

The Art of Ethics in Compliance Advice and Activities

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I. Introduction

Lawyers who provide legal advice to healthcare providers or entities frequently find themselves providing advice in matters that are wrought with corporate ethical issues or intersect with bioethics concerns. Oftentimes, the ethical advice a lawyer gives to a client is just as important as the legal intelligence. In other words, there may be legal consequences if the ethical issues are not addressed or raised with the client.

Therefore, in addition to being aware of and understanding the healthcare lawyer's own *Model Rules of Professional Conduct* to which s/he is bound, the lawyer should also be familiar with the ethical principles and issues that healthcare providers face in corporate matters, including but not limited to governance and compliance concerns. Additionally, the lawyer must be apprised of bioethical issues that arise in terms of informed consent, end of life care, aid-in-dying and assisted suicide.

This outline will provide a basic overview of specific *Model Rules of Professional Conduct*, general and corporate ethical principles, and bioethical standards and concerns in health care law. A person or provider may be in compliance with the law, while in the eyes of others, may be acting in an unethical or immoral manner. Alternatively, the opposite can be stated. Specifically, the behavior or actions of an individual or provider may be considered illegal while in the eyes of some, the actions may be considered ethical. For instance, consider issues such as abortion, gay marriage, medical marijuana,

and aid-in-dying. These are matters in which the law dictates a right and wrong behavior; however depending on one's values, or belief system, they may believe that the law is wrong.

The purpose of this paper is to provide an overview of ethical issues and principles that the healthcare lawyer should be aware of while providing legal advice to healthcare providers. This document is not intended to be an in-depth paper on any one principle; rather it should serve to increase awareness of legal and healthcare ethical principles that may arise in the course of the healthcare lawyer's role in providing legal advice.

II. Rules of Professional Conduct & Codes of Ethics

In addition to a required state license or a professional or national certification, many professions have rules or codes of conduct that govern the vocation. Likewise, many organizations or associations have established standards of conduct or rules of ethics that govern the behavior of the employees, members, contractors and vendors.

Common guidance or requirements included in various codes or standards of ethics include, but are not limited to issues such as confidentiality, conflict of interest and disclosure, competence, informed consent, social responsibility, appearances of impropriety, integrity in personal conduct, and more.

However, with or without specific written codes of conduct or standards of behavior, actions at the top management of an organization permeate down through the levels of the organization. These behaviors often highlight a company's attitude toward

ethical or unethical conduct. To understand this, it is important to understand the role of values and morals in ethical behavior.

Values can be defined as broad preferences concerning appropriate courses of action or outcomes. Values reveal a person's viewpoint of right and wrong such as the value of honesty, respect for others, fairness and accountability. Consider the value of refraining from taking that which does not belong to you. Most people believe that taking something that doesn't belong to you is stealing ---and stealing is viewed as wrong. But would a person look at this from a difference perspective if a father was stealing to pay for medical treatment for his child if the child would otherwise die because the family could not afford to pay for the treatment?

Values can be personal, cultural or organizational and are considered subjective. They vary and can change over time across individuals, families, cultures and companies or organizations. Values tend to influence a person's attitudes and behaviors.ⁱ

Frank Navran, in an article titled *Defining Values, Morals, and Ethics* describes values as fundamental beliefs or standards which are used to guide people, while morals are values which we attribute to a system of beliefs. Ethics is about a person's actions and decisions.ⁱⁱ

Consider the organization that has a written compliance plan and has distributed a company code of conduct. The company also has an anonymous reporting system. In a regional meeting the Vice President of Human Resources gave a short speech about the program, but in a sarcastic tone she refers to the "hotline" as the "rat line." What message

does this send to the employees in the meeting? How will this attitude affect the employees' perception of the company's compliance program?

III. Ethics and Compliance Programs for the Healthcare Organization

The Patient Protection & Affordable Care Act (ACA) of 2010, Section 6401(a)(7) requires all healthcare providers who receive Medicare or Medicaid funds to establish a compliance program to guard against fraud and abuse in government healthcare programs. Centers for Medicare and Medicaid Services (CMS) is responsible for drafting and implementing the regulations for establishing compliance programs. Although CMS has not yet published proposed regulations, healthcare providers are expected to implement compliance and ethics programs.

