It's Not Easy Being Me:
Ethical Dilemmas with Representing Professionals

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I. Representing Physicians

A. Physician Obligations of Confidentiality

a. Fact Pattern: An individual dying of an AIDS-related complication who has never disclosed the disease to his family is admitted into a hospital and falls into a coma. His family arrives and wants to know what is happening, including his brother, who is his health care proxy. Can the physician treating this individual disclose his disease?[1]

b. Relevant Ethical Rules

1. AMA Principles of Medical Ethics, Principal IV - A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.

2. AMA Code of Medical Ethics, Opinion 3.2.1: Physicians may disclose personal health information without the specific consent of the patient (or authorized surrogate when the patient lacks decision-making capacity):

- To other health care personnel for purposes of providing care or for health care operations; or
- To appropriate authorities when disclosure is required by law; or
- To other third parties situated to mitigate the threat when in the physician's judgment there is a reasonable probability that:
    - The patient will seriously harm him/herself.

[1] This scenario comes from New York Magazine's article, "*Can One Sibling Pull the Plug if the Others Don't Want To? And Five Other Vexing Medical-Ethics Dilemmas, Examined*," by Janelle Nanos, June 8, 2008.

- The patient will inflict serious physical harm on an identifiable individual or individuals.

- For any other disclosures, physicians should obtain the consent of the patient (or authorized surrogate) before disclosing personal health information.

c. New York State Law

1. New York Public Health Law § 2782: A physician can disclose HIV status in the following circumstances:

- Disclosure to a "contact" (sex partner or spouse of infected individual; person identified as having shared needles or syringes with infected individual; or a person who the individual may have exposed to HIV under circumstances that present a risk of transmission); or

- Disclosure to a public health officer (mandatory);

- Disclosure is medically appropriate; there is a significant risk of infection to the contact; the physician has counseled the infected individual about the need to notify the contact; and the physician has informed the infected individual of his intent to disclose to the contact and responsibility to report the individual's case to the public health officer.

    - If the individual expresses a preference for disclosure to the contact by a public health officer, as opposed to the physician, the physician shall honor such preference.

- Disclosure to a person known to the physician authorized by law to consent to health care for an infected individual when the physician reasonably believes that (1) disclosure is medically necessary to provide timely care and treatment for the infected individual and (2) after appropriate counseling about the need for disclosure, the individual will not disclose the information ***provided that*** the physician shall not disclose if disclosure would not be in the best interest of the individual or the individual can consent to appropriate care and treatment.

d. What happens if you get it wrong?

1. *Doe v. Roe*, 190 A.D.2d 463 (4th Dep't 1993): Plaintiff went to defendant doctor's office and told him that he was HIV positive and asked him to keep that information confidential because he was concerned that release of the information could jeopardize his employment. Defendant orally agreed to keep it confidential. After the consultation, plaintiff filed a claim in PA for worker's compensation benefits. The worker's compensation bureau issued a subpoena to the defendant requesting that he appear at a hearing and bring all medical reports or records relating to treatment of plaintiff. The attorney representing plaintiff's employer sent the subpoena to the defendant, along with a medical report, including a paragraph authorizing a treating physician to release medical information about the claim to the worker's compensation board. The attorney's letter advised the defendant that he need not appear at the hearing, if he submitted the requested documents directly to the attorney. Defendant forwarded his chart regarding plaintiff to the attorney, which included a reference to plaintiff's HIV positive status. Plaintiff filed suit. On appeal, the court found that plaintiff had the right to maintain a private cause of action against his doctor for disclosing his HIV status in violation of the Public Health Law. The court rejected the argument that the medical authorizations were valid because, under the Public Health Law, the release had to be dated, must specify to whom disclosure is authorized, the purpose of the disclosure, and the time period that the release is effective. The authorizations relied upon by the doctor were not dated and did not indicate a time period of effectiveness. Nor did the subpoena authorize the disclosure. The subpoena was issued in PA and had no effect on a NY doctor.

