

Dealing with  
Mental Health, Anxiety , Depression and Substance  
Abuse Before they Become  
**Disciplinary Concerns**

Dallas Bar Association Health Law Section

Martin Merritt

Attorney

Jason Friedman

Chairman Dist. 6A Grievance  
Committee

Friedman & Feiger

Rachael Craig & Kristin Brady

Attorneys

Office of the Chief Disciplinary Counsel  
State Bar of Texas

# 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.



# Mental Health

Anxiety

Depression

Substance Abuse

Legal Troubles

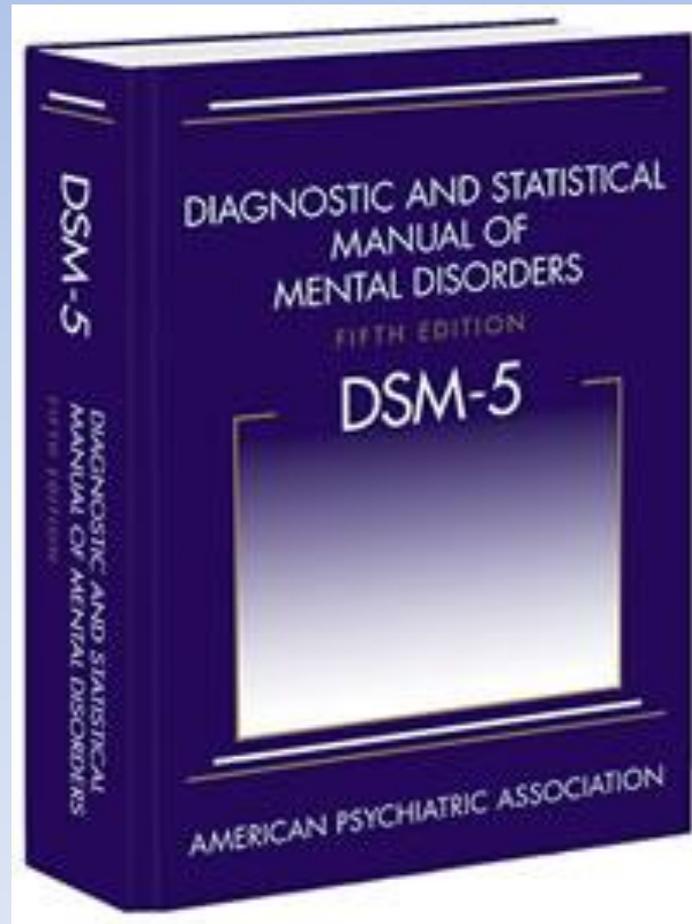
# Four Burners Theory



# Precursors

Anxiety	→ Depression	→ Abuse	→ Legal Trouble
<p><b>Precursor to Depression</b></p> <p><b>(How it Presents)</b></p> <p>Panic            Fear of Texts and Email            Dread of Phone calls            Uncomfortable Feeling            Sleeplessness            Fatigued            Irritability and Anger            Muscle tension            Insomnia            Agoraphobia</p>	<p><b>Precursor to Abuse</b></p> <p><b>(How it Presents)</b></p> <p>Low energy            Unplug            Empty            Loss of enjoyment            Hollowness            Hopelessness            Shame            Pain            Angry            Apathy            No Interest            Suicide Thoughts            Isolation            Withdrawal</p>	<p><b>Precursor to Legal Problems</b></p> <p><b>(How it Presents)</b></p> <p>Self-Medication:            Alcohol            Drugs            Food            Gambling            Spending            Risk-Taking            Sex</p>	<p><b><u>Criminal:</u></b></p> <p>DWI            Car Accidents            Possession</p> <p><b><u>Civil:</u></b></p> <p>Debt/ Lawsuits            Bankruptcy            Divorce            Malpractice Suit</p> <p><b><u>Grievance:</u></b></p> <p>Trust Accounts            Malpractice</p>

# Everybody Has Some





**60 PERCENT**

of all malpractice claims and

**85 PERCENT**

of all trust fund violation cases  
involve substance abuse.

