

Ethical Issues in Health Law Practice

Alaska Bar Association

Health Law Section

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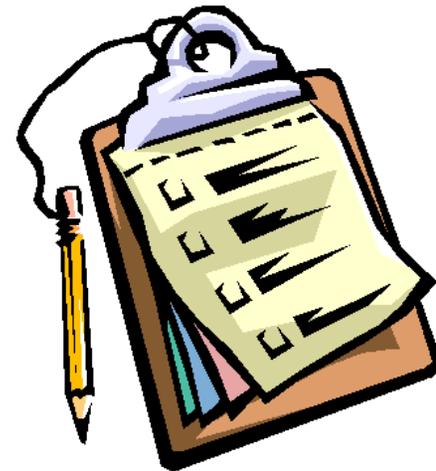
Presented by:

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Overview

- Personal values v. professional obligations
- Ethical dilemmas in health law
- The lawyer's role on medical ethics committees



What about personal values?

- Beliefs of a person or social group in which they have an emotional investment (either for or against something)
 - Dictionary.com
- Values are the rules by which we make decisions about right and wrong, should and shouldn't, good and bad
- Values tell us which are more or less important, which is useful when we have to trade off meeting one value over another

What about morals?

- Motivation based on ideas of right and wrong
 - Dictionary.com
- Morals have a greater social element to values and tend to have a very broad acceptance
- Morals are far more about good and bad than other values
- We thus judge others more strongly on morals than values
- A person can be described as immoral, yet there is no word for them not following values
- Do you ever hear about professional morals?

What about ethics?

- The rules or standards governing the conduct of a person or the members of a profession
 - Dictionary.com
- Ethics tend to be codified into a formal system or set of rules which are explicitly adopted by a group of people
- If you accuse someone of being unethical, it is equivalent of calling them unprofessional and may well be taken as a significant insult and perceived more personally than if you called them immoral (which of course they may also not like)

What about professional obligations?

- A health care lawyer has the same professional obligations as any other lawyer, right?



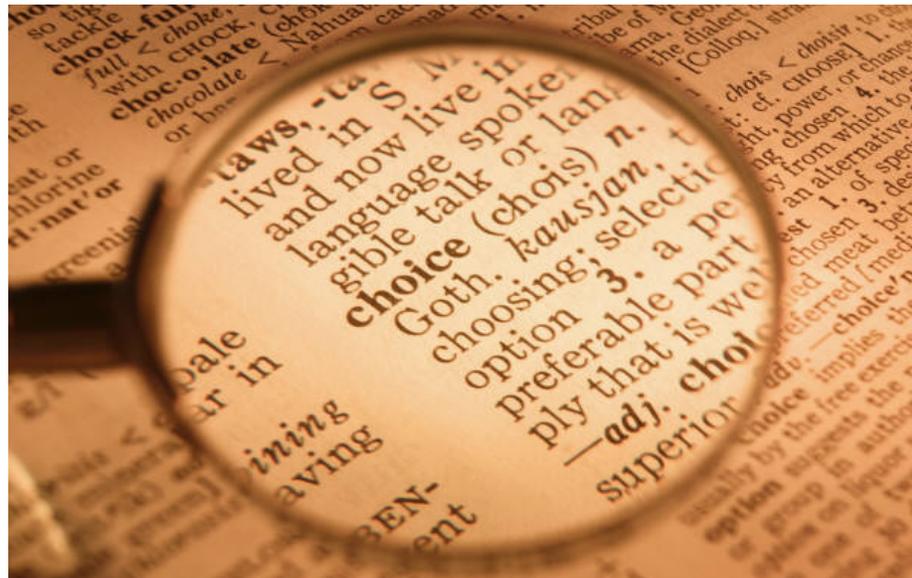
Alaska Rules of Professional Conduct

- Rule 1.1 Competence
- Rule 1.3 Diligence
- Rule 1.4 Communication
- Rule 1.7 Conflict of Interest
- Rule 1.13 Organization as Client
- Rule 1.14 Client Under a Disability
- Rule 1.16 Declining or Terminating Representation
- Rule 8.3 Reporting Professional Misconduct
- Rule 8.4 Misconduct

What about ethical dilemmas?

- Choosing between two rights
- Between right and wrong is a troublesome gray area
- Boeing Ethics Poster

Is It All About Choices?



What about choices?

- Is it legal?
- Is it fair?
- Does it hurt anyone?
- Have I been honest with those affected?
- Can my conscience live with the decision?

- *Ethics* by Steven Hall and Dr. Ellis Langston

Obstacles to Ethical Behavior

- Time
- Ego
- Unreliable information
- Ignorance
- Bottom line \$ only
- Greed

- *Ethics* by Steven Hall and Dr. Ellis Langston



Ethics, Law & Risk Management



Ethics, Law & Risk Management

Ethics

- ought to

Law

- have to

Risk Management

- choose to

Ethical Issues in Health Care

- Access
- Cost
- Quality
- Confidentiality
- \$ Profit \$
- End of life
- Pharma
- Medical devices
- Technology
- Insurance
- Marketing
- Patient autonomy
- Informed consent
- Government policy
- Managed care
- Public health
- Environmental health
- Behavioral health
- Fraud and abuse
- Research
- Others?

