

Clinical and Legal Ethics in an Age of Patient Choice, Medical Marijuana and End of Life Options

Driving Results

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Simione Healthcare Consultants advances quality and cost efficiency, providing reliable experts, technology and tools to grow and improve home- and community-based services.



Presentation Summary

Today's dynamic healthcare landscape continues to create legal and ethical issues for healthcare providers and their attorneys. State and federal laws conflict in issues of recreational and medical marijuana and end of life options. A person or organization's values will dictate how they view the ethical issues in these matters, including the attorney who provides advice to providers. This presentation will provide a brief history of the intersection of legal ethics and bioethical principles, such as autonomy. Discussion of the ABA Model Rules of professional conduct will highlight issues in healthcare such as medical marijuana and end of life issues.

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Learning Objectives

Participants will:




- State the bioethical principles that affect your client healthcare providers' policies and practices
- Identify the ABA Rules that address the lawyer as counselor and advisor in light of today's healthcare ethical dilemmas
- Discuss process of facilitating discussion regarding ethical dilemmas
- Identify practices to assist clinicians and other agency employees in dealing with ethical issues in the workplace and in providing care to patients

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The Law



- In our society, laws are written:
 - Statutory
 - Regulatory
 - Common law (case law)
 - Ballot Measures/Initiatives
- Alleged violation of laws are dependent on facts
- Accountability and punishment
- Administrative “punishment”
 - Medicare/OIG Civil Monetary Penalties
 - Corporate Integrity Agreements (CIA)

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Ethics Defined

- The word ethics comes from the Greek word ethos which means “custom” or “character”
- Principle of “right” or “wrong” conduct
- A set of rules or conduct governing a profession or business: ABA Model Rules of Professional Conduct for lawyers; ANA Code of Ethics for Nurses; AMA; Corporate Standards or Code of Conduct
- Set of social or religious norms and a way of life


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Who Decides




- Ethical principles or judgments are closely related to moral judgments or principles; morals are a *value*
 - Ethics: based on values of individual, community or society
 - Values may differ in people... cultures....communities...countries

Notes: Laws are often based on a group of people’s ethical values ---- Example: U.S. Democracy





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Values Defined



- A principle, quality or standard considered desirable and important
- Many types of values:
 - Social: i.e. social programs, security...
 - Religious: charity, sanctity of life...
 - Legal: order, justice, equality, freedom
 - Economic: frugality, financial security...
 - Cultural: sanctity of land, caring for elderly
 - Environmental: clean air, carpooling, other








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Values (continued)

- Corporation/Agency/Providers: quality, leadership, teamwork
- Self Determination: autonomy, respect, responsibility, right to consent/refuse medical /health care/Medical Marijuana
- Aid-in-Dying, Other...









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Legal versus Ethical

- Difficult issues:
 - What is ethical may be illegal
 - What is legal may be unethical
- Less complicated issues:
 - Legal and ethical
 - Illegal and unethical
- Examples





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Issues with Legal and Ethical Considerations & Conflicts

- ACA: birth control
- Abortion
- Gun Control
- Immigration
- Medical Marijuana/Recreational
- Gay Rights/Marriage
- End-of life:
 - Informed Consent
 - Autonomy
 - Withdrawing & withholding treatment
 - Assisted Suicide
 - Aid-in-Dying

The diagram consists of a central triangle with 'Culture' at the top, 'Process' on the left, and 'People' on the right. Below this triangle is a box labeled 'Organization'. To the left of the triangle is an image of a hand holding a blue structure. Above the triangle is a magnifying glass over a document labeled 'ETHICS'.

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Ethical Principles in Healthcare

- Principles:
 - Respect for Autonomy
 - Non-maleficence: do no harm
 - Beneficence: do good, duty to help
 - Distribution of Justice

The image shows a caduceus (a staff with two snakes entwined and wings at the top) with the word 'First' written above it and 'Do No Harm' written below it.

Beneficence / Nonmaleficence

- **Beneficence**: The duty to do and to maximize good
- **Nonmaleficence**: the duty to do no harm or to minimize harm in pursuing a greater good

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Ethics & Informed Consent

- History: Case 1914
 - Pre-World War II
 - Post World War II
 - Mid-1960's-1970's:
 - Abuses in human experimentation exposed
 - Karen Ann Quinlan Case, 1976
 - 1976-1988: by one count, there were 54 reported decisions involving the right to refuse life-sustaining treatment

The image is a portrait of a man in a dark military-style uniform with epaulettes, sitting at a desk and reading a document.

