

# Legal Ethics for Healthcare Attorneys, Part 1

Presented by:



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**George F. Indest III, J.D., M.P.A., LL.M.**

**Board Certified by the Florida Bar in the Legal  
Specialty of Health Law**

**Website: [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)**



**Main Office:**

1101 Douglas Avenue  
Altamonte Springs, Florida 32714

**Phone:** (407) 331-6620

**Fax:** (407) 331-3030

**Website:** [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)

# LEGAL ETHICS Part 1

- PRELIMINARY COMMENTS:
- Nursing insurance article available
- The Florida Healthcare Professional's Medico-Legal Guide, DC Press (2004)
- Warning: feeble attempts at humor will be made throughout this presentation

# Legal Ethics, Part 1

## Today's Lecture:

- ❖ Identify potential conflicts, esp. when representing multiple clients & organizations
- ❖ Standards applicable to attorneys who “specialize” in health law
- ❖ Implications of Sarbanes-Oxley Act (2002) for attorneys

# LEGAL ETHICS Part 1

- COMMENTS CONCERNING THE NEW ABA MODEL RULES OF PROFESSIONAL CONDUCT, ADOPTED 2002

# Issues Involving the Representation of Parties

1. Who do you represent?
2. Is there a conflict or a potential conflict?
3. What if your client ignores your advice?

# Fla. Rule 4-1.13 ABA Model Rule 1.13

## Organization as Client





# Florida Rule 4-1.13

## ABA Model Rule 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.

# 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.

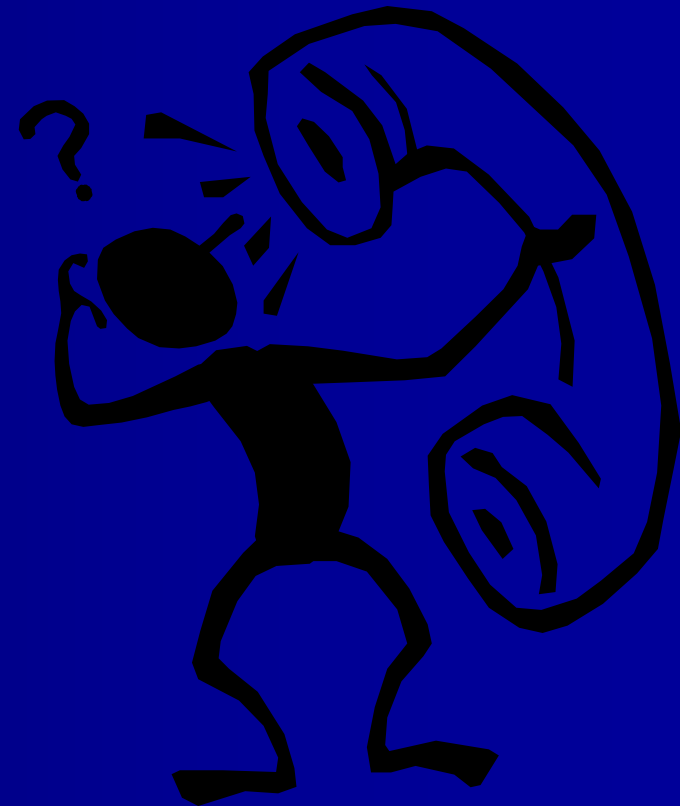
# Florida Bar Opinion 86-6

- 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



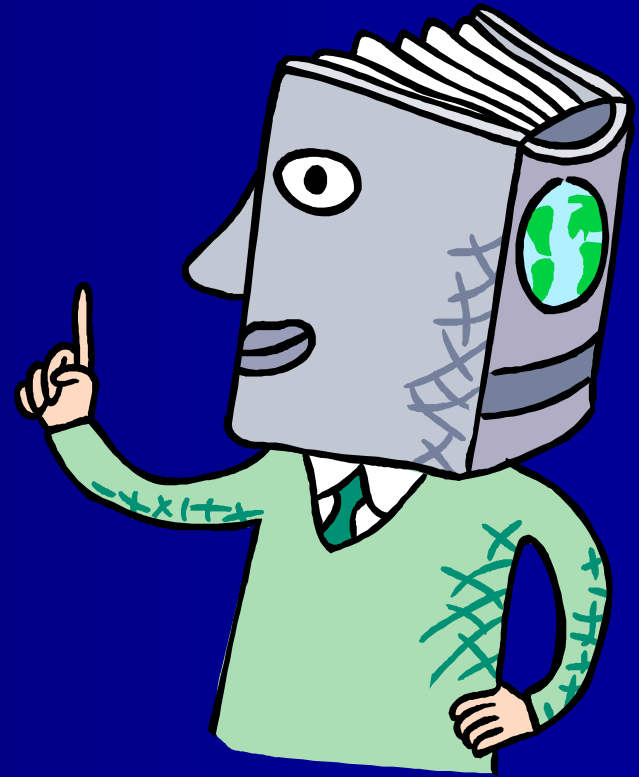
# Options under Rule 4-1.13

- **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 as a Health Care Lawyer

1. What is legal competence?
2. Does a higher standard apply to a lawyer who holds herself out to be a specialist in health care law?
3. Other issues on counsel's competency. . . .

