Battening Down the Hatches: Representing a Law Firm in the Stormy Seas of a Criminal Investigation

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"A lawyer is guilty of an offense for an act committed in the course of representing a client to the same extent and on the same basis as would a nonlawyer acting similarly."[1]

Even lawyers get into trouble with the law. And when they do—when the defense of a law firm in a professional negligence or breach of fiduciary duty case intersects with the defense of an individual in a criminal case—tactical and substantive complexities multiply, visiting eye-socket splitting headaches on even the most seasoned practitioners.

Yes, it happens: lawyers tip or trade on confidential information, drawing the ire of the SEC, the DOJ, and the client whose information was stolen and misused; lawyers misapply client funds or pay kickbacks to class representatives; they obstruct justice or suborn perjury; and lawyers sometimes even advance the objectives of a client's criminal enterprise, participate in a client's fraud, or launder money. The emergence of (or even allegations about) such unsavory conduct launches the law firm's lawyer into the land of parallel civil and criminal proceedings, slopping over into each other, and with the potential to readily ruin everyone's day.

This paper hopes to serve as a primer for the uninitiated, addressing issues such as joint or separate representation, joint defense agreements, assertions of the Fifth Amendment and its potential consequences, *respondeat superior* liability, stays of civil proceedings due to pending criminal charges, and other fun topics, too.

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[1] Restatement (Third) of Law Governing Lawyers § 8 (2000).

I. HOW LAWYERS GET INTO TROUBLE

It's worth beginning with an axiomatic but vital observation: lawyers have a unique relationship with the law. They're constantly exposed to others' foibles; they're under unique pressures to report the criminal conduct of their peers;[2] they're likely to be held to higher standards by society, jurors, and perhaps even the law itself;[3] and, once lawyers' troubles begin, the consequences are more complicated and more severe.[4]

Sometimes, lawyers find criminal trouble in the same, ordinary ways as their clients:

> In 1982, lawyer David Barber agreed to represent Mark McFarland in various civil, criminal and bankruptcy matters. The pair entered into what the Seventh Circuit would later describe as "an unusual arrangement with respect to the payment of attorney's fees: [they] agreed to plan the arson of several properties belonging to McFarland and to use the insurance proceeds to pay Mr. Barber." Although Barber was thorough—he stressed that the fires needed to appear accidental and recommended additional insurance (for which he paid)—he didn't realize that his client was already cooperating with the authorities. Barber was indicted on twelve counts; he pled guilty to one count of mail fraud and three counts of fraud on a bankruptcy court; and he ended up serving thirteen months in prison and five years on probation.[5]

David Barber's story only gets worse,[6] but this first act is enough to illustrate that lawyers can,

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[2] *See infra* Part VI; Model Rules of Prof'l Conduct R. 8.3(a) (1983) ("A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.").

[3] Restatement (Third) of Law Governing Lawyers § 8 cmt. c (2000) ("For example, a lawyer charged with the offense of fraud against a client will be held to the standards of disclosure to the client required by an applicable lawyer code. A criminal statute that, consistent with precedent and with accepted norms governing construction of a criminal statute, could be construed so as to make it consistent with an applicable lawyer-code provision should be so construed.").

[4] *See* Model Rules of Prof'l Conduct R. 8.4 (1983) ("It is professional misconduct for a lawyer to: . . . (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .").

[5] For more, see *United States v. Barber*, 881 F.2d 345, 346 (7th Cir. 1989).

[6] While out on probation, Barber learned that McFarland was about to be sentenced for a conviction on an unrelated fraud charge. Likely still smarting from McFarland's cooperation with the authorities, Barber wrote several letters to the USAO and the presiding judge, urging that his former client receive the strongest possible sentence. Unfortunately, these letters were written on "fraudulently acquired stationery of local businesses and bore forged signatures of their owners"—and Barber's fingerprints. *Id.* at 347. Barber's probation was revoked and he was sentenced to concurrent five-year sentences. *Id.*

just as easily as their clients, get into serious trouble with the law (creatively and repeatedly). Indeed, there are several crimes that pose particular dangers for lawyers—who regularly sign written declarations, prepare witnesses for sworn testimony, vigilantly advocate for their clients, and are constantly entrusted with confidential information:

- Perjury. Anyone who, "in any declaration, certificate, verification, or statement under penalty of perjury" intentionally "subscribes as true any material matter which he does not believe to be true" is guilty of perjury and can be fined, or imprisoned not more than five years, or both.[7]

- Subornation of perjury. Anyone who "procures another to commit any perjury is guilty of subornation of perjury, and shall be fined . . . or imprisoned not more than five years, or both."[8]

- Obstruction of justice. Anyone who endeavors to corruptly influence the due administration of justice can be fined, or imprisoned not more than ten years, or both.[9]

- Tampering with evidence. In *State v. Romeo*, the Iowa Supreme Court upheld an attorney-defendant's conviction for "record tampering" after he fabricated false receipts to protect his client from a theft charge.[10] Attorneys have also been convicted for concealing evidence.[11]

- Traditional fraud. Depriving clients of "the[ir] intangible right of honest services"[12] is a quick and easy route to criminal liability; in particular, lawyers often get into trouble for giving[13] and receiving[14] kickbacks. Defrauding your

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[7] 28 U.S.C. § 1621.

[8] 18 U.S.C. § 1622.

[9] 18 U.S.C. § 1503. Courts can exceed the ten-year sentencing limit in cases where the obstruction involves murder, attempted murder, or a class A or B felony against a petit juror. *Id.*

[10] *State v. Romeo*, 542 N.W.2d 543 (Iowa 1996).

[11] For more, see Elizabeth Cazden, *Criminal Liability of Attorney for Tampering with Evidence*, 49 A.L.R. 5th 619 (1997).

[12] *See* 18 U.S.C. § 1346; *see also Skilling v. United States*, 561 U.S. ___ (2010), 130 S. Ct. 2896, 2905 (2010) ("[T]here is no doubt that Congress intended § 1346 to reach *at least* bribes and kickbacks.") (emphasis in original).

[13] *See, e.g.*, *United States v. Lazar et al.*, No. 05-cr-00587 (JFW) (C.D. Cal.) at Dkt. No. 630 (sentencing Melvyn Weiss to 30 months' imprisonment for paying kickbacks to class action plaintiffs); *see also* Edvard Pettersson, *Weiss Sentenced to 2 1/2 Years for Kickback Scheme*, Bloomberg News, June 2, 2008, *available at* http://bloom.bg/IOhxpQ. In the interests of full disclosure, one of the authors of this article represented former Milberg Weiss partner William Lerach in that investigation.