# Remember this guy?



# F. Lee Bailey Represented Neurosurgeon Sam Sheppard

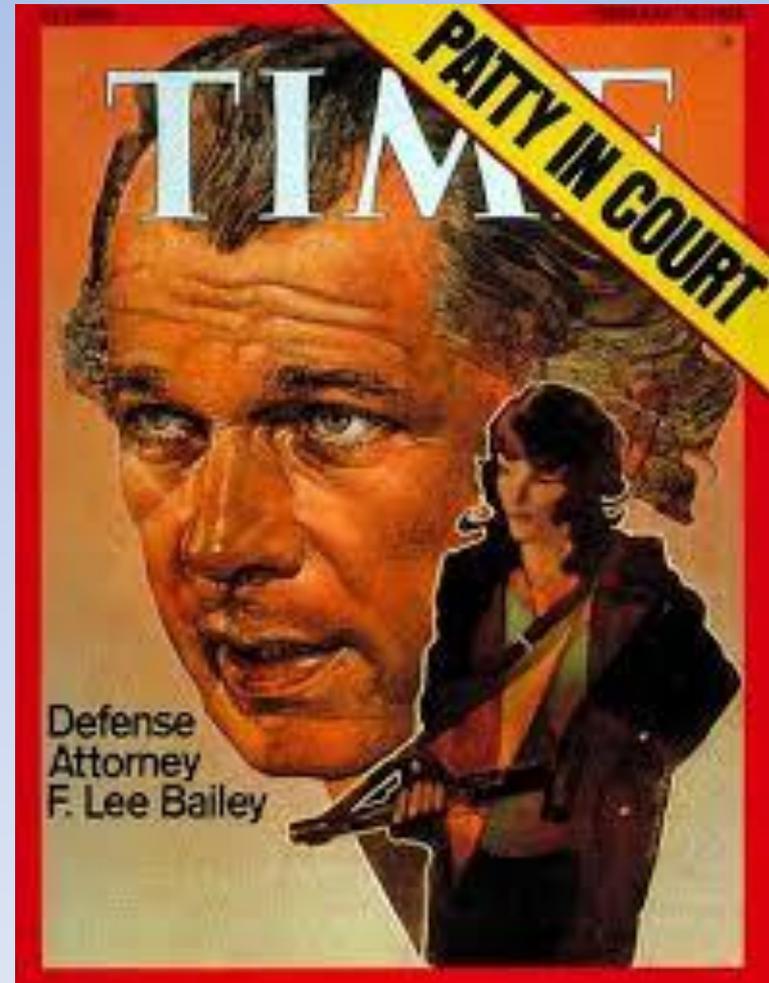
“I Did not kill my wife”



# F. Lee Bailey was Lawyer for the Boston Strangler



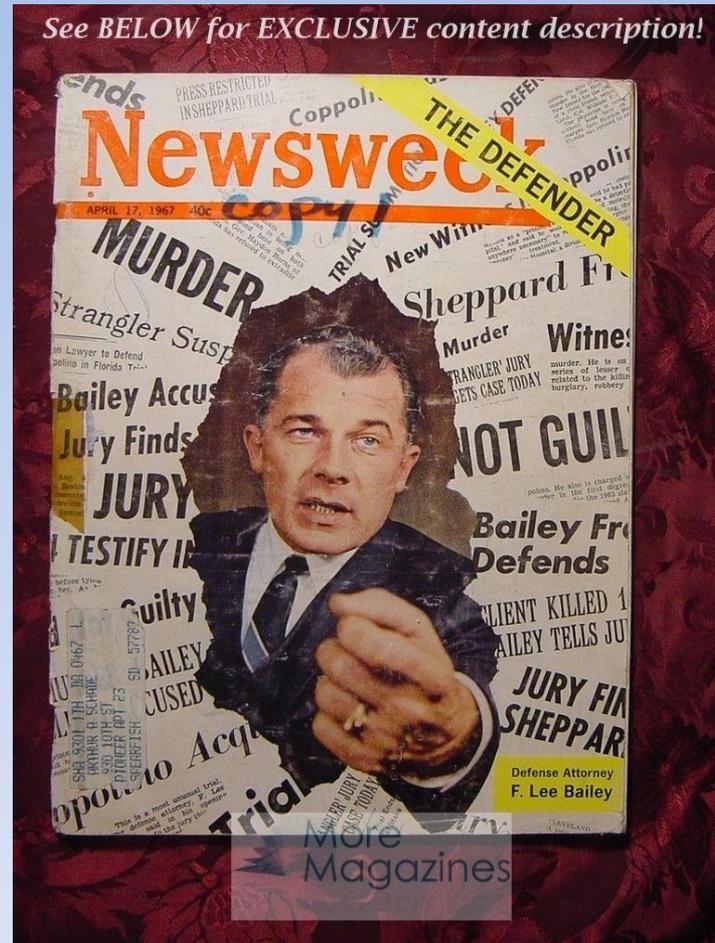
# And. . . Patty Hearst



# And This Guy . . .



# F. Lee Bailey Had it All . . .



# And He Threw it Away



# What did F. Lee Bailey do?

Bailey, 68, was found guilty of seven counts of misconduct, including mixing client funds with his own, misappropriating funds, continuing to spend client funds after a federal court ordered him to stop, giving false testimony, self-dealing and disclosure of confidential client information. TALLAHASSEE, Fla., Nov. 21, 2001 (UPI)



**60 PERCENT**

of all malpractice claims and

**85 PERCENT**

of all trust fund violation cases  
involve substance abuse.

# A Client who Owned Pharmaceutical Stock.



# Client Had a Side Business



# The DEA Got Involved



# Gov't Seized Client's Assets

- **18 U.S. Code § 981 - Civil forfeiture**
- Any property, real or personal, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly [from certain crimes] or . .
- Relating to Federal program fraud;
- **Relating to fraud and false statements**;
- Relating to major fraud against the United States;
- Relating to concealment of assets from conservator or receiver of insured financial institution);
- **Relating to mail fraud or wire fraud**

# Sham Transfer to Bailey

About 602,000 of the F. Lee Bailey's Client's shares of Biochem Pharma stock worth almost \$6 million were transferred into Bailey's Swiss account.

