Resolution of the Thirteenth Judicial Circuit
Adopting the Hillsborough County Medical-Legal Code

Whereas, the Hillsborough County Medical Association and the Hillsborough County Bar Association collaborated on and adopted a Medical-Legal Code in 1983 to promote better communication and understanding between physicians and attorneys in the Thirteenth Judicial Circuit and to establish guidelines for responsible, respectful and ethical interaction between lawyers and physicians and their patients in cases pending before the court; and

Whereas, the Hillsborough County Medical-Legal Code provides guidance to physicians and lawyers concerning the professional interaction of the medical and legal practices, primarily in civil cases, but also, where applicable, in other court divisions; and

Whereas, the judges of the Thirteenth Judicial Circuit believe the guidelines established in the Hillsborough County Medical-Legal Code set the standards for professional and courteous interaction between lawyers and physicians which must be met when proceeding through the judicial system; and

Whereas, the Hillsborough County Medical Association and the Hillsborough County Bar Association have recommended recent revisions to the Medical-Legal Code, including the establishment of a medical-legal helpline maintained by the Hillsborough County Bar Association as a resource for physicians who have questions about the judicial system as it affects their practices and their patients' interaction with the judicial system;

Now, therefore, be it resolved, that the judges of the Thirteenth Judicial Circuit hereby adopt the newly-revised Hillsborough County Medical-Legal Code established between the Hillsborough County Medical Association and the Hillsborough County Bar Association.

Resolved on this 6th day of February, 2014.

Manuel Menendez, Jr., Chief Judge
Thirteenth Judicial Circuit

HILLSBOROUGH COUNTY MEDICAL-LEGAL CODE

The Medical-Legal Code was first developed in 1983 by the Hillsborough County Medical Association (HCMA) and the Hillsborough County Bar Association (HCBA) and was subsequently revised in 1998 and, most recently, July, 2013. HCMA and HCBA members who have participated in the creation and revisions of the code are listed in Appendix A. The HCMA and the HCBA maintain Medical/Legal Committees to promote better communications and understanding between physicians and attorneys and to establish guidelines for responsible, respectful, and ethical interaction between lawyers and physicians regarding their clients/patients involvement in the judicial process.

The 2013 revision to the code attempts to address contemporary changes to the practice of law and medicine, to provide guidance to physicians and lawyers concerning the professional intersection of their practices as it concerns their patients/clients, and to establish a medical-legal helpline for dispute resolution and to provide guidance to healthcare professionals in explaining or resolving specific conflicts, issues, or disputes about which this Medical-Legal Code is concerned and to provide a resource for physicians who have questions about the Federal or State judicial system as it affects their practices and their patients' interaction with the judicial system.

Although this code was developed by the joint efforts and cooperation of the HCMA and HCBA, the general principles and guidelines are applicable to all medical and healthcare professionals and it is the hope of the 2013 revision committee that the code will be adopted and used not just by physicians, but by other healthcare professionals as well.

PREAMBLE

Doctors and lawyers alike have an obligation to assist their patients/clients in the administration of justice. From time to time healthcare professionals are requested by patients, governmental entities, parties to litigation, employers, or insurance companies to provide testimony or services in the administration of justice. This Medical-Legal Code is intended to provide guidelines to both medical and legal professionals to achieve a harmonious working arrangement between the two professions in the administration of justice that meets the ethical standards of both professions. To do so, the Medical-Legal Code endeavors to:

1. promote better communication and understanding between physician and attorney with respect to their involvement and interaction as professionals in the judicial system;

2. promote the welfare and well-being of the patient/client;

3. assist the patient/client in the administration of justice;

4. establish guidelines that conform to the highest code of ethics consistent with both professions and which are mutually acceptable to both professions.

MEDICAL-LEGAL HELPLINE

Much of this Medical-Legal Code is designed to explain the legal process that is customarily utilized by attorneys in representing physicians' patients in resolving legal disputes. In many respects, the judicial process is complicated and, at times, seemingly confusing and frustrating in its application to a physician's practice. Often times, because a healthcare professional may have had only limited interaction with the judicial system, when a legal issue does arise or a legal demand or request is made regarding a patient, the physician is unsure what is required of him, whether a specific request is reasonable, whether he or she may charge for responding to the demand, and how to function responsibly, legally and professionally in a legal system with which the physician has very little experience.

In order to help explain the judicial system and to assist the physician in understanding his or her rights and responsibilities, the HCBA has created a medical-legal helpline that is available free of charge to physicians who have questions or concerns about a specific legal request made by a patient's lawyer or by the lawyer of a party opposing a patient's legal claim. This service will allow a physician to obtain basic information and answers to questions covered by this Medical-Legal code when faced with a specific issue, dispute, or concern with the operation of the legal system in connection with the physician's healthcare services to a patient.

In order to access the helpline, an inquiring physician need only call the HCMA at 813-253-3737, which will gather information from the physician and then contact the Medical-Legal Helpline Liaison for a referral to a volunteer lawyer who will be able to answer questions from the physician or, if appropriate, advise him or her that private counsel may need to be retained to resolve the issue. When calling, the physician should be prepared to provide the style of the case (the name of the plaintiffs and defendants), the attorneys involved in the case at issue, and a telephone number and/or e-mail address for the volunteer lawyer to contact the physician. This will allow the coordinating counsel to select an appropriate volunteer lawyer and to avoid any potential conflicts of interest.

INTERPROFESSIONAL RELATIONSHIPS

The laws of Florida and the United States allow individuals, governments and businesses who are involved in a legal dispute to compel witnesses – including healthcare professionals – to provide testimony and produce documents that may be relevant to the litigants' legal dispute. The proper and efficient administration of justice depends upon the participation of witnesses, including healthcare professionals, to provide relevant testimony and documentation required to resolve litigants' legal disputes. It is important, however, for legal professionals to recognize, respect, and appreciate the fact that a healthcare professional's time is a limited, valuable, and primarily devoted to the important

and critical task of delivering healthcare and treatment to members of society who may be experiencing serious and sometimes life-threatening health challenges.

This Medical-Legal Code is designed, in part, to provide reasonable guidelines to assist both professions to work together amicably and efficiently to coordinate their respective calendars and professional obligations to their clients/patients in a reasonable, ethical, and professional manner, and to permit those in need to receive proper and timely health care and treatment while at the same time providing necessary and reasonable assistance to the administration of justice so important to the maintenance of a civilized society.

I. COMPULSORY MEDICAL EXAMINATIONS

A. General Guidelines

1. The Florida and Federal Rules of Civil Procedure provide a mechanism to permit one party to compel another to undergo a medical examination when that party's medical condition is relevant and material to a resolution a legal dispute. Typically, the lawyers agree to the scope of any examination, but in the absence of any agreement, the Court is empowered to make that determination.

2. There is no obligation for a physician to participate in performing compulsory medical examinations for a lawyer. It is a matter that is completely within the discretion of the participating physician and, as such, the fee for performing the examination is a matter of discussion, negotiation, and agreement between the physician and the requesting attorney. While a physician is not required to agree to perform a compulsory medical examination, if he or she chooses to do so, the scope of the examination, the participants, the report of the examination and the physician's findings, and the obligation to provide certain information to participate in the legal process is controlled by the applicable rules of civil procedure and the judge before whom the case is pending.

3. Compulsory medical examinations are governed by Florida Rule of Civil Procedure 1.360 for cases pending in state court and Federal Rule of Civil Procedure 35 for cases pending in federal court. In addition, the Circuit Court for Hillsborough County has adopted a Uniform Order Compelling a rule 1.360 Examination that is frequently entered by the presiding judge – either by agreement of the parties or after a hearing. A judge is not required to enter the uniform order. It is a guide to the court and the parties and can be altered to fit the particular circumstances of a case. When an order requiring a rule 1.360 examination is entered, it will control the conduct and responsibilities of the examining physician, attorneys and parties and, further, will provide for the ability and terms under which others may attend the examination. Florida law permits the person being examined, at his or

her option, to have the examination recorded by a videographer, a court reporter, or both and to have others present for the examination itself (e.g., a court reporter, examinee's attorney, examinee's spouse or family member). A copy of the Hillsborough County Uniform Order is Appendix B and can be located on the Internet at http://tinyurl.com/c3hw2tg or as may be subsequently updated at the web page for the Hillsborough County Circuit Court (http://www.fljud13.org).

4. When an appointment is made for the medical examination of a person, the physician sets aside part of his day for that purpose. It is the responsibility of the scheduling attorney to make reasonable efforts in advance to coordinate an examination time that is convenient to the person to be examined and those who may attend the examination and to advise the physician about the nature, scope and limitations of the examination itself, including those who may be in attendance. It is the responsibility of the examinee's attorney to take reasonable steps to coordinate the date and time with opposing counsel and to thereafter take reasonable measures to make sure that his or her client will attend the examination as scheduled and to advise the scheduling attorney who may be in attendance at the examination in addition to the examinee. Once scheduled, it is the responsibility of the examining physician to take reasonable measures to conduct the examination when scheduled.

