

The American Association of Nurse Attorneys (TAANA) 2016

Legal Ethics in Representing Healthcare Clients

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- Participants will:
 - Identify at least two applicable attorney ethical rules/responsibilities in advising client providers in healthcare settings (ABA Model Rules)
 - Identify at least two applicable bioethical principles and two corporate ethical principles in healthcare matters
 - Provide practice tips for attorneys to identify legal, risk and ethical issues in healthcare and to advise clients accordingly
 - Practice tips for advising your client on merging ethical principles with regulatory requirements

- The word ethics comes from the Greek word ethos which means “custom” or “character”
- Principle of “right” or “wrong” conduct
- A set of rules or conduct governing a profession or business: ABA Model Rules of Professional Conduct for lawyers; ANA Code of Ethics for Nurses; AMA; Corporate Standards or Code of Conduct
- Set of social or religious norms and a way of life



WHO DECIDES ?

- Ethical principles or judgments are closely related to moral judgments or principles
- Based on values of individual, community or society, business entity
- Values may differ in people... cultures....communities...countries
- Laws are often based on a group of people's ethical values



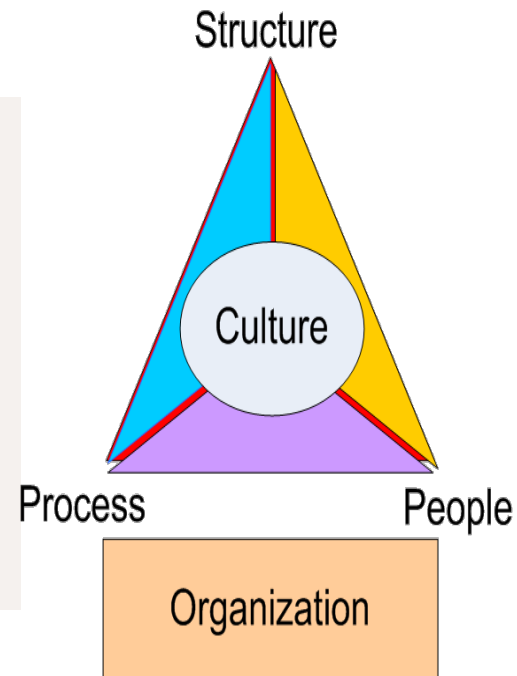
A principle, quality or standard considered desirable and important

- Many types of values:
- Social: i.e. social programs, security...
- Religious: charity, sanctity of life...
- Legal: order, justice, equality, freedom
- Economic: frugality, financial security...
- Cultural: sanctity of land, caring for elderly
- Environmental: clean air, carpooling, other



VALUES ... CONTINUED

- Corporation/Agency/Providers: quality, leadership, teamwork
- Self Determination: autonomy, respect, responsibility, right to consent/refuse medical/health care
- Aide-in-Dying, Other...



- Client-Lawyer Relationship
- Model Rules applicable to lawyer representation:
- Rule 1.1 Competence;
- 1.2 Scope of Representation
 - 1.2(b).....does not constitute an endorsement of the client's political, economic, social or moral views or activities.



