

# Legal Ethics for Healthcare Attorneys, Part 2

Presented by:



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# Legal Ethics, Part 2

## Today's Lecture:

- ❖ Whatever is left over from Part 1
- ❖ Ethical obligations of those in dual professions
- ❖ Ethical issues involved in doing business with a client
- ❖ Ethical considerations and rules concerning attorney advertising (incl. use of internet)
- ❖ Legal resources to consult

# Dual Professionals - Independent Legal Judgment

## ABA Model Rule 5.4

(c) A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

# Independent Legal Judgment - Cont'd

## Florida Bar Rule 4-5.4

**(d) Exercise of Independent Professional Judgment.** A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.

# Independent Legal Judgment - Cont'd

## Florida Bar Rule 4-5.4

**(e) Nonlawyer Ownership of Authorized Business Entity.** A lawyer shall not practice with or in the form of a business entity authorized to practice law for a profit if:

a nonlawyer has the right to direct or control the professional judgment of a lawyer.

# Independent Legal Judgment - Cont'd

## Florida Bar Rule 4-1.7

**(b) Duty to Avoid Limitation on Independent Professional Judgment.** 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.



# Independent Legal Judgment - Cont'd

## Florida Bar Rule 4-1.8

An ownership, possessory, security, or other pecuniary interest adverse to client may limit the attorney's independent legal judgment.

# Dual Professionals - Responsibility for Nonlegal Services

- I. ABA Model Rule 5.7
  - A. Professional Conduct
  - B. “Law-Related Services”
  
- II. Florida Bar Rule 4-5.7
  - A. Services Not Distinct from Legal Services
  - B. Services Distinct from Legal Services
  - C. Service by Nonlegal Entity
  - D. Effect of Disclosure of Nature of Service

# Dual Professionals - Responsibility for Nonlegal Services

## III. Conflicts of Interest

A. ABA Model Rule 1.8

B. Florida Bar Rule 4-1.7

# Use of the Internet in Your Practice

- Internet is a tool to assist attorney in practice of law
- 1. Legal research
  - a. Lexis
  - b. Westlaw
  - c. State & Fed'l gov't sites

# Use of the Internet in Your Practice

- 2. E-mail
- 3. Investigation
- 4. Advertising
  - a. Florida Bar Rule 4-7.6 Computer-Accessed Communications

# Use of the Internet in Your Practice

- Advertising
  - Florida Bar Rule 4-7.6 Computer-Accessed Communications
- All web sites and home pages must contain: jurisdiction(s) where licensed to practice law, and at least one office location.

# Use of the Internet in Your Practice

- B. Internet Practice of Law raises several issues
- 1. Unlicensed Practice
  - a. a nonlawyer who provides consultation, explanation, recommendations, advice, and assistance is engaged in the unlicensed practice of law. The Fla. Bar v. We The People Forms and Servs. Ctr. of Sarasota, Inc., No. SC02-1675, 2004 Fla. Lexis 641.

# Use of the Internet in Your Practice

- Internet Practice (cont.)
  - 1. Legal Forms
  - 2. Legal Software
  - 3. Immigration (Public Notary "Notarios" considered attorneys in Latin America) - fraud



# Use of the Internet in Your Practice

- 2. Multi-jurisdiction Practice of Law
  - a. ABA Model Rule Rule 5.5

# Taking Interest in Your Clients

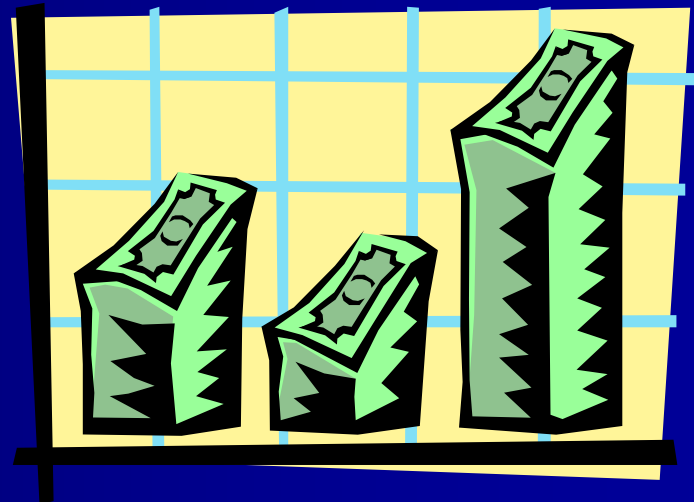


# Applicable Fla. Rules

- 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.

# Relevant Case Law

Florida Cases on a 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.**

# Relevant Case Law

## Reasonableness of Legal Fees





# The Internet and Ethics

1. Using the Internet to Market and Enhance Your Legal Practice
2. Confidential Communications
3. Internet-based Research

# 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.

# Checklist for Websites

- 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.

# 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.





# A FRAMEWORK FOR ANALYZING ETHICAL PROBLEMS

## 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)**

**5. 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 AHLA Best Practices Handbook.
- Review & be familiar with U.S. v. Anderson.

**5. Ethics questions? - Call State Bar Ethics Hotline or Ethics Committee. Ask another attorney.**

**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. But if you do, comply with ABA Op. 00-418.**

**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), time in which to request administrative hearing, etc.**
- **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.**
- **In Fla., you don't need to go to court on many of these any more = living wills are self-executing.**

# ADDITIONAL RESOURCES

- Florida Rules of Prof'l Conduct (2004)
- ABA Model Rules of Prof'l Conduct (2004)  
(<http://www.abanet.org>)
- Ethics Opinions of the Florida Bar  
(<http://www.flabar.org>)
- ABA Opinions (<http://www.abanet.org>)

# ADDITIONAL RESOURCES

- AHLA, Best Practices Handbook in Advising Clients on Fraud and Abuse Issues (1999)
- Best internet website on legal ethics:  
<http://www.legalethics.com>
- Ethical issues involved in multi-jurisdictional practice of law:  
<http://www.crossingthebar.com>

# ADDITIONAL RESOURCES

- "Netethics" from the Computer Law Sect. Of the Georgia Bar:  
<http://www.computerbar.org/netethics>
- American Legal Ethics Library:  
<http://www.law.cornell.edu/ethics>
- Subject of "Legal Ethics" at:  
<http://www.findlaw.com>

# ADDITIONAL RESOURCES

- National Organization of Bar Counsel's site at: <http://www.nobc.org>
- Sect. on "Prof. Resp. & Ethics" in the Internet Legal Resources Guide at: <http://www.ilrg.com>
- Fla. Institute for Litigation Ethics at Stetson University College of Law: [www.law.stetson.edu/excellence/litethics](http://www.law.stetson.edu/excellence/litethics)



# ADDITIONAL RESOURCES

- Your state bar association's ethics committee or ethics hotline



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