

LEGAL ETHICS FOR THE HEALTH CARE LAWYER

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NEW DEVELOPMENTS IN
FLORIDA LEGAL ETHICS
2006-2007

(SEE HANDOUT)

NEW DEVELOPMENTS

2007

- **ABA Formal Opinion 06-444 (Sept. 13, 2006)**
- The use of restrictive covenants in lawyer agreements concerning benefits upon retirement may be permitted under certain circumstances.

NEW DEVELOPMENTS

2007

- **ABA Formal Opinion 06-442 (Aug. 5, 2006)**
- Lawyers may ethically review and use metadata embedded in electronic documents. Rescinding prior opinions that held the contrary. BUT SEE FLA. BAR ETHICS OPINION.

NEW DEVELOPMENTS

2007

- **Fla. Bar Ethics Opinion 06-2 (Sept. 15, 2006)**
Handout – page H-29
- Lawyers sending documents electronically to opposing parties should take care to ensure metadata is not included. Lawyers receiving such documents should not attempt to obtain information from metadata that the lawyer knows is not intended for the receiving party. Mining metadata may be perceived as unethical conduct.

NEW DEVELOPMENTS

2007

- **Fla. Bar Ethics Opinion 06-1 (Apr. 10, 2006) Handout – page H-33**
- Lawyers may store client files and other documents electronically unless a statute or rule requires the contrary or if destruction of a paper document will adversely affect a client's case.

NEW DEVELOPMENTS

2007

- **New Advertising Rules Adopted by Florida Supreme Court (Nov. 2, 2006)**
- Rules changes include adoption of prior review for television and radio advertisements. See appendix to text, Chapter 13, for these new Rules

NEW DEVELOPMENTS

2007

- **Florida Bar May Approve Client Testimonials on Law Firm Web Sites**
- **See article in Handout – page H-35**

NEW DEVELOPMENTS (FROM 2006)

- GOOD NEWS!
- FLORIDA NOW HAS
RECIPROCITY WITH EVERY
OTHER STATE!!

NEW DEVELOPMENTS (FROM 2006)

- ACTUALLY, THAT'S NOT EXACTLY TRUE. BUT, IT'S ALMOST THAT WAY.

1. NEW MJP RULES

NEW DEVELOPMENTS (FROM 2006)

2. Out of State Lawyers are Now
Subject to Discipline by Florida
(Rule 3-4.1)

pg. H-2

NEW DEVELOPMENTS (FROM 2006)

- Florida's Multi-jurisdictional Practice (MJP) Rule Changes -- Florida Supreme Court Decision SC04-135 (May 12, 2005) (Effective Sept. 12, 2005)

pp. H-3 to H-16

NEW DEVELOPMENTS (FROM 2006)

- Rule 4-5.5 -- Unlicensed Practice of Law; Multi-jurisdictional Practice of Law (More than just a name change!)

NEW DEVELOPMENTS (FROM 2006)

- Rule 1-3.11 -- Appearance by Non-Florida Lawyer in an Arbitration Proceeding in Florida

NEW DEVELOPMENTS (FROM 2006)

- Rule 2.061 -- Foreign Attorneys

pg. H-15

NEW DEVELOPMENTS (FROM 2006)

4. Florida Attorneys Practicing in Florida
Must Designate an Inventory Attorney
(Rule 1-3.8(e))

pg. H-17

- FORM

pg. H-18

NEW DEVELOPMENTS (FROM 2006)

5. Federal Court in Ohio
Refuses to Dismiss
Healthcare Fraud Charges
Against Healthcare Attorney
(U.S. v. Altiere)

NEW DEVELOPMENTS (FROM 2006)

- 6. Florida Bar's Questions and Answers on Ethical Implications of the New Lobbyist Disclosure Statute

