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## ETHICAL CONSIDERATIONS WHEN REPRESENTING HEALTH CARE ORGANIZATIONS

*John M. Burman\**

Representing physicians or other health care workers (physicians and other individual health care practitioners are referred to collectively as “HCWs”), medical organizations, physicians’ organizations, is not particularly unique. The same ethical standards apply that generally apply to lawyers who represent clients. As with any group or type of clients, however, there can be a few differences. Perhaps the main one in this area, however, is that the medical profession is itself, unique, subject to myriad federal and state laws that govern the payment and receipt of government funds for HCWs and organizations that provide health care services, as well as laws about virtually every aspect of the health care system. That uniqueness presents some different challenges for those lawyers who represent HCWs, health care organizations, or both.

Among the many ethical issues facing lawyers who represent HCWs is that many HCWs, or the associations or institutions for which the lawyers work, are governmental entities, or private entities that receive federal money, state money, or both. Accordingly, the ethical issues faced by the lawyers who represent such clients are the issues faced by government lawyers (or, more accurately, lawyers who represent government entities), in general. The other major category of ethical issues involves lawyers who represent any type or organization or entity, governmental or private. Those two categories of issues are the focus of this article.

This article is intended to provide a general overview of a lawyer’s ethical duties when the lawyer represents either an individual HCW or a health care

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organization. As so many HCWs and health care organizations are governmental, part I addresses the differences between private and government lawyers. Part II considers a lawyer's obligations when that lawyer represents an organization, including: (1) who is the client and with whom should the lawyer interact when representing the client? (2) general ethical considerations when representing a health care organization; (3) explaining how a lawyer's duty of confidentiality and the attorney-client privilege apply when the client is an organization; (4) a lawyer's obligation to blow the whistle to protect an organization; and (5) a brief description of the additional requirements imposed by Congress on health care lawyers and HCWs or health care organizations that receive government funds.

### I. GOVERNMENT LAWYERS ARE DIFFERENT

Any discussion of how the Rules of Professional Conduct ("the Rules") apply to government lawyers,<sup>1</sup> begins with the cardinal concept that all lawyers are subject to the Rules, even when they act at the direction of another person.<sup>2</sup> The Rules do, however, anticipate that government lawyers, especially full-time government lawyers, will play a somewhat different role than lawyers in private practice, and their ethical obligations, therefore, are a bit different.

An analysis of a lawyer's ethical obligations begins with the Preamble and Scope of the Rules, as: "[t]he Preamble and this note on Scope provide general orientation [to the Rules]."<sup>3</sup> The note on Scope also makes it clear that sources other than the Rules may affect government lawyers' ethical obligations (the Rules do not generally expressly distinguish between full and part-time government lawyers; that distinction is the author's): "Under various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client in private client-lawyer relationships."<sup>4</sup>

The Scope continues by illustrating how a government lawyer's role may differ:

For example, a lawyer for a government agency may have authority on behalf of the government to decide upon settlement or whether to appeal from an adverse judgment. Such authority in various respects is generally vested in the attorney general and the state's attorney in state government, and their federal

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<sup>1</sup> See *infra* note 79-223 and accompanying text.

<sup>2</sup> WYO. RULES OF PROF'L CONDUCT Rs. 5.2(a) and 8.5(a) (2006); see also, DISCIPLINARY CODE FOR THE WYO. STATE BAR Preamble, § 1(a) (2006) ("Any attorney [in Wyoming] is subject to the exclusive disciplinary jurisdiction of this Court and the Board of Professional Responsibility.").

<sup>3</sup> WYO. RULES OF PROF'L CONDUCT Scope [20] (2006).

<sup>4</sup> *Id.* at Scope [17].

counterparts, and the same may be true of other government law officers. Also, lawyers under the supervision of these officers may be authorized to represent several government agencies in intragovernmental legal controversies in circumstances where a private lawyer could not represent multiple private clients. These Rules do not abrogate any such authority.<sup>5</sup>

The reference to “a lawyer for a government agency” does not indicate whether the reference is to full-time government lawyers, part-time government lawyers, or both. Given the general structure of the Rules and applicable substantive law, however, it appears that the question should not be simply whether one is a full or part-time government lawyer, but rather the key is the role the lawyer is playing, *i.e.*, does the lawyer represent a government agency. As a practical matter, however, a part-time government lawyer may feel that he or she has less “power” than a full-time one.

#### *A. Differences in the Rules.*

While all lawyers are bound by the Rules, the Rules treat government lawyers differently in a couple respects. The most important difference applies to full-time government lawyers.

The Rules treat conflicts of interest involving former clients of full-time government lawyers differently. Generally, conflicts of interest regarding former clients are addressed in Rule 1.9, “Duties to former clients.”<sup>6</sup> Under that Rule, lawyers owe duties of loyalty when they switch firms<sup>7</sup> and a duty of confidentiality to former clients and former clients of the lawyer’s former or current firm.<sup>8</sup> The duty of loyalty when a lawyer switches employment is more flexible for former full-time government lawyers who move to private practice, than for lawyers in private practice who switch private firms.

##### *1. Rule 1.11: “Special Conflicts of Interest for Former and Current Government Officers and Employees.”*

Rule 1.11 is entitled “Special conflicts of interest for former and current government officers and employees.” As the title suggests, it contains different conflict of interest standards for full-time government lawyers.

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<sup>5</sup> *Id.* at Scope [4] (emphasis added).

<sup>6</sup> See *Carlson v. Langdon*, 751 P.2d 344, 348 (Wyo. 1988) (the Wyoming Supreme Court applied Rule 1.9 to lawyers in private practice).

<sup>7</sup> WYO. RULES OF PROF’L CONDUCT R. 1.9(b) (2006).

<sup>8</sup> *Id.* at R. 1.9(c).

First, Rule 1.11 makes it clear that the rule applies to a lawyer who “has formerly served as a public officer or employee of the government.”<sup>9</sup> The Rule applies, in other words to former full-time government lawyers.<sup>10</sup> As Rule 1.9 does with respect to non-governmental lawyers, Rule 1.11 creates duties of confidentiality and loyalty to former clients. The duty of confidentiality is the same. Lawyers who were formerly “public officer[s] or employee[s] of the government” are “subject to Rule 1.9(c) [which prohibits lawyers from using or revealing information about former clients in most circumstances].”<sup>11</sup>

Second, the Rule creates, and limits, full-time government lawyers’ duty of loyalty to former clients. The general rule is that “[a] lawyer who has formerly served as a public officer or employee . . . shall not . . . represent a client in connection with a matter<sup>12</sup> in which the lawyer participated personally and substantially as a public officer or employee . . . .”<sup>13</sup> The Rule creates the typical exception for waiver of a conflict when a lawyer was involved in a matter “personally and substantially.” A lawyer may represent a client with interests adverse to the former client if “the appropriate government agency makes an informed decision<sup>14</sup> [to allow the representation], confirmed in writing.”<sup>15</sup>

The big difference between the Rules’ treatment of full-time government lawyers and other lawyers is in the imputation of conflicts. As a general matter,

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<sup>9</sup> WYO. RULES OF PROF’L CONDUCT R. 1.11(a) (2006).

<sup>10</sup> Though the Rule and the comments do not use the term “full-time,” it seems clear from the use of the words “public officer or employee . . .” that the Rule applies to full-time government lawyers, not employees of a private firm that represent government entities. *See id.* R. 1.11 cmt. [2].

<sup>11</sup> *Id.* at R. 1.11(a)(1).

<sup>12</sup> “Matter” means, for purposes of Rule 1.11, “any judicial or other proceeding, application, request for a ruling or other determination, contract, claim, controversy, investigation, charge, accusation, arrest or other particular matter involving a specific party or parties . . . .” *Id.* at R. 1.11(e)(1). It includes “any other matter covered by the conflict of interest rules of the appropriate government agency.” *Id.* at R. 1.11(e)(2).

<sup>13</sup> *Id.* at R. 1.11(a)(2).

<sup>14</sup> “Informed decision” means “the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.” WYO. RULES OF PROF’L CONDUCT R. 1.0(f) (2006).

<sup>15</sup> WYO. RULES OF PROF’L CONDUCT R. 1.11(a)(2) (2006). “Confirmed in writing” means an informed decision that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming the oral informed decision. . . . If it is not feasible to obtain or transmit the writing at the time the person makes an informed decision, then the lawyer must obtain or transmit it within a reasonable time thereafter.

WYO. RULES OF PROF’L CONDUCT R. 1.0(c) (2006).

“[w]hile lawyers are associated in a firm,<sup>16</sup> none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9 . . .”<sup>17</sup> Significantly, the Rule on imputing conflicts of interest refers only to “Rules 1.7 or 1.9,” not to Rule 1.11, the Rule which applies to current or former full-time government lawyers. It is clear, therefore, that the Rules treat full-time government lawyers differently when it comes to imputing conflicts of interest.

The difference is that even when a former full-time government lawyer is disqualified under Rule 1.11 because he or she “participated personally and substantially,”<sup>18</sup> the lawyer’s new private firm is not precluded from involvement in the matter, as it would be under Rule 1.9(b), if certain conditions are met. First, the disqualified lawyer must be “timely screened<sup>19</sup> from any participation in the matter and is apportioned no part of the fee therefrom.”<sup>20</sup> Screening is not permitted under Rule 1.9(b) with respect to lawyers who switch between private firms. The new firm will be disqualified if the lawyer switching firms “acquired information” protected by Rule 1.6 (the Rule which generally prohibits a lawyer from revealing “confidential information”<sup>21</sup> about a client) that is “material to the matter . . .”<sup>22</sup>

Second, “written notice [must be] promptly given to the appropriate government agency to enable it to ascertain compliance with the provisions of this rule.”<sup>23</sup> The phrase “to enable it [the government agency] to ascertain compliance with the provisions of this rule [Rule 1.11],” is to allow “the government agency [to] have a reasonable opportunity to ascertain that the lawyer

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<sup>16</sup> “Firm” means “a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” *Id.* at R. 1.0(d). The reference to “the legal department of . . . [an] organization” includes a government law office. *See id.* at R. 1.0 cmt. [3].

<sup>17</sup> WYO. RULES OF PROF’L CONDUCT R. 1.10(a) (2006).

<sup>18</sup> *Id.* at R. 1.11(a)(2).

<sup>19</sup> “Screened” means “the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules or other law.” *Id.* at R. 1.0(l). “The purpose of screening is to assure the affected parties that confidential information known by the personally disqualified lawyer remains protected.” *Id.* at R. 1.0 cmt. [8]. Screening may include “denial of access by the screened lawyer to firm files or other materials relating to the matter and periodic reminders of the screen to the screened lawyer and all other firm personnel.” *Id.*

<sup>20</sup> WYO. RULES OF PROF’L CONDUCT R. at R. 1.11(b)(1) (2006).

<sup>21</sup> “Confidential information” means “information provided by the client or relating to the client which is not otherwise available to the public.” WYO. RULES OF PROF’L CONDUCT R. 1.0(b) (2006).

<sup>22</sup> WYO. RULES OF PROF’L CONDUCT R. 1.9(b)(2) (2006).

<sup>23</sup> WYO. RULES OF PROF’L CONDUCT R. 1.11(b)(2) (2006).

is complying with Rule 1.11 and to take appropriate action if it believes the lawyer is not complying.”<sup>24</sup>

Paragraph (c) of Rule 1.11 addresses another conflict of interest issue regarding government lawyers (whether full or part-time), and, once again, treats them differently than lawyers in private practice. The issue is a former full-time lawyer who obtained “confidential government information.”<sup>25</sup>

If a lawyer has obtained “confidential government information,” while “the lawyer was a public officer or [government] employee” and “knows”<sup>26</sup> it, the lawyer “may not represent a private client whose interests are adverse to that person in a matter in which the information could be used to the material disadvantage of that person . . . .”<sup>27</sup> Once again, however, the disqualification of an individual lawyer is not necessarily imputed to the new firm. “A firm with which that lawyer is associated may undertake or continue representation in the matter only if the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.”<sup>28</sup>

The restriction on using “confidential government information” to the “material disadvantage” of the person identified in the information is particularly important when medical records or information are involved (it will be common for full-time government lawyers who represent medical institutions to have access to such information as “public records” is defined very broadly, but the definition excludes those records “privileged or confidential by law.”<sup>29</sup>) Among those “privileged or confidential” records to which the custodian “shall deny the right of inspection”<sup>30</sup> are “[m]edical, psychological and sociological data on individual persons . . . .”<sup>31</sup> In other words, a government lawyer, either full or part-time, who obtains medical records that identify an individual or individuals may not subsequently use that information, after he or she is no longer a government lawyer, to the “material disadvantage” of person so identified.<sup>32</sup>

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<sup>24</sup> *Id.* at R. 1.11 cmt. [8].

<sup>25</sup> *Id.* at R. 1.11(c). As used in this rule “confidential government information” means “information that has been obtained under governmental authority and which, at the time this Rule is applied, the government is prohibited by law from disclosing to the public or has a legal privilege not to disclose and which is not otherwise available to the public.” *Id.*

<sup>26</sup> “Knows” means “actual knowledge of the fact in question. A person’s knowledge may be inferred from circumstances.” WYO. RULES OF PROF’L CONDUCT R. 1.0(g) (2006).

<sup>27</sup> WYO. RULES OF PROF’L CONDUCT R. 1.11(c) (2006).

<sup>28</sup> *Id.* at R. 1.11(c).

<sup>29</sup> WYO. STAT. ANN. § 16-4-201(a)(v) (2006).

<sup>30</sup> *Id.* at § 16-4-203(d).

<sup>31</sup> *Id.* at § 16-4-203(d)(i).

<sup>32</sup> WYO. RULES OF PROF’L CONDUCT R. 1.11(c) (2006).

The reason that the restriction should apply to both full and part-time government lawyers is that the danger to be avoided, using confidential government information to the “material disadvantage” of a person or persons identified in the records, exists whenever a lawyer has access to such information, regardless of whether the lawyer is a full-time or a part-time government lawyer. And given the reality that many lawyers who represent government HCWs and the institutions in which they work are private attorneys, such as a private firm that represents a county or county memorial hospital,<sup>33</sup> it is critical that the prohibition be applied to any lawyer with access to such confidential information.

Paragraph (d) of Rule 1.11 addresses the conflicts that may arise when a lawyer moves from private practice to work as a “public officer or employee,” conflicts, that is, for current government lawyers. Once again, the Rule does not specify whether it applies to full-time or part-time government employees. Given the use of the term “public officer or employee,” it could be argued that the provision applies to full-time government employees only as lawyers in private practice are not “employees” of a governmental entity. Nevertheless, given the harm to be avoided, the use of confidential information gained in previous employment, the Rule should apply to both full-time and part-time lawyers as a current government lawyer, whether full-time or part-time, should not be able to use information against a previous client.<sup>34</sup>

The general rule is that a lawyer who has moved from private practice to government practice is subject to the general conflict of interest provisions of Rule 1.7 (concurrent conflicts of interest) and Rule 1.9 (conflicts involving former clients).<sup>35</sup> In addition to complying with those Rules, the current government lawyer “shall not participate in a matter in which the lawyer participated personally and substantially while in private practice . . . unless the appropriate government agency makes an informed decision to allow the representation, confirmed in writing.”<sup>36</sup>

It appears counter-intuitive, at first blush, that a “government agency,” presumably the agency for which the lawyer now works or represents, and which

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<sup>33</sup> “County hospitals” and “county memorial hospitals” are regulated by WYO. STAT. ANN. §§ 18-8-101 *et seq.* (2006).

<sup>34</sup> See Lisa G. Lerman, *Public Service by Public Servants*, 19 HOFSTRA L. REV. 1141, 1162 (1991)

The case law addressing who is the client of the government attorney for the purpose of determining conflicts of interest involves mainly part-time state or local government lawyers, and most of the cases involve conflicts with compensated private practice. . . . The courts tend to examine each situation to determine whether the government lawyer in question has an actual or an apparent conflict of interest.

*Id.*

<sup>35</sup> WYO. RULES OF PROF'L CONDUCT R. 1.11(d)(1) (2006).

<sup>36</sup> *Id.* at R. 1.11(d)(2)(i).

is, therefore, the current client, and not the lawyer's former client, should be allowed to waive such a conflict. The interests of the former client are protected, however, by the Rule's earlier inclusion of Rule 1.9, the Rule which sets out lawyers' duties to former clients.<sup>37</sup> Rule 1.9 "would require the former client's consent ["informed decision" is the term used in Wyoming's Rules]".<sup>38</sup>

The Rule also limits a government lawyer's (a full-time government lawyer's) ability to "negotiate for private employment" while a government employee.<sup>39</sup> A "public officer or [government] employee . . . shall not . . . negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially . . ."<sup>40</sup> (There is an exception for lawyers working as law clerks.)<sup>41</sup>

## 2. Rule 1.13: "Organization as Client"

One of the more troublesome realities of virtually all forms of government practice, and most forms of private practice, is that many clients today are organizations of some sort, not individuals. The difficulty is that the ABA's Model Rules, and the Wyoming Rules which are based on them, is that they were developed, for the most part, to accommodate an individual lawyer, or a member of a small firm, who represents individuals. The reality, today, is that many lawyers are part of a firm, whether private or governmental, and many of their clients are organizations, either private or governmental, large or small, or for profit or not-for-profit. A lawyer's duties do not change when the lawyer's client is an organization, but applying the rules to organizations, including the government, can be a challenge. Just identifying the client can be difficult when it is a collection of individuals. Applying confidentiality concepts and conflict of interest standards to organizations can be equally difficult.

Most HCWs work in some sort of group, or for some sort of institution, either private or governmental. Accordingly, the lawyers who represent those groups or institutions must be aware of how their duties are applied in an organizational setting. In addition, many groups or institutions are governmental organizations, presenting some additional challenges to the lawyers who represent them.

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<sup>37</sup> ABA ANN. RULES OF PROF'L CONDUCT, 205 (5th ed. 2003).

<sup>38</sup> See, e.g., WYO. RULES OF PROF'L CONDUCT R. 1.9(a) & (b)(2) (2006) "Informed decision" means "the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." *Id.* at R. 1.0(f).

<sup>39</sup> WYO. RULES OF PROF'L CONDUCT R. 1.11(d)(2)(ii) (2006).

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

Rule 1.13 is the only Rule that expressly addresses organizations as clients. It generally applies to all organizations, but does anticipate that government lawyers may play a slightly different role. While the language of the Rule does not distinguish between governmental and private organizations, the commentary<sup>42</sup> does.

