

OBERMAYER

REBMANN MAXWELL & HIPPEL LLP

ATTORNEYS AT LAW

Ethics for Attorneys Who Represent Physicians and Dentists

Lawrence Tabas, Esq.
Partner and Chair of the Health Care Law Department

Alina Chuklin, Esq.
Associate, Health Care Law Department
November , 2018

Disclaimer and Copyright Notice

- **Disclaimer:** This presentation is only intended as a high level summary and is not intended to be legal advice. Please consult with attorney for advice specific to individual circumstances.
- **Note:** Due to time constraints, some slides will not be covered in this presentation and are included as resources only.
- All images used in this presentation are for educational and teaching purposes only. All images are either in the public domain and not subject to copyright, or they have been purchased from iStock. Any and all marks used throughout this presentation are trademarks of their respective owners.

Representing Physicians and Dentists

ABA Model Rules of Professional Conduct
Pennsylvania Rules of Professional Conduct

The Rules inform attorneys how to properly determine

1. Who the client is;
2. How to handle disputes within a medical/dental practice;
3. Who in a practice entity has the right to assert the attorney-client privilege;
4. How to represent the organization's interest when there may be disagreement amongst owners;
5. How to advise the practice during an investigation/audit when one or more members may put the organization at legal risk;
6. When the organization's information is not protected by privilege/confidentiality;
7. When may and when must an attorney withdraw from representation



Applicable Rules

- 1.1 – Competence
- 1.3 – Diligence
- 1.4 – Communication with Clients
- 1.6 – Confidentiality of Information
- 1.7 – Conflict of Interest with Current Clients
- 1.9 – Duties to Former Clients
- 1.13 – Duties to the Client that is an Organization
- 1.16 – Withdrawal
- 2.1 – Role of Attorney as an Advisor
- 4.1 – Truthfulness in Statements

Who is the Client?

Determine who the client is:

- Hospital, Practice Group, Nursing facility, Surgical Service Center *or*
- Physicians, Directors, Employees, Shareholders?

Perform a conflict check

Present client with an Engagement Letter

Rule 1.13(a)

Attorney owes a duty of loyalty to the organization, not its constituents

Rule 1.13(b)

Attorney must act in the interest of the organization:

- a. Report to the higher authority to prevent injury to the organization;
- b. Attorney **MAY** report the conduct to the outside authority (DOJ, OIG) if it is in the best interest of the organization;
- c. If the authority of the organization persists in unlawful action, attorney may withdraw in accordance with Rule 1.16

Withdrawal from Representation

Rule 1.16

- Attorney **MUST** withdraw if to continue representation will require the attorney to violate a law or disciplinary rule
- Attorney **MAY** withdraw from representation for any reason so long as the withdrawal can be done without material adverse effect on the client's interest:
 - If the client persists on the course of action that is criminal or fraudulent (but **MUST** withdraw if the attorney's services are used in furtherance of the criminal or fraudulent act)
 - If client has used attorney's services to perpetrate fraud or crime;
 - Client's objective is repugnant or with which the attorney has fundamental disagreement
 - Client failed to fulfil obligations to the attorney regarding the attorney's services
 - Other good cause exists

Communication with the Clients



Rule 1.4

- *“The guiding principle is that the attorney should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements as to the character of representation.” Comment 5*
- *“When the client is an organization or group, it is often impossible or inappropriate to inform every one of its members about its legal affairs; ordinarily, the attorney should address communications to the appropriate officials of the organization.” Comment 6.*

Confidentiality of Information

Rule 1.6

Covers *all information* relating to representation of a client and protects the information from being used to the disadvantage of a client

Exceptions:

- Client gives informed consent
- Attorney has implied authority
- Information is used to prevent reasonably certain death or substantial bodily harm (permissive)
- Disclosure is to prevent, mitigate or rectify the consequences of a client's criminal act in the commission of which attorney's services are used
- Disclosure to obtain legal ethics advice
- Disclosure to comply with the duty of candor toward the tribunal
- Disclosure to prevent or mitigate substantial injury to the financial interest or property of another

Attorney-Client Privilege

Evidentiary rule that protects litigants and their counsel from testifying and disclosing confidential information. 42 Pa. C.S.A. Section 5928