Client Claimed Bailey was supposed to use the money to maintain and liquidate Client's other assets, which included French real estate.

The Subtext appears to indicate the intent was to hide the stock from the feds and forfeiture.

# Then, Client Agreed to Forfeiture

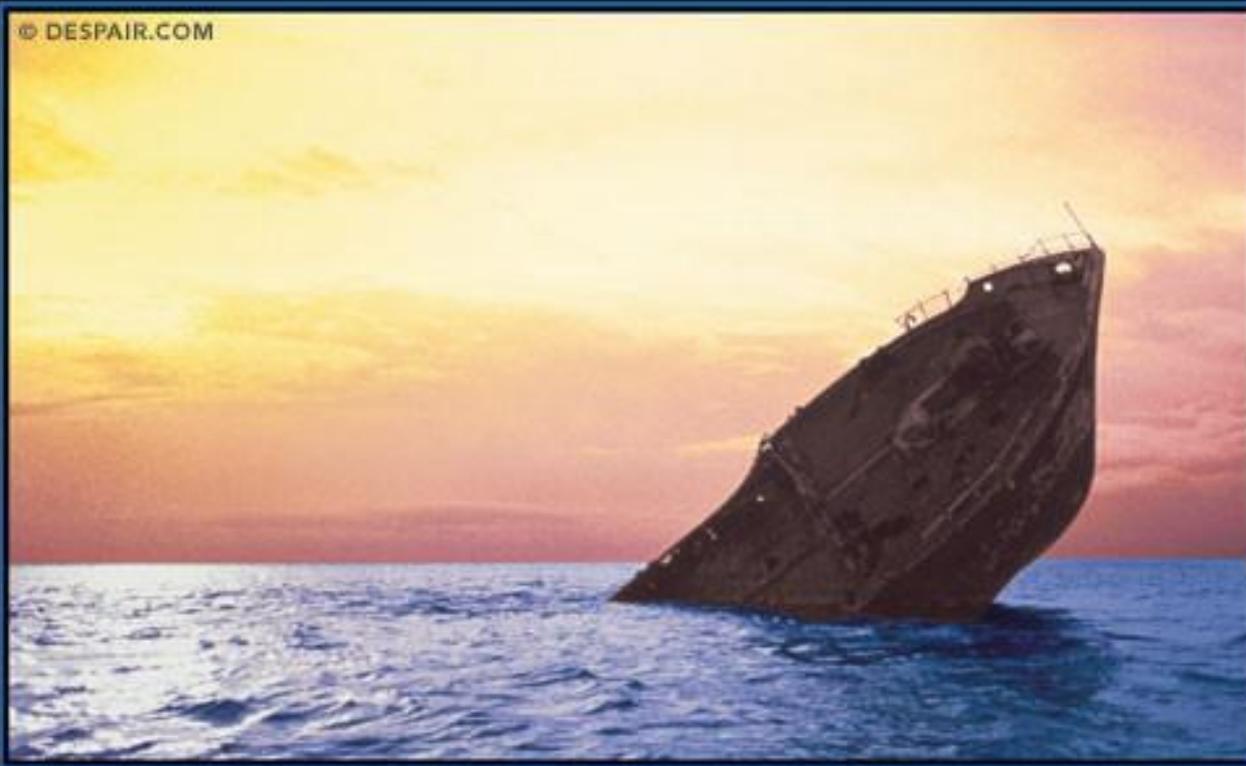
- The Client was accused of Marijuana trafficking in Gainesville, Fla., in 1994.
- The Client agreed to cooperate with the government by pleading guilty and forfeiting all of his assets in hope of a lighter sentence.
- By then Biochem Pharma stock rose to \$20 million because of HIV drugs.

# But Bailey Kept the Stock

He moved the money to his personal account and spent some of it to buy a home.

"Bailey's self-dealing and willingness to compromise client confidences are especially disturbing. Not only did Bailey use assets that his client intended to forfeit to the U.S. Government for Bailey's own purposes, but Bailey also attempted to further his own interests by disparaging his client in an ex parte letter to the judge who would sentence his client. Bailey's self-dealing constitutes a complete abdication of his duty of loyalty to his client," the court ruling said.

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# MISTAKES

IT COULD BE THAT THE PURPOSE OF YOUR LIFE IS  
ONLY TO SERVE AS A WARNING TO OTHERS.