[14] *See, e.g.*, *United States v. Hausmann*, 345 F.3d 952, 954 (7th Cir. 2003) (affirming personal injury

clients while breaching the fiduciary duties owed to them can lead to an indictment, too.[15]

- Securities fraud. Lawyers who use confidential information about clients—either for their own trading or as tippers—can be held criminally liable under § 10(b) of the Securities Exchanges Act and related Rule 10b–5.[16]

- Accomplice liability. A lawyer who advises a client, with knowledge of that client's intentions, becomes liable as an accomplice if his client's conduct is later determined to be criminal.[17]

- Money laundering. Unlike most creditors, lawyers are often privy to their clients' darkest secrets: conducting financial transactions with the proceeds "of some form of unlawful activity" could result in a $500,000 fine or twenty years' imprisonment, or both.[18] (And the firm may well lose the fees, too.[19])

- Bribery. Bribery of any public official—including jurors—with the intent to induce them "to do or omit to do any act in violation of the[ir] lawful duty" could result in up to fifteen years' imprisonment.[20]

A lawyer's duty of zealous advocacy is unquestionably "limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth."[21] But many of these lines are

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lawyer's sixty-day sentence for receiving kickbacks from chiropractor to whom he referred his clients).

[15] *See, e.g.*, *United States v. Bronston*, 491 F. Supp. 593, 593 (S.D.N.Y. 1980), *aff'd*, 658 F.2d 920 (2d Cir. 1981) (affirming Jack Bronston's indictment under 18 U.S.C. § 1341 for promoting the interests of one corporation "at and during the same times as his law firm was actively representing the adverse interests of the minority investors of [a bus shelter franchise].").

[16] *See, e.g.*, *United States v. O'Hagan*, 521 U.S. 642 (1997) (holding that criminal liability under § 10(b) may be predicated on the misappropriation theory). James O'Hagan, a Dorsey & Whitney partner, purchased shares and call options on the Pillsbury Company's common stock after Grand Metropolitan plc retained the firm regarding a potential tender offer. O'Hagan netted a $4.3 million profit—and an SEC investigation which culminated in a 57-count indictment.

[17] *See* Model Penal Code § 2.06(3) ("A person is an accomplice of another person in the commission of an offense if: . . . (a) with the purpose of promoting or facilitating the commission of the offense, he . . . (ii) aids or agrees or attempts to aid such other person in planning or committing it."); *see also* Matthew A. Smith, *Advice and Complicity*, 60 Duke L.J. 499, 501 (2010) ("Under the professional rules, a good-faith belief that the client's purpose was legal is exculpatory. Under the criminal law, that belief excuses nothing.").

[18] 18 U.S.C. § 1956.

[19] For more on forfeiture, see *infra* Part V.B.1.

[20] 18 U.S.C. § 201.

[21] *Nix v. Whiteside*, 475 U.S. 157, 166 (1986).

finer, trickier, and more complicated in the real world.

Think, for instance, about how you might advise a lawyer who sought your counsel because: during his representation of a murder defendant, he conducted his own investigation based on facts revealed by his client; and during those investigations, he found and inspected the body of one of his client's victims. Should he reveal the body's whereabouts—or risk violating various laws?[22] The New York court faced with these facts held that the lawyer was justified in keeping this information from the authorities: "There must always be a conflict between the obstruction of the administration of criminal justice and the preservation of the right against self-incrimination which permeates the mind of the attorney as the alter ego of his client."[23]

II. ORGANIZING THE REPRESENTATION

The law firm is not a typical client. Although many ordinary first instincts—establishing good rapport; allowing your client to tell the story and define the problem; working out what your client hopes to achieve—will serve you well, an array of particular problems should guide your approach from the outset. Who will represent the lawyer and who will represent the firm? Who will pay the lawyer's (or lawyers') fees? Is a joint defense agreement a good idea? What are the firm's (and its other lawyers') ethical and professional responsibilities? Is a formal internal investigation necessary?

A. SHARED AND DIVERGENT INTERESTS

In some ways, the firm's and its lawyer's interests will undoubtedly coincide. Generally, for instance, a law firm "may be vicariously liable for legal malpractice only when one or more of its principals or associates are liable for legal malpractice."[24] Make the individual lawyer's problems go away, and yours might, too.

In other ways, your interests and incentives may diverge dramatically. The lawyer, for instance, may benefit by pleading guilty, because "[t]hose who plead guilty to every element get sentence reductions of thirty-five percent or more."[25] For your client, though, the civil liability and public relations problems will probably be more important than the lawyer's criminal concerns; where the defendant lawyer pleads guilty to fraud, for instance, the law firm will have a harder time defeating a civil *respondeat superior* suit.[26]

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[22] These facts are based on a New York state case, *People v. Belge*, 372 N.Y.S.2d 798, 799 (N.Y. Co. Ct. 1975). The New York public laws that Francis Belge was accused of violating required that (a) a decent burial be accorded the dead, and (b) anyone knowing of the death of a person without medical attendance report that death to the proper authorities.

[23] *Id.*

[24] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939, 945 (Ohio 2009); *see also Illinois Nat'l Ins. Co. v. Wiles, Boyle, Burkholder & Bringardner Co., L.P.A.*, 931 N.E.2D 215, 222–23 (Ohio 2010).

[25] Stephanos Bibas, *Legal Issues and Sociolegal Consequences of the Federal Sentencing Guidelines: How* Apprendi *Affects Institutional Allocations of Power*, 87 Iowa L. Rev. 465, 473 (2002).

[26] *See infra* Part V.A.

The complexities (and competing calculi) of each party's decisions—when to invoke the Fifth Amendment; whether to move to stay proceedings; whether to reveal or rely on confidential or privileged information—will most often counsel for separate representation.

Because these cases are sensitive, your law firm client should consider paying the lawyer defendant's legal fees. First, having a better lawyer reduces the firm's potential exposure, and "[p]aying for representation of an employee gives value to the corporation—and its creditors—when it tends to protect the corporation from criminal liability based on the employee's exposure."[27] Second, it will allow your client (and you) to be involved in deciding whom the lawyer retains, which should in turn improve the potential success and efficacy of any formal or informal joint defense agreement. This influence should not be underestimated; remember, whether the lawyer defendant testifies and what he says significantly impact the firm's civil and criminal liability.

B. JOINT DEFENSE AGREEMENTS

Joint defense agreements ("JDAs") allow parties—in our case, counsel for the law firm and counsel for the wayward lawyer—to communicate and share information about the litigation without waiving their respective privileges. The ordinary rule is that privilege is waived where communications occur in the presence of third parties;[28] under the joint defense doctrine, though, the attorney-client privilege extends to communications "made in confidence to an attorney for a co-defendant for a common purpose related to both defenses."[29]

JDAs are agreements between the lawyers, which should typically provide that:

- Parties to the JDA (*i.e.*, the lawyers) are entitled to communicate and share information as they see fit. Unless explicitly stated otherwise, any communications between joint defense group members are protected by—depending on the nature of those communications—their clients' attorney-client privilege and/or the parties' attorney work product privileges.

- The client of a joint defense group member (*i.e.* the wayward lawyer or her law firm) is not a third party, and, as such, disclosure of information to that client does not constitute a waiver of privilege.

- No information shall be disclosed to third parties by any member of the JDA without the prior written consent of the relevant joint defense group member.