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Landmark Case: Nancy Cruzan

- Right to consent and right to refuse treatment evolves...
- Cruzan case: 1980's
 - Car Accident: coma to persistent vegetative state
 - Feeding tube inserted for hydration and nutrition
 - Parents claim a "somewhat serious conversation" with Nancy in which she stated that she did not want to be kept alive unless she could have a halfway normal life
 - U. S. Supreme Court: "clear and convincing evidence" needed; Missouri to decide
 - 1990-Missouri courts: friends testified re: Nancy's wishes; Nancy allowed to die



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Compliance with the Patient Self-Determination Act

- Federal Patient Self-Determination Act 1991
- State laws follow:
 - Living Wills, Health Care POA's, also known as advance directives—(Legal/ethical resolution? Allows for decision-making based on values)
 - Terry Schiavo Case occurred after state and federal laws allowing advance directives—
 - Query: how many of you have advance directive?



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Health Care Decisions

- State Law
 - Patient has capacity
 - Legal or natural guardian
 - Appointed agent
 - Health care surrogate based on state law—order of priority
 - Health care provider based on futility issues...

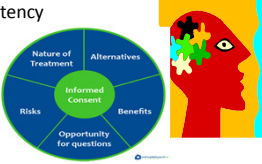


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Ethics of Informed Consent

- Consent: Informed and Implied
- Informed Consent and Refusal of Care
 - Capacity
 - Competency




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Surrogate Decision-Making

- Surrogate Decision-makers have an obligation to make decisions based on:
 - Substituted Judgment
 - Best Interests
 - Informed Refusal of Care



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American Bar Association (ABA) Model Rules of Professional Conduct 1983

The Client-Lawyer Relationship addresses issues of:

- Competence
- Scope of Representation
- Communications
- Diligence
- Fees
- Confidentiality
- Conflict of Interest
- Duties to Clients and former clients

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ABA Model Rule: 2.1 Advisor

The *Model Rules* section titled *Counselor* discusses the lawyer's role as an advisor:

Rule 2.1 Advisor

- 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.



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Lawyer as Advisor: Considerations



When a healthcare provider organization requests the expertise of a lawyer, that lawyer may need to investigate the issue on the premises of the provider and the lawyer may be required to interview managers and staff.



In the course of the necessary inquiry into the matter, the lawyer may encounter corporate ethical issues or issues regarding bioethics matters.



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Lawyer as Advisor: Considerations

Corporate or provider concerns may include appearances of impropriety, fiduciary duties, conflicts of interest, confidentiality, or other.

In the healthcare setting, bioethical conflicts regarding informed consent or end-of-life issues may come to light in an investigation.

How does the lawyer deal with these issues if they are not related to the direct legal matter inquired about by the client organization?




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Lawyer as Advisor: Considerations

- The lawyer should have a clear understanding of the issues and be able to differentiate between the legal concerns and the ethical considerations.
- The lawyer should advise the client regarding the legal issues and the remedies or course of action available.
- The lawyer should clearly define what s/he believes are ethical issues. If the lawyer believes the ethical concerns may evolve into legal issues if not addressed, s/he should state this and provide rationale or examples.

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ABA Comments on Rule 2.1 Advisor

These comments, in whole or in part, are taken directly from the ABA website under the *Model Rules of Professional*

Scope of Advice: Comment One

[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.


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ABA Comment to Rule 2.1: Scope of Advice

Scope of Advice: Comment [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.

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Rule 2.1 Considerations

- While moral and ethical considerations may impact a lawyer's advice, the lawyer should not impose his or her morals or values on a particular individual or entity.
- If the lawyer is representing an organization and s/he is familiar with the organization's values and code of conduct, the lawyer should consider these ethical standards when providing legal advice.

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ABA Comment to Rule 2.1 Scope of Advice

Scope of Advice: Comment [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.

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ABA Comment to Rule 2.1 Scope of Advice

Scope of Advice: Comment [4] Matters that go beyond strictly legal questions may also be in the domain of another profession.; business matters can involve problems within the competence of the accounting profession or of financial specialist. 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.

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ABA Comment Rule 2.1: Offering Advice

Offering Advice

Comment [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.

