop* and other Supreme Court cases to “evil motive” or “bad purpose” were not meant to alter this requirement.⁶⁹

What is important to realize about *Pomponino* is that the Court consistently confines its discussion of “willfulness” to section 7206. It does not purport to define this word in a manner that would be uniformly applicable to other statutes. For this

60. *Pomponino*, 429 U.S. at 10 (emphasis added).

61. *Id.* at 11.

62. *See id.* at 10.

63. *See id.* at 11.

64. *See id.* at 12. Note that the Supreme Court refers to this defense as one of “good faith” rather than “good motive,” although there does not appear to be a distinction between the two.

65. *See id.* at 10.

66. 412 U.S. 346 (1973).

67. *See Pomponino*, 429 U.S. at 11-12.

68. *Id.* at 12, quoted by *Hanlester Network*, 51 F.3d at 1400.

69. *See id.*

reason, the *Hanlester Network* court was arguably misapplying *Pomponino* when it relied upon this case to support its interpretation of the Anti-Kickback Statute's willfulness requirement.

b. Ratzlaf v. United States

*Ratzlaf*⁷⁰ was decided by the Supreme Court the same year it heard arguments for *Hanlester Network*.⁷¹ In *Ratzlaf*, the Court was called upon to interpret the "willfulness" requirement of the Money Laundering Control Act of 1986.⁷² The defendant in *Ratzlaf* owed a gambling debt of \$160,000 to the High Sierra Casino in Reno, Nevada.⁷³ In order to facilitate his repayment, a casino employee instructed Ratzlaf to use the \$100,000 in cash that he expeditiously — albeit inexplicably — obtained to purchase cashier's checks from local banks.⁷⁴ This casino official also told Ratzlaf that cash transactions that exceed \$10,000 had to be reported to state and federal authorities.⁷⁵ With his newly acquired financial knowledge, Ratzlaf set out to obtain a number of cashier's checks totaling \$100,000, each in an amount less than \$10,000.⁷⁶ Based on his subsequent actions, Ratzlaf was charged with "willfully violating" the antistructuring provisions of the Money Laundering Control Act:⁷⁷

Federal law requires banks and other financial institutions to file reports with the Secretary of the Treasury whenever they are involved in a cash transaction that exceeds \$10,000. It is illegal to "structure" transactions — i.e., to break up a single transaction above the reporting threshold into two or more separate transactions — for the purpose of evading a financial institution's reporting requirement. "A person willfully violating" this antistructuring provision is subject to criminal penalties.⁷⁸

The trial judge instructed the jury that, to convict Ratzlaf, it must find that the government proved Ratzlaf knew of the

70. 510 U.S. 135 (1994).

71. *Ratzlaf* was decided in a 5-4 split vote by the Supreme Court. Justice Blackmun wrote the dissenting opinion that was joined by three of the other justices, including Chief Justice Rehnquist. The dissent articulates a persuasive argument as to why the majority's interpretation of 42 U.S.C. § 5322(a)'s willfulness requirement is unsound. *See id.* at 150-162.

72. 31 U.S.C. § 5324 (1998).

73. *See Ratzlaf*, 510 U.S. at 137.

74. *See id.*

75. *See id.*; *see also* 31 U.S.C. § 5313 and 31 C.F.R. § 103.22(a).

76. *See Ratzlaf*, 510 U.S. at 137.

77. 31 U.S.C. § 5324 (1998).

78. *Ratzlaf*, 510 U.S. at 136 (citations omitted).

The "Knowing and Willfully"

banks' reporting obligations and that he attempted to avoid that obligation.⁷⁹ However, and most importantly, the court told the jury that the government did not have to prove that Ratzlaf knew that structuring the transactions to avoid this obligation was unlawful.⁸⁰ In other words, the trial judge instructed the jury that they could convict Ratzlaf even if they found he did not know his conduct was specifically prohibited by the Money Laundering Control Act or, for that matter, any other law. Consequently, the jury had no trouble convicting Ratzlaf.

In appealing his conviction, Ratzlaf argued that it was insufficient to find him guilty of "willfully violating" the antistructuring provisions simply because he knew that institutions must report cash transactions that exceed \$10,000 and because he intended to avoid this reporting requirement. According to Ratzlaf, to be convicted, the government must also prove that he knew that the "structuring" in which he was engaged was unlawful.⁸¹ Without such proof Ratzlaf's conduct could not be said to be "willful."⁸² Although the Ninth Circuit agreed with the trial judge's interpretation of the statute and affirmed Ratzlaf's conviction, the Supreme Court granted certiorari and, finding merit in Ratzlaf's argument, reversed.⁸³

In order to understand the court's rationale in *Ratzlaf*, it is necessary to first examine the three underlying statutory sections relevant to the case. The first is a section of the Currency and Foreign Transactions Reporting Act⁸⁴ that reads, in part, as follows:

When a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the

79. *See id.* at 137.

80. *See id.* at 137-138.

81. *See id.*

82. *See id.*

83. *See id.* Note that the Ninth Circuit (which also decided *Hanlester Network*) was the same court that heard the underlying case on appeal in *Ratzlaf*. In that earlier decision, the Ninth Circuit interpreted "willfully," for purposes of the Money Laundering Control Act, as not requiring an intent to violate the law. Perhaps the Ninth Circuit interpreted this same word for purposes of the Anti-Kickback Statute as requiring such an intent because it was overruled as to this issue in *Ratzlaf*.

84. *See* Pub. L. 91-508, Title II, 84 Stat. 1118 (1970).

Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes . . . ”⁸⁵

Presumably, this is the statute to which the casino official was implicitly referring when he told Ratzlaf that financial institutions were required to report cash transactions in excess of \$10,000.⁸⁶

The second relevant statutory provision, and the one with which Ratzlaf was charged with “willfully” violating, is section 1354(a) of the Money Laundering Control Act of 1986,⁸⁷ codified at 31 U.S.C. § 5324. The relevant language of section 5324 reads as follows:

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction —

. . .

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.⁸⁸

The third pertinent statutory section is the Money Laundering Control Act’s criminal enforcement provision found at 31 U.S.C. § 5322(a):

A person *willfully* violating this subchapter [31 U.S.C. § 5311 et seq.] or a regulation prescribed under this subchapter . . . shall be fined not more than \$250,000, or [imprisoned] for not more than five years, or both.⁸⁹

It is this third statutory section that served as the gravamen of Ratzlaf’s appeal. Ratzlaf asserted that the trial court essentially negated this willfulness requirement when instructing the jury. Not surprisingly, the government maintained a different view. It proclaimed that violating section 5324 itself was sufficient to show the “bad purpose” element of section 5322(a)’s “willfulness” requirement.⁹⁰ The government employed the following logic to support its position: “[S]tructuring is not the kind of activity that an ordinary person would engage in innocently.’ It is therefore ‘reasonable’ . . . ‘to hold a structurer responsible for

85. 31 U.S.C. § 5313(a), quoted by *Ratzlaf*, 510 U.S. at 138-39.

86. Subsequent to Congress enacting the Currency and Foreign Transactions Reporting Act, the Secretary of the Treasury promulgated a regulation that required the reporting of “transaction[s] in currency of more than \$10,000.” See 31 C.F.R. § 103.22(a); see also *Ratzlaf*, 510 U.S. at 139, n.3.

87. See Pub. L. 99-570, Title I, Subtitle H, 100 Stat. 3207-3222 (1986).

88. 31 U.S.C. § 5324 (1998).