- No information is to be used against any other party to the JDA for any reason—including the litigation in question. (Many JDAs create an exception for

[27] *Fed. Land Bank Ass'n of S. Alabama, FLCA v. Cornelius & Salhab*, CIV. A. H-09-3115, 2010 WL 3545406 (S.D. Tex. Sept. 9, 2010).

[28] *United States v. Gann*, 732 F.2d 714, 723 (9th Cir.), *cert. denied*, 469 U.S. 1034 (1984).

[29] *See, e.g., United States v. McPartlin*, 595 F.2d 1321, 1336–37 (7th Cir.), *cert. denied*, 444 U.S. 833 (1979).

information that was already in the possession of, or known by, the receiving party at the time that it was communicated.)

JDAs present a host of particular, complicated questions. Before signing, be sure to consider:

- What happens if a member of your JDA enters into an agreement with the plaintiff(s)?
- What happens if a member withdraws from the JDA?
- Does the JDA obligate the parties to share information?
- How will the JDA affect any subsequent action your law firm client might want to take against its lawyer employee?
- Although imputed conflicts are likely not a problem where the parties are a lawyer and her law firm, your client still needs to be careful: courts have held that "an attorney may be disqualified if her client's interests require that she cross-examine (or opposed in a subsequent action) another member of the [JDA] about whom she has learned confidential information."[30]

JDAs provide important opportunities and insights and may allow you to keep abreast of (and have input into) the lawyer's legal strategy. But questions of joint representation are complicated—and the legal uncertainties underlying joint defense privilege are compounded where all parties (the lawyer, the law firm, and their counsel) are lawyers. Remember that lawyers have particular and unique obligations to report the criminal conduct of their peers;[31] although these obligations are waived when information is protected by privilege, "[c]ourts have consistently viewed the obligations created by joint defense agreements as distinct from those created by actual attorney-client relationships."[32]

C. INTERNAL INVESTIGATIONS

Rarely, your client may be required to conduct an internal investigation—if, for instance, the wayward lawyer has run afoul of the Foreign Corrupt Practices Act by bribing a foreign official or paying kickbacks to obtain or retain business. Often, if the firm is considering dismissing the lawyer, a thorough investigation will help insulate the firm from future litigation over wrongful termination. Most likely, though, the firm's biggest concern will be its vicarious liability.

An effective internal investigation can (i) mitigate the firm's exposure by halting the misconduct; (ii) help assess the extent of the firm's exposure; (iii) provide government investigators with an outline of the case, often considered to be valuable cooperation; and (iv) demonstrate that the firm has an effective program to detect and prevent criminal misconduct by its employees—a

[30] *United States v. Stepney*, 246 F. Supp. 2d 1069, 1075 (N.D. Cal. 2003).

[31] *See* Model Rules of Prof'l Conduct R. 8.3(a); *see infra* Part VI.

[32] *Stepney*, 246 F. Supp. 2d at 1080.

factor that counsels for reduced fines under the Organizational Sentencing Guidelines.

If your firm client decides to conduct its own internal investigation, there are several steps it should take to protect its attorney-client privilege and work product immunity:

1. The firm should have a regular, appointed general counsel—and should not attempt to fill this role on an ad hoc basis.

2. The firm should explicitly request (and document its request) that the general counsel conduct the investigation for the purpose of providing legal advice to the firm.

3. Firm counsel should treat the investigation as they would any other client matter.

4. As with any privileged firm work, the general counsel should be careful to safeguard the attorney-client and work-product privilege: "he cannot discuss investigations with curious partners or associates, and written communications must be kept confidential. In-house counsel should report to the firm's management committee or to its managing partner, depending on the firm's structure. Counsel must confine his communications to only those lawyers in the firm's structure who, because of their positions or responsibilities, need to know the information conveyed. Counsel must, in the course of any investigation, advise those attorneys or staff with whom he speaks that their communications are confidential and must be kept that way."[33]

Although protecting privilege is always of paramount importance, waiver has especially significant consequences in this context: first, the firm is already dealing with a difficult public relations problem and cannot afford to risk waiving its own privileges; second, if privilege is waived, the investigating lawyers may well find themselves obliged to report their wayward colleague's misconduct to the state bar.[34] If there is no designated general counsel, the sanctity of the firm's privileged information cannot be ensured; in these cases, you should advise the firm to outsource any investigation. (Hiring outside counsel to conduct an investigation is not without its own complications, of course: Will the investigators need access to confidential or privileged client information? Does the firm need its clients' consent? Will disclosing an investigation to implicated clients increase the firm's civil liability exposure?)

III. DEALING WITH LAW ENFORCEMENT

For the civil litigator familiar with meet and confer letters, protective orders and motions to compel, the government's discovery powers in criminal or SEC formal investigations arrive like

[33] *See generally* Douglas R. Richmond, *Essential Principles for Law Firm General Counsel*, 53 U. Kan. L. Rev. 805, 833 (2005); Douglas R. Richmond, *Law Firm Internal Investigations: Principles and Perils*, 54 Syracuse L. Rev. 69 (2004).

[34] For more, see *infra* Part VI.

a cold, hard slap in the face. Meet the grand jury subpoena.[35] With a grand jury subpoena, prosecutors can subpoena just about anything from just about anywhere, and the displeased recipient has virtually no recourse or ability to delay. They get bank records, phone records and credit card records—usually without the knowledge of the people being investigated. Grand jury subpoenas can also be used to summon witnesses for secret testimony before the grand jury.[36] In federal courts and two-thirds of the states, the witness—even a target witness—has no right to have counsel present.[37] Lawyers must wait in the hallway and can only give advice if and when the witness asks for a break to confer with counsel.

While a grand jury witness can assert her Fifth Amendment rights and refuse to testify, the right to refuse goes away if the government chooses to give immunity to the witness.[38] For this reason, prosecutors sometimes refer to immunity orders as "compulsion orders," because they do just that—compel the witness to testify.[39] If a witness then declines, they can be sent straight to jail for civil contempt during the life of the grand jury, and then later sentenced for criminal contempt.[40] The grand jury process is designed to give prosecutors great leeway and powerful tools in rooting out criminal conduct—but, although the grand jury is a <u>criminal</u> tool, the fruits of their investigations can often be used for <u>civil</u> purposes too.[41]

SEC lawyers have almost as much fun when conducting formal investigations of violations of

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[35] Sara Beale et al., *Grand Jury Law and Practice* § 6:3 (2d ed. 2008) ("Grand juries have universally been accorded the power to compel witnesses to testify before them, and to obtain physical evidence by subpoena as well. A subpoena to compel the testimony of a witness is known as a subpoena ad testificandum, while a subpoena that calls for the production of physical evidence, either with or without oral testimony, is known as a subpoena duces tecum.").

[36] *See, e.g.*, Cal. Penal Code § 939.2 ("A subpoena requiring the attendance of a witness before the grand jury may be signed and issued by the district attorney . . . ."). In the federal and most state systems, the prosecutor is empowered to use the subpoena power—often without the grand jury's authorization—"to marshal evidence for presentation to the grand jury. . . ." Beale et al., *supra* note 33, § 6:2.