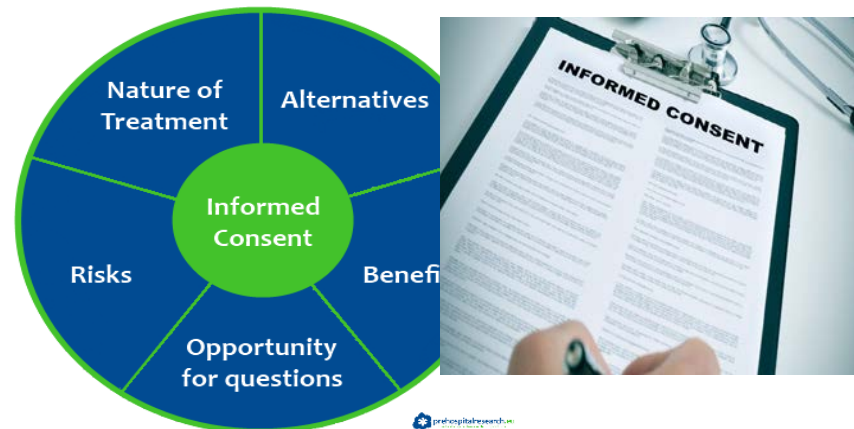
RULE 1.7 CONFLICT OF INTEREST: CURRENT CLIENTS

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. (i.e. Representing one client is adverse to another or material limitation)
- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
 - (1) Lawyer reasonably believes that lawyer can provide competent and diligent representation to each affected client... (2) ...not prohibited by law ... (3) ...no claim by one client against another
- (4) each affected client gives informed consent, confirmed in writing
- Examples



- 1.13 Organization as a Client
- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization,likely to result in substantial injurylawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless...not necessary....the lawyer shall refer the matter to higher authority in the organization

- Doctrine of Informed Consent
- Consent: Informed and Implied
- Capacity and Competency
- Surrogate decision-makers have an obligations to make decisions based on:
- Substituted Judgment and Best Interests
- Informed Refusal of Care



- Respect for Autonomy/Refusal of Care\
- Non-maleficence: do no harm
- Beneficence: do good, duty to help
- Distribution of Justice



Beneficence / Nonmaleficence

- ♦ **Beneficence**: The duty to do and to maximize good
- ♦ **Nonmaleficence**: the duty to do no harm or to minimize harm in pursuing a greater good

- Other potential ethical issues:
- Managing People:
- Bullying
- Harassment; gender
- Disciplinary issues
- Working environment
- Training and Education
- Reporting/Whistleblowing



- Laws are written:
- Statutory,
- Regulatory/rules/surveyor guidance
- Common law (case law)
- Alleged violation of laws are dependent on facts
- Accountability and punishment/Healthcare:
Corporate Integrity Agreements (CIAs)



- History:
- Pre-World War II
- Post World War II
- Mid-1960's-1970's:
- Abuses in human experimentation exposed
- Quinlan Case, 1976
- 1976-1988: by one count, there were 54 reported decisions involving the right to refuse life-sustaining treatment



- Right to consent and right to refuse treatment evolves...
- Cruzan case: 1980's
- Car Accident: coma to persistent vegetative state
- Feeding tube inserted for hydration and nutrition
- Parents claim a "somewhat serious conversation" with Nancy in which she stated that she did not want to be kept alive unless she could have a halfway normal life
- Supreme Court: "clear and convincing evidence" needed
- 1990-Missouri courts; Nancy allowed to die

- Federal Patient Self-Determination Act 1991
- State laws follow:
- Living Wills, Health Care POA's, also known as advance directives



**It's
your
choice**

- 1990: Terri Schiavo collapses and falls into a coma –she is 27 years old.
- Coma to unconscious state
- Malpractice case
- 1994: Husband accepts diagnosis of persistent vegetative state (PVS); he limits tx and enters DNR order
- 1998: Petition to discontinue treatment; parents fight petition... .
- 2000 Court rules that Terri would want tube removed....multiple appeals/petition—regarding feedings
- 2005, March feeding tube removed... Terri dies...

DEATH WITH DIGNITY: THE FUTURE?

- Oregon: "Death with Dignity Act" 1997 allowed terminally ill patients to be prescribed a lethal dose. Brittany Maynard. Supreme Court Ruling in 2006 affirmed.
- Montana Note 3: 12/31/09 State's living will act permits forms a basis for aide-in-dying. Consent of patient can be used as a defense
- The Washington Death with Dignity Act: the prior crime of assisted suicide is a medical treatment if the assistance is provided by a physician
- Vermont: Common law based on customs and case law
- Colorado & New York 2015 introduced "Death with Dignity"
- California: Fifth State
- New Mexico
- Other states introducing legislation– over 20... (Terminally ill, competent, two MD, capable admin meds)



- Counselor
- 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.



