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Introduction to Codes; Competence as an Ethical Obligation

How is professional competence defined and enforced in a self-regulating profession? We will discuss the role of licensing boards, clients and patients, colleagues and self-discipline in defining and maintaining professional competence.

Lawyers have state-adopted codes and doctors generalized AMA set-up that is adopted in different ways at the state level.

Medical: We used to have oaths – now we’ve got codes… Modern codes, unlike historical oaths, does not restrict sex or abortion. The modern code is a personal affirmation (opposed to a swear to G’d). The modern oath also acknowledges that the practice will change. Extends competence to requiring the person seek help from colleagues.

Model Rules of Professional Conduct 1.1: Competence

Competence wasn’t added to the codes until the 1970s.

Lawyer has to provide “competent representation” to client.

“A L shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation”

“Requisite knowledge and skill” based on:

1.) relative complexity and specialized nature
2.) L’s general experience
3.) L’s training and experience
4.) Prep and study L can provide
5.) Being a general practitioner is usually enough; sometimes expertise needed
6.) New L can take on unfamiliar issues.
   a. Can make herself competent through necessary study or association w/L w/established competence.
7.) Unknowledgeable lawyer may give advice/assistance in an emergency, but the information must be reasonably necessary.

“Competent handling” includes:

1.) inquiry and analysis of the factual and legal elements of the problem
2.) use of standard methods and procedures meeting the standards of competent practitioners.
3.) adequate preparation
   a. determined by what’s at stake.
   b. L-C agreement may limit scope
To maintain competence, the lawyer must stay abreast of changes, and engage in continuing education.

<table>
<thead>
<tr>
<th>Legal</th>
<th>Medical</th>
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<tr>
<td>Malpractice case. See <em>Lucas</em>. Skill +</td>
<td>Malpractice. Degree of skill and learning</td>
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<td>diligence of lawyers in ordinary capacity</td>
<td>that is ordinarily used by doctors in</td>
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<td>(“ordinary capac” determined by expert).</td>
<td>similar circumstance. (Experts decide</td>
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<td>“ordinarily used ...” experts not needed or</td>
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<td><em>res ipsa loquitur</em> case).</td>
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<tr>
<td>Disciplinary Action. See <em>Henry</em>.</td>
<td>Disciplinary Action: Standards acceptable</td>
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|                                           | in medical community in state. See *Toussaint*.
|                                           | Experts used again.                          |
| Outcome                                   | Outcome.                                     |

Model Rules of Professional Conduct 8.3: Reporting Prof. Misconduct

(a) L must “rat out” L2 who is/has committed misconduct (or insubordinate) to the “appropriate authority.”
   a. Comment [4]: not applied for L retained to represent L2 whose conduct is in question.
   b. There is a little wiggle room: L uses discretion about conduct and, maybe, who to contact.
      i. Maybe it was just a one-time thing. How do you know for sure when there’s been misconduct?
   c. Comment [1]: reporting violation especially important when victim unlikely to discover the offense
   d. Comment [5]: exception for when information is received from L2 in appropriate L/judge assistance program.

(b) L must “rat out” judges who are tainting the office

(c) L is not required to disclose information protected by Rule 1.6 or information gained while participating in an approved lawyer’s assistance program.
   a. Comment [2]: lawyer should encourage client to consent to disclosure where prosecution would not substantially prejudice the client’s interests.

“Appropriate agency” is the bar disciplinary agency unless some other agency, such as a peer review agency, is more appropriate in the circumstances.


Holding: D was not liable for mistaken will formation because he was in error as to a question of law on which well-informed lawyers could entertain reasonable doubt.

“… the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the
tasks which they undertake. … The attorney is not liable for every mistake he may make in his practice; he is not, in the absence of an express agreement, an insurer of the soundness of his opinions or of the validity of an instrument that he is engaged to draft; and he is not liable for being in error as to a question of law in which reasonable doubt may be entertained by well-informed lawyers.” *Id.* at 591.

“In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by D in preparing the instrument, it would not be proper to hold that D failed to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise.” *Id.* at 592.

**Office of Disciplinary Counsel v. Henry, 664 S.W.2d 62 (Tenn. 1983).**

Disciplinary action imposed [on L appropriate when L] mishandled four cases in a relatively short period of time, and his actions in each case demonstrated a lack of knowledge of basic procedure and of substantive law and no inclination on his part to do anything to improve his ability to represent his clients.

**AMA Opinions 9.011: Continuing Medical Education**

Fulfillment of mandatory state CME requirements does not necessarily fulfill the physician’s ethical obligation to maintain his/her medical expertise.

- Guidelines:
  
  1.) physicians should only attend activities that they need for their own education, and choose those activities that
      a. At minimum, sponsored by ACCME, AAFP, or state medical society
      b. Contain information relevant to physician’s needs
      c. Conducted by qualified faculty
      d. Conform to Opinion 8.061 (Gifts to Physicians from Industry).
  
  2.) Physician must primarily base selection of course based on *educational value.*
  
  3.) Physicians should only claim credit based on actual time spent at activity or studying material from activity.
  
  4.) Attending promotional activity (by industry or their designees) is ethical as long as it conforms w/8.061 and is clearly identified as promotional to all participants.

- To be a faculty at a CME conference, physician must
  
  1.) Ensure that presentation
      a. Scientifically accurate, up-to-date, balanced, and objective
      b. Not modified/influenced/shaped by industry representative/financial contributors
         i. Industry material may be used in presentation as long as it is only of nominal monetary value and does not influence the context.
  
  2.) Avoid participation in non-CME, primarily promotional, activities unless it is clearly designated as such.
3.) Conflicts of interest and biases should be disclosed by faculty members to activity’s sponsor and to audience. Honoraria/reimburse for expenses permitted in accordance with 8.061.

- **Sponsors**
  1.) Physicians involved in sponsoring CME activity must ensure that
      a. Program is balanced and scientifically supportable
      b. Industry reps/financial contributors don’t exert control. (See 8.061 re funding).
  2.) Sponsors shouldn’t promote CME in a way that encourages violation of guidelines or principles established for AMA’s Physician Recognition Award.
  3.) Non-CME activity that is primarily promotional must be identified as such.
  4.) There shall not be unfair profit/charge excessive for program content and length.
  5.) Program, content, duration, and ancillary activities should be consistent with the ideals of the AMA CME program.

**AMA Opinions 9.031: Reporting Impaired, Incompetent, or Unethical Colleagues**

Ds have an ethical obligation to report impaired, incompetent, and unethical colleagues

- **Impairment**
  1.) Report to hospital’s in-house impairment program.
  2.) If no in-house impairment program, report to applicable Chief.
      a. Or, report to external impaired physician program.
  3.) If neither 1, 2, nor 3 work, report directly to state licensing board.

- **Incompetence**
  1.) Report to appropriate clinical authority that can assess the situation.
  2.) When appropriate, contact hospital peer review body.
  3.) If it’s an immediate threat, report directly to state licensing board.
  4.) When D2 isn’t hospital affiliated, report to local or state med society and/or the state licensing or disciplinary board.

- **Unethical**
  1.) Threat to patient care/welfare: report to appropriate authority.
  2.) If violates state licensing provisions, report to state licensing board or impaired physician programs.
  3.) If criminal, report to appropriate law enforcement authorities.
  4.) If not 1, 2, or 3, report to local or state medical society.
  5.) If 1, 2, 3, and 4 don’t work, report to higher or additional authority.
  6.) Person/body receiving notice must:
a. Notify reporting D when action has been taken
b. Have ethical duty to critically and objectively evaluate reported info and assure issues are remedied or further reported
c. Anonymous reports should be taken seriously
d. D2 gets confidentiality until charges are proven or D2 is exonerated

**AMA Opinions 9.10: Peer Review**

Peer review groups might impinge upon absolute professional freedom of physicians, but they are recognized and accepted because they are necessary.

Peer review groups must observe principles of due process.

Peer review groups “balance the physician’s right to exercise medical judgment freely with the obligation to do so wisely and temperately.”

**Toussaint v. State Board of Medical Examiners, 400 S.E.2d 488 (S.C. 1991).**

The doctor performed gynecomastia on three boys for enlarged breasts by performing mastectomies. Experts testified that the procedure was improper when the doctor failed to investigate whether the boys' conditions were such to be improved by surgery. The doctor performed a tubal ligation and scar revision on a female patient who came to him for a tummy tuck because her abdomen had stretch marks from pregnancy. The patient was to receive a tummy tuck rather than the scar revision, and the doctor was not qualified to perform the scar revision. In the procedure he removed the patient's navel. Without conducting an examination, the doctor ordered the discharge of an emergency room patient who required observation.

Disciplinary action against P maintained by SC.S.Ct. because: (1) evidence that physician's treatment was below the standard of care expected of competent medical practitioners, and (2) applicable statute (§ 40-47-200 clearly applies to respondent's conduct. Subsection (8) forbids unprofessional conduct that is likely to harm the public. Subsection (12) specifically provides that a lack of professional competence constitutes misconduct for which a physician may be disciplined.) is sufficiently definite to provide notice that a physician must conform his conduct to those standards of competence acceptable within the medical community or face discipline for unprofessional conduct.


Med students/residents have to practice, but the practicing may sometimes seem cruel, unethical, or just inappropriate. It is for good of society that they practice on patients, but doctors don’t even want students/residents practicing on their loved ones.
Confidentiality
We will look at the attorney-client and patient-physician privileges. We will also begin a review of the confidentiality obligations of physicians and lawyers, focusing on the differences between duties of confidentiality and legal privileges. We will also examine the recent changes to Rule 1.6 of the Model Rules of Professional Conduct.