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Considerations Under Rule 2.1

- The healthcare lawyer's role can become more complicated as s/he navigates a complex organization.
- The lawyer should be clear with the company's employees and staff that the lawyer's client is the organization.
- In conferring with various executives, managers and employees, the lawyer may discover issues not raised by the company but related to the representation.
- For example-- the motives, behaviors, or a course of action of an executive or manager may be adverse to the organization.

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ABA Rule 2.4: Lawyer Serving as a Third- Party Neutral

(a) A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them. Service as a third-party neutral may include service as an arbitrator, a mediator or in such other capacity as will enable the lawyer to assist the parties to resolve the matter.

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Rule 2.4 Lawyer Serving as Third-Party Neutral

(b) A lawyer serving as a third-party neutral shall inform unrepresented parties that the lawyer is not representing them. When the lawyer knows or reasonably should know that a party does not understand the lawyer's role in the matter, the lawyer shall explain the difference between the lawyer's role as a third party neutral and a lawyer's role as one who represents a client.



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Case Studies: Facts/Positions

- You are outside counsel to a regional **Nursing Home (HOME)** in Washington State
- **Nursing Home** is a Faith-Based organization and they have a policy that will not allow the physician Medical Directors to certify medical marijuana for residents who reside in HOME
- Likewise **Home** does not allow patients to receive or use a prescribed end-of-life lethal dose of medication per Oregon law
- **Nursing Home** has a contract with a local **Hospice** who sees patients in the patient's home (the **Nursing Home**)
 - The Hospice policies allow the hospice physician and nurses to work with patient who have chosen options such as medical marijuana use and who may choose an end of life option (prescription for lethal dose).
 - What is patient is a veteran? Implications?



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Case Studies and Facts

- Hospice nurse is assigned to a patient in HOME who has bone cancer and who uses medical marijuana for pain control
- Nurse at the HOME refuses to take care of patient who is using marijuana because of her personal values
- Patient wants her attending Hospice *attending* physician to write lethal dose for "when the time comes"
- What if Patient resides in a **Nursing Home** with policies and procedures that allow patients to exercise these options but nurse will not take care of patient
- What if patient has a stash of medical marijuana he is using for a recognized diagnosis under Oregon law---but he does not have a medical marijuana card
- What if family member does not want patient to have lethal dose



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Marijuana Basics

- Controlled Substance I
- The Federal Government continues to deem it illegal
- US Food and Drug administration has not recognized or approved the Marijuana plant as medicine
- Limited medical studies for efficacy
- But the studies of the chemicals (Cannabinoids) have led to two FDA approved medications that contain Cannabinoid in pill form
- As of January 2019, 33 states plus Washington D.C. have legalized medical marijuana (and in 13 countries)
- Recreational Marijuana is legal in 10 states plus DC; other states have decriminalized marijuana
- Arguments for legalization: new source of tax revenue

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Controlled Substance Act (CSA) Statute

- The CSA Title II of the Comprehensive Drug Abuse Preventions and Control Act of 1970 is the federal U.S. drug policy under which the manufacture, importation, possession, use and distribution of certain narcotics, stimulants, depressants, hallucinogens, anabolic steroids and other chemicals
- Legislation created the five schedules or classification
 - The DEA and The FDA determine which substances are added to or removed from the various schedules
 - Schedule I drugs (Examples: Marijuana, Heroin, LSD) are defined by:
 - High potential for abuse
 - No currently accepted medical use for treatment in US
 - Lack of accepted safety for use of the drug or other substance under medical supervision.
 - No prescriptions may be written

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Legal Use of Adult Recreational Marijuana

- Ten States and the District of Columbia have legalized marijuana for adult recreational use:
 - 2012 Colorado, Washington & District of Columbia
 - 2014 Alaska & Oregon
 - 2016 California, Massachusetts, Nevada
 - 2018: Michigan, Maine---over legislative override of Governor's veto
 - 2018: Vermont (first state to legalize it through the legislative process rather than a ballot initiatives
- In 2018—24 additional states considered bills or constitutional initiatives that would legalize marijuana adult use--- but none passed
- Study bills are in effect in several states to study the legalization, regulation and taxation of marijuana



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Issues in Legalizing Medical or Recreational Marijuana

- Decriminalization: 23 states and the DC have decriminalized small amounts of marijuana-- often one ounce or less. It may be a civil or local infraction but not a state crime; some states may impose a low-level misdemeanor
- Other state actions involve reduced criminal penalties for marijuana convictions. This follows a trend to reduce adverse consequences of some marijuana crimes
- Expungement of certain marijuana convictions
- Safety issues regarding dosage, route of ingestion and concerns regarding addiction