# Health Lawyers Do have to Worry . . .

- **18 U.S. Code § 981 - Civil forfeiture**
- Any property, real or personal, constituting, derived from, or traceable to, any proceeds obtained directly or indirectly [from certain crimes] or . . .
- Relating to Federal program fraud;
- **Relating to fraud and false statements**;
- Relating to major fraud against the United States;
- Relating to concealment of assets from conservator or receiver of insured financial institution);
- **Relating to mail fraud or wire fraud**

# Because this implicates the Treatment of Retainers and Legal Fees In Healthcare Cases



**How Do You Know it Is Safe  
To Accept a Fee/Retainer?**

# Attorney Fee Forfeiture Guidelines



- Policy Limitations on Application of Forfeiture Provisions to Attorney Fees
- Attorney Fee Forfeiture Guidelines
- Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction
- Forfeiture of Assets Transferred to an Attorney for Representation in a Civil/Criminal Matter

# Attorney Fee Forfeiture Guidelines



- Discussion of Actual Knowledge and/or Reasonable Cause to Know
- At the Time of the Transfer
- Actual Knowledge of Forfeitability
- Knowledge that the Government has Asserted that a Particular Asset is Subject to Forfeiture
- Reasonable Cause to Know that an Asset is Subject to Forfeiture

# “Forfeiture of Assets Transferred to an Attorney in a Fraudulent or Sham Transaction”

- The mere fact that an attorney has received a forfeitable asset as payment for legal fees by itself does not provide reasonable grounds to believe the transfer was a fraudulent or sham transaction. There must be reasonable cause to believe the asset was transferred for the purpose of impeding or defeating the government's ability to forfeit it.

# “Forfeiture of Assets Transferred to Attorney in a Civil Matter”

- Forfeiture of an asset transferred to an attorney as payment for legal fees for representation in a civil matter may be pursued, notwithstanding the fact that the asset may have been transferred for legitimate services actually rendered, when there are reasonable grounds to believe that the attorney had reasonable cause to know that the asset was subject to forfeiture at the time of the transfer.

# “Actual Knowledge and/or Reasonable Cause to Know At the Time of Transfer”

- “Transfer” is “when the fee is earned” not placed into trust account.
- (Probably why criminal defense lawyers use flat fee arrangements.)



**Flat Fees:** “Rule 1.04. Fees (a) A lawyer shall not enter into an arrangement for, charge, or collect an illegal fee or unconscionable fee. A fee is unconscionable if a competent lawyer could not form a reasonable belief that the fee is reasonable. TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT Eff. Mar. 2016

# “Reasonable grounds to Believe”

Reasonable grounds exist for believing that an attorney has actual knowledge that an asset is subject to forfeiture when there is evidence that it was known to the attorney at the time of the transfer either: (a) that the government had asserted that the particular asset is subject to forfeiture or (b) that the particular asset in fact is from criminal misconduct.

# “Case By Case Basis ”

- Order restraining assets is relevant.
- Client's income other than Crime/Fraud?
- Drug Trafficker with no other income?
- Hospital Chain or Fortune 500 Pharma?
- Smaller Entity with only one business model?
- Retirement Funded before Alleged Fraud?

# “Conclusive Knowledge ”

- “Assets . . . . specifically named in the indictment or subject to a restraining order or civil forfeiture proceeding.”

# Discovery, Subpoenas, Compelling Attorney Disclosure

- Discovery may be available
- Confidential communications may be compelled in limited situations
- Subpoenas may be issued
- Agreements can be reached with Asst. A.G. and Attorney, where assets clearly not subject to forfeiture

# Good News: Just accepting a fee won't get you disbarred

Bailey, 68, was found guilty of seven counts of misconduct, including mixing client funds with his own, misappropriating funds, continuing to spend client funds after a federal court ordered him to stop, giving false testimony, self-dealing and disclosure of confidential client information. TALLAHASSEE, Fla., Nov. 21, 2001 (UPI)

# Health Lawyer's Workload Anxiety



# Almost constant worry . . .



**How Do You Deal With  
This Kind of Stress ?**

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. If it is Legal.”