2. *Anderson v. Strong Mem. Hosp*., 140 Misc. 2d 770 (Sup. Co. 1988) *aff'd in relevant part* 151 A.D.2d 1033 (4th Dep't 1989): Plaintiff was at Strong Hospital's infectious disease unit and asked by a nurse if he would permit a newspaper reporter to take his picture. Plaintiff was assured by both the nurse and defendant doctor that the picture would be taken in silhouette form so that he wouldn't be recognized. He agreed. Plaintiff claimed he was not aware of the purpose of the photograph and believed it was only for internal purposes. Two days later, the picture was on the front page of the local news section under an article called "Aura of urgency cloaks UR's research on AIDS." Plaintiff claimed that he was identifiable from the photograph and that the article strongly implied that he had AIDS. He sued the hospital and the doctor for beach of the physician-patient privilege, and the court denied their motion to dismiss that claim. It found that the fact that a person received

treatment is protected by the privilege and it was that information that was improperly disclosed.

B. Physicians and Medical Marijuana

a. Fact Pattern: A doctor asks you to advise him as to whether he can prescribe medical marijuana in New York. What can you tell him?

b. Relevant Rules

1. New York Law. Physicians licensed to practice in New York can "certify" a patient for medical marijuana.

- Physicians must be licensed and practicing in NYS; must be qualified to treat a "serious condition;" and have completed a DOH course and registered with the department. N.Y. Public Health Law § 3360.

- "Certified patients, designated caregivers, practitioners, registered organizations and the employees of registered organizations shall not be subject to arrest, prosecution, or penalty in any manner, or denied any right or privilege, including but not limited to civil penalty or disciplinary action by a business or occupational or professional licensing board or bureau, solely for the certified medical use or manufacture of marihuana, or for any other action or conduct in accordance with this title." N.Y. Public Health Law § 3369.

2. Federal Law. Marijuana is a Schedule I controlled substance and ***has no medical use***. 21 U.S.C. § 812. And there is no "medical necessity" exception to the federal prohibition on marijuana. *United States v. Oakland Cannabis Buyers' Co-op*., 532 U.S. 483 (2001).

- Since December 2014, congressional appropriations riders prohibit the use of DOJ funds to prevent states with medical marijuana programs from implementing state laws. This rider is set to expire on February 8, 2018.

- On January 4, 2018, AG Sessions rescinded previous guidance specific to marijuana enforcement, including the memorandum issued by Deputy Attorney General James Cole in 2013.

- The Cole memorandum made clear that, in light of state laws that legalize marijuana, enforcement by state and local authorities, as opposed to the federal government, was generally appropriate in the absence of a federal enforcement priority.

3. Ethics Opinions - Can lawyers represent physicians with respect to medical marijuana?

- NY Rules of Professional Conduct 1.2(d): "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, except that the lawyer may discuss the legal consequences of any proposed course of conduct with a client."

- NYS Bar Opinion 1024: A lawyer can assist a client with respect to conduct that will comply with state medical marijuana law. *But this opinion was based, in part, on the DOJ guidance restricting federal enforcement of the marijuana prohibition as long as entities act in accord with the state regulatory regime.*

II. <u>Representing Lawyers</u>

A. Civil Context

a. Fact Pattern: Can you represent an attorney who is currently representing, or has formerly represented, an adversary of your client?

b. Relevant Rules

- NY Rules of Professional Conduct, Rule 1.7 Conflict of Interest: Current Clients

  (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:

  (1) the representation will involve the lawyer in representing differing interests; or

(2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing

- NYS Bar Opinion 579 – An attorney for a party in a pending lawsuit can simultaneously represent counsel for the adverse party in an unrelated litigation, as long as there is full disclosure to the clients of both lawyers in the litigation in which they are adverse and both lawyers believe there will be no adverse effect on their professional judgments. The Opinion cautioned that "it must be apparent that representation of Attorney B will not call upon either attorney to reveal or use any confidences or secrets of the existing clients . . . .".

c. Relevant Case Law

- *Adelman v. Adelman*, 561 So.2d 671 (Fla. App. 1990): Law firm representing husband in marriage dissolution action also represented ex-lawyer of wife in legal malpractice action arising from dissolution action. The court upheld the firm's disqualification from representing the husband in the marriage action, holding that, "by virtue of his representation of the opposing party's ex-lawyer in the malpractice action, [he has access] to confidential communications between the opposing party and her ex-lawyer in the marriage dissolution action."