*Bryson v. Tillinghast, 749 P.2d 110 (Ok S.Ct. 1988).*

The patient was convicted of kidnapping, rape, and sodomy. He filed a complaint against D for negligence in supplying certain information to the police, which ultimately led to the patient's arrest. While committing a rape, the patient was bitten by his victim on his penis. The bite temporarily disabled the patient, allowing his victim to escape. The patient sought medical care for his injury at a local hospital and was treated by D, who furnished the information to the police. TC dismissed the complaint. The court affirmed. D did not testify at the patient's trial. The D-patient privilege under Okla. Stat. Ann. tit. 12, § 2503 (1981) was restricted to trial testimony. The doctor's disclosure enabled the police to apprehend a suspected rapist and bring him to trial; the benefit of the doctor's divulgence inured to the benefit of the public at large. The liability of a doctor for his disclosure did not rest on licensing statutes. The doctor's disclosure was, as a matter of law, necessary to protect the welfare of the community, and protected from liability by an absolute common-law privilege based on this state's public policy.

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<th>Allegations</th>
<th>Holding</th>
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<tr>
<td>Breach of Doctor-Patient privileges</td>
<td>Statutory D-P privilege only restricts testimony. This case was about informal cooperation w/policy. Even if it did apply, public policy exception applies. Med. Confidentiality Rules (5.05): anything a patient tells a physician during the course of treatment must be held in confidence. But, this case modifies it to say the physician may break the confidence for the benefit of public protection (from criminal activity).</td>
</tr>
<tr>
<td>Beach of Contract</td>
<td>“In a case involving the unlawful ... agreements ... are ineffectual in law, for they involve acts which, though not positively forbidden, are disapproved by law and are therefore not recognized as the ground of legal rights because they are against public policy.”</td>
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<tr>
<td>Violation of Licensing Statute (the statute talks about what is, and isn’t, professional conduct).</td>
<td>Breaches of ethical rules do not equal malpractice.</td>
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During the course of representation of a C, L conducted an investigation based upon information provided by the client and discovered the missing body of a person that the client had said that he had murdered. L did not disclose the discovery to the authorities, but the discovery became public during the trial of the client when, to affirmatively establish the defense of insanity, L brought the information to the jury. The state filed an indictment against L accusing him of violating N.Y. Pub. Health Law, §§ 4200, 4143, and L filed a motion for a dismissal of the indictment. L contended that he was excused from making a full disclosure to the authorities based on the L-C privilege. The court held that the discovery was a privileged communication. The court held that L was also excused from disclosure in the interest of justice.

In the A-C relationship, attorney’s privacy duty is to zealously advocate for his/her client. The court said the attorney’s actions were “zealous advocacy.” He was commended.

What about if attorney knew where bodies were but never told anyone (and information came to light independently)?

For L to have obligation to save an innocent man (i.e. victim), he must have duty either to the innocent man, which transcends his duty to C (unlikely), or he must have a duty to truth over the duty to his client.

The duty of confidentiality circumscribes or, at least, limits the duty that L has to the public. (This is good because when an innocent man is being tried, it is his right to have an attorney that zealously supports the case.)

This doesn’t mean you lie! It means you put forth the best argument that you can.


Appellants were convicted of first-degree murder and first-degree robbery. One appellant's convictions depended on the theory that he conspired with the other appellant to bring about the killing and robbery. The prosecution rested this theory on the location where the victim's wallet was found. A D investigator made the discovery of the wallet's location after appellant had divulged it to his counsel. The principal issue on appeal was whether observation of the wallet's location, which was the product of a privileged communication, finds protection under the L-C privilege, specified in Cal. Evid. Code § 954. The court, in light of policy considerations, held that whenever defense counsel removes or alters evidence, the privilege does not bar revelation of the original location or condition of the evidence in question. The court modified appellant's sentencing.

Mo.Rev.Stat. §491.060: Persons Incompetent to Testify

1.) mentally retarded
2.) child under ten, with qualifications
3.) attorney re confidential client information w/o client’s consent
4.) clergy re communication made to him/her in his/her professional role
5.) medical personal re confidential client info
AMA Opinions 5.05: Confidentiality

Exceptions, because of “overriding social considerations” to confidentiality requirement in doctor/patient relationship:

- when patient
  - threatens to inflict serious bodily harm to another person or him/herself,
    - and there is a reasonable probability of threat being carried out
  - has a communicable disease
  - has a gunshot wound
  - has a knife wound

- physician must
  - take reasonable and required precautions/steps
    - including notification of law enforcement authorities

AMA Opinions 5.09: Confidentiality – Industry-Employed Physicians and Independent Medical Examiners

Industry-employed physician must keep exam results confidential unless individual releases info through prior written consent (unless required by law).

If individual authorized release of med info to ER or potential ER, physician should release only reasonably relevant info to ER’s hiring decision.

Workers comp laws might regulate handling of med info in relation to work-related illness/injury. Otherwise unrelated info may not be discussed with ER w/o EE (or EE’s proxy’s) consent.

EE identities “should be” deleted in EE health stats.

Rule 1.6: Missouri Confidentiality of Information

Lawyer may only disclose information that is (1) consented-to by client, or (2) impliedly authorized to carry-out representation (which may be explicitly limited by client).

Exception: Lawyer MAY reveal information that is reasonably necessary:

- to prevent client from committing criminal act likely to result in imminent death or substantial bodily harm, or
  - “the public is better protected if full and open communication by the client is encouraged than if it is inhibited.”
  - “[T]he lawyer has professional discretion to reveal information in order to prevent such consequences.
  - Attorney should try to convince client to take the right action
  - Adverse action to client’s interest must be no greater than necessary.

- to establish claim or defense
to defend the lawyer in a controversy between the lawyer and the client,
- Response may only be to extent reasonably necessary to establish a defense.
- “disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence”
- “limit access to the info to tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by lawyer to the fullest extent practicable.”

- to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client.

Comparison of Three Versions of Rule 1.6

<table>
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<tr>
<th>Dislose?</th>
<th>Medical</th>
<th>1st Model Rule 1.6-MoBar</th>
<th>2001 Model Rule Revis’n of earlier</th>
<th>2003 Model Rule</th>
</tr>
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| Must!    | • When, in prof’l opinion, there is a reasonable probability that the threat will be fulfilled.  
• Required by law (wounds, HIV, etc.). | Enough to prevent criminal act that is likely to result in imminent death or substantial bodily harm.  
Conflict w/client.  
(Disciplinary action or conflict about payment.) | Enough to prevent reasonably certain death or substantial bodily harm.  
(Significant broadening of what can be reported.) | Allows even more disclosure than 2001. Hotly contested and has not been adopted anywhere.  
You can also disclose info to prevent financial injury, or to mitigate financial injury if services were used. |

D’s goal to promote health and well-being; L’s goal is to promote client’s best interest. In L-C relationship, unlike D-P relationship, there is someone who has diametrically opposed interests to the client’s interests.

Maybe one of the reasons the strictures is so much tighter for Ls than for physicians is b/c there is a tighter seal around confidentiality envelope in part because there is an adversary
out there who needs the information and your job is to protect the best interests of your client, not just in the abstract, but vis-à-vis the opposition.

*Biddle v. Warren General Hospital et. al.*, 86 Ohio St.3d 395 (Oh. S.Ct. 1999).

Appellees had brought a class action against appellants. The basis of appellees' claims was that appellants had breached patient confidentiality. Appellants had entered into an arrangement whereby patient medical records were disclosed for the purpose of obtaining information regarding eligibility among patients for SSI benefits. The TC granted SJ to appellants on all claims. Finding that appellees adequately pleaded a claim for tortious breach of confidentiality, the CoA reversed. On appeal, appellants contended that confidentiality was not breached due to the A-C privilege. The court held that reasonable minds could conclude that appellants breached the duty of confidentiality owed to appellees and that there was inducement to do so on the part of 3d-party appellants; thus, there was no L-C relationship. Thus, the court affirmed the reversal.

Confidentiality questions sometimes raise the question what damages?

*Biddle* dissent says that the hospital has to function through its agents and the lawyer is one of their agents. It is not that much of a stretch to think the lawyer would be within the loop. Also, what really happened to these folks that someone saw a piece of paper with their name and medical condition is on? What is the actual damage they suffered?

**Confidentiality and Duties to Third Parties**

We will explore the limits of the professional’s confidentiality obligation by analyzing the tension between the duty of confidentiality and duties to third parties, including a comparison of the duty to warn in the medical and legal professions.


Appellant was booked for possession of marijuana. Appellee L was his court appointed defense attorney. Appellant wanted his freedom despite his mother’s attempts to keep him in custody due to psychiatric problems. L obtained appellant’s release on bail. Appellant assaulted his mother and attempted suicide. Appellant and his mother commenced an action for damages against, among others, L. L moved to dismiss, and that dismissal was granted. Appellant and his mother challenged the ruling, arguing that L’s failure to disclose appellant's mental condition at the bail hearing subjected him to liability for malpractice and that L negligently violated a common-law duty to warn foreseeable victims of a dangerous individual. The court found appellant and mother failed to cite any clear provision of the law which required L to volunteer information damaging to his C's expressed interests. Disclosure was not required by law. Moreover, where there was no indication that appellant was violent, merely possibly mentally ill, and L did not have an obligation to warn.

The big question: what is the duty to outside persons?

Even though the information was not privileged information because it came from a 3d party, you could say that he got the information as part of his work product, which might be privileged.
Was the information confidential? Does L become part of the “loop” between the psychiatrist and the patient? Maybe the psychiatrist was okay divulging the information if he thought it might be relevant to an incompetence trial down the line.

The privileges cover a narrower field of information than confidentiality. You can make the argument that this is confidential information, but you can’t argue that it’s privileged.

Two claimed causes of action:

1.) Legal malpractice
   a. Court said there was no such legal duty to disclose the information.
   b. Plus, it should really be his C who brought the malpractice case (not C’s mom).

2.) Negligent violation of common law duty to warn.
   a. Mom can assert a CL duty claim even though she can’t claim malpractice.
   b. L has no responsibility to warn of something the mom already knew.

