

CLE Resources: Texas Health Law Conference 1998

Ten Ethical Dilemmas Faced by Health Care Lawyers

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DILEMMA ONE. You are a litigator in a law firm. Recently, a group of physicians have asked you to represent them in a lawsuit against a health maintenance organization. The physicians have recently been terminated, without cause, from the HMO's network. In order to win this case, you believe that you will have to make new law--possibly overturning *Texas Medical Ass'n v. Aetna Life Ins. Co.* Your firm represents two health maintenance organizations on regulatory and operational issues, and any new law created would not be in their best interests. Should you take this case? What if you believe that you would not be "creating" new law or overturning the *Aetna* case, but merely "clarifying" new statutory rules in the Texas HMO Act and thereby distinguishing *Aetna*?

Rule 1.06(b) -- . . . except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

(1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.

Comment -- Within the meaning of Rule 1.06(b), the representation of one client is "directly adverse" to the representation of another client if the lawyer's independent judgment on behalf of another client or the lawyer's ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by the lawyer's representation of, or responsibilities to, the other client. The dual representation also is directly adverse if the lawyer reasonably appears to be called upon to espouse adverse positions in the same matter or a related matter. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interests.

DILEMMA TWO. You represent a large hospital in a two-hospital town. The hospitals are at each other's economic throat and, as a result, hate each other intensely. The second hospital calls you for some operational advice on a matter that does not relate to your client. Is there an ethical conflict of interest that bars you from accepting representation?

Comment -- On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not constitute the representation of directly adverse interest. Even when neither paragraph (a) or (b) is applicable, a lawyer should realize that a business rivalry or personal differences between two clients or potential clients may be so important to one or both that one or the other would consider it contrary to its interests to have the same lawyer as its rival even in unrelated matters; and, in those situations a wise lawyer would forego the dual representation.

DILEMMA THREE. You have negotiated an asset acquisition and long-term service agreement on behalf of a medical clinic. The physician practice management company now managing the practice has asked you for some ongoing operational advice as it continues to acquire individual physician practices into the clinic. However, it has run into problems dealing with attorneys who do not understand the mechanics or structure of the service agreement or the partnership agreement of the clinic (not only did the attorneys= ignorance frustrate the medical clinic and the PPM, it caused the physician-clients to pay exorbitant legal fees as the attorneys had to learn the transaction). The PPMC, the medical clinic, and a physician have all come to you asking that you represent the physician in an upcoming transaction whereby the PPMC would acquire the physician's assets, and the physician would join the clinic as a partner. How can you accept representation of the physician?

Rule 1.06(c) -- a lawyer may represent a client in the circumstances described in (b) if:

(1) the lawyer reasonably believes the representation of each client will not be materially affected; and

(2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.

Comment -- A client under some circumstances may consent to representation notwithstanding a conflict or potential conflict. However as indicated in paragraph (c)(1), when a disinterested lawyer would conclude that the client should not agree to the representation under the circumstances, the lawyer involved should not ask for such agreement or provide representation on the basis of the client's consent. When more than one client is involved, the question of conflict must be resolved as to each client. Moreover, there may be circumstances where it is impossible to make the full disclosure necessary to obtain informed consent. For example, when the lawyer represents different clients in related matters and one of the clients refuses to consent to the disclosure necessary to permit the other client to make an informed decision, the lawyer cannot properly ask the latter to consent.

Disclosure and consent are not formalities. Disclosure sufficient for sophisticated clients may not be sufficient to permit less sophisticated clients to provide fully informed consent. While it is not required that the disclosure and consent be in writing, it would be prudent for the lawyer to provide potential dual clients with at least a written summary of the considerations disclosed.

DILEMMA FOUR. You helped organize a group of ten surgeons as a professional association, drafting the articles of association, bylaws, employment agreement, and buy-sell agreement. One year later, a physician announces that he will leave the practice and move to California. A dispute arises regarding the proper valuation of the shares in the PA under the buy-sell agreement. May you send a letter to the physician on behalf of the PA setting forth your interpretation of the buy-sell?

Rule 1.06(d) -- A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.

