

# Lawyers, Docs and Money:

The Healthcare  
Lawyer's Guide to  
Legal Ethics in  
Physician  
Transactions

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# “Well, That Can’t Be Illegal ...”

“[I]f one purpose of the payment was to induce future referrals, the [anti-kickback statute] has been violated.”

- United States v. Greber, 760 F.2d 68,69 (3d Cir. 1985)

“Except as provided in [an exception], if a physician (or an immediate family member of such physician) has a financial relationship with an entity [providing designated health services], then— (A) the physician may not make a referral to the entity for the furnishing of designated health services ... , and (B) the entity may not present or cause to be presented a claim under this title or bill to any individual, third party payor, or other entity for designated health services furnished pursuant to a [prohibited] referral ...”

- 42 U.S.C. 1395 (a)(1)

# The Problem(s) with Advising Healthcare Clients

- Almost everything that makes business sense is at least arguably illegal (and maybe criminal)
- Almost every arrangement between a physician and a healthcare organization assumes referrals by the physician, but no one can talk about that (or put a price on it)
- Almost every deal involves emails, voicemails and other paper trails that can be used adversely in the right circumstances

# The Problem(s) with Advising Healthcare Clients

- The lawyer often has to decide whether a deal can be saved or is beyond recovery
- ... and if the lawyer rescues a deal that is later scrutinized, has the lawyer become a co-conspirator?

# Some Lawyerly Disclaimers

- Discussion of ethics rules is based on the ABA Model Rules of Professional Conduct; YMMV (but in Kentucky, it mostly doesn't)
  - The ABA can't take your license, but your state can; know the rules that apply to you
- Cases discussed in materials are for illustration only – no adverse inferences should be drawn
- Any hypothetical situations discussed are purely imaginary and probably never happened to anyone ... especially your speaker

# “Threshold” Model Rules

## ***Rule 1.1 – Competence – Rule***

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

- Same as Ky. Rules of Prof. Conduct Rule 3.130(1.1)

## ***Rule 1.1 – Competence – Comment***

*[1] In determining whether a lawyer employs the requisite knowledge and skill in a particular matter, relevant factors include the relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question. In many instances, the required proficiency is that of a general practitioner. Expertise in a particular field of law may be required in some circumstances.*

# “Threshold” Model Rules

## **Rule 1.3 – Diligence -Rule**

A lawyer shall act with reasonable diligence and promptness in representing a client.

- Same as Ky. Rules of Prof. Conduct Rule 3.130(1.3)

## **Rule 1.3 – Diligence –Comments**

*[1] A lawyer should pursue a matter on behalf of a client despite opposition, obstruction or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued. See Rule 1.2.*

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### **Scenario 1**

Client, St. Eligius Hospital, wishes to employ Dr. Mark Craig, a high-powered cardiovascular surgeon. Dr. Craig has traditionally done a fair number of surgeries at St. Eligius, but has lately been shifting more cases to Excelsior Medical Center. St. Eligius believes that employing him will both ensure his loyalty and elevate the profile of its cardiac surgery program.

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 1 (continued)

St. Eligius asks you to draft up an employment agreement, providing for a base salary at the 95<sup>th</sup> %ile level for cardiovascular surgeons in comparable markets. In addition, the contract will provide for an additional \$100K for serving as Medical Director of the St. Eligius Heart Center. In response to your inquiry about support for the compensation being at fair market value, the hospital's physician relations director gives you ...

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 1 (continued)

... a copy of a 10-page valuation opinion from a local accounting firm, which recites that the firm is “relying on certain assumptions provided to us by St. Eligius Hospital, as to which we have made no independent investigation,” and concludes that the compensation is A-OK.

Any concerns for you?

# Potentially Relevant Model Rules

## ***Rule 2.1 – Counsel as Advisor – Rule***

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

- Same as Ky. Rules of Prof. Conduct Rule 3.130(2.1)

# Potentially Relevant Model Rules

## **Rule 2.1 – Counsel as Advisor – Comments**

*[1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.*

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

# Potentially Relevant Model Rules

## **Rule 2.1 – Counsel as Advisor – Comments**

*[4] Matters that go beyond strictly legal questions may also be in the domain of another profession... Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts.*

*[5] In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation...*

*... A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.*

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 2

Client, Dr. Rosetta Stone, has a practice in which it is often necessary for her to refer her patients for MRI scans. She has been offered the opportunity to invest in a freestanding MRI center developed and managed by Scan-o-Rama, LLC. The center will not accept patients covered by Medicare or other federal reimbursement programs; therefore, Dr. Stone believes, Stark and AKS will not apply.

