The Healthcare Law Section Presents

17th Annual Healthcare Law Compliance Symposium: Part II

Thursday, October 15, 2020
3:30 - 5:45 P.M.
Via Zoom
2.0 hours Gen. CLE Credit

Provider #36
The Los Angeles County Bar Association is a State Bar of California approve MCLE provider. The Los Angeles County Bar Association certifies that this activity has been approved for MCLE credit by the State Bar of California.
Session 1-
Politics and the Pandemic:
Health Care in the 2020 Election

Dan Schnur, Professor of Political Communications — UC-Berkeley, USC and Pepperdine University (Keynoter)
DAN SCHNUR

Dan Schnur is a Professor at the University of California – Berkeley’s Institute of Governmental Studies, Pepperdine University’s Graduate School of Public Policy, and the University of Southern California’s Annenberg School of Communications, where he teaches courses in politics, communications and leadership. Dan has also taught at the John F. Kennedy School of Government’s Institute of Politics at Harvard University and George Washington University’s Graduate School of Political Management.

He is the founder of the USC/LA Times statewide political poll and currently hosts a weekly webinar for the LA World Affairs Council Town Hall called “Politics in the Time of Coronavirus.” (www.lawac.org)

Previously, Dan worked on four presidential and three gubernatorial campaigns as one of California’s leading political strategists. He served as the national Director of Communications for the 2000 presidential campaign of U.S. Senator John McCain and was the chief media spokesman for California Governor Pete Wilson.

In 2010, Dan was appointed Chairman of the California Fair Political Practices Commission (FPPC), where he implemented groundbreaking campaign finance disclosure requirements. Dan also was a founder and cochairman of the Voices of Reform project, the bipartisan statewide effort whose work laid the foundation for California’s landmark redistricting reform. After completing his FPPC term, Dan registered as a No Party Preference voter and launched Fixing California, an organization dedicated to campaign finance and political reform. In 2014, Dan ran for statewide office as a non-partisan candidate for California Secretary of State.

Dan has been an advisor to the William & Melinda Gates Foundation, the William and Flora Hewlett Foundation, the Broad Education Foundation, the Pew Charitable Trusts, the James Irvine Foundation, the Public Policy Institute of California and the Stuart Foundation on a variety of political reform, K-12 education and college and workforce preparedness efforts.

Dan is an active community volunteer as well, serving as a board member of the Los Angeles Museum of the Holocaust, Junior State of America, the Pacific Council on International Policy, the Center for Asians United for Self Empowerment (CAUSE) and as a senior advisor to the Hispanas Organized for Political Equality (HOPE) leadership training programs. He is the former Los Angeles director for the American Jewish Committee and serves as an advisor to the Los Angeles Jewish Federation. He is a member of the UCLA Luskin School of Public Affairs Senior Fellows program, where he mentors UCLA graduate students and advises them on their academic and professional goals.

Dan’s commentaries have appeared in several newspapers, including the Los Angeles Times, the San Francisco Chronicle, the Sacramento Bee, the Wall Street Journal, the Washington Post, and the New York Times. In addition, he has been an analyst and political commentator for CNN, MSNBC, Fox News, and National Public Radio.

Dan is a graduate of the American University in Washington, D.C. He and his wife Cecile Ablack, an international communications consultant and former Deputy Mayor of Los Angeles, live in LA.
Don't be fooled by media bias and fake news.

Perspectives Blog (/blog)
Perspectives from across the political spectrum

When the President’s Options Start to Shrink (/blog/when-president-s-options-start-shrink)

RECOMMENDED READING (/BLOG-CATEGORY/RECOMMENDED-READING) / OCTOBER 7TH, 2020 / BY DAN SCHNUR (/USERS/DAN-SCHNUR)

226 Shares

Tags:
- Polling (/Tags/Polling)
- #2020Election (/Tags/2020election)
- 2020 Election (/Tags/2020-Election)
- Joe Biden (/Tags/Joe-Biden)
- Donald Trump (/Tags/Donald-TRump)
- 2020 Presidential Election (/Tags/2020-President-Election)
- Candidates (/Tags/Candidates)
Mark Twain told a story about the cat who sat on a hot stove.

“That cat won’t ever sit on a hot stove again,” Twain said. “But he’ll never sit on a cold stove again either.”

For the cat writing this column, the 2020 election (https://www.allsides.com/tags/2020-election?search=2020%20election#gsc.tab=0&gsc.q=2020%20election&gsc.page=1) is the political version of a cold stove.