*What should L’s job be? What about if the client is a juvenile, and the attorney is working in a quasi-judicial capacity? Is the client entitled to zealous advocacy even if L might have an inkling that the C isn’t “all there” mentally? What about L’s duty as an officer of the court? What about if L were to be asked by the court whether he knew of any reason to keep C incarcerated? Would it be okay not to mention the mental illness concern? Does L have the responsibility to divulge information given to him by a psychiatrist who he did not hire?*

*Virgin v. Hopewell Center, 66 S.W.3d 21 (2002).*

The patient was driving the wrong way on an interstate highway, when her vehicle collided head-on with the motorist's vehicle. At the time of the accident, the patient had a long history of psychiatric treatment. The patient had expressed to her psychiatrist that she had a death wish when she drove. The motorist claimed that the mental healthcare providers were negligent for failing to warn the patient, her family, her close associates, the police and the MO Department of Revenue that she should not drive a motor vehicle. In the instant case, there was no reasonably foreseeable group of people to which AC could hold the mental healthcare providers had a duty. The effect of creating such a duty, would be fairly predictable, the treating physicians would indulge every presumption in favor of further restraint, out of fear of being sued. Such a climate was not in the public interest. Moreover, a finding of no duty furthered the public interest in maintaining the physician-patient privilege. Finally, Missouri case law had already held that such a duty did not exist.

There has to be a foreseeable victim. *When is there ever a duty to the public, and when is there a duty to a particular individual?*

In general, the court is more apt to find a duty to a readily foreseeable victim in the medical context than in the legal context. Possible reasons:

1.) Different dynamic – No actual adversary against the medical professional, whereas the prosecutor could certainly use information divulged by D’s L to go against D’s interest.
2.) Medical professional might be in a better position to know when there is an actual danger – greater expectation that the physician will know what they’re talking about when it comes to understanding a patient’s mindset.

Should there be a duty to warn? The ethical rules say you *may*. Should the law say you must or else you’re subject to civil penalties?

The Full and Frank disclosure rule is supposed to serve public good as well as private good. We hope it means the client will tell L everything necessary to advance his/her interests as much as possible. Same for with the D-P relationship.

Is there any public good served by the Full and Frank disclosure rule?

1.) Privacy interest served.
   a. Might encourage patient to get treatment of embarrassing disease.

2.) L-C situation: public good is served by encouraging forthright communication.
   a. Perhaps in that process what you’re encouraging is the creation of process where an attorney may encourage the client into compliance with the law.

3.) Keeping the relationship protected helps the public by fostering compliance with the law.

*What about if a layperson discloses to you that she knows where a kidnapped child is being kept, but doesn’t want the information shared b/c she doesn’t want to get involved?*

The most recent confidentiality rules say that you may disclose when there is a risk of death or serious bodily harm.

You could advise them of their own liability in the situation and hope that they ‘fess up. The law says information *relating to the client’s matter* is to be held in confidence. Don’t assume that you’re in a confidential relationship at all times. Be very careful about discerning what is part of your L-C relationship and what is not part of that relationship.

The amount of the disclosure depends on the capacity that the lawyer is talking with the client. Example: if the lawyer is discussing tax shelters ‘n’ stuff, then he might not have a duty of confidentiality about information about a 3d person kidnapping.

D’s PoV: unless D knows there’s no reasonable likelihood of harm, D must disclose.

**Informed Consent and Issues of Client/Patient Autonomy**

How do the two professions address the ethical issues that can arise in the decision-making process? When, if ever, should the greater expertise and experience of the professional override the autonomy of the patient/client? Is it ever proper for the professional to withhold information from the patient or client?

**Model Rules of Professional Conduct 1.0(e): Terminology – “Informed Consent”**

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated *adequate information* and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.
Model Rules of Professional Conduct 1.2: Scope of Representation and Allocation of Authority Between C and L

1.) Lawyer must follow C’s decisions
   a. re objectives of representation, and
   b. consult with C re means to pursue objectives and representation.
      i. Does not clarify what to do in case of conflict of opinion re means
      ii. If cannot resolve fundamental conflict
         1. L may withdraw. See 1.16(b)(4).
         2. C may discharge L. See 1.16(a)(3).
      iii. C may give (revocable) blanket consent to L.
      iv. If C has diminished capacity, L guided by Rule 1.14.
   c. Abide by C’s decision re settlement
   d. In criminal case, abide by C’s decision (post consultation w/L)
      i. re entering plea, waive jury trial, testify.

2.) Such representation does not constitute endorsement of C’s political, economic, social or moral views or activities.
   a. L should not turn away C b/c C’s cause is controversial or subject to popular disapproval.

3.) L may limit representation if reasonable under circumstances and C consents.

4.) L may not counsel/assist C in criminal or fraudulent conduct, but
   a. may discuss legal ramifications, and
   b. may counsel/assist C make good faith effort to determine validity, scope, meaning or application of the law.
      i. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending means by which a crime or fraud might be committed with impunity.
      ii. If criminal conduct is ongoing, L must withdraw from representing C in the matter.
         1. If withdrawal is not enough, it may be necessary to give notice of the fact of the withdrawal and to disaffirm any opinion, document, affirmation, etc. See Rule 4.1
   c. If L believes his assistance to C will not be permitted, L must council C re that inability.

Model Rules of Professional Conduct 1.4: Communication
L must
1.) promptly inform C of decisions or circumstances related to C’s informed consent
a. modified if C previously indicated proposal will be acceptable or not and authorized acceptance/rejection.

2.) reasonably consult w/C re means to accomplish C’s objectives
    a. may require consultation prior to taking action
    b. when immediate decision required, L may act w/o prior consultation. L must act reasonably to inform C.

3.) keep C reasonably informed
    a. includes re developments affecting timing/substance of representation.
    b. Comment [7]: L may delay info when C likely to react imprudently to immediate communication.
       i. Example: psychiatric diagnosis of C when psychiatrist says disclosure would harm C.
       ii. May not withhold to serve L’s interest/convenience or 3d party’s.

4.) promptly comply w/reasonable requests for info
    a. if prompt is not feasible, must acknowledge receipt of request and advice C of when to expect response.
    b. Telephone calls should be promptly returned or acknowledged

5.) Consult w/C re relevant limits on L’s conduct when L knows C expects disallowed assistance.
    a. Explain the matter to extent necessary for C to make informed decision re representation
       i. Info provided is ordinarily that which is appropriate for comprehending and responsible adult.
          1. For kids or diminished capacity, See Rule 1.14.
       ii. When C is a group/organization, L should address communications to appropriate officials. See Rule 1.13.
       iii. Re routine matters, system of limited or occasional reported may be arranged w/C.
### Dax Medical Case (CD-Rom).

How do you know that there are enough reasons to let the person die? Is it appropriate for D to use his experience and expertise to make a decision overriding P’s desire? Can D’s personal moral belief come into play? Is it D’s obligation to treat P to the best of one’s medical ability, even against P’s wishes? What about an alternative: convincing P to stay for therapy for long enough to be physically able to get home (and then kill himself if he so chooses). What about the fact that the patient has done the treatment for so long and there’s less than that time to go? What about asking him if he’s thought of the implications of his decisions on others – who’s paid for the treatments, etc.? Are Ps in the initial stages of treatment competent to make decisions regarding their case? What about the fact that Ds have an investment in a positive outcome?

**The People v. Ronald Lee Deere, 53 Cal.3d 705 (Ca. Sup. Ct. 1991).**

The court affirmed the judgment of TC. D convicted of 1 count of first-degree murder and 2 counts of second-degree murder, accompanied by a finding of a multiple-murder special circumstance, Cal. Penal Code § 190.2(a)(3). The penalty was fixed at death. The penalty judgment was reversed. Following a remand for retrial of the penalty phase, the sentence was again fixed at death. On appeal, C argued that his L rendered ineffective assistance of counsel at the penalty phases in failing to raise the issues of C’s mental competence to stand trial and waive a jury. The court found that the contentions lacked merit. C cited no evidence to support the claim. Instead, he referred to the testimony of his former girlfriend and her sister indicating that at the time of the murders C was despondent. The TC inquired directly on several occasions whether C wished to waive his right to a JT. C responded clearly and unequivocally that he did. The TC also observed that C appeared to be rational and intelligent. There was no merit to C's claim that counsel was deficient.

Do you think the same way for this as you did for the Dax circumstance? Does it make a difference that one case involves physical pain and the other case involves the decision of either death penalty or life in prison? Is there a difference between wanting to be put to death (active approach) versus being left to die (passive)?

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1 Informed consent comes into play when there is a diversion bet. what P wants and what D wants is when.
The “informed” part of informed consent only just recently came into play.

Inherent in the informed consent doctrine:

1. We value autonomy
2. Professional can communicate things within their expertise in a manner in which
   a. The layperson can understand
   b. Professional can make determination about what is important to patient.
   c. Professional can offer competence

Is informed consent really possible?

**AMA Opinions 8.08: Informed Consent**

D obligated to accurately present medical facts to P (or P’s caretaker) and recommend management in accordance with good med practice.

D has ethical obligation to help P choose from alternatives within good med practice

Informed consent is a “basic social policy.” Exceptions:

1.) P is unconscious or otherwise incapable of consenting and harm is imminent, or
2.) Disclosure risks serious psychological threat of detriment to patient as to be medically contraindicated.
3.) Paternalistic view is NOT allowed: D may not remain silence b/c disclosure may prompt P to end/forego therapy
   a. The rational P is not expected to consent to treatment in every case.

**AMA Opinions 8.12: Patient Information**

P ethically required to inform P of facts of significant medical complications necessary to ensure understanding of what occurred.

Ethical responsibility includes informing P of changes in diagnosis resulting from retrospective review of test results or any other information. This obligation applies even though P’s medical treatment/therapy may not be altered.

