

Ethics and Health Law Advice /Opinions

Dallas Bar Association Health Law Section January 21, 2015

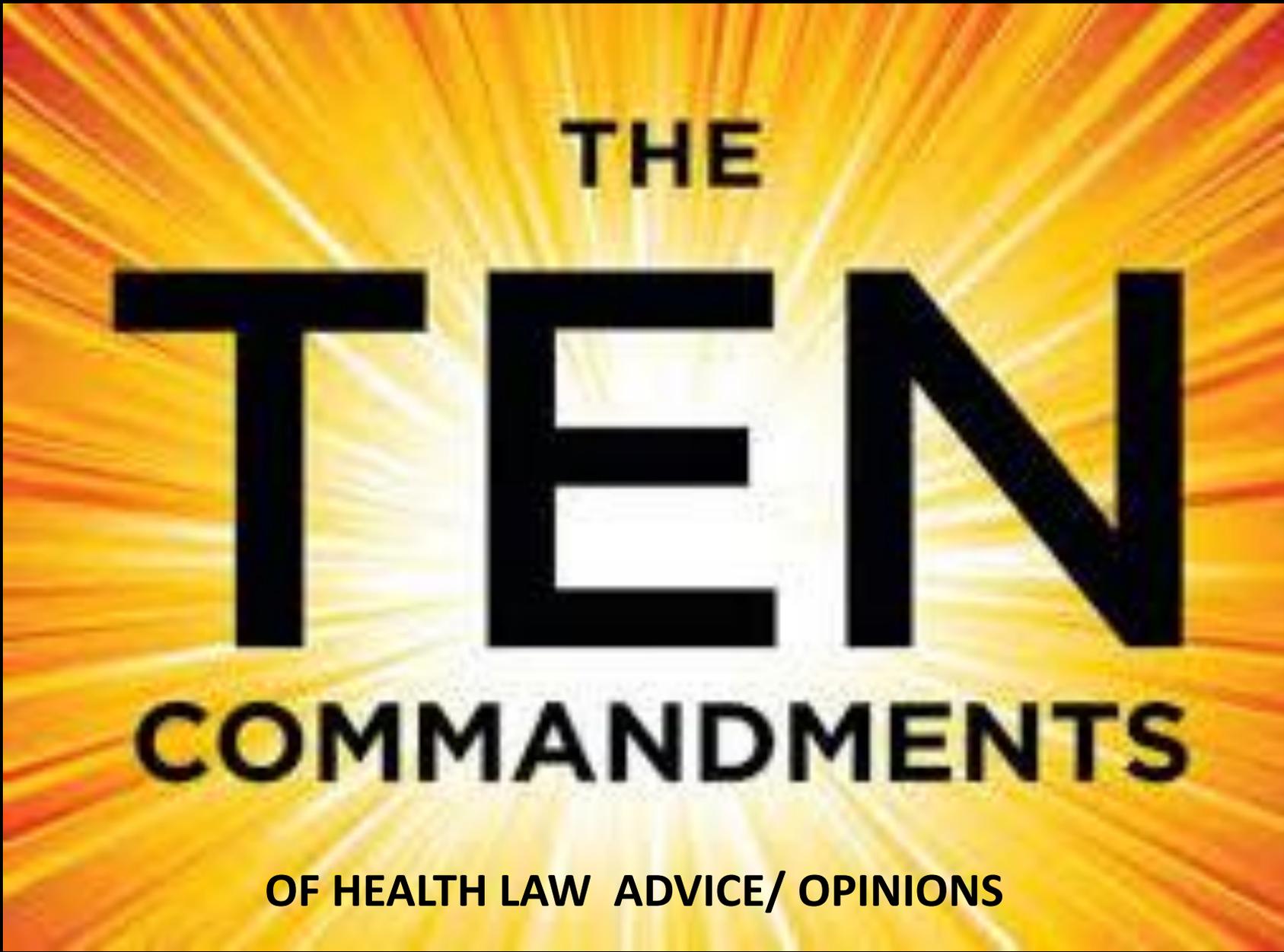


Martin Merritt, PLLC

Health Law and Healthcare Litigation



Martin Merritt is a founder and Executive Director of the Texas Health Lawyers Association where he has served from 2013 to the present. He has been repeatedly voted by D Magazine Best Lawyers in Dallas List. He has been elected by his peers to serve as Chairman of the Dallas Bar Association Health Law Section for 2021. He has served as special disciplinary counsel for the Texas Commission for Lawyer Discipline and serves outside litigation counsel and as outside general counsel to healthcare clients.



**THE
TEN
COMMANDMENTS**

OF HEALTH LAW ADVICE/ OPINIONS

The First Commandment



A scroll of aged, yellowish parchment is unrolled, showing a central area with text. The scroll is held by wooden rollers on the left and right sides. The parchment has a textured, slightly mottled appearance with some small dark spots and creases. The text is centered and reads:

Read the Ethics Rules Again
(You'll Thank me later)



1.02(c) Scope and Objectives of Representation

“A lawyer shall not assist or counsel a client to engage in conduct that the lawyer knows is criminal or fraudulent.”

Healthcare Client's seldom look like this . .



They look like this. . .



They don't say
“we want to break the law...”



They say
“We want to earn a living”





1.02(c) Scope and Objectives of Representation

“A lawyer may discuss the legal consequences of any proposed course of conduct with a client . . .



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“A lawyer may discuss the legal consequences of any proposed course of conduct with a client . . .

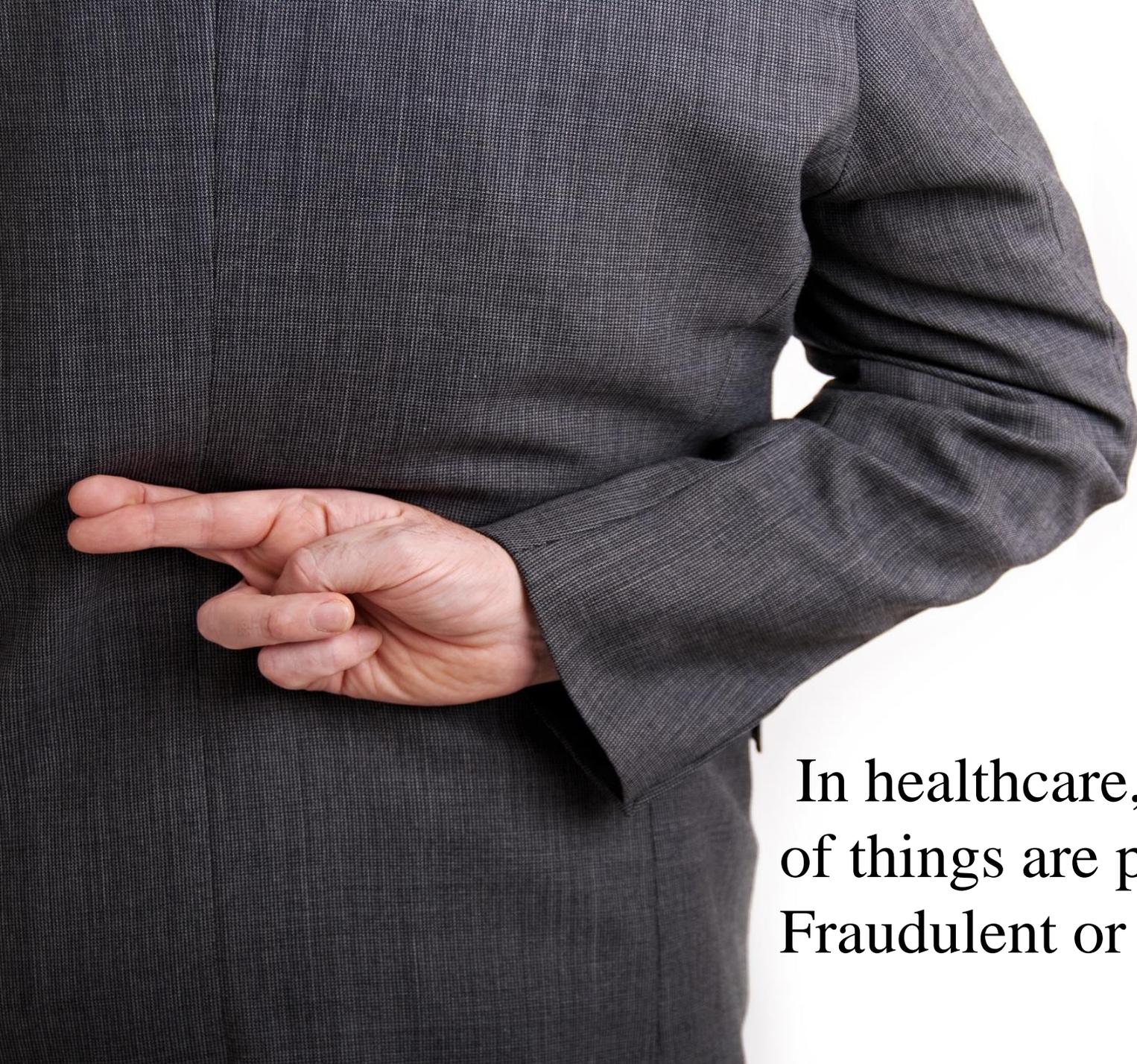


1.02(c) Scope and Objectives of Representation

“...and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning or application of the law.”

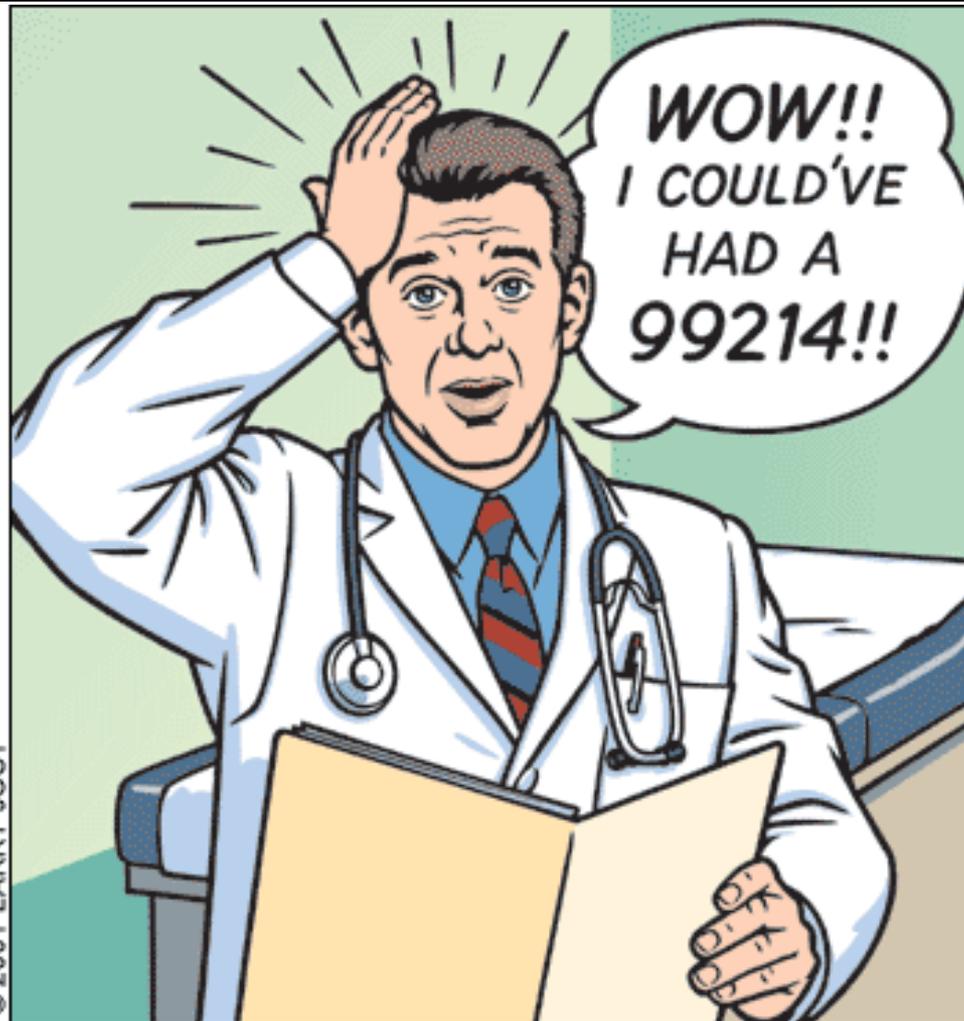


Trouble is . . .