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The NCSBN National Nursing Guidelines for Medical Marijuana

- Journal of Nursing Regulation: The Official Journal of the National Council of State Boards of Nursing
 - Volume 9, Issue 2, July 2018 Supplement (Email me if you would like an E-Copy)
- Nurse Practitioners may *certify* patients for medical marijuana if it is legal in the state, they are practicing
 - APRN should have working knowledge of current state of legalization and knowledge of the jurisdiction's Medical Marijuana Program (MMP)
 - APRN should have an understanding of: the endocannabinoid system, cannabinoids and the interactions between them, the pharmacology and research associated with the medical use of cannabis; Recognize signs/symptoms use disorder, withdrawal and safety for patient use of cannabis

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The Future: Aid-in-Dying?

- **Oregon:** "Death with Dignity Act" 1997 allowed terminally ill patients to be prescribed a lethal dose. Brittany Maynard. Supreme Court Ruling in 2006 affirmed.
- **Montana:** Note 3: 12/31/09 State's living will act permits a basis for aid-in-dying. Consent of patient can be used as a defense. Court decision *Baxter v. Montana*.
- **The Washington** "Death with Dignity Act": passed by general Election in November 2008 by a margin of 58% to 42%.
- **Vermont:** First to pass through legislative action. May 2013— " Patient Choice and Control at End of Life."
- **California:** Second state to pass via legislative action. Fifth state to legalize: "End of Life Option Act 2015"; implemented June 2016
- **Colorado: 2016** --CO voters approved Proposition 106 "Access to Medical Aid in Dying."
- **Washington D.C.:** D.C. Death with Dignity Act 2016
- **Hawaii:** Our Care, Our Choice Act (2018/2019)
- New Jersey (Aid in Dying for the Terminally Ill Act; 2019
- **New Mexico case and 2017 /2019 Legislation**
- **Many other states introducing legislation--over 20...**



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End of Life Options

- State Laws: End of Life Options; Death with Dignity, Aid-in-Dying, Physician-Assisted dying, other
- Distinguish from Assisted Suicide laws
- The patient has to be competent and able to administer the medication to him/herself
- Some state laws have built in safeguards such as: Physician must certify that the patient has six months or less to live if illness runs its normal course; two physicians must certify; waiting periods; other



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Healthcare Provider Considerations

In States where End of Life options acts have passed must consider:

- Implications of State and Federal law. For instance, Veterans Administration is governed by Federal Law
- Agency/Provider policies and procedures in light of *End of Life Laws*
- Faith-based providers
- Employee beliefs and actions
- Documentation



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Bioethics Discussions

- Does agency have an ethics committee (may be an ad hoc committee) for bioethics discussion?
 - May discuss values in light of:
 - **Medical issues:** current condition, prognosis,
 - **Patient wishes/preferences:** Surrogate decision-maker's knowledge of patient wishes, or if unknown, best interests
 - **Patient quality of life issues**
 - **Outside issues:** financial resources, legal, family, other
- See Atul Gawande's book titled: *Being Mortal*
See Albert Jonsen's book *Clinical Ethics*, All editions; Eighth Edition 2015 , McGraw-Hill, Inc.



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Corporate/Business Ethics

- Do your Provider clients have a Corporate Code of Conduct?
 - Ethical issues include but are not limited to:
 - Conflicts of Interest Disclosure
 - Confidentiality: Patient, Business, Employee
 - Appearances of impropriety
 - Managing people
 - Bullying; harassment; gender
 - Disciplinary issues
 - Working environment
 - Billing and Coding/Licenses/Certifications
 - Referrals /Kickback issues/Abuse and Neglect



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Opportunities to Guide

- As Counselors-at-Law, healthcare attorneys have a unique opportunity to provide both legal and ethical guidance to their clients about healthcare issues, including but not limited to corporate issues and bioethical concerns.
- Whether a lawyer represents post-acute care or long-term care organizations, physician groups, or individuals, he or she can guide, educate, and lead clients in conversations on ethical matters while being cognizant and aware of his/her own obligations under the Model Rules of Professional Conduct.



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Corporate & Bioethics Discussions

- Review: Facilitate discussion of values with all parties involved
- May use outside mediator or internal bioethics/corporate ethics consultants




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QUESTIONS

?



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