89. *Id.* § 5322(a) (emphasis added).

90. See *Ratzlaf*, 510 U.S. at 143.

evading the reporting requirements without the need to prove [the defendant had] specific knowledge that such evasion is unlawful.’”⁹¹ After considering both parties’ arguments, the Supreme Court agreed with Ratzlaf, remaining “unpersuaded by the argument that structuring is so obviously ‘evil’ or inherently ‘bad’ that the ‘willfulness’ requirement is satisfied irrespective of the defendant’s knowledge of the illegality of structuring.”⁹² The jury had to find that Ratzlaf knew the structuring in which he engaged was unlawful.⁹³ In other words, one cannot willfully violate a statute without knowing what that statute prohibits. Structuring financial transactions, as prohibited by section 5324(3), “is not inevitably nefarious.”⁹⁴ Additionally, the Court surmised that the trial judge “treated [section] 5322(a)’s ‘willfulness’ requirement essentially as *surplusage* — as words of no consequence.”⁹⁵ As to this mode of statutory interpretation, the Supreme Court commented that “[j]udges should hesitate so to treat statutory terms in any setting, and resistance should be heightened when the words describe an element of a criminal offense.”⁹⁶

What the court in *Hanlester Network* failed to recognize in applying the principles of *Ratzlaf*, was that *Ratzlaf*’s interpretation of “willfully” was arguably limited to the Money Laundering Control Act:

“Willful,” this Court has recognized, is a “word of many meanings,” and “its construction [is] often . . . influenced by its context.” Accordingly, we view [sections] 5322(a) and 5324(3) mindful of the complex of provisions in which they are embedded. In this light, we count it significant that [section] 5322(a)’s omnibus “willfulness” requirement, when applied to other provisions in the same subchapter, consistently has been

91. *Id.* at 144.

92. *Id.* at 146.

93. *See id.* at 149. Note, however, that *Ratzlaf* should not be read as overruling the general principle that ignorance of the law is no defense to a criminal charge. Nonetheless, Congress can, by statute, decree otherwise. According to the *Ratzlaf* court, this is exactly what Congress did in enacting the willfulness requirement of section 5322(a). *See id.*

94. *Id.* at 144. “In [section] 5322, Congress subjected to criminal penalties only those ‘willfully violating’ [section] 5324, signaling its intention to require for conviction proof that the defendant knew not only of the bank’s duty to report cash transactions in excess of \$10,000, but also of this duty not to avoid triggering such a report.” *Id.* at 146-147.

95. *Id.* at 140 (emphasis added). In contrast, “[t]he United States confirmed at oral argument that, in its view, as in the view of the courts below, ‘the 5324 offense is just what it would be if you never had 5322.’” *Id.* at 141, n.2.

96. *Id.* at 140-141.

read by the Courts of Appeals to require both “knowledge of the reporting requirement” and a “specific intent to commit the crime,” (i.e., “a purpose to disobey the law”).⁹⁷

Obviously, the *Ratzlaf* court recognized that “willfulness” could, and does, have different meanings in various “contexts” (i.e., statutes). Apparently ignoring this caveat, however, the Ninth Circuit failed to appreciate and distinguish the unique “complex of provisions” that faced the *Ratzlaf* court. Faced with these complexities, the Court in *Ratzlaf* interpreted the Money Laundering Control Act’s “willfulness” requirement in a manner that it deemed fair to the defendant.⁹⁸ Consequently, it would be unwise to apply *Ratzlaf*’s interpretation of willfulness to other cases without first examining the underlying statutes to determine if the *Ratzlaf* rationale is appropriate. Indeed, it is difficult to imagine another situation that would involve the quagmire generated by the interrelated statutes at issue in *Ratzlaf*. Furthermore, it appears that the tax statutes and the anti-structuring provisions are the only two examples of statutory contexts in which “willfulness” has been interpreted to require an intentional violation of the law.⁹⁹

After the Ninth Circuit delivered its opinion in *Hanlester Network*, the government unsuccessfully petitioned the court to rehear the case *en banc*.¹⁰⁰ HHS then asked the Solicitor General to appeal the Ninth Circuit’s decision to the Supreme Court.¹⁰¹ However, the Solicitor General refused to petition the Supreme Court for a writ of certiorari because it believed there was a lack of conflict among the Courts of Appeals.¹⁰² Despite this decision, the Inspector General for HHS promised that the govern-

97. *Id.* at 141 (citations omitted).

98. An underlying legal principle occupying the court’s collective conscience in *Ratzlaf* was that of “lenity,” which stands for the proposition that ambiguities in statutes are to be interpreted in the defendant’s favor. *See id.* at 148.

99. Based on a Westlaw search conducted by the author on January 10, 1999, retrieving all reported opinions interpreting the word “willfully.”

100. *See DOJ Refuses to Ask for Supreme Court Review of Hanlester Anti-Kick-back Case*, 5 HEALTH L. REP. (BNA) 6 (Feb. 8, 1996).

101. *See id.*

102. *See id.* How the Solicitor General arrived at this conclusion is puzzling. By the time *Hanlester Network* was decided in 1995, there already existed the conflicting decision delivered by the Third Circuit in *Greber*. Although *Greber* never directly addresses the “knowingly and willfully” language, it is clear from the court’s decision that it found these words to be of little significance. In addition, the First Circuit dealt with the scienter requirement in 1989, delivering an opinion that parallels the holding of *Hanlester Network*. *See United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20 (1st Cir. 1989) (discussed in Part II.C.1, *infra*).

ment would "aggressively contest" the application of *Hanlester Network* in other circuits.¹⁰³ According to the Inspector General, the Ninth Circuit's interpretation of "willfully" was "unusual" and the government should not be required to prove that a defendant specifically intended to violate a "known legal duty."¹⁰⁴ As one prosecutor has lamented: "If more courts apply the *Hanlester* standard, it would be extremely difficult to bring kickback cases without confessions or other dead-bang evidence of intent."¹⁰⁵

B. *United States v. Jain: Striking a Middle Ground*

Only two years after *Hanlester Network* was decided, the Court of Appeals for the Eighth Circuit, in *United States v. Jain*,¹⁰⁶ tried its hand at finding the one true meaning of "knowingly and willfully" that thus far had eluded the other Courts of Appeals. Although the Eighth Circuit did not mention *Greber*, it specifically found the holding of *Hanlester Network* to be unpersuasive.¹⁰⁷

Jain involved a psychologist (Dr. Jain) who received payments from a psychiatric facility (North Hills Hospital) for referring patients. Based on this conduct, the United States charged Dr. Jain with violating the Anti-Kickback Statute. At trial, a North Hills Hospital administrator admitted that a letter he wrote to Dr. Jain agreeing to pay him \$1,000 per month for "marketing" was in reality an agreement to pay for his referrals.¹⁰⁸ In addition, other evidence was introduced that supported the contention that North Hills Hospital was paying Dr. Jain for his "substantial volume of patient referrals."¹⁰⁹ Although Dr. Jain adamantly refuted the testimony against him, the jury appar-

103. See *DOJ Refuses to Ask for Supreme Court Review of Hanlester Anti-Kickback Case*, 5 HEALTH L. REP. (BNA) 6 (Feb. 8, 1996).