Comment [7] is entitled “Government Agency.” It makes several important points. First, “[t]he duty defined in this Rule applies to governmental organizations.”<sup>43</sup> Second, the comment warns that “[d]efining precisely the identity of the client and prescribing the resulting obligations of such lawyers may be more difficult in the government context and is a matter beyond the scope of these Rules.”<sup>44</sup> Third, when it comes to identifying the client, “in some circumstances the client may be a specific agency, [but] it may also be a branch of government, such as the executive branch, or the government as a whole.” (Perhaps the best way to determine who is the client is for a lawyer to consider from whom he or she takes directions. An assistant attorney general for the State of Wyoming is unlikely, for example, to take directions from the Governor. Rather, an agency head, or even a lower ranking official, is likely the person. That agency, therefore, and not the entire state government, is the client. By contrast, a city attorney generally takes direction from the City Council. The client, therefore, is the entire city.) Finally, the comment notes that:

[I]n a matter involving the conduct of government officials, a government lawyer may have authority under applicable law to question such conduct more extensively than that of a lawyer for a private organization in similar circumstances. Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved.<sup>45</sup>

Comment [7] appears to apply to both full-time and part-time government lawyers, as both may face the issues raised. Furthermore, misconduct by a government official can occur at any level, and the evil to be avoided is the same, regardless of whether the lawyer for the government organization is a full-time

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<sup>42</sup> The Commentary to each Rule “explains and illustrates the meaning and purpose of the Rule” *Id.* at Scope [20].

<sup>43</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. [7] (2006).

<sup>44</sup> *Id.*; see WYO. RULES OF PROF’L CONDUCT R. at Scope [16] (2006) (noting that “for purposes of determining the lawyer’s authority and responsibility, principles of substantive law external to these Rules determine whether a client-lawyer relationship exists”).

<sup>45</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. [7] (2006).

or part-time lawyer. A lawyer's general obligations to an organizational client are discussed in detail below.<sup>46</sup>

The Rules “presuppose a larger legal context shaping the lawyer’s role.”<sup>47</sup> Accordingly, “[u]nder various legal provisions, including constitutional, statutory and common law, the responsibilities of government lawyers may include authority concerning legal matters that ordinarily reposes in the client. . . .”<sup>48</sup> It is important, therefore, for government lawyers who represent HCWs or institutions in which HCWs work, to know if statutes impose certain obligations on them.

## B. *Statutory Duties*

### 1. *The Wyoming Attorney General*

Not surprisingly, different statutes apply to different levels of government and different types of representation, including the representation of HCWs, institutions in which they work, or both. While there are numerous HCWs who work for federal institutions, the duties of the lawyers who represent them are beyond the scope of this article. Rather, this article focuses on Wyoming State Government, and its subdivisions.

By statute, the Wyoming Attorney General has several responsibilities. First, he or she is “to [p]rosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law;”<sup>49</sup> Second, the Attorney General is to “[d]efend suits brought against state officers in their official relations, . . .”<sup>50</sup> Third, the Attorney General is to “[b]e the legal adviser of all elective and appointive state officers and of the county and district attorneys of the state.”<sup>51</sup> Fourth, “[w]hen requested, [the Attorney General shall] give written opinions upon questions submitted to him by elective and appointive state officers . . .”<sup>52</sup> Fifth, the Attorney General is to “[a]pprove or disapprove any contract submitted to him for review . . .”<sup>53</sup> Finally, the Attorney General is to be involved in rulemaking by agencies, including the Departments of Health and Correction, both of which operate health care institutions or provide health care services. As part of that involvement, notice of proposed rulemaking is

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<sup>46</sup> See *infra* notes 99–109 and accompanying text.

<sup>47</sup> WYO. RULES OF PROF'L CONDUCT Scope [15] (2006).

<sup>48</sup> *Id.* at Scope [17].

<sup>49</sup> WYO. STAT. ANN. § 9-1-603(a)(i) (2008).

<sup>50</sup> *Id.* at § 9-1-603(a)(iii).

<sup>51</sup> *Id.* at § 9-1-603(a)(v).

<sup>52</sup> *Id.* at § 9-1-603(a)(vi).

<sup>53</sup> *Id.* at § 9-1-603(a)(viii).

to be given to the Attorney General.<sup>54</sup> In addition to receiving notice of proposed rulemaking, the Attorney General “shall furnish advice and assistance to all state agencies in the preparation of their regulations, and in revising, codifying and editing existing or new regulations.”<sup>55</sup> A party to a lawsuit, an individual seeking advice or an opinion, a party to a contract, or an agency that wishes to promulgate rules, may well be the Director of the Department of Health<sup>56</sup> or the Directors subordinates, some of which administer HCWs or the institutions in which HCWs work.

The Wyoming Department of Corrections also maintains several institutions, such as the Wyoming State Penitentiary, the Wyoming women’s center, the boys’ school, the girls’ school, the Wyoming retirement center, and the Wyoming state hospital.<sup>57</sup> Inmates at those, and other correctional institutions, have a right to adequate medical treatment.<sup>58</sup>

## 2. *Attorneys for County Hospitals, County Memorial Hospitals, or Special Hospital Districts.*

Most hospitals in Wyoming are public, either county hospitals, county memorial hospitals, or hospitals in special hospital districts (A “rural health care district” may also be established). The lawyers who represent them are generally part-time government lawyers, lawyers in private practice for whom the hospital or hospital district is one of the firm’s clients. Since county hospitals, county memorial hospitals, and hospitals in special hospital districts exist by virtue of statutes, it is important to know what those statutes say.

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<sup>54</sup> WYO. STAT. ANN. § 16-3-103(a)(i) (2008).

<sup>55</sup> *Id.* at § 16-3-104(d).

<sup>56</sup> The Director of the Department of Health has broad powers. WYO. STAT. ANN. § 9-2-102 (2008). They are, *inter alia*, “the state mental health authority, the developmental disabilities authority and the substance abuse authority,” with broad powers in those health fields. *Id.* at § 9-2-102(a). Among other things, the Department of Health is to “[p]rovide a coordinated network of programs and facilities offering the following services to persons afflicted with mental illness or developmental disabilities or for substance abuse: diagnosis, treatment, education, care, training, community living, habilitation and rehabilitation.” *Id.* at § 9-2-102(a)(ii). The Department’s powers include promulgating administrative rules. *Id.* at § 9-2-106(a)(iii); *see also* WYO. STAT. ANN. § 42-4-104(a)(iv) (2008) (“The department of health shall . . . [a]dopt, amend and rescind rules and regulations on the administration of [the Medical Services Act] . . .”).

<sup>57</sup> WYO. STAT. ANN. § 25-1-201(a) (2008).

<sup>58</sup> *See, e.g.,* Farmer v. Brennan, 511 U.S. 825, 832 (1994) (Under the Eighth Amendment, “officials . . . must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate . . . medical care . . .”). The Department of Corrections may provide such medical services through contracts through private service providers. WYO. STAT. ANN. § 25-1-105 (c)(iv) (2008). The department is also to “adopt rules and regulations necessary to carry out its functions.” *Id.* at § 25-1-105(a).

County hospitals and county memorial hospitals are governed by Chapter 8 of Title 18 of the Wyoming statutes (Title 18 is entitled “Counties,” and sets forth provisions regarding counties, which are subdivisions of the State of Wyoming, which have only those powers delegated to them by the State Legislature.<sup>59</sup>)

A “[c]ounty hospital and a county memorial hospital” is “any institution, place, building or agency in which any accommodation is maintained, furnished or offered for the hospitalization of the sick, injured . . . .”<sup>60</sup> It is to be governed by a “board of trustees” appointed by the county commissioners.<sup>61</sup> Upon appointment and compliance with the statute, the board of trustees “is a body corporate with power to sue and be sued. . . .”<sup>62</sup> Among its (the board’s) powers, are the “erection, management and control” of a hospital.<sup>63</sup>

As a “body corporate” governed by a “board of trustees,” a county hospital or county memorial hospital qualifies as a governmental organization, and the duties of a lawyer who represents an organization, whether public or private, are discussed in detail below.<sup>64</sup>

Chapter 2 of Title 35 allows for the creation of “special hospital districts,”<sup>65</sup> and “special rural health care districts.”<sup>66</sup> Either a “special hospital district”<sup>67</sup> or a “special rural health care district”<sup>68</sup> is a “body corporate,” governed by an elected “board of trustees.”<sup>69</sup> Once again, either a “special hospital district” or a “special rural health care district” is a governmental organization, and the duties of a lawyer who represents an organization are discussed below.<sup>70</sup>

In addition to the various governmental organizations that employ HCWs, there are myriad private organizations that do, too. An organization of HCWs may take the form of a partnership,<sup>71</sup> P.C. (professional corporation),<sup>72</sup> limited

<sup>59</sup> See, e.g., Board of County Com’rs of Teton County v. Crow, 65 P.3d 720, 724 (Wyo. 2003).

<sup>60</sup> WYO. STAT. ANN. § 18-8-101(a)(i) (2008).

<sup>61</sup> *Id.* at § 18-8-104(a).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See *infra* notes 85–143 and accompanying text.

<sup>65</sup> WYO. STAT. ANN. § 35-2-401(d) (2008);

<sup>66</sup> *Id.* at § 35-2-701(e).

<sup>67</sup> *Id.* at § 35-2-401(d).

<sup>68</sup> *Id.* at § 35-2-701(e).

<sup>69</sup> See *id.* at § 35-2-404 (“special hospital district”) and *id.* at § 35-2-704 (“special rural health care districts”).

<sup>70</sup> See *infra* notes 85–143 and accompanying text.

<sup>71</sup> See WYO. STAT. ANN. §§ 17-21-101 through 1105 (2008).

<sup>72</sup> See *id.* at §§ 17-3-101–104.

liability company,<sup>73</sup> or some other form. Any of these associations of HCWs are organizations for purposes of determining lawyers' obligations, which obligations are discussed below.<sup>74</sup>

### C. *Wyoming Supreme Court*

While the Wyoming Supreme Court has, as the Rules, generally held governmental and non-governmental lawyers to the same standards, there are some differences. When it comes to conflicts of interest, the court has applied different standards, and it is important for lawyers, whether governmental or in private practice, to be aware of the difference. The difference which is important for lawyers who represent HCWs or the institutions in which they work is found in the court's opinion in *State v. Asch*.<sup>75</sup> While that case was a criminal one, its analysis of how conflicts of interest should be addressed in the context of full-time government lawyers who work for a single entity (the Wyoming Public Defender's Office, in that case), is relevant to how conflicts might be addressed when the lawyers involved are full-time government lawyers, such as the members of the Wyoming Attorney General's Office, who represent government HCWs or the State institutions in which they work.

The primary issue in *Asch* was whether it was permissible for two lawyers from the Casper office of the Wyoming State Public Defender to represent, even briefly, two individuals (one of whom was David Asch) who were charged with (different) crimes arising out of the same set of facts.<sup>76</sup> One was appointed counsel from the Casper Office of the Wyoming Public Defender. The other, Asch, was appointed an attorney who was not part of that office, but was on contract with the Public Defender's Office.

For whatever reason, the second attorney was not able to appear at Asch's initial hearing, in county (now circuit) court. In her stead, another attorney from the Casper Office of the Wyoming Public Defender appeared on behalf of Asch. Since the attorney who appeared on behalf of Asch at the initial appearance was "associated in" the practice of law with the attorney for the other person charged with a crime arising out of the same traffic stop, the question became whether an improper conflict of interest had arisen (the reason for the question is that the

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<sup>73</sup> See *id.* at §§ 17-15-101 through 147.

<sup>74</sup> See *infra* notes 85–143 and accompanying text.

<sup>75</sup> *State v. Asch*, 62 P.3d 945 (Wyo. 2003). The court has also established a more flexible conflicts of interest standard for full-time government lawyers who switch sides, *e.g.*, from the defense to the prosecution of a criminal defendant. See *State v. Hart*, 62 P.3d 566, 573 (Wyo. 2003); *Johnson v. State*, 61 P.3d 1234 (Wyo. 2003). It seems unlikely that a full-time government lawyer would switch sides in the health care context, so those decisions are not discussed in this article.

<sup>76</sup> This, and the following paragraph, is based on *Asch*, 62 P.3d at 948-49.

conflicts of one attorney are generally imputed<sup>77</sup> to the rest of the firm<sup>78</sup> and the Wyoming Supreme Court has held that allowing a lawyer to represent multiple defendants in a criminal case is reversible error.<sup>79</sup>)

In *Asch*, the court concluded that although the Wyoming Public Defender's Office is a "firm" within the meaning of the conflict of interest rules, those rules should be applied on a case-by-case basis, and not result in *per se* disqualification of the State Public Defender's Office.<sup>80</sup>

It seems reasonably likely that the court would use the same standard with respect to other government "firms," such as the Attorney General's Office. As those firms may be involved in representing HCWs or the institutions in which they work, the more flexible standard for conflicts of interest may well be applicable.

## II. ETHICAL AND LEGAL CONSIDERATIONS WHEN REPRESENTING AN ORGANIZATION<sup>81</sup>

### A. *The Proliferation of Health Care Organizations*

Most HCWs work for or as part of an organization, though there are still some sole practitioners around. Accordingly, as with the majority of a lawyer's other clients, most of today's health lawyers' clients are organizations of some sort, not individuals. As mentioned earlier, the Rules refer generally contemplate clients as individuals, leaving unanswered many ethical questions which inevitably arise when a lawyer represents an organization. With one notable exception, Rule 1.13, the Rules do not directly address how a lawyer's duties and responsibilities change when the client is an organization.

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<sup>77</sup> WYO. RULES OF PROF'L CONDUCT R. 1.10(a) (2006). The Rule in effect now is substantially similar. The difference is that the current rule contains the following phrase: "unless the prohibition is based on a personal interest of the prohibited lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm." *Id.* at R. 1.10(a).

<sup>78</sup> A "firm" was defined as "a lawyer or lawyers in a private firm, the legal department of a corporation or other organization and lawyers employed in a legal services organization. See Comment, Rule 1.10." WYO. RULES OF PROF'L CONDUCT Terminology (c) (2006). The current definition is: "a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization." WYO. RULES OF PROF'L CONDUCT R. 1.0(d) (2006). Much of the comment to Rule 1.10, to which the old Terminology section referred, is now found in Comment [2] to Rule 1.0.

<sup>79</sup> *Shongutsie v. Wyoming*, 827 P.2d 361, 367 (Wyo. 1992).

<sup>80</sup> *Asch*, 62 P.3d at 953, 952 n.3.

<sup>81</sup> The following section of this article is based, in part, on John M. Burman, *Ethical Considerations When Representing Organizations*, 3 WYO. L. REV. 581, 612-630 (2003).

Health care organizations come in all shapes and sizes. Some are private, others are governmental. Among private organizations, some are for profit, ranging from two HCWs to large, national chains, such as nursing-homes. Others are not-for-profit; they too may be small or large. Government health care organizations have proliferated. Thousands of HCWs now work in dozens of them. Collectively, they now play a significant role, and often a dominant one, such as with public hospitals, and virtually all HCWs and health care organizations receive federal funds, state funds, or both, and must, therefore, comply with applicable laws. Accordingly, a lawyer must know either how to ethically represent the government, its employees, or both, or how to ethically represent clients with interests adverse to the governments.

Not surprisingly, the development and proliferation of health care organizations and other organizational clients has significantly altered lawyers' ethical and legal obligations in several important ways. First, questions which are simple when a client is an individual, become complex when the client is an organization. When a client is an individual, for example, the lawyer knows who the client is and with whom the lawyer should interact—the individual. But that question becomes difficult when the client is an organization, which is a legal entity, but, as such, can act only through individuals. Second, a lawyer's duties of confidentiality and the application of the attorney-client privilege are relatively simple when the client is an individual. They are not when the client is an organization. Third, when the client is an organization, a lawyer's duties run primarily to it; meaning that the lawyer must take action to protect the organization's interests, even when doing so is contrary to the interests of the individuals within the organization with whom the lawyer interacts. Fourth, potential and actual conflicts of interest increase substantially when the client is an organization, meaning that a lawyer must be even more sensitive to discovering and properly handling such conflicts. Finally, while government lawyers are generally held to the same ethical standards as private lawyers, their duties may vary in some circumstances.<sup>82</sup>

Attorneys for health care organizations may be outside counsel or they may work directly for the organization as in-house counsel. Attorneys in the former role face numerous challenges in determining who is the client and with whom should the lawyer interact. The first question, who is the client, is not an issue for in-house counsel; the client is the employer. While that issue is simple, in-house counsel faces the additional issues which arise from the dual role of representing a client who is also one's employer. Since the Rules generally do not distinguish between outside and in-house counsel, the latter are "subject to the full array of ethical rules and considerations governing the practice of law . . . and the concomitant fiduciary obligations of a faithful and loyal employee."<sup>83</sup>

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<sup>82</sup> See *supra*, notes 7–42 and accompanying text.

<sup>83</sup> Carol Basri, *The Client-Ethical Considerations*, 126 N.Y. PRAC. LAW INST. 17, 19 (2002).

1. *Who Is the Client, and With Whom Should the Lawyer Interact?*

When a client is an individual HCW, the questions of who is the client and with whom should the lawyer interact are usually easily answered. The client is the individual, and generally that individual is the person with whom the lawyer should interact.<sup>84</sup> The same cannot be true when the client is a health care organization, of any type, because by definition, an organization is a legal entity made up of individuals, referred to in the Rules as “constituents,”<sup>85</sup> who are supposed to act on behalf of the organization. A county hospital or county memorial hospital’s constituents, for example, include the members of the board of trustees, the chief executive office, the chief financial officer, and other employees. There may be others, such as the county commissioners who have an interest in the operation of the hospital. The variety of interested parties and their varied interests makes it more difficult, and even more important, for a lawyer to clarify who is the client<sup>86</sup> and with which individuals may or should the lawyer interact professionally.

