

Ethics in Health Law

Real-World Dilemmas and Best Practices

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Katie Miller (kmiller@hallrender.com)

Lindsay McManus (lmcmamus@hallrender.com)

Joe Wolfe (jwolfe@hallrender.com)

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Session Agenda



- **Part I: Applicable Health Care Laws**
- **Part II: The Rules of Professional Conduct**
- **Part III: Artificial Intelligence Implications**
- **Part IV: Hypothetical Ethical Scenarios**

Part I: Applicable Health Care Laws

Applicable Health Care Laws

Anti-Kickback, Fee-Splitting and Patient Brokering

Physician Self-Referral

False Claims Act

Compliance Program Guidance

Contracting, Integration, Tax, and Anti-Trust

Reimbursement and Managed Care

Patient Rights, Informed Consent, Advanced Directives and Bioethics

Privacy, Confidentiality, HIPAA and Medical Records

Licensure, Certification and Accreditation, Certificates of Need

Disciplinary Actions, Reporting Requirements, Administrative Law / Procedures and EMTALA

Credentialing, Professional Peer Review, Medical Staff Governance and Risk Management

Applicable Health Care Laws

Academic Medical
Centers and
Teaching Hospitals

Behavioral Health

Business Law and
Governance

Fraud and Abuse

Health Care
Liability and
Litigation

Health Information
and Technology

Hospitals and
Health Systems

In-House Counsel

Labor and
Employment

Medical Staff,
Credentialing, and
Peer Review

Payers, Plans, and
Managed Care

Physician
Organizations

Post-Acute and
Long-Term Services

Regulation,
Accreditation, and
Payment

Tax and Finance

Part II: The Rules of Professional Conduct

Rules Focused on the Attorney-Client Relationship

Competence

Objectives and Scope of Representation

Diligence

Communication

Fees and Costs for Legal Services

Confidentiality of Information

Conflicts of Interest
(current clients, business transactions, former clients, government officers, judges)

Organization as Client

Declining or Terminating Representation

Sale of Practice

Duties to Prospective Clients

Rules Focused on our Lawyer-Counselor Role

Lawyer as Adviser

Lawyer Serving as
Third-Party Neutral

Meritorious Claims,
Expediting Litigation,
Candor Towards the
Tribunal

Unrepresented
Persons

Law Firms, Partners,
Managers,
Supervisory and
Subordinate Lawyers

In House Counsel
Considerations

Advertising

Misconduct

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Part III: Artificial Intelligence Implications

ABA Ethical Guidance on Use of AI

- The ABA Standing Committee on Ethics and Professional Responsibility issued guidance in July 2024 covering the growing use of generative AI in the practice of law.
- It encourage lawyers to be mindful of a host of model rules, namely:
 - Model Rule 1.1 Competence
 - Model Rule 1.6 Confidentiality of Information
 - Model Rule 1.4 Communications

Model Rule 1.1 Competence

- Lawyers must provide competent representation to clients and exercise the “legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”
- Lawyers should understand “the benefits and risks associated” with the AI technologies used to deliver legal services to clients.
- Thus, lawyers need not become AI experts to use the tools in legal representation, but they must “have a reasonable understanding of the capabilities and limitations” of the tools they might use.

Model Rule 1.6 Confidentiality of Information

- Under this Model Rule, a lawyer using generative AI must be cognizant of the duty to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent.
- Other Model Rules require lawyers to extend similar protections to former and prospective clients' information.
- Before a lawyer enters information related to a client representation into an AI tool, they must assess the potential that the information entered into the tool will be “disclosed to or accessed by” other individuals inside and outside the firm.

Model Rule 1.4 Communications

- Lawyers have a duty to communicate with their clients, which includes “the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.”
- Particularly relevant to AI, the Model Rule states that a lawyer shall “reasonably consult” with the client about the means by which the client’s objectives are to be accomplished.
 - This likely includes the use of AI, if significant/relied upon

Use of AI – Practice Takeaways

- AI can be an extremely helpful and efficient tool!
- Have a reasonable understanding of the limitations of the AI tool you are using
- Be mindful not to input confidential information into the AI tool
- Communicate openly about your use of AI



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Part IV: Hypothetical Ethical Scenarios

Ethical Scenario #1: Hypothetical Hospital

Hypothetical Hospital ("Hospital") is a tax-exempt acute care hospital.



