Dynamic Chiropractic

Attorneys, Accountants and Consultants: Whom Can You Trust?

I heard a scary story recently. It seems that a chiropractor wanted to make sure his practice was compliant with all applicable federal and state regulations, so he hired a consultant to come in and do a preliminary audit. The initial fee was very reasonable. After the initial consultation, the consultant came back and said it would take a low five-figure payment to ensure compliance and implementation of his recommendations. The chiropractor declined to take the expanded service.

Several months later, government authorities contacted him. They were focusing on the same problems highlighted by the consultant. In making some inquiries, the chiropractor found out that several other DCs had used the same consultant for the preliminary review. All of them had declined the expanded service, and all of them became subjects of investigation.

Is there a causal relationship here? Did the consultant contact the authorities after going into the offices of these chiropractors? Or were all of these cases just a combination of coincidences? Who knows. But this story illustrates a problem in the consulting business. Some consultants, especially those who do compliance audits, work both sides of the street. That is to say, they both advise health care providers and also work on cases involving insurance fraud and abuse for federal and state agencies, private insurance companies, or groups closely affiliated to them.

Most chiropractors, and people in general, probably think that someone who comes into your office has a legal or ethical obligation not to disclose information from a client. Sort of like an attorney-client privilege. However, that is simply not the case. Business consultants have no inherent or statutory legal obligation to maintain the confidences or information that they obtain from their clients. A consultant is free to disclose any information he or she finds out to anyone.

Beyond that, there is no legally recognized privilege by which a client can prevent such a disclosure in the event a government authority seeks to compel a consultant to provide information against the client. In other words, a consultant can be compelled by the government to tell everything he or she knows about a client.

Some consultants might contractually agree to keep a client's secrets secret. A breach of that agreement might create a cause of action. However, in an individual case, it would likely be hard to prove that a disclosure originated from the consultant. And in any event, a contractual provision in a consulting agreement would not shield the consultant from providing information to a government agency, if the consultant is compelled to do so by way of a subpoena before a grand jury. More importantly, improper disclosure by a consultant to a government agency does not bar the government from utilizing the information. There is no throwing out of improperly obtained information like there is for improperly obtained confessions or improper warrantless searches under the federal Constitution.

The same lack of legal protection for confidential information applies to accountants. That is to say that there is no accountant-client privilege under which an accountant is prohibited from disclosing a client's confidences. In many criminal prosecutions, accountants are called on to testify against their clients.

However, accountants are licensed, and they do have enforceable ethical codes that govern their conduct. Some aspects of these codes may protect information. But in some cases, an accountant is actually duty bound to disclose an accounting problem, even against the wishes of the client.

The situation with attorneys is better. In every jurisdiction, the courts and even the government recognize the attorney-client privilege. Under that privilege, an attorney is not permitted to disclose a client's confidences without the express permission of the client. This prohibition is backed by state bar associations. It is not unusual for an attorney to be disciplined for making an unauthorized disclosure that harms the client. In fact, the privilege is so strong that in most states, an attorney cannot even be compelled to reveal a client's criminal activity. The one exception is that in some states, when there is a risk of imminent harm to a person, an attorney may - but is not obligated to - notify authorities about the future crime. But most states prohibit disclosure by attorneys of a client's past crimes.[1]

This means that an attorney could not do what the business consultant perhaps did, namely, voluntarily provide information to a government or third party. Does this mean that chiropractors should only discuss intimate business details with attorneys, and not accountants and consultants? Of course not. Accountants and consultants provide necessary services. In order for them to work effectively, complete disclosure is often necessary. But a client has to remember that these disclosures are not protected by any privilege or statutory obligation to keep the confidences secret. But at least accountants have a code of ethical conduct, are usually licensed, and there are enforcement mechanisms by which unethical conduct can be punished.

There is no such licensure or enforceable ethical codes for business consultants. So, if that consultant mentioned at the beginning of this article did contact the authorities after not being retained to provide the full array of consulting services, there would likely be no remedy - for two reasons. First, there is no statutory obligation for a consultant to maintain confidences. Second, in any individual case, it would be difficult to prove that an investigation was triggered by the consultant.

That being said, it would not be a bad idea for every chiropractor who uses a consultant to have the contract specifically provide for the confidentiality of information. This would not stop a government agency from compelling information from a consultant, but would make a consultant think twice before voluntarily providing information about clients to the other side.

So, the message here is that chiropractors should be circumspect about the disclosures they make. Needless to say, ever greater care is required if a chiropractor is involved in borderline practices or beyond (practices that he or she may not even know are inappropriate), because sometimes, revealing these kinds of practices to the wrong person may make things worse.

Reference

1. It gets more complicated because under federal law and in a federal case, there is a crime/fraud exception to the attorney/client privilege. Under this exception, an attorney can be compelled to reveal a client's confidences if there is proof that a crime or fraud was perpetrated.

But it would usually take a subpoena and a trip to the grand jury (and sometimes even permission from the Department of Justice) for the feds to get information from an attorney. As a result, this is a rarely invoked practice.

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