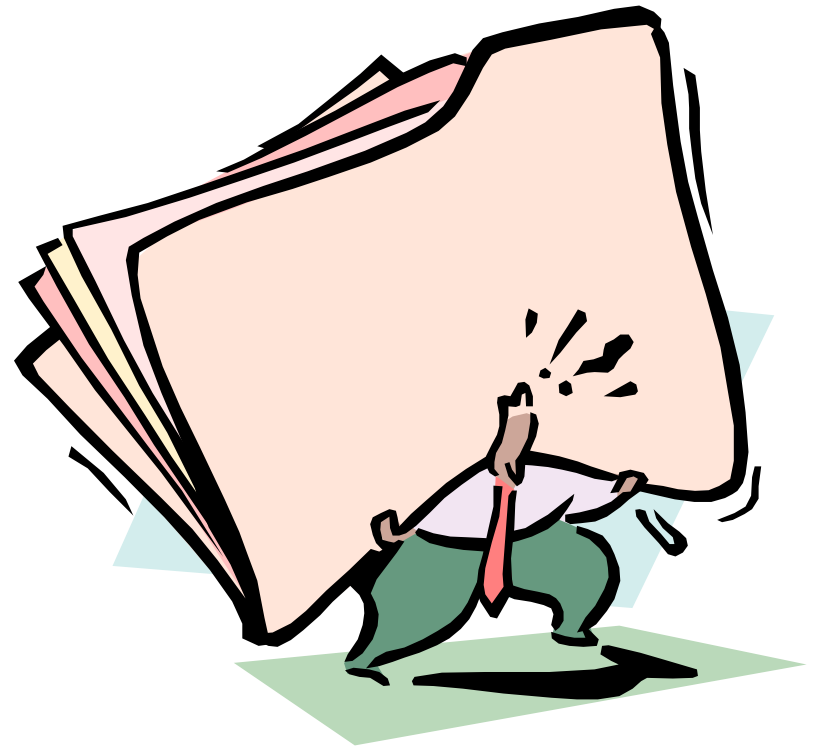
NEW DEVELOPMENTS (FROM 2006)

- 7. Limited Representation of
Clients Allowed and Explained
(Rule 4-1.2(c))

Legal Ethics for the Health Care Lawyer

OVERVIEW OF OUTLINE

Representation of Parties



Rule 4-1.13

Organization as Client



Florida Rule 4-1.13

- **A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.**

Rule 4-1.13 - Cont'd

- In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.**

Rule 4-1.13 - Cont'd

- **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 4-1.7.**

Rule 4-1.13 - Cont'd

- If the organization's consent to the dual representation is required by rule 4-1.7, the consent shall be given by an appropriate official of the organization other than the individual who is represented, or by the shareholders.**

**QUOTES TAKEN FROM ACTUAL
MEDICAL RECORDS DICTATED
BY PHYSICIANS:**

- “Patient and her daughter were in for a check up today. Her daughter reports patient has been more combative lately and refuses to take the medications I prescribed. Informed daughter if this continues to bring patient back next week and I will give her a smack.”

Conflicts of Interest

Rule 4-1.7



Rule 4-1.7

- **A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless:**
 - (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and relationship with the other client; and**
 - (2) each client consents after consultation.**

Rule 4-1.7 Cont'd

- **When representation of multiple clients in a single matter is undertaken, the consultation shall include explanation of the implications of the common representation and the advantages and risks involved.**

Rule 4-1.7 Cont'd

- **A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest, unless: (1) the lawyer reasonably believes the representation will not be adversely affected; and (2) the client consents after consultation.**

Dual Representation

- **Comments to Rule 4-1.7**
 - **Indicate that a lawyer should be guided by the principle of loyalty when deciding whether to undertake dual representation.**
- **Rule 4-1.13**
 - **Dual Representation & Organizational Clients (Discussed above)**

Florida Bar Opinion 65-66

- **If you draft an agreement on behalf of multiple health care providers, you should not represent any of the individual providers in a controversy related to the agreement.**

Florida Bar Opinion 86-6

- **In malpractice actions, where an attorney is asked to represent both the insurer and the physician, an attorney must take settlement directions from the physician.**