Four years ago, everyone knew that Hillary Clinton would be elected president. Every conventional polling metric showed her winning decisively, and even when the polls narrowed in the final weeks of that campaign, it was difficult to find a mainstream analyst who gave Donald Trump even a small chance of pulling off a historic upset.

But the problem with conventional metrics is that they can’t account for unconventional candidates. Trump rejected almost every traditional approach to political campaigning by ignoring the political center in favor of an effort that mobilized a largely-overlooked segment of white working class voters. As recently as this past winter, it was still an open question whether their affection and enthusiasm could carry him to re-election over a restive and divided opposition.

Then the pandemic hit. Voters have harshly judged Trump’s handling of the Covid-19 crisis, most notably two key voter groups who were instrumental to his election four years ago. Older voters, who have supported Republican candidates by large margins for twenty years, have been disproportionately affected by the coronavirus and have moved decisively toward
Joe Biden (https://www.vox.com/21419972/older-voters-joe-biden-polls-trump-2020). As the virus spread from coastal urban areas into small towns and rural communities, working class women who supported Trump over Clinton (https://www.brookings.edu/blog/fixgov/2020/06/03/new-polling-eroding-support-from-white-working-class-women-threatens-trumps-reelection/) in large numbers began shifting to Biden too.

While Trump managed to partially close that gap over the summer by focusing his message on law enforcement and public safety issues, his performance in last week’s debate was so poorly received that the margin between the two candidates is now larger than ever. Some national polls show Biden with leads as large as sixteen points (https://www.forbes.com/sites/jackbrewster/2020/10/06/biden-jumps-out-to-16-point-national-lead-following-trumps-covid-diagnosis-new-poll-finds/#6a73b9554568), and his margins in key swing states are growing as well. Under almost any circumstance, it would appear that Trump’s chances for re-election are rapidly shrinking.

But because the president and his advisors know that his political successes have always relied on an unusually motivated core of supporters, they have determined that his most likely path out of his current predicament is to excite that remaining base to even greater levels. Through that prism, Trump’s public conduct over the last week or so makes much more sense. His debate strategy, his reaction to his Covid diagnosis, and his early release from the hospital are all messages aimed squarely at his most fervent anti-Washington loyalists. Even his seemingly inexplicable decision to terminate negotiations for a pandemic-related stimulus package (https://www.allsides.com/story/citing-broken-negotiations-trump-calls-postpone-stimulus-talks-until-after-election) may have been intended to underscore his persona as a defiant crusader against the oppressive forces of government. (Trump’s late Tuesday night tweets (https://twitter.com/realDonaldTrump/status/1313658825040371712) focused specifically on aid for airlines and other businesses, along with direct payments to individuals. They did not appear to address any of the other types of government relief on which his Administration had been negotiating.)

Trump was elected as an anti-establishment populist, he has governed as an anti-establishment populist, and he will fight to last political breath as one.

This approach was effective four years ago because Hillary Clinton was an ideal foil for this type of voter resentment. But while Biden is far from beloved, the American people have not formed opinions about him that are nearly as vivid or nearly as negative as their feelings toward Clinton. In 2016, voters who disliked both candidates opted for Trump by a sizable gap of 17 points. This year, some polls suggest those same “double-haters” are supporting Biden by more than 20 points (https://www.bloomberg.com/news/articles/2020-04-24/new-poll-shows-a-hidden-danger-for-trump-double-haters?srref=xuVirdpv&cmpid=socialflow-twitter-
These are voters who never liked Trump, but they dislike Biden a lot less. And Trump has struggled to frame an attack that can turn those numbers around.

But Trump has been counted out before, and he has defied expectations in the past by mobilizing these non-voters to turn out for him. He still believes in his gut that he is the tribune of the disrespected and alienated white working class, and if that frightens them enough about the alternative to his re-election, they will carry him to victory one last time.

This is a long shot. But it’s Trump’s best – and possibly last – chance to shock the world again.

Dan Schnur is a Professor at the University of California – Berkeley, Pepperdine University, and the University of Southern California, where he teaches courses in politics, communications and leadership. Dan is a No Party Preference voter, but previously worked on four presidential and three gubernatorial campaigns, serving as the national Director of Communications for the 2000 presidential campaign of U.S. Senator John McCain and the chief media spokesman for California Governor Pete Wilson. He has a Center bias.

This piece was reviewed by AllSides News Editor Henry A. Brechter. He has a Center bias.