Specifically, healthcare lawyers should be aware of the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) compliance guidance issued in the late 1990s and early 2000s for most healthcare provider types, including but not limited to hospitals, home health care, hospice, skilled nursing facilities and physician providers. While not mandatory, these guidelines, along with numerous Corporate Integrity Agreements (CIAs) offer a roadmap to providers on crucial elements of a compliance program. For Skilled Nursing Facilities see *65 Fed. Reg. 14289; March 16, 2000* and *73 Fed. Reg. 56832; September 30, 2008*. For Home Health providers see *63 Fed. Reg. 42410; August 7, 1998* and for Hospice see *64 Fed. Reg. 54031; October 5, 1999*.

The OIG compliance guidance consistently lists seven elements of a compliance program. The first element requires providers to draft and implement policy and procedures as well as a written company Code of Conduct. The program is structured to allow for companies to implement oversight by a designated compliance officer, provide education and training to all staff on the program as well as education targeted to the appropriate audience specific to accuracy in clinical documentation, coding and billing. The plan should allow anonymous reporting of allegations of wrong-doing. Finally, the compliance plan should establish monitoring and auditing functions as well as disciplinary actions and prompt investigations. The programs should appeal to the individual and entity's culture of high ethical standards.

IV. The ABA *Model Rules of Professional Conduct*

The American Bar Association (ABA) House of Delegates adopted the ABA *Model Rules of Professional Conduct* in 1983 (*Model Rules*). Most states apply these rules as models for the state specific codes of ethics or professional responsibility rules applicable to lawyers who are licensed to practice law in that state. Prior to the adoption of the *Model Rules*, the ABA standard was the 1969 *Model Code of Professional Responsibility*. Before the Model Code was approved, the 1908 *Canons of Professional Ethics* were widely used; the *Canons* were amended for the last time in 1963.ⁱⁱⁱ

The *Model Rules* address many concepts typically found in other codes of conduct/ethics. For instance, the *Client-Lawyer Relationship* section includes topics on competence, diligence, communications, confidentiality, conflict of interest issues, and

duties to clients. While the applicability is specific to attorney activities, these concepts transfer widely to most individuals, professions and businesses.

The *Model Rules* section titled *Counselor* discusses the lawyer's role as an advisor:

Rule 2.1 Advisor

In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.^{iv}

When a healthcare provider organization requests the expertise of a lawyer, that lawyer may need to investigate the issue on the premises of the provider and the lawyer may be required to interview managers and staff. In the course of the necessary inquiry into the matter, the lawyer may encounter corporate ethical issues or issues regarding bioethics matters.

Corporate or provider concerns may include appearances of impropriety, fiduciary duties, conflicts of interest, confidentiality, or other. Additionally, in the healthcare setting, bioethical conflicts regarding informed consent or end-of-life issues may come to light in an investigation. How does the lawyer deal with these issues if they are not related to the direct legal matter inquired about by the client organization?

The lawyer should have a clear understanding of, and be able to differentiate between the legal concerns and the ethical issues. The lawyer should advise the client regarding the legal issues and the remedies or course of action available. Then the lawyer

should clearly define what s/he believes are ethical issues. If the lawyer believes the ethical concerns may evolve into legal issues if not addressed, s/he should state this and provide rationale or examples.

The *Comment on RULE 2.1: Advisor* is instructive. These comments, in whole or in part, are taken directly from the ABA website under the *Model Rules of Professional*

Scope of Advice

[1] 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. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.^v

A lawyer is obligated to provide honesty in his or her advice to a client and should not refrain from doing so regardless of how uncomfortable the lawyer may feel. A client has the right to be informed and to make a choice based on all information available.

In the complex healthcare compliance regulatory environment, lawyers are often confronted with difficult issues—many of which do not have black and white answers. In recent years, the OIG has increasingly provided more guidance for healthcare providers to further its goal of combating fraud and abusive practices in healthcare.