Bottom Line

- **Make it clear to constituents of an entity that you represent the entity and its interest, not those of the constituents.**
- **Always be aware of the potential for conflicts if you represent both the entity and the constituent.**

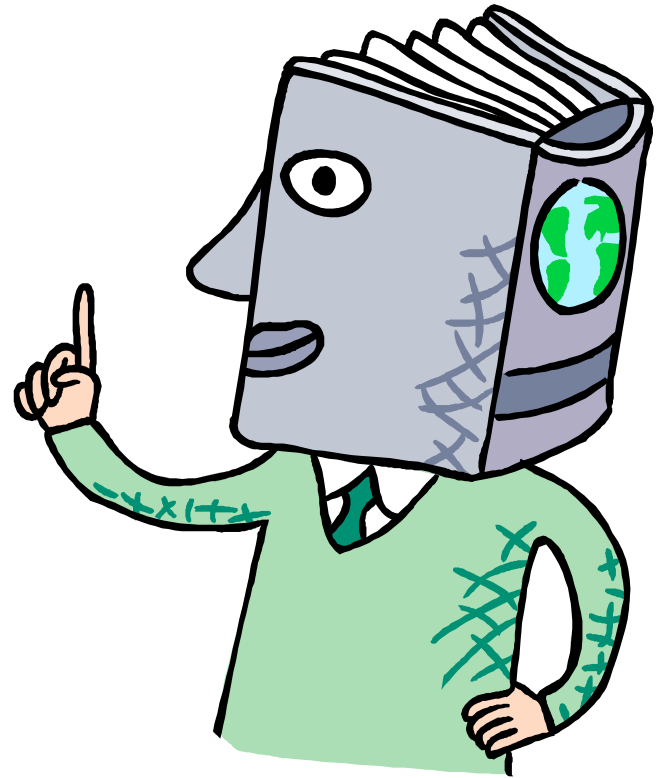
When the Client Ignores Your Advice



Options under Rule 4-1.13

- **Ask for reconsideration**
- **Advise client to seek a separate legal opinion from another attorney or regulatory authority**
- **Refer the matter to a higher authority in the organization.**
- **Terminate or withdraw**

Competence



Rule 4-1.1

- **A lawyer shall provide competent representation to a client.**
- **Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.**

Rule 4-1.2

- **Permits a lawyer to limit the scope of the representation if the client consents after consultation.**
- **Safest course - disclose limitations in the retainer agreement**

What Standard Applies?

- **Duffey Law Office: appellate court in Wisconsin held that when an attorney represents to a client that he or she has greater expertise, the attorney will be held to a standard consistent with the claimed expertise.**
- **Duffey Law Office, S.C. v. Tank Transport, Inc., 535 N.W.2d 91 (Wisc. App. 1995)**

Standard of Care Cont'd

- **Health care providers know that specialists are held to a higher standard of care - the standards of practice in that specialty.**
- **If you hold yourself out as a specialist, it is likely that a higher standard will be applied against you in a malpractice or grievance matter.**