The attorney-client relationship in Wyoming is contractual, arising either by express agreement of the parties or because of their conduct.<sup>87</sup> It seems self-evident that everyone who enters into a contract should know with whom he or she is contracting and what he or she is agreeing to. A lawyer is no different. A lawyer should never be in doubt about whether he or she has a client or about the identity of that client, regardless of whether the client is a health care organization or an individual HCW. When a lawyer represents a governmental entity, the client may be specified by statute.<sup>88</sup> A lawyer in private practice has much more freedom about whom the lawyer will represent. That freedom makes it imperative that the client’s identity be addressed in an engagement letter which, *inter alia*: (1) identifies the client; (2) specifies those persons with whom the lawyer should or may interact; (3) clarifies the scope of the lawyer’s representation; (4) discusses

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<sup>84</sup> In some circumstances, that question is not quite so simple. When a client is an insured, for example, the role of the payer may confuse the issue. It should not. Two separate rules make it clear that a lawyer cannot ethically allow a third party payer to intrude into the attorney’s relationship with the client. WYO. RULES OF PROF’L CONDUCT R. 1.8(f) and 5.4(c) (2006). A lawyer who represents a client who is impaired by reason of youth, age, mental disability, or for any other reason, has special obligations. *Id.* at R. 1.14. Finally, a lawyer who is appointed as an attorney for the best interests of an individual or as a guardian *ad litem* for a person has special obligations. See WYO. RULES OF PROF’L CONDUCT R. Preamble [2]; R. 1.2(a) & (e); R. 1.4(b); R. 1.6(b)(5); R. 1.14(d) (2006) and the comments thereto.

<sup>85</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13 (2006).

<sup>86</sup> M.C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1318 N.Y. PRAC. LAW INST. 721, 724 (2002) (“[I]t is critical that the lawyer not lose sight of the client’s identity.”).

<sup>87</sup> *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

<sup>88</sup> See, e.g., WYO. STAT. ANN. § 9-1-603(a)(1) (2008) (“The attorney general shall [among other things]. . . : [p]rosecute and defend all suits instituted by or against the state of Wyoming, the prosecution and defense of which is not otherwise provided for by law . . .”).

the rate or rates to be paid the lawyer for the lawyer's services (fees) and which costs and disbursements (costs) will be the responsibility of the client; (5) sets forth how and when fees and costs will be billed; and (6) clarifies who will pay the lawyer's fees and costs.<sup>89</sup> Such a written engagement letter is recommended, but not required by the Wyoming Rules.<sup>90</sup> Lawyers who choose not to use engagement letters are, however, asking for trouble. Without an express agreement about the representation, the agreement between the attorney and the client may be an implied one.<sup>91</sup> Whenever an implied agreement arises, there will be at least two versions of the agreement, the client's and the lawyer's. A dispute over the existence of or terms of the agreement is an invitation for a client to file a grievance, a malpractice suit, or both, when the client believes the lawyer did not live up to the agreement, as the client understood it. A contest with a client over the existence and/or terms of an implied agreement is always dangerous for a lawyer since the lawyer has the burden of clarifying the existence and terms of the relationship.<sup>92</sup> That is because the attorney-client relationship is not one between equals. The lawyer has a fiduciary relationship with each client,<sup>93</sup> and the benefit of any doubt will go to the client, the subordinate one in the relationship. Accordingly, in a dispute between a client and a lawyer about the existence and/or terms of an implied agreement, the lawyer is likely to lose.<sup>94</sup>

Identifying the client(s) is especially important when representing organizations, whether private or public, small or large, profit or not for profit. Unfortunately, too many lawyers do not follow the practice of using engagement letters. That failure gets them into trouble (one simply does not read disciplinary opinions where a lawyer had an engagement letter; virtually all involve implied attorney-client relationships in which the attorney and the client disagree about the terms of the implied agreement or about its very existence).

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<sup>89</sup> For a sample engagement letter, see R.W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191, 238 (1998).

<sup>90</sup> WYO. RULES OF PROF'L CONDUCT R. 1.5(b) (2006) (When the lawyer has not regularly represented the client, "[t]he scope of the representation and the basis or rate of the fee and expenses for which the client will be responsible shall be communicated to the client, *preferably in writing*, before or within a reasonable time after commencing the representation . . .") (emphasis added).

<sup>91</sup> See, e.g., *Meyer v. Mulligan*, 889 P.2d 509, 513 (Wyo. 1995) (An attorney-client relationship "may be implied from the conduct of the parties." (quoting *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979))).

<sup>92</sup> See, e.g., WYO. RULES OF PROF'L CONDUCT R. 1.3 cmt. [4] (2006) ("Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so."); *Carlson*, 751 P.2d at 348 ("The burden of proof to show that it was unreasonable for a client to believe that an attorney-client relationship existed . . . has to rest with the attorney.").

<sup>93</sup> CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* § 4.1 (1986).

<sup>94</sup> See *Carlson*, 751 P.2d at 348 (The lawyer "did not demonstrate any effort to dispel [the former client's] understanding . . .").

## 2. *General Ethical Considerations in Representing Health Care Organizations*

Although Rule 1.13 is titled “Organization as client,” it applies only after an attorney-client relationship has been formed between a lawyer and an organization. The Rule does not purport to address how that relationship is or should be formed. Accordingly, whether an attorney-client relationship exists is not determined by the Rules, whether the client is an individual HCW or a health care organization. Rather, the Rules say that “principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.”<sup>95</sup> Substantive law in Wyoming, in turn, says that whether such a relationship exists “depends on the facts and circumstances of each case.”<sup>96</sup> Generally, an attorney-client relationship exists if: (1) a prospective client consults a lawyer; (2) for the purpose of obtaining legal advice; (3) the lawyer undertakes to give the advice or fails to clarify that he or she will not give the requested advice; and (4) the prospective client relies on the advice or the lawyer’s inaction.<sup>97</sup> Since the first, second, and fourth elements are virtually always present (a prospective client almost always consults a lawyer to receive legal advice and then nearly always relies on that advice or inaction), the third element should be a lawyer’s focus, as it is the only element the lawyer can control. That is, a lawyer should know when he or she is undertaking to give legal advice, and a lawyer needs to be especially careful to ensure that prospective clients know that the lawyer is not going to represent them as it is the failure to clarify that a lawyer is not going to give legal advice which most often gets lawyers in trouble.<sup>98</sup>

As noted above, the attorney-client relationship in Wyoming is contractual.<sup>99</sup> The contract may, of course, and should be, an express one; it may, however, “be implied from the conduct of the parties . . . [and] the general rules of agency apply to the establishment of the relationship.”<sup>100</sup> When the contract is implied, doubt about whether a relationship exists, or doubt about the terms of the contract, will be resolved in favor of the client.<sup>101</sup> The question for a court considering

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<sup>95</sup> WYO. RULES OF PROF'L CONDUCT Scope [16] (2007).

<sup>96</sup> *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1979), *cert. denied*, 446 U.S. 984 (1980); *see also Meyer*, 889 P.2d at 513.

<sup>97</sup> No Wyoming Supreme Court case lays out the elements of the relationship clearly. The elements of the relationship, however, are consistent throughout the country. *See, e.g., Togstad v. Vesely*, 291 N.W.2d 686, 692 (Minn. 1980).

<sup>98</sup> *See, e.g., Togstad*, 291 N.W.2d at 692.

<sup>99</sup> *Carlson*, 751 P.2d at 347 (quoting *Chavez*, 604 P.2d at 1346).

<sup>100</sup> *Carlson*, 751 P.2d at 347.

<sup>101</sup> *See, e.g., WYO. RULES OF PROF'L CONDUCT*, R. 1.3 cmt. [4] (2006) (“Doubt about whether a client-lawyer relationship still exists *should be clarified by the lawyer, preferably in writing*, so that the client will not mistakenly suppose the lawyer is looking after the client’s affairs . . .”) (emphasis added).

whether an attorney-client relationship existed and, if so, what its terms were, will be whether it was reasonable for the client to believe that the relationship existed and/or whether it was reasonable for the client to believe the terms were as the client asserts they were.<sup>102</sup> If so, the client (or former client) wins.

The focus on a client's reasonable belief means that a lawyer needs to use engagement letters when undertaking the representation of a client, especially a new one, and to use non-engagement letters when declining to do so. This is particularly important since the burden will be on the lawyer to show the asserted attorney-client relationship did not exist, or that if it did, its terms are different than the client alleges. It will be difficult, if not impossible, for a lawyer to carry that burden without having an engagement letter setting forth the scope and terms of the relationship, or a non-engagement letter declining the representation (it is advisable to send non-engagement letters by certified mail, return receipt requested so one can prove mailing and delivery).<sup>103</sup>

Assuming an attorney wishes to represent an organization, properly forming the attorney-client relationship involves an additional consideration, identifying and specifying with which person or persons ("constituents") in the organization the lawyer should or may interact. The reason is simple. "A lawyer employed or retained by an organization represents the organization, acting through its duly authorized constituents."<sup>104</sup> The question for the lawyer thus becomes who are the organization's "duly authorized constituents"? And it does not matter if the organization is public or private, small or large, profit or not-for-profit.<sup>105</sup> The lawyer represents the organization and the lawyer has to know with whom he or she may or must interact.

The importance of identifying the duly authorized constituents is easily demonstrated. Assume a lawyer represents a county hospital. The lawyer receives two telephone calls. One is from a member of the hospital's board of trustees. He requests the lawyer initiate termination action against one of the hospital's HCWs. The other call is from the director of human resources. She tells the lawyer to expect a call from angry trustees or others asking that an employee, the same one identified by the trustee, be fired. The director of human resources tells the lawyer to do nothing, at least for now. Which directive should the lawyer follow? The answer is it depends on who is "duly authorized" to act on behalf of

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<sup>102</sup> *Carlson*, 751 P.2d at 348.

<sup>103</sup> For a sample non-engagement letter, see Robert W. Martin, Jr., *Practicing Law in the 21st Century: Fundamentals for Avoiding Malpractice Liability*, 33 LAND & WATER L. REV. 191, 238 (1998).

<sup>104</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(a) (2006).

<sup>105</sup> Pietrina Scaraglino, *Ethical Problems in Representing Nonprofit Corporations*, 1330 N.Y. PRAC. LAW INST. 187, 194 (2002) ("An attorney retained by a not-for-profit corporation represents the corporation itself, not its employees.")

the organization, the hospital, which is the client. It is very unlikely the trustee, acting alone, is. It is likely the director of human resources is. And the lawyer better know who it is. That knowledge, in fact, is a threshold issue for the lawyer.

### 3. *Special Problems With Forming New Health Care Organizations.*

Even more difficult issues arise when a lawyer is asked to perform the legal work necessary to form a health care organization, such as a professional corporation or a limited liability company. It is common, for example, for professional colleagues to decide to go into practice together. They decide to form an entity, an organization in the parlance of the Rules, to do so, and they ask a lawyer to do the necessary legal work. Such request presents myriad ethical issues which, if not properly resolved, can lead to serious problems for the lawyer who receives and acts on the request. Although it was not in the health care context, such a case reached the Wyoming Supreme Court, and the opinion provides important guidance for health lawyers.

*Meyer v. Mulligan*<sup>106</sup> involved a typical scenario. Two married couples asked a lawyer to form a corporation to operate a business. The lawyer agreed to do so and formed the corporation. Problems began when one couple refused to contribute the promised money, and the couples become embroiled in a lawsuit. One couple, the Meyers, sued the lawyer who had established the corporation for malpractice, claiming he had negligently failed to draft documents which accurately reflected the parties' agreement.<sup>107</sup> The attorney moved for summary judgment, arguing that he had no attorney-client relationship with the Meyers, and they could not, therefore, sue him; the trial court agreed and granted the motion.<sup>108</sup> On appeal, the supreme court reversed and said "it is not clear" who the attorney represented:<sup>109</sup>

Since the record is devoid of the specifics of any conversation concerning representation, we cannot discern whether Mulligan disclaimed representation of the Meyers or if the Meyers' claimed reliance is valid. Therefore, we hold that a genuine issue of material fact remains concerning the existence of an attorney-client relationship between the Meyers and Mulligan.<sup>110</sup>

*Meyer v. Mulligan* plainly illustrates the difficulties a lawyer faces when asked to represent a nascent business, whatever the context, and the problems which arise when the lawyer does not use an engagement letter. The lawyer cannot represent

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<sup>106</sup> *Meyer v. Mulligan*, 889 P.2d 509 (Wyo. 1995).

<sup>107</sup> *Id.* at 511-13.

<sup>108</sup> *Id.* at 513.

<sup>109</sup> *Id.* at 515.

<sup>110</sup> *Id.*

the entity to be formed for the simple reason that it does not exist. But the lawyer has to represent somebody or something, and the lawyer certainly expects that the client (whoever it is) will pay the bill. The threshold question must, therefore, be answered. Who is the client? And what should a lawyer do to avoid becoming trapped in the quagmire of friendly business ventures (and whether we want to admit it or not, a medical practice is a business) gone bad?

A lawyer asked to form a business entity has some options as to whom to represent; and the lawyer *must* select one, or the lawyer will be deemed to have chosen, anyway. First, the question of the existence or terms of an attorney-client relationship, can be solved simply by having an engagement letter which clarifies the existence and terms of the relationship. Second, it may not always be easy, but a lawyer asked to form an organization must identify the client(s). In the case of two doctors, for example, who want to form an entity within which to practice medicine, at least three options exist: the lawyer may agree to represent both doctors, one doctor, or the other doctor. Whatever the choice, the lawyer should then enter into a written agreement, usually in the form of an engagement letter, with the client(s) selected. That agreement should, *inter alia*, identify the client(s), define the scope of the representation (*e.g.*, form a professional corporation), specify who will be responsible for the lawyer's bills, and state with which person or persons the lawyer may or must interact. If the lawyer has multiple clients, *e.g.*, the lawyer has agreed to represent both of the doctors who wish to form an entity, the lawyer must also advise them of the potential conflicts of interest which abound in all joint representation situations, and obtain proper waivers.<sup>111</sup>

After the legal entity has been formed, the parties often expect the lawyer who formed the entity will become its lawyer. That is generally permissible, so long as it is done properly. The first consideration is that assuming the agreement with the entity's founders specified the scope of the representation as forming the entity, the completion of that task should conclude that representation and end the attorney-client relationship with the founders. Even if the agreement defines the end of the relationship, the lawyer should send a closing letter, clarifying the status of the relationship and setting forth the lawyer's document retention schedule.<sup>112</sup> It is the lawyer's obligation, by the way, to clarify the status of the relationship.<sup>113</sup> If the new entity then wishes to hire the lawyer as its lawyer, that may be done, so long as there representation does not involve an impermissible conflict of interest with any current or former clients—and the entity's founders are now former clients.<sup>114</sup> It is important to conclude attorney-client relationships

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<sup>111</sup> While potential conflicts exist, they are often conflicts which may be waived under *See* WYO. RULES OF PROF'L CONDUCT R. 1.7(b) (2006).

<sup>112</sup> For a sample closing letter, *see* Martin, *supra* note 107, at 242.

<sup>113</sup> WYO. RULES OF PROF'L CONDUCT R. 1.2, cmt. [1] (2006).

<sup>114</sup> Rule 1.9 regulates former client conflicts of interest. For a discussion of such conflicts, *see*, John M. Burman, *Conflicts of Interest in Wyoming*, 35 LAND AND WATER L. REV., 79, 86-69 (2000).

because the standards for conflicts of interest are more stringent for current clients than for former clients,<sup>115</sup> and a lawyer is much more likely to have on-going, affirmative obligations to a current client than to a former one.<sup>116</sup>

When a lawyer who formed an entity becomes the lawyer for that entity, the lawyer has a new client—the entity (an “organization”). As with any new client, the lawyer ethically must consider the possibility of conflicts of interest, including those with former clients, and the lawyer should enter a written agreement with the new client. The agreement should, of course, specify the identity of the client, the scope of the representation, and, a critical term when representing any organization, who is authorized to act on behalf of the organization and on what issues.<sup>117</sup> This may sound like much ado about nothing, and preparing engagement and closing letters will be a bit of work. It will be time well spent as preparing such letters is far less work than defending a lawsuit, a grievance, or both. If a deal goes bad, the time spent documenting the existence and terms of the relationship will provide valuable protection for the lawyer, and a court will not be able to find, as the Wyoming Supreme Court did in *Meyer v. Mulligan*, that there is a genuine issue of material fact about whether and on what terms a lawyer represented a client. In the absence of such an issue, the lawyer may be entitled to summary judgment.

#### 4. *With Whom Should the Lawyer Interact?*

It seems self-evident, but it bears repeating. “An organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents.”<sup>118</sup> Since an organization can act only through its “constituents,” the question for a lawyer, after an attorney-client relationship with the organization has been formed, is who within that organization is “duly

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<sup>115</sup> Compare WYO. RULES OF PROF'L CONDUCT R. 1.7(b) (2006) (which applies to current clients), with WYO. RULES OF PROF'L CONDUCT R. 1.9(a) and (b) (2006) (which applies to conflicts involving former clients). Perhaps the most significant difference is that a lawyer generally may not represent one client against another in litigation, even if the matters are not related. WYO. RULES OF PROF'L CONDUCT R. 1.7 cmt. [6] (2006). By contrast, a lawyer may represent a client against a former client unless the matters are “substantially similar” and the interests of the former client are “materially adverse” to those of the new client. WYO. RULES OF PROF'L CONDUCT R. 1.9(a) (2006).

<sup>116</sup> See, e.g., WYO. RULES OF PROF'L CONDUCT R. 2.1 cmt. [5] (2006) (“[W]hen a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer’s duty to the client under Rule 1.4 [Communication] may require that the lawyer offer advice . . . .”) The duty, when it exists, applies to “clients[s]”, not former clients. For a discussion of a lawyer’s duty to advise clients about non-legal matters, see John M. Burman, *Advising Clients About Non-Legal Factors*, VOL. XXVII, NO. 1, WYOMING LAWYER (February 2004).

<sup>117</sup> WYO. RULES OF PROF'L CONDUCT R. 1.4 cmt. [7] (2006) (“When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the lawyer should address communications to the appropriate officials of the organization. See Rule 1.13.”).

<sup>118</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [1] (2006).

authorized” to act on behalf of the organization.<sup>119</sup> The answer will vary, both by the type of organization, and the precise issue(s) involved.

The governing body of a legal entity is generally specified by law. In Wyoming, for example, it is common for HCWs to organize as “professional corporations.”<sup>120</sup> Under the Wyoming Business Corporation Act or the Wyoming Close Corporation Supplement, both of which are incorporated by reference in the professional corporation statute,<sup>121</sup> “[a]ll corporate powers shall be exercised by or under the authority of” a board of directors.<sup>122</sup> By contrast, the management of a limited liability company is “vested in its members, which . . . shall be in proportion to their contribution to the capital of the limited liability company . . . .”<sup>123</sup> In addition, most governing bodies have the authority to delegate various functions, such as interacting with the entity’s lawyer, by some form of resolution.<sup>124</sup> The keys for the organization’s lawyer are to know: (1) the law governing the organization; and (2) how and to whom the governing documents, the governing body, or both, of the organization has delegated authority. Ultimately, the lawyer must know who is authorized by law, the governing documents, or the governing body of the organization to act on its behalf, and what those individuals are authorized to do.