104. See *id.*

105. Brian J. Hennigan and Arif Alikhan, *Willfulness Under the Medicare and Anti-Kickback Statutes: The Continuing Debate Over Whether Ignorance of the Law is a Defense in Medicare Prosecutions*, AMERICAN BAR ASSOCIATION CENTER FOR CONTINUING LEGAL EDUCATION NATIONAL INSTITUTE (1997).

106. 93 F.3d 436 (8th Cir. 1996).

107. See *id.* at 441.

108. See *id.* at 438.

109. *Id.* at 438. Notable among this evidence was that Dr. Jain never provided any "marketing" for North Hills Hospital and that during a 15-month period he referred 49 patients to this hospital for which, in return, he received payments totaling \$40,500. See *id.* at 438-39.

ently did not believe him and found his conduct to be in violation of the Anti-Kickback Statute.¹¹⁰

At trial, the government urged the court “to apply the general rule that ‘willfully’ in a criminal statute ‘refers to consciousness of the act but not to consciousness that the act is unlawful.’”¹¹¹ In contrast, Dr. Jain, relying on *Ratzlaf* and *Cheek*, claimed that the “exception” to the general rule that had traditionally been applied in criminal tax cases should be applied to the Anti-Kickback Statute as well (i.e., that “willfully” refers to the “voluntary, intentional violation of a known legal duty”).¹¹² After considering both parties’ positions, the court essentially reached a compromise and

declined to instruct the jury that Jain must have intentionally violated a known legal duty because the [Anti-Kickback Statute] prohibits willful conduct — receiving remuneration for referring patients to a Medicare provider — rather than the willful violation of a statute, as in *Ratzlaf*. But the court also concluded that a *mens rea* instruction more rigorous than the traditional rule was appropriate because the literal language of this statute might otherwise encompass some types of innocent conduct.¹¹³

The “more rigorous” instruction to which the court referred was embodied in its telling the jury that “willfully” means “unjustifiably and wrongfully, known to be such by the defendant.”¹¹⁴ It also instructed the jury as to a “good faith” defense: If Dr. Jain believed he was being paid for promoting North Hills Hospital, and not for referring patients, then his conduct did not violate the Anti-Kickback Statute.¹¹⁵

110. *See id.* at 438, 439.

111. *Id.* at 440, quoting *Cheek*, 498 U.S. at 209 (Scalia, J., concurring).

112. *Id.* at 440, quoting *Cheek*, 498 U.S. at 201. Recall that in *Ratzlaf* the Supreme Court extended the “willfulness” exception for criminal tax cases to the anti-structuring provisions of the Money Laundering Control Act.

113. *Id.* at 440.

114. *Id.* Unfortunately, the court neither discussed what it meant by “unjustifiably and wrongfully,” nor whether it believed Dr. Jain’s conduct constituted such. One is left to query as to how somebody can know their actions are unjustifiable and yet be incognizant of the fact that they violate “a known legal duty.” Perhaps the court was referring to “wrongful” in the moral or ethical sense rather than equating it with unlawfulness. Or perhaps it believed that an inherent concept of wrongfulness has been bestowed upon each of us, making additional guidance from the legislature or judiciary unnecessary.

115. *See id.* What this “good faith” defense adds to the instruction is difficult to ascertain. The court’s instruction to the jury defining “willfully” already provided that the term means “unjustifiably and wrongfully, known to be such by the defendant.” Obviously, then, if Dr. Jain believed that he was being paid for promoting the hospi-

On appeal, Dr. Jain claimed that the trial court's instruction was erroneous. The Eighth Circuit, however, agreed with the trial court's instruction, noting, as did *Ratzlaf*, that "[t]he word 'willful' has many meanings and must be construed in light of its statutory context."¹¹⁶ The *Jain* court came to this conclusion by examining the legislative history behind Congress' passing the 1980 amendments that added the words "knowingly and willfully" to the statute.¹¹⁷ Congress was concerned that the 1977 amendments, which added the word "remuneration," caused the scope of the statute's applicability to be potentially over-reaching.¹¹⁸ Specifically, Congress believed "that criminal penalties may be imposed under [the 1977 version of the statute] to an individual whose conduct, while improper, was inadvertent."¹¹⁹

The Eighth Circuit believed that the word "inadvertent" was "ambiguous in this context, since the traditional definition of 'willfully' — consciousness of the act — might be sufficient to weed out inadvertent violators."¹²⁰ This remark is somewhat puzzling because the comments in the legislative history concerned the statute as it existed *before* the 1980 amendments, (i.e., absent the words "knowingly and willfully"). Indeed, the sole purpose of the amendments was to effectuate Congress' desire that the statute be modified to avoid sanctioning the "inadvertent" conduct to which the *Jain* court was referring.

tal, rather than for referring patients, it would be impossible to claim that it was "known" to him that his conduct was unjustifiable and wrongful. Consequently, Dr. Jain would not have "knowingly and willfully" solicited or received remuneration in exchange for referring patients to the hospital, as is required by the unambiguous language of the statute. See 42 U.S.C. § 1320a-7b(b)(1). Even assuming this was the situation, however, it cannot necessarily be said that the *hospital* is absolved from liability. If North Hills Hospital "knowingly and willfully" offered remuneration to Dr. Jain in exchange for his referring patients, then it engaged in the type of conduct prohibited by 42 U.S.C. § 1320a-7b(b)(2). In a transaction that potentially violates the Anti-Kickback Statute it is possible to find a unilateral violation, such as when only one party "knowingly and willfully" engaged in the statutorily prohibited conduct. Surprisingly, North Hills Hospital does not appear to have been charged with violating the Anti-Kickback Statute even though, as discussed *supra*, one of its administrators admitted the hospital was paying Dr. Jain for referring patients. See *Jain*, 93 F.3d at 448.

116. *Id.*, citing *Ratzlaf*, 510 U.S. at 140-41.

117. See Pub. L. No. 96-499, Title IX (1980); see also *Jain*, 93 F.3d at 440; and Part I *supra*.

118. See Part I *supra*.

119. H.R. Rep. No. 96-1167, at 59 (1980), reprinted in, 1980 U.S.C.C.A.N. 5526, 5572, quoted by *Jain*, 93 F.3d at 440; see also Part I *supra*.

120. *Jain*, 93 F.3d at 440.

The court went on to recognize that the Anti-Kickback Statute “also has elaborate ‘safe harbor’ provisions, . . . provisions which have prompted pages of administrative agency explication. This confirms that a broad ‘illegal remunerations’ statute is like the statute at issue in *Ratzlaf* in that it potentially includes conduct that is not ‘inevitably nefarious.’”¹²¹ This statement demonstrates a misunderstanding of the reasons behind HHS’ promulgation of its safe harbors.¹²² True, the Anti-Kickback Statute is what is sometimes referred to as an “exceptions bill” because its general prohibitory language is broad, but it lists numerous exemptions for conduct that would otherwise fall within the statute’s purview.