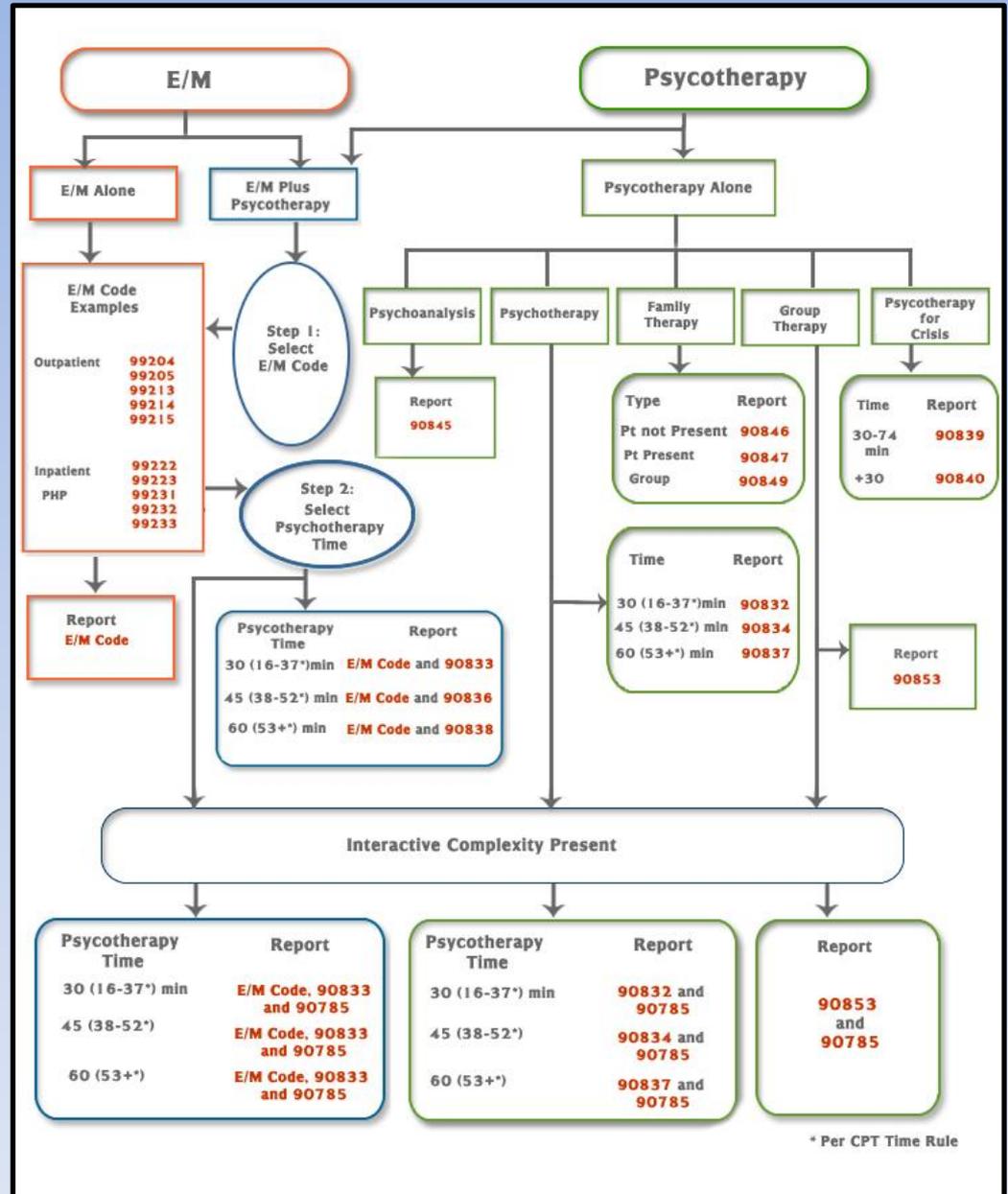
In healthcare, all sorts
of things are possibly
Fraudulent or Criminal

UPCODING



© 2001 LARRY JOST

Improper Coding

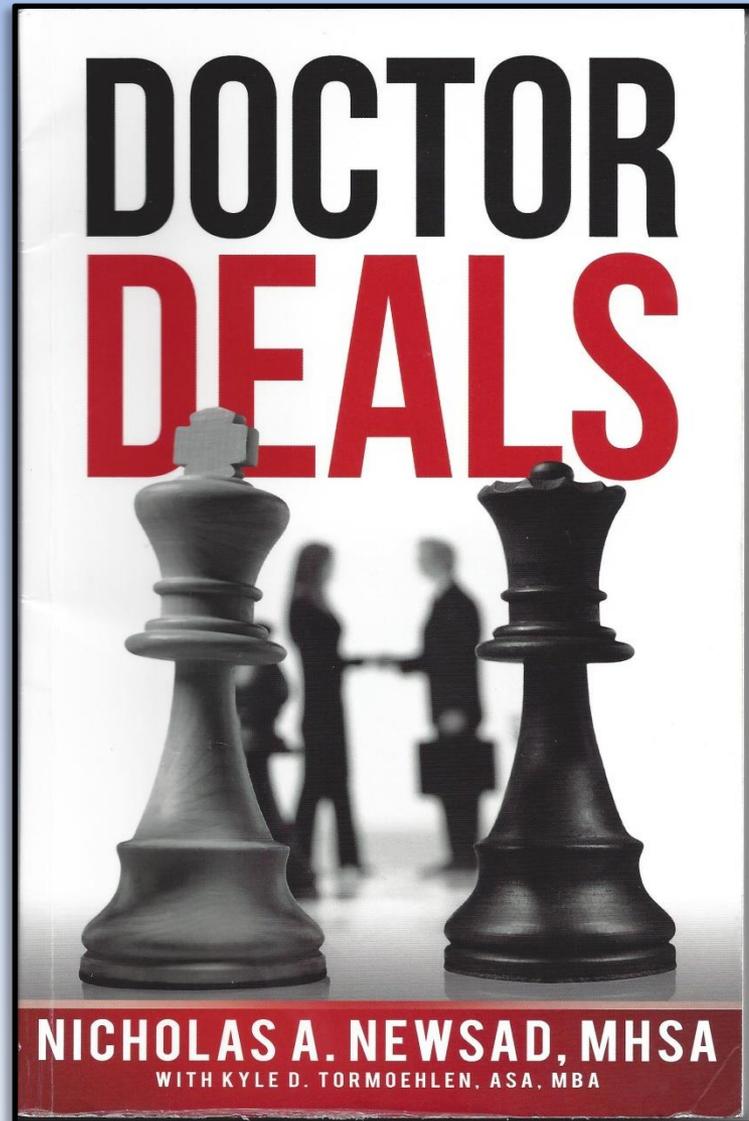


Billing with Improper Documentation

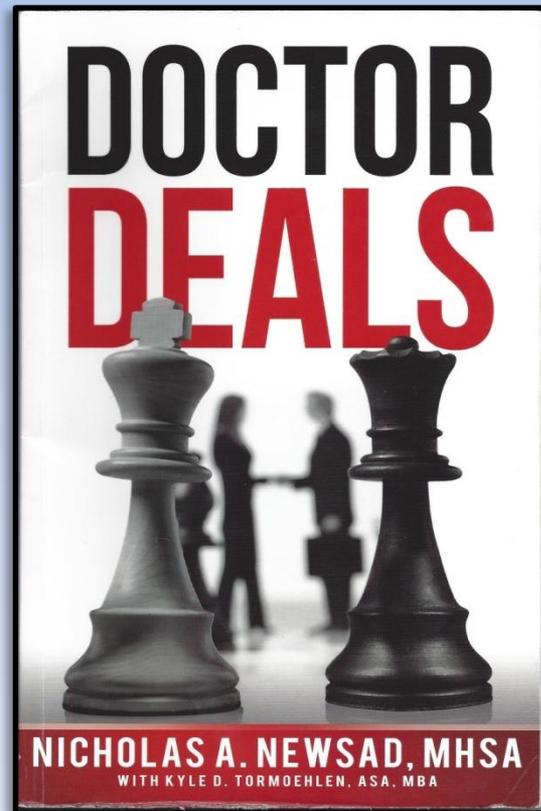


Accurate Medical Records
are Critical

Then there are . . .



This book is a good primer from the business side of Healthcare regulation



Government Fraud and Abuse Laws

- False Claims Act
- Anti-Kickback Statute
- Physician Self-Referral Statute
- Exclusion Statute
- Civil Monetary Penalties Law



**If you get past federal law You get to
figure out Texas State Statutes . . .**

Tex. Occ. Code 102.001

Patient Solicitation

“A person commits an offense if the person knowingly offers to pay or agrees to accept, directly or indirectly, overtly or covertly any remuneration in cash or in kind to or from another for securing or soliciting a patient or patronage for or from a person licensed, certified, or registered by a state health care regulatory agency.”

Tex. Occ. Code 102.001

Patient Solicitation

Section 102.001 permits any payment, business arrangement, or payment practice permitted by 42 U.S.C. Section 1320a-7b(b) or any regulation adopted under that law.

Tex. Occ. Code 102.001

Patient Solicitation

Section 102.001 permits any payment, business arrangement, or payment practice permitted by 42 U.S.C. Section 1320a-7b(b) or any regulation adopted under that law.

**If you get past that. . .you
get even more confusing
TAC Regulations**

**TMB RULE §164.3 False Misleading or
Deceptive Advertising:**

(17) “Drumming” patients or conduct considered an offense under Texas Occupations Code §102.001(a) relating to the solicitation of patients.

Doctors simply want to know
that they can't get into any trouble



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Which leads directly to . . .



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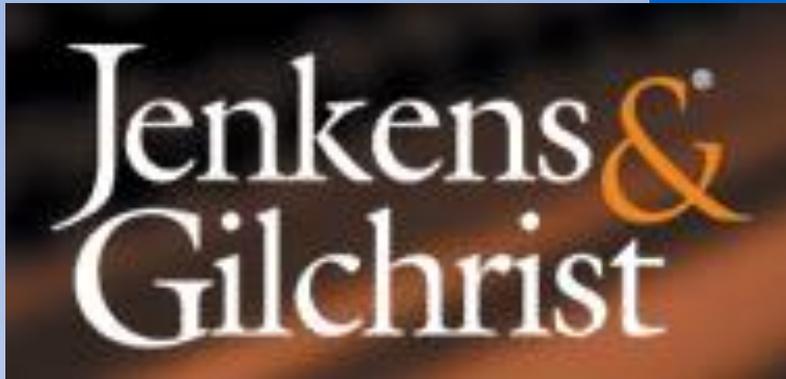
© 2010
For more ideas visit <http://www.dreamstime.com>

The Second Commandment



A scroll of parchment is unrolled, showing the text 'Keep Client Expectations Realistic' written in a bold, black, sans-serif font. The scroll is held by wooden rollers on the left and right sides. The parchment is aged and yellowed, with some creases and a slightly textured appearance. The background is a solid light blue color.

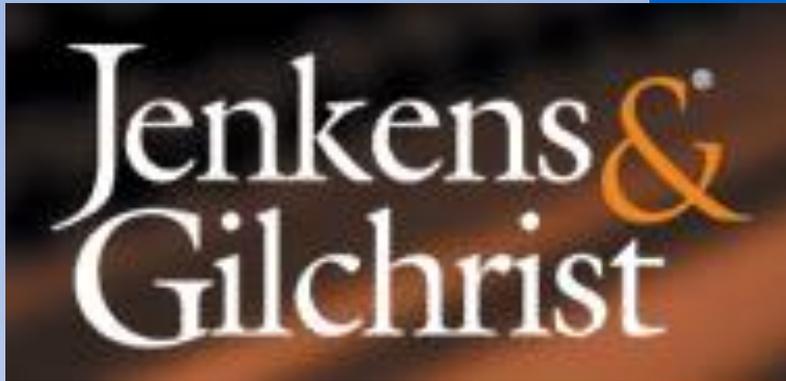
**Keep Client
Expectations
Realistic**



Born 1951

Died 2007





Allegedly...

The Dallas Morning News

How Jenkins lost its way

As law firm dissolves,
leaders have no doubt
tax scheme to blame

By **KATIE FAIRBANK**
and **TERRY MAXON**
Staff Writers

Four years of lawsuits and federal investigations had worn down the leaders of Jenkins & Gilchrist. Many of their biggest earners were leaving the law firm and taking their prized clients with them. And it had become hard to attract talent, with no end in sight for the

firm's problems.

It was time to execute the last-ditch plan: dissolve the firm. Jenkins & Gilchrist couldn't be saved. So the firm's leaders had to try and save the people. "There is a timeline beyond which even the most loyal people say no," said former chairman Tom Cantrill. "It had just taken so long."

Founded 56 years ago and once the largest law firm in Dallas, Jenkins is closing its doors for good this weekend. What drove it to extinction was a combination of is-

See **FIRM** Page 18A

**A Chicago tax lawyer
brought the whole firm
down. . . Over "legal
advice" opinions.**

The Dallas Morning News

How Jenkins lost its way

(So Far, Not so Terrible)

Those clients would pay a lot of money to Jenkins for opinion letters that said it was “more likely than not” that the tax shelters met the federal tax code. The money sounded good. Still, the proposal to

The Dallas Morning News

How Jenkins lost its way

“Drumming” clients is starting to make sense. ..

Mr. Deary said **clients usually heard about the shelters from their trusted accountants** and financial advisers, who touted the safety as well as the attractiveness of the tax strategies.

The Dallas Morning News

How Jenkins lost its way

Client expectations are beginning to rise. . .

“They would say the only downside to this — if there is one — is that if you’re audited, you’re going to have this great legal opinion from Jenkins & Gilchrist that, No. 1, is going to convince the IRS that this is a great tax strategy and you’re going to more than likely prevail with the IRS,” Mr. Deary said.

The Dallas Morning News

How Jenkins lost its way

(If promised, that is almost impossible to know . .)

“They would say the only downside to this — if there is one — is that if you’re audited, you’re going to have this great legal opinion from Jenkins & Gilchrist that, No. 1, is going to convince the IRS that this is a great tax strategy and you’re going to more than likely prevail with the IRS,” Mr. Deary said.

The Dallas Morning News

How Jenkins lost its way

*Seems to be Practically
guaranteeing a result. . .*

“But if you don’t prevail, you’re never going to have to pay a penalty, because you have this great opinion letter. You’ve got insurance, so there is no downside. And look, everybody in your position is doing it,” he said, repeating the arguments he turned up in his investigation of the shelters.

The Dallas Morning News

How Jenkins lost its way

This would be a problem.. .

“But if you don’t prevail, you’re never going to have to pay a penalty, because you have this great opinion letter. You’ve got insurance, so there is no downside. And look, everybody in your position is doing it,” he said, repeating the arguments he turned up in his investigation of the shelters.

