Control and Communication

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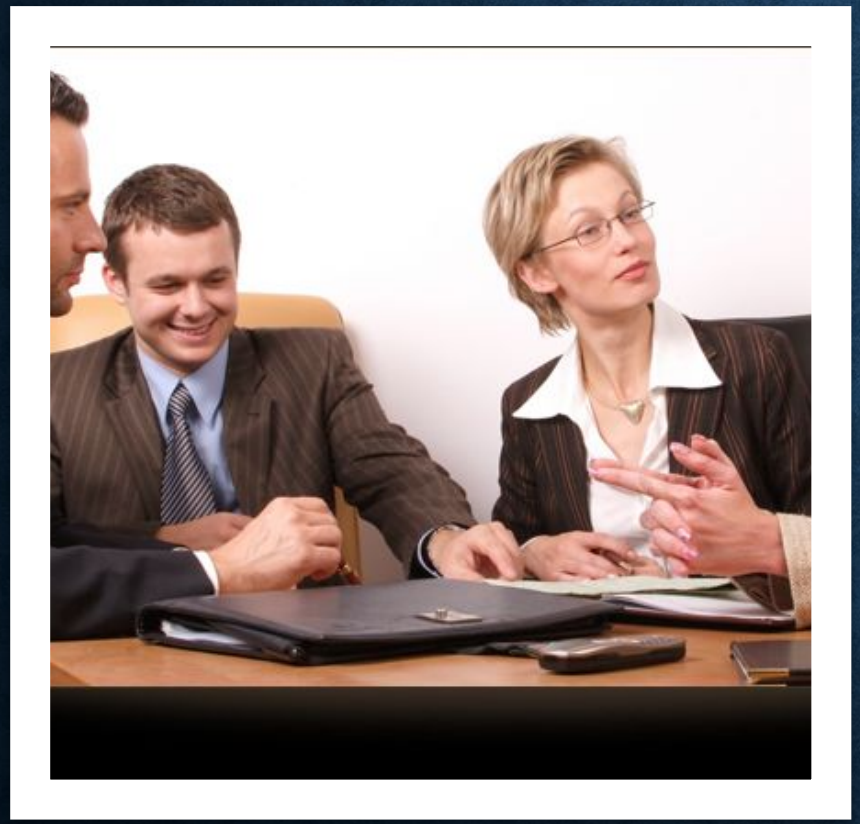
Conflicts/Ethics Attorney





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WORKING WITH CLIENTS



Golden Rules for developing a successful practice:

1) The client is the boss.

2) Never forget Rule #1.

MR 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT & LAWYER

- (a) Subject to paragraphs (c) and (d), a lawyer **shall** abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer **may** take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer **shall** abide by a client's decision whether to settle a matter. In a criminal case, the lawyer **shall** abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.
- (b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.
- (c) A lawyer **may** limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.
- (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

ALLOCATION OF RESPONSIBILITY BETWEEN LAWYER & CLIENT

•*What's it mean to be the boss?* **See MR 1.2:**

- Client controls the objectives, goals and specific decisions of the representation
  - Decisions to settle, take a plea agreement, jury trial waiver, testify in own defense, appeal, etc.

- Lawyer **shall consult** client on the means to be used to pursue the objective (joint decision with client). Lawyer "recommends" courses of action to achieve objectives and client decides.
  - Lawyer impliedly authorized to act – permission given by client on certain topics. Must stay within scope of authorization.
  - How to communicate with the client
  - Scope of representation (limited or open)
  - Moral views and courses of actions to pursue

- Lawyer SOLE Authority to Make Decisions
  - Refuse conduct that is unlawful [MR 1.2(d)]
  - Make decisions or take action required by the tribunal or by court order
  - Candor to the tribunal (MR 3.3)
  - Communicate with the client (MR 1.4) – consult and keep the client reasonably informed and promptly respond to client inquiries.

IMPLIED/EXPRESS AUTHORITY

- **Actual authority**: includes both express and implied authority to act in a matter that will further the client's objectives, but only if the lawyer has reasonability consulted with the client and believes the client desires the lawyer to take such action.

- Client can also be bound by a lawyer's actions if a third party reasonably believes that the lawyer-agent had the requisite authority to act on behalf of the client
  - **BUT** the lawyer is then probably liable to the client – **YIKES!**

EXAMPLES OF COMMON/SPECIAL AUTHORITY

- Authority to Represent Organization [MR 1.13(a), (b), and (f)]: a lawyer employed or retained by an organization represents the organization through its duly authorized constituents; must report constituents harming organization – protect organization first and foremost; explain to top executives that organization is the client, not them personally
  - **See Martyn & Fox Problem 5.2, pg. 83**

- Authority in Representing Clients with Diminished Capacity [MR 1.2(a) and 1.14]: lawyer must, as far as reasonably possible, maintain a normal client-lawyer relationship; take reasonable steps necessary to protect the client, including consulting with individuals or entities that have the ability to take action to protect the client, and in seek guardian ad litem, conservator, or guardian where necessary and appropriate
  - **See Martyn & Fox Problem 5.3, pg. 84**


COMMUNICATION IS KEY!