Concern re legal liability should not affect P’s honesty w/patient.
**Wilkinson v. Vesey, 110 RI 606 (RI S.Ct. 1972).**

P was treated for cancer after doctors found a shadow in her chest cavity that appeared on an x-ray. They recommended that she undergo a trial course of deep radiation therapy. After she underwent therapy there was shrinkage in the tumor and Ds diagnosed her with a malignant tumor in the right upper mediastinum. P continued radiation treatment. Several years later, the P's skin on her chest and back broke down from radiation burns. As a result, she needed extensive plastic surgery. At one point, P was told that she never had cancer. **RI S.Ct. held that there was evidence from which the jury could infer that the diagnosis was negligently made and erroneous in fact, and that TC erred in granting the directed verdict. The court also found that there was evidence that the patient was improperly given a double exposure of radiation and that the issue of negligent treatment should have been submitted to the jury. Additionally, the court held that the was error in directing the verdict on the issue of informed consent and that TC erred in not allowing the patient’s amendment to add res ipsa as a claim.**

- Artificial Blood Study Forgoes Patient Consent, Feb. 20 2004. The potential gain may be so great that it may warrant pulling the people into the research trial w/o consent. But, shouldn’t you find a way to do the clinical work on a consensual basis? But what about the fact that this is meant for emergency medical care-type situations and may actually help save the life of the nonconsensual patient despite the fact that it’s still in research phase. We have no way of knowing whether the person in the emergency situation will want or not want the experimental treatment. Is it worth it – for the greater good or statistically more people will want the experimental treatment than won’t want the treatment?

- The patient is over-18 and her parents predeceased. All she loves is her hair and her teen magazines. She’s diagnosed with cancer and the treatments will make her hair fall out. The doctor tells her about her prognosis (pretty bad) but does not tell her about the side affect of treatment (hair falling out). Is this ethical? What would you do? What do you think? Etc. How would this play in front of Wilkinson? Doctor overly paternalistic? What about if she had a low-normal IQ, does that make a difference? What about the fact that she’s willing to die for her hair – doesn’t that raise competency concerns? Isn’t this part of the problem with “competent” and how you define the term? What about the fact that her interaction with the staff and the other residents at her home is minimal? Does this indicate that she is not able to communicate fully with the physician what significance her hair has in her life and why she is making her decision? Should her decision be the end?

- 5 people are accused of a crime. 1 of them changes his plea to guilty. The other four think that they have to follow suit, so they tell their lawyer to change their plea to guilty as well. The lawyer refuses to do so and removes himself from the case. The 4 get a new lawyer and try to change their plea again, but now the court won’t let them. Did the first attorney act appropriately? He is not *forcing* them to do anything; he’s “acting” passively – refusal to take action.

- What about when a defendant wants to testify on his own behalf. Is it the lawyer’s position to determine his/her client’s competency to testify? What about when the lawyer has switched during the case. Should the judge do the evaluation process,
since the judge has been there the whole time, unlike the lawyer who is “pinch hitting”? Does the attorney have any sort of duty to warn the client about the pitfalls and/or risks of his/her decision to testify for himself?

- Joe, 14 year old boy, has been charged with robbery and assault. His parents retained a lawyer to represent Joe even though the parents are paying. The lawyer discovers that Joe has a history of learning disabilities and psychological problems. Lawyer gets a psychiatrist to see Joe who says that Joe has significant psychological problems that requires counseling. Joe is sentenced to juvenile detention. Joe refuses to do psychological treatment. What should Joe’s attorney do if he knows that Joe’s life in juvenile detention would be awful? Should the attorney talk with Joe’s parents about the situation? Should the attorney take the views of Joe’s parents into account when deciding what to do about the situation? What is a basic fundamental right? If the lawyer is acting in the child’s best interest without doing what the child wants, is that okay? Was the attorney hired to represent Joe’s best interest or his wishes → attorney does his wishes and guardian does his best interest. Are 14 year olds ever competent enough to know what’s good for them? Even if we decide Joe is competent but is just really making a bad decision at this particular phase in his life, would you be comfortable? But, it’s not like 30-year-olds always make choices in their own best interests … but the law does recognize a distinction between 14 year olds and 30 year olds. 14 year olds are the responsibility of their parents. The distinction exists and shouldn’t be disregarded.

- Jerry, another 14 year old boy. He’s been diagnosed as schizophrenic. The psychiatrist tells Jerry’s parents the diagnosis and the treatment. The parents agree to the treatments and they don’t tell Jerry about his diagnosis/treatment. The parents aren’t told about the likely side affect that most patients get if the medicine is used for a long period of time, but won’t happen if used for only a short time. Jerry starts getting the side affects (arms sticking up straight over his head). Should he be informed about his treatment and what it will mean for his life? Should physician inform Jerry of the side affects, parents of the side affects? Does it make a difference if the parents don’t know about the side affect because they didn’t ask questions? What if they said they’re overwhelmed and don’t understand everything and they just want the doctor to decide for them?

**The Professional Relationship**

This week’s discussion of the formation and termination of professional relationships will also give us an opportunity to review some of the concepts introduced in previous classes. For example, when does the duty of confidentiality arise? What obligations persist after termination of the relationship?

**Model Rules of Professional Conduct 1.16: Declining or Terminating Representation**

1.) L must withdraw from representing C when:
   a. Would violate rules of professional conduct
   b. L’s physical or mental cond’n materially impairs L’s ability to represent C
   c. L is discharged
i. w/ or w/o cause, as long as paid-up.
   ii. If C is of diminished capacity, L “should make special effort to help C consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.”

2.) L may withdraw from representing C when:
   a. Won’t be materially adverse to C’s interest
   b. L reasonably believes C conducting criminal or fraudulent activity
   c. C using L to perpetrate a crime/fraud
      i. Withdraw not obligated if C merely suggests course of conduct
   d. L considers C’s insistent conduct repugnant or fundamentally disagrees
   e. C fails to fulfill an obligation to L re service and L has given reasonable warning that service will be withdrawn
   f. Representation will create unreasonable financial burden on L or has been rendered unreasonably difficult by C
   g. Catch-all: “other good cause.”

3.) L must comply w/law requiring notice or permission to terminate representation.
   a. If tribunal does not give permission, L must continue service despite good cause to terminate
   b. If resignation desired based on C criminal conduct, “lawyer may be bound to keep confidential the facts that would constitute such an explanation.” L should just say that “professional considerations” require termination.
   c. Upon termination, L still has obligation to protect C’s interest
      i. Give reasonable notice to C
      ii. Allow time for C to get L2
      iii. Surrender papers and property that C is entitled to
      iv. Refund advance payment of fee/expenses that weren’t earned/incurred
      v. L may retain papers related to C to extend permitted by law.

Model Rules of Professional Conduct 1.18: Duties to Prospective Client

Once L has been contacted by prospective C, L cannot use or reveal info he learned in the consultation, except where Rule 1.9 applies.

L may not represent C2 w/ interests materially adverse to C in same or substantially related matter if L received info from C that would significantly harm him/her. This applies to any L2 in L’s firm.

Exception: if

1.) Both C and C2 give informed consent

2.) L took reasonable measures to avoid disqualifying info that was not reasonably necessary to determine whether to represent C, and
   a. L is timely screened from participation in the matter and is apportioned no part of the fee, and
   b. Written notice is promptly given to C.
Comment [2]: C who communicates info unilaterally to L, w/o reasonable expectation that L is discussing forming L-C relationship, is not a prospective C.

Comment [5]: L “may condition conversations w/ a prospective client on the person’s informed consent that no information disclosed during the consultation will prohibit the lawyer from representing a different client in the matter.”

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<th>Prospective Client</th>
<th>Atty-Client / Physician-Patient Actual Relationship</th>
<th>Withdrawal</th>
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<td>MD</td>
<td>Free to choose when to provide care.</td>
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<td>1.) mutual consent</td>
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<td>Exception: emergency, discrimination, b/c HIV, contractual agreement (i.e. HMO situation)</td>
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<td>2.) after reasonable notice</td>
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<td>May decline to provide if:</td>
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<td>3.) dismissal by patient</td>
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<td>• Beyond competence.</td>
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<td>• No scientific basis/benefit.</td>
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<td>• Treatment incompat w/her beliefs</td>
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<td>Grtr need → after obligation</td>
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<td>JD</td>
<td>Shall not use information learned</td>
<td>Sought legal advice and got it.</td>
<td>Must withdraw: violate law/rules of prof conduct, impaired ability to continue, discharged.</td>
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<td></td>
<td>Shall not represent client against prospective client if she got information that can be significantly harmful. Unless both consent in writing. Or took measures to limit knowledge and was screened and she doesn’t get the money (profit from firm taking on the client) and tell prospective client.</td>
<td>Ms. Togstad³</td>
<td>May withdraw: no material adverse effect on client, fraudulent client, use atty to commit crime, repugnant, don’t pay, other reason. In litigation content, you must get leave from the court.</td>
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<td>Miller³</td>
<td>We’re not interested in your case.</td>
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<td></td>
<td>There is no case</td>
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³ These are the rules the profession imposes on itself.
³ See Togstad v. Vesely, Otto, Miller & Keefe and Jerre Miller, infra at 23.
³ See Togstad v. Vesely, Otto, Miller & Keefe and Jerre Miller, infra at 23.

Cs were successful in their action for legal malpractice against L and law firm, as a jury found that L was negligent, and as a result, Cs suffered damages. Ls sought review of TC's denial of their motions for jnov, or alternatively, for a new trial. The court affirmed TC's denial of Ls' motions, holding that there was sufficient evidence in the record that established that an L-C relationship existed, that L acted negligently or in breach of contract, that such acts were the proximate cause of Cs' damages, and that but for L's conduct Cs would have been successful in the prosecution of their med mal claim. The court also held that Ls were not entitled to a new trial under Minn. R. Civ. P. 59.01(5), because TC acted within its discretionary authority in ruling that Cs’ damage award was not excessive. Ls were not entitled to a reduction of that award for a hypothetical contingency fee.

Issue: was L C’s lawyer?

AMA Opinion 10.05: Potential Patients

D have prerogative to choose whether to enter D-P relationship, except:

1.) Must provide care:
   a. to best of ability in medical emergencies
   b. Can’t refuse care based on discrimination or infectious disease
   c. May not refuse care to Ps when operating under contractual arrangement that requires them to treat
      i. Exception: when P care is ultimately compromised by contractual arrangement.

2.) May be ethically permissible to decline potential P when
   a. Treatment is beyond P’s current competence
   b. Treatment known to be scientifically invalid, has no medical indication, offers no possible benefit to P
   c. Treatment is incompatible w/D’s personal, religious, or moral beliefs.