# 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)

# CASES ON HIGHER "STANDARD OF CARE"

- Horne v. Peckham, 158 Cal.Rptr. 714 (Ct. App. 1979), disapproved on other grounds 885 P.2d 965 (a lawyer not specializing in tax law must refer the client to a tax law specialist, consult a specialist, or provide the client with the care and skill of a tax law specialist)

# CASES ON HIGHER "STANDARD OF CARE"

- Wright v. Williams, 121 Cal.Rptr. 194 (Ct.App. 1975) (attorney held to standards of a lawyer practicing federal maritime property law)

# CASES ON HIGHER "STANDARD OF CARE"

- Rodriguez v. Horton 622 P.2d 261  
(N.M. Ct.App. 1980), 13 A.L.R.4th 86  
(attorney held to standards of one  
practicing workers' compensation law)

# CASES ON HIGHER "STANDARD OF CARE"

- Walker v. Bangs, 601 P.2d 1279 (Wash. 1979) (standards of attorney practicing in area of federal maritime personal injury litigation found to apply)

# 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



# CASES ON HIGHER "STANDARD OF CARE"

- A lawyer undertaking a representation or performing work in a specialized area of the law must exercise the degree of skill and knowledge possessed by lawyers who routinely practice in that specialty.

# 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.

# Web Sites & Ethics of Practice over the Internet

- To be covered in Part 2.

WHAT ABOUT  
THEM SOX?

# Understanding the Sarbanes-Oxley Act of 2002

- Reasons Sarbanes-Oxley was enacted by Congress
- Types of entities to which the provisions of Sarbanes-Oxley apply
- Ethical duty owed by attorney to the issuer and not the officers of the corporation under Sarbanes-Oxley

# Section 307: Rules of Professional Responsibility for Attorneys

1. Reporting evidence of either:
  1. A material violation of securities law
  2. A breach of fiduciary dutyTo the audit committee of the board of directors
2. Mandate for rules setting forth standards of professional conduct for attorneys appearing and practicing before the Commission (17 CFR 205)

# Minimum Standards of Professional Conduct When Appearing Before the SEC

- I. “Up the ladder” Reporting
  - A. Evidence of a material violation - report to chief legal counsel
  - B. If chief legal counsel does not appropriately respond, attorney must report the evidence to the audit committee of the board of directors or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the company, or to the board of directors.
- II. “Noisy Withdrawal”

# Minimum Standards - Cont'd

III. Attorney may disclose confidential information, if:

- (1) In order to prevent the issuer from committing a material violation that is likely to cause substantial financial interest or property of the issuer or investors;



# Minimum Standards - Cont'd

III. Attorney may disclose confidential information, if:

(2) To prevent the issuer, in a Commission investigation or administrative proceeding from committing perjury, proscribed in 18 U.S.C. 1622; or committing any act proscribed in 18 U.S.C. 1001 that is likely to perpetrate a fraud upon the Commission;

# Minimum Standards - Cont'd

III. Attorney may disclose confidential information, if:

(3) To rectify the consequences of a material violation by the insurer that caused, or may cause, substantial injury to the financial interest or property of the issuer or investors in the furtherance of which the attorney's services were used

# Minimum Standards: Compliance

- ✓ Supervisory attorney must comply with 17 CFR 205.3
- ✓ Subordinate attorney may take steps permitted or required by 17 CFR 205.3(b) or (c)
- ✓ Attorney subject to discipline for violating any provision of 17 CFR 205
- ✓ Criminal penalty for destroying documents (Section 802)

## 17 CFR 205.4 (SOX)

### § 205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.

## 17 CFR 205.4 (SOX) - Cont'd

### § 205.4 Responsibilities of supervisory attorneys.

(b) A supervisory attorney shall make reasonable efforts to ensure that a subordinate attorney, as defined in § 205.5(a), that he or she supervises or directs conforms to this part. To the extent a subordinate attorney appears and practices before the Commission in the representation of an issuer, that subordinate attorney's supervisory attorneys also appear and practice before the Commission.

## 17 CFR 205.4 (SOX) - Cont'd

- (c) A supervisory attorney is responsible for complying with the reporting requirements in § 205.3 when a subordinate attorney has reported to the supervisory attorney evidence of a material violation.
  
- (d) A supervisory attorney who has received a report of evidence of a material violation from a subordinate attorney under § 205.3 may report such evidence to the issuer's qualified legal compliance committee if the issuer has duly formed such a committee.