5. Attorneys should always instruct their client and the examining physician to promptly notify those involved if unforeseen circumstances require cancellation of a compulsory medical examination. Cancellation within 48 hours of the examination may justify the inconvenienced party to a cancellation fee; however, the amount of any cancellation fee should not be arbitrary or excessive and should bear a reasonable relationship to the time actually lost, if any.

B. Scope of Examination

1. The scope of an examination may be determined by agreement of the attorneys or by Court order. The attorney retaining the physician to perform the compulsory medical examination is responsible for notifying the physician of any examination restriction sufficiently in advance to permit the physician to refuse the engagement to conduct the examination.

2. Subject to limitation by agreement or court order, the physician may take a history that is reasonably necessary to conduct the specialty appropriate examination. It is the responsibility of the attorney retaining the physician to perform the examination to obtain and to provide any additional information, documentation, or diagnostic studies reasonably requested by the physician to reach an opinion regarding the nature and extent of the

party's medical condition or any other medical issue in dispute. No invasive testing or studies may be performed or conducted unless there is a court order or written agreement permitting the testing, in which case the physician shall also obtain the informed consent of the examinee to perform the invasive testing.

C. The Physician's Rule 1.360 Written Report

1. Following the examination and the review and consideration of any relevant materials or information, the examining physician is required to prepare a report of the examination and the opinion he or she has formed as a result. The report should be prepared within a reasonable time following the examination; however, the order requiring the examination may proscribe a specific time within which the report is required to be submitted to the parties. The attorney requesting the examination is responsible for advising the examining physician of any time restrictions concerning the preparation of the physician's examination report.

2. The physician's rule 1.360 report should describe the nature, scope, and substance of the examination and should memorialize the opinions formed by the physician as a result. The examinee's attorney is not required to depose the examining physician to discover the examining physician's opinions concerning the examinee and it is the responsibility of the physician to fully disclose the substance of his or her opinions in the examination report. If additional opinions are formed after the physician's report has been prepared and submitted to the parties, a supplemental report should be promptly prepared and provided to the requesting attorney, who should promptly provide opposing counsel with a copy. Frequently, examining physicians will be required to testify – either by deposition or live at trial – regarding the examination and the opinions formed as a result. Generally, a physician will not be permitted to testify about opinions he or she hold regarding the examinee unless the opinion has been disclosed in the physician's report. For this reason, care should be taken to memorialize all opinions formed by the examining physician in his or her report.

D. Compensation

The physician is entitled to be compensated for the rule 1.360 examination and preparation of the report and for any testimony regarding the examination that is later provided. This subject is covered in detail in part VIII of the code, below.

II. PHYSICIANS' WRITTEN REPORTS OTHER THAN RULE 1.360 REPORTS

A. The Request for a Patient Report

1. On occasion, an attorney may request a physician to prepare a written report regarding a patient's condition, prognosis, care, treatment, cost of care, permanency, or cost of future care. The request for a physician report (other than a rule 1.360 report discussed above) should only be made by the attorney representing the patient. It is improper for the opposing attorney to communicate with a patient's treating physician absent a written and specific authorization from the patient. For this reason, communication and requests for information made by a lawyer that does not represent the patient will almost always be made more formally, by subpoena (see part III and IV, below).

2. The physician is under no obligation to prepare the report; however, doing so may avoid the necessity of the litigants requiring the physician to testify by deposition or live at trial – a process that may be more disruptive to his or her practice than preparing a report covering the matters requested. Physician reports frequently facilitate settlement, reduce the cost of litigation, and avoids the need to require testimony from the physician.

3. When an attorney requests that a physician provide a written report concerning a patient, the attorney is responsible for providing the physician with an appropriate, signed authorization of the patient. A physician should not provide to others a patient's medical records or other protected healthcare information without proper authorization or a subpoena. The request for a written physician's report should be made in writing and should contain the specific nature and subject matter of the report requested. It is the attorneys' responsibility to communicate clearly the matters he or she desires to be included in any requested written report (e.g., scope of the examination, diagnosis, prognosis, cost of future care, surgical recommendations, disability ratings, and etcetera).

4. A physician agreeing to provide a report regarding his patient should do so within a reasonable time. Under most circumstances, unless otherwise agreed, the report should be provided within 30 days of its request.

5. If, for some reason, a physician is unwilling to provide a report regarding his or her patient, the refusal should be clearly communicated to the requesting attorney. Likewise, if there are any limitations or preconditions to preparing a requested report, the physician should communicate those to the requesting lawyer as well.

B. Patient's Authorization

The physician must have a patient's signed authorization or valid subpoena before releasing any report, diagnostic study, or other protected healthcare information concerning a patient.

C. Compensation.

The physician is entitled to be compensated for the preparation of a report requested by an attorney. This subject is covered in detail in part VIII of the code, below.

III. MEDICAL RECORDS

A. Substance

1. It is helpful for medical records to be sufficiently detailed and legible to permit the attorney and client to make a reasonable evaluation of the nature and extent of the patient's medical condition and prognosis in order to reduce the necessity of obtaining the information by way of a requested written report, conference, or deposition, all of which may undesirably require physician time away from his or her practice.

2. Legible and detailed records are also important as an aid to the physician in providing accurate information if called upon to testify by deposition at trial.

B. Informal Requests for Medical Records

1. On occasion, either before a law suit has begun or after, a lawyer representing a physician's patient may request the physician to provide the lawyer with copies of the patient's medical records. Quite frequently, a lawyer will gather a client's medical records to investigate the validity, strengths, or weaknesses of a client's claim in order to advise the client about the wisdom and risks of proceeding with litigation or to make a determination about whether he or she is willing to handle the claim. With proper authorization from the patient, it is the physician's responsibility to provide legible copies of the requested records.

2. If convenient and available, medical records, diagnostic studies, X-rays, ECGs, EEGs, MRI's, Ultrasound, Scans etc. may be provided electronically by use of a CD-Rom or other acceptable storage media. For diagnostic imaging this is almost always preferred. Unless subpoenaed, original records should not be provided.

3. The physician must have a patient's signed authorization before releasing any medical records, report, diagnostic study, or other protected healthcare information concerning a patient.

C. Compensation.

The physician is entitled to be compensated for providing copies of medical records requested by an attorney. This subject is covered in detail in part VIII of the code, below.

IV. DEPOSITIONS AND SUBPOENAS

A. Deposition Defined

1. A deposition is an official proceeding, outside of court and before a court reporter, where a witness is required to answer questions asked by lawyers. The deposition begins by the court reporter placing the witness under oath. Thereafter each lawyer may question the witness on matters relevant to the law suit.

2. During the deposition, lawyers may object to some questions that are asked by other lawyers. Objections are typically designed to raise a legal issue that can be resolved by the court at a later date. Unless instructed not to answer a question to which an objection has been made, a physician should answer the question raised.

3. Depositions may be videotaped.

4. The witness may be required to produce medical records at the deposition and to release the records to the court reporter for duplication and immediate return. A physician who does not wish to part with original records when brought to the deposition, should bring a complete photocopy for submission to the court reporter.

5. Depositions are generally less formal than trial testimony, but the attorneys are engaged in an adversarial proceeding and the deposition may be read or played at trial in place of live testimony, so their demeanor and conduct may be different than what a physician would expect would be the norm between physicians in a collaborative conversation about a patient. Physicians and attorneys should treat each other professionally and courteously.

6. Depositions are scheduled by service of a Notice of Taking Deposition that describes the place and time of the deposition, the parties to the litigation, and the witness(es) to be deposed. If a deposition is being taken by agreement of the lawyers and the witness, then a subpoena may or may not

be served on the witness. Examples of a Notice of Taking Deposition and a Notice of Taking Deposition by Video are Appendix C.

B. Subpoena Defined

1. A subpoena is a legal document issued by an attorney under the power of the court. A subpoena commands a witness to appear for deposition and answer questions and/or to produce records, including medical and billing records. Because a lawyer who does not represent the patient may not communicate with a treating physician, subpoenas for medical records without deposition are routinely issued as the preferred method of gathering a plaintiff's medical records. Subpoenas for records without deposition may – and almost always do – permit the records to be produced by mail. Subpoenas for testimony are issued in connection with requiring a physician to appear and testify at trial or at a deposition.

2. A subpoena cannot be ignored and a physician must honor the subpoena if it is served on him personally or through his authorized representative (nurse or other employee). The failure to follow the command of a subpoena without a proper and timely objection can be grounds for a court to hold a witness in contempt, issue an order requiring compliance or to appear personally before the court, or for payment of penalties and fines.

3. If the subpoena requires an appearance or production of records that the physician feels is unreasonable or which cannot be complied with, it is the physician's duty to contact the requesting attorney and, if he or she cannot make a reasonable accommodation, to make a timely objection. Physicians may contact the Medical-Legal Helpline or their own attorney in an effort to resolve disputes that cannot be resolved directly with the attorneys themselves.

