



# Ethical Issues in the Investigation and Prosecution of Civil and Criminal Actions

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# What's Wrong with Ethics?



# Clip from rainmaker on ethics

- What ethics?



# Goal

- Understand the statutes, ethic rules and cases that help guide attorneys and their staff in investigating and litigating cases on behalf of the State of Indiana



# Goals

- This presentation will discuss the ethical issues that arise in a civil and criminal investigations related to the delivery of healthcare services.
  - It will touch on interviewing corporate constituents and former employees,
  - speaking to unrepresented parties,
  - conflicts of interest,
  - malicious prosecution and abuse of process,
  - disclosure of exculpatory evidence, and
  - bad faith denial of claims.
- We will touch on regulatory guidance, attorney discipline actions, and real life ethical dilemmas faced by government and insurance attorneys working on cases that involve health care.



# Who is MFCU?

- Branch of AG
- Criminal Investigative agency
- 31 Full time investigators
  - Local and State law enforcement, FBI, RN, LPN, EMT, OMPP, DCF
  - Neglect/Abuse, Fraud Investigators and Auditors, Data Analysts, Licensing Analysts
  - Average case load of 17 open cases.
- 10 Attorneys
  - 3 Ex-deputy prosecutors, 5 Med. Lic. Lawyer
- 9 Offices
- Approx. 3800 complaints a year



# Our Authority

- Inspect and review original medical records and billing records without notice
- Subpoena original records for review and copying
- Prosecute provider fraud and patient neglect and abuse cases after referral from prosecutor
- Civil lawsuits for provider fraud and failure to provide services
- Prosecute licensure actions against Medicaid providers in front of the IPLA



# Goals and Accomplishments

- Create a safer medical environment
- Protect taxpayer funded Medicaid program financially
- 232 Criminal Convictions 2009-2016 relating to the delivery of healthcare
- \$285 Million in False Claim (Fraud) collections from 2009-2016





# Not so much...

- Not an agent of FSSA; Nothing I say here will teach you how to bill, nor give you a defense if you are found to be billing incorrectly.
- Exploitation
- Law Enforcement Authority
  - Arrest
  - Protection
- Stalking Horse