We regularly represent Hospital on compliance and physician contracting matters and have a good working relationship with their legal counsel.

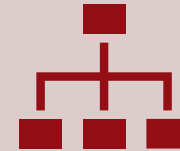


Legal counsel has led Hospital's legal and compliance functions since Hospital's compliance officer resigned five years ago.



Counsel leaves a voicemail indicating there is a potential compliance issue.

Ethical Scenario #1: Initial Questions




Should we have concerns about the structure of the engagement?




What should we do?

Ethical Scenario #1: Additional Facts

We talk to legal counsel. She shares her concerns about a call coverage agreement, predating her time at Hospital, with an independent orthopedic surgeon.



Hospital pays the orthopedic surgeon significantly more than it pays for call for other specialties, and the records show that Hospital's management sidestepped the normal FMV and contracting processes back when the arrangement was initially approved and entered into. Regardless, management does believe that the payment amounts were appropriate and consistent with FMV.



Hospital has received several anonymous reports about the arrangement being over FMV through its compliance hotline.


Ethical Scenario #1: Additional Questions

Do we have the skill and experience necessary for this representation?


What should we do?

Ethical Scenario #1: Additional Facts

To further complicate things, the orthopedic surgeon also serves as the Chair of Hospital's Board of Directors and was just reelected for an additional three-year term.



The Board's Compliance Committee has not been very active during legal counsel's time with Hospital and the board and committee members have not received regular compliance training.



Legal counsel cautions us that management has been reluctant to look into the arrangement because of the Chair's involvement and due to the potential disruption to the organization.

Ethical Scenario #1: Additional Questions



How could we navigate this complexity?



Who is our client?

Ethical Scenario #1: Additional Facts

Based on the investigation and potential whistleblower risk, legal counsel believes a self-disclosure of the situation may be the best course of action.

The surgeon, in the role as Chair, has asked for a full briefing on the investigation and potential options.

Legal counsel also has indicated that any course of action, and any settlement, must be approved by the full Board.

Ethical Scenario #1: Final Considerations

How should we bring
the situation to a
resolution?

Ethical Scenario #2

Hypothetical Hospital (“Hospital”) has an in-house legal department that routinely handles employment, compliance, risk management, and patient privacy matters internally, while using outside counsel for complex litigation or specialized regulatory issues.

A senior cardiologist files a formal complaint with the hospital’s compliance hotline, alleging the CMO has been pressuring physicians to refer cardiac patients to an imaging center in which he holds an ownership interest.

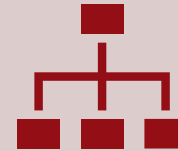
The General Counsel is asked by the Board’s Compliance Committee to look into the matter and provide a legal assessment.

The GC reports directly to the CEO of the Hospital, who has already expressed support for the CMO and stated that the issue “is probably a misunderstanding.”

The Hospital’s compliance officer believes the GC’s office should conduct interviews, but the Board Chair privately asks whether outside counsel might be more appropriate to ensure independence.

Question: What should the GC do??

Ethical Scenario #2: Initial Questions



Is there a conflict?



Should outside
counsel be
engaged?

Ethical Scenario #3: Use of AI in Practice


You represent a hypothetical Hospital ("Hospital") that is interested in creating a value-based arrangement with independent physicians.



The value-based arrangement will have, as a goal, improving the quality of services provided in the Emergency Department

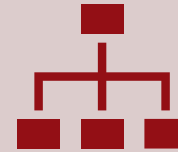


The operations team has asked that you assist in determining quality metrics under which the success of the value-based arrangement will be measured. They want to know what is “typical” in the industry.



How can you ethically use AI to help respond to the operations team?

Ethical Scenario #3: Initial Questions



What types of AI
can be used?



How can you
protect yourself
from an ethical
standpoint?

Example: Navigating AI Results

Perplexity cites the internet sources it pulls its information from, denoted by a number following the response

List quality metrics that can be used to improve the quality of care delivered in a hospital Emergency Department

Answer Sources · 10 Steps

Archives of Academic ...
Emergency Department
Quality Dashboard; a...