However, the Anti-Kickback Statute is broad not because of its requisite scienter; rather, it is broad because, as many criticisms have pointed out, the word “remuneration” encompasses countless health care arrangements that are not only innocuous, they are also potentially beneficial. With this in mind, one can clearly see the fallacy in *Jain’s* conclusion that “[t]his confirms that a broad ‘illegal remunerations’ statute is like the statute at issue in *Ratzlaf* in that it potentially includes conduct that is not ‘inevitably nefarious.’”¹²³ Granted, were it not for the parallel section imposing a willfulness requirement, one of the statutory sections in *Ratzlaf* could be used to prosecute conduct that is not “inevitably nefarious.”¹²⁴

Despite these errors in the court’s analysis, all was not lost in *Jain*. In fact, of all the courts that have confronted the issue of the Anti-Kickback Statute’s scienter requirement, the Eighth Circuit supported its conclusion with the most sound legal reasoning. *Jain* aptly criticized *Hanlester Network* for not adequately examining the appropriateness of the *Ratzlaf* standard:

Because one cannot willfully violate a statute without knowing what the statute prohibits, the Supreme Court [in *Ratzlaf*] required proof that the defendant intentionally violated a “known legal duty.” By contrast, in the [Anti-Kickback Statute], the word “willfully” modifies a series of prohibited acts. Both the plain language of that statute, and respect for the traditional principle that ignorance of the law is no defense, suggest that a heightened *mens rea* standard should only require proof that Dr. Jain knew that his conduct was wrongful,

121. *Id.*

122. See also *supra* note 23 and accompanying text.

123. *Jain*, 93 F.3d at 440.

124. See discussion of 42 U.S.C. §§ 5324 and 5322(a), *supra*.

rather than proof that he knew it violated "a known legal duty." *Hanlester Network* . . . does not persuade us to adopt defendants' position . . . [because that] court adopted *Ratzlaf's* heightened *mens rea* standard without considering alternatives to the general rule.¹²⁵

Consequently, the Eighth Circuit found that the trial court's definition of "willfully" correctly construed the 1980 amendments and affirmed Dr. Jain's conviction for violating the Anti-Kickback Statute.¹²⁶ Receiving an unfavorable decision, Dr. Jain filed a petition for writ of certiorari with the Supreme Court, advocating the appropriateness of the Court's review of the scienter issue.¹²⁷ Dr. Jain stood firm in the position that "the highest scienter requirement is necessary to prevent the criminal prosecution of health care professionals who lack a 'criminal' intent, yet who may inadvertently violate the law."¹²⁸ Moreover, he claimed that "[t]his perception of the proper scienter requirement for Anti-Kickback Statute violations is consistent with Congress' design to prevent the imposition of criminal sanctions on practitioners who do not intend to break the law."¹²⁹ Upon what information Dr. Jain based this assertion that his concept of the scienter requirement is consistent with Congress' intent is unclear. Indeed, there is nothing in the legislative history to indicate that Congress intended the Anti-Kickback Statute to apply only to individuals who "intend to break the law." Rather, "knowingly and willfully" was inserted into the statute to avoid prosecuting "inadvertent" violations.¹³⁰

125. *Jain*, 93 F.3d at 441. Note that it is not clear to what "general rule" the *Jain* court is referring, as *Ratzlaf* was carving out an exception to what that court conceptualized as the general rule — that ignorance of the law is generally not a defense to a criminal charge. See *supra* note 93. Presumably, the *Jain* court was trying to convey that the *Hanlester Network* court should be faulted for not examining the basis for the exception to the general rule established by *Ratzlaf*. As discussed *supra*, this criticism of *Hanlester Network* is shared by the author. See Part II.A.2.b *supra*. See also *United States v. Neufeld*, 908 F. Supp. 491, 497 (S.D. Ohio 1995) (discussed in Part II.C.2 *infra*), which the *Jain* court cited as supporting its criticism of *Hanlester Network*.

126. See *Jain*, 93 F.3d at 441, 443.

127. See *Appellant Asserts Panel Applied Incorrect Scienter Standard: United States v. Jain*, ANDREWS HEALTH CARE FRAUD LITIG. REP. 13 (April 1997). The Supreme Court subsequently denied Dr. Jain's petition for a writ of certiorari. See *Jain v. United States*, 65 U.S.L.W. 3821, 3825 (U.S. June 16, 1997) (No. 96-1167).

128. *Appellant Asserts Panel Applied Incorrect Scienter Standard: United States v. Jain*, ANDREWS HEALTH CARE FRAUD LITIG. REP. 13 (April 1997), quoting Dr. Jain.

129. *Id.*

130. See *supra* notes 15-18 and accompanying text.

*C. Filling in the Mens Rea Continuum: Other Cases
Interpreting the Anti-Kickback Statute's
Scienter Requirement*

In addition to *Greber*, *Hanlester Network*, and *Jain*, several other courts have interpreted the Anti-Kickback Statute's scienter requirement in ways that vary slightly from the foregoing cases.

1. *United States v. Bay State Ambulance and Hospital Rental Services, Inc.*

In 1989, the Court of Appeals for the First Circuit indirectly addressed the Anti-Kickback Statute's scienter requirement in *United States v. Bay State Ambulance and Hospital Rental Services, Inc.*¹³¹ The defendant ambulance company ("Bay State") contracted with the City of Quincy, Massachusetts, to provide ambulance services for Quincy City Hospital.¹³² Subsequently, the United States brought a number of charges against Bay State and its president for violating the Anti-Kickback Statute.¹³³ The crux of the government's allegations was that the defendants made "payments"¹³⁴ to a hospital official (John Felci) in return for his serving as a "consultant."¹³⁵ In reality, these payments were made to Felci to ensure that Bay State received the ambulance contract with Quincy City Hospital.¹³⁶ Although the government did not try to prove that the payments to Felci were from Medicare funds received by Bay State, it did prove that Bay State obtained approximately \$171,883 from Medicare as a result of the hospital contract.¹³⁷ At trial, the defendants tried to show that their payments to Felci were "reasonable amounts for actual services rendered."¹³⁸ Nonetheless, the jury convicted the defendants of several charges.¹³⁹

Defendants appealed their convictions on a number of grounds. Although the First Circuit captioned two of these is-

131. 874 F. 2d 20 (1st Cir. 1989).

132. *See id.* at 22, 23.

133. *See id.* at 22.

134. These "payments" included giving the hospital official a Buick and a Mazda. *See id.*

135. *See id.* at 25.

136. *See id.* at 27.

137. *See United States v. Bay State Ambulance and Hosp. Rental Serv., Inc.*, 874 F.2d 20, 27 (1st Cir. 1989).

138. *Id.*

139. *See id.* at 22.

sues in its opinion under the headings "Reasonable Payment Instruction"¹⁴⁰ and "Failure to Instruct re *Mens Rea*,"¹⁴¹ the sections both relate to the scienter requirement. As to the "Reasonable Payment Instruction," the defendants claimed that the jury should have been instructed "that the government had to show the payments to Felci were 'not as compensation for services performed . . . or were of substantially more value than the services performed or to be performed' and that Felci could not be guilty unless he was 'substantially overpaid' for his services."¹⁴² The trial court denied the defendants' instruction and instead instructed the jury that

the [g]overnment has to prove that the payments were made with a *corrupt intent*, that they were made for an *improper purpose*. If you find that payments were made for two or more purposes, then the Government has to prove that the improper purpose is the primary purpose or was the primary purpose in making and receiving the payments. It need not be the only purpose for making the payments and for receiving them. You cannot convict if you find that the improper purpose was an incidental or minor one in making the payments.¹⁴³

In rejecting the defendants' argument, the court relied upon *Greber's* "one purpose" rule.¹⁴⁴ Recall that according to *Greber* if one purpose of a remuneration is to induce the referral of Medicare or Medicaid-funded business, then the Anti-Kickback Statute has been violated.¹⁴⁵ Consequently, under *Greber*, the trial court did not err in refusing to instruct the jury that the government had to prove that the payments to Felci were "not

140. *Id.* at 29.