# Mandatory material



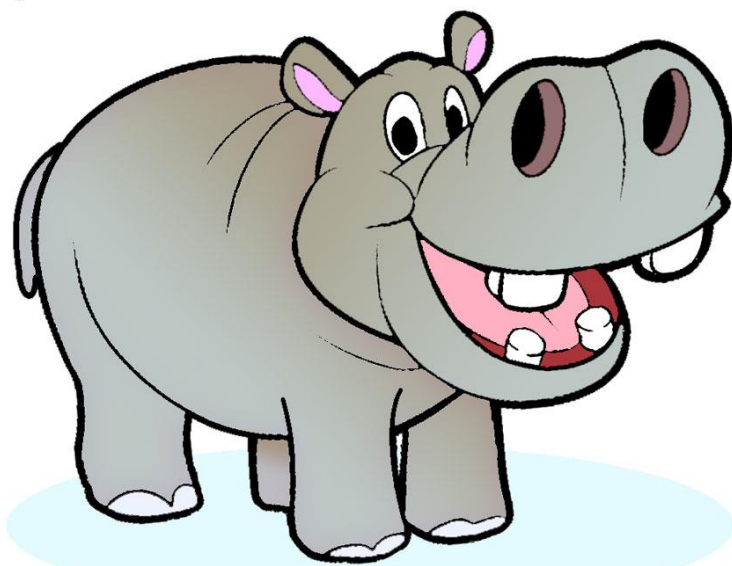
# HIPAA

- Congo movie clip Hippo attack



# Accessing Medical Records

- HIPAA



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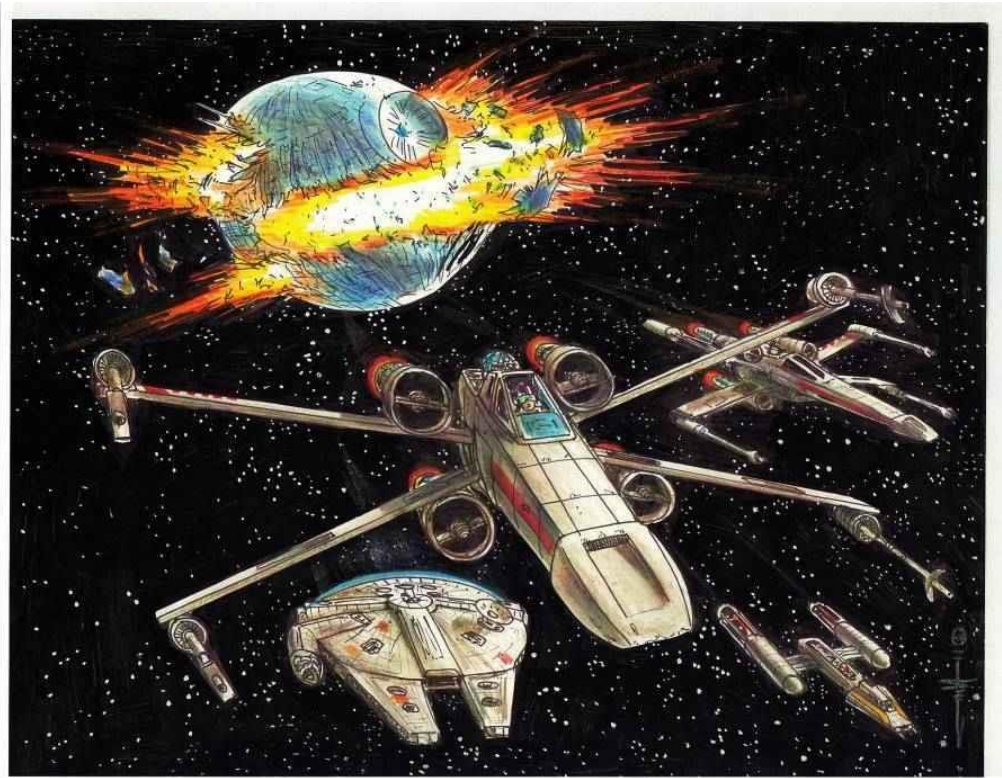
# Accessing Medical Records

- HIPAA
  - Redaction
- Mental Health Records
- Drug Treatment Records
- Discovery



# Accessing Medical Records

- Protective order
  - Destruction at conclusion





# Speaking to Represented Parties



# Speaking to Represented Parties

- Raimaker movie clip “you have a lawyer?”





# Speaking to Represented Parties

## ABA Model Ethics Rule Rule 4.2 Communication With Person Represented By Counsel

- In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.



# Speaking to Represented Parties

## Indiana Comment on IRPC 4.2

[1] This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounseled disclosure of information relating to the representation.

- [Emphasis added]



**Government  
Agent?**





# Speaking to Represented Parties

[5] ...Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or through investigative agents, prior to the commencement of criminal or civil enforcement proceedings.



# Speaking to Represented Parties

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. ...



# Speaking to Represented Parties

[7] In the case of a represented organization, this Rule prohibits communications with a constituent of the organization who

supervises, directs or regularly consults with the organization's lawyer concerning the matter or has authority to obligate the organization with respect to the matter

or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.



# Speaking to Represented Parties

[7] (Cont'd)

Consent of the organization's lawyer is not required for communication with a former constituent.

If a constituent of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this Rule.





# Speaking to Represented Parties

- Former Corporate Employees
- **PT's Show Club, 766 N.E.2nd 729**
  - Pinky promise
  - Affidavit from Fmr Manager
  - Excellent survey of ethics laws across Midwest
  - Former employees are clearly not parties to the litigation, as not even all current employees are covered

\*The Indiana AG does not endorse PT's Show Club





# Speaking to Unrepresented Parties

## ABA Model Rule 4.3 Dealing With Unrepresented Person

- In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. ...
- Undercover investigations?