ETHICAL VERSUS LEGAL

- Difficult issues:
- What is ethical may be illegal
- What is legal may be unethical
- Less complicated issues:
- Legal and ethical
- Illegal and unethical
- Examples



- ACA: birth control (Hobby Lobby Case)
- Abortion
- Medical marijuana
- Gun Control
- Gay Rights/Marriage
- End-of life:
- Informed Consent
- Autonomy
- Withdrawing & withholding treatment
- Assisted Suicide; aide-in-dying; death with dignity



- Compliance Programs require a healthcare entity to have a written Code of Conduct (Standards of Ethics)
 - It is about “doing the right” and knowing the right thing to do... and doing it....
 - Avoid appearances of impropriety
 - Disclose conflicts of interest
 - Maintain company proprietary information
 - Maintain patient /customer/client confidentiality
 - Crediting balances/claims adjustments for overpayments
 - Maintaining licenses/certification
 - Patient /Client rights/respect
 - Do no harm/guarding against patient abuse and neglect
 - Appropriate referrals



Regulation? Why? Why not?

Who: is subject to more regulations? Medicare Certified providers/Medicaid

- Government Healthcare Providers

What: Government oversight and enforcement

- CMS COPs, OIG compliance mandates & monitoring; investigations & enforcement actions; MACs, RACs, state laws & Medicaid fraud units; DOJ

Where: Everywhere

- All regions across the United States

When: Past, present & future

WHY ? CONSIDER ETHICAL PRINCIPLES

- **Why:** Government on watch for fraud, abuse & waste in health care
- Medicare spends billion of dollars each year on skilled nursing care, hospice and home health care services
- The Government has confirmed many reports of fraud, abuse and waste in hospitals, labs, physician office, skilled nursing, home health & hospice provider practices resulting in settlements for millions of dollars every year...
- Roadmaps: OIG reports & Work Plans, fraud alert, corporate integrity agreement (CIAs)
- New regulations dictate new compliance practices
- See government enforcement actions (Department of Justice)

- Anti-Fraud Initiative---Operations Restore Trust (ORT) Pilot 1995
 - Successful recoveries in 5 states (Texas, CA, NY, Illinois and Florida)
 - 42.3 million (\$10 in recoveries for each \$1 spent)
 - 35 Criminal convictions
 - 18 Civil settlements



- Over 20 years later
- HHS/DOJ Annual Report 2014 Report
 - 3.3. Billion recovered from Fraud and Abuse judgments & settlements (2.3 B in healthcare fraud)
 - 734 defendants convicted
 - 957 Civil matters pending at the end of 2014
 - 2015 Report Released Feb 2016---1.9 Billion in health care fraud settlements plus administrative penalties. 642 new Health care fraud investigations; 718 criminal convictions...
 - 250 Corporate Integrity Agreements (CIA) signed
 - 2016: Look for report early 2017

- Providers will do the right thing
- History of OIG voluntary guidance
 - Hospital: 63 Fed. Reg. 8987; February 23, 1998
 - Supplemental 70 Fed. Reg. 4858; January 31, 2005
 - Home Health Agencies: 63 Fed. Reg. 42410; August 7, 1998
 - Hospice: 64 Fed. Reg. 54031; October 5, 1999
 - Nursing Facilities: 65 Fed. Reg. 14289; March 16, 2000
 - Supplemental Compliance Program Guidance for Nursing Facilities: 73 Fed. Reg. 56832; September 30, 2008
 - Clinical lab; ambulance, physician practices; other...

- U.S. Department of Justice (DOJ)
 - United States Attorneys' Offices (USAOs)
 - Federal Bureau of Investigations (FBI)
- U.S. Department of Health and Human Services (HHS)
 - Office of Inspector General (OIG)
 - Centers for Medicare and Medicaid Services (CMS)
- State Attorneys' General Offices
 - Assistant U.S. Attorneys in the Medicaid Fraud Control Units (MFCUs)
- Program Integrity Contractors (Auditors)
 - Medicare Administrative Contractors (MACs)
 - Recovery Audit Contractors (RACs)
 - Zone Program Integrity Contractors (ZPICs)
 - Medicaid Integrity Contractors (MICs)



- The Laws --- aka:

→ The Government's Tools of Investigation and Enforcement of the Laws for preventing Fraud, Abuse and Waste