The revised OIG Self-Disclosure Protocol (April 2013) and other OIG guidance, Work Plans and website education heightened the awareness of ethical behavior and doing the right thing. However, many technical requirements of the laws regarding

clinical documentation and billing requirements for healthcare services are fraught with complexities and require ongoing education and diligence.

Reporting alleged overpayments for services needed and rendered in good faith, but for which technical program or billing requirements are in error, often present the provider and the attorney with ethical dilemmas. Even as the laws become more defined and the strict legalities more clear, the ethical concerns remain. How should an overpayment be determined? What are the ethical issues, if any, in the manner in which extrapolation for repayments is accomplished?

[2] Advice couched in narrow legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.^{vi}

While moral and ethical considerations may impact a lawyer's advice, the lawyer should not impose his or her morals or values on a particular individual or entity. With that said, if the lawyer is representing an organization and s/he is familiar with the organization's values and code of conduct, the lawyer should consider these ethical standards when providing legal advice.

Additionally, if, during the course of an investigation of a legal issue, the lawyer uncovers behaviors that involve ethical concerns such as confidentiality of proprietary information, fiduciary issues, appearances of impropriety or conflict of interests, the

lawyer should raise these issues with the client. While these issues may not of themselves be illegal, they may lead to legal issues if allowed to persist.

[3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.^{vii}

In providing legal advice to the healthcare provider or entity, the lawyer is often in a position of analyzing multiple state and federal laws and complex regulations and rules for which a client may not be fully informed, regardless of how astute s/he is in business. In these matters, the healthcare lawyer may choose to use more caution and provide advice based on the larger scope of the matter rather than focus just on the technical issue that was raised by the client--- especially if it is in the client's best interest.

Additionally, ethical and bioethical issues should be considered when providing advice on complex healthcare matters. The lawyer should clearly delineate or specify the legal issues and the ethical concerns and provide recommendations for plan of actions for the legal and ethical issues.

[4] 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 specialist. 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 or conflicting recommendations of experts.^{viii}

In the healthcare corporate world of compliance, lawyers often recommend and seek advice of financial and healthcare experts to provide a professional opinion, or to perform a review or audit of clinical, billing or financial records. While this work would normally take place under the direction of the attorney to preserve the attorney-client privilege and work product, the lawyer must advise their client of these recommendations, obtain the client's permission, and keep the client fully informed of such activities and advice.

Additionally, the lawyer should take care in preserving the attorney client privilege by such things as engaging the expert directly, ensuring privileged communications are addressed directly to the attorney as the primary recipient of such communications. The attorney should refer to the expert as such and use caution in seeking consulting advice per se.

Offering Advice

[5] 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, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. ...^{ix}

The healthcare lawyer's role can become more complicated as s/he navigates a complex organization. The lawyer should be clear with the company's employees and staff that the lawyer's client is the organization. In conferring with various executives, managers and employees, the lawyer may discover issues not raised by the company but related to the representation. Specifically, the motives, behaviors, or a course of action of

an executive or manager may be adverse to the organization. The lawyer should provide advice to the organization's top management or governing body on these issues if they would have a negative legal consequence to the organization.

V. Ethical Principles in Healthcare

The healthcare lawyer should be competent in the body of healthcare law as well as have a familiarity with healthcare ethical issues and principles.

A. Principle of Informed Consent

The doctrine of informed consent allows for persons who are capable of decisional capacity to make choices for their own health or medical treatment. The patient's choice should be based on all relevant information regarding diagnoses and prognosis, as well as the risk and benefits of the treatment. Like a lawyer advising his or her clients, the physician is obligated to provide all necessary information to the patient so the patient and or his/her legal agent or next of kin is able to make an informed choice for treatment or for the refusal of treatment.

The principal of informed consent took root over one hundred years ago in a case called *Schloendorff v. Society of New York Hospital*, 105 N.E. 92, 1914 where the plaintiff claimed she did not consent to the removal of a tumor. In his opinion, Justice Cardozo affirms that adults of "sound mind" have the right to decide what is to be done to his or her body.