Emergency Medicine J...
Updated framework on
quality and safety in...

jointcommission.org
Emergency Department |
The Joint Commission

Slideshare
Quality Indicators in
Emergency Medicine | PPT...

Quality Metrics for Improving Care in the Emergency Department

A variety of quality metrics can be used to assess and improve the quality of care delivered in a hospital Emergency Department (ED). These metrics span domains such as patient flow, timeliness, safety, effectiveness, patient-centeredness, efficiency, and equity. Below is a structured overview of key metrics, drawing from leading frameworks and published research.

1. Patient Flow and Timeliness Metrics

- **Total number of ED visits:** Tracks overall demand and helps with resource planning ¹.
- **Number of patients discharged and type of discharge:** Indicates throughput and disposition patterns ¹.
- **Number of patients leaving without being seen:** High rates may signal long waits or dissatisfaction ^{1 2}.
- **Mean length of stay in ED:** Measures overall efficiency ^{1 3}.

Go deeper: try asking a followup question!

Ask anything...



Example: Navigating AI Results

The tool also has a separate “Sources” tab, where you can confirm the validity of the generated response

List quality metrics that can be used to improve the quality of care delivered in a...

Answer Sources · 10 Steps

Selected



1. Archives of Academic Emergency Medicine
pmc.ncbi.nlm.nih.gov/articles/PMC83...

Emergency Department Quality Dashboard; a Systematic Review of ...

Effective information management in the emergency department (ED) can improve the control and management of ED processes. Dashboards, known as data management tools, efficiently provide information and contribute greatly to control and management of ...



2. Emergency Medicine Journal : EMJ
pmc.ncbi.nlm.nih.gov/articles/PMC74...

Updated framework on quality and safety in emergency medicine

Quality and safety of emergency care is critical. Patients rely on emergency medicine (EM) for accessible, timely and high-quality care in addition to providing a 'safety-net' function. Demand is increasing, creating resource challenges in all ...



3. jointcommission.org
jointcommission.org/measurement/me...

Emergency Department | The Joint Commission

Reducing the time patients remain in the emergency department (ED) can improve access to treatment and increase quality of care. Reducing this time potentially improves access to care specific to the patient condition and increases the capability to provide additional treatment. The following are Emergency Department eQMs ...

Ethical Scenario #4

You have historically represented Hospital in contract negotiations and with compliance matters associated with referring physicians.

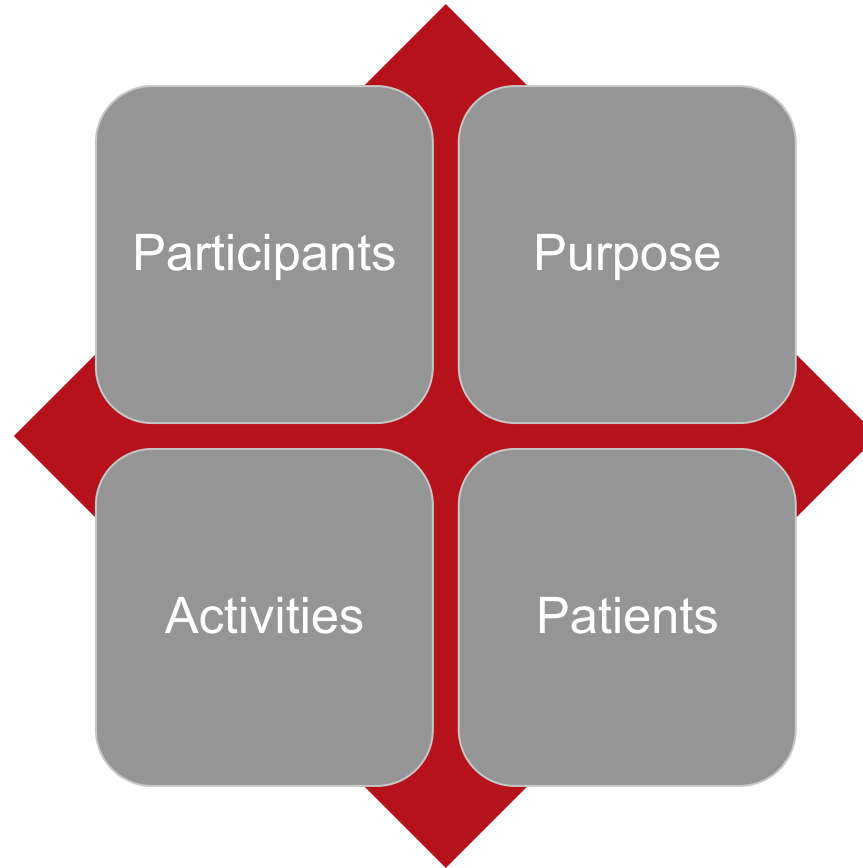
Hospital is exploring the termination of its co-management arrangement with Medical Group and development of a Value-Based Enterprise (“VBE”).