Want to talk about this topic more? Join Dan for his weekly webinar “Politics In The Time of Coronavirus” on Thursday mornings at 11 AM PST. You can register for it here (https://www.lawac.org/EventDetail/eventid/30781). Or read more of Dan’s writing at: www.danschnurpolitics.com (http://www.danschnurpolitics.com)
Popular Blog Topics

- Media Bias (/tags/media-bias)
- Bias (/tags/bias)
- Polarization (/tags/polarization)
- Fact Check (/tags/fact-check)
- Story of the Week (/tags/story-week)
- AllSides (/tags/allsides)

Perspectives - Recent Posts

- When Both Parties Pretend Not to Be Thinking About Abortion (/blog/when-both-parties-pretend-not-be-thinking-about-abortion)
- Coronavirus Reaches President Trump and the White House (/blog/coronavirus-reaches-president-trump-and-white-house)
- Trump v. Biden: Chinese Foreign Policy (/blog/trump-v-biden-chinese-foreign-policy)
- When the President’s Options Start to Shrink (/blog/when-president-s-options-start-shrink)
- RealClearPolitics Media Bias Review Finds Center Bias; Some Lean Right Content (/blog/realclearpolitics-media-bias-review-finds-center-bias-some-lean-right-content)
- Media Bias Alert: Details Differ After Driver Allegedly Strikes Pro-Trump Protesters (/blog/media-bias-alert-details-differ-after-driver-allegedly-strikes-pro-trump-protesters)
- Story of the Week: NY Times and Trump’s Taxes; First Presidential Debate (/blog/ny-times-and-trumps-taxes-first-presidential-debate)
- Slanted: How Partisan Media Use Data to Draw Wildly Different Conclusions (/blog/slanted-how-partisan-media-use-percentages-and-numbers-draw-wildly-different-conclusions)

More (/blog)
Barrett’s Nomination is a Test of Both Sides’ Motivation - 9/29/20

Who will be more motivated in the closing weeks of a presidential campaign taking place with the backdrop of a historic Supreme Court nomination debate -- pro-choice or pro-live voters? Which is a more inspirational cause? To fight to save something you might lose, or to win something you believe has rightfully belonged to you?

We are about to find out.

The current Supreme Court fight is a prelude to the larger battles for the White House and the Senate majority, which in turn is a prelude to an even bigger war for the future of legal abortion in this country.

Barring an extraordinarily unexpected turn of events, Amy Coney Barrett will be confirmed as the nation’s next Supreme Court justice. Senate Democrats can not prevent her confirmation: the only question is how loud they
will protest. But the intended impact of those complaints will have nothing to do with Barrett herself, but rather the makeup of the other two branches of our federal government. Depending on how effectively Democrats can mobilize their supporters in the aftermath of what would normally be a dispiriting defeat, Barrett could be sworn in as the court’s newest justice only days before Joe Biden is elected as nation’s next president.

Or not. The presidential election was already going to be determined almost entirely by which of the candidates would be more successful in turning out their parties’ respective bases. But both the circumstances surrounding Barrett’s nomination and the dramatic ideological shift in the Supreme Court’s makeup that her confirmation will bring have intensified the passions of liberal and conservative true believers alike. Yet to be determined is which side will use Barrett more effectively as emotional fuel for their most loyal supporters.

Given the enormous stakes represented in this election, it’s notable that both Biden and Donald Trump have faced noticeable challenges in motivating some of their parties critical voting blocs. Since the Democratic primary, Trump’s struggles to effectively address the coronavirus pandemic and the nation’s renewed debate over race relations has caused many older voters, suburbanites and other cultural conservatives to drift away. For his part, Biden has failed to excite young people, voters from minority communities and other progressives.

But a highly visible debate over Barrett and the Court’s future will remind those less enthused voters on why this election matters so much. In public, Democrats will emphasize the potential overturn of the Affordable Care Act rather than the more volatile topic of abortion rights. While swing voters are with Democrats on both issues, there are a lot more conservative voters who care passionately about abortion than they do about health care policy. So concentrating on Obamacare is less likely to inflame the opposition. But abortion is the issue that motivates Democrats above all others.

A Democratic president and Congress could not remove Barrett from the court. But there are many other potentially mitigating steps that they could take if they controlled both ends of Pennsylvania Avenue. The idea of increasing the Court’s membership to outnumber the conservative justices has received considerable attention and is being taken more seriously than at any time since Franklin Roosevelt’s ill-fated court-packing effort of the 1930’s.
The idea of adding additional justices is a cathartic one, and if it does inspire additional turnout among angry progressives, then it will have served a useful short-term purpose for Democrats. But the downside to the plan is the payback: when Republicans regain control of the White House and the Senate at some point in the future, they will simply expand the court even further. At some point, the Supreme Court will need to meet in a basketball arena.