The Dallas Morning News

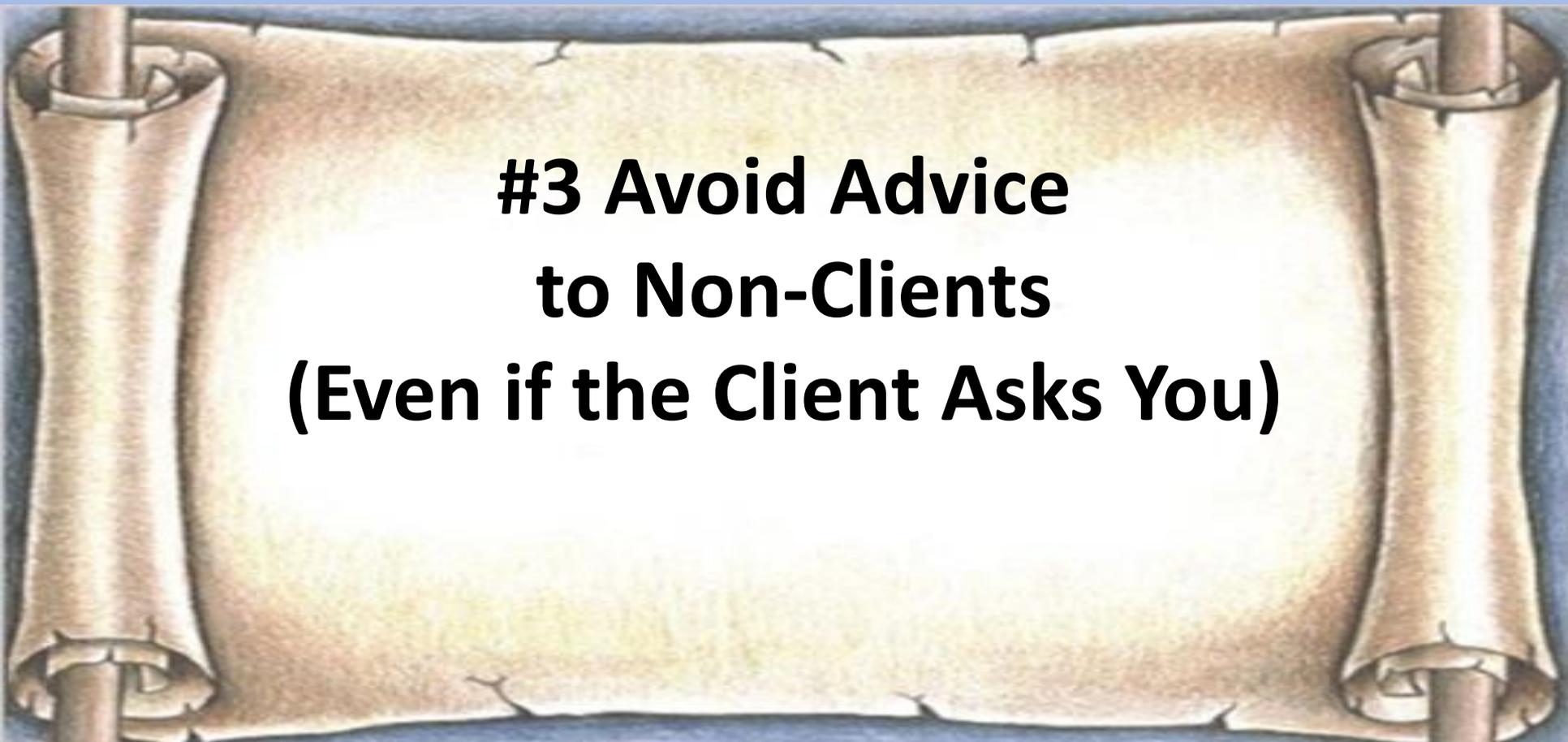
How Jenkins lost its way

- The IRS Went after 1000 Clients
- 1000 clients sued Jenkins
- The IRS went after Jenkins
- Jenkins agreed to shut their doors in 2007.

**Jenkins denied these claims, but
when 1000 clients sued, it became
unsalvageable.**



**COMMANDMENT
NUMBER 3**

A scroll of aged, yellowish parchment is unrolled, showing a central area with text. The scroll is held by wooden rollers on both sides. The background is a solid light blue color.

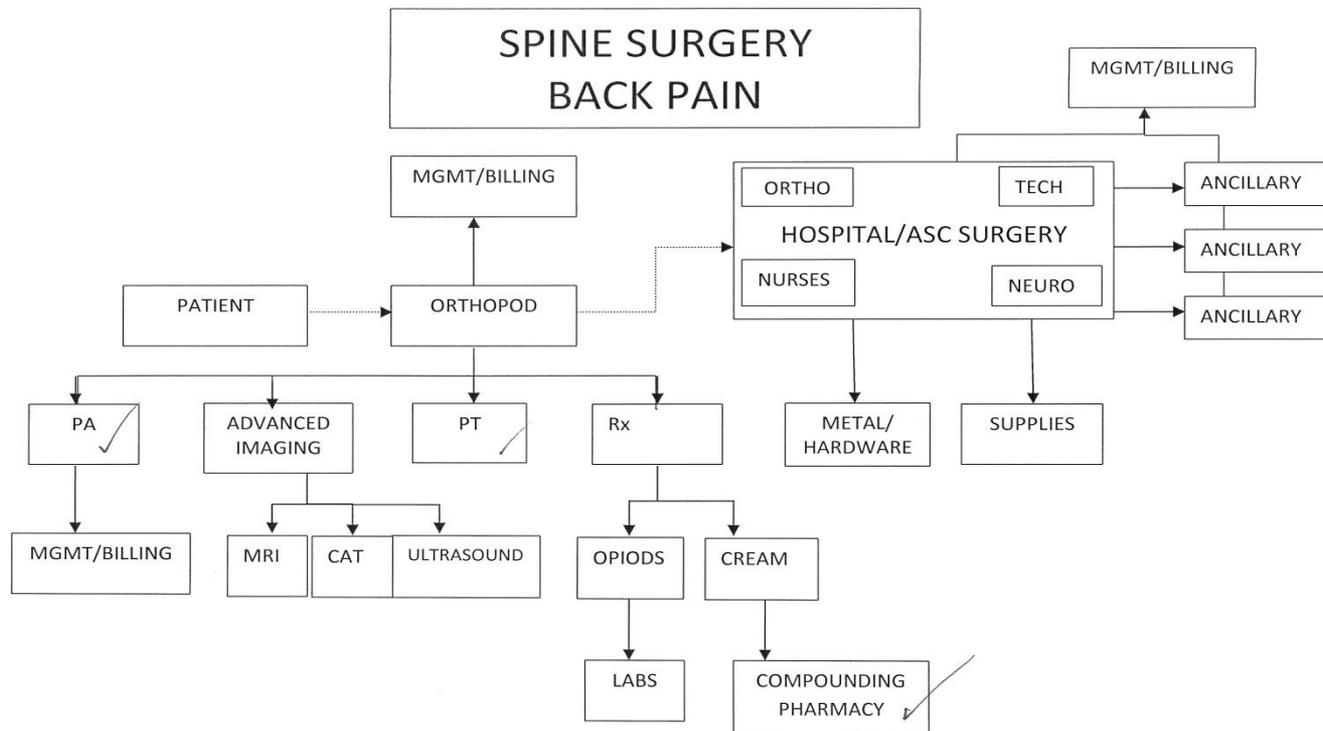
**#3 Avoid Advice
to Non-Clients
(Even if the Client Asks You)**

**How Many Times Has This
Happened?**

Somebody has an idea . . .



It's a little complicated . . .



But the Client is SOLD ...



And the Client tells you all about it.



Maybe the client has told some friends about it. (They're excited)



And all that is stopping them. ..



They need you . . .



To tell these guys, it is perfectly legal



But know this: when it all goes wrong.



These guys won't be smiling



They will remember things you may not
have said. . .

"Better Call Saul"

I CAN MAKE IT LEGAL!

SAUL GOODMAN
ATTORNEY AT LAW

CALL RISK FREE NOW!

A man in a dark suit, white shirt, and striped tie is pointing his right index finger directly at the viewer. He has a slight, confident smile. The background is a solid yellow color.

Really crazy things.



DRUG PROBLEM?

I'LL TURN THAT ADDICTION INTO A PRESCRIPTION!

"Better Call Saul"

SAUL GOODMAN
ATTORNEY AT LAW

CALL NOW!

BETTERCALLSAUL.COM SE HABLA ESPAÑOL



Rule 4.01 Truthfulness in Statements to Others

“A lawyer shall not knowingly make a false statement of fact or law to a third person.”



Rule 4.01 (Comment #3)

“A lawyer is generally under no duty to disclose relevant material facts.”



Rule 4.01 (Comment #3)

(Unless you start talking. Then you trigger. . .)



Rule 4.01 Truthfulness in Statements to Others

“A lawyer shall not make a false statement of fact or law to a third person . . .



Rule 4.01 Truthfulness in Statements to Others

“ And once you start talking. . . .”



Rule 4.01 Truthfulness in Statements to Others

“A lawyer shall not fail to disclose a material fact to a third person . . .



Rule 4.01 Truthfulness in Statements to Others

When disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assist a fraudulent act by client.

Q: What does that mean?

A: “It doesn’t matter what it means.”

**It is only going
to come up in hindsight .**



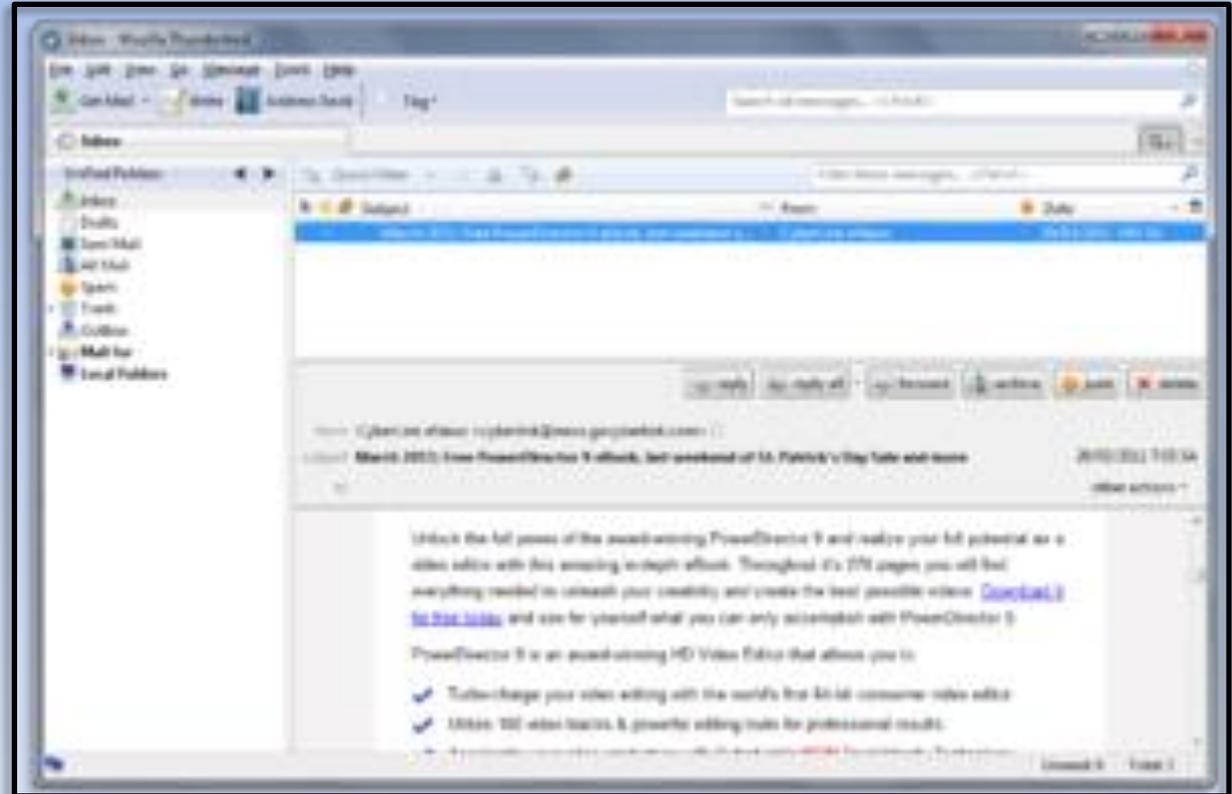


**COMMANDMENT
NUMBER 4**

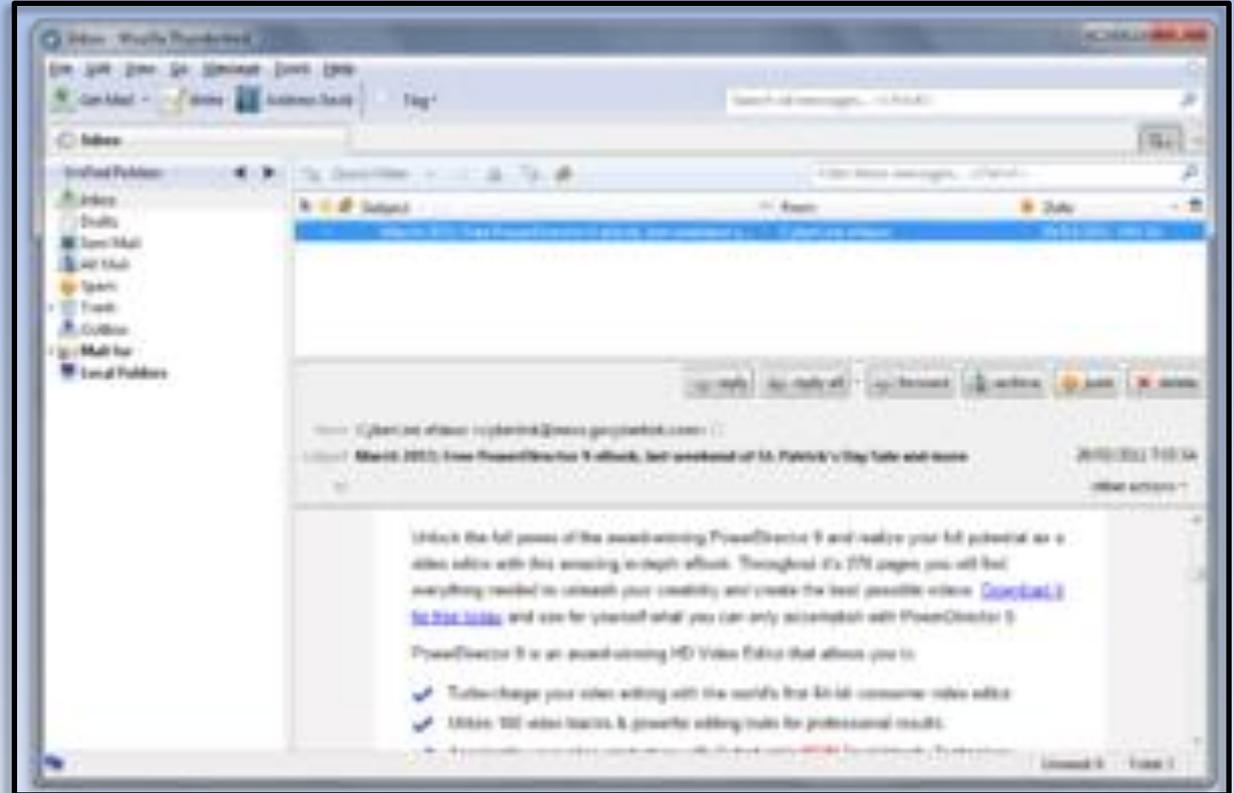
A scroll of aged, yellowish parchment is unrolled, showing a central area with text. The scroll is held by wooden rollers on the left and right sides. The parchment has a textured, slightly mottled appearance with some small cracks and discoloration, particularly along the edges. The text is written in a bold, black, sans-serif font.