[37] In federal proceedings and about two-thirds of the states, courts have held that a suspect is not entitled to be accompanied by counsel. In the remaining third of states, legislation does provide —at least in some circumstances—that witnesses are entitled to counsel during testimony. *See* Beale et al., *supra* note 33, § 6:25.

[38] The federal immunity statutes provide for grants of immunity to witnesses before a court of grand jury, 18 U.S.C. § 6003, and in agency proceedings, 18 U.S.C. § 6004. The very purpose of immunity is to overcome a witness's reliance on Fifth Amendment protections against self-incrimination. *See* Beale et al., *supra* note 33, § 7:2.

[39] Indeed, a grant of immunity "is the <u>only</u> means by which prosecutors can compel testimony from witnesses who refuse to testify on Fifth Amendment grounds." *Id.* at § 7:1 (emphasis added).

[40] *See generally id.* at § 11.

[41] *See id.* at § 10:3 ("The law requires only that the disclosure of the grand jury materials for civil purposes be authorized by the statutes or rules governing disclosure of grand jury materials, such as Rule 6(e) of the Federal Rules of Criminal Procedure.").

the securities laws. They can subpoena documents and witnesses,[42] forcing the latter to come to an SEC office and answer questions on the record for as long as the SEC is interested in asking them.[43] Courts rarely interfere with SEC investigations, and it constitutes the federal crime of perjury to lie during SEC testimony.[44]

Often, especially these days, federal prosecutors and the SEC work together. The SEC will subpoena documents and take testimony, clandestinely sharing what they receive with the prosecutors. (This is not a two-way street: if the prosecutors were using grand jury subpoenas, they likely could not share their evidence with the SEC, due to grand jury secrecy.[45]) If the evidence uncovered by the SEC is powerful enough, the SEC and the DOJ might announce the simultaneous filing of a criminal indictment and an SEC civil enforcement action.

Given the power these agencies wield in investigating and prosecuting suspected wrongdoing, counsel for any entity, especially a law firm, must seriously consider interacting with them in a

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[42] The SEC's subpoena powers have been significantly expanded over the past few years—temporarily in 2009 and permanently in 2010. The Commission delegated subpoena power to enforcement director Robert Khuzami, who subsequently authorized a number of his deputies. According to Khuzami, "[t]his means that if defense counsel resist the voluntary production of documents or witnesses . . . there will very likely be a subpoena on your desk the next morning." Zachary A. Goldfarb, *SEC enforcement division granted permanent subpoena powers*, Wash. Post, Aug. 12, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/11/AR2010081106274.html. *See also* Robert Khuzami, Address at the Society of American Business Editors and Writers (Mar. 19, 2010), *available at* http://www.sec.gov/news/speech/2010/spch031910rsk.htm ("[W]e have also delegated the authority to start formal investigations and issue subpoenas back to the senior officers in the Division, and no longer require these orders to be circulated to other Divisions and voted upon [by] the Commission. This expedites the investigative process and allows us to respond quickly and forcefully to persons who are less than cooperative in our investigations.").

[43] The federal securities laws provide that "any member of the Commission or any officer designated by it is empowered to administer oaths and affirmations, subpoena witnesses, compel their attendance, take evidence, and require the production of [documents] the Commission deems relevant or material to the inquiry." Securities Exchange Act of 1934 § 21(b), 15 U.S.C. 78u(b).

[44] This is true whenever a witness is placed under oath—whether compelled by subpoena or volunteering to testify. Indeed, 18 U.S.C. § 1001(a)(2) provides for imprisonment and financial penalties whenever an individual "makes any materially false, fictitious, or fraudulent statement or representation" in any matter within the jurisdiction of an executive branch of the United States Government—and applies whether or not the witness is under oath.

[45] Federal Rule of Criminal Procedure 6(e)(2)(B) imposes an express obligation of secrecy on attorneys for the government and their assistants. There are several exceptions, including: government lawyers may disclose grand jury matters to another federal grand jury, Fed. R. Crim. P. 6(e)(3)(C); or, where the matter involves foreign intelligence or a threat of terrorism, to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official," Fed. R. Crim. P. 6(e)(3)(D). With the exception of Alabama and Connecticut, all states impose at least some obligations of secrecy on grand jurors and attorneys and court officers privy to grand jury proceedings.

candid and forthright way from the outset. Establishing or preserving the credibility of the law firm may shield it from the harsh actions which may later be taken against its wayward lawyer.

Here, too, one should think about the significant consequences of joint representation. Working together, the parties' ability to share information can be of huge advantage—especially in the face of grand jury secrecy—and may help ward off classic prisoner's dilemma problems. But lawyers doing double duty can find themselves in ethically complicated situations: restricted from negotiating immunity for individual clients;[46] or unable both to preserve confidentiality and provide rigorous representation.[47]

IV. BALANCING CRIMINAL AND CIVIL PROCEEDINGS

A lawyer accused of criminal misconduct will have to balance competing interests: the state's criminal case; an almost-certain parallel civil suit; and disciplinary proceedings that could cost the lawyer her license.[48] Although the lawyer-defendant's two most important decisions—whether to move to stay the civil proceedings and whether to invoke her Fifth Amendment protections—may well be beyond the firm's control, both can have consequences that should not be underestimated.

A. STAYING THE CIVIL PROCEEDINGS

Staying a civil suit to deal with a related or parallel criminal proceeding is sometimes, but certainly not always, an important tool. When an accused lawyer is contemplating, and attempting to prioritize, a panoply of penalties (jail time, fines, malpractice exposure, and expulsion from the profession), a stay of all but the criminal action may allow her to focus her energies. It will also save her (and the law firm) from the negative civil consequences of invoking the Fifth Amendment. But these benefits aren't free: as the firm's lawyer, always remember that by postponing the civil suit, the defendants—you—lose the powerful tools of civil discovery.

B. STAY MECHANICS

Both state and federal courts have held that the pendency of parallel or related criminal proceedings can provide a basis for staying the civil suit—although stays are extraordinary remedies and are "not constitutionally required whenever a litigant finds himself facing dilemmas inherent in pursuing civil litigation while being the subject of a related criminal investigation."[49]

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[46] *See, e.g., Ruffin v. Kemp*, 767 F.2d 748 (11th Cir. 1985) (habeas granted because counsel negotiated plea agreement for codefendant who agreed to testify against Ruffin, creating conflict of interest that adversely affected counsel's performance).

[47] For more, see Nancy J. Moore, *Disqualification of an Attorney Representing Multiple Witnesses Before a Grand Jury: Legal Ethics and the Stonewall Defense*, 27 UCLA L. Rev. 1 (1979).

[48] *See supra* text accompanying note 2; *see also* Model Rules of Prof'l Conduct R. 8.4.

[49] *Sterling Nat'l Bank v. A-1 Hotels Intern., Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001).

