

# LEGAL ETHICS FOR THE HEALTH LAWYER

**RICHARD SIEHL**  
BAKER & HOSTETLER LLP  
ORLANDO, FLORIDA

## SPECIAL HEALTH LAW ISSUES

### **Corporate Integrity**

The Office of Inspector General (OIG) often negotiates compliance obligations with health care providers and other entities as part of the settlement of Federal health care program investigations arising under a variety of civil false claims statutes. A provider or entity consents to these obligations as part of the civil settlement and in exchange for the OIG's agreement not to seek an exclusion of that health care provider or entity from participation in Medicare, Medicaid and other Federal health care programs. See <http://oig.hhs.gov/fraud/cias.html>

The negotiation and ongoing enforcement of Corporate Integrity Agreements may pose ethical conflict of interest issues for lawyers advising health care providers, particularly when the lawyer has previously advised the client regarding compliance issues. The attorney may even end up being named a co-conspirator. See, *U.S. v. Anderson* 199WL 84290 (D. Kansas, Jan 8, 1999).

In house counsel also has special ethical issues in this context involving Medical Staff relationships and reporting obligations to top management and the Board.

### **State and Federal Criminal Laws**

A variety of state and federal criminal laws are often implicated in connection with compliance activities. Both outside counsel and in house counsel should be sensitive to the particular ethical issues involving the representation of clients in potential criminal matters and immediately seek special expertise from experienced criminal defense lawyers upon becoming aware of potential criminal conduct. Ethical issues arise when a lawyer provides legal advice in a specialized area where the lawyer may not be competent to handle. Avoid giving advice on any criminal implications to individuals when your client is the organization with whom the individual is associated.

### **Physician Hospital Contracting**

State and federal anti-kickback laws and Stark and state anti-referral laws create serious ethical issues for Health Lawyers when advising clients in hospital physician business relationships. In addition to regulatory and administrative compliance issues and potential criminal implications, conflict of interest concerns are frequently present. In addition to physician referral issues, non standard compensation, non competition issues, tax exempt concerns and securities law issues may result in ethical dilemmas when representing either side of a proposed business arrangement.

Because meeting a specific Stark exception usually gives comfort with respect to the antikickback implications even if a safe harbor is not fully met there is the risk of how confident a lawyer can be in giving a "green light" to any suspect arrangement. The prudent Health Lawyer

must carefully tread this minefield of ethical temptations to avoid possible enforcement sanctions and penalties for both client and lawyer.

### **Federal Tax Law**

Tax exempt organizations have many special and complicated requirements that again require highly specialized and experienced legal guidance. Compliance with Internal Revenue Service regulations when representing tax exempt organizations, particularly at the Board level, raises important ethical concerns for Health Lawyers with respect to competency and reliance on legal opinions in bond obligations. Giving tax advice is also subject to the restrictions of IRS Circular 230 Rules, 31 CFR parts 10, with respect to practicing before the Internal Revenue Service. There are severe sanctions for encouraging a client to violate any federal tax law.

### **End-of-Life**

End-of Life Treatment in institutional settings has become an area of ethical concern for Health Lawyers who are sometimes thrust into the middle of “right to die” situations... The recent case of Terri Schiavo illustrates the many ethical issues that have become the subject of moral, religious, judicial and legislative concern. The 1976 case of Karen Quinlan had long set the baseline for important decisions for patients in persistent unconscious states, surrogate decision makers and the removal of life-supporting treatment. On a state by state basis legislatures and courts had established basic ground rules to guide medical decision making for patients who could not make decisions for themselves. In 1990, the United States Supreme Court seemed to recognize a constitutionally protected right to refuse lifesaving hydration and nutrition in a carefully worded 5 to 4 decision in the *Curzan* case.

In the Schiavo case both the Florida Legislature, and eventually Congress, attempted to impose a legislative solution over the judicial process involving a tragic intrafamilial controversy. For the Health Lawyer the pull of professional legal ethics is often challenged by personal and moral concerns. Again, the Health Lawyer must consider these fundamental questions: who do you represent and what are your professional obligations to your client.

### **Religious and Ethical Directives**

All Catholic Hospitals must abide by the Directives promulgated by the National Conference of Catholic Bishops; see, <http://www.usccb.org/bishops/directives.shtml>. These Directives prohibit a Catholic entity from performing certain services including, abortions, sterilizations, cloning, artificial insemination and the restriction of nutrition and hydration at the end-of life. A health Lawyer who represents a Catholic entity must beware of these restrictions when advising a Catholic entity as an overlay on the lawyer’s professional obligations.

### **Sarbanes- Oxley**

Compliance with the requirements of the federal Sarbanes-Oxley Act of 2002 regarding Standards of Professional Conduct for Attorneys Appearing and Practicing before the Securities and Exchange Commission in the representation of an issuer of securities is another specific obligation of Health Lawyers who advise for profit and even in some instances non profit companies, see <http://www.sarbanes-oxley.com>.

### **Attorney Client Privilege**

The attorney-client privilege is one of the oldest common law privileges protecting confidential communications and has been codified in almost every jurisdiction. This privilege is intended to ensure full disclosure by clients. The right to assert the privilege belongs to the client and exists

for the client's benefit. The privilege may be invoked any time during the attorney-client relationship and even after the relationship is terminated. As a practical matter it falls on the attorney to assert the privilege on the client's behalf. The attorney-client privilege can be asserted by a corporation or other legal entity where the communication is made by an authorized officer or employee of the company for the purpose of obtaining legal advice for the company.

The attorney-client privilege applies when a client seeks professional legal advice from licensed practitioner who is acting in the capacity as a legal advisor and communications relating to that purpose made in confidence by the client are at the client's insistence permanently protected from disclosure by the legal advisor unless the client waives the privilege, either voluntarily or by implication.

### **Evidentiary Application of Attorney Client Privilege**

The attorney-client privilege is distinguished from the ethical obligations regarding confidential communications. The evidentiary privilege applies to testimony only; the ethical rule applies in all situations where a client's confidences might be disclosed.

The evidentiary privilege applies generally to information communicated by the client; the ethical rule applies to all information received by the attorney relating to the representation of the client regardless of its source.

### **The Work Product Doctrine**

The work product doctrine is designed to protect a lawyer's trial preparation by immunizing certain information and materials from discovery. The work product immunity is held by the lawyer and, unlike the attorney-client privilege can not be asserted independently by the client. For example, Federal Rule of Civil Procedure 26(b)(3)(B) *Protection Against Disclosure*, provides: "If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation. " The work product doctrine is often confused with the client communication privilege but is actually a separate and independent protection based on the lawyer's own thought process.

### **Crime Fraud Exception**

If the client communication is in furtherance of contemplated or ongoing criminal or fraudulent conduct, then the communication is generally not privileged to the extent the communication is in some way intended to facilitate or conceal the crime or fraud. This limited exception to the ethical rule of confidentiality permits the lawyer to reveal information that would otherwise be confidential to the extent necessary to prevent the client from committing the crime or fraud.

For the Health lawyer application of the crime fraud exception could force a lawyer to immediately cease providing legal services to a client knowingly engaged in fraudulent conduct and might also require the lawyer to report such conduct to the appropriate authority. The failure of the lawyer to immediately disengage from assisting a client to violate the law might even result in the lawyer being criminally implicated in the illegal conduct as a co-conspirator or perhaps accused of aiding and abetting any criminal conduct.