4. While it is permissible and proper for a physician to communicate with a lawyer who has issued a subpoena to resolve scheduling issues or the cost of complying with a request for records, the physician or his or her staff should never engage in any substantive communications about a patient or protected healthcare information with a lawyer that does not represent the patient or without proper authorization from the patient.

5. A sample subpoena for production of records without deposition is Appendix D. A sample subpoena for deposition is Appendix E. A sample subpoena for deposition which also requires the production of records is Appendix F.

C. Physician-Patient Privilege in Florida

1. By bringing a law suit for personal injuries, a plaintiff places his or her physical and emotional condition at issue. Sometimes, a defense raised by someone who is sued can also place that individual's physical and emotional condition at issue.

2. When validly subpoenaed for deposition or trial, there is generally no privilege that would protect the substance of communications between a physician and his or her patient.

3. It is the duty of the physician to answer questions or disclose the contents of his medical reports, unless excused by order of the court or expressly directed not to do so by an attorney at deposition. When a lawyer at a deposition objects to a question and directs a physician not to answer a question, the physician should follow the direction and allow the Court to resolve the lawyers' dispute regarding the testimony.

4. If an attorney asks questions that are personal, inquire into private financial matters of the physician, or otherwise delve into areas of inquiry that the physician for some legitimate reason does not wish to answer, he or she may refuse to answer, explain the reasons for the refusal to answer, suspend the deposition, and seek legal counsel or immediately contact the Medical-Legal Hotline. Great care should be taken in refusing to answer questions when the lawyers have not objected or directed the physician not to answer. The improper refusal to answer questions at deposition can result in court-imposed penalties, fines, and sanctions levied against the doctor. For this reason, if a physician for some reason believes he is not required to answer a question, an effort should be made at the deposition to resolve the dispute or, if possible, the physician should ask for a brief break to consult with counsel or contact the Medical-Legal Helpline.

D. Time and Place

1. It is the attorney's responsibility to make a reasonable effort to coordinate the time and place of a physician's deposition at the convenience of the parties. Customarily, a physician may reasonably require the deposition to be conducted at his or her medical office, assuming sufficient facilities exist to accommodate those who will be in attendance and the deposition can be conducted in a manner that will minimize the disruption of patient care.

2. If the physician would prefer to be deposed at his or her office, then sufficient space should be reserved to do so and to accommodate all of the attendees. If the deposition will be videotaped, special consideration should be given to the accommodations and consideration should perhaps be given to

conducting the deposition elsewhere. Depositions are often videotaped in contemplation of being shown to a jury or judge at trial when the witness is unable to attend live.

3. It is the lawyer's responsibility to attend the deposition when noticed and the physician's responsibility to do so as well. Attendance at the deposition should be with appropriate attire and professional conduct. It is the lawyer's obligation to make an effort to advise the physician about the anticipated time required for completion of the deposition so that the physician can plan accordingly.

4. In the event that a deposition is scheduled and a physician is subpoenaed without a prior effort of calendar coordination, a physician may contact the attorney issuing the subpoena to request a change to a more convenient time or location. Attorneys should accommodate reasonable requests to do so. However, if no agreement can be reached regarding a calendar conflict, a physician has a legal obligation to attend a deposition to which he or she has been subpoenaed, unless excused by a court's protective order. Failure to attend a deposition may subject the physician to contempt of court, fines or other sanctions.

E. Subpoena to Appear

1. If the deposition of a physician cannot be set by the attorney though mutual agreement, the physician's attendance can be required by subpoena. A subpoena is not an irrevocable order to appear at whatever cost, however. It should not require the cancellation of surgery or of appointments, some of which may be for persons coming from great distances. In the event that a subpoena is truly inconvenient, the physician may do the following:

a. Call the attorney that issued the subpoena, the patient's attorney, or the attorney who has retained his services and explain the difficulties created by the subpoena. Any effort to change by agreement the time and place commanded by a valid subpoena should be made promptly upon discovery of the conflict or reasonable inconvenience. While it is permissible and proper for a physician to communicate with a lawyer who has issued a subpoena to resolve scheduling issues, it is improper for the physician or his or her staff to engage in any substantive communications about a patient or protected healthcare information with a lawyer that does not represent the patient without proper, specific authorization from the patient.

b. Contact his own legal counsel, who can make an effort to have the time, place or circumstances of the subpoena altered by agreement or can, on the physician's behalf, request the Court nullify the subpoena as burdensome or oppressive and have the Court itself set an alternative time, place, and/or condition for the deposition proceeding.

c. Contact the Medical-Legal Helpline to discuss the issue with volunteer counsel who may be able to answer specific questions, contact one or more of the involved lawyers, or advise the physician that he should obtain independent legal counsel.

d. A physician cannot ignore a subpoena and doing so risks a court imposing severs sanctions or fines against the physician.

e. A sample subpoena for deposition is Appendix E. A sample subpoena for deposition which also requires the production of records is Appendix F.

2. When deposed and asked to express his or her professional opinion regarding a patient, a physician is entitled to reasonable compensation from the attorney that commanded his appearance (even though other attorneys may have questioned the physician at deposition as well). The issue of compensation is discussed below at section VI of the Code.

F. Subpoena of Medical Records

1. In many cases the physician's custodian of records will be subpoenaed to produce all of the records pertaining to the patient. Custodian of records means the person who has the delegated responsibility for control of the files in the office, and usually this requirement is met by the office manager, nurse, or receptionist. The physician's custodian of records must bring the original records to the place noticed by the deposition subpoena unless the attorney subpoenaing such records states a photocopy is sufficient.

2. Quite frequently the deposition subpoena for records will contain an option for the records to be produced by mail, as opposed to the requirement of appearing at the noticed place and time for the deposition for records production. Because a lawyer who does not represent the patient may not communicate with a treating physician, subpoenas for medical records without deposition are routinely issued as the preferred method of gathering a plaintiff's medical records. Subpoenas for records without deposition may – and almost always do – permit the records to be produced by mail.

Subpoenas for testimony are issued in connection with requiring a physician to appear and testify at trial or at a deposition. A sample subpoena for production of records without deposition is Appendix D. A sample subpoena for deposition which also requires the production of records is Appendix F.

G. Preparation and Deportment

1. Since the testimony given at deposition hearings may be read at the trial and a videotaped deposition may be shown at trial, it is important for the physician to prepare for the deposition as if he or she were being called to testify live before a jury and judge. The physician's attitude and deportment at the deposition should be similar to that at trial.

2. Because deposition testimony of a physician may be used at trial without the need of a live appearance, a patient's attorney may request the opportunity to meet or speak telephonically with the physician before the deposition. This issue is discussed in more detail, at section III(B) of the Code.

3. A physician is entitled to compensation for the time required in meeting with the patient's attorney. This issue is discussed at section VIII of the Code.

H. Choice of Language by Medical Witness

1. To the extent possible, the testifying physician should use language understandable by a lay person whenever possible. If testimony does not help to explain, clarify, and educate, it has not achieved its purpose. Technical expressions should be followed with simplified explanations.

2. Simplicity and clarity is the hallmark of excellence in testimony.

I. The Physician at Deposition

1. It is proper for attorneys to ask the physician questions at deposition about his qualifications, fees, accuracy of memory, records, the diagnosis, prognosis, and other opinions, as well as any other facts bearing on the weight and credibility of his testimony or relevant to the litigation.

2. Depositions are generally less formal than trial testimony, but the attorneys are engaged in an adversarial proceeding and the deposition transcript of video may often be used at trial instead of live testimony, so the attorneys' demeanor and conduct may be different than what a physician would expect would be the norm between physicians in a collaborative conversation about a patient.

V. RELATIONSHIP OF PHYSICIAN AND ATTORNEY PRIOR TO TRIAL

A. Privileged Information

1. When a physician has been retained to act as an expert witness to one of the parties in a legal matter, the physician should not consult with the opposing parties, unless authorized by the retaining attorney. Any information obtained from the attorney may be privileged as part of the attorney's work product.

2. A treating physician, past or present, should not agree to act in a retained expert capacity to a party in opposition to his or her patient's interest, nor should any attorney request such.

3. Without specific written authority from a patient, a physician may not meet with a lawyer who does not represent his or her patient to discuss the patient's medical condition or the substance of protected healthcare information.

4. Section 456.057(7)(d)(4), Florida Statutes permits a physician to communicate with his or her own lawyer and disclose information disclosed by a patient and records created by the physician during the course of care or treatment if the physician reasonably expects to be deposed, to be called as a witness, or to receive formal or informal discovery requests in a medical negligence action, pre-suit investigation of medical negligence, or administrative proceeding.[1]

B. Conferences Between Physician and Attorney

1. Because deposition testimony of a physician may be used at trial without the need of a live appearance, a patient's attorney may request the opportunity to meet with the physician before the deposition. Quite frequently, as well, the patient's lawyer may request a meeting or telephone conference before the physician testifies live at trial. A meeting or conference by phone before testifying at deposition or trial is frequently arranged a week or several days before trial commences and, on occasion, immediately before the trial testimony itself.