Comment -- In certain situations, such as in the preparation of loan papers or the preparation of a partnership agreement, a lawyer might have properly undertaken multiple representation and be confronted subsequently by a dispute among those clients in regard to that matter. Paragraph (d) forbids the representation of any of those parties in regard to that dispute unless informed consent is obtained from all of the parties to the dispute who had been represented by the lawyer in that matter.

DILEMMA FIVE. After all of your experience with PPMCs, you have come to the conclusion that they are a bad deal for physicians all around. You do not believe that they deliver on their promises of cost-savings, of increased and better managed care contracts, or access to capital. You believe that they just offer physicians quick cash, but physicians do not focus on the long term implications of losing a significant portion of their revenue year after year. A medical clinic has come to you and asked that you represent them in an upcoming transaction with a PPMC. What are your obligations in this situation?

Rule 2.01 -- In advising or otherwise representing a client, a lawyer shall exercise independent professional judgment and render candid advice.

Comment -- A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront.

Matters that go beyond strictly legal questions may also be in the domain of another profession. . . business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts. In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, duty to the client may require that the lawyer act if the client's course of action is related to the representation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is

unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's best interest.

DILEMMA SIX. A hospital administrator calls you and asks for your opinion on whether he has the right to veto an election of a department chairman. There is no provision in the medical staff bylaws that specifically gives the administrator this right, although there is a general provision contained in the preamble that says "the Medical Staff is subject to the ultimate authority of the Board and the cooperative efforts of the Medical Staff, Administrator, and Board are necessary to fulfill the purposes of the Hospital." You tell the administrator that, in your opinion, he does not have the right to veto the election. The administrator then gets angry and demands that you write him a letter saying that the provision may give him this right and, further, if you do not, he will just hire another lawyer who will. You know he will show this letter to the department chairmen that he wants to veto. Do you accede to his demands?

Rule 4.01. In the course of representing a client, a lawyer shall not knowingly:

- (a) make a false statement of material fact or law to a third person; or
- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client.

Comment -- Paragraph (a) of this Rule refers to statements of *material fact*. Whether a particular statement should be regarded as one of *material fact* can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture....

A lawyer violates paragraph (a) of this Rule either by making a false statement of law or material fact or by incorporating or affirming such a statement made by another person. Such statements will violate this Rule, however, only if the lawyer knows they are false and intends thereby to mislead.

DILEMMA SEVEN. You represent a non-profit hospital that wants to recruit a cardiologist in order to compete with the cardiology program of the only other hospital in town. The hospital has identified a top-notch candidate to recruit; unfortunately, the physician will not come unless the hospital provides him with a package that you feel violates IRS and Medicare rules. The administrator is dead set on recruiting this physician, as the administrator of the other hospital told him "we will bury you," and has approved the terms of the package. Do you have any duties in this situation?

Rule 1.12(a) -- A lawyer employed or retained by an organization represents the entity. While the lawyer in the ordinary course of working relationships may report to and accept direction from, an entity's duly authorized constituents, in the situations described in paragraph (b) the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization.

(b) A lawyer representing an organization must take reasonable remedial actions whenever the lawyer learns or knows that:

- (1) an officer, employee, or other person associated with the organization has committed or intends to commit a violation of a legal obligation to the organization or a violation of law which reasonably might be imputed to the organization;
- (2) the violation is likely to result in substantial injury to the organization; and
- (3) the violation is related to a matter within the scope of the lawyer's representation of the organization.

(c) Except where prior disclosure to persons outside the organization is required by law or other Rules, a lawyer shall first attempt to resolve a violation by taking measures within the organization. In determining the internal procedures, actions or measures that are reasonably necessary in order to comply with paragraphs (a) and (b), a lawyer shall give due consideration to the seriousness of the violation and its consequences, the scope and nature of the lawyer's representation, the responsibility in the organization and the apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Such procedures, actions and measures may include, but are not limited to, the following:

- (1) asking reconsideration of the matter;

- (2) advising that a separate legal opinion on the matter be sought for presentation to appropriate authority in the organization; and
- (3) referring the matter to higher authority in the organization, including, if warranted by the seriousness of the matter, referral to the highest authority that can act in behalf of the organization as determined by applicable law.