3.) Ps supposed to work to assuring access to adequate health care
   a. Therefore, obligated to share in providing charity care
      i. Not to the degree that would seriously compromise care provided to existing patients.
      ii. P should consider individual’s need for med service along w/needs of current Ps
      iii. Greater individual need for a service corresponds w/stronger obligation to treat.

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5 Are ethical requirements actual requirements?
AMA Opinion 8.115: Termination of the Physician-Patient Relationship

P has option to withdraw from case, but must give notice to patients/relatives/responsible friends with sufficient lead time to permit other treatment to be secured.

**Corbet v. McKinney, M.D., 980 S.W.2d 166 (E.D.Mo. 1998).**

P claimed that the D’s failure to diagnose her caused her to become deaf in one ear. D never spoke to or examined P, but was consulted by telephone by the treating physician. The AC held that as a matter of law, there was no D-P relationship between the parties. **D merely advised P’s treating physician and had no contractual obligation to provide care. D did not bill for any services. P was not referred to D for treatment or consultation and D’s medical opinions were addressed to the treating physician as a colleague, not indirectly to the patient.** The treating physician was free to accept or reject the physician’s recommendations. **Because no physician-patient relationship existed, the physician did not owe a duty of care to the patient.**

**Millard v. Corrado, M.D., 14 S.W.3d 42 (E.D.Mo. 2000).**

Plaintiff was an emergency room P that suffered aggravation of injuries resulting from delay in treatment because D, the on call surgeon, was absent from the hospital. P brought an action against D alleging negligence. D filed a SJ motion arguing P failed to establish a D-P relationship, a necessary component of a medical negligence claim. The TC granted the motion and entered judgment in favor of D. On appeal, the court reversed the judgment. **The court held that on call Ds owed a duty to reasonably foreseeable emergency Ps to provide reasonable notice to appropriate hospital personnel when they will be unavailable to respond to calls.** Further, since P adequately pleaded both a general negligence claim and a medical negligence claim, and because there were material questions of fact as to the existence of a D-P relationship, TC erred in entering SJ.
**Model Rules of Professional Conduct 1.7: Conflict of Interest – Current Clients**

L may not represent C who presents CoI.

CoI exists if:

1.) Representation of one C directly adverse to C2
2.) Significant risk that representation of one or more Cs will be materially limited by L’s responsibilities to another C, a former C or a 3d person or by a personal interest of the lawyer.

Despite CoI, L may represent C if:

1.) L reasonably believes that L can competently and diligent represent each C
2.) Representation no prohibited by law
3.) Representation doesn’t involve assertion of claim by C against C2 in the same litigation or other proceeding before a tribunal, and
4.) Each affected C gives written informed consent.

**Model Rules of Professional Conduct 1.9: Duties to Former Clients**

L needs consent from former C to represent C2 in matter that is substantially related to C’s interests or materially adverse to C’s interests.

May not represent C2 when acquired info from C that’s protected by Rule 1.6 and 1.9(c) that is material to the matter, unless C consents in writing.

L may not use information from former C to disadvantage former C except where permitted or required, or when info becomes generally known.

L may not reveal info relating to representation except as the Rules permit or require.

The scope of the “matter” is fact-based.

**Model Rules of Professional Conduct 1.10: Imputation of Conflicts of interest – General Rule**

Firm where L is associated may not knowingly represent C when any of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9.

Exception: when prohibition based on personal interested of prohibited L that does not significant risk of materially limiting representation of C by the remaining Ls in the firm.

After L terminates association w/Firm, Firm may represent person w/interests materially adverse to C of former L and not currently represented by Firm.

Exception: matter is same or substantially related to that in which the formerly associated L represented the C, and

Any L remaining in the firm ahs information protected by Rules 1.6 and 1.9(c) that is material to the matter.

C may waive disqualification under conditions stated in Rule 1.7.
### 1.7 Current Client
- Shall not
  - Directly adverse or
  - Significantly risk representation materially limited by responsibilities to another client, 3d person lawyer’s personal interest

### 1.9 Former Client
- Shall not
  - Same or substantially similar matter, AND
  - Materially adverse to a former client and have privileged information.

### 1.10 Imputed
- Rule 1.7 and 1.9 apply to an ENTIRE firm, (unless the disqualification is because of the lawyer’s personal interest). This applies even if the lawyer who actually tried the case is gone.

### May
- 1.) reasonably believe can provide competent and diligent, and
- 2.) not prohibited by law, &
- 3.) no claims against clients in same litigation, AND
- 4.) informed consent in writing.

### May
- 1.) informed consent in writing


Appellants, four oil companies, were defendants in an antitrust suit filed by appellee manufacturer. Appellee's attorney's firm represented 3 of appellants on similar matters and other appellant in previous, unrelated matters. Appellants' motions to disqualify appellee's attorney were denied. On appeal, the court reversed in part, holding that the court abused its discretion in applying narrow, formal agency rules to determine whether an L-C relationship existed with 3 of appellants and in not imputing knowledge on appellee's attorney. Two contrary undertakings by appellee's attorney occurred contemporaneously. Each involved substantial stakes and was substantially related to the other, thus, outbalancing appellee's interest in continuing with its chosen attorney. The court did not abuse its discretion in denying other appellant's motion because the more than 10-year past representations for two specific matters unrelated to the present case did not warrant disqualification.
Court, essentially, had to decide whether As belonged within the A-C relationship “bubble.” TC said “no relationship.” Said they’re distinct legal entities. CoA disagreed.

CoA ultimately determined that As were not clients with API. Decision based on information between API and Kirkland that said the information would stay confidential, as well as testimony from As.

Should the amount of $$$ for fees make a difference? What about the potentials for problems? What are the remedies? Should they be able to file a breach of fiduciary duty claim against Kirkland?

Fiduciary Duties

- Due care
- Confidentiality
  - One of the key duties that holds the relationship together.
- Loyalty – trust

*Moore v. Regents of the University of California, 271 Cal.Rptr. 146 (Ca. 1990).*

Review was sought of AC’s decision, which found P stated cause of action for conversion when Ds used P’s cells in medical research without permission. The court found P stated cause of action for breach of D’s disclosure obligations. Ds seeking P consent for medical procedures must disclose personal interests unrelated to the P’s health that may affect medical judgment. D did not properly disclose personal interests in P’s cells before he operated, thus P stated cause of action for breach of disclosure obligations. The court reversed and held use of P’s cells without permission did not state conversion cause of action. P did not retain ownership interest in cells after they left his body and thus could not assert conversion claim. Conversion should not lie because it would discourage medical research of cells and patients are adequately protected from abuse because of informed consent laws.
If there’s no medical benefit to the patient and there’s no reason for him to have the follow-up service other than for the Dr’s own needs, that’s certainly not okay, but that’s “just” a battery. But, this was a breach of fiduciary duty.

D could have dealt with that competing interest through disclosure.

*Is P really in the position to know and evaluate whether D is making the right decision? Should you say disclosure is not necessary because it just scares P? If in a certain way what we’re doing is trusting the professional to put P’s interest above their own, does disclosure really add anything to that?*

Disclosure only gives you the right to know what’s going on and approve or disapprove. Is it okay for D to be clouded by profit but not for P to be clouded by profit.

The rules require informed consent.

*What about if D thought it would disturb P too much to hear that he has to have the surgery and that his cells would be used for research that would help people down the line, so makes the determination not to tell P for P’s own sake?*

Fiduciary duty sort-of lodges better into the legal concept. The notion of D having fiduciary duty to patient is a narrower, modern, concept. It all comes up in distinct instances like the fiduciary duty to protect confidentiality.

**AMA Opinion 8.03: Conflicts of Interests – Guidelines**

P may not place their own financial interests above the welfare of Ps.

Unnecessarily hospitalization, unnecessary drug prescription, or unnecessary conduction of diagnostic tests for D’s financial benefit is *unethical*.

If a conflict develops between the D’s financial interest and D’s responsibilities to P, the conflict must be resolved to P’s benefit.


The bar counsel filed a petition for discipline against L alleging that L charged excessive fees for a drunken driving case. The Board of Bar Overseers (board) dismissed the petition after hearings on the matter. A LC justice denied L’s motion to dismiss bar counsel’s appeal to LC, and the court affirmed the decision. The court found that L charged a clearly excessive fee pursuant to Mass. Sup. Jud. Ct. R. 3:07, DR 2-106(B), departing substantially from the obligation of professional responsibility owed to his C, and ordered that a judgment be entered in LC imposing a public censure. The court found that (1) it had jurisdiction
to hear the appeal, (2) expert testimony indicated that the number of hours devoted to the case was substantially in excess of the hours a prudent experienced lawyer would have spent, (3) the attorney's inexperience did not justify the high fee, as the client should not have paid for the education of the attorney, and (4) the disciplinary rule regarding excessive fees did not inquire into the nature of the attorney's good faith or diligence.

There was a power disparity and maybe C was intimidated or reluctant to challenge/bargain with L.

What about the fact that C was fairly wealthy and he spent a lot of his time spending his wealthy wife’s portfolio – he was sophisticated in the financial world – does he need the court to step in and protect him? Seems like he does deals all the time, if he really was disturbed, he could have done something about it...

C didn’t complain, but the court still “protected” him.

L alleged lack of due process – he said that he didn’t have notice. (There is very little discipline for charging excessive fee.) There’s a lot of discretion in the hourly fee arrangement.

There is tension with the hourly fee: incentive for L to bill more hours and C’s interest in efficiency and cost-effective legal services.


A truck driven by the alleged tortfeasor crashed into a parked trailer killing 1 person and severely injuring the injured party. The injured party retained L to pursue his claims against the alleged tortfeasor and his ER. The injured party and L signed a contingent fee agreement and L filed an action. After extensive discovery and investigation, a structured settlement was reached subject to TC's approval under Mass. Gen. Laws ch. 152, § 15 (1988). The trial judge approved the settlement, but concluded that the award of L’s fees based on the contingent fee agreement was unconscionable. He reduced the amount of L’s fees from $ 975,000 to $ 695,000. L appealed. The court held that it was error for the trial judge to disapprove the agreed fee. There was nothing in the language of Mass. Gen. Laws ch. 152, § 15 to permit a judge to substitute his evaluation of the legal services rendered under a contingent fee agreement. The court noted that no one challenged the contingent fee agreement, and the injured party testified that he was satisfied with the amount of the fee.