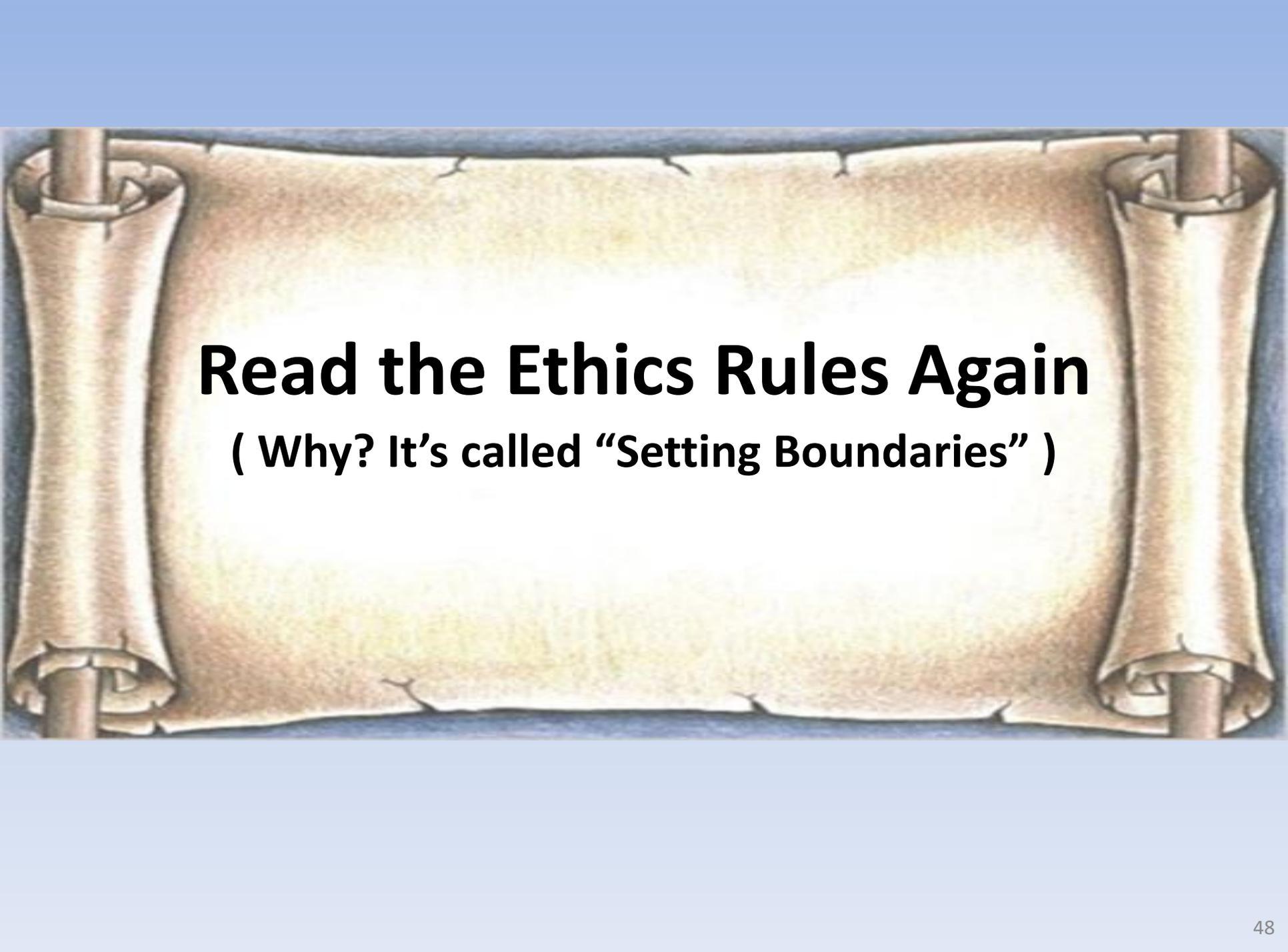


# Clients Don't Tell Us Everything



# Health Law is Often Like Being Bottom of a Well



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 centered and reads:

**Read the Ethics Rules Again**  
**( Why? It's called "Setting Boundaries" )**



## **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.”



## **1.02(c) Scope and Objectives of Representation**

**“Assist” meaning you can’t participate in the client’s fraud.**



## **1.02(c) Scope and Objectives of Representation**

“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.”



## 1.02(c) Scope and Objectives of Representation

“The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action.”



## 1.02(c) Scope and Objectives of Representation

“There is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity..” COMMENT 7



## Fraud Defined as the “Big Kind” only. . .

““**Fraud**” or “**Fraudulent**” denotes conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information (Omission).