The “duly authorized constituents” are the individuals, of course, with whom the organization’s lawyer will normally communicate about the representation. Having a specified individual or individuals with whom to communicate is not simply an ethical imperative. As the commentary to Rule 1.4 (Communication) notes, it is a practical necessity because it “is often impossible or inappropriate to inform every one of [the organization’s] members about its legal affairs; ordinarily, [therefore,] the lawyer should address communications to the appropriate officials of the organization.”<sup>125</sup>

Even after identifying the individuals with whom the organization’s lawyer should interact, a lawyer has the ethical obligation to make sure that those individuals understand the lawyer’s role. Many will not. The common

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<sup>119</sup> *Id.* at R. 1.13(a) (“A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.”).

<sup>120</sup> *See* WYO. STAT ANN. § 17-3-101 (2008) (“A corporation organized under the Wyoming Business Corporation Act or the Wyoming Statutory Close Corporation Supplement [chapter 17 of this title] . . . may, by and through the person or persons of such licensed stockholder or stockholders, or licensed employees, practice and offer professional services in such profession.”).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at § 17-16-801(a).

<sup>123</sup> *Id.* at § 17-15-116.

<sup>124</sup> *See, e.g., id.* at § 17-16-841 (“Each officer has the authority and shall perform the duties set forth in the bylaws or . . . [and] the duties prescribed by the board of directors . . .”).

<sup>125</sup> WYO. RULES OF PROF’L CONDUCT R. 1.4 cmt. [7] (2006).

misunderstanding involves the question just discussed. Whom does the lawyer for an organization represent? Many, if not most, of an organization's constituents will assume the lawyer represents them and the organization, and not just the organization.<sup>126</sup>

Because many constituents will misunderstand the lawyer's role, a lawyer who represents an organization must ensure constituents with whom he or she interacts understand that the organization's lawyer does not generally represent the organization's constituents, even those "duly authorized" to speak for it. Similarly, the lawyer must take care to avoid implying that he or she represents the duly authorized constituents individually. The failure to do so may result in the inadvertent creation of an attorney-client relationship with such individuals arising by implication.<sup>127</sup> While it is ethically permissible to represent both an organization and some of its constituents in some circumstances, a lawyer should never allow an attorney-client relationship to arise inadvertently. It will be ethically permissible to represent both an organization and some of its constituents only when no impermissible conflicts of interest exist between the interests of the organization and those of the individual constituents.<sup>128</sup> If representation of both the organization and a constituent is ethically permissible and the attorney intends to have an attorney-client relationship with each, those relationships should both be explicit. A lawyer should simply never allow an attorney-client relationship to arise by implication; to do so is to invite problems.

Furthermore, whenever a lawyer represents an organization, the lawyer must be aware of the possible divergence of interest between the client (the organization) and the constituents of the organization with whom the lawyer is dealing. The reason is that when it becomes "apparent" that their interests are adverse, the lawyer has an ethical duty to "explain the identity of the client . . . [and] that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."<sup>129</sup> Where the interests of the organization and constituents diverge, and the constituents do not have separate counsel, the lawyer for the organization is essentially dealing with an unrepresented person. Accordingly, the only advice the lawyer may ethically give the constituent, which the lawyer should

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<sup>126</sup> ABA ANN. RULES OF PROF'L CONDUCT, 91 (5th ed. 2007) ("Many corporate executives apparently do not realize that corporate counsel represents the corporation only, and not them as individuals.").

<sup>127</sup> *Id.*

<sup>128</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(e) (2006) ("A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents, subject to the provisions of Rule 1.7 [Rule 1.7 regulates concurrent conflicts of interest].").

<sup>129</sup> *Id.* at R. 1.13(d).

give, is that the individual should obtain counsel.<sup>130</sup> As an example, when an organization is being sued for the actions or inactions of one of its constituents, the interests of the organization and those of that individual whose actions led to the suit, are potentially adverse. The organization may have an interest, for example, in trying to avoid liability by asserting that the individual was acting beyond the scope of his or her employment. The individual's interest, by contrast, is to make sure that the organization is responsible for the individual's actions or inactions, and will, therefore, likely assert that the actions in question were within the scope of employment. In such circumstances, the divergence of interests is obvious, and direct. Because of that divergence of interests, the organization's lawyer must be careful to notify the individual of the identity of the lawyer's client (the organization), and that the lawyer is looking after the client's interests, not the individual's.<sup>131</sup>

As with any attorney-client relationship, the information the lawyer learns in the course of the representation is often confidential,<sup>132</sup> regardless of when or how the information was learned.<sup>133</sup> Accordingly, the information a lawyer learns from constituents of the organization is confidential. The lawyer may not, therefore, generally disclose the information to anyone other than the client without an "informed decision"<sup>134</sup> by the client to allow such disclosure.<sup>135</sup> The lawyer must be careful, however, not to disclose information learned from one constituent to another unless the constituent to whom the disclosure is made is authorized to receive the information. The reason is simple. The mere fact that a lawyer has obtained confidential information from a constituent "does not mean . . . that constituents of an organizational client are the clients of the lawyer."<sup>136</sup>

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<sup>130</sup> WYO. RULES OF PROF'L CONDUCT R. 4.3 (2006) ("The lawyer shall not give legal advice to an unrepresented person, other than *the advice to secure counsel*, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.") (emphasis added).

<sup>131</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(d) (2006).

<sup>132</sup> Wyoming's Rule on confidentiality is unique. It protects "confidential information relating to the representation . . ." WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006). "Confidential information" means "information provided by the client or relating to the client which is not otherwise available to the public." The ABA Model Rules are not limited to "confidential information." They apply to "information relating to the representation." ABA MODEL RULES OF PROF'L CONDUCT, R. 1.6(a) (2008).

<sup>133</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

<sup>134</sup> "Informed decision" means "the decision by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct." WYO. RULES OF PROF'L CONDUCT R. 1.0(f) (2006).

<sup>135</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

<sup>136</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13 cmt. [3] (2006) ("The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6 [the Rule on confidentiality]").

The lawyer must be careful, therefore, not to create the impression that the lawyer represents the constituent by disclosing confidential information to unauthorized constituents.

With small businesses, including professional practices, the same individuals often fill multiple roles. The same persons are often a professional corporation's shareholders, directors, and officers. A lawyer's obligations do not, however, change because of the relative size of an organization. The organization's lawyer still represents the organization and does not automatically represent the constituents.<sup>137</sup> In such circumstances, however, the possibility of confusion about the lawyer's role is significantly increased, and the lawyer needs to be especially careful to clarify his or her role. The question of whether the lawyer represents only the organization or the individuals within the organization, too, should be expressly addressed. The reason is simple. The individuals will probably assume that the lawyer represents the organization and themselves, as well, particularly when the lawyer has extensive interactions with one or more of the organization's constituents.<sup>138</sup> Failing to clarify the lawyer's role may mean just that. If the lawyer has done nothing to defeat the client's expectation that the lawyer represents the organization and the individuals who constitute it, and if that expectation is reasonable, the lawyer has probably allowed an attorney-client relationship to arise by implication.<sup>139</sup> Once again, the clarification should be done in an engagement letter with the organization which clarifies the identify of the client and that the lawyer does not represent the constituents, individually.

##### 5. *Summary*

Organizational clients present special ethical challenges for a lawyer. Those challenges are not, however, insurmountable. First, the lawyer must identify the client. In the case of a health care organization, it is the organization, whether small or large, private or government, profit or not-for-profit. Second, the lawyer must identify the individuals (the "constituents") who are authorized to act on behalf of the organization and with respect to which issues. Third, when it is apparent that the interests of the organization and those of the constituent(s) with whom the lawyer is dealing are adverse, the lawyer has a duty to notify the constituent of the identity of the client (the organization), that the lawyer is representing the organization, not the constituent, and that the constituent may want to seek legal counsel.

The first two issues, the identity of the client and the individuals authorized to act on behalf of the client, should be clarified in a written agreement between the client and the lawyer, usually an engagement letter. Such an agreement will

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<sup>137</sup> ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 91:2015.

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 91:2001.

eliminate the possibility of the lawyer, of a court, wondering who the client is or was. The third issue, advising constituents about the lawyer's role, is critical to avoiding an attorney-client relationship arising by implication, which will put the lawyer in a conflict which is likely non-waivable, and which will likely require the lawyer to withdraw from the representation of both the organization and the individual.

## *B. Confidentiality and the Attorney-Client Privilege.*

### *1. Introduction*

A lawyer has both a legal and an ethical obligation to maintain client confidences. The legal obligation arises out of the law of agency, the law of evidence (through the attorney-client privilege)<sup>140</sup> and the rules of civil and criminal procedure (which embody the work-product doctrine<sup>141</sup>). Each requires a lawyer to preserve client confidences, certain information regarding a client or the client's case; or both, and each survives the termination of the attorney-client relationship.<sup>142</sup>

A lawyer's ethical obligation of confidentiality is based on Rule 1.6 of the Wyoming Rules of Professional Conduct, or similar rules in other states. The Wyoming Rule says that a lawyer "shall not reveal confidential information relating to representation of a client . . .," however the information is learned and regardless of the source.<sup>143</sup> The ethical duty is much broader than either

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<sup>140</sup> See, e.g., RESTATEMENT (SECOND) OF THE LAW OF AGENCY, § 395 (2006) ("[A]n agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal . . .").

The attorney-client privilege is part of the law in every American jurisdiction, either by statute, court rule, or common-law. Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.3.1 (West 1986). Generally, it prevents an attorney from testifying about communications to or from a client and the lawyer regarding the representation. *Id.*

<sup>141</sup> See, e.g., WYO. R. CIV. P. 26(b)(3). A lawyer must assert the privilege or it disappears. *Id.* at 26(b)(5) and WYO. R. CRIM P. 16(a)(2) & (b)(2).

<sup>142</sup> After the end of an agency relationship, the agent may not use or disclose "trade secrets, written lists of names, or other, similar confidential information concerning the methods of business of the principal . . . . The agent is entitled to use general information concerning the method of business of the principal . . . ." RESTATEMENT (SECOND) OF AGENCY, § 396(b) (2006). While many statutes or rules which establish the attorney-client privilege are silent on the question of whether the privilege continues after the end of the attorney-client relationship, courts generally hold that the privilege continues, along with the attorney's obligation to assert it. Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.3.4 (West 1986). The privilege generally extends after the death of a client. See, e.g., *Swidler & Berlin v. U.S.*, 524 U.S. 399, 407 (1998).

<sup>143</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(a)(2006); see also *id.* at R. 1.6 cmt. [6] ("The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

the attorney-client privilege or the work-product doctrine since it applies to all “confidential information relating to the representation.”<sup>144</sup> The attorney-client privilege, by contrast, protects only communications between a lawyer and a client.<sup>145</sup> The work-product doctrine protects only “trial preparation materials.”<sup>146</sup> Accordingly, everything which is subject to the attorney-client privilege or the work-product doctrine is confidential under Rule 1.6, but information which is covered by Rule 1.6 may not be protected by either the attorney-client privilege or the work-product doctrine (a communication from a third person, for example, is subject to Rule 1.6 if it is confidential information that relates to the representation. That communication is not protected by the attorney-client privilege, because it is not a communication to or from a client, and it is not subject to the work-product doctrine as it was not prepared in anticipation of litigation.) The ethical duty of confidentiality is, however, similar to the legal duty in one important way. It never ends.<sup>147</sup> Not only is the scope of the duties different, they apply at different times, too.

The attorney-client privilege applies when communications between a lawyer and a client are sought from the attorney or the client through judicial or other legal processes, including discovery.<sup>148</sup> The attorney-client privilege is much narrower, as it applies only to communications between a lawyer and a client, not to other information the lawyer learns during the representation.<sup>149</sup>

Applying the confidentiality concept, the attorney-client privilege, or the work product doctrine becomes significantly more difficult when the client is an organization. The identity of the client is clear; it is the organization. A lawyer cannot communicate, however, with a legal entity. The lawyer must communicate with one or more constituents of the entity.

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<sup>144</sup> *Id.* at R. 1.6(a).

<sup>145</sup> WYO. STAT. ANN. § 1-12-101(a) (2008).

<sup>146</sup> WYO. R. CIV. P. 26(b)(3); *see also* WYO. R. CRIM. P. 16(a)(2) & (b)(2).

<sup>147</sup> WYO. RULES OF PROF'L CONDUCT R. 1.9(c) and R. 1.6, cmt. [25] (2006).

<sup>148</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6, cmt. [6]. The attorney-client privilege and the work product doctrine are not a part of the rules of ethics. *Id.* The attorney-client privilege is part of the law of evidence and is differently defined in different jurisdictions. The privilege generally exists when four features are present: (1) There is a communication; (2) between privileged persons (an attorney or the attorney's staff and a client); (3) made in confidence; and (4) for the purpose of obtaining or providing legal advice. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

<sup>149</sup> *See, e.g.*, ABA/BNA LAWYER'S MANUAL ON PROF'L CONDUCT § 55:304 (“the ethical duty of confidentiality is much broader in scope and covers communications that would not be protected under the [attorney-client privilege].”).

2. *Which Information is Subject to the Confidentiality Obligation of Rule 1.6?*

The language of Rule 1.6 is clear: “A lawyer shall not reveal confidential information relating to representation of a client . . .”<sup>150</sup> The commentary to Rule 1.13 (“Organization as client”) discusses the application of the confidentiality principle to an organizational client. “When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by Rule 1.6 [The Rule which creates the ethical duty of confidentiality]”<sup>151</sup> It does not matter, in short, if the client is an individual or an organization. The Rule applies. Since the Rule applies, a lawyer may not reveal confidential information about the representation of a client, regardless of how it is learned, unless the client makes an informed decision to allow the disclosure, the disclosure is “impliedly authorized in order to carry out the representation,”<sup>152</sup> or unless one of the Rule’s narrow exceptions applies.<sup>153</sup>

Although it is easy to say that all confidential information which relates to representation of an organizational client “shall not be revealed,”<sup>154</sup> the more difficult question is to whom within the organization may a lawyer ethically disclose such information? Assume, for example, that a lawyer conducts an investigation for an organization the request of the organization’s board of directors (the governing authority for a corporation). The lawyer receives information from a variety of sources, including many “constituents” of the organization. Some are high level management, such as corporate officers. Others are lower level employees or other constituents, such as stockholders. As noted above, the information communicated to the lawyer by any constituent in that individual’s organizational capacity is confidential. The question becomes, therefore, which confidential information may be shared with which constituents?

The commentary to the Rule 1.13 (Organization as a client) provides important guidance. Information learned from organizational constituents is confidential. The lawyer may not, however, necessarily disclose such information learned from one constituent to another:

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<sup>150</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

<sup>151</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. [3] (2006).

<sup>152</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

<sup>153</sup> A lawyer may disclose otherwise confidential information if the lawyer “reasonably believes” disclosure is necessary to prevent a client “from committing a criminal act,” “to establish a claim or defense” in a dispute with a client, or “to comply with other law or court order,” or “to protect the best interests” of an individual for whom the attorney is acting as guardian *ad litem*. See *id.* at R. 1.6(b)(1), (2), (3).and (4).

<sup>154</sup> *Id.*

The lawyer *may not disclose* to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6 [“Confidentiality of information”].<sup>155</sup>

The answer should have a familiar ring. A lawyer may disclose confidential information only to duly authorized constituents. The question comes back, in short, to the question addressed above. With whom should a lawyer interact when representing an organization? Such constituent is likely also authorized to receive information from the lawyer. Accordingly, the answer is disclosure may be made to the persons duly authorized by the organization to interact with the lawyer.

An attorney’s ethical duty of confidentiality may, of course, be waived by the client.<sup>156</sup> That waiver may be explicit or implicit. An attorney may reveal confidential information if “the client makes an informed decision,” or if disclosure is “impliedly authorized in order to carry out the representation.”<sup>157</sup> The questions which arises when the client is an organization are: (1) who may make a decision to waive confidentiality; and (2) with whom must the lawyer consult before that waiver is valid? The answers follow from the concept that the client is the organization. Therefore, the organization may waive confidentiality. As with other decisions by an organization, this one must be made by the organization’s governing body or someone duly authorized by that body to act in its stead. This means that information imparted to the attorney by an individual is controlled by the organization, not by the individual from whom it was received.

### *3. Applying the Attorney-Client Privilege to a Health Care Organization.*

The attorney-client privilege is “the oldest of the privileges of the common law . . .”<sup>158</sup> The privilege is not only recognized by federal law,<sup>159</sup> it is a part of the law of evidence in every U.S. jurisdiction.<sup>160</sup> Since it is part of the law of evidence, the starting point in analyzing the applicability of the privilege is the rules of evidence. Rule 501 of the Wyoming Rules of Evidence says “[e]xcept as otherwise required by . . . statute . . . the privilege of a witness . . . shall be governed by the principles of the common law . . .”<sup>161</sup> Rule 501 of the Federal Rules of Evidence

<sup>155</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13 cmt. [3] (2006).

<sup>156</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

<sup>157</sup> *Id.*

<sup>158</sup> *Upjohn Co. v. U.S.*, 449 U.S. 383, 389 (1981).

<sup>159</sup> *Id.* at 396-97.

<sup>160</sup> Charles W. Wolfram, *MODERN LEGAL ETHICS*, § 6.1.1 (West 1986).

<sup>161</sup> WYO. R. EVID. 501.

contains identical language.<sup>162</sup> While the attorney-client privilege in Wyoming is now statutory, the federal privilege is part of the federal common law.<sup>163</sup>

The attorney-client privilege in Wyoming is codified in statute, but the statute is regrettably sparse, especially on issues involving its application to an entity.<sup>164</sup> The statute simply says:

The following persons shall not testify in certain respects:

*An attorney or physician concerning a communication made to him by his client or patient in that relation, or his advice to his client or patient. The attorney or physician may testify by express consent of the client or patient, and if the client or patient voluntarily testifies the attorney or physician may be compelled to testify on the same subject;*<sup>165</sup>

That's it. The statute sets forth three criteria. First, an "attorney" may not testify in certain respects. Second, the privilege is limited to "communications" from a client to an attorney or the attorney's "advice" to the client. Finally, the communications or advice must be "in that relation," *i.e.*, communications which are a part of the attorney-client relationship. The statute leaves numerous questions unanswered, including questions about how the privilege applies to organizational clients, if it applies at all.<sup>166</sup>

The first problem is that Wyoming's statute, on its face, provides a privilege for attorneys to not testify about their communications to or from a client, but it does not provide a reciprocal privilege for clients. Second, the statute makes no mention of the non-attorney staff members who work for an attorney, persons such as secretaries, investigators, and paralegals, who often have more communications with a client than the attorney. Third, the statute is silent on if or how the privilege should be applied to organizational clients. The statute's silence about organizational clients raises three significant issues: (1) Does the attorney-client privilege apply to organizational clients at all? (2) If so, which communications between an attorney and individuals within the organization are privileged? (3) Finally, who within the organization may waive the privilege?