In contrast to Fordham, C did not complain, and so the court did not protect him.

Contingency fees make for CoI.

There are some cases where the liability and damages are so clear is that the only question is of how large the contingency will be – that is a good case from a contingency point of view – and that most raises questions about the contingency fee payment system.

Gatekeeper provision: there is a proposal to limit L’s fees to no more than 10% if an offer is made and accepted within 30 days of the demand letter. _Doesn’t this punish L who takes total crapshoots and gets nothing most of the time, and then the one winning case (where he wins big) pays for all his time losing?_

Contingency lawyers are:
1.) Gate keepers to the legal system.

2.) Accessible to people who couldn’t otherwise afford legal assistance

Fee questions point out a conflict of interest in any type of scenario – you can show opposing interests of L and C in almost-any situation.

The medical and legal rules practically parallel each other: shall not charge/collect excessive/unreasonable fee. Rule 1.5, Opinion 6.05.

**AMA Opinion 6.01: Contingent Physician Fees**

D’s fee for medical service should be based on the value of the service provided by D to P and not based on contingency basis that does not in any way relate to the medical service.

D’s fee should not be contingent on successful outcome of medical treatment. Contingency is *unethical* because implies that successful outcomes are guaranteed, thus creating unrealistic expectations and false promises to Ps.

**AMA Opinion 6.02: Fee Splitting**

Ds receipt of referral payment for solely referring P(s) is *unethical*.

D may not receive payment from any source for prescribing or referring patient to a source.

Payment violates requirement to deal honestly with Ds and colleagues.

All referrals and prescriptions must be based on the skill and quality of the D2 to whom P is referred, or the quality/efficiency of the drug or product prescribed.

**AMA Opinion 6.05: Fees for Medical Services**

D should not charge/collect illegal or excessive fee.

Determination of reasonable fee based on:

1.) Difficulty and/or uniqueness of the services performed and the time, skill, and experience required

2.) Fee customarily charged in the locality for similar physician services;

3.) Amount of the charges involved;

4.) Quality of performance;

5.) Experience, reputation, and ability of the physician in performing the kind of services involved.


Article about how pharmaceutical companies influence doctors prescriptions.

**Neade v. Portes, 739 N.E.2d 496 (Ill.Sup.Ct. 2000).**

P's young husband died about a year after first seeing D doctor and health maintenance organization with symptoms of coronary artery blockage. His family and personal history indicated serious risk of heart disease, but Ds ignored this and 2
doctors' recommendations for angiograms, insisting his chest pain was not cardiac related. P sued Ds for medical negligence for the death and breach of fiduciary duty for their failure to disclose their financial incentives arrangement, which P believed caused them to deny proper treatment. The TC struck the breach claim and found financial incentives irrelevant to medical negligence. The AC reinstated the breach claim and found financial incentives evidence could be relevant to D doctor's credibility at trial. The court reversed in part, holding financial incentive evidence might have been relevant if D doctor testified, but reversed reinstatement of the breach claim, holding a patient could not bring a breach of fiduciary duty claim against a physician in a medical negligence case when that claim was duplicative of the negligence claim.

P said D should have disclosed that he had a CoI: not wanting to spend more money than necessary.

The court would not recognize fiduciary duty claim – said med malpractice is the issue.

The court says that doctors should not be held responsible for disclosing the different payment schemes and how it might be affecting their judgment – said this could create a slippery slope and that doctors should not be required to remember that information.

Dissent saw direct cause-and-effect and chose to impose the duty to make the disclosure.

What benefit does disclosure really practically create? In a real-world practical matter, how is this going to help? How is P going to react? Does P really know what to do?

Would it help if you got a financial disclosure form with your HIPAA form?

<table>
<thead>
<tr>
<th>Medical</th>
<th>Legal</th>
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<tbody>
<tr>
<td>No contingency fees</td>
<td>Contingencies ok except divorce/criminal. Must be in writing/signed by client</td>
</tr>
<tr>
<td>No referral fees</td>
<td>Referral fees ok if:</td>
</tr>
<tr>
<td></td>
<td>1.) proportionate to services</td>
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<td></td>
<td>2.) joint responsibility</td>
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<td>AND</td>
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<td></td>
<td>3.) court agrees in writing/shares disclosed</td>
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<td></td>
<td>4.) total fee is reasonable</td>
</tr>
<tr>
<td>Non-compete regularly enforced/though ethics discourages</td>
<td>Non-competes prohibited by Rule 5.6</td>
</tr>
</tbody>
</table>

Model Rule of Professional Conduct 1.5: Fees

L may not charge unreasonable fee or an unreasonable amount of expenses.

Reasonableness based on:

1.) time and labor required
2.) likelihood that acceptance of C’s case will preclude taking other cases
3.) customary fee in the locality for similar legal services
4.) amount involved and the results obtained
5.) time limitations
6.) nature and length of the professional relationship
7.) experience, reputation, ability of L/Ls
8.) whether fee is fixed or contingent
   a. L may accept property for payment, so long as the property is not the
cause of action or subject matter of the litigation contrary to Rule 1.8(i).
   This type of payment may be subject to the requirements of Rule 1.8(a).

L must communicate rate/fee scheme to C, preferably in writing, before or within
reasonable time after commencing representation.

Exception: when L will charge regularly represented C at same basis or rate. But, any
change must be communicated.

Fee may be contingent on the outcome of the matter except when prohibited by law.

Contingent fee arrangement must be made in writing and signed by C. Document
includes how fee is calculated. Must clearly notify C of expenses C will be liable for
whether or not C prevails. At conclusion of matter, L present C with written statement the
outcome of the matter and, in case of recovery, the remittance to he C and method of its
determination.

Exception (based on policy concerns): contingency fee not allowed for:
1.) domestic relations matter, or for
   a. does not apply for contract for a contingent fee for legal representation in
connection with recovery of post-judgment balances due for domestic
relations issues.
2.) representing D in criminal case

Ls in separate firms may split fees if:
1.) division is in proportion to services performed by each L or each L assumes joint
   responsibility for representation,
2.) C agrees in writing to the arrangement, including the share each L will receive,
   and
3.) Total fee is reasonable.

Comment [5] payment scheme may not be developed that will induce L to improperly
curtail services or perform them in a way contrary to C’s interests. … L should not exploit
fee arrangement based primarily on hourly charges by using wasteful procedures.

**Access to Legal Services**

Mr. Kenneth K. Vuylsteke – speaker re tort reform issues

MO – special statute for actions against health care providers; many other states have
this, too.
Some protections built in – shorter SoL – 2 years instead of 5 years. Screening process: there has to be an affidavit filed that some healthcare worker has read the accusations and feels that there is merit to the case.

Protections in joint and several liability: only with those individuals who have the same amount of fault as you, or lesser.

Damage cap: set by the department of insurance – bumped up each year

Activity in courts have tried to increase the caps for Ps - at one time, one cap per D, now one cap per each occurrence of negligence – could possibly find more than one incident in the treatment

Damage cap only applies to non-economic damages.

There is also an effort to limit venue shopping.

*Should doctors be sued the same way Walmart can be?*

Ds, Ls, priests all have fiduciary duty. That duty is to do what is best for the patient or client – cuts against the corporate ethic – what is best for the shareholders

Speaker: “If the business community can put Ls against Ds, they are happy.”

Before 1986, MO had unlimited amount of non-economic damages in cases. In 1986, $375,000 cap placed on non-economic damages. Then, 1/3 of trial lawyers quit the practice, saying it was unfair. Now, $565,000 dollars is the most you can get, except for nursing home cases (where there is no cap on non-economic damages).

Because kids, homemakers, and senior citizens don’t make money, their lives have no economic value.

There is supposed to be a cost of living increase every year

Now, bills that are paid by Medicaid are not count towards damages

Senate has proposed that if any other D is joined in a lawsuit with a healthcare provider under this act, they also will have a non-economic cap of $375,000.

The current bill would put nursing homes under the non-economic cap.

Every insurance company will look for an excuse to join a health care provider; they sue doctors to save money. Encourage Ds to sue doctors – don’t have to prove a case against a doctor to raise the rates – just a claim will cause the insurance rates to go up

There are 18 lawyers in MO legislature – the legislators hate lawyers

MO has Republican legislators and Democratic governor

Only two industries are not regulated by anti-trust laws: baseball and insurance.

Malpractice insurance premium increases: partially caused by refusal of the medical profession to police itself?

5% of doctors account for 40% of malpractice claims – may be in a higher risk specialty – obstetrics, etc.
We shouldn’t be too quick to deprive society as a whole of a resource that has been very costly to produce – the education of a doctor is expensive, and society needs them.

Some of the problem is bad interpersonal skills, and there are often bad outcomes in the medical profession – not caused by medical mistake – just the way it is.

“I’m sorry” immediately hinged with a statement of fault is admissible – but simply saying “I’m sorry” about a bad outcome is not admissible.


Article about the political bruh-hah-hah surrounding last years veto of a trot-reform bill. Doctors want to win reforms that could yield lower liability-insurance premiums. Among other things, they want to restore MO’s cap on non-economic damages, curb excesses in the system and limit or eliminate venue shopping.

Roark v. Humana, Inc., 307 F.3d 298 (5th Cir. 2002).

Ps alleged that although their Ds recommended treatment, the HMOs negligently refused to cover it. 3 Ps were denied remand due to ERISA preemption. The AC determined that DC should have remanded 2 Ps’ claims because ERISA § 502(a), codified at 29 U.S.C.S. § 1132(a), did not completely preempt their claims. § 502(a)(2) did not cover those Ps’ claims, because their HMOs were not acting as plan fiduciaries when denying them medical treatment. § 502(a)(1)(B) also did not completely preempt those Ps’ claims. Regarding an HMO’s appeal from the decision to remand one P’s claims, remand was mandatory, not discretionary, because DC never had removal jurisdiction over the joined claims. Regarding the final P who was denied remand, the spouse of a P, AC determined that DC had subject matter jurisdiction and the power to entertain the suit. Also, as to the analysis of the spouse's claims, AC was bound by a previous panel's decision regarding preemption.