In determining whether to grant stays in these situations, courts have applied a number of tests that all, fundamentally, require balancing equities. Courts have held, for instance, that because some attempt must be made to accommodate a civil litigant's Fifth Amendment concerns, a stay should be granted if one party requests it and the other party will not be substantially prejudiced.[50] The competing interests typically include:[51]

- the extent to which the criminal and civil proceedings overlap;
- the status of the proceedings, including whether the defendant has been indicted;
- whether the government entity behind the criminal case is also a party in the civil case;
- the interests of the civil plaintiff in proceeding expeditiously and the potential prejudice to plaintiff as a result of any delay;
- the interests of, and burden on, the defendant;
- the extent to which the defendant's Fifth Amendment rights are implicated and/or have already been waived;
- the interests of persons not parties to the civil proceedings;
- the interests of the public in both the criminal and civil proceedings; and
- the court's interest in the efficient management of cases.

Courts have also sometimes opted to balance the parties' competing interests by sculpting tailored remedies: for example, "a court may issue a protective order sealing a deposition transcript until the completion of the criminal proceeding or stay discovery only as to certain defendants or non-party witnesses while letting discovery proceed as to others."[52]

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[50] *In re Phillips, Beckwith & Hall*, 896 F. Supp. 553, 558 (E.D. Va. 1995).

[51] *See, e.g., Keating v. Office of Thrift Supervision*, 45 F.3d 322, 324 (9th Cir. 1994); *SEC v. Amerifirst Funding, Inc.*, 2008 U.S. Dist. LEXIS 21229 (N.D. Tex. March 17, 2008); *Hollinger Int'l, Inc. v. Hollinger Inc. et al.*, 2008 WL 161683 at *2 (N.D. Ill. Jan. 16, 2008); *Parker v. Dawson*, 2007 WL 2462677 at *3 (E.D.N.Y. Aug. 27, 2007); *In re CFS-Related Sec. Fraud Litig.*, 256 F. Supp. 2d 1227 (N.D. Okla. 2003); *Trustees of Plumbers & Pipefitters National Pension Fund v. Transworld Mechanical, Inc.*, 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995); *Ex Parte Ebbers*, 871 So.2d 776, 789 (Ala. 2003); *Ex parte Price*, 707 So.2d 1105 (Ala. 1997) (holding that defendant was entitled to protective order because constitutional privilege more important than interest in avoiding delay); *DeSiervi v. Liverzani*, 136 A.D.2d 527 (N.Y.A.D. 1988) (holding that defendant attorney's constitutional protection against self-incrimination was more important than civil plaintiff's interest in proceeding); *see also* Milton Pollack, *Parallel Civil and Criminal Proceedings*, 129 F.R.D. 201 (1990); PLI, *Defending Parallel Proceedings: Basic Principles and Tactical Considerations*, 1962 PLI/Corp. 943, 985 (2008) [hereinafter *PLI*].

[52] PLI, *supra* note 51, at 969.

Importantly, staying the civil proceedings is only really an option when the lawyer defendant has already been indicted; if he is dealing with only the threat of potential criminal proceedings, the case for a stay is significantly weaker.[53] This accords with the balancing test: while a criminal action may never happen, staying the civil proceedings will likely result in significant prejudice to the civil plaintiff's interests. Similarly, where criminal proceedings are complete, or there is no significant criminal exposure, courts are very likely to deny any motion to stay proceedings.[54]

Finally, bear in mind that the lawyer defendant also faces a potential third set of proceedings: disciplinary sanctions from the state bar association. Where the criminal conduct falls within the sphere of a lawyer's professional duties, courts have typically found that the factors weigh against issuing a stay in the disbarment proceeding.[55]

Although corporations do not enjoy Fifth Amendment protections (the foundation on which many stays are premised), there are other avenues for your law firm client to explore. In *Corcoran Law Group, LLC v. Posner, et al.*,[56] the Southern District of New York granted a law firm defendant's motion to stay civil proceedings because the lawyer was "a central figure in the action, and each cause of action directly involves her alleged conduct, [and] denying the stay as to the Posner Law Firm would likely lead to duplicative discovery efforts."[57]

C. INVOKING THE FIFTH AMENDMENT

The Fifth Amendment supports both the legal foundation for staying a contemporaneous civil action—and perhaps your biggest motivation for doing so. Lawyer-defendants tackling simultaneous criminal and civil cases will inevitably face a serious dilemma in depositions: whether to answer questions that call for incriminating responses. ("Did you arrange for McFarland to pay you by setting his properties alight? When did you buy common stock in the Pillsbury Company? Did you ever pay kickbacks to class action plaintiffs?")

Any answer will most likely be admissible against the defendant in his criminal prosecution,[58]

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[53] *See, e.g.*, *SEC v. Dresser Indus., Inc.*, 628 F.2d 1368, 1375–76 (D.C. Cir. 1980) ("Other than where there is specific evidence of agency bad faith or malicious government tactics, the strongest case for deferring civil proceedings until after completion of criminal proceedings is where a party under indictment for a serious offense is required to defend a civil or administrative action involving the same matter.").

[54] Pollack, *supra* note 51.

[55] *See, e.g.*, *Committee on Legal Ethics of West Virginia State Bar v. Pence*, 161 W.Va. 240 (1977); *Sternberg v. State Bar of Michigan*, 384 Mich. 588 (1971); *Fulmer v. State*, 445 S.W.2d 546 (Tex. Ct. Civ. App. 1960) (holding that the denial of a motion to stay civil proceedings for disbarment did not deny an attorney his rights under the Fifth Amendment where there were two related, pending criminal cases).

[56] No. 09 Civ. 1861 (WHP), 2009 WL 1739702 (S.D.N.Y. June 10, 2009).

[57] *Id.*

[58] *United States v. Veltmann*, 6 F.3d 1483, 1500–01 (11th Cir. 1993) ("Statements made in a civil deposition arising out of the same facts as a criminal prosecution are admissible as admissions when

and a direct admission of fraud, theft, or malpractice may have serious negative consequences for the civil suit (including, for instance, your client's ability to negotiate a settlement). Moreover, answering questions in the civil suit may constitute a waiver of Fifth Amendment privileges in the criminal proceedings too.[59]

The lawyer defendant's alternative—provided the question is incriminating[60]—is to invoke his Fifth Amendment rights.

1. ADVERSE INFERENCES

Although these protections are powerful, they're not without risk: refusal to testify can lead to adverse inferences against parties in the civil suit,[61] and, "in practice, an adverse inference instruction often ends litigation."[62]

Although law firms do not have Fifth Amendment privileges (and the decision to refuse to testify is the individual lawyer's), the firm may feel the risks just as acutely. No matter how cooperative the firm is, it can still have an adverse inference drawn against it in any civil proceedings based on its lawyer's refusal to testify. In *LiButti v. United States*, the Second Circuit identified a number of factors that courts should consider in deciding whether adverse inferences may be drawn against parties based on a non-party witness's decision to invoke the Fifth Amendment:

- the nature of the relationship between the defendant (the law firm) and the non-party witness (its lawyer);
- the degree of control of the party over the non-party witness;
- the compatibility of the interests of the party and non-party witness in the outcome of the litigation; and
- the role of the non-party witness in the litigation.[63]

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offered against the declarant."); *see also* Fed. R. Evid. 801(d)(2)(A).