2. A meeting or conference with the patient's lawyer can be helpful to educate the physician about the nature of the parties' dispute, the expected areas of questioning by the lawyers, and how the law relates to

[1] This statute was enacted in the 2013 legislative session and is a new statutory provision passed to overturn a recent decision by the Florida Supreme Court. A physician should consult with his or her counsel regarding the substance and effect of this statutory provision.

the physician's testimony. It is often most beneficial in shortening the deposition or trial testimony itself and, sometimes, can eliminate the need for the trial appearance and testimony altogether.

3. Frequently, medical opinions and legal rules do not coincide. An attorney will often have a pre-deposition or pre-trial conference with a physician to explain what the law requires in a given case so a physician can render medical opinions in a lucid and coherent manner which conforms to the rules of law. To the extent that the physician has questions about the deposition or trial process, the time required, scheduling or other special accommodations required, a meeting will allow the physician's concerns to be addressed.

4. The conference should be held at a time and place mutually convenient to the physician and attorney. Occasionally, attorneys have conflicts and must cancel depositions or conferences on short notice. Since a physician allots time in his schedule to have conferences, reasonable notice (at least 48 hours) should be given to the physician so he can properly utilize the time. In the event of a medical emergency, the physician should notify the attorney as soon as possible so that the attorney can properly utilize his time. Physicians should recognize and appreciate that the attorney's time is his stock-in-trade and attorneys should not be kept waiting to attend a conference or deposition needlessly.

5. A meeting or telephone conference with the patient's lawyer can be helpful to let the physician know the nature of the parties' dispute and the expected areas of questioning by the lawyers. It can often shorten the deposition process itself and, sometime, eliminate the need for the deposition altogether. While often very helpful to the parties and to the administration of justice, the physician is not required to meet with the patient's attorney before the deposition.

6. It is permissible and appropriate for opposing counsel to inquire at deposition or trial about the substance of the conversation between the physician and the patient's attorney.

7. Without specific written authority from a patient, a physician may not meet with a lawyer who does represent his or her patient to discuss the patient's medical condition or the substance of protected healthcare information.

8. A physician is entitled to compensation for the time required in meeting with the patient's attorney. This issue is discussed at section VIII of the Code.

VI. THE PHYSICIAN AND THE LAW

A. General Information Concerning Trial

1. All jury cases are set for trial for a one, two, or three week period, commencing on a Monday morning. As a result, physicians are sent subpoenas for the trial period and definite time is often unable to be set for the physician's appearance. The physician is placed on standby (alert). This should be stated or attached to the subpoena so the physician will know that sometime that week or the following two weeks he will be called to testify.

2. The staff of the attorney who has subpoenaed the physician or arranged for his or her appearance at trial should periodically keep the physician advised as to the progress of the case so the physician will have some advance notice and can schedule patients accordingly. If a case is concluded and the physician is not required to testify even though he has been on standby, he is not permitted to charge a fee for standby, unless the physician has altered his practice schedule.

3. When a case has been concluded, the attorney should notify the physician as soon as possible. Communication between the two offices is absolutely essential to maintain and promote goodwill between the professions.

4. The attorney who subpoenas a physician or who has arranged for his or her appearance at trial should notify the physician of the date of the trial as soon as this fact is known. If the physician is going to be unavailable during that period, he should alert the attorney immediately so the attorney can act accordingly; i.e. postpone or continue a trial. This also gives the attorney advance notice, should he need to depose the physician or have the testimony given by the physician pre-videotaped to mutually assist each professional.

B. Subpoena for Trial

1. Some attorneys will not subpoena a physician they expect to call as a witness, preferring to make personal arrangements with the physician and relying upon the physician's promise to appear. Other attorneys subpoena medical witnesses because:

   a. it may be desirable in a particular case for the physician to be able to testify, if asked; or,

   b. it may be essential in order to secure a continuance if for any reason the physician fails to appear as required.

C. Recommended Policy Regarding Subpoenas and the Physician's Appearance

1. An attorney should notify a physician in advance of the service of a subpoena, unless it would be detrimental to the client's interest to do so.

2. The attorney should make reasonable efforts to make advance arrangements with the physician regarding the time the physician will be called to testify.

3. Recognizing the time demands of the medical profession, attorneys should make reasonable efforts to avoid unnecessary inconvenience for the physician. Notwithstanding, the physician may not be called to testify as scheduled because of factors not within the attorney's control. The process of law and the time of other individuals must also be recognized and respected by the physician.

D. Duty to Testify

Our system of justice depends upon being able to require any citizen's attendance at a judicial proceeding and to give testimony regarding the case. There is an obligation of the physician to respond to a subpoena as any other citizen.

VII. TRIAL PROCEDURE

The attorney should treat the physician on the stand with courtesy and tact; however, the physician should realize that under the "adversary system" it is permissible and not unusual that something other than a completely objective attitude may be used by the attorneys toward the testimony being elicited from the physician on the stand.

A. Objections by the Lawyers

Trials are governed by the rules of evidence. When an attorney makes an objection to a question, the attorney is merely requesting the court to decide the legality of the question. When an objection is made, the physician should not answer the question until the court rules on the objection and permits an answer. If the judge "over-rules" an objection, the physician may answer the question; if the judge "sustains" the objection, the physician should not answer the question and should await another question from the lawyer. If, after the court makes its ruling, the physician is in doubt whether to answer the question, he should ask the judge.

B. Categorical Answers

When a physician feels that "yes" or "no" will not accurately answer a question, he should so state. Permission will usually be given to qualify or explain the answer.

VIII. COMPENSATION TO PHYSICIAN

This is an area of frequent disagreement among physicians and lawyers alike. Some confusion in this area stem from the fact that compensation agreements, rights, and obligations are frequently the subject of negotiation and agreement, but can also be subject to court rules, case precedent, and judicial determination. In attempting to reach an agreement regarding a fair and reasonable fee for a physician's services, both lawyers and doctors should be mindful that the cost of litigation is ultimately born by the party litigant requesting the service, the insurance companies that provide coverage, and the judicial system and society. There are special provisions that can require a "losing" party at trial to pay certain costs.

A. Compulsory Examinations

1. A physician is under no duty to agree to perform a compulsory examination and issue the required report concerning the examination. The physician may agree to do so for any amount that the requesting party is willing to pay. The amount requested by the physician and the amount the requesting party is willing to pay for the examination and physician's report is a matter between them as a subject for negotiation and agreement. The person examined will be entitled to know the details regarding the compensation agreement and that subject can and usually is a subject of inquiry during deposition or testimony at trial.

2. A physician may be called upon to testify by deposition or live at trial regarding the substance of his or her examination and opinions regarding the examinee. Charges for testimony are discussed below.

B. Requests for Patient Reports

1. A physician is under no duty to provide a written patient report at the request of a lawyer. The physician may therefore agree to do so for any amount that the requesting party is willing to pay. The amount requested by the physician and the amount the requesting party is willing to pay for the report is a matter between them as a subject for negotiation and agreement. Only the patient's lawyer may request a report from the physician, but the other parties to the litigation will be entitled to know

the details regarding the compensation agreement and that subject can and usually is a subject of inquiry during deposition or testimony at trial.

2. A physician may be called upon to testify by deposition or live at trial regarding the substance of his or her report. Charges for testimony are discussed below.

C. Requests for Medical Records

1. Whether requested informally by letter or formally by subpoena, a physician may charge a reasonable fee for providing records requested and provided. It is the responsibility of the requesting lawyer to pay the reasonable charge for providing the records and payment should customarily be made within 30 days. It is permissible to request payment in advance. The current, customary charge for providing medical records has been $1.00 per page for the first 25 pages and $.25 thereafter. This rate is subject to change and may be determined by the court in the event that there is a disagreement among the physician and requesting attorney.

2. A lawyer may request records without knowing the volume of records actually possessed by the physician. For that reason, the subpoena or request may contain a limitation on the amount that a lawyer is willing to pay for the records without advance knowledge and preapproval of the anticipated charge. For instance, the request may use the following, or similar, language: "If the charges for the records requested is expected to exceed $100.00, do not copy and produce the records by mail without prior approval of the undersigned lawyer." It is the lawyer's responsibility to communicate clearly the need for prior approval if the physician's copy charges are anticipated to exceed some predetermined amount.

3. If medical records are provided electronically, a reasonable charge should be made to account for the cost or reproducing the records electronically.

D. Conferences

1. A physician is under no duty to meet with a patient's lawyer, although doing so often avoids the necessity of a more formal proceeding and does assist in the administration of justice. In addition, a conference can assist the physician to understand the facts at issue and the areas of inquiry before testimony. The physician may agree to meet and charge any amount that the requesting party is willing to pay. The amount requested by the physician and the amount the requesting party is willing to pay for the report is a matter between them as a subject for negotiation and

agreement. The other parties to the litigation will be entitled to know the details regarding the compensation agreement and that subject can and usually is a subject of inquiry during deposition or testimony at trial.