**#4 Avoid
Healthcare Advice via Email.**

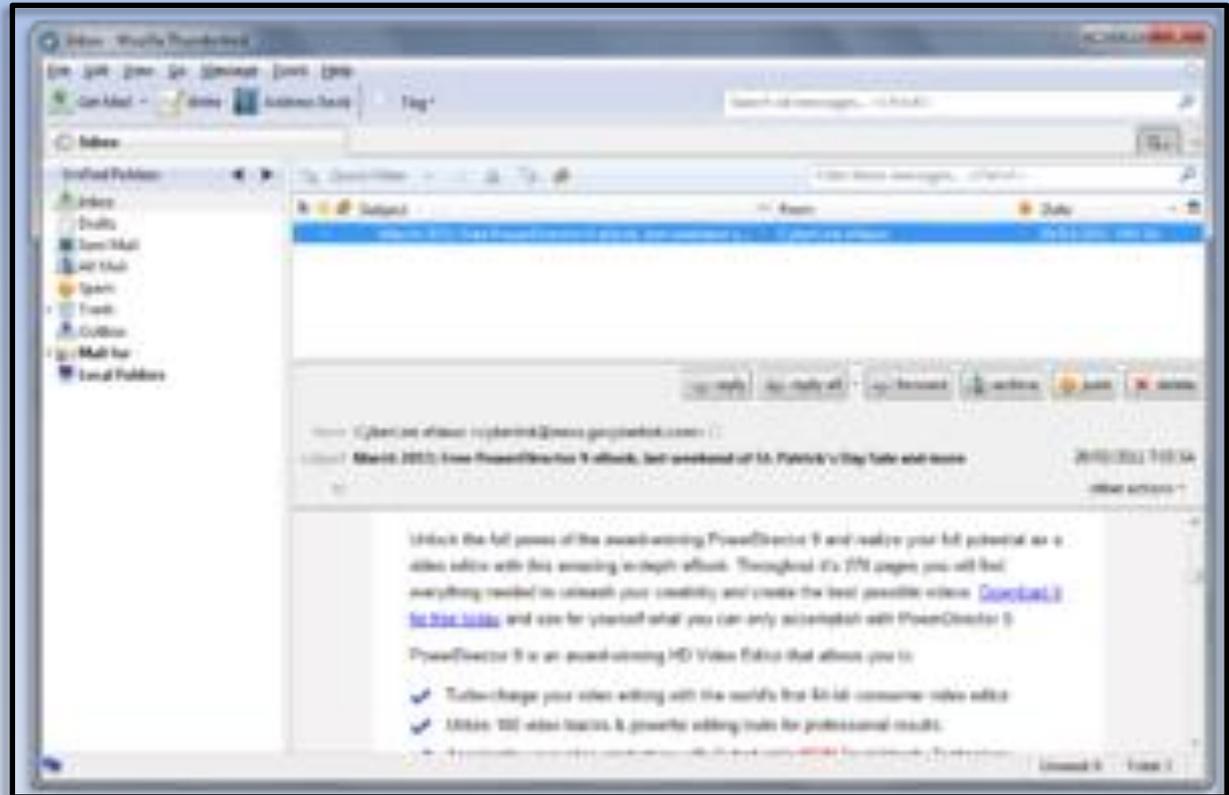
Email is usually to a person, not the company.



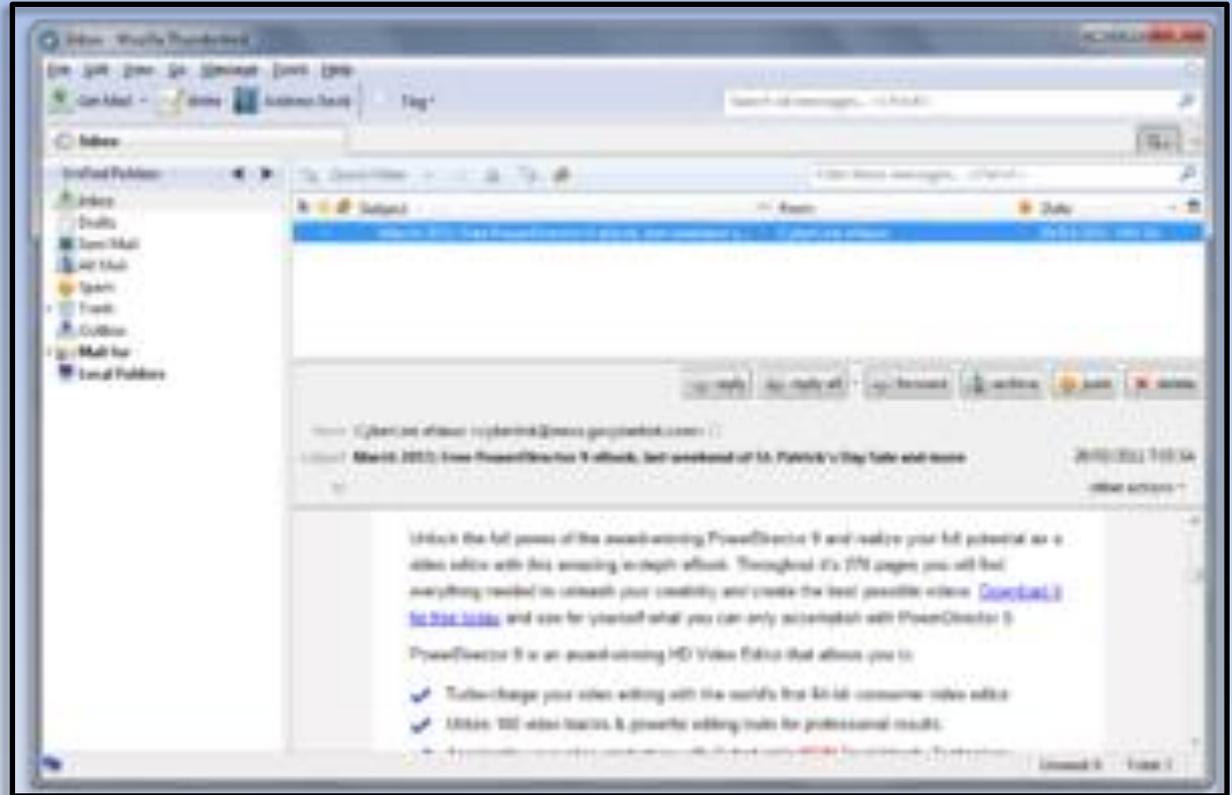
You represent ABC Company



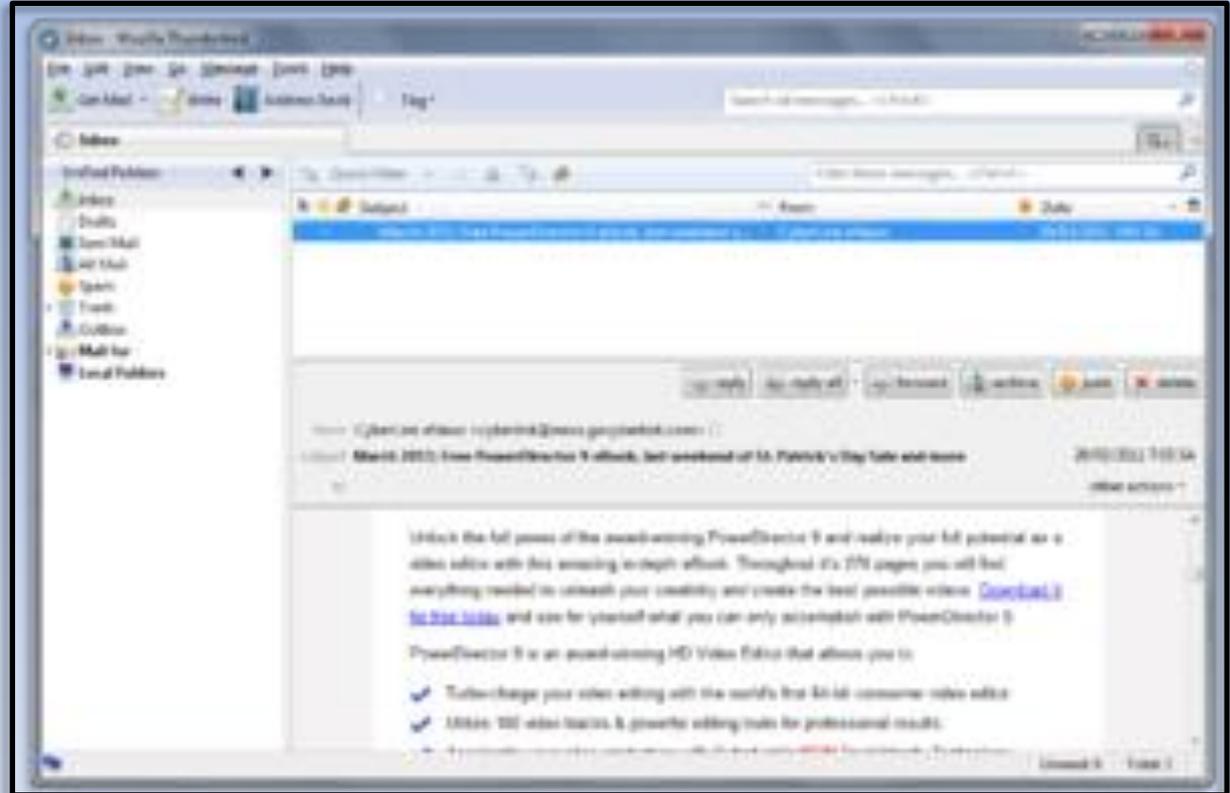
You might find your email being relied on by XYZ Company



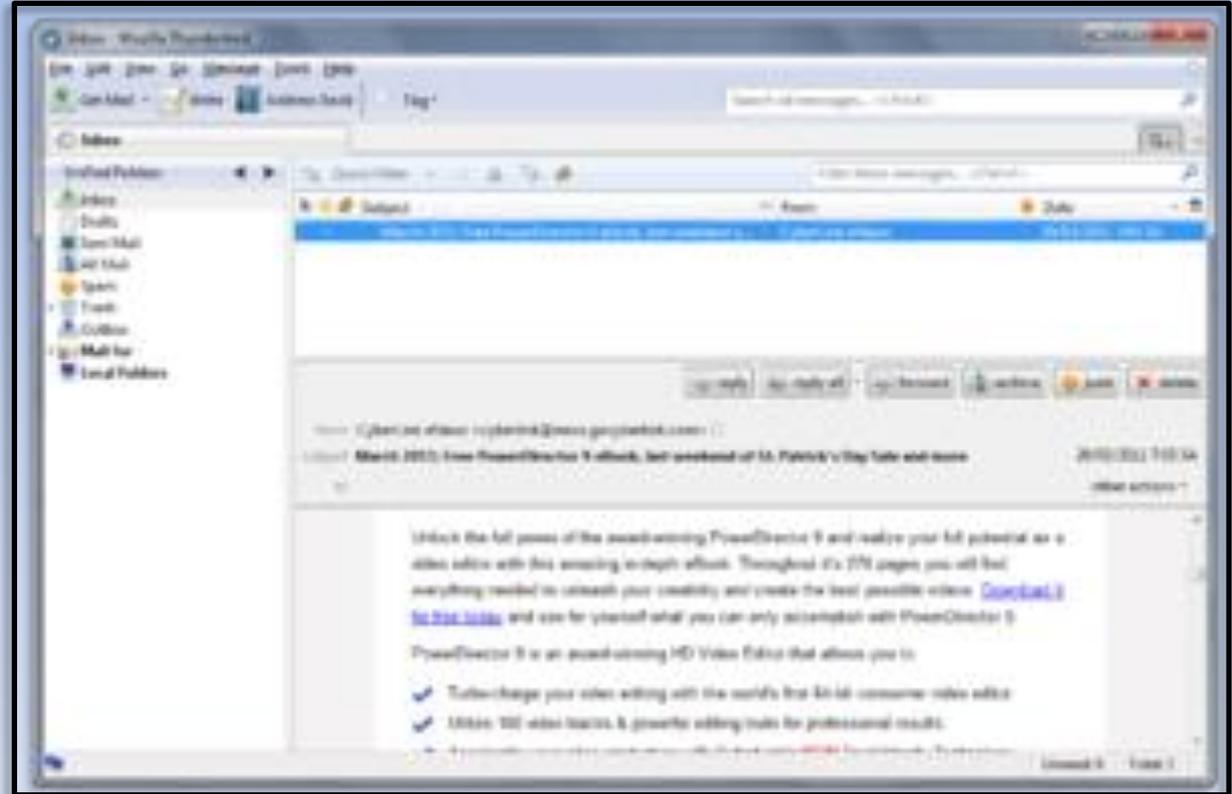
In Florida. . .Alaska. . . and. . .