Comment -- A lawyer employed or retained to represent an organization represents the organization as distinct from its directors, officers, employees, members, shareholders or other constituents. Unlike individual clients who can speak and decide finally and authoritatively for themselves, an organization can speak and decide only through its agents or constituents such as its officers and employees. In effect, the lawyer-client relationship must be maintained through a constituent who acts as an intermediary between the organizational client and the lawyer. This fact requires the lawyer under certain conditions to be concerned whether the intermediary legitimately represents the organizational client.

. . . When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. However, different considerations arise when the lawyer knows, in regard to a matter within the scope of the lawyer's responsibility, that the organization is likely to be substantially injured by the action of a constituent that is in violation of law or in violation of a legal obligation to the organization. In such circumstances, the lawyer must take reasonable remedial measure.

DILEMMA EIGHT. You are in the process of organizing a group of investors who want to open a physical therapy clinic (which will not accept Medicare or Medicaid patients). One of the investors is a physician who will also be the medical director. They ask you to draft the medical director agreement--what are your obligations to the investors and to the physician?

Rule 1.12(e) -- 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 or when explanation appears reasonably necessary to avoid misunderstanding on their part.

Comment -- There are times when the organization's interest may be or become adverse to those of one or more of its constituents. In such circumstances the lawyer should advise any constituent, whose interest the lawyer finds adverse to that of the organization of the conflict or potential conflict of interest, that the lawyer cannot represent such constituent, and that such person may wish to obtain independent representation. Care should be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged insofar as that individual is concerned. Whether such a warning should be given by the lawyer for the organization to any constituent individual may turn on the facts of each case.

Rule 4.03 -- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Comment -- An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel.

DILEMMA NINE. You provide some ongoing advice to a physician group practice. A young physician associated with the group, who is unaware of your representation, calls your partner and asks if he would review his employment contract. Your partner explains that he cannot, because of a conflict of interest. You suspect that the physician is trying to break his non-compete covenant with your client. May you tell your client about this inquiry?

Rule 1.05 -- (a) "Confidential information" includes both "privileged information" and "unprivileged client information." . . .

(b) Except as permitted by paragraphs (c) and (d), or as required by paragraphs (e) and (f), a lawyer shall not knowingly:

- (1) Reveal confidential information of a client or a former client to:
 - (i) a person that the client has instructed is not to receive the information;
or
 - (ii) anyone else, other than the client, the client's representatives, or the members, associates, or employees of the lawyer's law firm.
- (2) Use confidential information of a client to the disadvantage of the client unless the client consents after consultation.
- (3) Use confidential information of a former client to the disadvantage of the former client after the representation is concluded unless the former client consents after consultation or the confidential information has become generally known.
- (4) Use privileged information of a client for the advantage of the lawyer or of a third person, unless the client consents after consultation.

Comment -- Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidential information of one who has employed or sought to employ the lawyer. Free discussion should prevail between the lawyer and client in order for the lawyer to be fully informed and for the client to obtain the full benefit of the legal system. The ethical obligation of the lawyer to protect the confidential information of the client not only facilitates the proper representation of the client but also encourages potential clients to seek early legal assistance.

DILEMMA TEN. In accordance with a hospital client's compliance plan, you have conducted interviews with the hospital's employees regarding possible billing errors. It has come to your attention that the hospital wrongfully codes numerous procedures and thus receives overpayments from Medicare. You bring these problems to senior management, who, after much contemplation, instructs you to hold this information in the strictest confidence. Must you hold this information in the strictest confidence?

Rule 1.05(c)(7) -- A lawyer may reveal confidential information. . .when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act.

Comment -- . . .the lawyer may learn that a client intends prospective conduct that is criminal or fraudulent. The lawyer's knowledge of the client's purpose may enable the lawyer to prevent commission of the prospective crime or fraud. . . The lawyer's exercise of discretion under paragraphs (c) and (d) involves consideration of such factors as the magnitude, proximity, and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the client's conduct in question. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer believes necessary to the purpose.

If the client is an organization, a lawyer also should refer to Rule 1.12 in order to determine the appropriate conduct in connection with this Rule.