2. Any fee charged for a lawyer conference should be fair and reasonable under the circumstances and commensurate with the physician's training, experience, and skill, along with the specific circumstances of the time or resources required for the conference.

E. Testimony by deposition or at trial

The rules and customs regarding physician compensation are dependent upon whether the physician has been requested to voluntarily appear and give testimony or if he or she has been required by subpoena to appear and testify.

1. When a physician is asked by a lawyer to voluntarily appear and testify – either by deposition or live at trial – the fee for that service is a matter of negotiation and agreement between the physician and the lawyer. The physician may charge whatever he or she wishes and whatever the requesting lawyer will agree to pay. In determining a fair fee for his or her appearance, however, a treating physician should be mindful of the ability for the lawyer to command his or her appearance by subpoena and the responsibility to assist the patient in the administration of justice. In addition, although the fee may initially be paid by a lawyer, ultimately it is usually paid by the parties to litigation or their insurance companies and can dramatically affect the cost of litigation, the likelihood of settlement, and the cost to society to resolve disputes. In addition, the amount of any fee may subject the physician to cross-examination regarding the reasonableness of the charge. The physician should charge a fair and reasonable fee for his or her time.

2. Sometimes a physician is asked to testify when he or she is not a treating physician. Lawyers generally refer to this as a "retained expert" role. Other professionals are frequently asked to do so as well and some make a business out providing litigation support. It is not uncommon for economists, engineers, accident re-constructionists, and even lawyers to provide such services. For retained experts, whether physicians or not, the rules are simple. An expert may charge whatever he or she wishes to charge and what the requesting lawyer (and client) are willing to pay. It is a matter of negotiation and agreement. Whatever the agreement, it should be in writing to avoid confusion or misunderstanding later. In addition, the amount of any fee may subject the physician to cross-examination regarding the reasonableness of the charge.

3. When a physician is commanded to appear and give testimony by subpoena and asked to express his or her professional opinion regarding a patient, the physician is entitled to reasonable compensation from the lawyer that commanded his appearance (even though other lawyers may have questioned the physician at deposition as well). Customarily, rate of compensation is a matter that is agreed to among the requesting lawyer and the physician and both the lawyer and the physician should make reasonable efforts to do so without the need to involve the Court. If no agreement regarding the physician's compensation can be reached, rule 1.390 of the Florida Rules of Civil Procedure empowers the court to set the compensation amount.

4. The Federal and Florida Rules of Civil Procedure provide that witnesses called to testify by deposition or by trial are due a fee for their time. In most instances, the fee is agreed upon in advance by the witness and the lawyer; however, in the absence of any agreement, the Court will set the required fee after a hearing to consider the matter. The physician is entitled to notice of any hearing that will establish his or her fee and is also entitled to be heard and to present evidence at the hearing, either personally or through counsel. There is no requirement, however, for a physician to attend or present evidence at any hearing to establish a reasonable fee. Customarily, an approved hourly fee will vary by specialty and can vary from judge to judge under the specific circumstances of each case. While a physician may request prepayment of a fee for his appearance at trial or deposition when subpoenaed to testify, the rules do not require such.

5. It is customary to pay any bill for testimonial services within 30 days unless other arrangements are agreed upon.

F. Miscellaneous

1. Cancellation within 48 hours of the examination would justify the inconvenienced party to a cancellation fee; however, the amount of any cancellation fee should not be arbitrary or excessive and should bear a reasonable relationship to the time actually lost, if any.

2. Under no circumstances may a physician charge a fee for services, medical care, an examination, information, documentation, or for testifying, that is contingent upon the outcome of litigation.

G. Medical Care

1. On occasion, a physician will agree to provide medical care and treatment to those involved in litigation that may not have health insurance or a means of payment. The charges for such services are a matter of negotiation and agreement between the patient and the physician. A lawyer is not obligated to pay physician or other creditor bills out of the proceeds of a settlement or case recovery unless the lawyer, patient, and physician have an agreement to do so. These agreements are generally referred to as Letters of Protection (LOPs) but are colloquially know by other names. The lawyer should give the client/patient honest advice regarding the rights, risks and obligations with respect to unpaid medical bills and LOPs.

2. For additional information regarding a lawyer's obligations to his client and to those who are parties to LOPs, lien holders, and the like, lawyers and physicians should consult Opinion 02-4, Professional Ethics of the Florida Bar http://tinyurl.com/c2bhl3t , attached as Appendix G.

3. The Medical-Legal Code is designed as a resource to provide general information to physicians and attorneys alike. The Code deals with areas of the law that can be quite complex, depending on the circumstances of any particular issue or dispute. Often times, there are business considerations that can affect the decision-making process. For additional information about the issues discussed in this Code, a physician should consult with his or her own attorney or, if appropriate, contact the Medical-Legal Helpline for guidance.

Appendix A

Grateful appreciation is given to the following attorney and physician members of the Joint Medical-Legal Committee of the Hillsborough County Bar Association and the Hillsborough County Medical Association for their efforts in creating the 2013 Medical-Legal Code:

John Curran, MD, Chair
Kevin McLaughlin, Esq., Chair

Hon. James Barton
Fred Bearison, MD
Mathis Becker, MD
William Davison, MD
Devanand Mangar, MD
Todd Miller, Esq.
Brandon Scheele, Esq.
Marc Semago, Esq.
Alan Wagner, Esq.
Rob Williams, Esq.
Michael Wasylik, MD
Jay Wolfson, DrPH, Esq.

Grateful appreciation is given to the following attorney and physician members of the Joint Medical-Legal Committee of the Hillsborough County Bar Association and the Hillsborough County Medical Association for their efforts in developing the 1983 Medical-Legal Code:

Michael Wasylik, M.D., Co-Chairman
David Kadyk, Esq., Co-Chairman

Constantin Artzibushev, M.D.
Richard Bagby, M.D.
Davis Boling, M.D.
J. Robert Campbell, M.D.
Lawrence Cohen, M.D.
James Crumbley, M.D.
D. R. D'Alessandro, M.D.
William DeWeese, M.D.
John Fletcher, M.D.
Arthur Forman, M.D.
David Keller, M.D.
Frank Kriz, M.D.
Frank Lindeman, M.D.
Jesus Martinez, M.D.
Donald Mellman, M.D.

Richard Miller, M.D.
Arthur Pasach, M.D.
L. Douglas Perry, M.D.
Gordon Puryear, M.D.
Ortelio Rodriguez, M.D.
Ralph Rydell, M.D.
Daniel Sprehe, M.D.
Ralph Stephan, M.D.
Charles Walker, M.D.
William Terry, Esq.
Bill Wagner, Esq.

Robert Bonanno, Esq.
Bruce Campbell, Esq.
James Clark, Esq.
Jeff Chilldon, Esq.
C. Tim Corcoran, III, Esq.
Richard Crooke, Esq.
Woody Isom, Esq.
Ken Dandar, Esq.
Pat Dekle, Esq.
Mike Fogarty, Esq.
Frank Gassler, Esq.
Larry Goodrich, Esq.
Eurich Griffin, Esq.
Bill Han, Esq.
Benjamin H. Hill, Esq.

Bill Holland, Esq.
John Lazarra, Esq.
Gregory Macy, Esq.
John McLaughlin, Esq.
Jim Moody, Esq.
Jerry Newman, Esq.
Tim Prugh, Esq.
Mike Rywant, Esq.
Charles Sansone, Esq.
David Tyrrell, Esq.
Robert Wallace, III, Esq.

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT
IN AND FOR HILLSBOROUGH COUNTY, FLORIDA
GENERAL CIVIL DIVISION

**,

Plaintiff(s),

v.

**,

Defendant(s).

Case No. **

Division: D

ORDER COMPELLING RULE 1.360 EXAMINATION

Pursuant to Florida Rule of Civil Procedure 1.360, ("Examination of Persons"), Defendant's counsel has notified Plaintiff's counsel that the Plaintiff, **, is requested to present for a noninvasive medical examination as follows:

Examiner:	**	
Address:	**	
Date:	**	
Time:	**	
Scope:	**	

THE FOLLOWING CONDITIONS ARE TO BE OBSERVED BY ALL PARTIES INVOLVED:

1. This examination is not a deposition so the examiner shall be limited to that information reasonably necessary to conduct the specialty-appropriate examination and evaluation of an individual, including a brief medical history as well as present complaints. The examination is to be limited to the specific medical or psychological conditions in controversy and unless modified by another court order, such examination will be the only exam for the specific condition(s) or issues in controversy (without limiting the possibility of multiple specialties). No invasive testing shall be performed without informed consent by the Plaintiff/examinee, or further Order of court.