**Trouble is . . .**



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

# Government Fraud and Abuse Laws

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



# Commercial Payor Lawsuits



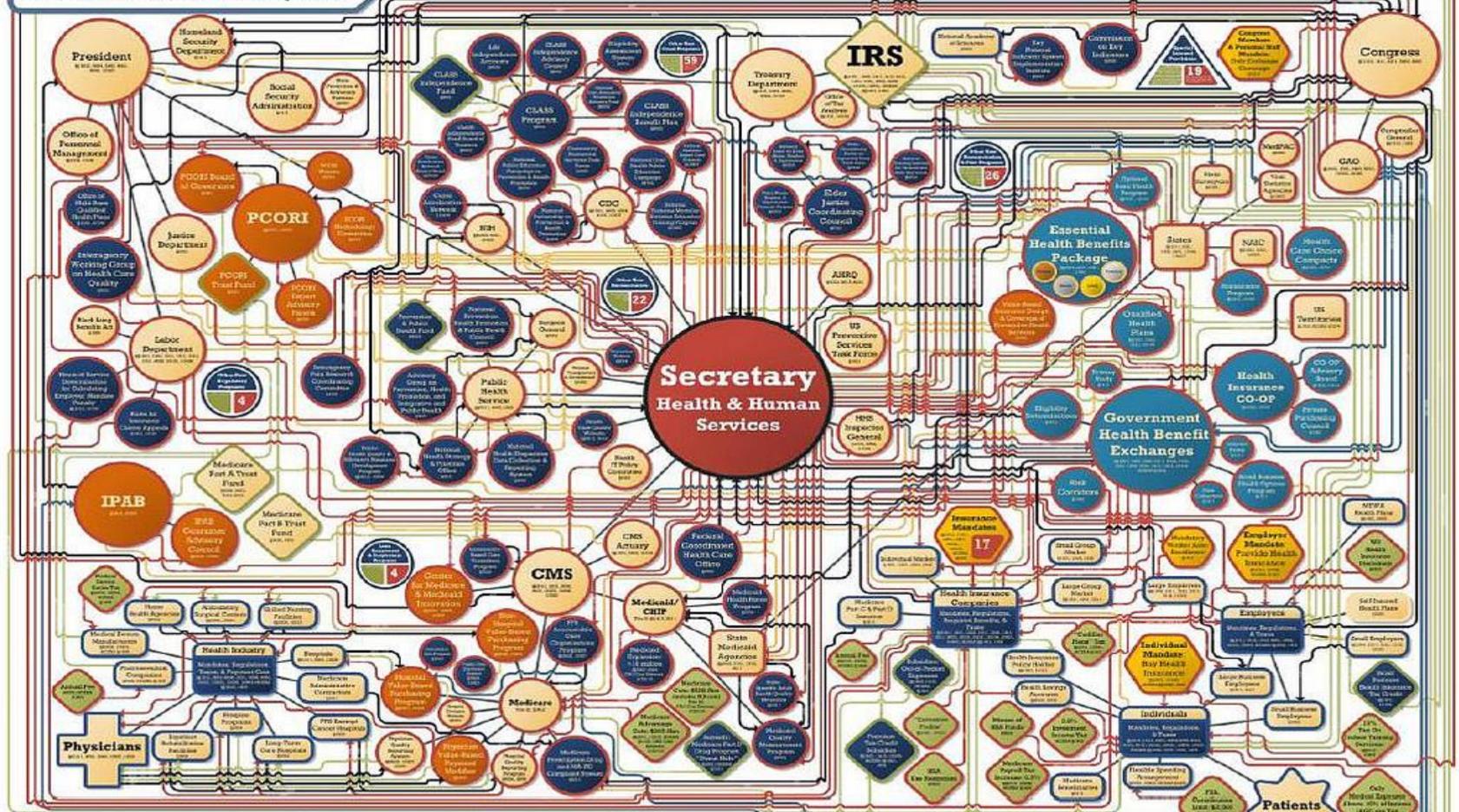
# Commercial Payors are Suing the Doctors



# Aetna v. Peoples Choice Hospital 9/29/17 HCFA 1500

17. NAME OF REFERRING PROVIDER OR OTHER SOURCE										17a. <input type="checkbox"/>		17b. NPI <b>a</b>		18. HOSPITALIZATION DATES RELATED TO CURRENT SERVICES																					
19. RESERVED FOR LOCAL USE										FROM MM DD YY		TO MM DD YY		20. OUTSIDE LAB? \$ CHARGES																					
21. DIAGNOSIS OR NATURE OF ILLNESS OR INJURY (Relate Items 1, 2, 3 or 4 to Item 24E by Line)										<input type="checkbox"/> YES <input type="checkbox"/> NO				22. MEDICAID RESUBMISSION CODE ORIGINAL REF. NO.																					
23. PRIOR AUTHORIZATION NUMBER																																			
24. A. DATE(S) OF SERVICE										B. PLACE OF SERVICE		C. EMG		D. PROCEDURES, SERVICES, OR SUPPLIES (Explain Unusual Circumstances)										E. DIAGNOSIS POINTER		F. \$ CHARGES		G. DAYS OR UNITS		H. ICD-9-CM Plan		I. ID. QUAL.		J. RENDERING PROVIDER ID. #	
1																																			
2																																			
3																																			
4																																			
5																																			
6																																			
25. FEDERAL TAX I.D. NUMBER										SSN EIN		26. PATIENT'S ACCOUNT NO.		27. ACCEPT ASSIGNMENT? (If 24E, assign, see 24E)		28. TOTAL CHARGE		29. AMOUNT PAID		30. BALANCE DUE															
31. SIGNATURE OF PHYSICIAN OR SUPPLIER INCLUDING DEGREES OR CREDENTIALS (I certify that the statements on the reverse apply to this bill and are made a part thereof.)														<input type="checkbox"/> YES <input type="checkbox"/> NO		\$		\$		\$															
32. SERVICE FACILITY LOCATION INFORMATION																				33. BILLING PROVIDER INFO & PH # ( )															
SIGNED										DATE		a. <b>c</b>		b.		a. <b>d</b>		b.																	

# Your New Health Care System



New Government	Expanded Government	Private	New Relationships
<ul style="list-style-type: none"> <li>Restoring Potential</li> <li>Involvement in Health Insurance Market</li> <li>Other Expansions</li> <li>Represents Benefits of Additional Entities</li> </ul>	<ul style="list-style-type: none"> <li>Mandates</li> <li>Taxes &amp; Monetary Fees/ Penalties/Cuts</li> <li>Trust Fund (Restoring Potential)</li> <li>Other New Trust Funds/ Monetary Benefits</li> </ul>	<ul style="list-style-type: none"> <li>Private Entity with New Mandates/ Regulations/ Responsibilities</li> <li>Package &amp; Package Entity</li> <li>Special Federal Provision</li> </ul>	<ul style="list-style-type: none"> <li>Regulations/ Requirements/Mandates</li> <li>Reporting Requirements</li> <li>Oversight</li> <li>Money Flows</li> <li>Consultation/Advisory/ Laid Sharing</li> <li>Structural Connections (Includes Dairies)</li> </ul>