Clients Can forward Emails To Third Parties.



Better to pick up the phone.



A scroll of parchment is unrolled, showing a central area with text. The scroll is tied with wooden pegs on both sides. The parchment is aged and yellowed, with some creases and small holes. The text is written in a bold, black, sans-serif font.

**#4 Avoid
Healthcare Advice via Email.**



**COMMANDMENT
NUMBER 5**

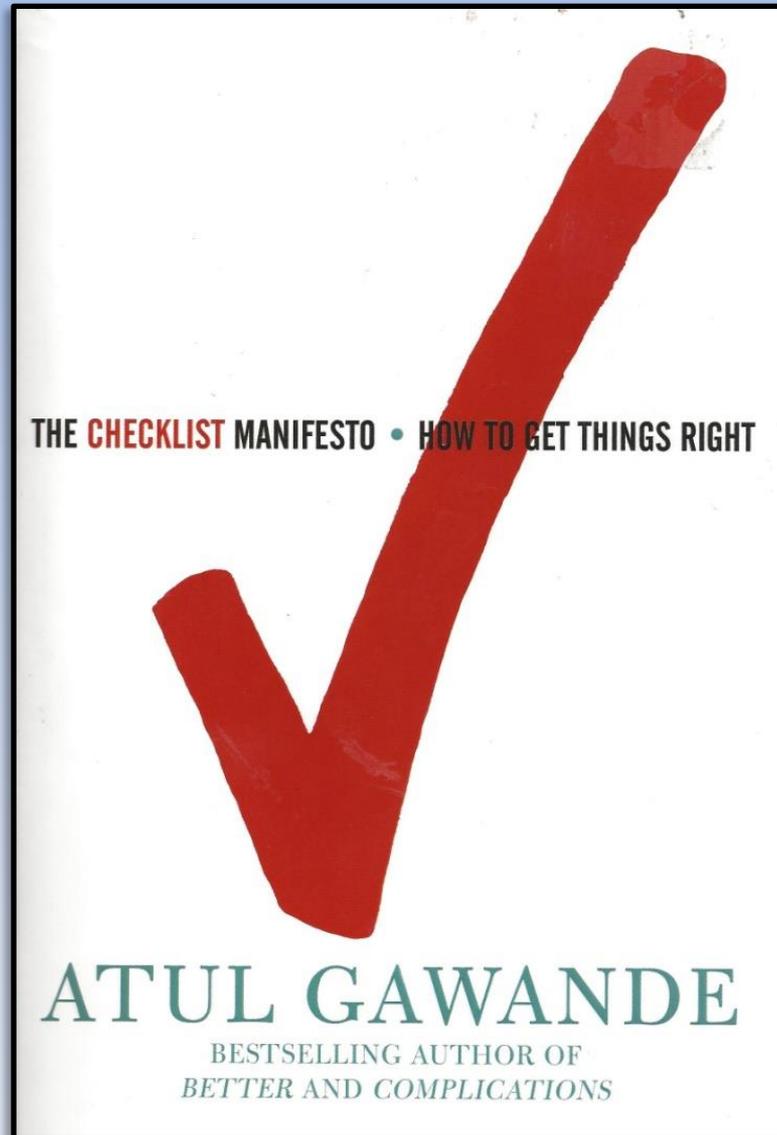
A scroll of parchment is unrolled, showing a central area with text. The scroll is held by wooden rods on the left and right sides. The parchment is yellowed and has some creases and small holes. The text is written in a dark, bold font.

**#5 Make a Template.
Always Use it.**

I am not sure it matters if you use a letter or a memorandum.

It is “Advice” under 2.01.

The Checklist Manifesto

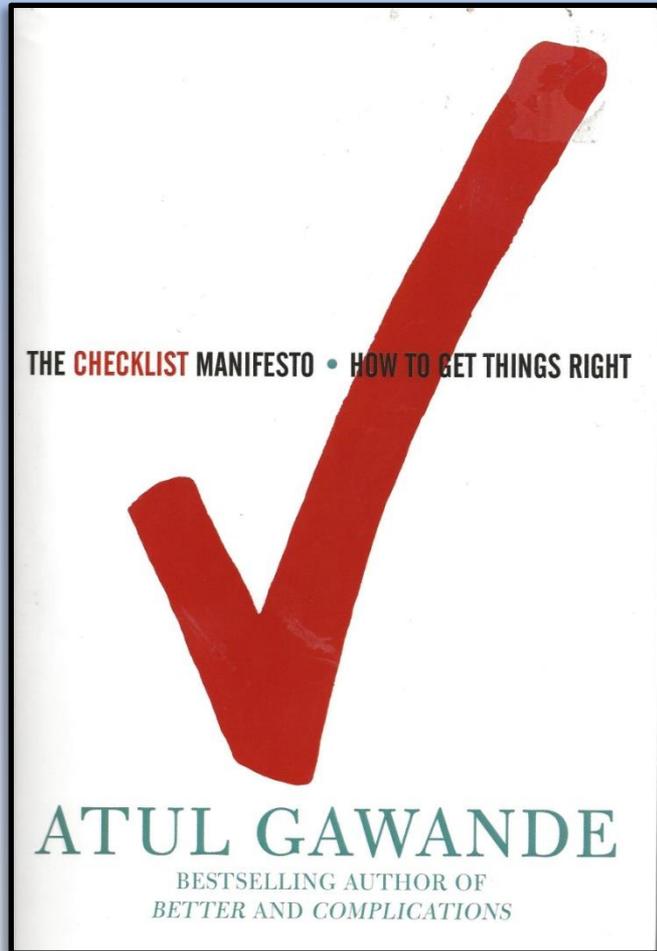


Atul Gawande. How to Get things done right



- Harvard Medical School Professor
- Rhodes Scholar
- *The New Yorker* Staff Writer
- World Health Organization Director

The Checklist Manifesto



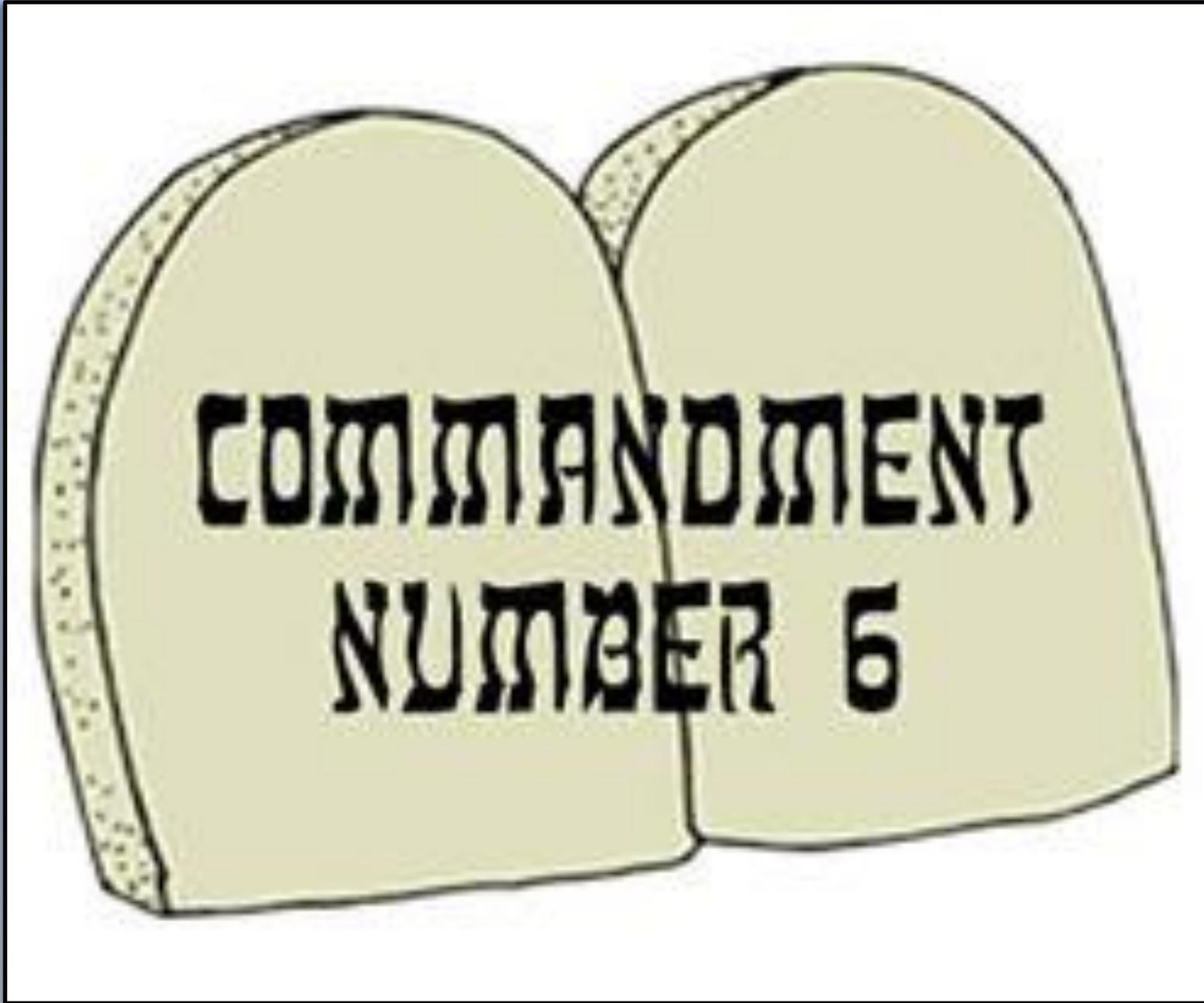
Discusses the importance of organization and pre-planning (such as thorough checklists) in both medicine and the larger world.

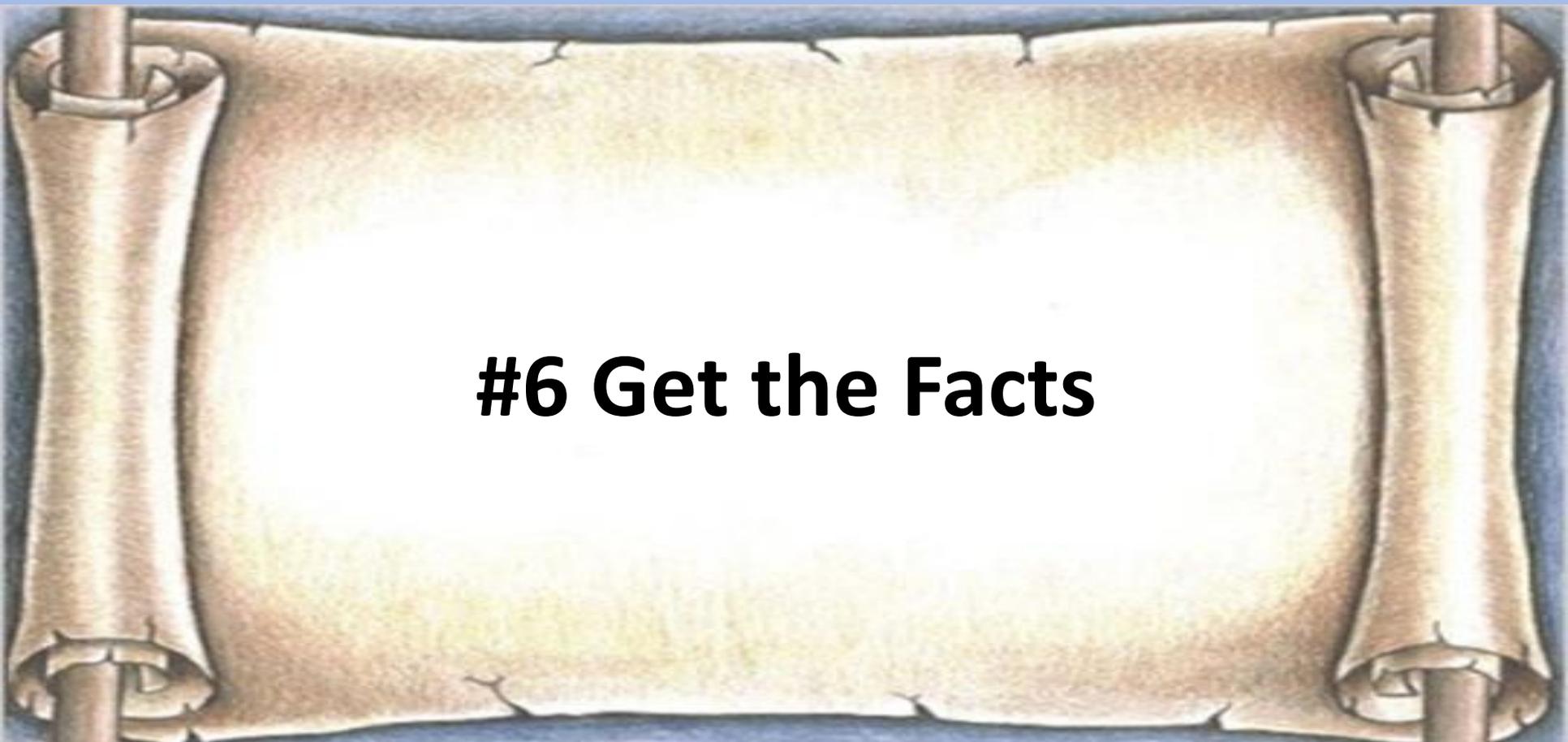
A Template Can Help

- Limit Reliance to ONLY the Client.
- Disclaim 3rd Party reliance.
- Limit advice to the facts (and Texas law).
- Warn that the advice is protected by Privilege
- Disclaim any continuing duty to monitor facts
- Should the facts be different or change, the opinion is no longer valid.