Taking Interest in Your Clients

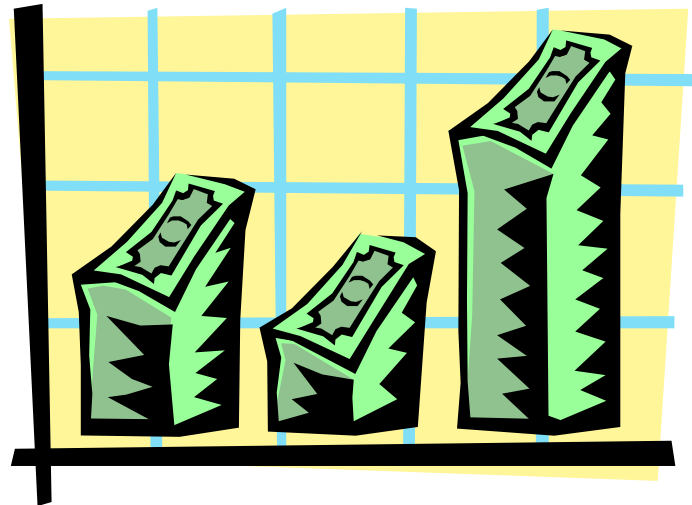


Applicable Florida Bar Rules of Professional Conduct

- **Florida Rule 4-1.5(a): Reasonable Fee**
- **Florida Rule 4-1.7(b): Conflict of Interest**
- **Florida Rule 4-1.8(a): Prohibited Transactions**
- **Florida Rule 4-1.13: Organization as Client**

Florida Rule 4-1.5(a)

**Illegal, Prohibited, or Clearly
Excessive Fees**



Florida Rule 4-1.5(a)

- **An attorney shall not enter an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee...**

Factors Used to Determine Reasonableness of a Fee

- **Time and labor required, novelty, complexity and difficulty of questions, skill required;**
- **Exclusion of other employment by accepting client;**
- **Fee or rate customarily charged in the locality;**

Factors - Cont'd

- **Experience, reputation, diligence, ability, skill, expertise, or efficiency of the lawyer;**
- **Significance of, or amount involved in, the subject matter of the representation, the responsibility involved, and the results obtained;**

Factors - Cont'd

- **Time limitations and special demands imposed by client or circumstances;**
- **Nature and length of attorney's professional relationship with client; and**
- **Whether fixed or contingent.**

Florida Rule 4-1.8(a)

Business Dealing Between Lawyers and Client



Florida Rule 4-1.8(a)

- **A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security, or other pecuniary interest adverse to a client, except a lien granted by law to secure a lawyer's fee or expenses.**

Business dealings will be permitted if:

- **The transaction and terms on which the attorney acquires the interest must be fair and reasonable to the client**
- **AND fully disclosed and transmitted in writing to the client in a manner that can be reasonably understood by the client**

Business dealings will be permitted if:

- **The client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and**
- **The client consents in writing thereto.**

ABA Formal Opinion 00-418

July 7, 2000



ABA Formal Opinion 00-418

- **The Model Rules do not prohibit a lawyer from acquiring an ownership interest in a client, as part or all of the fee, so long as the lawyer complies with Model Rules 1.5(a) and 1.8(a)**

ABA Formal Opinion - Cont'd

- **Model Rule 1.5(a) governs reasonableness of fees and is similar to the Florida Rule.**
- **Model Rule 1.8(a) governs business transactions with clients and is similar to the Florida Rule**

ABA Formal Opinion - Cont'd

- You can minimize the risk by establishing a fee based on the factors set out in Rule 1.5(a). Then accept interest that, at the time of the transaction, is worth the reasonable fee.**

ABA Formal Opinion - Cont'd

- **Explain important features and material consequences, in a way the client understands.**
- **Set forth scope of services covered in return for the “fee.”**
- **Document recommendation to seek further advice from outside counsel.**

ABA Formal Opinion - Cont'd

- **Warn of potential conflict between duty to exercise independent professional judgment on behalf of the corporation and the desire to protect the value of the stock.**
- **Warn that this could lead to withdrawal or a recommendation for outside counsel.**

ABA Formal Opinion - Cont'd

- **Rule 1.8(i) may also be implicated. This prohibits an attorney from acquiring a proprietary interest in a cause of action.**
- **The requirements of Rule 1.7(b), governing conflicts of interest, must also be met.**

ABA Formal Opinion - Cont'd

- **ABA Rule 2.1 is also applicable. It requires attorneys to exercise independent professional judgment when advising clients.**
- **Florida Rule 4-2.1 is similar.**

Case Law

On Lawyer's
Business Transactions
with Clients



Smyrna Developers, Inc. V. Bornstein,
177 So. 2d 16 (Fla. 2d DCA 1965)