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<sup>162</sup> FED. R. EVID. 501.

<sup>163</sup> *Upjohn Co.*, 449 U.S. at 389.

<sup>164</sup> WYO. STAT. ANN. § 1-12-101(a) (2008).

<sup>165</sup> WYO. STAT. ANN. § 1-12-101(a) (2008) (emphasis added).

<sup>166</sup> Statutes in other states often address such issues directly. In Arizona, for example, the statute includes an attorney's "paralegal, assistant, secretary, stenographer or clerk." ARIZ. REV. STAT. § 12-2234(A) (2007). It further provides that "any communication is privileged between an attorney for a corporation, governmental entity, partnership, business, association or other similar entity or an employer and any employee, agent or member of the entity . . ." *Id.* at § 12-2234(B).

This section will address the general questions surrounding the attorney-client privilege in Wyoming, as well as those issues unique to organizations.

*a. The Attorney-Client Privilege Applies to Clients, As Well As to Lawyers.*

As noted, Wyoming's statute says that "attorneys" may not testify in certain respects, but it says nothing about clients. The notion that the omission of any reference to clients means that they are not covered by the attorney-client privilege flies in the face of the reasons for the privilege, as well as the applicability of the common-law privilege.

The reason for the attorney-client privilege, according to the United States Supreme Court, is to encourage "full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice."<sup>167</sup> That policy is so important that the privilege has been extended to include not just communications between a lawyer and a client, but observations "which [are] the product of a privileged communication."<sup>168</sup> Not extending the privilege to include observations "might chill free and open communication between attorney and client and might also inhibit counsel's investigation of his client's case."<sup>169</sup> So, too, not applying the privilege to protect clients from testifying would severely chill attorney-client communications, and courts have interpreted the privilege to foster communications, not chill it.

Over a century ago, the Alabama Supreme Court put it well. The privilege "against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel's lips are sealed."<sup>170</sup> Not extending Wyoming's attorney-client privilege to prevent a client from testifying would seriously chill full and frank communication between attorneys and their clients; not doing so would make a mockery out of the privilege. It is hard to imagine, therefore, that the Wyoming Supreme Court would not construe the statute which codifies the attorney-client privilege to also prevent clients from having to testify.

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<sup>167</sup> *Upjohn*, 449 U.S. at 389.

<sup>168</sup> *People v. Meredith*, 631 P.2d 46 (Cal. 1981).

<sup>169</sup> *Id.* at 48.

<sup>170</sup> *Birmingham Railway and Electric, Co., v. Wildman*, 24 So. 546, 549-50 (Ala. 1898).

*b. The Attorney-Client Privilege Applies to an Attorney's Non-Attorney Staff.*

A second problem with Wyoming's attorney-client privilege statute is that it refers only to a communication between a client and an "attorney."<sup>171</sup> Many of a lawyer's communications with a client, however, are through non-attorney support staff members, such as a secretary, an investigator, or a paralegal. The absence of any reference in the statute to non-attorney support staff raises the question of whether the attorney-client privilege covers communications between a client and a non-attorney staff member. It should.

One of the most recent and most comprehensive analyses of the attorney-privilege is contained in the Third Restatement of The Law Governing Lawyers. The Restatement asserts that the attorney-client privilege applies to communications between "privileged persons."<sup>172</sup> The term "privileged persons" is then defined as "the client (including a prospective client), the client's lawyer, [and] agents of either who facilitate communication between them . . ."<sup>173</sup> A person is a privileged agent if "the person's participation is reasonably necessary to facilitate the client's communication with a lawyer . . ."<sup>174</sup> Since it is often reasonably necessary for a client and a lawyer to communicate through other person's, the attorney-client privilege should extend to them, as well.

*c. The Attorney-Client Privilege Applies to Organizational Clients.*

Although there has been substantial debate about whether the attorney-client privilege should apply to organizations, that debate has been resolved in favor of such a privilege in every jurisdiction which has considered the issue.<sup>175</sup> Accordingly, the general view is that when the client is "a corporation, unincorporated association, partnership, trust, estate, sole proprietorship, or other for-profit or not-for-profit organization, the attorney-client privilege extends" to qualified communications between privileged persons.<sup>176</sup> A qualified communication is one which is made "for the purpose of obtaining or providing legal assistance to the client."<sup>177</sup> Privileged persons include, those whose participation "is reasonably necessary to facilitate the client's communication with a lawyer."<sup>178</sup> Since an

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<sup>171</sup> WYO. STAT. ANN. § 1-12-101(a)(1) (2008).

<sup>172</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 68 (2000).

<sup>173</sup> *Id.* at § 70.

<sup>174</sup> *Id.* at § 70 cmt. f.

<sup>175</sup> Charles W. Wolfram, MODERN LEGAL ETHICS § 6.5.3, 283-84 (West 1986).

<sup>176</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 (2000).

<sup>177</sup> *Id.* at § 68(4).

<sup>178</sup> *Id.* at § 70 cmt. f.

organization can act only through its agents, it is reasonably necessary to protect communications between at least some of the organization's agents (constituents) and the organization's attorney. Extending the privilege to organizations is also consistent with promoting the policy behind the privilege. Including associations within the privilege "encourages organizational clients to have their agents confide in lawyer in order to realize the organization's legal rights and to achieve compliance with law."<sup>179</sup>

Although the Wyoming attorney-client statute is silent<sup>180</sup> and no Wyoming Supreme Court opinions are on point, it is reasonable to expect that the privilege will be extended to organizations in Wyoming as has been done everywhere else.<sup>181</sup> In addition to the overwhelming weight of authority in other jurisdictions, the Wyoming Supreme Court has acknowledged the need for corporate privacy by limiting the *ex parte* contacts a lawyer for an opposing party may have with corporate employees.<sup>182</sup> The same principles argue in favor of extending the attorney-client privilege to include organizations. Doing so, however, does not end the inquiry. The next issue is to define the scope of the privilege in an organizational setting. And while it is reasonable to assume that the privilege will be extended to organizations in Wyoming, predicting the scope of the privilege is more difficult.

*d. Which Communications To or From Which Constituents of an Organization Are Protected by the Attorney-Client Privilege?*

Two general views of the scope of the attorney-client privilege in the organizational setting have emerged: (1) the control-group test; and (2) the subject-matter test.<sup>183</sup> The control-group test is based on the notion that the attorney-client privilege applies only to communications between the organization's lawyer and persons who have managerial responsibility or control of the issue(s) involved in the communications. The standard is difficult to apply, however, because the parameters of the control group will vary with the issue(s) involved.<sup>184</sup> The persons with managerial responsibility for one area of the organization's operation may be different than the persons responsible for another. As the composition of the control group varies, it is difficult to know which communications with which

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<sup>179</sup> *Id.* at § 72 cmt. b.

<sup>180</sup> The Wyoming statute refers only to "client," without definition of that term. WYO. STAT. ANN. § 1-12-101(a)(i) (2008).

<sup>181</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 cmt. b. (2000) ("Extending the attorney-client privilege to corporations and other organizations was formerly a matter of doubt but is no longer questioned.").

<sup>182</sup> *Strawser v. Exxon*, 843 P.2d 613, 616-17 (Wyo. 1992).

<sup>183</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73 cmt. b. (2000). *See also*, *Upjohn Co. v. U.S.*, 449 U.S. 385 (1981).

<sup>184</sup> *Upjohn Co.*, 449 U.S. at 392 (The control group test "is difficult to apply.").

persons are protected. This lack of predictability renders the test impractical since “the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected [because a]n uncertain privilege . . . is little better than no privilege at all.”<sup>185</sup> In addition, by definition, the test excludes communications between the attorney for the organization and constituents without managerial responsibility. As a result, persons with important information, usually factual, fall outside the protection of the privilege. Similarly, individuals who are not part of the control group may be responsible for implementing the lawyer’s legal advice. Not protecting the communications with the organization’s lawyer “makes it more difficult to convey full and frank legal advice to the employees who will put into effect the client corporation’s policy.”<sup>186</sup> Ultimately, the narrow scope of the control group theory “not only makes it difficult for corporate attorneys to formulate sound advice . . . [it] also threatens to limit the valuable efforts of corporate counsel to ensure their client’s compliance with the law.”<sup>187</sup>

The subject-matter test takes a very different approach. Communications between an organization’s lawyer and any constituents of the organization are subject to the attorney-client privilege if they relate to the giving or receiving of legal advice.<sup>188</sup> The test was given a significant boost in 1981 when the United States Supreme Court rejected the control-group test and, at least implicitly, adopted the subject-matter test in its decision in *Upjohn Co. v. United States*.<sup>189</sup> The Court began by reiterating the purpose of the privilege. It exists, wrote then Justice Rehnquist, to “protect . . . the giving of professional advice to those who can act on it, but also the giving of information to the lawyer to enable him to give sound and informed advice.”<sup>190</sup> Although the Court criticized and rejected the control group test, its adoption of the subject matter test has not ended the debate for two reasons. First, *Upjohn* involved the scope of the federal law of attorney-client privilege and the scope of the privilege is often an issue of state law. Second, the subject-matter test requires a case-by-case analysis. Since *Upjohn*, some states have rejected the subject matter test, deciding to retain the control group test.<sup>191</sup> Courts have generally been unwilling to adopt the subject-matter

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<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> Charles W. Wolfram, *MODERN LEGAL ETHICS*, § 6.5.4, 285 (West 1986).

<sup>189</sup> *Upjohn Co.*, 449 U.S. at 390.

<sup>190</sup> *Id.* at 389-90.

<sup>191</sup> See, e.g., *Nalian Truck Lines, Inc., v. Nakano Warehouse & Transportation Corp.*, 8 Cal. Rptr.2d 467, 471 (Cal. Ct. App. 1992) (The drafters of the rules of professional conduct in California “intended to retain the control group test.”).

test *in toto*, preferring some sort of hybrid test. Also, applying the test case-by-case has resulted in numerous attempts to formulate a workable standard. The decision in *Boyer v. Board of County Commissioners*<sup>192</sup> is a good example of the latter.

*Boyer* involved a §1983 claim of unlawful retaliation. Ruling on a motion to compel discovery, the court discussed the practical application of the subject-matter test. The court took a pragmatic approach, noting that corporations act “through all employees acting within the scope of their employment.”<sup>193</sup> Accordingly, it adopted the *Upjohn* decision’s approach that the giving of sound legal advice requires corporate counsel to gather information from “multiple levels of the corporation . . . .”<sup>194</sup> When it comes to the question of the applicability of the attorney-client privilege, therefore, the inquiry must be “whether the communications [to or from non-managerial constituents] were made at the request of management in order to allow the corporation to secure legal advice.”<sup>195</sup> The court then crafted a two step test: (1) the status of the employee; and (2) the context of the communication. If the employee occupies a managerial position, communications will generally be privileged. Regardless of an employee’s status, however, if the employee is a “primary source for information concerning the facts” involved in the legal matter, the attorney’s communications with that person will be covered by the attorney-client privilege.<sup>196</sup>

The *Boyer* opinion, which has been often cited, usually favorably, by both courts and commentators, recognizes that organizations often act through constituents who are not in managerial positions, and that if the attorney-client privilege is going to accomplish its goals, it must include communications with the relevant actors, regardless of their positions.<sup>197</sup> The opinion represents a logical, practical approach to the issue, an approach which is similar to the approach taken by the Wyoming Supreme Court in the *Strawser* case, which involved the related issue of *ex parte* communications with corporate employees.<sup>198</sup> Further, *Boyer* was affirmed by the Tenth Circuit.<sup>199</sup> Judge Brorby authored the unpublished opinion.<sup>200</sup>

The Restatement also favors the subject matter test over the control group test since the latter “overlooks that the division of functions within an organization often separates decisionmakers from those knowing relevant facts.”<sup>201</sup> It seems

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<sup>192</sup> *Boyer v. Bd. of County Comm’rs*, 162 F.R.D. 687 (D. Kan. 1994).

<sup>193</sup> *Id.* at 690.

<sup>194</sup> *Id.* at 689.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 690.

<sup>197</sup> *Boyer v. Bd. of County Comm’rs*, 162 F.R.D. 687, 690 (D. Kan. 1994).

<sup>198</sup> *Strawser v. Exxon*, 843 P.2d 613, 614 (Wyo. 1992).

<sup>199</sup> *Boyer v. Johnson County Bd. of County Comm’rs*, 108 F.3d 1388 (10th Cir. 1997).

<sup>200</sup> Although the opinion is unpublished, it is available at 1997 WL 143597.

<sup>201</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73, cmt. d, (2000).

clear, therefore, that the better reasoned approach is the subject matter test or some variant of it. When all is said and done, however, lawyers in Wyoming have no clear standards for which communications with which of an organization's constituents will be protected by the attorney-client privilege.

Although the parameters of the attorney-client privilege in Wyoming with respect to organizations are unclear, an attorney can and should advise organizational clients about that uncertainly. The lawyer should advise organizational constituents that the scope of the privilege in Wyoming is unclear, and that communications with non-managerial persons may not be protected. The attorney should make such a disclosure since most constituents will have the expectation that their communications with the organization's lawyer are privileged. Disclosing that they may not be may result in reticent constituents, but that is preferable to constituents having an expectation of confidentiality which turns out to be incorrect. If that occurs, the lawyer will likely be the target of a grievance, a malpractice action, or both, premised on the lawyer's failure to properly disclose the true situation and "explain [the] matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation . . ." <sup>202</sup>

While the scope of the attorney-client privilege is unclear, an organizational lawyer's ethical duty is clear. Whatever the source of the information, it is confidential under Rule 1.6, meaning that the lawyer may not disclose it in the absence of an informed decision by the client to waive that confidentiality, unless it falls within one of the exceptions to the rule or the lawyer has a duty to disclose. <sup>203</sup>

*e. Who Within An Organization May Waive the Attorney-Client Privilege?*

The attorney-client privilege belongs to the client. <sup>204</sup> Since an organizational lawyer's client is the organization, the privilege belongs to it, regardless of which test is adopted to define the scope of the privilege. Accordingly, the organization may waive the privilege. <sup>205</sup> This creates the potential that constituents who were

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<sup>202</sup> WYO. RULES OF PROF'L CONDUCT R. 1.4(b) (2006). Although not designed to serve as a basis for civil liability, "the Rules do establish standards of conduct by lawyers, [and] the Rules may be evidence of the applicable standard of conduct." *Id.* at Scope [19].

<sup>203</sup> For discussions of exceptions to the rule and a lawyer's duty to disclose, see John M. Burman, *An Attorney's Duty to Warn*, Vol 30, No.1, WYOMING LAWYER (February 2007) and John M. Burman, *The Disclosure of Confidential Information Under the New Wyoming Rules of Professional Conduct*, Vol 29, No 6, WYOMING LAWYER (December 2006).

<sup>204</sup> See, e.g., WYO. STAT. ANN. § 1-12-101(a)(i) (2008) (An attorney may testify "by express consent of the client . . .").

<sup>205</sup> Charles W. Wolfram, MODERN LEGAL ETHICS, § 6.5.4 (West 1986).

not involved in communications with the organization's lawyer may, nevertheless, have the authority to decide to waive the privilege. Similarly, constituents who were involved in the combinations may not be in a position to oppose a waiver. Such a situation is likely contrary to the expectations of those constituents who were involved in the communications. It is important, therefore, for the lawyer involved in the communications to ensure that constituent's expectations regarding the attorney-client privilege are accurate.

Under the control-group test, the subject-matter test, or any other test which the court might adopt, it is likely that at least some of the constituents who communicate with an organization's lawyer will not be in a position to control the decision of whether to waive the privilege. Yet those constituents will probably assume that their communications with the organization's lawyer are privileged, and that they are the ones who may waive or insist on the privilege. Both of those assumptions may be incorrect—and it is the lawyer's responsibility to correct them.

As discussed above, the scope of the attorney-client privilege in Wyoming is unclear, and that uncertainty should be disclosed to the organization's constituents with whom the attorney is interacting.<sup>206</sup> In addition, the constituent(s) with whom the lawyer is dealing may not be the one(s) who will decide if the privilege should be waived. To ensure that those persons are properly informed, the lawyer should explain that someone else will be making that decision. The reason is that the organization's interests may well diverge from a constituent's. Consider a simple example.<sup>207</sup>

An organization (a corporation) is being investigated for illegal activity. The corporation's lawyer learns, through conversations with corporate constituents, that persons within the entity were involved in the activity. The corporate management decides that the best approach is to disclose to the appropriate regulatory officials which individuals were involved in the illegal activity. The decision, in other words, is to hang someone out to dry, for the benefit of the corporation. While that may be the best strategy for the organization, it is likely counter to the interests of the person(s) who are to be hung out to dry. Because of the clear divergence of interests, which was a potential conflict from the outset, the lawyer should have notified the constituents of the possible outcome, *i.e.*, that although the conversations between the lawyer and the constituent may well be privileged under any test the court may adopt, the corporation may decide to waive the privilege, regardless of the wishes of the constituents involved in the communications. Only with such a disclosure at the time of the initial contact with the constituent can the lawyer avoid being the subject of a disgruntled

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<sup>206</sup> See *supra* notes 188–208 and accompanying text.

<sup>207</sup> This example is based on the facts of *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981).

constituent's wrath when there is a waiver of the privilege (or the ethical duty of confidentiality), thereby disclosing the individual's potential culpability. Such a disclosure will also satisfy the lawyer's disclosure obligations under Rule 1.13(d); those obligations are discussed above.<sup>208</sup>

*f. Summary*

Although the applicability and scope of the attorney-client privilege in Wyoming are not specified in the statute, the answers to three fundamental questions are reasonably predictable, while the answer to a fourth is less certain. First, there is little doubt the privilege will apply to protect clients, and not just their lawyers. Second, it is reasonable to assume that the privilege will be applied to organizations' in Wyoming, just as it has in every jurisdiction which has considered the issue. To hold otherwise would completely undermine the purpose of the privilege, encouraging full disclosure between an attorney and the attorney's client. Third, there is also little doubt that the privilege belongs to the organization, and it, acting through its governing body, may waive the privilege, just as it may waive a lawyer's ethical duty of confidentiality.