[59] *See United States v. Kordel*, 397 U.S. 1 (1970) (holding that corporate officer who failed to assert Fifth Amendment privilege in responding to interrogatories directed to corporation cannot later complain in context of criminal proceeding that he was compelled to give testimony against himself).

[60] *See, e.g.*, *Nationwide Mut. Fire Ins. Co. v. Dunkin*, 850 F.2d 441 (8th Cir. 1988); *AT&T Broadband v. Private Cable Systems, Inc.*, No. 02 C 2338, 2002 WL 924635 (N.D. Ill. May 3, 2002).

[61] *See Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[62] *See Zubulake v. UBS Warber, LLC*, 220 F.R.D. 212, 219–20 (S.D.N.Y. June 20, 2004).

[63] *See LiButti v. United States*, 107 F.3d 110, 123-24 (2d Cir. 1997) (finding adverse inference against plaintiff daughter in wrongful levy action based on father's refusal to answer probative questions regarding effective ownership of property admissible in light of close relationship and identity of interest against the drawing of the inference); *see also* PLI, *supra* note 51.

Ultimately, the *LiButti* court held that the fundamental question is "whether the adverse inference is trustworthy under all of the circumstances and will advance the search for the truth."[64] Whether courts follow the *LiButti* test[65] or permit adverse inferences against an employer under general principles of vicarious liability[66] will matter less to your client than that it can happen at all. It can—and it does.[67]

2. LIMITATIONS ON ADVERSE INFERENCES

Because adverse inferences are severe sanctions, courts have limited their scope. First, be sure to research whether your jurisdiction even allows adverse inferences to be drawn at all. While the Supreme Court held in *Baxter*[68] that adverse inferences are permissible, they certainly haven't required them. Some states have completely eliminated the use of adverse inferences in connection with a defendant's decision to invoke her Fifth Amendment rights.

Second, adverse inferences can only be drawn where independent evidence exists to support the facts underlying questions the deponent refuses to answer.[69] Diligent preparation is more important than ever: if an attorney determines that a plaintiff lacks evidence to support its allegations, invoking the Fifth Amendment may be a win-win (*i.e.*, the deponent keeps the incriminating testimony off the record and doesn't suffer the adverse inference).

Third, perhaps relatedly, some courts have held that an adverse inference may not be the only basis for a judgment on the merits.[70]

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[64] *LiButti*, 107 F.3d at 124.

[65] *See, e.g.*, *Matter of Andrew Carothers M.D. P.C. v. Insurance Cos. Represented by Bruno Gerbino & Soriano LLP*, 26 Misc. 3d 448 (N.Y. Civ. Ct. 2009) (holding that a doctor's invocation of the Fifth Amendment could be imputed to his employer corporation in an insurance fraud case).

[66] *See, e.g.*, *Lentz v. Metro. Prop. & Cas. Ins. Co.*, 768 N.E.2d 538 (Mass. 2002) (affirming the trial court's determination that a body shop's employee's assertion of the Fifth Amendment could be imputed to the employer because the conduct at issue was within the scope of his employment).

[67] *See, e.g.*, *RAD Services, Inc. v. Aetna Casualty and Surety Co.*, 818 F.2d 271 (3d Cir. 1986) (holding that employees' assertion of the Fifth Amendment could be imputed to the corporation even where the employees were not parties to the civil suit because the activities were within the scope of their employment); *Cerro Gordo Charity v. Fireman's Fund American Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987) (holding that when a controlling member of a charitable organization invoked his right to remain silent, that invocation was admissible against the charity); *Labor Relations Comm'n v. Fall River Educators' Ass'n*, 416 N.E.2d 1340 (Mass. 1981) (allowing a reasonable adverse inference to be drawn against an organization whose officers invoked the privilege).

[68] *Baxter v. Palmigiano*, 425 U.S. 308 (1976).

[69] *See LaSall Bank Lake View v. Seguban*, 54 F.3d 387 (7th Cir. 1995); *Peiffer v. Lebanon School Dist.*, 848 F.2d 44 (3d Cir. 1988).

[70] *See Rockwood v. Computer Corp.*, 94 F.R.D. 64, 67 (E.D.N.Y. 1982) (holding that granting summary judgment against a defendant who invoked the Fifth Amendment "would impose a significant cost for the defendant's silence, and as such, would run afoul of the constitutional protection.").

Fourth, some courts have held that an adverse inference instruction is unduly prejudicial under Federal Rule of Evidence 403.[71]

D. ADVANTAGES OF PARALLEL PROCEEDINGS

Now that we have covered the difficulties of managing contemporaneous and parallel civil and criminal proceedings, let us be clear about the advantages.

Under Federal Rule of Civil Procedure 26, civil litigants are allowed to "obtain discovery regarding any matter relevant to the subject matter involved in the action."[72] As any civil lawyer knows, the discovery relevance standard is broad: if information even "appears reasonably calculated to lead to the discovery of admissible evidence,"[73] it's within the reach of civil discovery. This power is expansive: it would allow you to serve interrogatories on the SEC; depose the DOJ's key third-party witness; or request all relevant documents from a former client suing the lawyer and the firm for malpractice. A party (including the government) that seeks to withhold (non-privileged) information from your client in civil discovery must move for a protective order—and bears the burden of demonstrating "good cause."[74]

By contrast, the criminal defendant has very limited protection. He is entitled only to discovery that is "material to preparing [his] defense" or is intended for use by the government in its case-in-chief at the trial.[75] Remember, of course, that although the firm's civil liability may hinge on the outcome of its lawyer's criminal case, the firm itself may not be criminally implicated; in that case, absent a parallel civil suit, the firm will not have any discovery tools at its disposal.

V. THE FIRM'S LIABILITY

Having navigated potential investigations, decisions about the lawyer's representation, joint defense agreements, and the various and significant implications of the Fifth Amendment for both the lawyer and the firm, pay attention to the firm's own, direct exposure. Although a recent Ohio Supreme Court decision may have a significant impact on law firms' primary liability—the *Wuerth* court held that a law firm "does not engage in the practice of law and therefore cannot commit legal malpractice[76]—there is no doubt that your law firm client may itself have to deal with both civil and criminal suits. Under general partnership principles, lawyers are usually liable for the acts and omissions of their partners; and, under the doctrine of *respondeat superior*, for torts of their employees and agents.[77]

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[71] *See, e.g., Doe v. Glanzer*, 232 F.3d 1258, 1264–67 (9th Cir. 2000) (holding that the probative value of an adverse inference was substantially outweighed by the danger of unfair prejudice).

[72] Fed. R. Civ. P. 26(b)(1).

[73] *Id.*

[74] *Id.* at 26(c).

[75] Fed. R. Crim. P. 16(a)(1)(E).