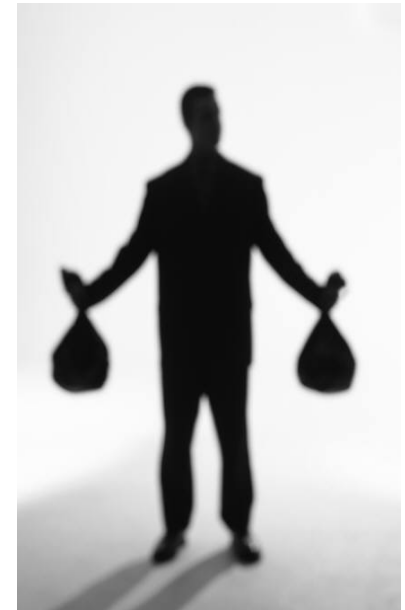


- Focus on Federal Anti-Kickback Statute (Criminal)

- Broadly prohibits offering or providing anything of value (remuneration) in return for referrals for goods, services, or items paid for by a federal health care program. Liability for AKS includes fines, civil penalties, and imprisonment.
- Statute: 42 U.S.C. Sec. 1320a-7b: "Whoever knowingly and willingly solicits or receives any remuneration directly or indirectly, overtly or covertly, in cash or in kind, ..."
 - Kickbacks, bribes, rebates, gifts, other
- **Landmark Case:** United States v. Greber, 760 F.2d 68,69 (3rd Cir. 1985), cert. denied, 474 US 988 (1985)
 - Established the "one purpose" test



- Federal law sanctions include but may not be limited to:
 - Single violation can be \$25,000 and up to five years in prison, exclusion for certified and Federal programs
 - Civil sanctions may be applied for treble damages
- Must review State Anti-Kickback Statutes



- Safe Harbors may apply
 - Bonuses for marketing employees may apply
 - No bonuses for Independent contractors
- Sales and Marketing Teams
 - Provide specialized education at hire, annually and at staff meetings through-out the year
 - Maintain records of agendas, training, education materials
 - Fair market value



- Stark laws:
 - Prohibits a physician from making referrals for designated health services to an entity with which he or she ---or immediate family members---have an investment relationship. Other arrangements/referrals...may also be illegal
 - Up to \$15,000 per claim plus 3 times (treble damages) the claims and/or \$100,000 per circumvention scheme.



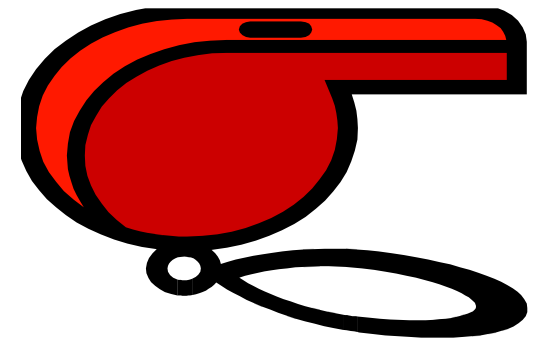
- The FCA has become an important government tool—if not the most important tool—for demanding healthcare providers' compliance with the requirements of the federal healthcare programs. (Federal FCA as well as State False Claims Acts)
- Liability for any person who (1) knowingly presents or causes to be presented a false or fraudulent claim for payment; (2) knowingly makes, uses, or causes to be made or used, a false record or statement material to a false or fraudulent claim; or (3) conspires to commit a violation.



- FCA liability can impose mandatory treble damages, and a civil penalty of \$5,500 to \$11,000 imposed for each claim for payment that is found to be false or fraudulent.