The question which is both unanswered and difficult to predict with accuracy is what is the scope of the privilege? Will it be defined by the control group test, the subject matter test, or something else? The better reasoned view is the subject matter test, or some variant of it. That view is better reasoned because it recognizes reality. Organizations act through all constituents, not just those in managerial positions, and it is critical that an organization's lawyer be able to commentate with relevant constituents, regardless of their position in the organization, confident that the communications will be privileged.

Whatever the scope of the privilege, an organization's lawyer must be careful to correct constituents' misconceptions about the nature of their communications. A constituent needs to know the communications may not be privileged, and that the organization, not the constituent, will have the ability to waive the privilege, if it exists, the attorney's ethical duty of confidentiality, or both.

*D. A Lawyer's Whistle-Blowing Obligations.*

Identifying the client, the constituents authorized to act on behalf of the client, and properly applying the confidentiality principles to organizations are critically important, but doing so does not end an organizational lawyer's ethical duties to the client. Among the lawyer's other duties to the organization is the obligation to blow the whistle when the actions or inactions of an individual within or associated with the organization threaten the organization.

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<sup>208</sup> See *supra* notes 106–107 and accompanying text.

### 1. *The Ethical Framework*

Generally, clients, not lawyers, call the shots: ethically, a lawyer “shall abide by the client’s decisions regarding the objectives of the representation.”<sup>209</sup> Further, a lawyer “shall consult with the client as to the means by which they [the objectives] are to be pursued.”<sup>210</sup> As in any attorney-client relationship, the attorney for an organization is an agent for the client, who is the principal in that relationship. An agent must, of course, “act solely for the benefit of the principal . . .”<sup>211</sup> Furthermore, as an agent, “the lawyer generally owes the client rigorously enforced fiduciary duties . . .”<sup>212</sup> The lawyer for an organization, therefore, is both an agent and a fiduciary for the organization—and to it flow all the ethical and legal duties a lawyer owes to any client, including the duties of loyalty, confidentiality, and competence.<sup>213</sup>

Paragraph (b) of Rule 1.13 articulates the importance of the lawyer’s duty of loyalty to an organizational client. It is based on the principle that since a lawyer for an organization represents the organization, the lawyer must act to protect the organization from individuals who might harm it, even if those individuals are constituents who work for or are associated with the organization and are constituents with whom the lawyer interacts. The lawyer must, in short, ignore his or her personal relationship with any such constituent and blow the whistle on any person whose actions or inactions threaten the organization’s best interests from within.

The whistle-blowing provisions, paragraphs (b) and (c) of Rule 1.13, contain two components. First, the organization’s lawyer must “know” certain things. Second, if the lawyer does “know” those things, the lawyer must act to protect the organization.

“Know” is a defined term. It means “actual knowledge of the fact in question. A person’s knowledge may [however] be inferred from circumstances.”<sup>214</sup> It is not enough, therefore, for a lawyer to suspect, believe, or even reasonably believe something. The lawyer must “know” before the whistle blowing obligation is triggered. The lawyer must know four things: (1) that “an officer, employee or other person associated with the organization is engaged in action, intends to

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<sup>209</sup> WYO. RULES OF PROF’L CONDUCT R. 1.2(a) (2006).

<sup>210</sup> *Id.*; see also WYO. RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2006) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished.”).

<sup>211</sup> RESTATEMENT (SECOND) OF THE LAW OF AGENCY, § 387 (1958).

<sup>212</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 73, cmt. B (2000).

<sup>213</sup> Charles W. Wolfram, MODERN LEGAL ETHICS § 4.1 (West 1986).

<sup>214</sup> WYO. RULES OF PROF’L CONDUCT R. 1.0(g) (2006).

act or refuses to act in a matter related to the representation.” (2) “that is a violation of a legal obligation to the organization, or a violation of law which reasonably might be imputed to the organization;” (3) that the violation of a legal obligation or violation of law “reasonably might be imputed to the organization . . . ;” and (4) the violation is “likely to result in substantial injury to the organization . . . .”<sup>215</sup>

The question is what does that really mean? What must a lawyer know? Two types of events fall within Rule 1.13(b). Actions or inactions by a person associated with the organization that is either (1) “a violation of a legal obligation to the organization;” or (2) “a violation of law which reasonably might be imputed to the organization.”<sup>216</sup> The former type of activity generally involves the “breach of a constituent’s fiduciary duty to the organization, such as usurpation of a corporate opportunity or self-dealing.”<sup>217</sup> The latter type of activity “refers to conduct for which an organization would be traditionally responsible under the common law doctrine of ‘respondeat superior’ or by operation of statute or regulation.”<sup>218</sup> Given the proliferation of federal and state laws that allow for the recovery of erroneously paid government funds from the provider itself, which is likely an organization, lawyers need to be especially mindful of the possibility the health care organization the lawyer represents does not get into legal hot water.<sup>219</sup>

How will a lawyer know? A common scenario will be that an organization’s lawyer is asked for an opinion about one of the organization’s proposed activities. The lawyer opines that the proposal will involve either actions by a constituent that are a violation of legal obligations owed to the organization or a violation of law which might reasonably be imputed to the organization, and, therefore, taking the proposed action would be ill-advised. The lawyer’s advice is rejected by

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<sup>215</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13(b) (2006).

<sup>216</sup> *Id.*

<sup>217</sup> Mary C. Daly, *Avoiding the Ethical Pitfall of Misidentifying the Organizational Client*, 1319 PLI/CORP. 721, 725-26 (1997).

<sup>218</sup> *Id.* at 726.

<sup>219</sup> See, e.g., WYO. STAT. ANN. § 42-4-207 (2008) (“the department [of Health] may through appropriate action recover any incorrect payment of medical assistance under this chapter on behalf of a recipient . . . . Any recovery shall be prorated to the federal government in proportion to the amount it contributed . . . .”); see also WY Rules and Regulations HLTH MDCD Ch. 7 s 31 (“Recovery of excess payments or overpayments.”) and Ch. 16 (“Medicaid Program Integrity.”). The State is required by federal law to attempt to recover overpayments. 42 U.S.C. § 1396b (1984) (“[W]hen an overpayment [of Medicaid funds] is discovered, which was made by a State to a person or other entity, the State shall have a period of 60 days in which to recover or attempt to recover such overpayment . . .”).

The foregoing are just a few of the myriad laws and regulations, at both the state and federal level, which permit or require recovery from a provider of medical services (a provider is often an organization, such as a hospital, nursing home, or group of HCWs) of erroneously paid government funds.

the constituent(s) with whom the lawyer is interacting. Another common scenario is that a lawyer is asked to investigate certain activity and learns of on-going, improper activity, such as improper billing for and receipt of state and/or federal funds for medical services, by someone associated with the organization. Finally, a lawyer who has an on-going relationship with an organizational client may become aware of improper actions just because of the lawyer's general familiarity with how the organization operates. However the lawyer comes to "know," once he or she does, the question for the lawyer is "What next?" The question is a tough one, but the Rules help to answer it by clarifying that the lawyer's ultimate duty is to the organization, not its constituents, regardless of the constituent's position in the organization.

If a lawyer "knows" the foregoing, *i.e.*, that an individual associated with an organization is about to embark on or has already embarked on a course of conduct which is in violation of the individual's obligations to the organization or which is illegal and may be imputed to the organization, and the injury to the organization will be substantial, the lawyer must act. He or she "shall," says the Rule, "proceed as is reasonably necessary in the best interest of the organization."<sup>220</sup> This language makes the organization's primacy clear. The lawyer "shall" act in the best interest of "the organization," even at the expense of the interests of the individual(s) who may control it. The Rule then articulates several factors for the lawyer to consider in deciding what to do:

In determining how to proceed, the lawyer shall give due consideration to *the seriousness of the violation* and its consequences, *the scope and nature of the lawyer's representation*, the responsibility in the organization and the apparent motivation of the person involved, *the policies of the organization* concerning such matters and any other relevant considerations.<sup>221</sup>

While the lawyer's primary obligation is to protect the organization, the lawyer must act with caution. "Any measures taken shall be designed to minimize disruption of the organization and the risk of revealing information relating to the representation to persons outside the organization."<sup>222</sup> The emphasis on not disclosing otherwise confidential information outside the organization is a natural outgrowth of a lawyer's general obligation not to reveal "confidential information relating to the representation."<sup>223</sup> The idea is that a lawyer can, and should, take steps within the organization to protect the best interests of the organization, while at the same time preserving the client's confidences.

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<sup>220</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(b) (2006).

<sup>221</sup> *Id.* (emphasis added).

<sup>222</sup> *Id.*

<sup>223</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

In addition to the Rule's general directive to "minimize disruption of the organization," the Rule provides specific ideas. Acting in the best interest of an organization "may include" the following: First, the lawyer may ask for "reconsideration of the matter."<sup>224</sup> The persons to ask, of course, are the persons, the constituents, in the words of the Rule, who are authorized to act on behalf of the organization.<sup>225</sup> They are the persons who made the decision in question, and they are the persons who can change it. If that does not work, the second recommended step is that the lawyer "advise[e] that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization."<sup>226</sup> Once again, the advice to ask for reconsideration should be given to the constituent or constituents authorized to act on behalf of the organization. If that advice falls on deaf ears, the third suggestion is to "refer[] the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law."<sup>227</sup> Who is a "higher authority" depends on with whom the lawyer has been interacting and, as the Rule notes, "applicable law." The ABA's new Model Rules, adopted in 2002 substantially revised Rule 1.13, including paragraphs (b) through (d). Among other things, the ABA's Rules presume that attorneys should refer the matter to a higher authority, and, under some circumstances, ABA Rule 1.13(c) permits attorneys to disclose otherwise confidential client information.<sup>228</sup> Those changes were not adopted when the Wyoming Rules were modified in 2005.<sup>229</sup>

If, for example, the organization is a corporation and the "authorized constituent" with whom the corporation's lawyer has been dealing is a vice-president, the CEO is obviously a higher authority. If the CEO is the authorized constituent, the "higher authority," according to Wyoming law, the applicable law, is the board of directors, which has ultimate authority over the corporation.<sup>230</sup> If the organization is a limited liability company, governance is vested in its members.<sup>231</sup> Whatever the entity, the ultimate control will be established by "applicable law," and the lawyer better know that law.

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<sup>224</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(b)(1) (2006).

<sup>225</sup> See John M. Burman, *Representing Organizations: Part I, Who is the Client, and With whom Should the Lawyer Interact?* XXV. WYOMING LAWYER at 39-41 (April 2002).

<sup>226</sup> WYO. RULES OF PROF'L CONDUCT R. 1.13(b)(2) (2006).

<sup>227</sup> *Id.* at R. 1.13(b)(3).

<sup>228</sup> MODEL RULES OF PROF'L CONDUCT R. 1.13(b) through (d) (2008).

<sup>229</sup> See WYO. RULES OF PROF'L CONDUCT R. 1.13 (2006).

<sup>230</sup> By law, a corporation is governed by its board of directors. WYO. STAT. ANN. § 17-16-801(a) (2008).

<sup>231</sup> *Id.* at § 17-16-801.

If asking for reconsideration, requesting a second opinion, and referring the matter to a higher authority do not succeed in diverting the organization from a harmful course of conduct, paragraph 1.13(c) provides further guidance. If “the highest authority that can act on behalf of the organization” is unwilling to alter the organization’s conduct, and the conduct is “*clearly a violation of law and is likely to result in substantial injury* to the organization, the *lawyer may resign* in accordance with Rule 1.16” [“Declining or terminating representation”].<sup>232</sup> The language of this paragraph is more restrictive than the language of paragraph (b), which requires the lawyer to blow the whistle. While a lawyer must blow the whistle when an act or proposed act is “a violation of a legal obligation to the organization, or a violation of law,” paragraph (c) requires an action which is “*clearly a violation of law.*” The “substantial injury” language of paragraph (c) is the same as the language of paragraph (b). Accordingly, when the action is “clearly a violation of law” a lawyer may resign in accordance with Rule 1.16<sup>233</sup> (the “may resign” standard may become a shall resign if the lawyer’s continued representation of the organization “will result in violation of the Rules of Professional Conduct or other law.”<sup>234</sup>). While withdrawal likely satisfies the lawyer’s ethical duty, it may be an empty gesture. The client may not be deterred from the conduct which led to the lawyer blowing the whistle, and, ultimately, the lawyer’s withdrawing. The issue which then arises is whether the lawyer may disclose the now former client’s intended conduct.

A lawyer whose former (or current) client intends to pursue an illegal or otherwise improper course of conduct is caught in a bind, between two potentially conflicting ethical and legal duties. On the one hand, a lawyer “shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”<sup>235</sup> Further, a lawyer must withdraw from representation of a client if “the representation will result in violation of the Rules of Professional Conduct or other law.”<sup>236</sup> On the other, a lawyer has an obligation of confidentiality to both current and former clients and may not use or reveal any “confidential information relating to the representation” of a current<sup>237</sup> or former client.<sup>238</sup> A lawyer may not, therefore, simply withdraw and disclose the reasons for doing so. There is authority, however, to support a lawyer making a “noisy withdrawal,” in which the lawyer communicates, at least implicitly, the fact and the reasons for

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<sup>232</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13(c) (2006) (emphasis added).

<sup>233</sup> WYO. RULES OF PROF’L CONDUCT R. 1.16 (2006) (Paragraph (a) of Rule 1.16 requires withdrawal in certain circumstances. Paragraph (b) permits withdrawal in others.).

<sup>234</sup> *Id.* at R. 1.16(a)(1).

<sup>235</sup> WYO. RULES OF PROF’L CONDUCT R. 1.2(d) (2006).

<sup>236</sup> WYO. RULES OF PROF’L CONDUCT R. 1.16(a)(1) (2006).

<sup>237</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

<sup>238</sup> WYO. RULES OF PROF’L CONDUCT R. 1.9(c) (2006).

withdrawing.”<sup>239</sup> That authority is considerably stronger in Wyoming because of a Wyoming’s lenient rule on disclosing confidential information.<sup>240</sup>

As discussed in detail above,<sup>241</sup> when it is “apparent” to an organization’s lawyer that the interests of the organization and its constituents “are adverse,” the lawyer must “explain the identity of the client . . . [and] that the organization’s interests are adverse to those of the constituents with whom the lawyer is dealing.”<sup>242</sup> If the constituent with whom the lawyer is interacting does not have a lawyer, the only advice the lawyer may give the individual, which the lawyer should give, is that the individual should obtain counsel.<sup>243</sup> If the constituent has counsel, the lawyer may not communicate about the matter with the individual “unless the lawyer has the consent of the other lawyer or is authorized by law to do so.”<sup>244</sup>

Requiring a lawyer to act to take reasonable steps to protect an organization’s best interests is consistent with the Rules’ general requirement that “[a] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”<sup>245</sup> It is also consistent with the ethical mandate that a lawyer “shall withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or other law.”<sup>246</sup> Despite these clear directives, a lawyer must remember that the duty of confidentiality always applies and a lawyer’s withdrawal from representing a client does not mean that the lawyer may disclose information about the client’s conduct.<sup>247</sup>

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<sup>239</sup> Valerie Breslin & Jeff Dooley, *Whistleblowing v. Confidentiality: Can Circumstances Mandate Attorneys To Expose Their Clients*, 15 GEO. J. LEGAL ETHICS, 719, 720-22 (2002).

<sup>240</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006) (“A lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act.”).

<sup>241</sup> See *supra* notes 240 through 245 and accompanying text.

<sup>242</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13(d) (2006).

<sup>243</sup> WYO. RULES OF PROF’L CONDUCT R. 4.3 (2006) (“In dealing on behalf of a client with a person who is not represented by counsel . . . [t]he lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel.”) (emphasis added).

<sup>244</sup> WYO. RULES OF PROF’L CONDUCT R. 4.2 (2006).

<sup>245</sup> WYO. RULES OF PROF’L CONDUCT R. 1.2(d) (2006).

<sup>246</sup> WYO. RULES OF PROF’L CONDUCT R. 1.16(a)(1) (2006).

<sup>247</sup> WYO. RULES OF PROF’L CONDUCT R. 1.9(c)(1) & (2) (2006) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . [u]se information relating to the representation to the disadvantage of the former client . . . or . . . [r]eveal information relating to the representation . . .”); see also WYO. RULES OF PROF’L CONDUCT R. 1.6, cmt. [25] (2006) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

## 2. *Disclosing the Information Which Led to Whistle-Blowing.*

A lawyer's ethical duty of confidentiality is broad: "A lawyer shall not reveal confidential information relating to representation of a client *unless* the client makes an informed decision, the disclosure is impliedly authorized in order to carry out the representation, or the disclosure is permitted by paragraph (b)."<sup>248</sup> Since it is unlikely that an organization will decide to allow its lawyer to disclose the information which triggered the lawyer's whistle-blowing obligation, the question becomes is the lawyer permitted to disclose the information pursuant to "paragraph (b)," or is the lawyer required to remain mute, knowing that the proposed action may cause injury, either physical or otherwise, to third parties? In answering this question, Wyoming has taken a much different approach than the ABA.

When it comes to personal injury, the ABA suggests restricting a lawyer's disclosure of confidential information to circumstances where the lawyer "reasonably believes"<sup>249</sup> that disclosure is necessary to prevent "reasonably certain death or substantial bodily injury."<sup>250</sup> The ABA also permits disclosure when a lawyer "reasonably believes" disclosure is "necessary . . . to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;<sup>251</sup> Also, in a significant departure from the policy that a lawyer may only disclose confidential client information to prevent future crimes, the ABA now recommends that lawyers be allowed to reveal confidential client information about prior client actions in some circumstances. Subparagraph (b)(3) permits disclosure when a lawyer "reasonably believes" that disclosure is "necessary . . . to prevent, *mitigate or rectify* substantial injury to the financial interests or property of another that is reasonably certain to result or *has resulted* from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;<sup>252</sup> The use of the words "mitigate [or] rectify," and "has resulted" make the rule's applicability to past acts clear. One simply cannot "mitigate [or] rectify" future acts, and the use of the past-tense, "has resulted," obviously applies to the past, not the future. Finally, the ABA has added a disclosure provision to Rule 1.13 ("Organization as client"). If a lawyer blows the whistle inside an organization (and has referred the matter to the "highest authority that can act on behalf of an organization [and it] insists

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<sup>248</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(b) (2006).