A scroll of parchment is unrolled, showing a central area with text. The scroll is held by wooden rods on the left and right sides. The parchment is yellowed and has some creases and small holes. The text is written in a dark, bold font.

**#5 Make a Template.
Always Use it.**





#6 Get the Facts

Just the Facts



Good Example: OIG Advisory Opinions



Disclaim

Any independent investigation.

Disclaim

Any obligation to monitor the facts.

Disclaimer

If the facts are different, the Advice is not Valid.

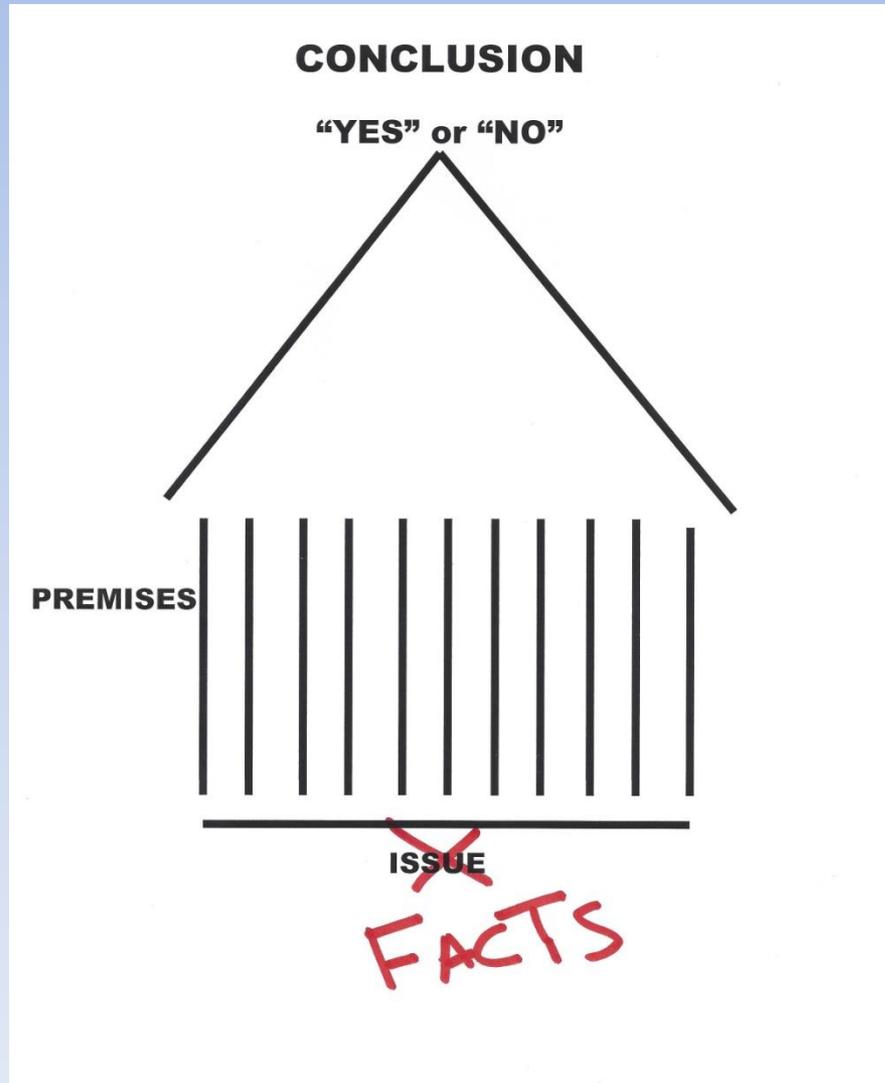
Journalism's "Five Ws and One H"

"Who, What, Why, When, Where and How."

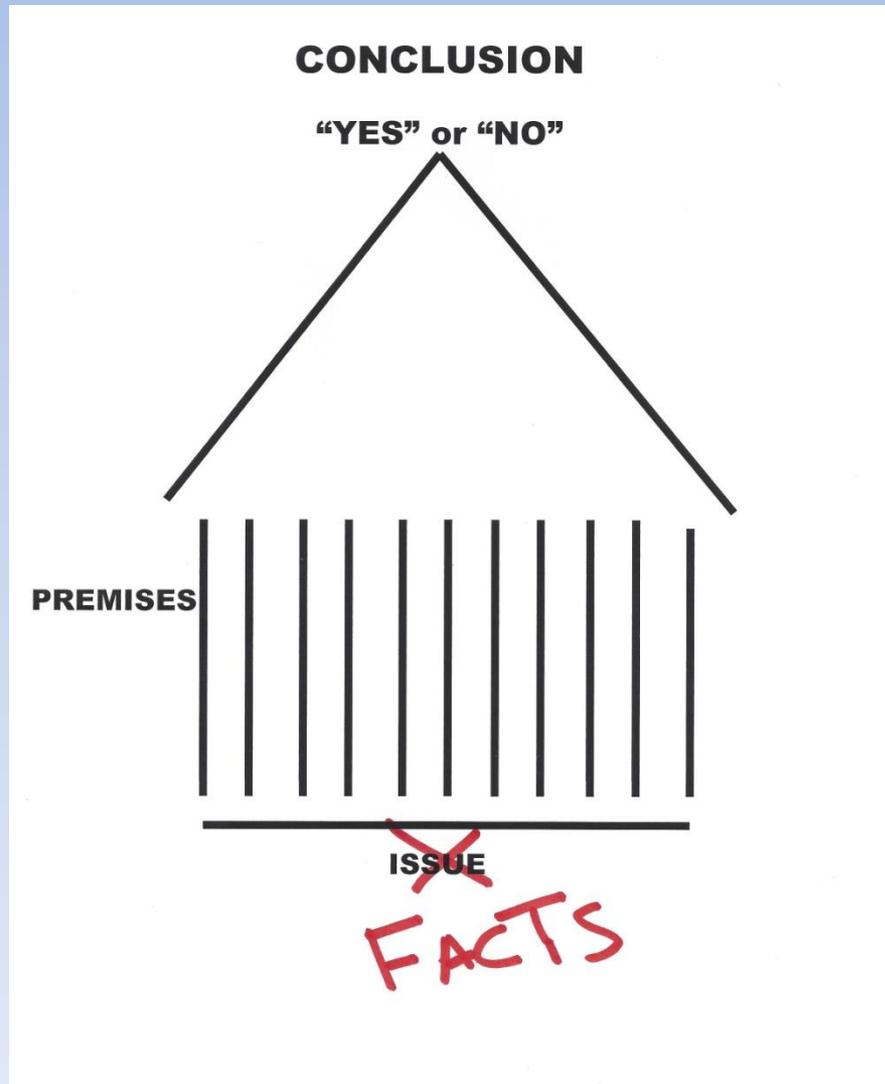
Limit Advice

“Who, What, Why, When, Where and How.”

Formal Argumentation



Prosecutors often look to Facts Omitted by Client





**COMMANDMENT
NUMBER 7**



Don't forget About State Laws

3 Questions to Always Ask



Where is the Provider Located?



Where is the Referring Doctor Located?



Where is the Referring Doctor Located?



Are Goods or Services Crossing State Lines?



Clients will not always tell you!



AHLA 50 State Survey



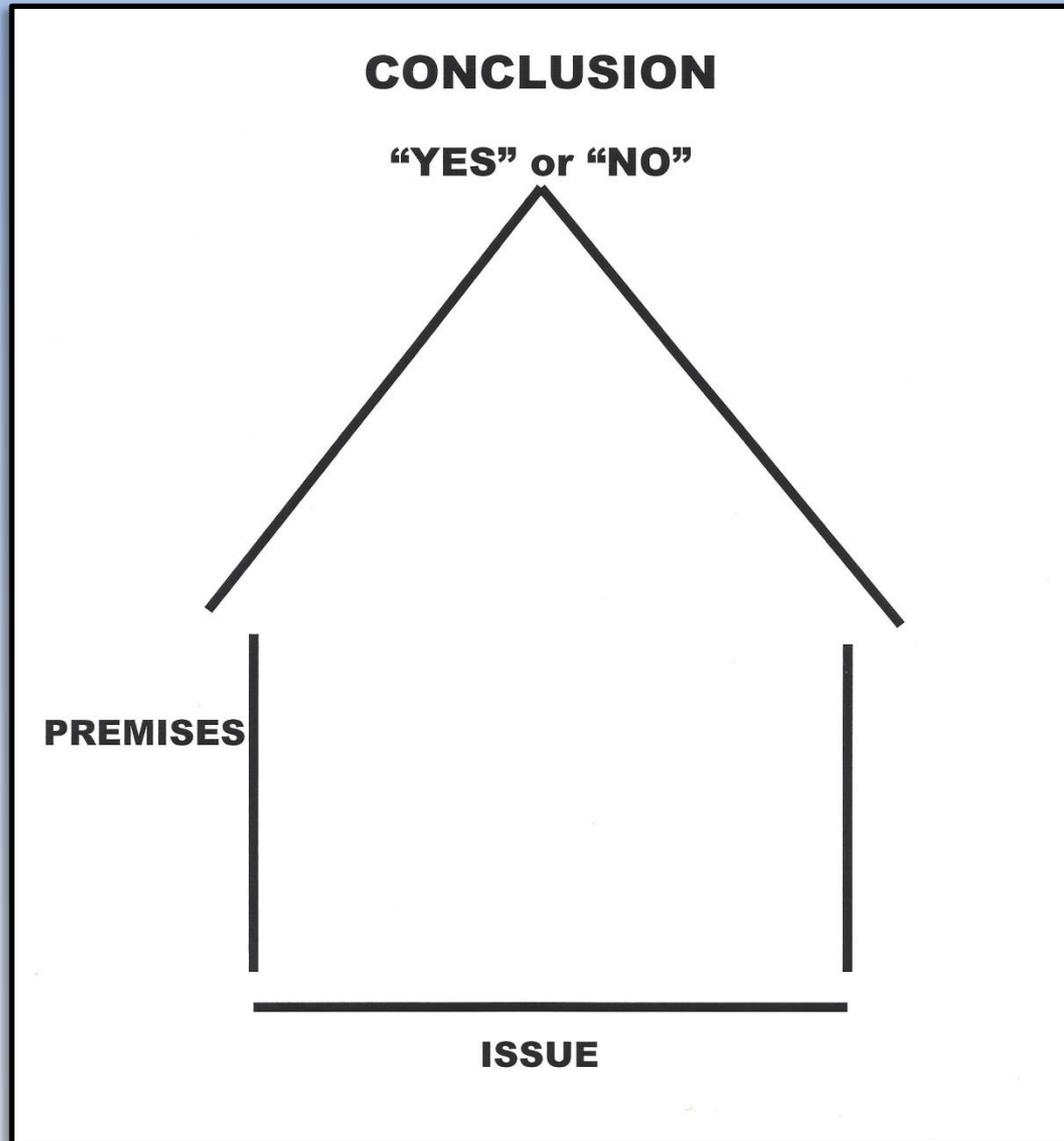
The image shows two overlapping, light-colored stone tablets with a slightly arched top. The tablets are positioned such that the one on the right is partially behind the one on the left. The text is inscribed in a bold, black, serif font. The top tablet reads "COMMANDMENT" and the bottom tablet reads "NUMBER 8".

**COMMANDMENT
NUMBER 8**

A scroll of aged, yellowed parchment is unrolled, showing the word "Research" written in a bold, black, sans-serif font. The word is repeated three times in a row, separated by periods. The scroll is held by wooden rollers on the left and right sides. The parchment has a textured, slightly mottled appearance with some small cracks and discoloration, particularly along the edges. The background is a solid, light blue color.

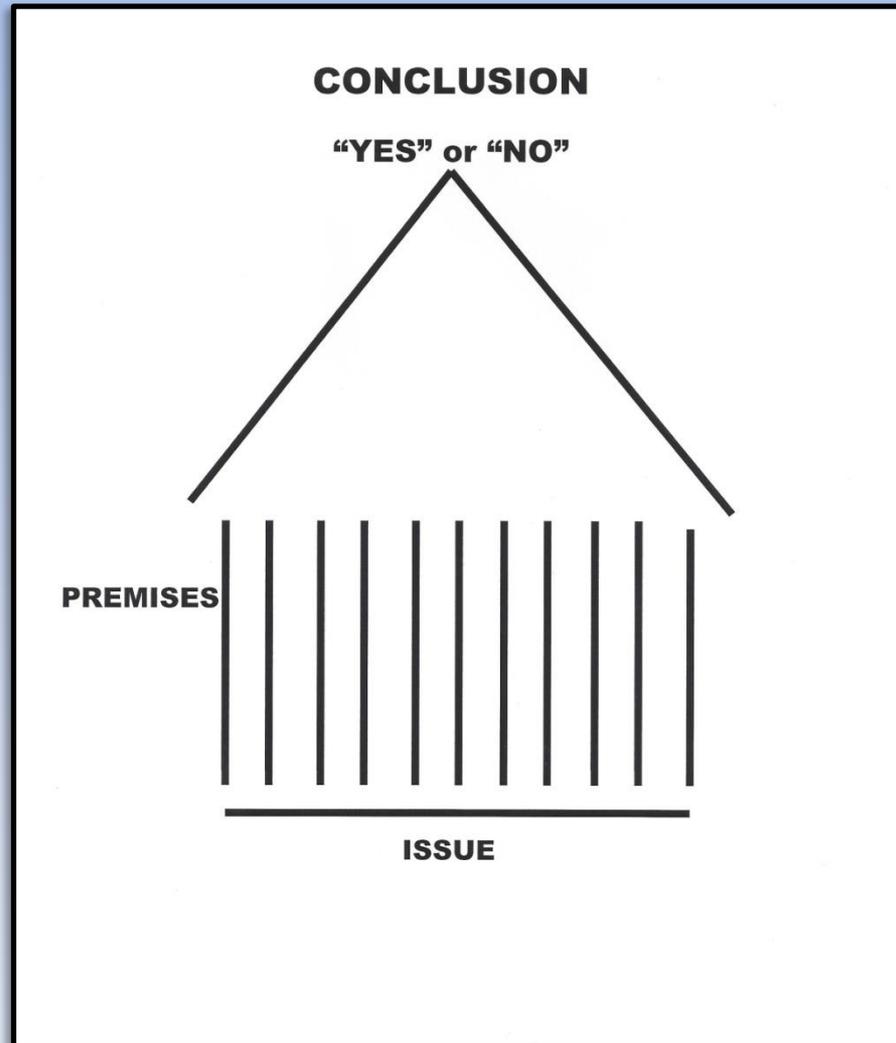
Research. Research. Research.