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 2 (continued)

As you review the documents, you remind Dr. Stone that she may not refer federal-program patients to the center. She says, “I know, I know. Those I refer to Scan-o-Rama’s affiliated center, Scan-o-Rama Federal. I won’t own any of that, but they tell me I’ll make it up with those big distributions from the private-pay center. They’d better, because I had to promise to send all my federal patients to Scan-o-Rama Federal before they’d let me buy into the other one.”

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 2 (continued)

You point out that, in the OIG's view, this arrangement could be deemed to violate AKS. Dr. Stone says, "Look, all I asked you to do was look at the contract. If I want your advice on anything else, I'll give you a call."

What can you do? What should you do?

# Potentially Relevant Model Rules

## **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer – Rule**

- (a) *Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation...*
- (b) *A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.*
- (c) *A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.*
- (d) *A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.*
  - Same as Ky. Rules of Prof. Conduct Rule 3.130(1.2)

# Potentially Relevant Model Rules

## **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer– *Comment***

*[1] Paragraph (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations....With respect to the means by which the client's objectives are to be pursued, the lawyer shall consult with the client as required by Rule 1.4(a)(2) and may take such action as is impliedly authorized to carry out the representation.*

# Potentially Relevant Model Rules

## **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer– Comment**

*[2] On occasion, however, a lawyer and a client may disagree about the means to be used to accomplish the client's objectives. Clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. Conversely, lawyers usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected. Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4). Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).*

# Potentially Relevant Model Rules

## **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer– Comment**

*[6] The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer's services are made available to the client .... A limited representation may be appropriate because the client has limited objectives for the representation. In addition, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives. Such limitations may exclude actions that the client thinks are too costly or that the lawyer regards as repugnant or imprudent.*

*[7] Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances. If, for example, a client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation. Such a limitation, however, would not be reasonable if the time allotted was not sufficient to yield advice upon which the client could rely ....*

# Potentially Relevant Model Rules

## **Rule 1.2 – Scope of Representation and Allocation of Authority Between Client and Lawyer– Comment**

*[9] Paragraph (d) prohibits a lawyer from knowingly counseling or assisting a client to commit a crime or fraud. This prohibition, however, does not preclude the lawyer from giving an honest opinion about the actual consequences that appear likely to result from a client's conduct. Nor does the fact that a client uses advice in a course of action that is criminal or fraudulent of itself make a lawyer a party to the course of action. There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.*

*[10] When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent or by suggesting how the wrongdoing might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposed was legally proper but then discovers is criminal or fraudulent. The lawyer must, therefore, withdraw from the representation of the client in the matter. See Rule 1.16(a). In some cases, withdrawal alone might be insufficient. It may be necessary for the lawyer to give notice of the fact of withdrawal and to disaffirm any opinion, document, affirmation or the like. See Rule 4.1.*

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 3

You are an in-house lawyer for Megalithic Healthcare, Inc., a large, diversified healthcare services company. In that capacity you work with a variety of officers and managers and have developed a close working relationship with them.

You have been working with Hy Volume, Megalithic's Senior Vice President of Physician Development, on a deal in which Megalithic will acquire DozensODocs, LLC, a large multispecialty physician group that is expected to throw off significant hospital admissions and ancillary services referrals to Megalithic facilities.

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 3 (continued)

One day, Hy comes to you and says, “Look, I need you to draw up some kind of contract for us to pay Dr. Kildare, DozenODocs, LLC’s president, \$200,000 a year for consulting services or something and backdate it to January 1. I had to give her that to get the deal done, and now I need to paper it up. And listen, I did this on my own, so don’t say anything to the CEO about this, okay? After all, you’re my lawyer, right, so all this stuff is under attorney-client privilege?”

# It Can't Happen Here ... Can It?

## Some Brief, Purely Imaginary Scenarios

### Scenario 3 (continued)

What do you say to Hy? What, if anything, do you say to the CEO?