MR 1.4 COMMUNICATIONS

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

ETHICAL BASELINE

RULE HAS TWO ASPECTS:

- **Temporal:** Be prompt (prior to taking action)
  - Bad news doesn't get better with age

- **Substantive**: Give the client sufficient information to participate intelligently in decision-making

- Gear toward client's sophistication

BUT Always meet client's expectations; some expect more communication than others

NINE (9) TRIGGERING EVENTS FOR COMMUNICATION

- Fee arrangement and scope of representation – get engagement letter (recommended, not required unless contingent fee MR 1.5)
- Decision requires client consent about the objectives of representation (MR 1.2)
- Situation requires client consent, e.g., conflicts of interest, limit scope, limit fiduciary obligations, confidentiality, etc.
- Client consultation required about the means of the representation to accomplish objectives, e.g., litigate, arbitrate, mediate, trial, etc. . .
- Periodically update the client on status
- Lawyer makes a significant mistake affecting the client
- Client requests information
- Law requires limits on the conduct that the client requests.
- Reasonably necessary to permit a client to make an informed decision about the representation

WHAT DOES THIS ACTUAL MEAN? (SUMMARY)

- Lawyer MUST initiate conversations with the client

- Lawyer MUST provide the client with necessary insights to effectuate the client's goals.

- Discipline if not Communicate: Professional Discipline/Civil Liability/Ineffective Assistance of Counsel
  - We will see these in our cases throughout this chapter.



BEST PRACTICES

1) Return client calls and messages within 24 hours **OR** Acknowledge the call promptly.

2) Send your client drafts of significant documents one week before they must be filed with a court or government agency or shared with a third-party.

3) Bad news (or any news) does not get better with time/age!

4) Communicate – your client WANTS to talk to you!!

DILIGENCE



MR 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client

Comment 2: A lawyer's **workload must be controlled** so that each matter can be handled competently.

Comment 3: Perhaps **no professional shortcoming is more widely resented than procrastination.** A client's interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness. . .

Other Comments: Identify **personal inconvenience and a lawyer's death or disability** as major problems that can result in the failure to meet the duty of diligence!! **Fiduciary duty does not vanish because of the lawyer's unanticipated expense, effort, or fatigue**. Lawyer must withdraw, but only if the client consents, or if other grounds for withdrawal exist!

WAYS LAWYERS HAVE ABANDONED CLIENTS (NOT HAVE DILIGENCE)

- Failure to recognize a client who relies on the lawyer for legal services
- Unreasonable recognition of the scope of engagement
- Personal impairment of the lawyer, such as substance abuse, physical or mental illness, or inability to continue law practice
- Caseloads causing significant neglect or disregard of a client's matter, often resulting in a missed time deadline
- Difficulty of a case or client
- Complete lack of client communication
- Disregard of a client due to inability to pay
- Failure of a law firm to assume responsibilities owed to a client when a lawyer leaves the firm
- Failure of a lawyer departing a firm or law practice to assume proper responsibility
- Improper withdrawal from a client matter.

EXAMPLE
LAWYERS/CLIENTS: CRIMINAL DEFENSE

- Clients: Per accused of a crime has the right to retained or appointed counsel at all "critical stages" of such proceedings (including plea negotiations); right to counsel for capital sentencing hearings and the first appeal

- Competence: refer to *Strickland v. Washington*, and a 2-prong test for **ineffective assistance of counsel** (1) performance requires the defendant to show "counsel's representation fell below an objective standard of reasonableness"; (2) prejudice requires the defendant to show "but for counsel's errors, the result in the proceeding would have been different". This is a case-by-case determination and presumes a strong presumption that conduct falls within the wide range of reasonable professional assistance or strategic decision.

LAWYERS/CLIENTS: CRIMINAL DEFENSE

- Communication: Rule 1.4 regarding plea agreements and offer correct legal advice, legal requirements at trial and collateral consequences (e.g., consequences of accepting a plea)

- Candor: special responsibility with candor to the tribunal (MR 3.3.) and cannot offer evidence the lawyer reasonable believes to be false, with one exception. Lawyers who reasonably believe, but do not KNOW, that their client will testify falsely, but bow to the client's choice.

- Conflict of Interest: joint representation of co-defendants, previous representation of a victim or witness, fee arrangements, investigation and possible prosecution of counsel (MR 1.7).

MACHADO V. STATEWIDE GRIEVANCE COMMITTEE

- What are the facts?
- Ethical Violations?
- Reasoning/Holding?
- Do you agree? Or do you think the attorney was proper to rely on the "agency relationship"? Why or why not?

DEPAPE V. TRINITY HEALTH SYSTEMS, INC.

- What are the facts?
- Ethical Violations?
- Reasoning/Holding?
- Do you agree with the decision?

MAPLES V. THOMAS

- What are the facts?
- Ethical Violations?
- Reasoning/Holding?
- Do you agree with the decision?



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