**ACI:** Acquired Care System  
**AHRQ:** Agency for Healthcare Research and Quality  
**CEA:** Congressional Budget Office  
**GAO:** Government Accountability Office  
**IRS:** Internal Revenue Service  
**PCORI:** Patient-Centered Outcomes Research Institute  
**IPAB:** Institute of Medicine  
**Physicians:** American Medical Association  
**Patients:** American Hospital Association  
**Employers:** National Business Roundtable  
**Insurance Companies:** American Insurance Association  
**Medicare:** Social Security Administration  
**Medicaid:** Department of Health and Human Services  
**Medicaid/CHIP:** Children's Health Insurance Program  
**Medicare Part A:** Social Security Administration  
**Medicare Part B:** Social Security Administration  
**Medicare Part C:** Social Security Administration  
**Medicare Part D:** Social Security Administration  
**Medicare Advantage:** Social Security Administration  
**Medicare Supplement:** Social Security Administration  
**Medicare Part A:** Social Security Administration  
**Medicare Part B:** Social Security Administration  
**Medicare Part C:** Social Security Administration  
**Medicare Part D:** Social Security Administration  
**Medicare Advantage:** Social Security Administration  
**Medicare Supplement:** Social Security Administration

**Patient Protection & Affordable Care Act, P.L. 111-148;**  
**Health Care & Education Reconciliation Act, P.L. 111-152**  
 Prepared by Joint Economic Committee, Republican Staff  
 Congressman Kevin Brady, Senior House Republican  
 Senator Sam Brownback, Ranking Member

# IT'S COMPLICATED

# Consequences Are Severe



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It Feels “Scary,” Cause it is “Scary”



# Mental Health Precursors

<b>Anxiety</b>	<b>Depression</b>	<b>Abuses</b>	<b>Legal Trouble</b>
<b>Precursor to Depression</b>	<b>Precursor to Abuse</b>	<b>Precursor to Legal Problems</b>	<b>Problems</b>
<b>(How it Presents)</b>	<b>(How it Presents)</b>	<b>(How it Presents)</b>	<b>(How you end up)</b>
<b>Panic</b> <b>Fear of Texts and Email</b> <b>Dread of Phone calls</b> <b>Uncomfortable Feeling</b> <b>Sleeplessness</b> <b>Fatigued</b> <b>Irritability and Anger</b> <b>Muscle tension</b> <b>Insomnia</b> <b>Agoraphobia</b>	<b>Low energy</b> <b>Unplug</b> <b>Empty</b> <b>Loss of enjoyment</b> <b>Hollowness</b> <b>Hopelessness</b> <b>Shame</b> <b>Pain</b> <b>Angry</b> <b>Apathy</b> <b>No Interest</b> <b>Suicide Thoughts</b> <b>Isolation</b> <b>Withdrawal</b>	<b>Self-Medication:</b>  <b>Alcohol</b> <b>Drugs</b> <b>Food</b> <b>Gambling</b> <b>Spending</b> <b>Risk-Taking</b> <b>Sex</b>	<b>Criminal:</b>  <b>DWI</b> <b>Possession</b>  <b>Civil:</b> <b>Debt/ Lawsuits</b> <b>Divorce</b> <b>Malpractice Suit</b>  <b>Grievance:</b>  <b>Trust</b> <b>Malpractice</b>

# Don't Wait.



# Work on Enjoying Life



**READ THE TLAP PAPER:  
“TEN TIPS FOR LAWYERS DEALING WITH  
STRESS, MENTAL HEALTH, OR  
SUBSTANCE USE ISSUES.”  
CHRIS RITTER , STAFF ATTORNEY, TLAP**

# Chief Disciplinary Counsel

- Administers Texas attorney discipline system
- Represents Commission for Lawyer Discipline in disciplinary litigation
- 4 Regional Offices (Austin, Dallas, Houston, San Antonio)
- Investigates and prosecutes disciplinary matters within each region

# Commission for Lawyer Discipline

- Standing committee of State Bar of Texas
- Oversees Chief Disciplinary Counsel (CDC)
- 12 members:
  - 6 attorneys appointed by President of the State Bar
  - 6 public members appointed by the Supreme Court of Texas

# Grievance Committees

- Volunteer members
  - 2/3 Attorneys
  - 1/3 Public members
- Disciplinary Districts



# Classification of Grievance

- Upon receipt of a grievance, the CDC has 30 days to decide whether it is an Inquiry or Complaint.
- Inquiry: Assuming that grievance is true, it still does not allege Professional Misconduct and is dismissed with notice to Complainant and Respondent.
- Complaint: Grievance states allegation of Professional Misconduct. Notice and copy of Complaint are sent to Respondent advising him or her to respond within 30 days from receipt.