Assume the deal goes forward. What do you say to the FBI agent when Hy pleads out and says, “Oh, yeah, I told the lawyers all about this. They told me it was okay.”?

# Potentially Relevant Model Rules

## ***Rule 1.13 – Organization as Client - Rule***

- (a) A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.
- (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.
- This and following slides are identical to Ky. Rules of Prof. Conduct Rule 3.130(1.13)

# Potentially Relevant Model Rules

## ***Rule 1.13 – Organization as Client - Rule***

(c) Except as provided in paragraph (d), if

- (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
- (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.

# Potentially Relevant Model Rules

## ***Rule 1.13 – Organization as Client - Rule***

- (d) Paragraph (c) shall not apply with respect to information relating to a lawyer's representation of an organization to investigate an alleged violation of law, or to defend the organization or an officer, employee or other constituent associated with the organization against a claim arising out of an alleged violation of law.
- (e) A lawyer who reasonably believes that he or she has been discharged because of the lawyer's actions taken pursuant to paragraphs (b) or (c), or who withdraws under circumstances that require or permit the lawyer to take action under either of those paragraphs, shall proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge or withdrawal.

# Potentially Relevant Model Rules

## ***Rule 1.13 – Organization as Client - Comments***

*[1] An organizational client is a legal entity, but it cannot act except through its officers, directors, employees shareholder and other constituents. Officers, directors, employees and shareholders are the constituents of the corporate organizational client...*

*[2] When one of the constituents of an organizational client communicates with the organization's lawyer in that person's organizational capacity, the communication is protected by Rule 1.6. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees or other constituents are covered by Rule 1.6. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer may not disclose to such constituents the information relating to the representation except for disclosures impliedly authorized by the organizational client to carry out the representation otherwise authorized by Rule 1.6.*

# Potentially Relevant Model Rules

## **Rule 1.13 – Organization as Client – Comments**

*[3] When constituents of the organization make decisions for it, the decisions ordinarily must be accepted by the lawyer, even if their utility or prudence is doubtful. Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province. Paragraph (b) makes clear, however, that when the lawyer knows the organization is likely to be substantially injured by action of an officer or other constituent that violates a legal obligation to the organization or is in violation of law that might be imputed to the organization, the lawyer must proceed as is reasonably necessary in the best interest of the organization. As defined in Rule 1.0(f), knowledge can be inferred from circumstances, and a lawyer cannot ignore the obvious.*

*[4] In determining how to proceed under paragraph (b), the lawyer should give due consideration to the seriousness of the violation and its consequences, the responsibility in the organization and apparent motivation of the person involved, the policies of the organization concerning such matters, and any other relevant considerations. Ordinarily, referral to a higher authority would be necessary...*

# Potentially Relevant Model Rules

## **Rule 1.13 – Organization as Client -Comments**

*[4] ... In some circumstances, however, it may be appropriate for the lawyer to ask the constituent to reconsider the matter, for example, if the circumstances involve the constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to a higher authority. If a constituent persists in conduct contrary to the lawyer's advice, it will be necessary for the lawyer to take steps to have the matter reviewed by a higher authority in the organization... Even in circumstances where a lawyer is not obligated by Rule 1.13 to proceed, a lawyer may bring to the attention of an organizational client, including its highest authority, matters that the lawyer reasonably believes to be of sufficient importance to warrant doing so in the best interest of the organization.*

*[5] Paragraph (b) also makes clear that when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, the lawyer must refer the matter to higher authority, including, if warranted, the highest authority that can act on behalf of the organization under applicable law...*

# Potentially Relevant Model Rules

## **Rule 1.6 – Confidentiality of Information - Rule**

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - ...
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
  - (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
  - (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense 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 ...

# But Kentucky Is Different

## ***Ky. Rules of Prof. Conduct Rule 3.130(1.6)– Confidentiality of Information - Rule***

- (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph
- (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - ...
  - (3) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense 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, including a disciplinary proceeding, concerning the lawyer's representation of the client...

→→→ Nothing about financial or property interests, nothing about mitigating or rectifying anything

# When in Doubt ...



Don't ignore the little voice inside your head.

# Questions?

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