# Speaking to Unrepresented Parties

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# Para-Lawyers





# Well, I'm not a Lawyer...

## Rule 5.3 Responsibilities Regarding Nonlawyer Assistance

With respect to a nonlawyer employed or retained by or associated with a lawyer:

...

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

...



# Conflict of Interest – 3<sup>rd</sup> Party

## Indiana Rules of Professional Conduct

### **RULE 1.8: CONFLICT OF INTEREST: CURRENT CLIENTS: SPECIFIC RULES**

- (f) A lawyer shall not accept compensation for representing a client from one other than the client unless:
  - (1) the client gives informed consent;
  - (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
  - (3) information relating to representation of a client is protected as required by Rule 1.6.



# Duties of a Prosecutor

## Indiana Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(a) refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause;



# Duties of a Prosecutor

## Indiana Rule 3.8 Special Responsibilities Of A Prosecutor

The prosecutor in a criminal case shall:

(f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose,

refrain from making extrajudicial comments that have a substantial likelihood of heightening public condemnation of the accused and

exercise reasonable care to prevent investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.



# Never put something in writing...

- Testimony you do not want to see in Court...





# Bad Faith Claim Denial

- Rainmaker movie clip “you are stupid stupid stupid”



# Bad Faith Claim Denial

**Bankers Life v. Crenshaw 108 S.Ct. 1645 (1988).**

- Alternator crushes foot
- Amputation
- Pt. had hx or Arteriosclerosis
- BL denies – “there was no evidence that appellee's " `injury caused this loss "directly and independently of all other causes,"
- Ct = \$20k, \$1.6m punitive; +15% (bd appl).



# Exculpatory Evidence

Raise your hand when you think you have  
it...



- Brady bunch intro



# Exculpatory Evidence

## Brady v. Maryland, 373 U.S. 83

- “...evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”
- Impeachment
- Criminal



# Exculpatory Evidence

- **Unlimited Medical Supplies**
- Medical Supplies never delivered
- Or were they?
- Disclose?



# Malicious Prosecution

- ABA Model Rules **Rule 3.1 Meritorious Claims And Contentions**
- A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.



# Malicious Prosecution

**Indian Harbor v. Waukegan, 33 N.E.2d 613, 617 (Ill. App 2015)**

Tort of Malicious Prosecution - Illinois

- (1) the commencement of judicial proceedings by the defendant;
- (2) a lack of probable cause for the proceedings;
- (3) malice in instituting the proceedings;
- (4) termination of the prosecution in the plaintiff's favor; and
- (5) damage or injury to the plaintiff.





# PRESERVATION OF PUBLIC RECORDS

- Indiana Code 35-44.1-1
- A public servant who knowingly or intentionally fails to deliver public records and property in the public servant's custody to the public servant's successor in office when that successor qualifies commits official misconduct, a Class D felony.



# Leaving State Government

## IC 4-2-6-11 (b)

A former state officer, employee, or special state appointee **may not accept employment** or receive compensation:

(1) as an executive-branch **lobbyist** (IC 4-2-7-1);

(2) from an employer if the former state officer, employee, or special state appointee was:

(A) **engaged in the negotiation** or the administration of one (1) or more contracts with that employer on behalf of the state or an agency; and

(B) in a position to **make a discretionary decision** affecting the:

(i) outcome of the negotiation; or

(ii) nature of the administration; or

(3) from an employer if the former state officer, employee, or special state appointee **made a regulatory or licensing decision that directly applied to the employer** or to a parent or subsidiary of the employer; before the elapse of at least three hundred sixty-five (365) days after the date on which the former state officer, employee, or special state appointee ceases to be a state officer, employee, or special state appointee.



# Leaving State Government

## Lifetime Ban, IC 4-2-6-11 (c)

- A former state officer, employee, or special state appointee may not represent or assist a person in a particular matter involving the state if the former state officer, employee, or special state appointee personally and substantially participated in the matter as a state officer, employee, or special state appointee, even if the former state officer, employee, or special state appointee receives no compensation for the representation or assistance.