- *Estate of Re v. Kornstein Veisz & Wexler*, 958 F. Supp. 907 (S.D.N.Y. 1997): Plaintiffs brought a breach of fiduciary duty claim against the attorneys for Joseph Re (who died during the lawsuit). Defendants represented Re, a former partner at Bear Stearns, in an arbitration against Bear Stearns relating to Re's removal from the partnership. Bear Stearns' corporate counsel was Paul Weiss, and Paul Weiss referred a significant amount of work to defendants, and a Paul Weiss partner was a witness at the arbitration. Plaintiffs argued that defendants' relationship with Paul Weiss posed a conflict of interest such that defendants should have informed Re of their association with that firm. The court denied defendants' summary judgment motion on their breach of fiduciary duty claim, finding that their referral relationship with Paul Weiss – on the order of $500,000 over several years – could allow the jury to conclude that defendants should have told Re about their relationship with Paul Weiss.

B. Criminal Context

a. Fact Pattern: A murder defendant walks into his attorney's office and gives him the murder weapon and tells him to keep it. What do you advise the attorney to do?

b. Relevant Rules

1. ABA Model Rule 3.4(a): A lawyer shall not unlawfully obstruct another party's access to evidence or unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act.

- Comment 2: "Applicable law may permit a lawyer to take temporary possession of physical evidence of client crimes for the purpose of conducting a limited examination that will not alter or destroy material characteristics of the evidence. In such a case, applicable law may require the lawyer to turn the evidence over to the police or other prosecuting authority, depending on the circumstances." (emphasis added)

2. ABA Criminal Justice Standards for the Defense Function, Standard 4-4.7, Handling Physical Evidence With Incriminating Implications (excerpts)

> (b) *Permissible actions of the client*: If requested or legally required, defense counsel may assist the client in lawfully disclosing such physical evidence to law enforcement

authorities. Counsel may advise destruction of a physical item if its destruction would not obstruct justice or otherwise violate the law or ethical obligations. Counsel may not assist the client in conduct that counsel knows is unlawful, and should not knowingly and unlawfully impede efforts of law enforcement authorities to obtain evidence.

(d) Receipt of physical evidence: Defense counsel should not take possession of such physical evidence, personally or through third parties, and should advise the client not to give such evidence to defense counsel, except in circumstances in which defense counsel may lawfully take possession of the evidence. Such circumstances may include:

(i) when counsel reasonably believes the client intends to unlawfully destroy or conceal such evidence;

(ii) when counsel reasonably believes that taking possession is necessary to prevent physical harm to someone;

(iii) when counsel takes possession in order to produce such evidence, with the client's informed consent, to its lawful owner or to law enforcement authorities;

(iv) when such evidence is contraband and counsel may lawfully take possession of it in order to destroy it; and

(v) when defense counsel reasonably believes that examining or testing such evidence is necessary for effective representation of the client.

(e) Compliance with legal obligations to produce physical evidence: If defense counsel receives physical evidence that might implicate a client in criminal conduct, counsel should determine whether there is a legal obligation to return the evidence to its source or owner, or to deliver it to law enforcement or a court, and comply with any such legal obligations. A lawyer who is legally obligated to turn over such physical evidence should do so in a lawful manner that will minimize prejudice to the client.

(f) Retention of producible item for examination. Unless defense counsel has a legal obligation to disclose, produce, or dispose of such physical evidence, defense counsel may retain such physical evidence for a reasonable time for a legitimate purpose. Legitimate purposes for temporarily obtaining or retaining physical evidence may include: preventing its

destruction; arranging for its production to relevant authorities; arranging for its return to the source or owner; preventing its use to harm others; and examining or testing the evidence in order to effectively represent the client.

- Restatement (Third) Law Governing Lawyers § 119, With respect to physical evidence of a client crime, a lawyer:

  (1) may, when reasonably necessary for purposes of the representation, take possession of the evidence and retain it for the time reasonably necessary to examine it and subject it to tests that do not alter or destroy material characteristics of the evidence; but

  (2) following possession under Subsection (1), the lawyer must notify prosecuting authorities of the lawyer's possession of the evidence or turn the evidence over to them.