<sup>249</sup> "Reasonable belief" is a defined term. It means: "that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." MODEL RULES OF PROF'L CONDUCT, R. 1.0(3) (2008).

<sup>250</sup> MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(1) (2008).

<sup>251</sup> MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(2).

<sup>252</sup> MODEL RULES OF PROF'L CONDUCT, R. 1.6(b)(3) (emphasis added).

upon or fails to address [a matter] . . . that is clearly a violation of law,” a lawyer may disclose information outside the organization if: (1) the lawyer “reasonably believes” (2) “that the violation is reasonably certain to result in substantial injury to the organization.”<sup>253</sup>

The Wyoming Rules, however, take a much different approach, permitting disclosure of otherwise confidential information “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act.”<sup>254</sup> In some ways, that standard is more liberal than the ABA’s standard with respect to future acts. It does not, however, allow disclosure of past acts, ever, and is, in that way, more restrictive than the ABA’s Rule.

Wyoming is not alone in rejecting the ABA’s view. It is one of approximately thirty-three jurisdictions which have adopted the view that a lawyer may disclose otherwise confidential information to prevent the client from committing a criminal act.<sup>255</sup> (By contrast, eighteen jurisdictions have adopted the ABA’s view and permit disclosure only when a client’s intended criminal act will result in substantial harm or death.<sup>256</sup> Another eleven jurisdictions require disclosure to

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<sup>253</sup> MODEL RULES OF PROF’L CONDUCT, R.1.13(c) (2008).

<sup>254</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006).

<sup>255</sup> *Id.* at R. 1.6(b)(1); *see also* Arkansas (ARK. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); California (CAL. RULES OF PROF’L CONDUCT R. 3-100(B)); Colorado (COLO. RULES OF PROF’L CONDUCT R. 1.6 (b)); Idaho (IDAHO RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Indiana (IND. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Iowa (IOWA CODE OF PROF’L CONDUCT R. 4-101 (C)(3)); Kansas (KAN. RULES OF PROF’L CONDUCT R. 1.6(b)(1);R. 226); Maine (ME. RULES OF PROF’L CONDUCT R. 3.6 (h)(4)); Michigan (MICH. RULES OF PROF’L CONDUCT R. 1.6 (c)(4)); Minnesota (MINN. RULES OF PROF’L CONDUCT R. 1.6 (b)(3)); Mississippi (MISS. RULES OF PROF’L CONDUCT R. 1.6 (b)(2)); Nebraska (NEB. CODE OF PROF’L CONDUCT DR. 4-101 (C)(3)); New York (N.Y. RULES OF PROF’L CONDUCT DR. 4-101 C. 3); North Carolina (N.C. R BAR Ch 2, R. 1.6 (b)(2)); Ohio (OHIO CODE OF PROF’L CONDUCT DR. 4-101 (C)(3)); Oklahoma (OKLA. RULES OF PROF’L CONDUCT R. 1.6 (b)(2)(i)); Oregon (OR. CODE OF PROF’L CONDUCT DR. 4-101 (C)(3)); South Carolina (S.C. R A CT R. 407, S.C. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Tennessee (TENN. S CT RULE 8, TENN. CODE OF PROF’L CONDUCT DR. 4-101 (C)(3)); Washington (WASH. RULES OF PROF’L CONDUCT R. 1.6 (b)(2)); and West Virginia (W. VA. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)). In addition, eleven states require the disclosure of information necessary to prevent substantial bodily harm or death, and permit a lawyer to disclose information relating to other crimes. *See*, Arizona (ARIZ. ST S CT R. 42, ARIZ. CODE OF PROF’L CONDUCT ER. 1.6 (b)); Connecticut (CONN. RULES OF PROF’L CONDUCT R. 1.6 (b)); Florida (FLA. ST BAR R. 4-1.6 (b)(1)); Illinois (ILL. S CT RULES OF PROF’L CONDUCT R. 1.6 (b)); Nevada (NEV. S CT R. 1.6 (c)); New Jersey (N.J. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); North Dakota (N.D. RULES OF PROF’L CONDUCT R. 1.6 (b)); Texas (TEX. RULES OF PROF’L CONDUCT R. 1.05 (e)); Vermont (VT. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Virginia (VA R S CT PT 6 S 2, VA. RULES OF PROF’L CONDUCT R. 1.6 (c)(1)); and Wisconsin (WIS RULES OF PROF’L CONDUCT R. 20:1.6 (b)).

<sup>256</sup> The eighteen jurisdictions are: Alabama (ALA. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Alaska (ALA. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Delaware (DEL. RULES OF PROF’L CONDUCT R.1.6 (b)(1)); District of Columbia (D.C. RULES OF PROF’L CONDUCT R.1.6 (c)(1)); Georgia (GA. BAR R. 4-102. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)(ii)); Hawaii (HAW. S CT EX A RULES OF PROF’L CONDUCT R. 1.6 (c)(1)); Kentucky (KY. ST S CT R. 3.130, RULES OF PROF’L CONDUCT

prevent serious bodily harm or death, and they permit disclosure of information to prevent lesser crimes.<sup>257</sup> Allowing disclosure of confidential information to prevent a “criminal act” will certainly permit an organization’s lawyer to disclose information to prevent the organization from committing a crime. Under no circumstances, however, may a Wyoming lawyer disclose a client’s past conduct. The exception is for future conduct because one can prevent it, not past crimes. A “lawyer may disclose otherwise confidential information in order to prevent the criminal act which the lawyer reasonably believes is intended by the client. [But i]t is very difficult for a lawyer to ‘know’ when such a purpose will actually be carried out for the client may have a change of mind.”<sup>258</sup> Accordingly, while a Wyoming lawyer may disclose a client’s intent to commit a future crime, he or she never has an ethical duty under Rule 1.6 (which governs confidentiality of information) to disclose. Accordingly:

A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule. Disclosure may be required, however, by other rules. Some rules require disclosure only if such disclosure would be permitted by paragraph (b). See Rules 1.2(d), 4.1(b), 8.1 and 8.3. Rule 3.3, conversely, requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule. See Rule 3.3(c).<sup>259</sup>

Regardless of whether a Wyoming lawyer has an ethical duty to disclose, he or she may have a tort duty to disclose when a client intends to commit a crime which will result in substantial bodily harm or death to an identifiable victim.<sup>260</sup>

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R. 1.6 (b)(1)); Louisiana (L.A. ST BAR ART 16, L.A. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Maryland (MD. R CTS J & ATTYS RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Massachusetts (MASS. S CT R. 3:07, MASS. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Missouri (MO. R RULE 4, RULES OF PROF’L CONDUCT R. 4-1.6 (b)(1)); Montana (MONT. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); New Hampshire (N.H. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); New Mexico (N.M. RULES OF PROF’L CONDUCT R. 16-106 B. (“a lawyer should reveal”)); Pennsylvania (PA. RULES OF PROF’L CONDUCT R.1.6 (c)(1)); Rhode Island (R.I. R S CT ART V RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); South Dakota (S.D. ST T. 16, Ch 16-18, APP, RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); and Utah (UT. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)).

<sup>257</sup> Arizona (ARIZ. ST S CT RULE 42 RULES OF PROF’L CONDUCT ER. 1.6 (b)&(c)); Connecticut (CONN. RULES OF PROF’L CONDUCT R. 1.6 (b)&(c)); Florida (FLA. ST BAR R. 4-1.6 (b)(1)); Illinois (ILL. ST S CT RULES OF PROF’L CONDUCT R. 1.6 (b)&(c)(3)); Nevada (NEV. ST S CT R. 1.6(b) 2)); New Jersey (N.J. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); North Dakota (N.D. RULES OF PROF’L CONDUCT R. 1.6 (c)); Texas (TEX. RULES OF PROF’L CONDUCT R. 1.05(e)); Vermont (VT. RULES OF PROF’L CONDUCT R. 1.6 (b)(1)); Virginia (VA. R S CT PT 6 S 2, RULES OF PROF’L CONDUCT R. 1.6 (c)(1)); and Wisconsin (WIS. RULES OF PROF’L CONDUCT SCR. 20:1.6 (b)).

<sup>258</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6 cmt. [12] (2006).

<sup>259</sup> *Id.* at R. 1.6 cmt. [20].

<sup>260</sup> See, e.g., John M. Burman, *An Attorney’s Duty to Warn*, Vol 30, No.1, WYOMING LAWYER (February 2007).

In sum, withdrawing from representation of an organization does not free a lawyer from the duty of confidentiality discussed above as a lawyer owes a similar duty not to use or reveal confidential information regarding a former client<sup>261</sup> or a former prospective client.<sup>262</sup> The commentary<sup>263</sup> to Rule 1.6 explains the effect of withdrawal on a lawyer's confidentiality obligation:

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise permitted in Rule 1.6. Neither this Rule [1.6] nor Rule 1.8(b) nor Rule 1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like. *Where the client is an organization*, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with this Rule, *the lawyer may make inquiry within the organization* as indicated in Rule 1.13(b).<sup>264</sup>

The commentary makes it clear that the Rule contemplates giving notice of the fact of withdrawal. The more difficult question is what does it mean to and how should a lawyer "disaffirm any opinion, document, affirmation, or the like?" The answer depends on the context.

When a lawyer enters an appearance in a tribunal<sup>265</sup> on behalf of a client, the rules change. The lawyer now owes his or her highest duty to the tribunal. The lawyer must not, among other things, "make a false statement of fact or law . . . fail to disclose to the tribunal legal authority . . . known to the lawyer to be directly adverse to the position of the client . . . [or] offer evidence the lawyer knows to be false."<sup>266</sup> In addition, if the lawyer has offered evidence which the lawyer subsequently learns to be false, the lawyer "shall take reasonable remedial measures" to correct the situation.<sup>267</sup> Such measures begin with the lawyer seeking

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<sup>261</sup> WYO. RULES OF PROF'L CONDUCT R. 1.9(c) (2006); *see also* WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt.[25] ("The duty of confidentiality continues after the client-lawyer relationship has terminated.").

<sup>262</sup> WYO. RULES OF PROF'L CONDUCT R. 1.18(b) (2006).

<sup>263</sup> The comments which accompany each rule "explain and illustrate the meaning and purpose of the Rule." WYO. RULES OF PROF'L CONDUCT R. Scope [20] (2006).

<sup>264</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6 cmt. [21] (2006) (emphasis added).

<sup>265</sup> "Tribunal" means "a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity." WYO. RULES OF PROF'L CONDUCT R. 1.0(n) (2006).

<sup>266</sup> WYO. RULES OF PROF'L CONDUCT R. 3.3(a)(1), (2), & (4) (2006).

<sup>267</sup> *Id.* at R. 3.3(a)(3).

to persuade the client to correct the falsity.<sup>268</sup> If that fails, the lawyer may seek to withdraw from the representation if doing so “will undo the effect of the false evidence.”<sup>269</sup> If withdrawal will not work either, the lawyer “must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6 [the rule on confidentiality].”<sup>270</sup> This duty to disclose is much different than a lawyer’s general duty of confidentiality, which overrides the lawyer’s duties to other third parties.<sup>271</sup> A lawyer’s duties to a tribunal, however, have primacy.

A lawyer’s duties to the tribunal “apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”<sup>272</sup> This means that a “lawyer shall not knowingly . . . fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”<sup>273</sup> Accordingly, if the lawyer has filed a pleading with a tribunal that the lawyer later learns contains a material misstatement of fact or law, or that omits a material fact, the lawyer must correct or supplement the pleading, or disaffirm it. Doing so is required by Rule 3.3 (“Candor to the tribunal”).<sup>274</sup> The disclosure of otherwise confidential information,

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<sup>268</sup> *Id.* at R. 3.3 cmt. [10].

<sup>269</sup> *Id.*

<sup>270</sup> *Id.* Although the ethical duty applies to criminal defense lawyers, it may be qualified by the client’s Constitutional rights: “The general rule—that an advocate must disclose the existence of perjury with respect to a material fact, even that of a client—applies to defense counsel in criminal cases . . . . However, the definition of the lawyer’s ethical duty in such a situation may be qualified by constitutional provisions for due process and the right to counsel in criminal cases. “ *Id.*; *but see* *Nix v. Whiteside*, 475 U.S. 157 (1986) (“It was not a violation of a defendant’s Sixth Amendment right to effective assistance of counsel for his attorney to threaten to withdraw if client committed perjury.”).

<sup>271</sup> *See, e.g.*, WYO. RULES OF PROF’L CONDUCT R. 4.1(b) (2006) (A lawyer shall not “fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”).

<sup>272</sup> WYO. RULES OF PROF’L CONDUCT R. 3.3(c) (2006).

<sup>273</sup> *Id.* at R. 3.3(a)(1).

<sup>274</sup> The lawyer may also have a problem with Rule 11 (of the Wyoming Rules of Civil Procedure). The problem is that a lawyer who signs a pleading which is filed with the court (which is a tribunal) is certifying that the document is: (1) not submitted for any improper purpose; (2) the legal contentions in the document are “warranted;” and (3) the factual allegations have evidentiary support. WYO. R. CIV. P. 11(b). If that turns out to be incorrect, the signing lawyer may be sanctioned. *Id.* at R. 11(c).

In Wyoming, the requirements of Rule 11 have been adopted as part of the Rules of Professional Conduct. WYO. RULES OF PROF’L CONDUCT R. 3.1(c) (2006) (“The signature of an attorney constitutes a certificate by him that he has read the pleading, motion, or other court document; that to the best of his knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.”).

however, “should be no greater than the lawyer reasonably believes necessary to accomplish the purpose.”<sup>275</sup>

Finally, a lawyer who has entered an appearance in a court may not withdraw without the permission of the court, regardless of the client’s actions.<sup>276</sup> The lawyer must receive the court’s permission even if the Rules would otherwise require the lawyer to terminate the representation because of the severity of the client’s conduct.<sup>277</sup> The lawyer who wishes to withdraw, and who is ethically obligated to withdraw because of a client’s conduct, may not tell all. Instead, the lawyer must be careful not to disclose too much information, even information which would clearly establish the impropriety of the client’s actions and the appropriateness of the lawyer’s request to withdraw since the lawyer still owes a duty of confidentiality to the client and the disclosure must be limited to that which is “necessary.” The lawyer should resist the temptation to detail the reasons for seeking to withdraw, and the court should not require the lawyer to specify the reasons:

Difficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. *The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted* as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 [confidentiality] and 3.3 [“Candor to the tribunal”].<sup>278</sup>

If the matter is not in litigation and the lawyer has not entered an appearance, Rule 3.3, which requires candor to the tribunal, will not apply, although the Rule on confidentiality (1.6) will. Withdrawal from the representation will be governed by Rule 1.16 (“Declining or terminating representation”) Paragraph (a) of the Rule requires termination of the representation if continued representation “will result in violation of the Rules of Professional Conduct or other law.”<sup>279</sup> Paragraph (b)

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<sup>275</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6 cmt. [19] (2006).

<sup>276</sup> *See, e.g.*, UNIFORM RULES FOR THE DISTRICT COURTS OF WYO., R. 102(c) (2007) (“Counsel will not be permitted to withdraw from a case except upon court order.”) The rule applies in circuit court, as well. UNIFORM RULES FOR THE CIRCUIT COURTS OF WYO., R. 1.02 (2007) (“The Uniform Rules for the District Courts of Wyoming shall govern the practice before the circuit courts of Wyoming.”).

<sup>277</sup> WYO. RULES OF PROF’L CONDUCT R. 1.16(c) (2006) (“A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation.”).

<sup>278</sup> *Id.* at R. 1.16 cmt. [3] (emphasis added).

<sup>279</sup> *Id.* at R. 1.16(a)(1).

permits termination for a variety of reasons, including when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent,”<sup>280</sup> or “the client has used the lawyer’s services to perpetrate a crime or fraud.”<sup>281</sup> Conduct which gives rise to a lawyer’s duty to blow the whistle will likely fall under either the mandatory or the permissive withdrawal provisions, and if the attorney has not entered an appearance, those provisions will control withdrawal.

A lawyer’s whistle-blowing duty to an organization is the reciprocal of the lawyer’s obligation to ensure that constituent(s) whose conduct may lead to liability for the organization know that the organization’s lawyer does not represent them. Almost by definition, when a lawyer has a duty to blow the whistle, the interests of the constituent(s) and the organization are very much in conflict. The Rules anticipate such a conflict and require an organizational lawyer to take steps to avoid that conflict.<sup>282</sup>

Before disclosing confidential information, a lawyer has another duty, the duty to communicate with the client about the lawyer’s proposed actions and whether the client wishes to act to eliminate the need for the attorney’s disclosure.<sup>283</sup> The reason is that a client, not the client’s lawyer, is authorized to make decisions about the objectives of the representation, and the lawyer “shall abide” by those decisions.<sup>284</sup> Further, the lawyer “shall consult with the client as to the means by which they are to be pursued.”<sup>285</sup> Accordingly, whether disclosing information is an objective or a means, the lawyer has a duty to consult with the client about potential disclosure and its possible effects. Furthermore, a lawyer has a duty to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.”<sup>286</sup> The client thus needs to make such an informed decision about whether to act to eliminate the need for disclosure by the lawyer, or to do nothing, knowing the lawyer will disclose the information.

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<sup>280</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2006).

<sup>281</sup> WYO. RULES OF PROF’L CONDUCT R. 1.16(b)(3) (2006).

<sup>282</sup> *Id.* at R. 1.16.

<sup>283</sup> WYO. RULES OF PROF’L CONDUCT R. 1.6 cmt.[19] (2006) (“Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.”).

<sup>284</sup> WYO. RULES OF PROF’L CONDUCT R. 1.2(a) (2006).

<sup>285</sup> *Id.*; *see also* WYO. RULES OF PROF’L CONDUCT R. 1.4(a)(2) (2006) (“A lawyer shall . . . reasonably consult with the client about the means by which the client’s objectives are to be accomplished;”).

<sup>286</sup> WYO. RULES OF PROF’L CONDUCT R. 1.4(b) (2006).

Requiring a lawyer to consult with a client before disclosure appears to be effective. In the only study which has been done on the efficacy of lawyers trying to dissuade their clients from committing violent acts, lawyer suasion was found to be very effective with individual clients who had told their lawyers of their intentions to commit violent crimes.<sup>287</sup> It should be similarly effective with organizational clients. It may be more effective as the organization's ultimate decision-maker may not have been involved in the original decision and may be very pleased to be able to correct the proposed action and avoid potential legal liability for the organization.