You are asked to consider compliance with the federal Stark Law, federal Anti-Kickback Statute, and any other applicable laws related to a potential VBE.

Hospital has historically relied upon the Stark Law’s PSA Exception and the Anti-Kickback Statute’s Personal Services Safe Harbor for its prior co-management arrangement and its team is not familiar with the VBE rules.

The scope of the VBE is anticipated to include the Medical Group’s performance of management, care coordination and quality improvement “value-based activities” in support of the Hospital’s cardiac program.

Ethical Scenario #4: Key VBE Components



Ethical Scenario #3: Key Questions



WHO IS OUR CLIENT?



HOW CAN WE MITIGATE RISK
UNDER THE VBE RULES?

Questions



Joe Wolfe

Attorney

jwolfe@hallrender.com



Katie Miller

Attorney

kmiller@hallrender.com



Lindsay McManus

Attorney

lmcmamus@hallrender.com



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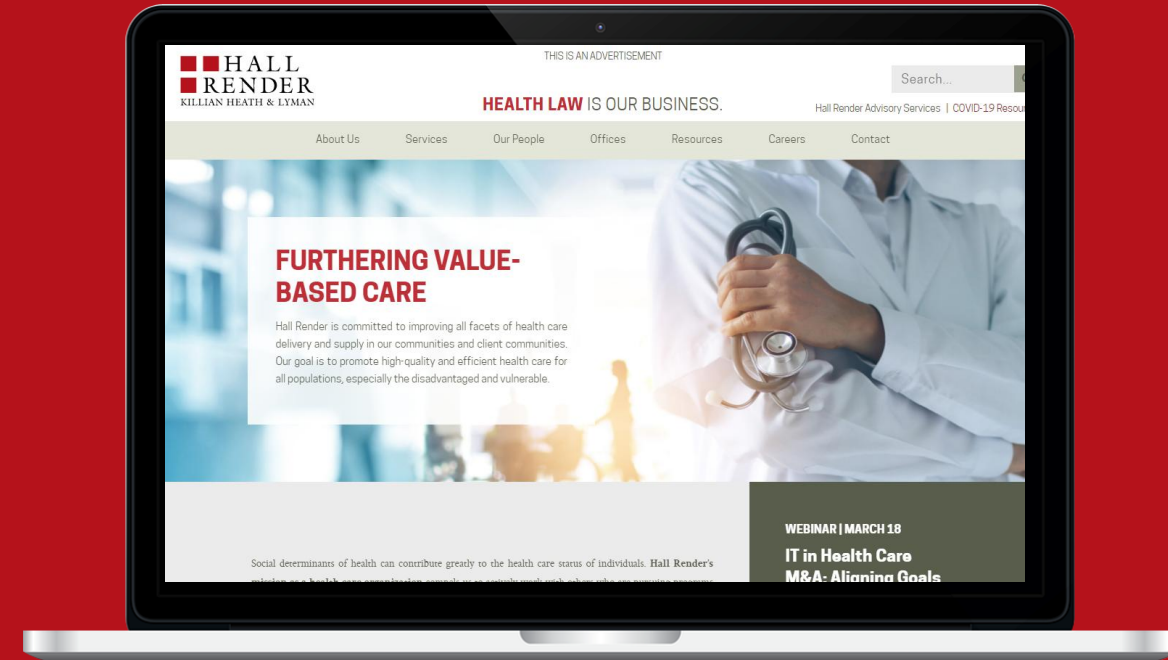
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