- New York Rules of Professional Conduct, Rule 3.4(a): A lawyer shall not suppress any evidence that the lawyer or the client has a legal obligation to produce or conceal or knowingly fail to disclose that which the lawyer is required by law to reveal.

c. The Distinction between Concealment/Suppression and Failure to Affirmatively Disclose

1. Courts have generally concluded that a criminal defense attorney has a legal and ethical obligation ***not*** to conceal or suppress physical evidence coming into his or her possession as a direct or indirect result of client communications.

- *In re Ryder*, 263 F. Supp. 360, 369 (E.D. Va. 1967), *aff'd* 381 F.2d 713 (4th Cir. 1967): Attorney took possession of stolen money and shotgun, knowing that the money was stolen and the gun was used in an armed robbery. According to the court, "[i]n helping Cook to conceal the shotgun and stolen money, Ryder acted without the bounds of law. He allowed the office of attorney to be used in violation of law." Thus, the court suspended the attorney for 18 months.

- *People v. Investigation into a Certain Weapon*, 113 Misc. 2d 348 (Sup. Co. Kings Cty. 1982): Defendant

was alleged to have killed a police officer, and the gun used in the murder was recovered without the clip and bullets, which were given to defendant's attorney. The court ordered a subpoena served on defendant's attorney and the attorney moved to quash, claiming that any property or information he received were a result of privileged communications with his client. The court found that the transfer of the physical items was covered by the attorney-client privilege. But "[t]here can be no doubt that it is an abuse of a lawyer's professional duties to knowingly take possession of and secrete the instrumentalities of a crime. . . . Public policy demands that this tangible property, for which there are reasonable grounds to believe may have been involved in a crime should be made available to the grand jury for its investigation." The court, however, recognized that the attorney should not have to testify that he received the evidence from defendant.

2. But, there is some authority for the proposition that an attorney can return the evidence to its source.

- *Hitch v. Pima County Superior Court*, 146 Ariz. 588 (Az. 1985): Defendant was indicted for murder and was awaiting trial. The police interviewed his girlfriend, who told them that the victim had a certain wristwatch before his death. An investigator for the Public Defender's office spoke with the defendant's girlfriend, who told him that she found the wristwatch in defendant's jackets and said that she didn't want to turn the evidence over to the police. Defendant's attorney told the investigator to get the watch and bring it to the attorney because he wanted to examine it to see if it was the one belonging to the victim and he was afraid that it would be destroyed. The attorney then filed a petition with the Ethics Committee as to his obligations and, after the committee said that he had a legal obligation to turn over the watch to the state, he filed a petition in court. The court held that, if the attorney reasonably believes that evidence will not be destroyed, he can return it to the source, explaining the laws of concealment and destruction. But, because the attorney believed in this case that the evidence would be destroyed, it must be turned over to the prosecution.

3. But does an attorney have an affirmative obligation to disclose evidence against his or her client that is not in the attorney's possession? Generally, no.

    - *People v. Belge*, 372 N.Y.S.2d 798 (Co. Ct. 1975): An attorney representing a murder defendant found a corpse of one of his victims. The attorney did not tell the authorities, but the fact came out during trial as part of the defense of insanity. The attorney was then criminally charged for failing to bring the corpse to the attention of the authorities. He moved to dismiss the indictment on the basis that a confidential, privileged communication existed between him and the defendant, which should excuse him from making a full disclosure. The court dismissed the indictment – "Attorney Belge, as Garrow's attorney, was not only equally exempt [from disclosure], but under a positive stricture precluding such disclosure….The criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney."

4. Except when there is an ongoing crime…

    - *Matter of Doe*, 420 N.Y.S.2d 996 (Sup. Ct. 1979): Defendant agreed to enter a psychiatric hospital and, after an appropriate period, would be released for sentencing. But the defendant left the hospital without permission and contacted the attorney who represented her in the plea bargaining. The attorney – without divulging the defendant's location – notified the court that he had information on her whereabouts. The attorney testified before the grand jury and was asked about the client's locations, and he refused to answer. The court required him to answer and distinguished *Belge* by noting that this was a crime in progress.