[76] *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939, 943 (Ohio 2009).

[77] *See* Ronald E. Mallen & Jeffrey M. Smith, *Legal Malpractice* § 5:1 (2012 ed.).

A. CIVIL RESPONDEAT SUPERIOR LIABILITY

Most actions brought by clients against attorneys are for negligence, breach of fiduciary duty, breach of contract, or fraud;[78] these bases of liability "are familiar, usually easier to establish, and provide full relief."[79] These can be imputed to the lawyer's firm where an employee of the firm "was acting in the ordinary course of the firm's business or with actual or apparent authority."[80]

There are several things to consider when analyzing *respondeat superior* liability:

- Courts are divided on whether the law firm's liability requires liability of an underlying employee or agent. In Ohio, the answer is yes: if the lawyer cannot be held liable, the law firm can't either.[81] (Note that while this may seem advantageous to you and your law firm client, the rule also encourages savvy plaintiffs to sue all of the lawyers that may have been involved in his representation—which only complicates the problems of joint representation discussed earlier.) Elsewhere, the answer is no: the Fifth Circuit has held that Louisiana law allows "a plaintiff to bring suit against an employer when the employee is completely dismissed, even when the employer's sole basis for liability is vicarious liability . . . ."[82]

- The firm cannot be held liable unless the lawyer was "acting in the ordinary course of the firm's business . . . ."[83] Whether this has any practical limiting effect is unclear:

    - In *Dickinson v. Edwards*, the Supreme Court of Washington extended the doctrine of *respondeat superior* to cover a banquet-hosting employer if the plaintiff could show: (i) the employee consumed alcohol at the employer's party (at which the employee's presence was requested or impliedly required); (ii) knowing that he would have to drive later, the employee negligently consumed alcohol to the point of intoxication; (iii) the banquet-based intoxication was the subsequent and proximate cause of an accident. Because the court found that this banquet was beneficial to the employer, it held that the employee's alcohol consumption occurred "during the scope of his employment."[84]

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[78] *Id.* at § 8:1.

[79] *Id.*

[80] Restatement (Third) of Law Governing Lawyers § 58 (2000).

[81] *See, e.g., Wuerth*, 913 N.E.2d at 943.

[82] *Stanley ex rel. Estate of Hale v. Trinchard*, 579 F.3d 515, 51 Bankr. Ct. Dec. (CRR) 278, Bankr. L. Rep. (CCH) P 81555 (5th Cir. 2009).

[83] Restatement (Third) of Law Governing Lawyers § 8 cmt. a (2000).

[84] *Dickinson v. Edwards*, 716 P.2d 814 (Wash. 1986).

- In *Hayes v. Far West Services*, the Washington Court of Appeals affirmed a lower court's summary judgment dismissal of a law firm defendant where one of its lawyers had "imbibed considerable alcohol," got into an argument with another bar patron, and then, at 1:45 a.m., shot him.[85] Without any obvious irony, the court noted that there was no evidence that "that [the lawyer] was acting in the scope of his employment when he shot [the victim] or that he typically "transacted firm business . . . any time after 11 p.m."[86]

- Although law firms' *respondeat superior* liability flows directly from general principles, firm partners have a unique duty to supervise their employees: the Model Rules of Professional Conduct place responsibility for the ethical integrity of lawyers and employees of the firm on the partners or principals of law firms.[87] (To date, the ethical responsibility has been placed on the principals, not the law firm as an entity.[88])

- Although *respondeat superior* liability typically does not attach to independent contractors, basic principles of agency do apply to "of counsel" attorneys.[89]

- An affected third party can sue both the lawyer (as primarily liable) and the law firm (as secondarily liable)—but he cannot have his claim satisfied twice.[90]

B. CRIMINAL RESPONDEAT SUPERIOR LIABILITY

Although your client cannot be imprisoned, you should still be acutely aware of its potential criminal liability. In the United States, "[a] corporation may be criminally liable for almost any crime except acts manifestly requiring commission by natural persons, such as rape and

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[85] *Hayes v. Far W. Services, Inc.*, 749 P.2d 178, 178 (Wash. Ct. App. 1988).

[86] *Id.*

[87] *See* Model Rules of Prof'l Conduct R. 5.1 (1983); Mallen & Smith, *supra* note 77, at § 5:8.

[88] The Comment to Model Rule of Professional Conduct 5.1(c)(2) notes that "[p]artners of a private firm have at least indirect responsibility for all work being done by the firm, while the partner in charge of a particular matter ordinarily has direct authority over other lawyers engaged in the matter. Appropriate remedial action by a partner would depend on the immediacy of the partner's involvement and the seriousness of the misconduct."

[89] *See, e.g., Trimble-Weber v. Weber*, 695 N.E.2d 344 (Ohio Ct. App. 1997) ("Since Ohio law fails to address the liability of a law firm for the conduct of an 'of counsel' attorney, we will analyze this issue through traditional agency law principles."); *Hart v. Comerica Bank*, 957 F. Supp. 958 (E.D. Mich. 1997) ("The liability of a law firm for the malpractice of a lawyer involved with the firm is a matter of agency.").

[90] *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Wuerth*, 913 N.E.2d 939, 944 (citing *Losito v. Kruse*, 24 N.E.2d 705 (Ohio 1940) ("The plaintiff, in any event, can have but one satisfaction of his claim.").

murder."[91] Worse still, the standards courts use to attribute liability to a corporation are relatively easily satisfied—usually through principles of agency and *respondeat superior*.[92]

As a general rule, "a corporation is liable for the criminal acts of its employees if done on its behalf and within the scope of the employees' authority."[93] Unpacking that rule uncovers three requirements that must be met before the state can impose criminal liability on a corporation:[94]

1. A corporate agent—the lawyer—must have committed a criminal act;[95]

2. The agent must have acted within the scope of his employment. This "scope of employment" requirement includes any act committed while the employee was carrying out a job-related activity—and may even extend to activities that were expressly forbidden by the company;[96] and

3. The agent must have intended to benefit the corporation. This prong does not require that the agent act with the exclusive purpose of benefitting the company[97]—or even that the company ever have received the benefit.[98]

Sometimes, the government will threaten to indict (or, indeed, indict) a corporation to force it to cooperate with the criminal investigation(s) against its employee(s). Often, the goal is to have the company surrender confidential or privileged material; with law firms, the consequences of these tactics can be profound.

So far, it appears that only one major law firm has ever been criminally indicted: in May 2006, the government filed a twenty-count indictment against Milberg Weiss Bershad & Shulman, alleging conspiracy, obstruction of justice, perjury, fraud and money laundering.[99] According to

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[91] V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477, 1488 (1996); *see, e.g.*, *Com. v. Angelo Todesca Corp.*, 842 N.E.2d 930, 938 (Mass. 2006) ("[W]e consistently have held that a corporation may be criminally liable for such acts when performed by corporate employees.").

[92] Khanna, *supra* note 91, at 1488–89.

[93] *United States v. Demauro*, 581 F.2d 50, 53 (2d Cir. 1978).