The lawyer's ethical duties are clear. The lawyer represents the organization, and he or she must act to protect it when the lawyer knows that the organization may be substantially harmed by the actions or inactions of an individual within or associated with the organization. Similarly, the lawyer must take care not to create the impression that the lawyer represents the individuals who work for or with the organization. This obligation means that the lawyer must explain his or her role to the individuals with whom the lawyer is interacting.

When all is said and done, a lawyer in Wyoming has discretion to reveal information when the lawyer reasonably believes disclosure is necessary to prevent the client from committing "a criminal act."<sup>288</sup> That will often permit a lawyer for an organization to disclose at least some of the conduct which has given rise to the lawyer's obligation to blow the whistle to protect the best interests of the organization. A disclosure outside the organization, however, must be limited. It "should be no greater than the lawyer reasonably believes necessary to accomplish the purpose."<sup>289</sup>

### 3. *The Legal Framework*

A lawyer owes both ethical and legal duties to a client. When it comes to blowing the whistle, a Wyoming lawyer's ethical and legal duties are virtually identical.

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<sup>287</sup> A 1993 study of New Jersey lawyers showed both that lawyers confront the issue of clients intending violent criminal action fairly often, and that the lawyers are generally successful in persuading the client not to commit the acts. Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 111–12 (1994). First, Professor Levin found that sixty-seven lawyers out of 776 responding lawyers reported that they had, at least once in their careers, reasonably believed that a client intended to commit future crime which would cause serious injury to another. Second, the study found that lawyers who reasonably believed that their clients were going to seriously harm a third party tried to convince the clients not to do so. *Id.* at 117. The lawyers believed they had been successful in persuading their clients not to commit the crimes 92.4% of the time. *Id.*

<sup>288</sup> WYO. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006).

<sup>289</sup> *Id.* at R. 1.6 cmt. [19].

The Third Restatement of the Law Governing Lawyers mirrors the ethical duty described above:

If a lawyer representing an organization knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization . . . the lawyer must proceed in what the lawyer reasonably believes to be in the best interests of the organization.<sup>290</sup>

The Restatement suggests the same steps as Wyoming's Rule 1.13(b). First, the lawyer may "ask the constituent to reconsider" the proposed action.<sup>291</sup> Second, the lawyer may "recommend that a second legal opinion be sought."<sup>292</sup> Third, the lawyer may "seek review by appropriate supervisory authority within the organization, including . . . the highest authority that can act on behalf of the organization."<sup>293</sup> Blowing the whistle on constituent wrong-doing is not, however, all an organizational lawyer must do.

As a general matter, a lawyer owes every client an ethical duty of competence, which "requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."<sup>294</sup> The legal duty is similar. A lawyer is held to the standard of "a reasonable, careful and prudent lawyer . . ."<sup>295</sup>

The legal duties a lawyer owes to an organizational client mirror the lawyer's ethical duties. The Wyoming Supreme Court addressed an organizational lawyer's legal duties in *Bowen v. Smith*.<sup>296</sup> In that case, minority shareholders sued the corporation's lawyers. Although the history leading up to and culminating in the suit is lengthy and complex, the salient facts are both simple and important. The corporation retained a law firm, at the sole expense of the majority shareholder, to represent it in litigation. The litigation was resolved through a cash settlement favorable to the corporation. The majority and minority shareholders then disagreed about the division of the settlement proceeds, a dispute which, itself, ultimately ended in litigation. In that dispute, the corporation's former law firm represented the majority shareholder. While the suit over the division of the settlement

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<sup>290</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 96 (2) (2000).

<sup>291</sup> *Id.* at § 96(3).

<sup>292</sup> *Id.*

<sup>293</sup> *Id.*

<sup>294</sup> WYO. RULES OF PROF'L CONDUCT R. 1.1.(2006).

<sup>295</sup> *Moore v. Lubnau*, 855 P.2d 1245 (Wyo. 1993).

<sup>296</sup> *Bowen v. Smith*, 838 P.2d 186 (Wyo. 1992) overturned in part on other grounds, *In re Estate of Drwenski*, 83 P.3d 457, 463 (Wyo.2004).

proceeds was pending, the minority shareholders sued the corporation's former law firm, the firm which was then representing the majority shareholder. The trial court granted the law firm's motion for summary judgment. The judgment was upheld on appeal.

The minority shareholders' suit against the corporation's former law firm was premised on the notion that an attorney-client relationship had existed between the corporation's law firm and the corporation's minority shareholders.<sup>297</sup> The minority shareholders thus asserted claims against the firm for breach of fiduciary duty; conspiracy; breach of contract; fraud; malpractice; and punitive damages.<sup>298</sup> Cutting through the cluster of charges and counter-charges, the supreme court held that the key was "one simple issue."<sup>299</sup> That is, whether "representation of the parent corporation . . . by attorneys employed in the interest of the majority shareholder . . . create[d] an attorney/client relationship with the minority shareholders in the same corporation."<sup>300</sup> The answer, said the court, was no: "[T]he law firm was not representing the minority shareholders and violated no fiduciary relationship to them."<sup>301</sup> Furthermore, as it should have been, "the settlement [had been] approved by the board of directors of the corporation . . ."<sup>302</sup> The law firm, in other words, represented the corporation, the organization, to which it owed ethical and legal duties, and not the individual shareholders who comprise it, the constituents. The Wyoming view is in accord with the prevailing principle that a lawyer for an organization owes legal duties to the organization, and not to the organization's constituents.<sup>303</sup>

*Bowen vs. Smith* is premised on a fundamental principle of corporate law. A corporation is an "independent entity" which must be "distinguished from individual shareholders."<sup>304</sup> The same principle should apply to a professional corporation of HCWs. Not only is that distinction well-established in law, it is, said the court, a "principle" of the Wyoming Rules of Professional Conduct, Rule 1.13 ["Organization as client"], in particular.<sup>305</sup> The ultimate question for the court, therefore, was whether the law firm had fulfilled its duties to its client, the corporation, not whether the law firm was looking out for the interests of the shareholders, who were non-clients. The answer, said the court, was yes: "[t]he parent corporation was faithfully and fully represented by the law firm . . ."<sup>306</sup>

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<sup>297</sup> *Bowden*, 838 P.2d at 187 n.1.

<sup>298</sup> *Id.*

<sup>299</sup> *Id.* at 189.

<sup>300</sup> *Id.*

<sup>301</sup> *Id.* at 187.

<sup>302</sup> *Bowden*, 838 P.2d at 190.

<sup>303</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, § 96(1) (2000).

<sup>304</sup> *Bowden*, 838 P.2d at 193.

<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

While *Bowen* remains good law, a lawyer who represents an organization must be careful not to blur the line between representing the organization and the constituents within it. The problem is that in Wyoming, the attorney-client relationship is a contractual one. It may arise by express agreement of the parties, or it “may be implied from the conduct of the parties.”<sup>307</sup> When a constituent claims an attorney-client relationship existed with both the organization and the constituent, the question for a reviewing court will be whether the constituent reasonably believed the lawyer represented him or her individually, and “the burden of proof to show that is was unreasonable for a client to believe that an attorney-client relationship existed . . . *has to rest with the attorney.*”<sup>308</sup>

One of the difficulties an organizational lawyer faces is that he or she “may also represent any of its directors, officers, employees, members, shareholders or other constituents” so long as the dual representation does not involve an impermissible conflict of interest.<sup>309</sup> So long as no problems arise, it is unlikely for an impermissible conflict to prevent dual representation of a constituent and the organization. When the obligation to blow the whistle arises, however, it is extremely likely that the circumstances which gave rise to that obligation will be the result of an adverse relationship between the constituent(s) involved and the organization.<sup>310</sup> When that occurs, having an attorney-client relationship with both an organization and some of its constituents will likely place the lawyer in an impossible conflict, one which will require the lawyer’s complete withdrawal from representing either the organization or its constituents.<sup>311</sup>

The frequency and likelihood of an organizational constituent reasonably believing that the organization’s lawyer also represents that individual is the reason for the organizational attorney’s ethical duty to be aware of when the organization’s interests and those of a constituent begin to diverge, and the further duty of the lawyer to clarify the identity of the client when that occurs.<sup>312</sup> It is critical, therefore, that the lawyer not create the impression in the minds of constituents that the lawyer represents them, as well as the organization.

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<sup>307</sup> *Chavez v. State*, 604 P.2d 1341, 1346 (Wyo. 1980), *cert den.* 446 U.S. 904; *see also* *Carlson v. Langdon*, 751 P.2d 344, 347 (Wyo. 1988).

<sup>308</sup> *Carlson*, 751 P.2d at 348 (emphasis added).

<sup>309</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13(d) (2006).

<sup>310</sup> The issue of conflicts between the interests of constituents and the organization is discussed in detail at notes 221 through 228, *infra*, and accompanying text.

<sup>311</sup> Some conflicts may not be waived. The question is, *inter alia*, whether the lawyer with the conflict “reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected.” WYO. RULES OF PROF’L CONDUCT R. 1.7(b)(1) (2006). In addition, the clients must “make[ ] an informed decision to waive the conflict, in writing signed by the client.” *Id.* at R. 1.7(b)(4).

<sup>312</sup> WYO. RULES OF PROF’L CONDUCT R. 1.13(d) (2006).

#### 4. *Special Considerations for Lawyers Who Represent HCWs or Health Care Organizations*

When the client is a HCW or an organization which provides health care and receives federal funds (virtually all health care providers, whether individual HCWs or health care organizations, receive Medicare or Medicaid payments, which include federal funds), the lawyer needs to be aware of federal law which arguably overrides a lawyer's general ethical and legal obligations of confidentiality, even with respect to past acts. A little known provision of the Social Security Act has the potential to fundamentally alter a lawyer's responsibility to a health care client:

*Whoever . . . having knowledge of the occurrence of any event affecting (A) his initial or continued right to any such benefit or payment, or (B) the initial or continued right to any such benefit or payment of any other individual in whose behalf he has applied for or is receiving such benefit or payment, conceals or fails to disclose such event with an intent fraudulently to secure such benefit or payment either in a greater amount or quantity than is due or when no such benefit or payment is authorized [is guilty of a felony].*<sup>313</sup>

Whether a lawyer who represents a provider of health care services, whether an individual HCW or an organization, who learns that the provider has received federal funds in excess of that to which the provider is entitled falls under the mandate of the statute is not clear. Nevertheless, its plain language—"whoever"—could be construed by a zealous federal prosecutor to apply to a health lawyer and effectively force him or her to inform on the lawyer's client. Such a result would dramatically change the traditional relationship between a client, who consults a lawyer for legal assistance, and the lawyer, who would become the client's worst nightmare (a government informant), instead of a confidant who will zealously represent the client's interests.

Thus far, no reported cases say that a lawyer falls within the purview of the above statute.<sup>314</sup> There are also many potential defenses should such a case arise. Lawyers who represent health care providers who receive federal funds, however,

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<sup>313</sup> 42 U.S.C. § 1320a-7b(a)(3) (2006) (emphasis added).

<sup>314</sup> See R.J. NESSIM, *Health Care Disclosure Statute: What Does It Mean?* 13 CRIMINAL JUSTICE 34 (Winter 1999). For an extensive discussion of a health care lawyer's duty to report, see, BEST PRACTICES HANDBOOK IN ADVISING CLIENTS ON FRAUD & ABUSE ISSUES, Chapters 1 & 2 (American Health Lawyers Association 1999); see also Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled Involuntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 897 (2006) ("[T]he [corporate] attorney-client privilege is under attack today as never before.").

need to be aware of the law and its potential applicability and advise their clients accordingly.

Lawyers who represent HCWs, health care organizations, or both, also need to be familiar with and advise their clients about complying with federal fraud and abuse laws. In particular, the so-called STARK and anti-kickback laws should be of concern. While similar in some respects, “[t]he Stark II exceptions unfortunately are sufficiently different from the anti-kickback law that a transaction can be valid under one and invalid under the other.”<sup>315</sup> Both laws apply when a HCW or a health care organization provide “ancillary” services, such as laboratory or other types of tests, or referrals to other HCWs or organizations.

When STARK was first enacted in 1989 it applied only to “Medicare referrals for clinical laboratory services.”<sup>316</sup> In 1993, STARK was “significantly modified,”<sup>317</sup> and became STARK II. As modified, “Stark II created a blanket prohibition on physician Medicare and Medicaid referrals.”<sup>318</sup>

After STARK became law, “the Health Care Financing Administration (“HCFA”) published proposed regulations interpreting it on March 11, 1992 and final regulations on August 14, 1995 (60 Fed. Reg. 41914).”<sup>319</sup> After the 1993 amendments became law:

HCFA published proposed regulations interpreting Stark II on January 9, 1998 (63 Fed. Reg. 1659) and published Phase I of the final regulations of Stark II on January 4, 2001 (66 Fed. Reg. 856). The Centers for Medicare and Medicaid Services (“CMS”)<sup>320</sup> published Phase II of the final regulations of Stark II on March 26, 2004 (69 Fed. Reg. 16054). The Phase II final

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<sup>315</sup> 4 COMPENSATION AND BENEFITS § 57:199, Part VIII. Health Care Benefits, Chapter 57. Other Legal Issues Affecting Health Care Plans, XI. Fraud and Abuse in Health Care Transactions, E. Other Federal Self-Referral Law (Stark Acts) (2008) (“The Stark II exceptions unfortunately are sufficiently different from the anti-kickback law that a transaction can be valid under one and invalid under the other.”).

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*; see also 42 U.S.C. § 1395nn (2003).

<sup>319</sup> Grant Nyhammer, *Physician Provided Physical Therapy Under Attack: South Carolina Rejects Consensus In Sloan v. South Carolina Board of Physical Therapy Examiner*, 20 NO. 3 HEALTH LAW. 17, n.281 (2008).

<sup>320</sup> HCFA was renamed CMS in January of 2001. Harvey L. McCormick, MEDICARE AND MEDICAID CLAIMS AND PROC. § 1:1, fen. 1 (4th ed.) (“The Secretary of the Department of Health and Human Services . . . announced on June 14, 2001, the new name for the Health Care Financing Administration (HCFA): The Centers for Medicare & Medicaid Services (CMS)”).

regulations of Stark II are published in the Code of Federal Regulations at 42 C.F.R. §411.350 et. seq. CMS published Phase III of the final regulations of Stark II on September 5, 2007. 72 Fed. Reg. 51012- 51099 (2007).<sup>321</sup>

Stark II applies to a variety of designated health services including

- clinical laboratory services;
- physical therapy services;
- occupational therapy services
- radiology or other diagnostic services;
- radiation therapy services;
- durable medical equipment;
- parenteral and enteral nutrients, equipment, or supplies;
- prosthetics, orthotics, and prosthetic devices;
- home health services;
- outpatient prescription drugs; and
- inpatient and outpatient hospital services.<sup>322</sup>

The anti-kickback statute<sup>323</sup> “is a criminal statute that prohibits the knowing and willful offer, solicitation, payment, or receipt of remuneration to induce or reward the referral of any business payable by a federal health care program.”<sup>324</sup> The severity of the potential sanctions should cause this statute to be in the forefront of the minds of every lawyer who represents HCWs or health care organizations that receive federal funds. The issue is that “violation of the anti-kickback statute is a crime, and the punishment carries a mandatory exclusion [from the program, such as Medicare] along with other penalties.”<sup>325</sup>

The anti-kickback statute does “list[] eight exceptions to which the statutory prohibitions against solicitation or receipt of remuneration in return for, or to induce, referral of program-related benefits under a federal health-care program do not apply . . . .”<sup>326</sup>

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<sup>321</sup> Nyhammer, *supra* note 319, at n.281.

<sup>322</sup> 4 COMPENSATION AND BENEFITS § 57:199, Part VIII. Health Care Benefits, Chapter 57. Other Legal Issues Affecting Health Care Plans, XI. Fraud and Abuse in Health Care Transactions, E. Other Federal Self-Referral Law (Stark Acts) (2008).

<sup>323</sup> 42 U.S.C. § 1128B(b)(3) (2006).

<sup>324</sup> Richard Kusserow, *Anti-Kickback Statute, Hospitals Cannot Form Intent to Violate the Law, Executives Might Pay More Attention to What They are Doing if They Knew They Could Be Held Liable*, 10 NO. 2 J. HEALTH COMPLIANCE 55 (March-April 2008).

<sup>325</sup> *Id.*

<sup>326</sup> Kimberly C. Simmons, *Florida Jurisprudence, Second Edition, Database* updated, 57 FLA. JUR 2D WELFARE § 4 (2008).

The key for a lawyer is to watch for any arrangement that could be construed as a referral or kickback. If such a thing exists, and the lawyer “knows” it, the whistle-blowing provisions, discussed above,<sup>327</sup> come into play.

### 5. *Summary*

A lawyer for a health care organization owes primary allegiance to the organization, not the individuals, the constituents, who make up the organization and with whom the lawyer interacts. When the actions or inactions of anyone, even constituents, threaten the organization, the lawyer must blow the whistle. He or she must act to protect the organization, even at the expense of the constituents with whom the lawyer interacts.

A lawyer has some options. The lawyer may ask for reconsideration, for a second legal opinion, or refer the matter to a higher, or even the highest, authority in the organization. If that does not work, the lawyer may withdraw (withdrawal will be required if the lawyer’s services will be used to perpetuate a crime or fraud). Both before and after withdrawal, a lawyer owes a duty of confidentiality to the client. The lawyer may be permitted, however, to disclose both the fact of withdrawal and at least some information about why withdrawal occurred. The lawyer should neither withdraw nor disclose information, however, until after he or she has advised the client of why the lawyer is proposing to withdraw, why, the potential ramifications of withdrawal, and that before withdrawal, the client has an opportunity to decide how to proceed in light of that information.

Because an organizational lawyer’s primary obligation is to the organization, the lawyer must strive to keep the line between the client (the organization) and its constituents (the individuals) clear. A lawyer who allows the line to blur, and by whose conduct allows an implied attorney-client relationship with such constituents to arise, may well face a conflict which cannot be waived. If that occurs, the lawyer will be required to withdraw from representing the organization and the constituents. Such a result will be a grave disservice to all clients, especially the organization which hired the lawyer in the first place, and to whom the lawyer owed his or her primary loyalty.

Finally, the unique nature of the health professions, and the concomitant receipt by most health care providers of federal funds, state funds, or both, imposes special obligations on the providers and their lawyers to make sure that they do not run afoul of federal law, state law, or both, thereby incurring civil liability, criminal liability, or both.

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<sup>327</sup> See *supra* notes 209–247 and accompanying text.