



David D. Dodge is a partner in the Phoenix law firm Lieberman, Dodge, Gerding, Kothe & Anderson, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

# Truth Not Trumped by Best Interest of Client

ER 4.1<sup>1</sup> TELLS US that in the course of representing a client we shall not knowingly make a false statement of material fact or law to a third person. A lawyer has to consider this ethical rule whenever the true facts of the matter, if disclosed to others, would be contrary to the client's "best interests." One example would be whenever a lawyer is settling a personal injury case and is confronted with a subrogation claim to the proceeds of the settlement by a medical provider. This is the situation frequently seen in the cases in which the client was treated by AHCCCS or in which medical expenses have been paid for by the Industrial Commission. The lawyer has an ethical duty to be honest with the medical provider as to the extent of the recovery even though it means less money for the client.

A recent case from Florida demonstrates how much trouble a lawyer can get into by failing to observe this simple proposition. The lawyer in the Florida case represented two men who were

injured in a bar fight with a third person. The treatment of one of the men was paid for by private insurance, whereas treatment of the other was underwritten by Medicaid. Medicaid claimed subrogation in the amount of \$40,000, a significant amount in view of the fact that the total recovery against the bar negotiated by the lawyer on behalf of

his clients was \$100,000. Seeking to maximize the recoveries for both clients, the lawyer engineered a deal whereby the Medicaid client would receive \$500 and the other man received the rest of the net proceeds. After these facts were disclosed and \$500 was paid to

**Ethics Opinions are available at [www.azbar.org/EthicsOpinions/](http://www.azbar.org/EthicsOpinions/)**

Medicaid, the non-Medicaid client paid the other man \$5,000.

As so often happens, the lawyer's plan was exposed, and he soon found himself in extremely hot water. Setting aside the fact that the lawyer was probably in violation of ER 1.7 (conflict of interest—general rule) by his representation of two clients with severe injuries competing for recovery against a limited fund, the lawyer certainly was in clear violation of ER 4.1 and ER 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). To make matters worse, the lawyer was also convicted of grand theft.<sup>2</sup>

In affirming the lawyer's conviction, the court made several statements on which we all might reflect. The court remarked that the case exemplified an unfortunate modern trend in which some lawyers view ethical standards as an impediment to financial success and that these lawyers have so corrupted the



phrase “best interest of the client” that it is now used as a “mantra justifying deception, misrepresentation of the facts, and the diversion of money belonging to one person or entity to another.” The court concluded, “As the number of lawyers

continues to increase, and the potential client to lawyer ratio becomes smaller, high professional standards are seen by some to conflict with the lawyers' financial well being.”<sup>3</sup>

After adding a parting shot concerning the surprise and extreme disappointment it experienced when several members of the Florida Bar appeared on behalf of the attorney and testified that his conduct had been ethical, the court then affirmed the lawyer's conviction.

Amen.

---

*Need ethics advice? Call the State Bar's Ethics Counsel at (602) 340-7284.*

---

#### ENDNOTES

1. Rule 42, ARIZ.R.S.CT.
2. *Durie v. State*, 751 So.2d 685 (Fla. Ct. App. 2000).
3. For other examples of lawyers getting into trouble because of deceptions during the settlement process, see STUART, *THE ETHICAL TRIAL LAWYER* § 20.1 (State Bar of Arizona 1994).