Advertising and Solicitation

The marketing activities of physicians and lawyers have traditionally been subject to much greater restriction than those of other businesses. We will study the restrictions on the advertising and solicitation activities of professionals and consider the assumptions implicit in those restrictions. Speaker: Mr. Thomas Casey.

States may regulate advertising of professionals, as long as the regulation does not violate 1st Am. protection of commercial speech.

Model Rules of Professional Conduct 7.1: Communications Concerning a Lawyer's Services

L may not make false or misleading communication about L or L’s services. A communication is false or misleading if it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.

Truthful statements that are misleading are also prohibited. A truthful statement is misleading if it omits a fact necessary and makes the communication materially misleading, or if there is a substantial likelihood that it will lead a reasonable person to
formulate a specific conclusion about the L or L’s services for which there is no reasonable factual foundation.

This applies to statements in advertisements.

A disclaimer or qualifying language may preclude a finding that a statement is likely to create unjustified expectations or otherwise mislead a prospective client.

**Model Rules of Professional Conduct 7.2: Advertising**

L may advertise services

L can not give referral fees, except:

1.) Pay reasonable cost of advertisements or communications

2.) Usual charge of legal service plan or not-for-profit or qualified L referral service.
   a. Qualified referral service must be approved by appropriate regulatory authority

3.) Pay for law practice in accordance w/Rule 1.17, and

4.) Refer Cs to other L or non-legal professional pursuant to agreement not otherwise prohibited that provides for referrals, if
   a. Reciprocal referral agreement is not exclusive, and
      i. These agreements may not be indefinite and must be periodically inspected.
   b. C is informed of the existence and nature of the agreement.

All communications must include L’s name and address.

**Model Rules of Professional Conduct 7.3: Direct Contact with Prospective Clients**

1.) L may not solicit professional employment from prospective client when significant motive for L’s doing so is L’s pecuniary gain, except if the contactee is
   a. A lawyer, or
   b. Has familial relations, close personal relationship, or prior professional relationship w/L

2.) But still limited if
   a. Prospective client has made known to L a desire to be solicited by L, or
   b. The solicitation involves coercion, duress or harassment.
      i. This includes further effort to communicate after L receives no response from first attempted communication.

3.) All [unsolicited] advertisements must include the words “advertising material” on outside envelope or beginning and ending, unless contactee is (1)(a)/(b).

4.) Ls may participate with prepaid or group legal service plan not owned or directed by L that uses in-person telephone contact to solicit memberships or subscriptions
for the plan from persons who are not known to need legal services in a participant matter covered by the plan.

**Snell v. Dept. of Prof. Regulation, 318 Ill.App.3d 972 (Ill.Ap. 2001).**

Ds filed an administrative complaint against P chiropractor, alleging that he violated the advertising provisions of § 26 of the Medical Practice Act of 1987, 225 Ill. Comp. Stat. 60/26 (Supp. 1999), by displaying in his office waiting room a 27-page booklet entitled "Our Patients Speak," which contained preprinted forms entitled "My Chiropractic Story," which were filled out by patients. An administrative law judge (ALJ) found the booklet contained testimonials, in violation of the statute. The medical disciplinary board adopted the ALJ's findings of fact, conclusions of law, and recommendations, and ordered plaintiff to pay a $2,500 fine. CC upheld the decision. The AC reversed, finding testimonials were not inherently misleading, the booklet constituted protected commercial speech under the U.S. Const. amend. I, and prohibiting use of the booklet violated Ps free speech right. A complete ban on testimonials was not in proportion to the State's admittedly important interests and was unnecessarily and disproportionately broad in the scope of communication it prohibited.

<table>
<thead>
<tr>
<th>Case</th>
<th>State may prohibit</th>
<th>State may not prohibit</th>
<th>State interests at issue</th>
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<tbody>
<tr>
<td>Bates (1977)</td>
<td>False or misleading advertising</td>
<td>Truthful information about availability and price</td>
<td>Stirs up litigation, Adverse effect on professionalism, Inherently misleading, Cause a decrease in quality of services</td>
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<tr>
<td>Ohralick (1978)</td>
<td>In-person solicitation, Court approved blanket rule</td>
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<td>Potential for overreaching</td>
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<tr>
<td>Primus (1978)</td>
<td>Targeted mail for a political purpose</td>
<td></td>
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<tr>
<td>Zaudere (1985)</td>
<td>Targeted advertisements</td>
<td></td>
<td>Professional dignity, Not substantial enough to abridge First Amendment</td>
</tr>
<tr>
<td>Shapero (1988)</td>
<td></td>
<td>Targeted mail to people known to need a certain service</td>
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<tr>
<td>Went For It (1995)</td>
<td>Targeted mail to accident victims within 30 days of the accident</td>
<td></td>
<td>Privacy and tranquility of the accident victim; Dignity of the profession</td>
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**Ethics in Advertising, Thomas J. Casey**

Historically – no rule against advertising in the U.S.

In GB – solicitation of clients was considered to be etiquette rule, rather than ethics
In late 19th century, states began to develop codes of responsibility for professionals—including regulations of advertising.

By 1908 every state adopted a code of responsibility: banned lawyer advertising.

**MO rule:** “A lawyer shall not publicize himself as a lawyer through newspaper or magazine advertisement, radio or television announcement, display advertisements in city or telephone directories, or other means of commercial publicity.”

*VA St. Bd. of Pharmacy v. VA Citizens Consumers Council* (1976): First time the S.Ct. recognized 1st Am. protection of commercial speech, rather than political speech. Prior to this time, every bar association had minimum fee schedules.

There was possibly an anti-trust element to the Court’s thinking.

Every S.Ct. decision on lawyer advertising has been split.


*Bates:* “If the naïveté of the public will cause advertising by attorneys to be misleading, then it is the bar’s role to assure that the populace is sufficiently informed as to enable it to place advertising in its proper perspective.”

Distinguish between “informational” and “promotional” advertising.

**Post Bates Advertising Cases**

*In Re R.M.J.* (MO case): listed court-approved practice areas that could advertise.

*Zauderer v. Ohio:* the state had tried to prohibit advertising with illustrations – Court overturned that restriction. Said the mere possibility that some members of the population might find advertising embarrassing or offensive cannot justify suppressing it. The same must hold true for advertising that some members of the bar might find beneath their dignity.

*Peel v. Illinois* – The court said that a lawyer who advertised that he was a trial specialist could not be stopped from such advertising.

**Post Bates Solicitation Cases**

*In re Primus* (1978): ACLU could solicit political cases

*Ohralik v. Ohio State Bar Association* (1978): Court upheld OH restriction on soliciting for personal injury cases

**AMA Opinion 5.02: Advertising and Publicity**

Ds are unrestricted re advertising, except for those that can be specifically justified to protect the public from deceptive practice:

1. Communication shall not mislead
   a. Communication may include:
      i. Educational background of the physician,
      ii. Basis on which fees are determined
iii. Available credit or other methods of payment, and
iv. Any other non-deceptive information

2.) Or otherwise deceive
   a. Material should be presented in readily comprehensible manner.
   b. High pressures advertising and publicity should be avoided.
   c. Certain types of communication have significant potential for deception so receive special attention:
      i. Testimonials of patients as to D’s skill or quality
      ii. Objective claims regarding experience
      iii. Generalized statements of satisfaction
         1. These are all allowed as long as they are representative of that P’s experience.
   d. Cannot claim exclusivity (because all medical advances must be shared).

3.) D must determine beforehand whether the communication or message is explicitly and implicitly truthful and not misleading.


P applied to the KY Attorneys Advertising Commission (Commission) for approval of a letter that he proposed to send to potential clients who had a foreclosure suit filed against them. The Commission did not find the letter false or misleading. Nevertheless, it declined to approve P’s proposal on the ground that a then-existing KY S.Ct. rule prohibited the mailing or delivery of written advertisements precipitated by a specific event or occurrence involving or relating to the addressee as distinct from the general public. Pursuing the Commission’s suggestion, P petitioned the ethics committee of respondent KY Bar Association for an advisory opinion as to the rule’s validity. The ethics committee upheld the rule. The KY S.Ct. replaced the rule with ABA Rule 7.3, which prohibited targeted, direct-mail solicitation by lawyers for pecuniary gain, without a particularized finding that the solicitation is false or misleading. The Court reversed, finding that the Bar Association failed to show that the rule advanced a substantial interest.

Held that targeted mail to people known to need a certain service is okay.

Florida Bar v. Went For It, Inc. (1995): “One distinguishing feature of any profession, unlike other occupations that may be equally respectable, is that membership entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.”

Iowa currently has a very restrictive rule about TV advertising for Ls. Their law is most restrictive code of prof responsibility dealing with advertising of any state in the union.

Humphrey: “Electronically conveyed image-building was not a part of the information package which has been described as needed by the public. The special potential for abuse presented by electronic lawyer advertising is especially apparent at the important line we have tried our best to draw between the dissemination of protected information
and the crass personal promotion. The field cries out for careful regulation.” – Iowa Supreme Court. S.Ct. declined to hear the case for lack of federal question

Some states have tried to define what is a misleading advertisement. Some have held that advertising the dollar amount of awards that were won for client is misleading.


1.) Is there a substantial interest?

2.) Direct and material advancement of government interest?

3.) Is it narrowly drawn?

*R.M.J.*: “We emphasize, as we have throughout the opinion, that the States retain the authority to regulate advertising that is inherently misleading or that has proved to be misleading in practice.”