2. The examinee will not be required to complete any lengthy information forms upon arrival at the examiner's office. The examinee will furnish the doctor with name, address, and date of birth. Questions pertaining to how the Plaintiff was injured, and where and how the Plaintiff sustained the injuries complained of, are permitted. Questions pertaining to "fault", when the Plaintiff hired his/her attorney, who referred the Plaintiff to any doctor, and what the Plaintiff told his attorney or any investigators are NOT permitted.

3. It shall be the defense attorney's responsibility to provide the examiner with all medical records, imaging studies, test results, and the like, which the defense wants the examiner to review and rely upon as part of the examination. Unless he or she has exclusive control of any original records or imaging studies, Plaintiff shall not be required to bring anything to the exam other than valid identification (eg., Driver's License, Official Florida Identification Card or government-issued Passport).

4. Plaintiff is permitted to have his/her attorney (and spouse, or parent, or other representative) present for the examination, provided that only one of these listed non-attorney persons may attend. Such person(s) may unobtrusively observe the examination, unless the examiner or defense counsel establishes a case-specific reason why such person's presence would be disruptive, and that no other qualified individual in the area would be willing to conduct the examination with such person present. In the case of a neuropsychological exam, all observers shall watch and listen from an adjacent room if available, or by video feed. If the examination is to be recorded or observed by others, the request or response of the examinee's attorney shall include the number of people attending, their role, and the method(s) of recording.

5. Plaintiff's counsel may also send a court reporter or a videographer to the examination, provided that claimant's counsel notifies defense counsel at least 10 days in advance of the identity, either by proper name or by title (eg., videographer from XYZ Reporting Service). It is the duty of defense counsel to relay this information to the examiner's office personnel.

6. Neither Defendant's attorney nor any of Defendant's representatives may attend, or observe, record or video the exam. Only if the video is identified as impeachment material for use at trial may the defense counsel obtain a copy. The medical examiner shall not be entitled to any payment of an additional or accommodation fee from the Plaintiff or his/her counsel, simply because of the presence of a legally permitted third parties. The court shall reserve ruling as to whether such costs, if imposed by an examiner, may be properly recoverable by the Defendant as a taxable cost, or otherwise awarded by the court.

7. If a videotape or digital recording is made of the examination by counsel for Plaintiff, it is considered work-product, and neither the defense nor the examiner is entitled to a copy, unless and until same is designated as (or reasonably expected to become) trial evidence, subject to discovery only upon a showing of need and undue hardship. Use of the video or DVD is limited specifically to the instant litigation. At the close of litigation, including any appeal, all copies shall be destroyed – unless counsel convinces the court (and an order is entered) that there is some compelling reason for either party, or the examiner, to retain a copy.

8. Neither Plaintiff's counsel, nor anyone else permitted to be present, shall interject themselves into the examination unless the examiner seeks information not permitted by this Order. If Plaintiff's counsel speaks openly or confers privately with the examinee, and this disrupts the exam or causes the examiner to terminate the examination, counsel may be subject to sanctions.

9. The report of the examiner shall be sent to Plaintiff's counsel, as required by Rule 1.360(b), within 30 days of the examination – but in no event less than 21 days before the beginning of trial, unless otherwise agreed between counsel for the parties or ordered by the court due to special problems. Unless a Plaintiff's treating or retained expert has revised or supplemented an opinion after his/her report or deposition, the examiner shall not change, amend, or supplement the opinions set forth in said report during any testimony (deposition or trial) he may give in reference to his examination of the Plaintiff, without providing a supplemental report, which must be provided to Plaintiff's counsel at least 15 days before trial. Violation of this provision may result in the limitation or striking of the examiner's testimony.

9(a). If the examination involves neuropsychological testing: In addition to the report, the examiner shall provide all raw data, including copies of all notes, tests, test results, scoring and test protocols, to Plaintiff's treating or retained psychologist or neuropsychologist, who must return them to the defense examiner at the conclusion of this case.

10. All protected health information generated or obtained by the examiner shall be kept in accordance with HIPPA requirements and shall not be disseminated by the examiner or defense counsel to any other person or entity not a party to this case without a specific order from this court.

11. Defense counsel must provide the examiner with a copy of this Order and explain the need for the examiner's compliance. As a condition of performing the examination, the examiner shall agree to provide responses to FRCP 1.280(b)(4)(A) inquiries, once such interrogatories or Requests to Produce are propounded by Plaintiff.

DONE AND ORDERED at Tampa, Florida, this _____ day of _____, 20___.

_____

MICHELLE, SISCO
CIRCUIT JUDGE

Copies furnished to:

**

Print Form

Appendix C

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA

SUE BROWN,

Plaintiff,

vs. CASE NO.: 12-CA-00000

STAN BLUE, DIVISION: F

Defendant.
_____/

NOTICE OF TAKING DEPOSITION

PLEASE TAKE NOTICE that the Plaintiff will take the deposition of the following persons at the time and place set forth hereinafter upon oral examination before the herein described Notary Public, or before any other notary public or officer authorized by law to take depositions:

DATE:	May 1, 2013
TIME:	2:00 p.m.
WITNESS:	Dr. John Doe
LOCATION:	Tampa Court Reporting 121 S. Main Street Tampa, Florida 33606
NOTARY PUBLIC:	Tampa Court Reporting (813) 834-8765

The oral examination will continue from day to day until completed. This deposition is being taken for all purposes as are permitted under the rules of court and all applicable statutes without limitation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to: Joe Attorney at Joe@lawfirm.com by e-mail on this 1st day of April, 2013.

Smith, Jones & Thompson
601 Bayshore Boulevard, Suite 910
Tampa, Florida 33606
Telephone No.: (813) 222-4444
Facsimile No.: (813) 225-4444
Primary e-mail: Robert@SmithJones.com
Secondary e-mail: Sue@SmithJones.com
Florida Bar No. 24685
Attorneys for Plaintiff

By: _____
Robert M. Smith

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA

SUE BROWN,

Plaintiff,

vs. CASE NO.: 12-CA-00000

STAN BLUE, DIVISION: F

Defendant.
_____/

NOTICE OF TAKING VIDEOTAPED DEPOSITION

PLEASE TAKE NOTICE that the Plaintiff will take the deposition by videotape of the following persons pursuant to Florida Rules of Civil Procedure 1.390 at the time and place set forth hereinafter upon oral examination before the herein described Notary Public, or before any other notary public or office authorized by law to take depositions:

DATE:	May 1, 2013
TIME:	2:00 p.m.
WITNESS:	Dr. John Doe
LOCATION:	Tampa Court Reporting 121 S. Main Street Tampa, Florida 33606
NOTARY PUBLIC:	Tampa Court Reporting (813) 834-8765
VIDEOGRAPHER:	Tampa Court Reporting

The oral examination will continue from day to day until completed. This deposition is being taken for all purposes as are permitted under the rules of court and all applicable statutes without limitation.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to: Joe Attorney at Joe@lawfirm.com by e-mail on this 1st day of April, 2013.

Smith, Jones & Thompson
601 Bayshore Boulevard, Suite 910
Tampa, Florida 33606
Telephone No.: (813) 222-4444
Facsimile No.: (813) 225-4444
Primary e-mail: Robert@SmithJones.com
Secondary e-mail: Sue@SmithJones.com
Florida Bar No. 24685
Attorneys for Plaintiff

By: _____
Robert M. Smith

Appendix D

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA

SUE BROWN,

Plaintiff,

CASE NO.: 12-CA-00000

DIVISION: F

vs.

STAN BLUE,

Defendant.
_____/

SUBPOENA DUCES TECUM WITHOUT DEPOSITION

THE STATE OF FLORIDA

TO: Jane Doe, M.D.
100 Main Street
Tampa, FL 33601

YOU ARE COMMANDED to appear at law offices of Wagner, Vaughan & McLaughlin, P.A., 601 Bayshore Boulevard, Suite 910, Tampa, Florida 33606, on February 18, 2013, at 10:00 a.m. and to have with you at that time and place the following:

1. All intake and insurance records or materials.

2. All records relative to this patient or person, whether or not associated with this case or any other prior or subsequent treatment. PLEASE PRODUCE A COMPLETE COPY OF YOUR FILE FROM COVER TO COVER REMOVING NOTHING!!

3. Copies of any and all X-rays, CT Scans, Myelograms and/or MRI films taken of the below identified patient or by any other health care providers that are in your possession.

4. All billing statements rendered and payments received.

5. All Assignments of Benefits or directions to pay executed by the patient in your favor.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You may comply with this subpoena by providing legible copies of the items to be produced to the attorney whose name appears on this subpoena on or before the scheduled date of production. You may condition the

preparation of the copies upon the payment in advance of the reasonable cost of preparation. You may mail or deliver the copies to the attorney whose name appears on this subpoena and thereby eliminate your appearance at the time and place specified above. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena. THIS WILL NOT BE A DEPOSITION. NO TESTIMONY WILL BE TAKEN.