# Conclusion

- Know the law
- Follow the law
- Tell those who work with you to follow the law
- And

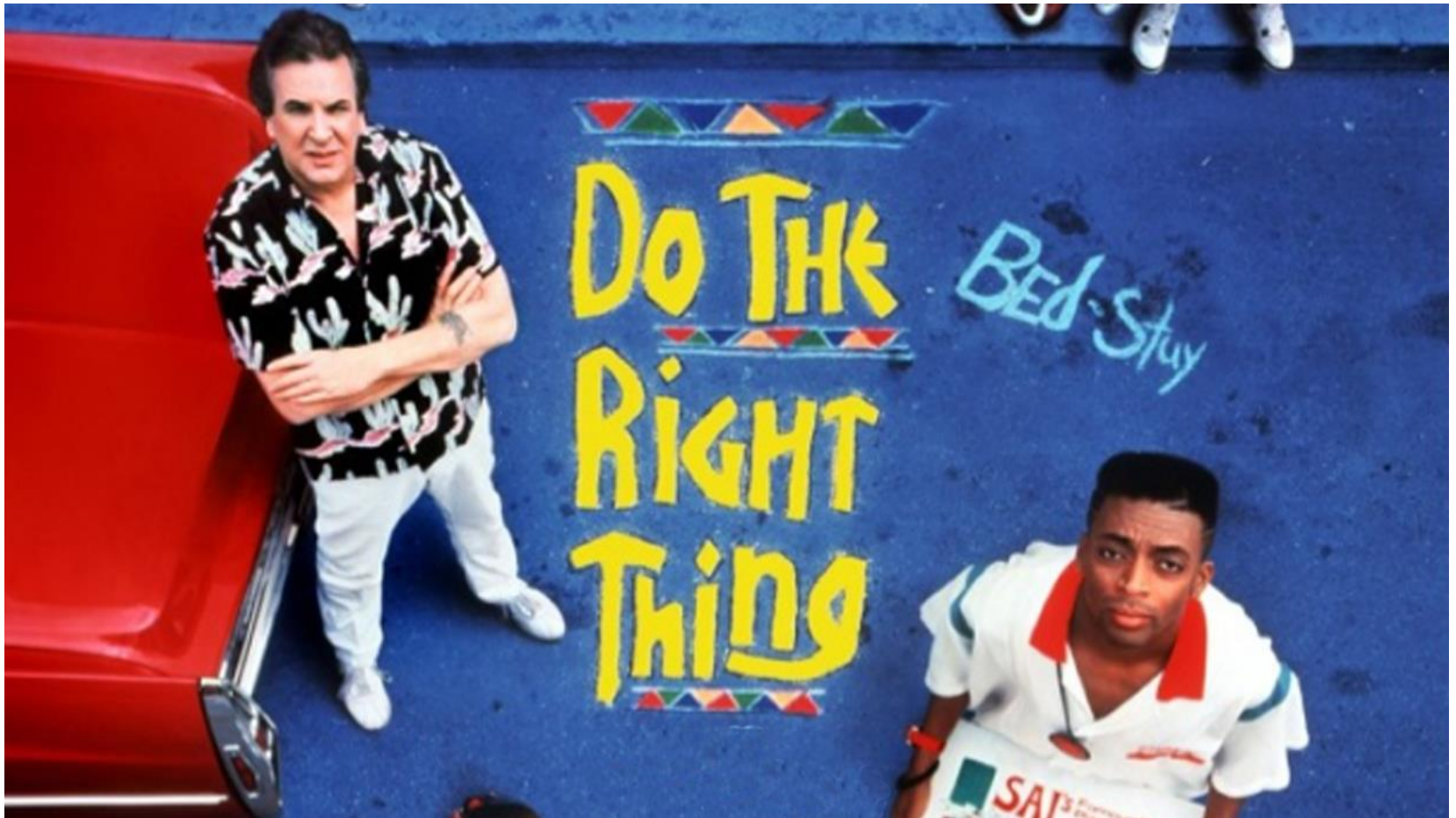


# Conclusion

- And Always...









# Medicaid Fraud Control Unit

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