- **Business transactions are subject to the closest scrutiny.**
- **Attorney must show by clear and convincing evidence the fairness of an agreement or transaction.**

**Abstract & Title Corp. of Florida
v. Cochran,**

414 So.2d 284 (Fla. 4th DCA 1982)

- **Attorney must demonstrate by clear and convincing evidence that he provided his client with all of the information that the attorney would have given that client had the transaction been between the client and a stranger.**

Case Law

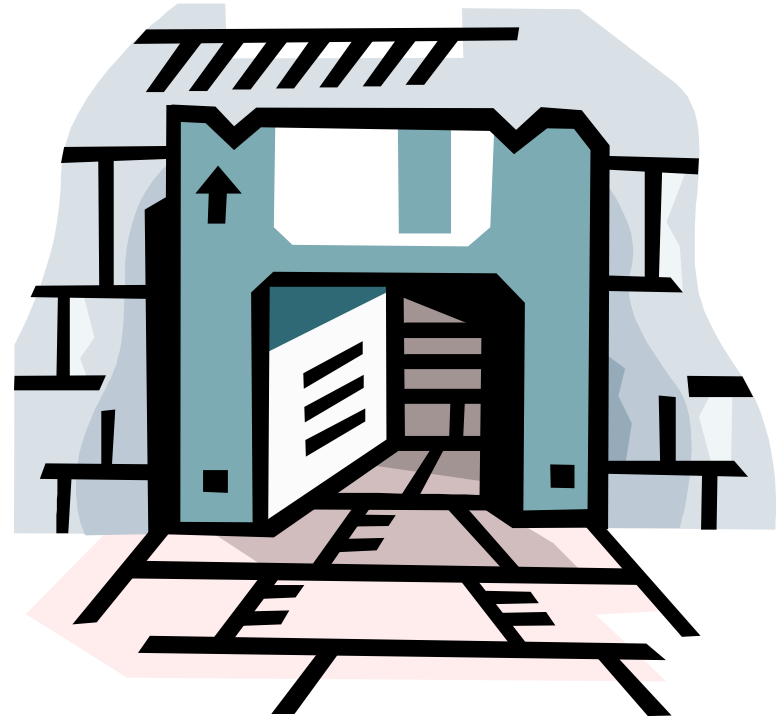
Reasonableness of Legal Fees



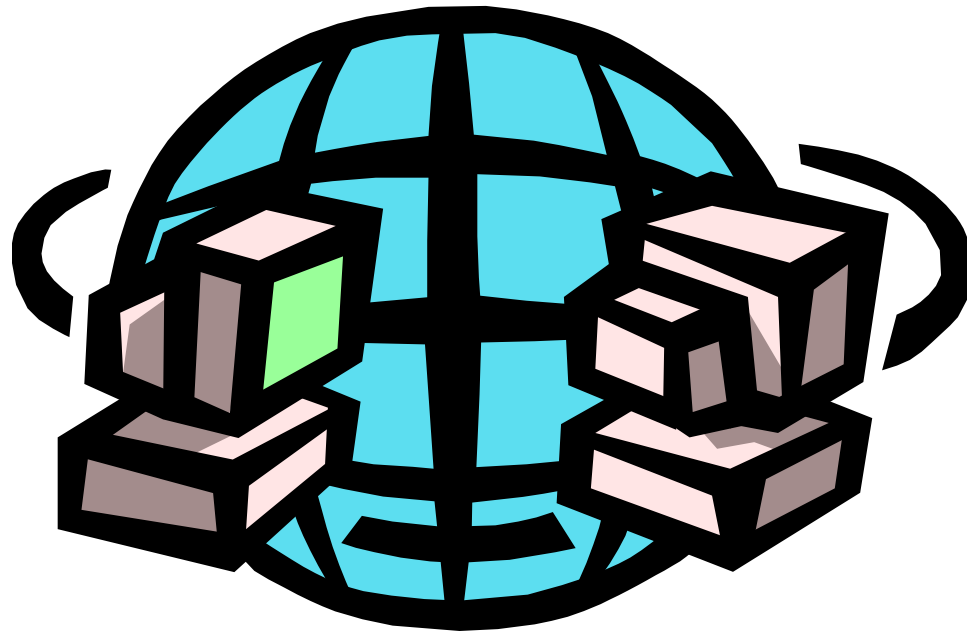
Morse v. Espeland,
696 P.2d 428 (Mont. 1985)