## 17 CFR 205.5 (SOX)

### § 205.5 Responsibilities of a subordinate attorney.

(a) An attorney who appears and practices before the Commission in the representation of an issuer on a matter under the supervision or direction of another attorney (other than under the direct supervision or direction of the issuer's chief legal officer (or the equivalent thereof)) is a subordinate attorney.

## 17 CFR 205.5 (SOX) - Cont'd

### § 205.5 Responsibilities of a subordinate attorney.

(b) A subordinate attorney shall comply with this part notwithstanding that the subordinate attorney acted at the direction of or under the supervision of another person.



## 17 CFR 205.5 (SOX) - Cont'd

### § 205.5 Responsibilities of a subordinate attorney.

(c) A subordinate attorney complies with § 205.3 if the subordinate attorney reports to his or her supervising attorney under § 205.3(b) evidence of a material violation of which the subordinate attorney has become aware in appearing and practicing before the Commission.

## 17 CFR 205.5 (SOX) - Cont'd

(d) A subordinate attorney may take the steps permitted or required by § 205.3(b) or (c) if the subordinate attorney reasonably believes that a supervisory attorney to whom he or she has reported evidence of a material violation under § 205.3(b) has failed to comply with § 205.3.

## 17 CFR 205.6 (SOX)

### § 205.6 Sanctions and discipline.

(a) A violation of this part by any attorney appearing and practicing before the Commission in the representation of an issuer shall subject such attorney to the civil penalties and remedies for a violation of the federal securities laws available to the Commission in an action brought by the Commission thereunder.

## 17 CFR 205.6 (SOX) - Cont'd

### § 205.6 Sanctions and discipline.

(b) An attorney appearing and practicing before the Commission who violates any provision of this part is subject to the disciplinary authority of the Commission, regardless of whether the attorney may also be subject to discipline for the same conduct in a jurisdiction where the attorney is admitted or practices. An administrative disciplinary proceeding initiated by the Commission for violation of this part may result in an attorney being censured, or being temporarily or permanently denied the privilege of appearing or practicing before the Commission.

## 17 CFR 205.6 (SOX) - Cont'd

(c) An attorney who complies in good faith with the provisions of this part shall not be subject to discipline or otherwise liable under inconsistent standards imposed by any state or other United States jurisdiction where the attorney is admitted or practices.

(d) An attorney practicing outside the United States shall not be required to comply with the requirements of this part to the extent that such compliance is prohibited by applicable foreign law.

# How Standards of SOX are Being Applied to Not-For-Profit

1. Formation of audit committee comprised entirely of independent directors
2. At least one independent director qualified as financial expert
3. Audit committee must perform the following:
  - a. Review organization's financial statements and audit reports
  - b. Evaluate internal audit controls
  - c. Ensure compliance with all state laws and regulations pertaining to financial reporting

# How Standards of SOX are Being Applied to Not-For-Profit - Cont'd

4. Prohibiting loans to corporate officers
5. Establishing code of conduct for executive officers
6. Establishing standards of professional conduct for attorneys

# How SOX May Affect YOU Anyway

- Indications are that the IRS will be applying many SOX principles to not-for-profit corporations
- Indications from the HHS OIG are that SOX principles will be implemented into future audit and investigation standards for health care facilities and institutions



# How SOX May Affect YOU Anyway

- Counsel representing health care institutions may find their actions as attorneys placed under much stricter scrutiny
- SOX has definitely raised the bar for corporate compliance programs in the health care industry

## 17 CFR 205.4 (SOX)

### § 205.4 Responsibilities of supervisory attorneys.

(a) An attorney supervising or directing another attorney who is appearing and practicing before the Commission in the representation of an issuer is a supervisory attorney. An issuer's chief legal officer (or the equivalent thereof) is a supervisory attorney under this section.



**Main Office:**

1101 Douglas Avenue  
Altamonte Springs, FL 32714

**Phone:** (407) 331-6620

**Fax:** (407) 331-3030

**Website:** [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)



**Orlando Office (By Appointment):**

37 North Orange Avenue, Suite 500  
Orlando, Florida 32801

**Phone:** (407) 331-6620

**Fax:** (407) 331-3030

**Website:** [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)



**Pensacola Office (By Appointment):**

201 East Government Street  
Pensacola, Florida 32502

**Phone:** (850) 439-1001

**Fax:** (407) 331-3030

**Website:** [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)



**Denver, Colorado Office (By Appointment):**

155 East Boardwalk Drive, Suite 424  
Fort Collins, Colorado 80525

**Phone:** (970) 416-7454

**Fax:** (866) 203-1464

**Website:** [www.TheHealthLawFirm.com](http://www.TheHealthLawFirm.com)



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