There are other alternatives. A Democratic Congress could pass legislation that would provide legal protections for abortion rights and a Democratic president could sign that legislation. While a pro-choice law would be vulnerable to be overturned by a future GOP-controlled government, such a move would be a much greater political risk than the same decision being made by the judicial branch.

But neither option can be pursued if Trump is re-elected or if Republicans retain control of the Senate. The question is whether Democrats are sufficiently motivated to prevent those outcomes.
17th Annual Healthcare Law
Compliance Symposium
Part II

Session 2-
An Ethical Challenge in Counseling Compliance: Avoiding the Trap of Assisting a Crime or Fraud (1-hour ethics credit)

Andrew J. Demetriou, Lamb and Kawakami, LLP

David Vaughn, Vaughn Law Offices
ANDREW J. DEMETRIOU
Lamb & Kawakami, LLP
Los Angeles, California

Andy Demetriou is a partner in Lamb & Kawakami, LLP, where he practices in the fields of Health Care Law and Corporate/Mergers and Acquisitions. He is also a Managing Director of Berkeley Research Group, LLC, for which he provides strategic counseling and expert witness services. He has held a number of leadership positions in the American Bar Association, and currently serves as a member of its Board of Governors. Andy is a Past Chair of the ABA Health Law Section. He has also served in leadership positions in the American Health Law Association.

He is a frequent speaker and writer on topics in health care law, professionalism and professional responsibility and ethics, corporate governance and mergers and acquisitions. He recently recorded a podcast for the ABA Health Law Section on the pending Supreme Court case of Texas v. California, which deals with the constitutionality of the Affordable Care Act and has written about other recent Supreme Court decisions affecting health care providers.

Andy graduated from the University of California Los Angeles, with a degree in Economics, summa cum laude and from the University of California Berkeley School of Law, where he served as Research and Books Editor of the Ecology Law Quarterly and was elected to Order of the Coif.
David Vaughn represents individuals and entities in health care and other white collar investigations and prosecutions. Prior to establishing Vaughn Law Offices, he worked on a variety of health care and other matters as a Managing Director of FTI Consulting, Inc. Previously he investigated and prosecuted health care and other crimes as an Assistant United States Attorney in Los Angeles, prosecuted state crimes as a Los Angeles County District Attorney, and served as Counsel to a subcommittee of the United States Congress.

David graduated from the University of California, Berkeley, with a degree in Political Science with Honors, the University of California, Hastings College of the Law, and Harvard University’s Kennedy School where his coursework included classes at Harvard Law School.
An Ethical Challenge in Counseling Compliance: Avoiding the Trap of Assisting a Crime or Fraud

ANDREW J. DEMETRIOU, LAMB & KAWAKAMI, LLP
DAVID VAUGHN, LAW OFFICES OF DAVID VAUGHN
This presentation will focus on the tension between the lawyer’s duty to acquiesce to the decisions of clients in the course of an engagement and the avoidance of assisting a client in criminal or fraudulent activity, which is particularly acute in counseling compliance with the law.

We will address these issues in the context of the California Rules of Professional Conduct, effective November 1, 2018 with references to the ABA Model Rules of Professional Conduct and Formal Opinions of the ABA Standing Committee on Ethics and Professional Responsibility.
FOUR QUESTIONS

1. When does an attorney have a duty to inquire?
2. What is that standard to which the attorney will be held?
3. How extensive does the inquiry have to be?
4. What if the client will not cooperate or the inquiry result is equivocal?
Rule 1.2(a): “Subject to Rule 1.2.1, a lawyer shall abide by the client’s decisions concerning the objectives of the representation and, as required by Rule 1.4, shall reasonably consult with the client as to the means by which they are to be pursued.”

This is true, even when the lawyer doubts the wisdom of the client’s decisions, see McCoy v. Louisiana, 584 U.S.___, 138 S. Ct. 1500 (2018)

The client has the right to be believed, rather than doubted, as to motives
BUT . . .

Rule 1.2.1(a): “A lawyer shall not counsel a client to engage, or assist a client in conduct that the lawyer knows is criminal or fraudulent, or a violation of any law, rule, or ruling of a tribunal.”

A client seeking compliance advice may be looking for guidance on how to follow the law, or how to achieve an objective that is not lawful—the lawyer must discern this.

This obligation is what triggers (a) the duty of the lawyer to inquire, in order to ascertain facts and make legal judgments and (b) the obligation to be diligent in providing advice.
Potential red flags

What are the circumstances in which a new client engages a lawyer?

Does the nature of the engagement raise suspicions?

Is the lawyer contacted by an agent of a business entity who may not be sensitive to the “who is the client” issue?