141. *Id.* at 33.

142. *Id.* at 29.

143. *Id.* (emphasis added). The excerpted instruction provided in the Court of Appeals' opinion does not define the terms "corrupt intent" and "improper purpose." Presumably, "corrupt intent" refers to the "knowingly and willfully" scienter required by the statute. However, it is also possible that the court was being led astray by referring to older cases decided under the Anti-Kickback Statute before the words "knowingly and willfully" were added in 1980. For instance, in *United States v. Zacher*, 586 F.2d 912, 916 (2d Cir. 1978), the court interpreted the words "bribe" and "kickback" as involving "a corrupt payment or receipt of payment in violation of the duty imposed by Congress on providers of services to use federal funds only for intended purposes and only in the approved manner." See also *United States v. Hancock*, 604 F.2d 999, 1001 (7th Cir. 1979). Additionally, the *Hancock* court determined that the "term kickback requires that the payment be received for a corrupt purpose." *Id.* at 1002. Similarly, "improper purpose" would appear to be a reference to remuneration offered to induce the referral of Medicare or Medicaid-funded business.

144. See *Bay State*, 874 F.2d at 30, citing *Greber*, 760 F.2d at 72. Note also that *Hanlester Network* had not yet been decided.

145. See Part I.A.1 *supra*.

as compensation for services performed . . . or were of substantially more value than the services performed or to be performed.”¹⁴⁶ In fact, the trial court could have given a much more liberal instruction and still have been in accord with *Greber*. As noted, the trial court instructed the jury that if payments were made for two or more purposes, then the “improper purpose” must also be the “primary purpose.” No such requirement exists under *Greber*. The “one purpose” rule of *Greber* would find a violation even if the improper purpose were only a *de minimis* purpose, let alone the fact that it is not the primary purpose. Unfortunately, the *Bay State* court did not find the need to address the “exact reach of the statute” (i.e., just what amount of scienter is required) because it found that the minimum safeguards established by *Greber* had been satisfied.¹⁴⁷

Concerning the “Failure to Instruct *re Mens Rea*” issue, the defendants contended that the court failed to instruct the jury that the “reasonableness” of the payments to Felci showed that they lacked the “knowingly and willfully” scienter.¹⁴⁸ The trial court’s instruction to the jury, which the defendants claimed was in error, read as follows:

The fourth element I told you is that the defendants have to act, have to have been shown to have acted knowingly and willfully. Knowingly simply means to do something voluntarily, to do it deliberately, not to do something by mistake or by accident or even negligently. Willfully means to do something purposely, *with the intent to violate the law*, to do something purposely that law forbids.¹⁴⁹

In reviewing this instruction, the *Bay State* court summarily concluded, without citing any caselaw, that “[t]he judge gave an appropriate explanation of the scienter element of the crime.”¹⁵⁰ Interestingly, the court adopted the *Hanlester Network* standard six years before that case was to be decided¹⁵¹ (i.e., that the re-

146. *Bay State*, 874 F.2d at 29.

147. *See id.* at 30.

148. *See id.* at 33.

149. *Id.* (emphasis added).

150. *Id.* The Court of Appeals did not address this issue in detail because the defendants failed to properly object to the allegedly faulty instruction at trial. Consequently, the court only reviewed the instruction for plain error and, finding none, affirmed. *See id.* at 33. Just why the *Bay State* court found no plain error, however, is not satisfactorily discernible from the opinion’s scant language.

151. Even *Ratzlaf*, the case upon which the *Hanlester Network* court largely relied, had not yet been decided.

muneration must be made "with the intent to violate the law").¹⁵² Recognize, though, that the *Bay State* court cited *Greber* in support of its ruling as to the first jury instruction discussed *supra* and that *Greber* and *Hanlester Network* are at opposite ends of the *mens rea* spectrum. This inconsistency can be resolved by keeping in mind that the *Bay State* court specifically discounted the need to address the full extent of *Greber's* holding.¹⁵³ Therefore, when *Bay State's* ruling as to both jury instructions are read together, it can be seen that this opinion is in accord with *Hanlester Network* (i.e., the government must prove that the defendant engaged in the conduct prohibited by the Anti-Kickback Statute "with the intent to violate the law").

2. *United States v. Neufeld*

The Courts of Appeals are not the only tribunals to grapple with the Anti-Kickback Statute's scienter requirement. The United States District Court for the Southern District of Ohio made its contribution in *United States v. Neufeld*.¹⁵⁴ *Neufeld* involved an osteopathic physician in Columbus, Ohio, who focused his practice on treating HIV/AIDS patients.¹⁵⁵ In 1990, Caremark, a home infusion company, expanded its operations to provide home infusion services for AIDS patients in the Columbus area.¹⁵⁶ Caremark contracted with Dr. Neufeld to develop treatment and educational programs for the company's medical staff and patients.¹⁵⁷ Dr. Neufeld was paid for services made pursuant to written "Consulting Agreements."¹⁵⁸ Based upon these agreements, and the payments Dr. Neufeld received thereunder, the federal government charged Dr. Neufeld with violating the Anti-Kickback Statute and committing mail fraud.¹⁵⁹ In response, Dr. Neufeld filed a motion to dismiss the indictment.¹⁶⁰ As for the charges of violating the Anti-Kickback

152. By instructing the jury that "willfully" means to do something "with the intent to violate the law," lends support to the author's interpretation of what the court meant by "corrupt intent" in its earlier instruction. See *supra* note 143.

153. See *supra* note 147 and accompanying text.

154. 908 F. Supp. 491 (S.D. Ohio 1995). Ironically, after concluding its discussion of the scienter requirement, the court stated that it "hesitates from embarking on an exact definition of the scienter requirement at this time." *Id.* at 497.

155. See *id.* at 493.

156. See *id.*

157. See *id.*

158. See *id.*

159. See *id.*

160. *United States v. Neufeld*, 908 F. Supp. 491, 493 (S.D. Ohio 1995).

Statute, Dr. Neufeld claimed that the statute was “unconstitutionally vague” and, alternatively, that even if it was not unconstitutionally vague, his conduct came within the scope of a “safe harbor.”¹⁶¹

The court ultimately rejected Dr. Neufeld’s vagueness argument, basing its decision, in part, on the fact that the Anti-Kickback Statute contains a “heightened” scienter requirement that militates against such a finding.¹⁶² Moreover, in response to Dr. Neufeld’s claim “that the facial vagueness challenge to the Anti-Kickback [S]tatute must stand or fall on an adoption of a ‘willfulness’ standard similar to that found in *Ratzlaf*,”¹⁶³ the court ruled as follows:

Ratzlaf’s analysis is neither useful nor applicable to the question of the scienter standard for the Anti-Kickback [S]tatute. Neither resort to the statutory language, the underlying nature of the offense, nor the relevant legislative history yields a definition of ‘willful’ which is beyond the ordinary call of the word in legal parlance.¹⁶⁴

In other words, the court recognized the general principle that “ignorance of the law . . . is no defense to a criminal charge”¹⁶⁵ and that “willfully” normally only requires a purpose to commit the prohibited act; intent to violate the law is not part of the inquiry.