Logic and Argumentation

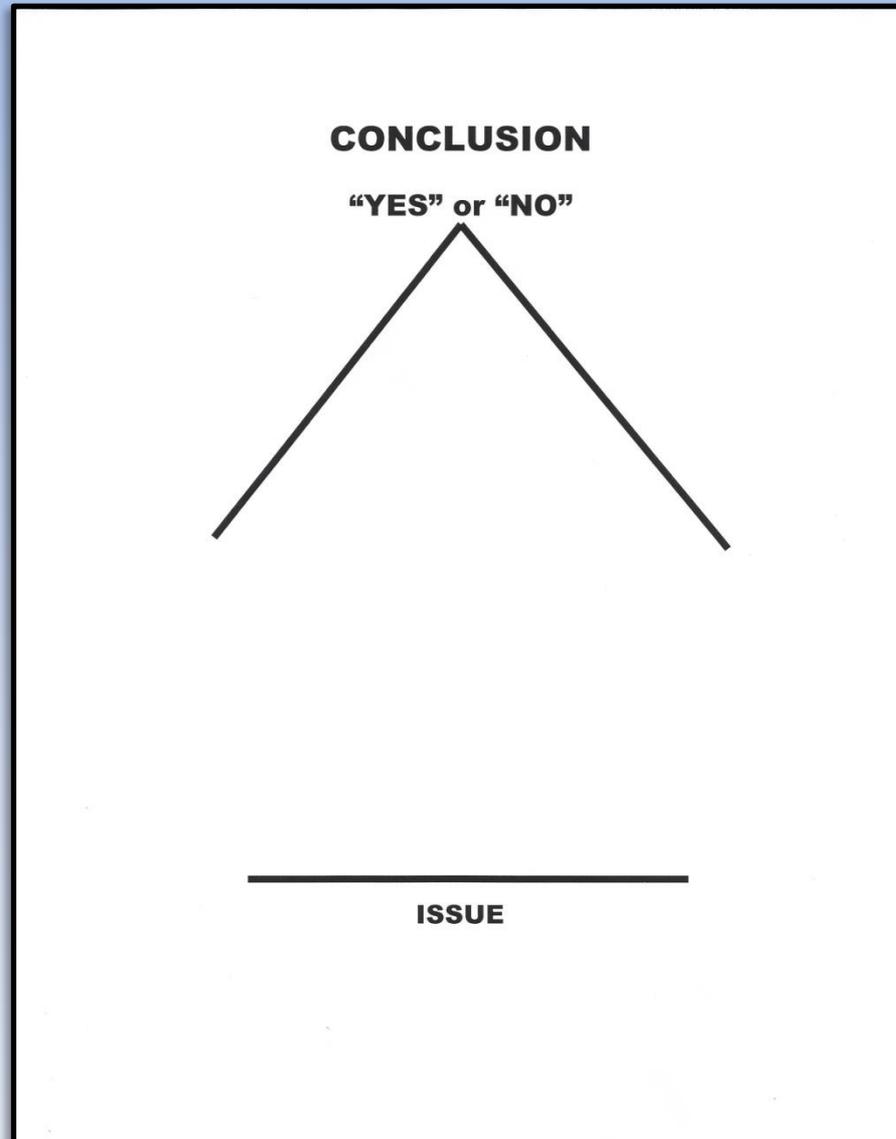


Logic and Argumentation

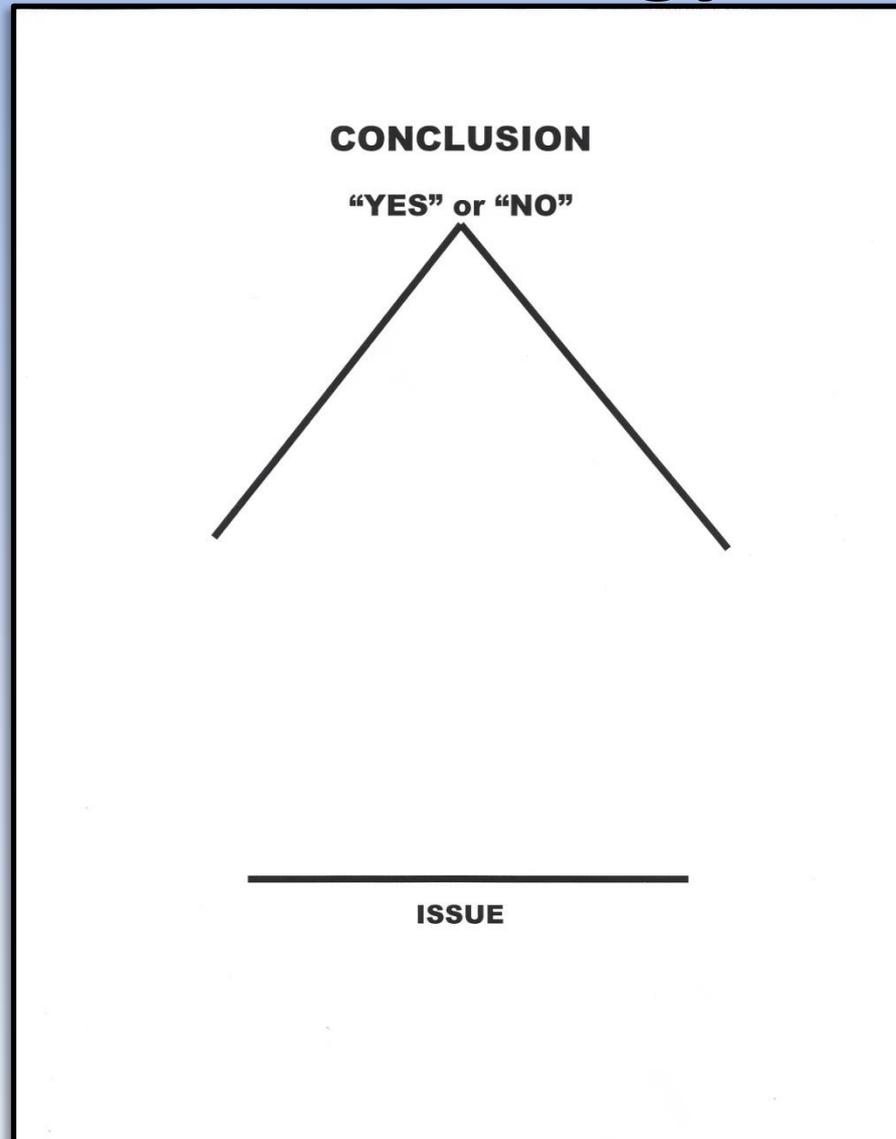
Conclusion Supported by Premises



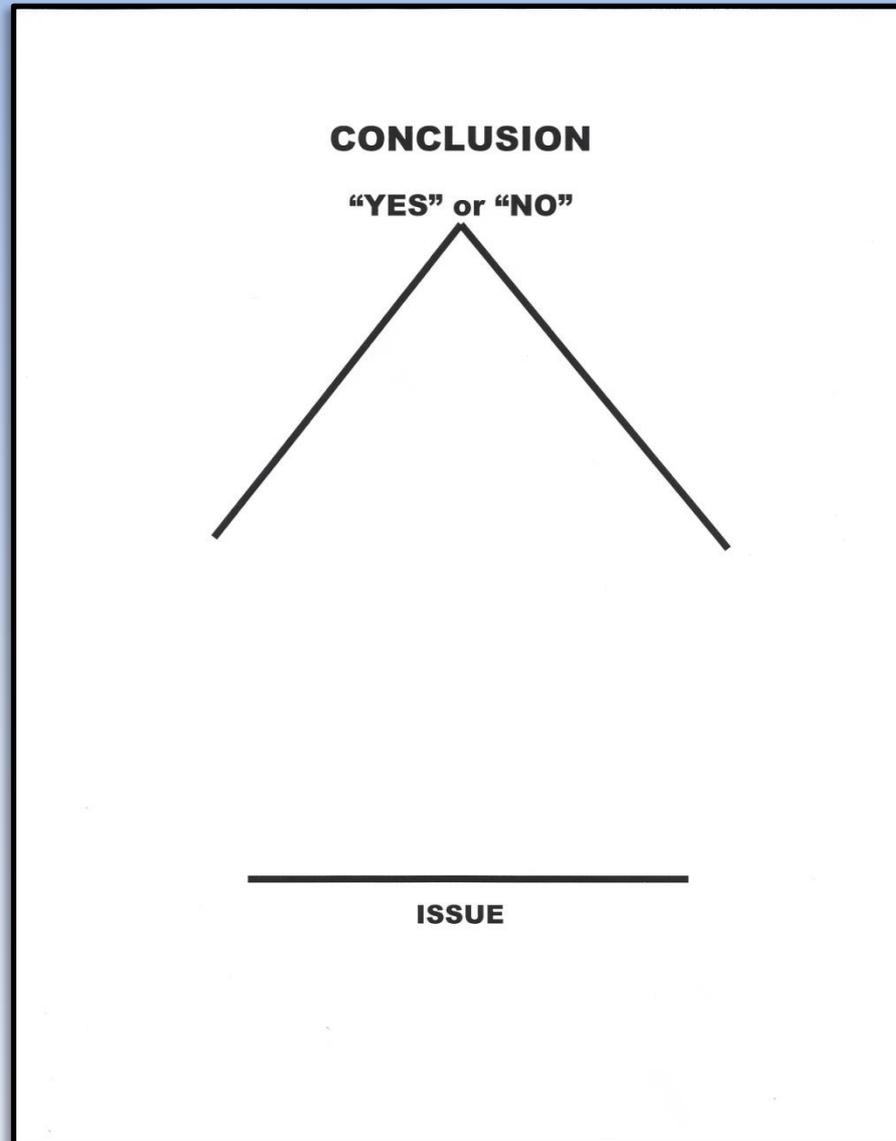
Conclusion with no support



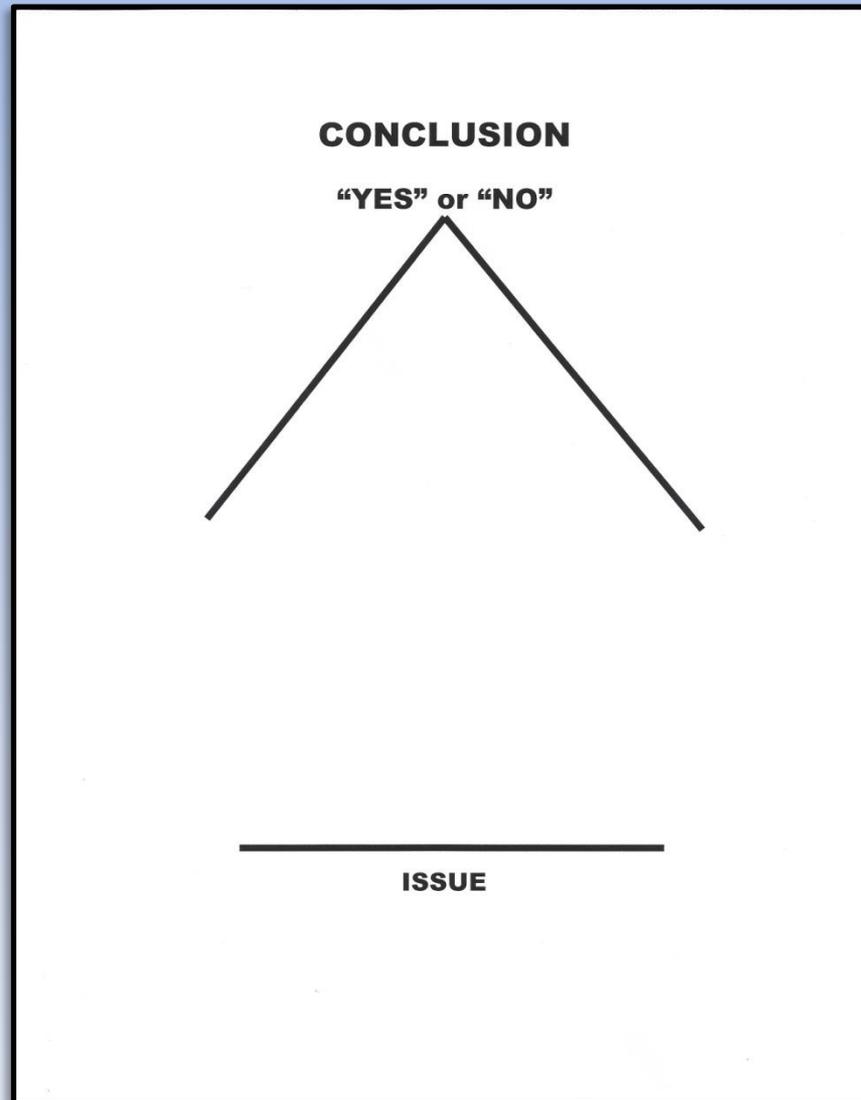
Daubert Reliable Opinions: “It is the methodology”



“Not the conclusion”