- **Although a lawyer negotiates the lawyer's fee with the client at arm's length and not as a fiduciary, the lawyer owes the client an obligation to deal fairly and in good faith when doing so.**

Technology and Ethics



Using the Internet



Web Sites

- **Have you complied with requirements of Rule 4-7.6 (Computer-Accessed Communications)?**

Checklist for Websites

- **If an attorney maintains a website, he must comply with all Rule 4-7 requirements, advertising by lawyers. Websites must also comply with Rule 4-7.9 because they are considered to be information upon request.**
- **Disclose geographic location and all jurisdictions in which you and members of your firm are licensed**
- **Have information regarding qualifications available in written form**

Advertising Specialization

- **Rule 4-7.2(c)(2) permits attorney to communicate fields of practice**
- **Rule 4-7.2(c)(3) permits specialist advertisement only when certified by the Florida Bar or an approved organization**

Florida Bar PEC

Advisory Opinion 00-4

- There is no bar rule prohibiting attorneys from practicing via the Internet. Providing such services as simple wills, incorporation papers, real estate contracts, residential leases & uncontested marital agreements is permissible, so long as all appropriate bar rules are followed.**

SCA Opinion A-00-1

- **Does participation in a chat room constitute impermissible solicitation?**
- **Standing Committee on Advertising found that Rule 4-7.4(a) prohibits an attorney from participating in a chat room in order to solicit professional employment.**

Other Ethical Issues



Crime-Fraud Exception

- Are you an Actor or Conspirator? Your advice to a client could pull you in.
- If the client communication is in furtherance of contemplated or ongoing criminal or fraudulent conduct, the communication is generally not privileged.



Crime-Fraud Exception Cont'd

- “The privilege takes flight if the relation is abused. A client that consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told.” U.S. v. Davis, 131 F.R.D. 391, 407 (S.D.N.Y. 1990)
- The exception applies only to communications with counsel intended in some way to facilitate or conceal the crime or fraud.

Crime-Fraud Exception Cont'd

- In Re: Grand Jury Subpoenas, Jane Roe and John Doe the 10th Circuit Court of Appeals held that two attorneys who had represented a hospital corporation accused of a variety of Federal health care-related crimes were compelled to testify even though the subject of their testimony was otherwise attorney-client privileged.

In Re: Grand Jury Subpoenas, Jane Roe and John Doe Cont'd

- The case is a fairly basic statement of the application of the crime-fraud privilege, with two notable exceptions.
- First, the case allows the intervenor, the hospital's indicted President and Chief Executive Officer, to assert the privilege personally with respect to his conversations with the corporation attorneys.

In Re: Grand Jury Subpoenas, Jane Roe and John Doe Cont'd

- Second, in Intervenor v. U.S.A. the U.S. Attorney for the District of Kansas subsequently indicted the intervenor and the two attorneys for, among other crimes, facilitating, aiding and abetting health care program fraud.
- The Court held that the services of Doe and Roe were used to effectuate and conceal the alleged crimes and frauds.

Other Issues to Be Aware Of

- **Be cognizant of antitrust problems.**
- **Be familiar with statutes/procedural rules, i.e. periods of appeal under Probate Code.**
- **Issues for Living Wills/Designation of Health Care Surrogate**

Living in a “Post-Enron” World



- Given the recent scandals in corporate America, many people are thinking about ethics and what part ethics play in the business arena.