<table>
<thead>
<tr>
<th>In St. Louis</th>
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<tbody>
<tr>
<td>8,861 Attorneys registered from St. Louis region</td>
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<tr>
<td>266 Promotional advertisers in the Bell Yellow Pages</td>
</tr>
<tr>
<td>1998 Report to the MO Bar Public Views on Ls: 68% negative response to L advertising</td>
</tr>
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**The Professional as Supervisor/Subordinate Relationship**

We will discuss the ethical obligations of D when he or she becomes a participant in the adversarial legal system. What are D’s ethical obligations when he/she serves as a fact witness in litigation? Are they any different if D is participating as an expert witness? What concerns are raised when a L is a witness or potential witness in litigation?

*Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962).*

The minor's injuries were diagnosed as a severe crushing chest injury, a cerebral concussion, and bilateral fractures of the clavicles. The defense's expert, who also examined the minor, reported that the minor had an aorta aneurysm, which may have been caused by the accident. At settlement negotiations, the minor's parents were not aware of the report received by the defense. The parties settled and TC approved the settlement. The drivers argued that TC was without jurisdiction to vacate the settlement because no mutual mistake of fact was involved, b/c there was no duty to disclose, b/c insurance limitations formed the basis for the settlement, and because the motion to vacate the order for settlement and to set aside the releases was barred by rule 60.02. **The court found that the fact that the settlement did not contemplate the aorta aneurysm gave TC reason to exercise its discretion in vacating the settlement under rule 60.02.** The court further found that there was no evidence that the defense had disclosed either to plaintiff's counsel or TC that insurance limitations were involved in the settlement.

Two issues: this was a case with an entangled situation in which there were Ls and Ds:

*Was D required to disclose to P to the aneurism information? Could he have told P? Should he have told P?*
What is the nature of the relationship between Hannah, who did the examination on Spaulding? Is it a physician-patient relationship with all the regular duties, or is it something else?

The whole relationship, where D’s L hired the doctor (Hannah) to do the work that L didn’t know how to do (medical evaluation) is all protected by the L-C privilege.

Why the decision was made: it wasn’t just that he needed special protection because he’s a minor, it’s also because the Ls had gone to the court and made specific representations about fact in order for the court to approve the settlement – the people with knowledge about the aneurism had a duty to the court – they failed the duty by misrepresenting. Had P been an adult at the time, it’s less likely that the court would have done this – the settlement wouldn’t have been brought to the court for approval and, more likely than not, what would have happened is the court would have left P to sue his doctor and lawyer for what he should have gotten.

**AMA Opinion – 9.07: Medical Testimony**

D has an ethical obligation to assist in the administration of justice. If a P who has a legal claim requests D’s assistance, D should furnish medical evidence, with P’s consent, in order to secure P’s legal rights.

Medical experts should have recent and substantive experience in the area in which they testify and should limit testimony to their sphere of medical expertise.

Medical witnesses should be adequately prepared and should testify honestly and truthfully to the best of their medical knowledge.

The medical witness must not become an advocate or a partisan in the legal proceeding.

The medical witness should be adequately prepared and should testify honestly and truthfully.

L for the party who calls D as a witness should be informed of all favorable and unfavorable information developed by D’s evaluation of the case.

It is unethical for a D to accept compensation that is contingent upon the outcome of litigation.

**Model Rules of Professional Conduct 5.1: Responsibilities of Partners, Managers, and Supervisory Ls**

L in managerial position at firm must take reasonable steps to ensure firm has effective measures to give reasonable assurance that all Ls conform with Rules of Prof Conduct.

L in supervisory position over another L shall reasonably ensure that other L conforms to the Rules.

L is responsible for L2’s violative conduct if:

1.) L orders or has specific knowledge or ratifies conduct involved, or

2.) L has managerial authority of the law firm in which L2 practices or has direct supervisory authority over L2, and knows of the conduct at the time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
Model Rules of Professional Conduct 5.2: Responsibilities of Subordinate L

1.)  L is bound by RPC notwithstanding that L acted at direction of another person.

2.)  Subordinate L does not violate RPC if that L acts in accordance with supervisory L2’s reasonable resolution of an arguable question of professional duty.

   a.  This goes to scienter – L must have knowledge to violate the Rules.

_Weider v. Skala, 593 N.Y.S.2d 752 (N.Y. 1992)._

L contended that he was wrongfully discharged as the result of his insistence L2’s misconduct be reported as required by Model Code of Professional Responsibility DR 1-103(A). Further, he contended that his termination by the law firm was a breach of the employment relationship. The AC concluded that L failed to state a cause of action because he was an at-will employee. **The court concluded that L had stated a valid claim for breach of contract based on an implied-in-law obligation in his relationship with his law firm.** Intrinsic to the employment relationship here was the unstated but essential compact that in conducting the firm’s legal practice both L and his law firm would do so in compliance with the prevailing rules of conduct and ethical standards of the profession. **Insisting that as an associate in their employ L must act unethically and in violation of one of the primary professional rules amounted to nothing less than a frustration of the only legitimate purpose of the employment relationship.** Next, the court concluded that recognition of the tort of abusive discharge was to come from the legislature.

You are obligated to report unethical conduct. The firm acknowledged that he’s a “pathological liar,” but they still refused to report him.

Does it report more poorly on them that they hired a pathological liar, or that they’re tolerating him?

Legal issue: L filed a lawsuit against the law firm saying the discharge was unlawful. The court said there was no actual contract, but they considered the theory of implied contract, some kind of implied obligation the attorney and the associate had. The court said that there is an implied obligation that can give rise to a breach of contract claim if you’re terminated. The obligation is the duty to fulfill ethical obligations between L and the firm. In this particular case, the court said the ethical obligations are the self-regulating obligation to report lawyers who commit fraud and other violations. The firm didn’t adhere to that and they fired L who was insisting upon adherence to the obligation.

Is this the right result?

Do you read this and say “this is extreme,” or do you read this and say “this is life”?

Review Rule 5.2 – it’s fairly clear-cut what the obligation is: there is a duty to report the malpractice. If it’s clear-cut, you have an obligation just as much as established partner.

Odds-are you won’t encounter a complete resistance like this, BUT you might encounter the rationalization that the more experienced attorneys know better than you do about what the right thing is to do.
AMA Opinion 9.055

Clear policies for handling complaints from medical students, resident physicians, and other staff should be established.

These policies should include adequate provisions for protecting the confidentiality of complainants whenever possible (when doing so does not hinder the subject’s ability to respond to the complaint).

Employment and evaluation files should be carefully monitored for tampering.

Residents should be permitted access to their employment files and also the right to copy the contents thereof, within the provisions of applicable federal and state laws.

Medical students, resident physicians, and other staff should refuse to participate in patient care ordered by their supervisors when they believe the orders reflect serious errors in clinical or ethical judgment, or D impairment that could result in a threat of imminent harm to the patient or to others. The complainant may withdraw from the care ordered by the supervisor, provided withdrawal does not itself threaten the patient’s immediate welfare. The complainant should communicate his or her concerns to D issuing the orders and, if necessary, to the appropriate persons for mediating such disputes.

Mechanisms for resolving these disputes, which require immediate resolution, should be in place.

Retaliatory or punitive actions against those who raise complaints are unethical and are a legitimate cause for filing a grievance with the appropriate institutional committee.

Associates in a law firm and residents in a hospital are licensed professionals with independent ethical obligations to their Cs or PS. At the same time, associates and residents are subject to the supervisory authority of law firm partners and teaching physicians. We will discuss the ethical concerns that can arise in the supervisor-subordinate relationship.

The Resident Named Scott: AMA, Case Commentary: When is There a Duty to Inform?

www.ama-assn.org/ama/pub/category/print/7877.html

The resident spotted something wrong in the medical records of a discharged patient while the resident was reviewing the file for purely scholarly purpose. Resident’s dilemma is whether to contact the patient and alert to the fact that he might have cancer. His attending said that he shouldn’t tell the patient; his wife said that he should tell the patient.

Two reactions in the commentary:

1.) Medical student
   a. Ask around and see what other people think

2.) PhD and director of the program in ethics consultation at a medical center.
a. Politely tell the attending that you think you should tell, and that s a medical student you have the “luxury of time” to contact the patient and you’ll take it on yourself.

It’s a problem of hierarchy ➔ the hierarchy having control over you. It would probably be better if the medical student were listened to, in which case people would be better-informed of their medical situations…

**Missouri Rule 7.1**

“A lawyer shall not make a false or misleading communication about L or L’s services.”

In MO law, and in most states, Ls may list their practice areas, but may not say they ‘specialize.’”

Chief Justice Warren Berger, June 2, 1990: “A fringe of the profession…seems bent on turning the practice of law into a trade or business like selling groceries, automobiles or real estate. Because the law permits professionals to advertise in no sense means we should do it.”
**Course Review**
Questions will be “standard type” law school exam questions – Two questions fact pattern.

The exam is two hours, closed book – will have supplement – with rules and opinions Organized by number, will have table of contents

If something would be treated differently in an old law than a new law, explain the difference.

She has a “decided, decided preference for full sentences.” She “won’t like it” if you don’t use full sentences (although arrows are okay).

She wants a sense of what you’re thinking about it; that matters more than whether she agrees with what we ultimately say. She wants to see how we draw on the rules, the discussions, and the readings.

What should professional do?
Incorporate rules into the response, but also weigh alternatives

If what should be done is contrary to rules, it is okay to say it.

What arguments to make to achieve the result – assess the strengths of the arguments

Key concepts we have covered:

- Fiduciaries: attorney, physicians → Clients/patients
- When does the relationship arise?
- What happens once the relationship exists?
- Core categories:
  - Competence
  - Putting the client or the patient first
    - Over self interest (fees)
  - Purpose of the relationship
  - Abide by the client/patient decisions
  - Confidentiality
  - Loyalty
  - Influence over the relationship – adversary
    - Profession in general – tribunals, etc.
  - Self-regulation of the professions
  - Reporting obligations

Ignore House proposed bill (on tort reform)
Client’s adversity (in legal context) has desire to get information from within the circle

- Put client/patient first
  - over self interest (fees)
  - abide by client/patient decisions
- obligation of confidentiality
- loyalty

KEY RULES AND PROVISIONS (double-check what they’re about; does not make obsolete other rules and provisions)

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