If you fail to:

(1) appear as specified; or

(2) furnish the records instead of appearing as provided above; or

(3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

Dated: _____

Smith, Jones & Thompson
601 Bayshore Boulevard, Suite 910
Tampa, Florida 33606
Telephone No.: (813) 222-4444
Facsimile No.: (813) 225-4444
Primary e-mail: Robert@SmithJones.com
Secondary e-mail: Sue@SmithJones.com
Florida Bar No. 24685
Attorneys for Plaintiff

By: _____
Robert M. Smith

If you are a person with a disability who needs any accommodation in order to participate in this deposition, you may request such assistance by contacting [identify attorney or party taking the deposition by name, address, and telephone number] within 2 working days of your receipt of this subpoena; if you are hearing or voice impaired, call 711.

Appendix E

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA

SUE BROWN,

Plaintiff,

CASE NO.: 12-CA-00000

DIVISION: F

vs.

STAN BLUE,

Defendant.
_____/

SUBPOENA DUCES TECUM FOR DEPOSITION

THE STATE OF FLORIDA:

TO: Jane Doe, M.D.
100 Main Street
Tampa, FL 33601

YOU ARE COMMANDED to appear at 201 E. Kennedy Blvd., Suite 950, Tampa, FL 33602, on May 21, 2013, at 3:00 p.m., and to have with you at that time and place the following:

1. All intake and insurance records or materials.
2. All records relative to this patient or person, whether or not associated with this case or any other prior or subsequent treatment. PLEASE PRODUCE A COMPLETE COPY OF YOUR FILE FROM COVER TO COVER REMOVING NOTHING!!
3. Copies of any and all X-rays, CT Scans, Myelograms and/or MRI films taken of the below identified patient or by any other health care providers that are in your possession.
4. All billing statements rendered and payments received.
5. All Assignments of Benefits or directions to pay executed by the patient in your favor.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena.

If you fail to:

(1) appear as specified; or

(2) furnish the records instead of appearing as provided above; or

(3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED on April 1, 2013.

Smith, Jones & Thompson
601 Bayshore Boulevard, Suite 910
Tampa, Florida 33606
Telephone No.: (813) 222-4444
Facsimile No.: (813) 225-4444
Primary e-mail: Robert@SmithJones.com
Secondary e-mail: Sue@SmithJones.com
Florida Bar No. 24685
Attorneys for Plaintiff

By: _____
Robert M. Smith

If you are a person with a disability who needs any accommodation in order to participate in this deposition, you may request such assistance by contacting [identify attorney or party taking the deposition by name, address, and telephone number] within 2 working days of your receipt of this subpoena; if you are hearing or voice impaired, call 711.

Appendix F

IN THE CIRCUIT COURT FOR HILLSBOROUGH COUNTY, FLORIDA

SUE BROWN,

Plaintiff,

CASE NO.: 12-CA-00000

DIVISION: F

vs.

STAN BLUE,

Defendant.
_____/

SUBPOENA DUCES TECUM FOR DEPOSITION

THE STATE OF FLORIDA:

TO: Jane Doe, M.D.
100 Main Street
Tampa, FL 33601

YOU ARE COMMANDED to appear at 201 E. Kennedy Blvd., Suite 950, Tampa, FL 33602, on May 21, 2013, at 3:00 p.m., and to have with you at that time and place the following:

1. All intake and insurance records or materials.
2. All records relative to this patient or person, whether or not associated with this case or any other prior or subsequent treatment. PLEASE PRODUCE A COMPLETE COPY OF YOUR FILE FROM COVER TO COVER REMOVING NOTHING!!
3. Copies of any and all X-rays, CT Scans, Myelograms and/or MRI films taken of the below identified patient or by any other health care providers that are in your possession.
4. All billing statements rendered and payments received.
5. All Assignments of Benefits or directions to pay executed by the patient in your favor.

These items will be inspected and may be copied at that time. You will not be required to surrender the original items. You have the right to object to the production pursuant to this subpoena at any time before production by giving written notice to the attorney whose name appears on this subpoena.

If you fail to:

(1) appear as specified; or

(2) furnish the records instead of appearing as provided above; or

(3) object to this subpoena,

you may be in contempt of court. You are subpoenaed to appear by the following attorney, and unless excused from this subpoena by this attorney or the court, you shall respond to this subpoena as directed.

DATED on April 1, 2013.

Smith, Jones & Thompson
601 Bayshore Boulevard, Suite 910
Tampa, Florida 33606
Telephone No.: (813) 222-4444
Facsimile No.: (813) 225-4444
Primary e-mail: Robert@SmithJones.com
Secondary e-mail: Sue@SmithJones.com
Florida Bar No. 24685
Attorneys for Plaintiff

By: _____
Robert M. Smith

If you are a person with a disability who needs any accommodation in order to participate in this deposition, you may request such assistance by contacting [identify attorney or party taking the deposition by name, address, and telephone number] within 2 working days of your receipt of this subpoena; if you are hearing or voice impaired, call 711.

Appendix G

PROFESSIONAL ETHICS OF THE FLORIDA BAR
OPINION 02-4
April 2, 2004

When the lawyer in a personal injury case is in possession of settlement funds against which third persons claim an interest, there is no bright line rule that can address all situations. An attorney cannot assist a client in unlawfully avoiding statutory liens or court orders involving the funds. If the lawyer is a party to the agreement giving rise to the claim, the lawyer must comply with the lawyer's agreement. If the client is a party to the agreement, the lawyer must consider the terms of the agreement, whether the agreement is enforceable, and whether the client wants to contest the agreement. The lawyer may assist the client by providing advice as to the client's rights and obligations and by negotiating with the third party on behalf of the client. If the lawyer owes a legal duty to the third person, the lawyer must inform the third person of the lawyer's receipt of the funds and must hold disputed funds in trust. Whether the lawyer owes a legal duty to protect the third person's interests is a legal question, outside the scope of an ethics opinion. Before taking action that is adverse to the client, the lawyer should give the client the opportunity to seek independent legal advice.

Note: This opinion was approved by The Florida Bar Board of Governors on April 2, 2004. **RPC:** 4-1.1, 4-1.4, 4-1.5(f)(5), 4-1.7, 4-1.16, 5-1.1, 5-1.2 **Opinions:** 67-36

The Professional Ethics Committee and bar ethics staff have received many inquiries involving a lawyer's duty when the lawyer, in a personal-injury settlement, is in possession of client's funds against which there are claims being made by third parties. In most, but not all cases, the inquiry involves claims by medical doctors or other providers for payment of outstanding bills for medical treatment or services. It is because of all of the variables mentioned below that the staff is most frequently required to advise an inquiring attorney that they can provide little assistance. Many times the answer involves issues of law that are outside the scope of an ethics opinion. Unfortunately, many times the inquiry involves efforts to resolve an ethical problem that has already arisen and may involve potential ethical violations that have already taken place rather than actions that can be taken to avoid future ethical violations. *See*, Rule 2, Fla. Proc. For Ruling on Questions of Ethics.

For these reasons and reasons given below, it is impossible for the Committee to announce any bright line rule that applies in all situations. Pronouncements by out-of-state committees on ethics provide some guidance but often are case specific to the law applicable in the other states. Even pronouncements by courts of this state cannot be blindly relied upon since they are often case specific in the factual applications, or the opinions lack factual information needed to provide a clear answer for a lawyer faced with a specific problem.

Nevertheless, the Committee endeavors in this opinion to provide some guidance to lawyers analyzing the particular factual situation with which they are faced. The listing of factors is not complete. The factors are those most prominent in cases involving problems arising out of the recovery of personal-injury settlements, since that issue most frequently prompts a call to the ethics hotline. Other factors may apply in situations involving a lawyer's receipt of funds or property under other circumstances (e.g., funds

held by an attorney as an escrow agent in a real estate transaction; funds held under a trust).

Factors to consider:

1. Is there a rule governing the situation?

The rule most frequently referenced is Rule 5-1.1, Rules Regulating The Florida Bar (formerly Rule 4-1.15(b)) which reads:

(e) Notice of Receipt of Trust Funds; Delivery; Accounting. Upon receiving funds or other property in which a client or third person has an interest, a lawyer shall promptly notify the client or third person. Except as stated in this rule or otherwise permitted by law or by agreement with the client, 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 and, upon request by the client or third person, shall promptly render a full accounting regarding such property.

While this rule is somewhat specific to the occasion, other rules may impact the question. Obviously, a lawyer has an obligation to act in the client's best interests. Likewise, rules governing a lawyer's obligation when conflicts of interest are anticipated or actually arise may impact a decision in specific cases. Rule 4-1.7. The lawyer's obligation to keep the client informed of actual or potential problems arising during representation may apply. Rule 4-1.4. In addition, a lawyer has an ethical duty of competence. Rule 4-1.1.