The *Neufeld* court distinguished *Ratzlaf* on several bases. First, it determined that the statute in that case concerned “parallel provisions” in which the scienter requirement of one could not be considered “mere surplusage.”¹⁶⁶ In contrast, “[e]ach term in the [Anti-Kickback Statute] is self-contained and relevant to the *mens rea* which the government must prove.”¹⁶⁷ Consequently, the defendants could not use *Ratzlaf* to claim that “willfulness,” as that term is used in the Anti-Kickback Statute, requires that a defendant have knowledge of the conduct’s illegality.¹⁶⁸

161. *See id.*

162. *See id.* at 495.

163. *See id.*

164. *Id.*

165. *Id.* at 495, quoting *Ratzlaf*, 510 U.S. at 149.

166. *See Neufeld*, 908 F. Supp. at 496.

167. *Id.*

168. *See id.* One commentator opined that “[t]he fact that *Ratzlaf* is still good law means that courts must distinguish the [Anti-Kickback Statute] from the anti-structuring statute in order to reject the *Hanlester* approach. This may be a factor in influencing some courts to adopt the *Hanlester* approach.” Tamsen D. Love, *Toward a Fair*

Second, it pointed out that *Ratzlaf* was based partly on the finding that the structuring of financial transactions to avoid tax consequences is not "obviously evil" nor "inevitably nefarious."¹⁶⁹ Thus, the Supreme Court ruled that one cannot conclusively presume that persons are put on notice as to the necessity of determining whether or not their conduct is unlawful.¹⁷⁰ In contrast, according to the *Neufeld* court, its defendants could not avail themselves of this same logic. The reason: Ohio statutorily prohibits physicians from soliciting payment for patient referrals.¹⁷¹ Violation of this statute can subject the offending physician to professional discipline.¹⁷² Therefore, according to *Neufeld*, "[t]aking bribes for referrals is not an innocent endeavor. It is an inherently wrongful activity and one of which a physician should be particularly aware."¹⁷³ Additionally, the court professed that it was "reluctant to recognize as 'harmless' an activity for which a physician may be disciplined in Ohio and criminally prosecuted in other states."¹⁷⁴

The problem with the court's second basis for distinguishing *Ratzlaf* is that it fails to keep in perspective that the Money Laundering Control Act at issue in *Ratzlaf* provided for criminal penalties. Contrast this with the fact that the most severe penalty for violating the Ohio statute was revocation of the physician's license.¹⁷⁵ Arguably, *Neufeld* mixes apples and oranges by equating a criminal statute with one that only carries a civil penalty (albeit a very severe one from a physician's perspective). Furthermore, *Neufeld* suggests that physicians in Ohio are inherently aware that not only is accepting payment for referring

and Practical Definition of "Willfully" in the Medicare/Medicaid Anti-Kickback Statute, 50 VAND. L. REV. 1029, 1059 n.23 (1997). However, this distinction is exactly what *Neufeld* tried to accomplish by rejecting *Ratzlaf*.

169. See *Neufeld*, 908 F. Supp. at 496.

170. See *id.*

171. See *id.* The relevant statutory provision is OHIO REV. CODE ANN. § 4731.22 (B), which reads, in part:

The [State medical] board . . . shall limit, revoke, or suspend a certificate [allowing the practice of medicine] for one . . . of the following reasons:

. . .

(4) Willfully . . . receiving a thing of value in return for a specific referral of a patient to utilize a particular service or business.

OHIO REV. CODE ANN. § 4731.22(B) (Anderson 1998).

172. See *Neufeld*, 908 F. Supp. at 496.

173. *Id.*

174. *Id.* (citing statutory provisions from other states that also prohibit physicians from accepting payment for referring patients).

175. See OHIO REV. CODE ANN. § 4731.22(B) (Anderson 1998).

patients a basis for professional discipline in that state, they are also aware of which other states prohibit this conduct and the penalties they impose for violations. The court offers no support for this statement and it is unconvincing when one considers that it is a commonly accepted practice in some professions, such as real estate, to pay for referrals.¹⁷⁶

The *Neufeld* court also examined the legislative history behind the 1980 amendments to the Anti-Kickback Statute¹⁷⁷ and found this source of authority unsupporting of the defendant's argument as well. Congress included the words "knowingly and willfully" in the 1980 amendments because it wished to avoid prosecuting individuals who "inadvertently" violated the literal language of the Anti-Kickback Statute.¹⁷⁸ "[H]owever, [this] does not equate 'willfulness' with knowledge of illegality nor mandate the availability of a defense of ignorance of the law."¹⁷⁹ Rather, according to *Neufeld*, all that is required is that a defendant "acted with some degree of deliberation."¹⁸⁰ In this regard, the court tacitly rejects *Hanlester Network's* definition of the Anti-Kickback Statute's scienter requirement.¹⁸¹ Simultane-

176. See also Love, *supra* note 168, at 1052:

[u]nlike murder, arson, rape and other traditional crimes, regulatory and economic crimes are not things people presumptively know are prohibited by law. Congress can transform previously legitimate conduct into criminal activity with the passage of appropriate legislation. The newly criminalized conduct may not be obviously or inherently wrong. In this context, it is often difficult to apply traditional principles of criminal intent. The fact that a defendant intends to do a certain act, in other words, may not be enough to establish criminal intent, if the conduct is not inherently or clearly immoral.

(Citations omitted.)

But compare the following statement made later in Love's article:

[A]lthough the *Ratzlaf* court felt that the general public could not be presumed to know that structuring is illegal, health care providers, as professionals, arguably can be presumed to know the regulations affecting the health care industry. In this sense, it may be appropriate to hold health care providers to a higher standard. Congress certainly did not intend to give health care providers an incentive to fail to get legal advice before engaging in business ventures, or otherwise to avoid learning the law of the industry.

Id. at 1054-1055 (citations omitted).

177. See Part I *supra*.

178. See Part I *supra*.

179. *Neufeld*, 908 F. Supp. at 496.

180. *Id.*, citing H.R. Rep. No. 96-1167, at 59 (1980), reprinted in 1980 U.S.C.C.A.N. 5526, 5572.

181. See *id.* at 497. *Neufeld* is not the only case that has rejected the holding of *Hanlester Network*. For instance, in *Medical Development Network, Inc. v. Professional Respiratory Care/Home Med. Equip. Serv., Inc.*, 673 So.2d 565, 567 (Fla. App. 1996), the state appellate court ruled "[t]he Anti-Kickback Statute is directed at punishment of those who perform specific acts and does not require that one engage in

ously, the *Neufeld* court implicitly recognized *Jain* as the correct interpretation of the willfulness requirement.¹⁸²

D. United States v. Davis: The Fifth Circuit Tries Its Hand at Defining "Knowingly and Willfully"

In January 1998, the Court of Appeals for the Fifth Circuit handed down the most recent addition to the scienter requirement continuum in *United States v. Davis*.¹⁸³ In an unusually brief opinion,¹⁸⁴ the *Davis* court wrestled with the eternally elusive definition of "knowingly and willfully." The defendant, Howard Davis, appealed his convictions for violating the Anti-Kickback Statute, claiming that the trial court improperly instructed the jury as to the requisite mental state.¹⁸⁵ At trial, the court refused to grant Davis' requested instruction to the jury that it could "find Davis guilty of conspiracy only if it finds that Davis' cash payments to a certain doctor were 'for no other purpose' than 'inducing the referral of Medicare patients.'"¹⁸⁶ The court also refused to grant Davis' "requested instruction dealing with the subject of good faith because those concepts were adequately explained through the [trial] court's definitions of the terms 'knowingly' and 'willfully.'"¹⁸⁷ Instead, the court instructed the jury that

knowingly "means that the act was done voluntarily and intentionally, not because of mistake or accident," and willfully "means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids; that is to say, with bad purpose either to disobey or disregard the law."¹⁸⁸

the prohibited conduct with the specific intent to violate the statute. . . . [and] therefore decline to follow the *Hanlester* interpretation of the Anti-Kickback Statute."