- Federal False Claims Act (FCA)
 - Statute: 31 U.S.C Sections 3729-3733 (aka Lincoln Law—1863) Amendments 1986 plus 3
 - 1) Actual knowledge; 2) Deliberate ignorance; 3) Reckless disregard
- FCA contains provision for Whistleblower (Qui Tam) Actions
- See also State False Claims Acts



- A high percentage of FCA actions are initiated by whistleblowers (at one time over 70%...of actions)
- Person can file an action on behalf of government
- 15-25% of recovered claims go to person who brought action (Government decides each case)
- Government can opt out but claim can go forward
- 35 Billion was recovered under FCA between 1987-2012;
→24 billion by qui tam actions



- Civil Monetary Penalties (OIG)
 - Self Voluntary Disclosure Regulations
- Other Criminal Provisions
 - Health Care Fraud
 - Mail and Wire Fraud
 - Obstruction
 - False Statements



- Liability also attaches for Reverse FCA claims:
 - “Any person who ... knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the Government...”
 - Obligation: “an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor/licensee relationship, from a fee-based or similar relationship, or from the retention of any overpayment....”
 - PPACA establishes 60-day clock for return of “identified” overpayment (or date of corresponding cost report)
 - See Updated OIG’s Self -Disclosure Protocol: April 17, 2013 (prior protocol was published in 1999)



- HH & HOS CMS Conditions of Participation (CoPs): Cover ethical issues, informed consent, dignity, privacy, resident rights, QAPI, etc.
 - Home Health New Proposed CoPs October 2014
- Coding
- Medicare Administrative Contractors (MACs); Local Coverage Determinations, Other
- CMS Regulations, Notices, Transmittals, other
- Self Disclosure Protocol (revised April 2013)
- Case Law: Jimmo V. Sebelius resulted in Program clarifications
- State laws regarding background checks/Medicaid fraud
- Other: OIG Exclusions List



- Definition
- When is a CIA appropriate?
- Who is subject to a CIA?
- Length of Agreement
- Contents
- *A Lawyer's Role*



- 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.....However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to client.
- [2] Advice couched in narrow legal terms may be of little value to a client, especially where practical consideration, such as cost or effect on other people, are predominant....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.

- Common areas for high risk:
- Marketing, Billing, Human Resources,
- Take inventory of what is in place
- Establish Compliance Committee/Plan
- Bioethics Committee—Advance Directive & Aide in Dying issues;
- QAPI -Audit,
- Monitor, Measure



COUNSELOR RULE 2.4

LAWYER SERVING AS THIRD PARTY

- (a) A lawyer services 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 shall inform unrepresented parties that the lawyer is not representing them.



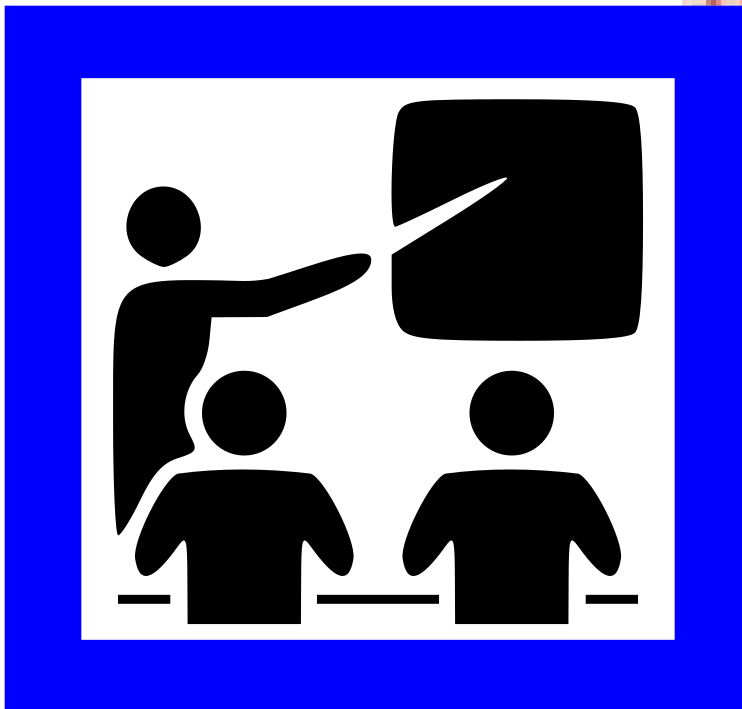
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QUESTIONS



- This presentation is for education purposes only and should not be construed as providing legal advice.



THANK YOU FOR YOUR TIME AND ATTENTION!

For questions or inquiries please contact:

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