Client is a person or entity that seeks legal advice services

When the client is a *corporation*:

- Privilege covers communication with the high-ranking officials
- The privilege remains with the corporation, not the corporation's BOD, shareholders or employees

Attorney-Client Privilege

- Privilege covers communication with constituents if:
 - The person asserting the privilege was or sought to become the client of the attorney;
 - The communication was to an attorney or subordinate, and the communication was made to that person acting in that capacity;
 - The communication concerned a fact that was communicated to the attorney by the client, without a non-client present, for the purpose of securing a legal opinion, legal services, or assistance in a legal proceeding and not for a purpose of committing a crime or tort;
 - The privilege has been claimed and not waived by the client

Attorney-Client Privilege

The privilege also covers communication between the attorney and another corporate employees and staff members if the following conditions are met:

- The communications were made by corporate employees;
- To counsel of company acting as such;
- At the direction of corporate superior;
- Concerning the matters within the scope of the employees' corporate duties;
- In order to secure legal advice from counsel; and
- Were considered confidential when made and have been kept confidential. *Upjohn v. United States*, 449 U.S. 383 (1981).

Conflict of Interest between Current Clients

Rule 1.7

The rule prohibits an attorney from representing one client whose interests are directly adverse to those of another client, unless both of the affected clients give their informed consent.

- Whether an attorney may properly request a client to waive conflicts that might arise in the future subject to the test under 1.7(b):
 - The attorney reasonably believes that he can competently and diligently represent each affected client, despite the conflict of interest;
 - The representation is not prohibited by law;
 - The representation does not involve asserting a claim by one client against another client represented by that attorney in the same litigation; and
 - Each affected client gives **informed consent**, confirmed in writing.

Conflict of Interest between Current Clients

Rule 1.7

If there is a present conflict, the attorney must withdraw from the joint representation if a reasonable attorney would have to advise either of the clients not to consent.

The attorney may continue to represent one consenting client, but only if the client who is dropped provides informed consent to the continuation of representation.

“Thus, the attorney for an organization is not barred from accepting representation adverse to an affiliate in an unrelated matter, unless the circumstances are such that the affiliate should also be considered a client of the attorney, there is an understanding between the attorney and the organizational client that the attorney will avoid representation adverse to the client’s affiliates, or the attorney’s obligations to either the organizational client or the new client are likely to limit materially the attorney’s representation of the other client.”

Duties to Former Clients

Rule 1.9

- (a) when a former client has imparted confidential information to an attorney, the attorney shall not represent another person in the same or substantially related matter, in which the person's interests are materially adverse to the interests of the former client, unless the former client gives informed consent;
- (b) a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented the client;
- (c) the duty to preserve confidentiality does not cease when the representation ends

Role of Attorney as Advisor

Rule 2.1

“A lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, which may be relevant to the client’s situation.” Comment 2.

A lawyer has no duty to advise the client until asked. “However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the attorney’s duty to the client under Rule 1.4 may require that the attorney offer advice if the client’s course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation.” Comment 5.

Examples of Ethical Issues in Representation

- What happens if there are disagreements within the practice?
- What if a conflict of interest arises when a physician/dentist asks for the attorney's representation for an individual matter?
- What if attorney serves as an officer on the board of directors of the practice and is accused of wrongdoing?
- What do you do if the client has wrongfully terminated an employee?
- What to do in a situation of a negotiated buy-out, or a sale, or an acquisition, where some of the members of the organization oppose the buy-out, or sale, or the acquisition?



Compliance with Privacy Laws

Federal Laws

- HIPAA, the Privacy Rule and Security Rule
- Substance Abuse Treatment Confidentiality Law

State Laws

- PA Mental Health and Disabilities Act of 1966
- PA Drug and Alcohol Abuse Control Act of 1972
- Confidentiality of HIV-Related Information Protection under 35 P.S. Section 7601 *et seq.*



Q&A

Contact information

Lawrence Tabas, Esquire

[Email: Lawrence.Tabas@Obermayer.com](mailto:Lawrence.Tabas@Obermayer.com)

Telephone: 215-665-3158