182. See *Neufeld*, 408 F. Supp. at 497, citing *United States v. Jain*, 1995 WL 9301, *4 (W.D. Mo. 1995) (the trial court decision from which the defendants appealed in *Jain*); see also *supra* note 116 and accompanying text.

183. 132 F.3d 1092. Note in looking back at *Greber* that one of the judges deciding that case, the Honorable John Minor Wisdom, was a Fifth Circuit judge sitting by designation. Although Judge Wisdom did not later sit on the *Davis* case, it is interesting to speculate as to whether the court would have reached a different decision if he had indeed been on the bench.

184. The *Davis* court does not even bother to relate the underlying facts involved in the case. Apparently, it did not wish to burden the reader with such trivial matters as identifying the defendant's conduct that violated the Anti-Kickback Statute or even his occupation and position.

185. See *Davis*, 132 F.3d at 1094.

186. *Id.*

187. *Id.*, citing *United States v. Upton*, 91 F.3d 677, 683 (5th Cir. 1996).

188. *Id.* at 1094.

On appeal, Davis argued that the “general definitions” of “knowingly” and “willfully” were inadequate because the Anti-Kickback Statute contains a “heightened scienter requirement.”¹⁸⁹ Davis based his appeal on the holding of *Hanlester Network*. In rejecting Davis’ argument, the court avoided a direct analysis of *Hanlester Network*:

Without deciding whether the statute does contain such a requirement . . . we note that even the *Hanlester [Network]* court requires knowledge only that the conduct in question was unlawful, and not necessarily knowledge of which particular statute makes the conduct unlawful.¹⁹⁰

This statement, however, reflects a misinterpretation of *Hanlester Network*. If the court had examined *Pomponino* and *Ratzlaf*, the cases upon which the *Hanlester Network* court largely based its decision, the Fifth Circuit would have realized that *Hanlester Network* does require that defendants know which statute they are violating.¹⁹¹ Granted, *Pomponino*, *Ratzlaf*, and *Hanlester Network* did not require that defendants be able to recite the language of the statutes they were charged with violating. At the same time, however, it would be ridiculous to claim that *Hanlester Network*’s requirement that a defendant “engage in prohibited conduct with the specific intent to disobey the law”¹⁹² can be satisfied if the defendant only has some vague concept of the law in question. In fact, the *Davis* court misunderstands the *Hanlester Network* two-prong test, the first prong of which specifically requires that a defendant “know that § 1128B prohibits offering or paying remuneration to induce referrals.”¹⁹³ Thus, contrary to the holding in *Davis*, *Hanlester Network* does indeed require “knowledge of which particular statute makes the conduct unlawful.” It is disconcerting that the Fifth Circuit made such a blatant error, especially considering that it cites the exact page where this language is found in *Hanlester Network*.¹⁹⁴

189. *Id.*, citing *Hanlester*, 51 F.3d 1390.

190. *Id.* at 1094.

191. The *Davis* court might have been correct if it had instead relied upon the “heightened intent” standard of *Jain*: “[T]he word ‘willfully’ means unjustifiably and wrongfully, known to be such by the defendant.” *Jain*, 93 F.3d at 440.

192. *Hanlester Network*, 51 F.3d at 1400.

193. *Id.*

194. See *Davis*, 132 F.3d at 1094.

III. RESOLVING THE CONFLICT: WHERE ARE CONGRESS, HHS, AND THE SUPREME COURT WHEN YOU NEED THEM?

To resolve the inconsistency in judicial interpretations and applications of the Anti-Kickback Statute's scienter requirement, one commentator, Tamsen Love, has suggested that the term "willfully" be read as requiring that a defendant have engaged in the prohibited conduct with a "corrupt intent."¹⁹⁵ Moreover, Love believes that an act violating the statute should show a "guilty mind" that made a "criminal choice."¹⁹⁶ Although Love never precisely defines "corrupt intent," she seems to suggest that a court must find that a defendant was motivated by some type of sinister objective (i.e., defrauding the government) when partaking in activity prohibited by the statute.¹⁹⁷ Arguably, this could be a workable standard, albeit one that is highly fact specific.¹⁹⁸ And, undoubtedly, on the surface it is far more reasonable than *Hanlester Network's* absurdly restrictive reading of the statute. However, the problem (lest we forget) is that a finding of "corrupt intent" is not mandated anywhere in the language of the statute nor its legislative history. In fact, there is not even so much as a hint that this is what Congress had in mind when it chose the words "knowingly and willfully" to define the requisite *mens rea*.

Love acknowledges that "[i]n a legal context, 'willfully' may be defined as 'proceeding from a conscious motion of the will,' 'deliberate,' 'designed,' 'purposeful,' or in other ways that track

195. See Love, *supra* note 168, at 1055-1058.

196. See *id.* at 1055, 1056.

197. For example, Love proposes that "[c]ourts should look not merely to whether defendants intend to provide remuneration to induce future referrals, which encompasses a great deal of harmless and even desirable conduct, nor to whether they intend to violate the law. Rather, courts should refocus the intent issue as a straightforward *mens rea* or 'guilty mind' standard. That is, courts should look to whether a defendant acted with a corrupt intent." *Id.* at 1058. Excerpts such as these leave the reader to ponder what exactly Love believes constitutes a "corrupt intent." Although she offers *Greber* as a case in which it was clear that the defendant had a corrupt intent, she never demarcates the parameters of this standard. Indeed, one could argue that Love's proposal would push courts even further into the judicial abyss of applying a definition similar to the one once articulated by Justice Stewart for pornography — "I know it when I see it." *Jacobellis v. Ohio*, 378 U.S. 184, 196 (1964) (Stewart, J., concurring).

198. Love claims that "[t]his intent requirement, though perhaps not overly precise, certainly renders the statute no more vague and open-ended than the current version of the statute." Love, *supra* note 168 at 1057. If this characterization is true, however, the author is dubious of the propriety in replacing one enigmatic standard with another.

the ordinary definition of the term.”¹⁹⁹ In addition, she believes that “[a]ll of these definitions are very different from ‘knowingly,’ and yet none goes so far as to require a specific intent to violate the law.”²⁰⁰ While all of this may be true, it still cannot be said that one of the “ordinary definitions” of “willfully” is congruous with a “corrupt intent.” Consequently, even if Love’s proposal would help to rectify the problem that currently plagues courts trying to interpret “knowingly and willfully,” ultimately the proper forum for such a resolution is Congress. Congress should amend the statute to make it clear just what amount of culpability it intended to attach to these words for purposes of the Anti-Kickback Statute. It would be beyond the permissible scope of the judiciary to incorporate a “fundamentally corrupt intent”²⁰¹ element into the statute when no basis for such a reading can be found in the language of the statute, its legislative history, or, for that matter, any other source of legal authority.