2. Under what circumstances have the funds come into the lawyer's possession?

In personal-injury cases, funds paid by defendants are almost always paid to the client and the lawyer jointly. The transaction is seldom completed without accompanying agreements, usually in writing. The settlement agreements are signed by the client before funds are delivered, and, at a minimum, there is an exchange of correspondence leading up to the delivery of funds. These writings must be carefully reviewed since they may create obligations regarding the funds that are binding not only on the client, but also on the lawyer. A lawyer has an ethical duty to abide by the lawyer's own agreements, and may have both an ethical and legal obligation to comply with agreements made by the lawyer on the client's behalf and as the client's agent. A lawyer also has an ethical obligation to advise the client to comply with legally binding agreements the client has made. Additionally, a lawyer has an ethical duty to fully inform a client of the potential effect of signing any agreement reviewed by the lawyer. Finally, a lawyer has an ethical duty not to bind the client to a disadvantageous agreement without consultation and agreement.

3. What circumstance forms the basis of a claim against the client's funds?

a. Some claims are based on statutorily created liens over which neither the client nor the lawyer has any direct control. The claim exists whether or not the client consents. Examples of such liens are Medicare or Medicaid liens, Social Security liens, and liens under state hospital lien laws. In representing the client, the lawyer has an obligation to

know and apply the law. The lawyer also has an obligation to inform the client of the impact of the law on the client's potential recovery so the client is fully informed in considering a potential settlement. The lawyer could potentially place the client at grave risk if this type of claim is ignored. The client, and even the lawyer in some cases, may be civilly or criminally liable if such liens are ignored or if there is any concealment or false statement of facts made in connection with enforcement of such liens. A lawyer who knowingly assists a client in unlawfully avoiding such liens is violating his or her ethical obligation to follow and uphold the law.

b. Some claims are based on the actions of courts or administrative bodies. These may be court orders directed to the client, or possibly to the lawyer, regarding such funds. The lawyer's obligations, as well as the client's, are similar to the situation involving statutory liens with an emphasis on the lawyer's duty to become fully familiar with the status of the law as applied to the particular client.

c. Most other claims are based upon interests created by private contract between the client and others, or between the lawyer and others. Some agreements are based on an agreement of a lawyer as agent of the client. Problems may arise when one party claims a contract exists, while the other party denies all or some of the claimed terms of the purported contract. Obviously the many different factual situations providing a factual basis for these claims make it impossible for any clear ethical guidance to be developed. All of the many factual issues arising in the formation and possible breach of contracts may be involved. To the extent the lawyer acts, or appears to act, as an agent of the client, the many issues in the law of agency arise. Most importantly, from the standpoint of the lawyer, these many factual possibilities greatly raise the problem of actual or apparent conflict of interest between the client and the lawyer. Such conflicts may create ethical problems for the lawyer, particularly if the client is unsophisticated in matters of contract or agency and is relying upon the lawyer to protect the client's interest in these matters. A lawyer has an ethical duty to urge the client to abide by the client's lawful contracts, but at the same time has an ethical duty to assist the client, by all legal means, to reject or avoid contracts that are not legally enforceable against the property in the lawyer's possession. The lawyer has an obligation to avoid conflicts of interest before they arise, and has an ethical obligation regarding the handling of conflicts of interest after they arise, including the obligation to fully inform the client of the basis of such conflict. *See*, Rule 4-1.7. While the law of contract forms the basis of most claims, allegations have been made based upon fraud or unjust enrichment, and may indirectly involve illegal activities revolving around improper avoidance of government regulations or even improper marketing activities of doctors or lawyers. Thus, again no bright line guidance can be given by this committee.

4. "Letters of Protection" and other agreements

There is no clear legal definition of a "letter of protection." The term means different things to different medical providers, to different lawyers, and to different clients. The term is applied loosely to include assignments, a term which itself has many definitions. The documents involved often refer to liens although there is rarely any statutory or judicial basis for the use of such term, and there is almost always a lack of any information as to how such claimed liens can be perfected or enforced except through litigation. This section discusses any claims involving any alleged agreement (oral or

written) under which a person claims the right to a client's funds held by a lawyer regardless of how that agreement is characterized. It does not include any claim based on statutory, administrative or judicial action. It basically involves a claim based on contract. Several crucial issues dominate discussions of the ethical and legal rights and duties of lawyers and clients when problems arise under such agreements.

a. To what extent is the lawyer a party to the agreement? Obviously, a lawyer has an ethical duty to comply with the lawyer's own lawful contracts freely entered into, absent some lawful defense. The lawyer, of course, may be a direct party to the agreement. The lawyer may be a party as the agent of the client, disclosed or undisclosed, apparent or actual, limited or general.

b. If only the client is a party to the agreement, the lawyer must consider the terms of the agreement, whether the agreement is enforceable, and whether the client wants to contest the agreement.

c. Is a conflict of interest involved because both the client and the lawyer (directly or as a claimed agent) are claimed to be parties to the agreement. A lawyer has numerous ethical obligations in situations involving actual or potential conflicts of interest. Complete and full disclosure of potential and actual conflicts of interest is required. It is unethical for a lawyer to avoid a conflict by taking action adverse to the client's interest. The lawyer's only option may be to withdraw from representation. *See* Rule 4-1.16.

d. What can a lawyer do to resolve a dispute between the client and a medical provider? The comment to Rule 5-1.2 is instructive:

A lawyer may have a duty under applicable law to protect such third party claims against wrongful interference by the client and, accordingly, may refuse to surrender the property to the client. *However, a lawyer should not unilaterally assume to arbitrate a dispute between the client and the third party, and where appropriate the lawyer should consider the possibility of depositing the property or funds in dispute into the registry of the applicable court so that the matter may be adjudicated.* (Emphasis added). The comment illustrates that the lawyer cannot unilaterally arbitrate a dispute between the client and the third person. In other words, the lawyer cannot take it upon himself or herself to decide who is entitled to what. Likewise, the lawyer may be prohibited from disbursing the disputed funds to anyone until the dispute is resolved. The lawyer's ethical duty turns on whether or not the lawyer owes a legal duty to the third person. The rule itself does not create a legal duty to a third person; such a legal duty arises independently of the rule. Where the lawyer owes a legal duty to the third person, the lawyer must, under Rule 5-1.1(e) and (f), notify the client and third person of the receipt of the funds or property, but the lawyer must retain the disputed funds or property in trust until the dispute is resolved. Any undisputed funds must be distributed to the appropriate person. It should be noted that in contingency fee cases no distributions can be made until the client signs the closing statement as required by Rule 4-1.5(f)(5). In the event of a dispute over whether a third person should be paid, the attorney should do a partial closing statement disclosing what undisputed amounts are being distributed and disclosing what is being held in trust pending resolution of the dispute. Whether the lawyer owes a legal duty to a third person is a legal question outside the scope of an ethics opinion and therefore is not determined in this opinion.

The only Florida ethics opinion on the issue of protecting a third person's interest in the face of the client's countermanding instructions arose in a personal-injury context. Opinion 67-36 dealt with a situation where the client executed an assignment with a medical provider for payment of unpaid medical bills out of the proceeds of the client's personal-injury claim. Once the personal-injury case was settled, the client withdrew authority for the lawyer to retain part of the proceeds to pay the medical bills. It does not appear from the opinion whether the client disputed the medical bills or simply instructed the lawyer not to disburse directly to the provider. Whether a particular lien has been perfected or a particular assignment is valid and enforceable is a legal question, beyond the scope of an ethics opinion. *See*, Rule 2, Florida Bar Procedures for Ruling on Questions of Ethics. In response to the question of what the lawyer ethically was required to do, the Committee stated that the lawyer "should initially endeavor to assist his client *and the physician* in effecting a compromise." (Emphasis added.) The Committee further recommended that if that effort failed, the lawyer "should institute an interpleader action in a court of competent jurisdiction naming his client and the physician as defendants." We believe that the Committee, by suggesting that the lawyer assist the client *and the physician* in effecting a compromise, did not mean to suggest that the lawyer act as a neutral arbitrator or mediator of the dispute. Likewise, we do not interpret the Committee's opinion to suggest that an interpleader action was the only alternative to settlement.

To resolve the dispute, the lawyer must give honest advice to the client concerning the client's rights, obligations and risks. The lawyer may act as a negotiator for the client, but not as an arbitrator. If a conflict of interest between the client and lawyer already exists, the lawyer should fully and completely inform the client of the basis of the conflict and suggest that the client seek independent counsel regarding the client's position. The lawyer should take no action which would be against the client's interests unless fully confident that under the law such action must be taken, and then the action should be taken only after fully advising the client of the intended action and the basis for the intended action. If possible, the client should be given an opportunity to seek independent legal counsel before any action is taken against the client's interests, such as depositing the funds or property into the court registry to allow the court to decide how the funds or property are to be distributed. In any event, the lawyer at all times must act as an advocate for the client in resolving the dispute.

Conclusion

While the information above may be of marginal assistance to a lawyer already faced with a dispute between the lawyer, the client, and the doctor involved, it is the hope of the Committee that publication of this opinion will provide assistance to lawyers in their future dealings on this difficult issue, and provide a framework whereby lawyers may avoid ethical and legal pitfalls when asked to assist clients in dealing with their difficult economic and medical issues in personal injury cases.

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