Remember – Appearances Matter

- Appearances matter when it comes to ethics in general, because trust is a valuable commodity.
- Remember that reputation is a form of capital: an organization needs it in order to operate, especially in an industry like health care.



Problem Analysis



FRAMEWORK FOR ANALYSIS

SEE OUTLINE ON PAGE 13-148.

**MEMORIZE IT AND USE IT (OR A
SIMILAR OUTLINE) TO ANALYZE
AND DISCUSS EVERY ETHICAL
SITUATION.**

Look for and address the following issues:

- 1. What party do you represent?**
 - Be sure to disclose it, in writing.**
 - Potential conflict? If you represent one party and advise other, you have one.**
 - What if client ignores advice?**

- 2. Competence? If this is outside your field of knowledge and expertise, consult with expert or refer to one more appropriately qualified.**

- 3. Limitations on your representation of a client (e.g., we do not provide advice on tax or antitrust implications)? Always set this out in writing, especially if some areas may be outside your area of expertise.**

4. Don't advise on illegal acts & be careful of advice you give on antitrust matters. You could become a conspirator. (Mention HIPAA)

- Be careful in negotiating contracts between/among competitors or on behalf of competing providers. You could be involved in antitrust violation (e.g., price fixing.)**

(4) Careful Advice Cont'd

- **Do it in writing! Otherwise, your client will say you told him it was permissible to do something else.**
- **Review and follow (for exam purposes, mention it) AHLA Best Practices Handbook.**
- **Review (for exam purposes, mention it) U.S. v. Anderson & U.S. v. Altieri.**

5. Ethics questions? - Call Florida Bar Ethics Hotline.

6. Terminating the relationship? It's probably okay to do this, but do it in writing.

7. Exceeding practice of law = exceeding limits of your legal malpractice insurance coverage: be very careful about giving business, medical or financial advice to your clients. Be careful about becoming a participant in your client's business venture.

- 8. Taking an interest in the organization.
You may be creating a conflict by doing this.**

- 9. When in doubt, always write it out
(disclose it in writing).**

10. Other Possible Issues to Consider:

- **Is a higher legal standard applied to lawyers holding themselves out as a specialists?**
- **Special considerations in the age of electronics:**
 - **Breaches of confidentiality.**
 - **Advertising regulations and website guidelines.**
 - **Practicing across state lines, malpractice insurance, competence, inadvertently establishing an attorney-client relationship.**

(10) Other Issues Cont'd

- **Better know rules such as short periods of appeal under probate code (e.g., 72 hours for appealing decision of Health Care Surrogate).**
- **When in doubt, refer it out (refer to other competent counsel or other specialist).**

(10) Other Issues Cont'd

- **Avoid obtaining an interest in outcome/matter:**

If you drafted the living will/designation of health care surrogate, should you be the one to serve? Can you? Better disclose, may be a conflict there. May conflict with attorney's economic interests.

(10) Other Issues Cont'd

- **Who has standing to challenge a medical decision that may result in the patient's death? Since In re: Dubreiu, state's attorney is one who must bring suit. Don't give bad advice, waste client's money, look stupid and (last, but not least) commit malpractice.**

(10) Other Issues Cont'd

- **Better advise client that despite a living will, some facilities/hospitals may not honor it under certain circumstances.**
- **You don't need to go to court on many of these any more = living wills are self-executing.**

Practice Tips



Tips

- 1. Review the Florida Supreme Court and adopted by the Florida Bar (including MJP Rule and Limitations on Scope of Representation, now allowed) .**
- 2. Memorize the Outline/Analysis on the prior to pages or one similar. Apply to every new client and situation.**

“Tips”

- 3. Disclose any possible conflict in writing and get a written waiver**
- 4. Call the Florida Bar Ethics Hotline**

Where to Go for Guidance

- **Florida Bar Ethics
Hotline (800) 235-8619**
- **Legal ethics websites**
- **Published ethics opinions**
- **A mentor or firm ethics
advisor**





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