[94] *See generally United States v. Singh*, 518 F.3d 236, 249 (4th Cir. 2008); *Mylan Labs., Inc. v. Akzo*, 2 F.3d 56, 63 (4th Cir. 1993); *United States v. Automated Med. Labs.*, 770 F.2d 399, 406–07 (4th Cir.1985).

[95] *See, e.g.*, *Com. v. Angelo Todesca Corp.*, 842 N.E.2d at 938 ("Clearly, a corporation cannot be criminally liable for acts of employee negligence that are not criminal.").

[96] Khanna, *supra* note 91, at 1489.

[97] *See United States v. Singh*, 518 F.3d 236, 251 (4th Cir. 2008) ("An agent may act for his own benefit while also acting for the benefit of the corporation.").

[98] Khanna, *supra* note 91, at 1490.

[99] Martha Neil, *Milberg Weiss on the Hot Seat*, ABA Journal, Dec. 2006, *available at* http://www.abajournal.com/magazine/article/milberg_weiss_on_the_hot_seat/. For more, see *supra*

prosecutors, the firm had—through two of its partners—"engaged in a multidecade, multimillion dollar scheme to make illegal payments to hand-picked clients serving as lead plaintiffs in class actions . . . ."[100] Two years later, federal prosecutors reached a settlement with the firm—dropping the criminal charges in exchange for $75 million in fines.[101] (Mel Weiss was sentenced to 30 months' imprisonment and a $10 million fine; Bill Lerach pled guilty to obstruction of justice and was sentenced to two years in prison and a $250,000 fine.)

1. FORFEITURE

A law firm can be forced to forfeit attorneys' fees under 21 U.S.C. § 853, if that firm has reason to believe that those fees were paid from the proceeds of criminal activities. In *In re Phillips, Beckwith & Hall*,[102] for example, the government sought to recover fees that it claimed were paid from drug trafficking profits. (Of that $103,800, "the government ultimately obtained forfeiture of approximately $18,000, a promissory note, four office chairs, and a [two-ninths] interest in a copier machine."[103] If you're wondering whether sharing your copy machine with the government might constitute cruel and unusual punishment, it's still unclear whether corporations have Eighth Amendment rights.[104])

VI. PROFESSIONAL RESPONSIBILITY

Lawyers dealing with the misconduct of other lawyers—which includes those representing or opposing a misbehaving lawyer or his firm—have to balance another set of peculiar, conflicting duties: the obligation to preserve confidentiality and the profession's interest in acquiring information about its misbehaving members.

The Model Rules of Professional Conduct make clear that a lawyer who knows that another lawyer has committed a violation of those rules "that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness . . . shall inform the appropriate professional authority."[105] But this mandatory reporting requirement does not extend to information "relating to representation of a client . . . ."[106]

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note 13.

[100] *Id.*

[101] Anthony Lin, *Milberg Agrees to Pay $75 Million in Settlement Over Kickback Scheme*, Law.com, June 17, 2008, *available at* http://www.law.com/jsp/article.jsp?id=1202422319517&slreturn=1&hbxlogin=1 (subscription required).

[102] 896 F. Supp. 553, 555 (E.D. Va. 1995).

[103] *Id.* at 560 n.1.

[104] For more, see Elizabeth Warren, *The Case for Applying the Eighth Amendment to Corporations*, 49 Vand. L. Rev. 1313, 1331 (1996).

[105] Model Rules of Prof'l Conduct R. 8.3 (1983).

[106] *Id*. at 1.6, 8.3(c).

Where the troubled lawyer himself is your client, ranking these competing interests is straightforward: the duty of confidentiality trumps the reporting obligation.[107] This may influence your evaluation of (or decision to enter into) a joint defense agreement.[108]

Things can get far trickier, though. Imagine your firm client approaches you about one of its lawyers: they have just discovered that he once helped a client launder money and they want to know what their reporting obligations are. The costs are high, of course: reporting him may thwart any potential cooperation or joint defense strategy; it could enhance (or lead to) an indictment for the lawyer or the firm; and it could result in enormous civil liability exposure. In an opinion that may surprise and worry you, the Connecticut Committee on Professional Ethics advised a similarly situated lawyer that "the acts of [the wayward lawyer] must be reported promptly to the Statewide Grievance Committee."[109] This opinion may be inadequate or wrong,[110] but your advice needs to be carefully considered. Failure to report an errant lawyer could constitute another ethics violation and further compound your client's concerns.

VII. PUBLIC RELATIONS

Your law firm client may already know how it wants to handle the media, but providing counsel on these issues will make you an invaluable ally—and help both you and the firm avoid potential setbacks. Remember:

- Expect the story to get out. News is instant, virtually omnipresent, and—in the age of online content—both permanent and instantly accessible.
- Do not ignore the story in the hope that it will go away; it won't.
- Think carefully about the message you want to convey. Identify a spokesperson, prepare them for interviews, and craft your message.
- Control the message internally, too. If other employees read about the law firm's problems from an outside source, they're more likely to distrust or resent the firm (and vent by speaking to the press as anonymous sources).

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[107] Peter K. Rofes, *Another Misunderstood Relation: Confidentiality and the Duty to Report*, 14 Geo. J. Legal Ethics 621, 629 (2001); *see also* Model Rules of Prof'l Conduct R. 1.6 cmt. 4 ("The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.").

[108] *See supra* Part II.B.

[109] Conn. Bar. Ass'n Comm. on Prof'l Ethics, Informal Op. 89-21 (1989).

[110] It fails, for instance, to consider the exception created by Model Rule 8.3(c), nor does it contemplate that information "relating to" the client's representation is "likely to include the manner in which [the wayward lawyer] chose to carry out the representation." Rofes, *supra* note 107, at 646.

- Consider whether, when, and how to alert clients. Doing so in the (criminal) legal malpractice context may impact the firm's credibility—but so, too, may keeping quiet.[111]

VIII. CONCLUSION

While in theory lawyers should know better, sometimes they don't. Instead, they may use a special combination of ingenuity and poor judgment to get themselves and their employers into civil and criminal litigation messes that an entire jar of migraine medicine won't fix. When that happens, it makes sense to reach out to that rare breed of defense lawyer—and there are a few—who specialize in both white collar criminal practice and defending lawyers and law firms in legal malpractice and related matters.

[111] For more, see Bill Murphy, Jr., *Bad Press? 5 Ways to React*, Inc. (May 7, 2012), *available at* http://www.inc.com/bill-murphy-jr/strategies-for-reacting-to-bad-press.html; Derede McAlpin, *When in Crisis, Watch Your Blind Side the First 48 Hours*, The Locker Room (Apr. 18, 2012), *available at* http://lockerroommag.com/when-in-crisis-watch-your-blind-side-the-first-48-hours/; Paramjit L. Mahli, *Crisis Communication: How to Manage Them Effectively*, ABA Law Practice Today (Jan. 2008), *available at* http://apps.americanbar.org/lpm/lpt/articles/mgt01081.shtml.