This is not to say that it would be improper for the Supreme Court to take the matter under review. In fact, the opposite is true. As *Davis* exemplifies, the trend among the Courts of Appeals appears to be that of continuing to deliver a broad range of interpretations of the Anti-Kickback Statute’s scienter requirement. With this in mind, it becomes obvious that this issue is ripe for review by the Supreme Court. Until either Congress amends the Anti-Kickback Statute or HHS provides interpretive guidance, the inconsistency in interpretation of “knowingly and willfully” should be resolved by the Supreme Court. Contrary to the Solicitor General’s position after *Hanlester Network*,²⁰² a conflict among the Courts of Appeals *does* exist, even more so after the Fifth Circuit’s recent decision in *United States v. Davis*. In order to obtain a clear judicial standard, the next party to receive an unfavorable interpretation of the scienter requirement from one of the Courts of Appeals should petition the Supreme Court for a writ of certiorari.²⁰³

A writ of certiorari provides, in part, for “[c]ases in the [C]ourts of [A]ppeals [to] be reviewed by the Supreme Court . . .

199. *Id.* at 1056.

200. *Id.* at 1056-57.

201. *Id.* at 1057.

202. *See supra* notes 103-107 and accompanying text.

203. Unfortunately, it is too late for even one of the litigants in *Davis* to petition the Court as this must be done within 90 days after an entry of judgment. *See* U.S. SUP. CT. R. 13(1), 28 U.S.C. § 2101 (1998).

upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree."²⁰⁴ Although there are almost no technical barriers to review under a writ of certiorari,²⁰⁵ the granting of writs has been narrowly limited.²⁰⁶ In the words of Justice Scalia on behalf of the Supreme Court:

A principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States [C]ourts of [A]ppeals and state courts concerning the meaning of provisions of federal law. With respect to federal law apart from the Constitution, we are not the sole body that could eliminate such conflicts . . . Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute . . . Ordinarily, however, we regard the task as initially and primarily ours.²⁰⁷

United States Supreme Court Rule 10 enumerates some of the factors the Court considers in deciding whether to grant certiorari, including:

1. If "a United States [C]ourt of [A]ppeals has entered a decision in conflict with the decision of another United States [C]ourt of [A]ppeals on the same important matter;" or
2. If "a state court or a United States [C]ourt of [A]ppeals has decided an important question of federal law that has not been, but should be, settled by [the Supreme] Court, or has decided an important federal question in a way that conflicts with relevant decisions of [the Supreme] Court."²⁰⁸

Reviewing the caselaw discussed throughout this article, it becomes apparent that both of these factors have been satisfied as to the Anti-Kickback Statute's scienter requirement. *Greber, Hanlester Network, Jain, and Davis* all interpret "knowingly and willfully" somewhat differently, thereby meeting the demands of the first factor. In fact, in *Davis*, the Fifth Circuit even misinterpreted the ruling of another Court of Appeals.²⁰⁹ Moreover, with the increased focus of the federal government on eradicating fraud and abuse in the Medicare and Medicaid programs, no one could earnestly deny that clarification of the Anti-Kickback

204. 28 U.S.C. § 1254 (1998).

205. See 4 AM. JUR. 2d *Appellate Review* § 4 (1995).

206. See 16B WRIGHT, CHARLES A., ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 4004 (2d ed. 1996). "Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons." U.S. SUP. CT. R. 10, 28 U.S.C. § 2102 (1998).

207. *Braxton v. United States*, 500 U.S. 344, 347-48 (1991) (unanimous decision) (citations omitted).

208. U.S. SUP. CT. R. 10, 28 U.S.C. § 1651 (1998).

209. See *supra* notes 193-94 and accompanying text.

Statute's scienter requirement is an "important matter."²¹⁰ Likewise, the second factor also has been met by virtue of the Florida state appellate court's decision in *Medical Development Network, Inc. v. Professional Respiratory Care/Home Med. Equip. Serv., Inc.*,²¹¹ in which the court explicitly rejected the Ninth Circuit's decision in *Hanlester Network*.²¹² *Medical Development* can thus be viewed as satisfying the second factor in one of two ways. First, the court interpreted a federal statute in a manner that is unsettled among the federal Courts of Appeals and that is in conflict with at least one of those courts (i.e., the Ninth Circuit). Therefore, the Florida court "decided an important question of federal law that has not been, but should be, settled by the Supreme Court."²¹³ Second, because the Florida court (in contrast to the Ninth Circuit) also believed that the Supreme Court's holding in *Ratzlaf* was inapplicable to the Anti-Kickback Statute, it arguably "decided an important federal question in a way that conflicts with relevant decisions of the Supreme Court."²¹⁴

CONCLUSION

Until providers and others in the health care industry receive clear guidance from either Congress, HHS, or the Supreme

210. One notable source has pointed out that "[a]s the number of cases seeking review has grown, the [Supreme Court] docket has had to be devoted more and more to constitutional and statutory questions that are likely to have widespread and general impact." WRIGHT, ET AL., *supra* note 206, § 4004.1 (notes omitted). Undoubtedly, resolving the "statutory question" of the Anti-Kickback Statute's scienter requirement is "likely to have widespread and general impact" (at least on the health care industry) for the reasons discussed *supra*. Furthermore, the Supreme Court has granted certiorari in other cases involving disagreement among the Courts of Appeals as to the proper interpretation of a statute. See, e.g., *Central Bank v. First Interstate Bank*, 511 U.S. 164, 170 (1994) (The Supreme Court "granted certiorari to resolve the continuing confusion over the existence and scope of the [Securities Exchange Act of 1934] § 10(b) aiding and abetting action."); *United States v. Burke*, 504 U.S. 229, 233 (1992) ("We granted certiorari to resolve a conflict among the Courts of Appeals concerning the exclusion of Title VII backpay awards from gross income under [26 U.S.C.] § 104(a)(2).").

211. 673 So.2d 565, 567 (Fla. App. 1996).

212. See *supra* note 181.

213. See *supra* note 208 and accompanying text.

214. See *Foucha v. Louisiana*, 504 U.S. 71, 75 (1992) (finding that "[b]ecause the case presents an important issue and was decided by the court below in a manner arguably at odds with prior decisions of this Court, we granted certiorari"). Similarly, the *Medical Development* court's decision is "arguably at odds" with the Supreme Court's holding in *Ratzlaf*, thereby justifying a grant of certiorari. See also *Arizona v. Mauro*, 481 U.S. 520, 525 (1987) ("Because the decision below appeared to misconstrue our decision in *Rhode Island v. Innis* . . . we granted the petition.").

Court, confusion and differing standards will continue to proliferate, as no one can be certain how the Anti-Kickback Statute's scienter requirement will be applied in individual cases. That such a situation has emerged seems ironic, given the Clinton Administration's emphasis on reforming health care and reducing the overall costs of this service to society. These goals can never be reached, however, until individuals and entities can be assured of what conduct and state of mind constitutes a violation of the Anti-Kickback Statute. Because the Anti-Kickback Statute is receiving increased attention from the DOJ under the auspices of Operation Restore Trust,²¹⁵ it is now imperative that this problem be expeditiously resolved. In the absence of legislative or regulatory clarification, the matter is ripe for Supreme Court review. Until such time, health care providers and their counsel will continue to face confusion and uncertainty when entering into transactions that are potentially within the scope of the Anti-Kickback Statute.

215. For a brief discussion of Operation Restore Trust and its resounding success, see Aaron M. Altschuler, et al., *Health Care Fraud*, 35 AM. CRIM. L. REV. 841, 871-72 (1998).