The Front Page Test

- Contemplating any business act, an employee should ask himself whether he would be willing to see it immediately described by an informed and critical reporter on the front page of his local paper, there to be read by his spouse, children, and friends
- Warren Buffet



How Do We Resolve Ethical Dilemmas?

- Step 1
 - Analyze the consequences
 - Who will be helped by what you do?
 - Who will be harmed?
 - What kind of benefits and harms are we talking about?
 - Some are more valuable or more harmful than others: good health, someone's trust and a clean environment are very valuable benefits, more so than a faster remote control device
 - How does all of this look over the long run as well as the short run?

- The Center For Business And Ethics: Loyola Marymount University

How Do We Resolve Ethical Dilemmas?

- Step 2
 - Analyze the actions
 - Consider all of the options from a different perspective, without thinking about the consequences
 - How do the actions measure up against moral principles like honest, fairness, equality, respecting the dignity of others, people's rights?
 - Consider the common good
 - Do any of the actions "cross the line?"
 - If there's a conflict between principles or between the rights of different people involved, is there a way to see one principle as more important than the others?
 - Which option offers actions that are least problematic?

- The Center For Business And Ethics: Loyola Marymount University

How Do We Resolve Ethical Dilemmas?

- Step 3
 - Make a decision
 - Take both parts of your analysis into account and make a decision
 - This strategy at least gives you some basic steps you can follow
- The Center For Business And Ethics: Loyola Marymount University

Role of Medical Ethics Committees

- Educate clinical staff and patients about ethical issues in patient care
- Develop institutional policies
- Provide ethics consultation services upon request



Attorneys on Ethics Committees

- Hospital v. independent attorney
- Do teach on relevant legal issues, cases, and decisions
- Do provide counsel and advice
- Don't undermine clinical participant perspectives
- Don't weaken committee deliberations

Subject Matter Expertise

- Living wills
- Durable Power of Attorney for Health Care
- Malpractice law
- Do not resuscitate orders
- Foregoing life-sustaining treatment
- Withholding nutrition and hydration
- Treatment for incompetent patients
- Proportionate v. disproportionate treatment
- Suicide and the law

Hypotheticals

- The Corporate Compliance Officer Princess Pea for your hospital comes to you as General Counsel.
- She reports that there are concerns with the billing practices of Dr. Wyatt Beanstalk. Dr. Beanstalk believes it is acceptable to bill all insurers, including Medicaid and Medicare, at a greater return rate for a service than is allowed because he is smarter than everyone else on the planet and his advice should be worth more.
- CCO Pea tells you that she has spoken to Dr. Beanstalk, but Dr. Beanstalk refuses to back down. CCO Pea says she brought this matter to the attention of Chief Financial Officer Red Riding Hood, but CFO Riding Hood was not overly concerned. While walking out the door CFO Riding Hood said something that sounded a lot like, “Dr. Beanstalk is a piece of work, but if we do anything about it he’s sure to tell people about what really happened to Nurse Dumpty and we don’t want the police looking into that one.”
- CCO Pea is afraid to talk to CEO Jacqueline Beanstalk, because Jacqueline is Dr. Beanstalk’s sister-in-law.
- CCO Pea doesn’t know what to do next. What do you advise her? Who do you follow-up with? Do the answers to these questions change if you are Outside Counsel instead of General Counsel?

Hypotheticals

- Attorney Jane represents Client Joe in a personal injury case. Joe is a CPA by profession and unmarried with no immediate family in the area. Joe was a passenger in a car that was struck broadside by a semi owned by a major grocery store chain.
- Joe suffered significant injuries including a fractured skull. Liability isn't in dispute—just the extent of Joe's injuries and damages. Jane's expert has concluded that Joe is permanently disabled and will never be able to work as a CPA again. Defense counsel's IME expert believes that Joe could be retrained and be successful in another line of work.
- The case has been on going for several years and the emotional strain on Joe has built to a critical point. In desperation, Joe appears unannounced at Jane's office one afternoon and demands that Jane settle the case immediately for the last offer made by the insurance company. Jane believes that this amount is a quarter of what she would be able to prove at trial. Jane has met regularly with Joe over the course of the case and has noticed in the past year that Joe has become increasingly erratic and unable to carry on a coherent conversation.

Hypotheticals

- If Jane believes that Joe is unable to make critical decisions in his case, may she contact Joe's family Outside for help? What can she tell the family?
- If Jane knows that Joe attends a local church, may she ask for help from his minister? What can she tell the minister?
- If neither family nor his minister are able to help Joe, can Jane seek the appointment of a guardian?
- If a guardian is appointed, is Jane obligated to consider Joe's wishes if they conflict with the guardian's decisions?
- If Jane is unable to get a guardian appointed but Joe insists on settling the case for far less than the case is worth, what can Jane do?
- What can Jane do if Joe threatens to kill himself if this case goes one more week without resolution?
- If Jane decides to contact mental health authorities or law enforcement about Joe's threat to commit suicide, what can she tell them?
- If Jane has contacted mental health authorities or law enforcement or others in an effort to help Joe, is she required to withdraw from Joes' case?

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