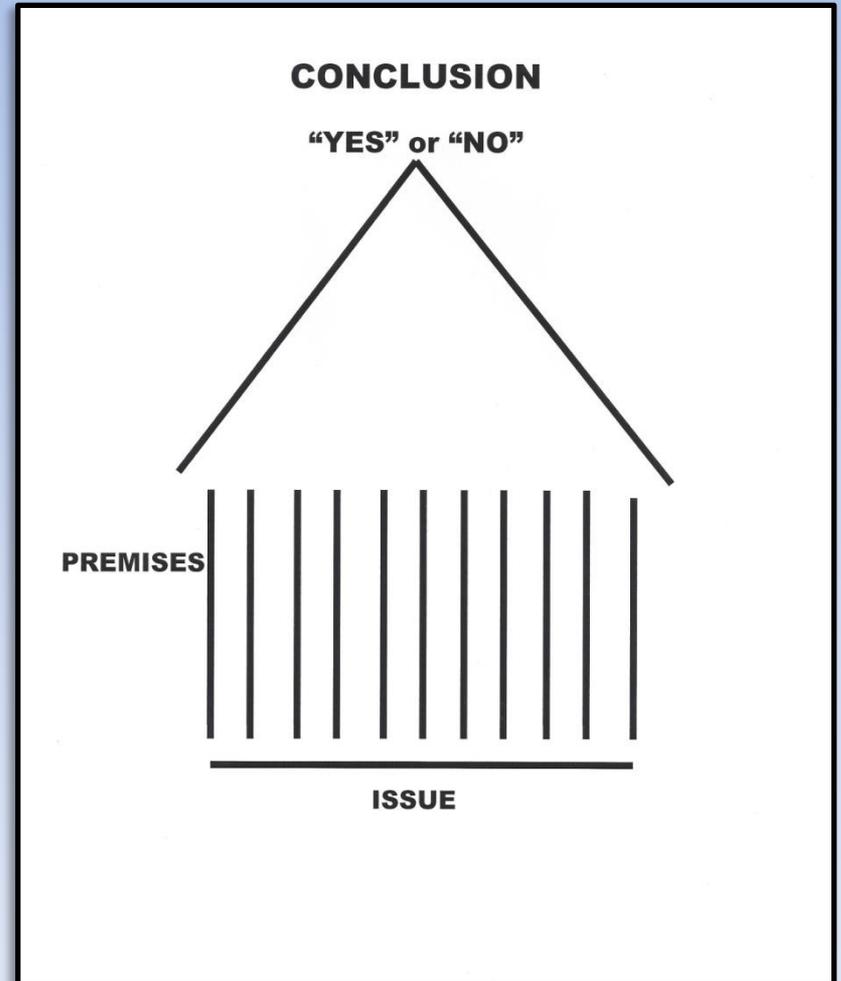
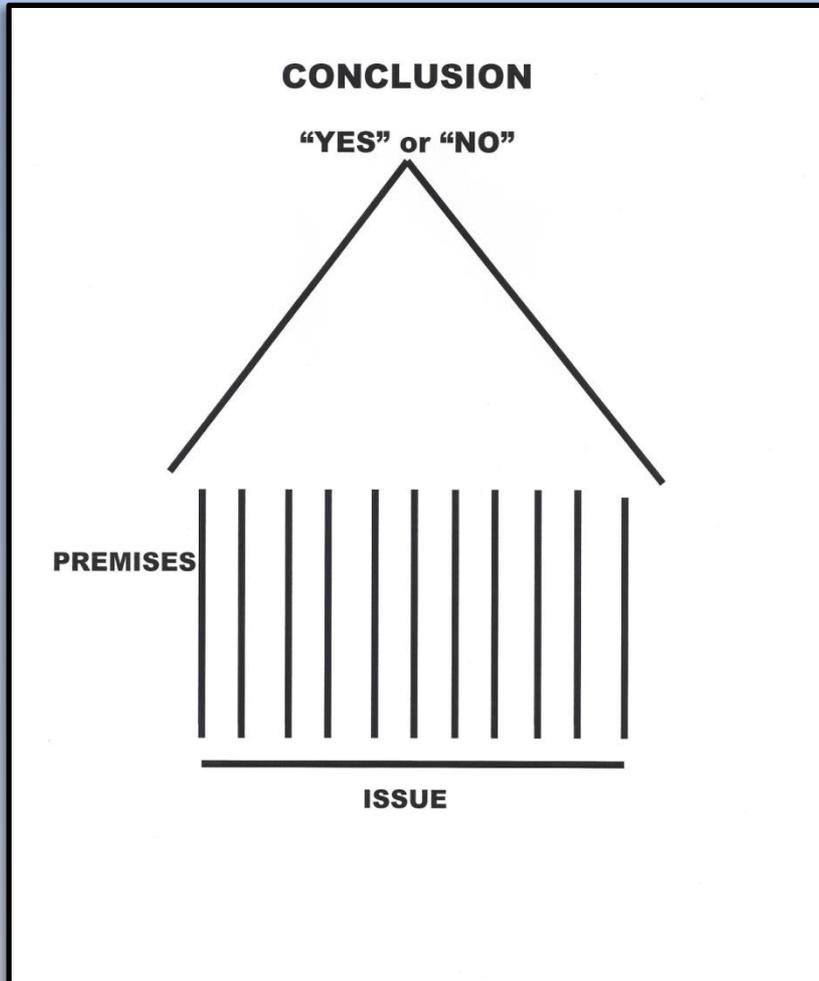
“Which makes and opinion reliable.”





**Unreliable *Ipse Dixit* Opinion .
(Because I say it's so.)**

In Health Law, We often discuss both Pro and Con





Georgetown University Law Center
Scholarship @ GEORGETOWN LAW

2012

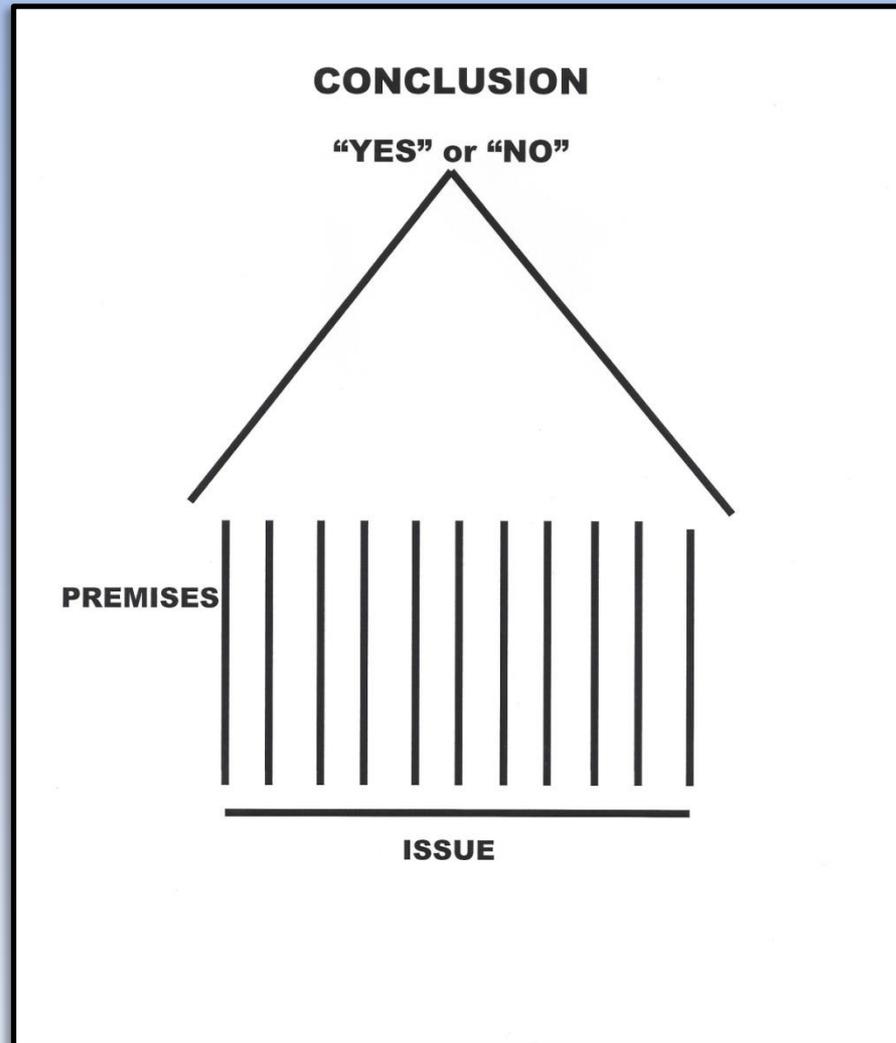
That the Laws be Faithfully Executed: The Perils of the Government Legal Advisor

David Luban

Georgetown University Law Center, luband@law.georgetown.edu

One article suggests 2.01 test: “Advice should be ‘independent and candid.’ A reader can’t tell which answer the client hoped to get from you.

If you are ever called upon to defend your opinion/conclusion . . .



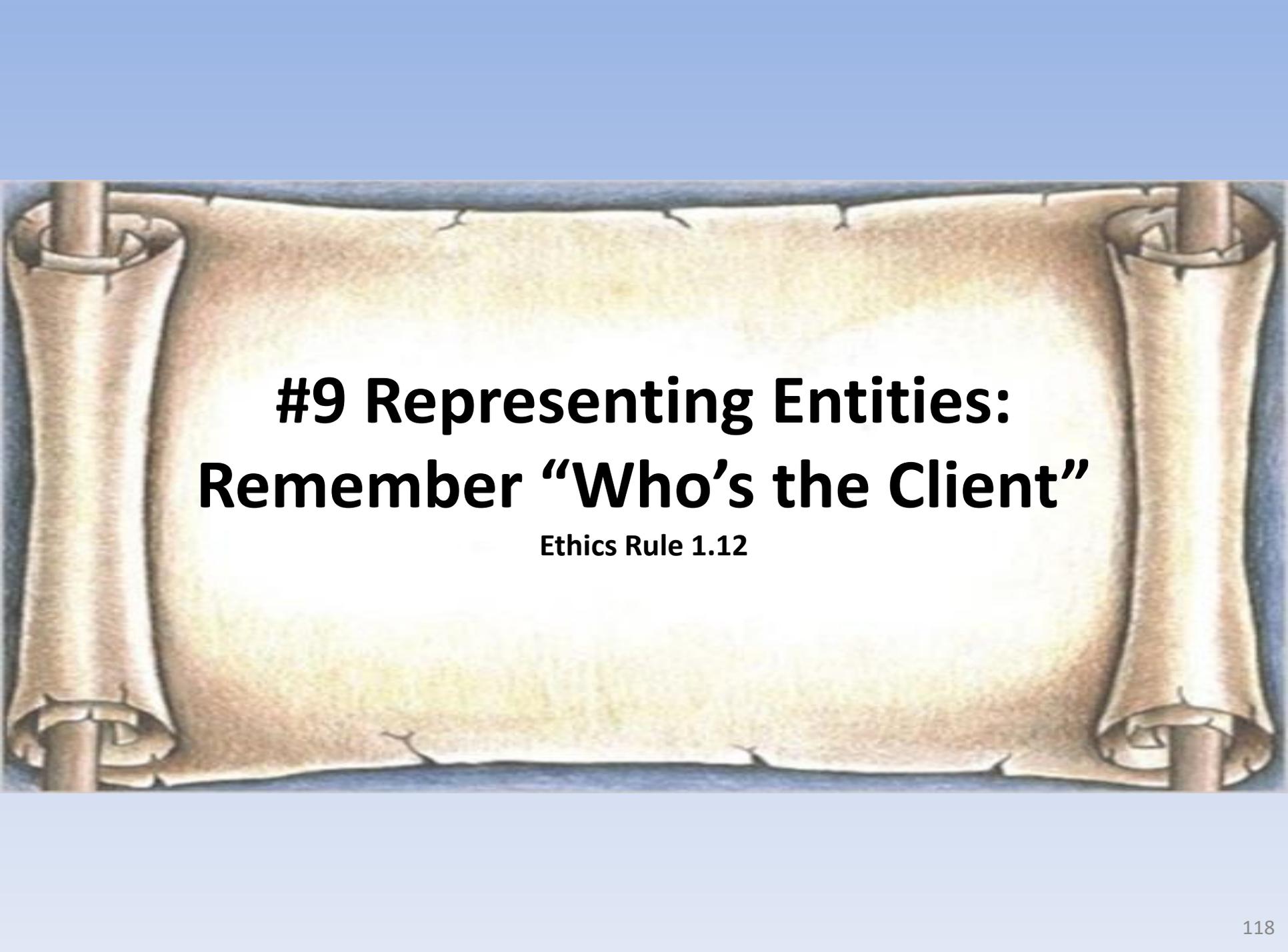


Here at the rock, we have two basic rules.
Memorize them so you can say them in your sleep.
The first rule is: Obey all rules!

This is not the time to be Original.



**COMMANDMENT
NUMBER 9**

A scroll of parchment is unrolled, showing a central area with text. The scroll is tied with wooden pegs on both sides. The parchment is aged and yellowed, with some creases and small holes. The background is a solid light blue color.

#9 Representing Entities: Remember “Who’s the Client”

Ethics Rule 1.12

This isn't the Client?



Is it this guy?



Maybe the 60% Investors?



Or the 40% Investors?



People will try to talk you into doing stupid things.



Ethics Rule 1.12

“A lawyer retained by an organization represents the entity.”

Ethics Rule 1.12

If you learn an agent or representative intends to commit a violation of a legal obligation which can be imputed to the organization, You may be required to take action.

Ethics Rule 1.12

1. Talk the Agent out of it
2. A separate Advice opinion is written to the organization
3. Inform higher (other) authority in organization



**COMMANDMENT
NUMBER 10**



#10 Ask for Help



Ethics Helpline — (800) 532-3947

**The Ethics Helpline received more than 5,300
calls from Texas lawyers seeking advice**

Ethics and Health Law Advice/Opinions



FRIEDMAN & FEIGER
ATTORNEYS AT LAW