During the last decades of the 20th century, the courts heard numerous cases regarding a patient's right to make their own health care decisions. In the 1970's and

1980's the courts were hearing an increasing number of cases where the patient was incapable of making healthcare decisions. In many of these cases, while the legal guardian or next of kin was willing to make decisions on behalf of the patient, the healthcare provider or family member disagreed and sought court action.

Cases such as Karen Ann Quinlan (1976) and Nancy Cruzan (1980s) brought attention to the issues of who decides end-of-life treatment for people who are not capable of making their own decisions. There were over 50 such cases in the courts in the last decades of the 20th century.

B. Autonomy or Self-Determination

As a result of the numerous court cases regarding end-of-life healthcare decision-making, Congress passed the Federal Patient Self-Determination Act of 1991 which mandated all states implement legislation which would allow people to document, in advance, their end-of-life care wishes. Advance Directives (also known as Living Wills) allow patients to make and to put in writing health care directives in advance and to appoint an agent to make choices for them if they become incapacitated.

The concept of autonomy continues to evolve today in the area of aid-in-dying. Rather than label assistance with dying as assisted-suicide, some states are drafting legislation called Aid-in-Dying or Death with Dignity.

While the majority of states have laws in place making assisted suicide a crime, several states have decriminalized aid-in-dying for physicians who provide a prescription of a lethal dose of medication so that a terminally ill patient with decisional capacity is

able to take his/her own life when he/she determines. Oregon has allowed physician assisted suicide for 17 years. Brittany Maynard was a young woman with an end-stage brain cancer diagnosis who lived in Oregon. On November 2, 2014, she who took her life with a lethal dose of medication prescribed by her doctor. Her situation received wide-spread media attention.

Montana, Washington and Vermont have laws allowing physician assisted aid-in-dying, also called “death with dignity”. In New Mexico, the courts are currently deciding an aid-in-dying matter.

While, as a society, we place great value on an individual’s right to make choices in determining their healthcare and medical treatment options, and the right to refuse treatment, this right does not give the patient unrestricted permission to demand futile or unnecessary care.

However, this right of patient self-determination is coupled with competing ethical issues. As technological advances saturate the medical and health fields, reasonable decisions become more complex and difficult. Ethical dilemmas become more evident to individuals or their surrogate decision-makers as they struggle with treatment options.

Likewise, these dilemmas are increasingly causing anxiety in the patient care setting for physicians, nurses, social workers and other health care professionals. A person’s own values and beliefs may have a significant impact on how a provider, employee or staff member views a particular situation. Organizational assistance in the

form of ethics consultations, bioethics mediators and or attorney mediators may be needed to provide neutral guidance or facilitation of these intense issues.

C. Principle of Beneficence

Beneficence is defined as the principle of doing good, showing kindness, and or helping others.^x In healthcare, practicing the principle of beneficence means promoting the patient's best interest as well as protecting the patient from harm. In other words, the benefits of providing a medical intervention (or omission of an intervention) must outweigh the burden of the intervention or omission.

Consider the competent person who has been diagnosed with a terminal illness and who is suffering physically and emotionally. The patient asks the physician to write a prescription for a lethal dose of medication that can be taken when the patient chooses. Assume that the state has laws permitting aid-in-dying. Would this be a medical intervention that provides a benefit to the patient? Or, would this be harming the patient? What if the state treats a physician intervention in this matter as a crime? Would it make a difference in how you look at this ethically?

In a situation where a patient is incapacitated or incompetent, beneficence rises above the principle of autonomy in protecting and benefiting the patient.^{xi}

D. Principles of Non-maleficence and Futile Treatment

Clinicians have an ethical obligation to avoid causing harm. This principle is widely recognized as *nonmaleficence* or “do no harm.” While providers must not

intentionally harm patients, many chosen and acceptable treatments carry potential for risk or harm for the patient. However, the benefits of chosen treatments are expected to outweigh the burden to the patient.

Physicians are obligated to discuss the benefits versus risks of a given treatment (or omission of a treatment) with a patient and or surrogate decision-maker, thus enabling the patient to make an informed decision to accept or decline the treatment. A person's concept of good or harm, and thus their decision to accept or forego treatment are closely tied to their individual and or community values. Additionally, a physician may find that a patient or surrogate's decision conflict with the ethical principles that govern the medical profession.