# Investigation & Determination of Just Cause

- Just Cause must be determined within 60 days from Respondent's response deadline.
- Just Cause: “such cause as is found to exist upon a reasonable inquiry that would induce a reasonably intelligent and prudent person to believe that an attorney either has committed an act or acts of Professional Misconduct requiring that a Sanction be imposed, or suffers from a Disability that requires either suspension as an attorney licensed to practice law in the State of Texas or probation.”

# No Just Cause: Summary Disposition Panel Hearing

- If no Just Cause is found, the CDC presents Complaint to Summary Disposition Panel (SDP)
- Quorum requirements: at least 4 panel members present. At least one member must be a public member
- The SDP determines whether Complaint should be dismissed or should proceed
- A tie vote results in dismissal
- No appeal from decision
- Venue is in county of alleged misconduct

# Notification of Complaint & Election

- If Just Cause is found or if SDP votes to proceed, the CDC notifies Respondent in writing.
- Respondent must elect to have Complaint heard in district court or by Evidentiary Panel within 20 days from receipt of notice.
- If Respondent fails to elect, Complaint proceeds before Evidentiary Panel.
  - Evidentiary Panel: confidential; private reprimand
  - District Court: public proceeding; NO private reprimand

# Additional Sanctions/Terms and Conditions of Probation

- “Sanction” may also include:
  - restitution to client(s) or to Client Security Fund
  - reasonable attorneys’ fees and all direct expenses associated with the proceedings
- Judgment may also include the following terms of probation if the evidence supports inclusion:
  - Additional hours of CLE courses
  - Law Practice Management Consultation
  - Rehabilitative Monitor
  - Psychological Assessment and Compliance Reports
  - Law Practice Monitor
  - Random Drug Screens
  - Trust Account Reporting
  - Trust Account Audit

# Terminating Representation

TDRPC 1.15(d): Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payments of fee that has not been earned.

# Safekeeping Property

TDRPC 1.14(a):

- A lawyer shall hold funds & other property of clients or third persons separate from his or her own.
- These funds must be kept in a separate trust or escrow account.
- Other property of clients or third persons must be appropriately safeguarded.
- A lawyer must keep complete records for a period of 5 years after termination of representation.

# Trust Accounts

- Any lawyer who will handle funds that belong to a client or a 3<sup>rd</sup> party must have a trust account.
- Funds that **MUST** go into a trust account:
  - Advances fees/Retainers **UNTIL** they are **ACTUALLY EARNED** by the lawyer
  - Settlement Monies
- Funds that **MUST NOT** go into a trust account:
  - Lawyer's personal or business transactions

# Trust Accounts – Unearned Fees

- Examples of Unearned Fees:
  - Advance deposit or retainer for lawyer's fees which will be depleted as the lawyer bills the client
  - Flat fees that have not been earned, regardless of whether the fee is deemed “nonrefundable” in the fee agreement
  - Settlement funds which have not been distributed

# Trust Accounts – Unearned Fees (cont.)

- Unearned fees are *ALWAYS* subject to a refund until earned and cannot be deemed *nonrefundable*
- Labeling a flat fee as nonrefundable or earned upon receipt, does not make it so
- Only a *true nonrefundable retainer* should not be placed in the trust account

# True Nonrefundable Retainer

- Not a payment for services
- To secure a lawyer's services and remunerate the lawyer for loss of the opportunity to accept other employment
- Have to substantiate that other employment will be lost by obligating herself to represent the client
  - Only then a true retainer may be deemed earned at the moment received

# Safekeeping Property (cont.)

## TDRPC 1.14(b):

- Upon receiving funds or property of a client or third person, a lawyer shall promptly notify the client or third person.
- A lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.
- Upon request by the client or third person, the lawyer shall promptly render a full accounting.

# Safekeeping Property (cont.)

## TDRPC 1.14(c):

- If a lawyer is in possession of funds or property in which the lawyer and another person claim an interest, the property shall be kept separate until there is an accounting and severance.
- All funds in a trust or escrow account shall be disbursed only to those people entitled to receive them by law.
- If a dispute arises regarding respective interests of the funds or property, the portion in dispute shall be kept separately until the dispute is resolved, and the undisputed portion shall be distributed appropriately.

# CDC Contact Information

- The Princeton

14651 Dallas Parkway, Suite 925

Dallas, Texas 75254

- Phone #: (972) 383-2900

Fax #: (972) 383-2935

- [kbrady@texasbar.com](mailto:kbrady@texasbar.com)

- [rcraig@texasbar.com](mailto:rcraig@texasbar.com)

# State Bar of Texas Resources

- [www.texasbar.com](http://www.texasbar.com)
- [texaslawpracticemanagement.com](http://texaslawpracticemanagement.com)
- Ethics Helpline: (800) 532-3947
- Client-Attorney Assistance Program (CAAP): (800) 932-1900
- Texas Lawyers' Assistance Program (TLAP): (800) 343-8527
- Advertising Review Department: (800) 566-4616
- Texas Center for Legal Ethics & Professionalism:  
(800) 204-2222 or [www.legalethicstexas.com](http://www.legalethicstexas.com)