Has the client sought advice from other counsel?
**Knowledge**—the lawyer must determine the client’s objectives and assess the possible consequences of proposed conduct by complying with duties of competence (Rule 1.1) diligence (Rule 1.3) and effective communication with the client (Rule 1.4).

Knowledge is inferred from facts and circumstances and the lawyer may not be willfully blind to, or consciously avoid, facts. ABA Formal Opinion 491 (April 29, 2020)

“Opinion shopping” and the crafty client, *U.S. ex rel. Drakeford v. Tuomey Health System*
KEY ELEMENTS OF RULE 1.2.1(a)

- Conduct that is criminal, fraudulent or a violation of law—the lawyer must have the requisite knowledge and competence to assess whether a proposed course of action is consistent with the law

- Understanding the line between lawful and unlawful conduct—issues such as “fair market value,” what constitutes a “compensation arrangement” and the different standards for liability under the Anti-Kickback and Stark Laws
Key considerations in providing advice to the client

- Should you provide written advice at all?
- Recitation of key facts and limitations on the advice

Will the client potentially assert the “advice of counsel defense,” which requires that the client

- Make a good faith effort to seek advice and provide relevant facts to counsel
- Demonstrate good faith efforts to comply with the advice
Providing Advice

- Potential conflict between lawyer and client—what will the lawyer testify if called?
- Rule 1.2(b) permits the lawyer and client to limit the scope of the engagement, for reasons of efficiency and cost saving, but the limitations must be reasonable and may not relieve the lawyer of his or her ethical responsibilities.
- If the advice is extremely limited, or assumes away key facts or legal considerations, this may not be consistent with the duties of competence or diligence.
A FURTHER CAVEAT

- Rule 1.2.1(a) is not an absolute bar to advising the client.
- Rule 1.2.1(b): Notwithstanding paragraph (a), a lawyer may:
  1. discuss the legal consequences of any proposed course of conduct with a client; and
  2. counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of a law, rule, or ruling of a tribunal.
- The fine line between advising on consequences and assisting conduct.
“A lawyer’s reasonable judgment, under the circumstances presented, especially the information known and reasonably available to the lawyer at the time, does not violate the rules. Nor should a lawyer be subject to discipline because a course of action, objectively reasonable at the time it was chosen, turned out to be wrong with hindsight.” ABA Formal Opinion 491

There is no express duty to follow up with the client
SPECIAL PROBLEMS IN CLIENT COUNSELING

- Money laundering and cash transactions
  - 2010 ABA Good Practices and Formal Opinion 463
  - Reporting of cash fees and IRS Form 8300
  - “Structuring” liability
SPECIAL PROBLEMS IN CLIENT COUNSELING

- Inconsistencies between federal and state law
  - Fees for marketing on behalf of health care providers; the OIG Fraud Alerts and the *Duz-Mor* case
  - Representing cannabis businesses
    - Conflict between the Controlled Substances Act and state laws permitting sales of cannabis products
    - Bank Secrecy Act and Ant-Money Laundering Statutes
    - Inconsistent guidance from State Bars—Hawaii permits advising on the laws but not assisting the client in setting up a business
SPECIAL PROBLEMS IN COUNSELING

- Litigation counseling may also implicated Rule 1.2.1(a)
- Compliance with discovery and other orders
  - Avoiding the “suggestion” or did the documents just disappear?
  - The client’s “normal” document destruction practice and litigation holds
- Candor toward a tribunal (Rule 3.3) and fairness in dealing with opposing party and counsel (Rule 3.4)
What if the client does not comply with advice or demonstrates unwillingness to conform to the law?

Withdrawal (Rule 1.16)

- Circumstances in which mandatory
- Avoiding harm to client and the “noisy withdrawal” problem
- Special problems in the litigation context—will a tribunal permit withdrawal?
Client confidence issues (Rules 1.6(b) and (c))
- Historically California lawyers were forbidden to disclose client confidences under Business & Professions Code § 6068(e)
- Enactment of Rule 1.6 in 2018 permits disclosure to prevent a criminal act likely to cause death or substantial bodily harm
- Stricter standard than in other states
- Obligations to counsel client prior to disclosure
CONCLUSION

- There is increasing pressure to hold lawyers accountable for enabling their clients to commit criminal or fraudulent acts and require enhanced duties of diligence and competence.
- Willful blindness or strict limitations on the scope of engagement may not avail the lawyer.
- Advice may not be privileged if used in the commission of a crime or fraud.
- Federal and State prosecutors press for disclosure of advice and waivers of attorney-client privilege in criminal and civil prosecutions.
Let’s be careful out there!