Healthcare lawyers may be asked to counsel providers on the legal implications of refusing to provide care that is futile. The lawyer may represent the organization in providing such advice.

Alternatively, the lawyer may be asked to stand in the role of mediator between the family and the provider organization in a case where the family may be asking for treatment which the provider believes to be futile. The lawyer who is currently representing the organization in legal matters should not act as a third party mediator. However, the lawyer could recommend a lawyer who would be neutral in the role of facilitator.

The Model Rules speak to a lawyer's role as a third party neutral.

Counselor

Rule 2.4 Lawyer Serving As Third-Party Neutral

- (a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.
- (b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.^{xii}

The lawyer serving as a third-party neutral in a healthcare bioethics matter would be remiss if s/he did not familiarize him/herself with healthcare corporate ethics and bioethical principles and issues. The lawyer should make it clear what his/her role is and describe the process of mediation or arbitration to both parties.

E. Principle of Justice

The concept of justice is a perceived and accepted obligation in the medical community. Generally, justice demands that people in similar circumstances are treated similarly. The principle of distributive justice requires that all persons be treated equally and that no one should be given a disproportionate share of society's resources. But who decides? Does the principle of autonomy override the principle of justice when a patient or surrogate demands treatments that may be futile? Or, consider the lack of resources for some who have no insurance or limited insurance benefits.

VI. Ethical Dilemma

A dilemma is a situation in which one must choose between two alternatives that are usually undesirable. “An ethical dilemma is a complex situation that often involves an apparent mental conflict between moral imperatives, in which to obey one would result in transgressing another.”^{xiii}

Specifically, an *ethical dilemma* presents itself when a decision must be made between two or more actions where one of the actions can be justified, but where a question remains whether the correct course was chosen. A decision made in the context of an ethical dilemma may potentially harm another person, place a person at risk, or violate the rights of one or more people.^{xiv}

In order to address ethical dilemmas in healthcare treatment, open and honest discussions must take place among all parties involved. For ethical issues in corporate compliance, these discussions can first take place within a company’s compliance committee with a neutral facilitator.

The discussion should lead to a commitment to the company’s values and an action plan to align the values with a plan of action. Each person should be allowed to speak their point of view. While immediate resolutions are not always evident, such discussions can lead to clarity of purpose and choices.

Discussions regarding bioethical issues can be addressed through an organization’s bioethics committee or through individual consultations or mediations. Conversations should include discussions about a patient’s values or preferences, medical

conditions, and quality of life issues as well as financial, legal and other external considerations. Lawyers are in a unique position to facilitate such ethical conversations/discussions while advising their clients on the legal implications of various decisions.

VII. Role of the Attorney

As Counselors-at-Law, healthcare attorneys have a unique opportunity to provide both legal and ethical guidance to their clients about healthcare issues, including but not limited to corporate issues and bioethical concerns. Whether a lawyer represents post-acute care or long-term care organizations, physician groups, or individuals, he or she can guide, educate, and lead clients in conversations on ethical matters while being cognizant and aware of his/her own obligations under the Model Rules of Professional Conduct.

This article should not be construed to be legal or medical advice.

This presentation is for educational purposes only.

Endnotes

ⁱ [http://en.wikipedia.org/wiki/Value_\(personal_and_cultural\)](http://en.wikipedia.org/wiki/Value_(personal_and_cultural))

ⁱⁱ <http://www.navran.com/article-values-morals-ethics.html>

ⁱⁱⁱ http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html

^{iv} http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor.html

^v http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_1_advisor/comment_on_rule_2_1_advisor.html

^{vi} Id.

^{vii} Id.

^{viii} Id.

^{ix} Id.

^x Lo, Bernard. 2009. *Resolving Ethical Dilemmas, A Guide for Clinicians*, 4th ed. Lippincott Williams & Wilkens, Baltimore, MD.

^{xi} Id.

^{xii} http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_2_4_lawyer_serving_as_third_party_neutral.html

^{xiii} www.wikipedia.org/wiki/ethical_dilemma

^{xiv} Id.