

Professional Responsibility

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Attorney-Client Relationship

1 Agency & Fiduciary Duties

1.1 Agency Relationship

Rest. (3d) of Agency

§ 1.01

Agency is the fiduciary relationship that arises when one person (a “principal”) manifests assent to another person (an “agent”) that the agent shall act on the principal’s behalf and subject to the principal’s control, and the agent manifests

§ 8.01

An agent has a fiduciary duty to act loyally for the principal’s benefit in all matters connected with the agency relationship.

1.2 Agent & Third-Parties

Rest. (3d) of Agency

§2.01

An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent so to act.

§2.02(1)

An agent has actual authority to take action designated or implied in the principal’s manifestations to the agent and acts necessary or incidental to achieving the principal’s objectives, as the agent reasonably understands the principal’s manifestations and objectives when the agent determines how to act.

§2.03

Apparent authority is the power held by an agent or other actor to affect a principal’s legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal’s manifestations.

1.3 Fiduciary Duties to Clients

Competence

Rule 1.1

Diligence:

Rule 1.3

Communication

Rule 1.4

Confidentiality

Rule 1.6

Loyalty

Rules 1.7-1.12 (Conflicts of Interest)

Care

Rule 1.15 (Client Property)

1.4 Allocation of Decision-Making Authority

Rule 1.2(a)

Client retains authority over crucial decisions regarding purposes & goals of representation

- In civil cases, the client decides whether to sue and whether to settle
- In criminal cases, the client decides what plea to enter (e.g., guilty or innocent), whether to waive a jury trial, whether to testify, and whether to appeal
- The lawyer should counsel the client about the advantages, disadvantages, and alternatives

Lawyer retains authority over tactical & logistical/procedural decisions

- e.g., whether to depose a witness; whether to consent to an extension to file discovery responses

Lawyer should consult with client about these decisions, where possible

- If client objects to a lawyer's tactical or technical decisions, lawyer should defer to the client's wishes, unless client's wishes are contrary to law or applicable ethics rules

Restatement of the Law Governing Lawyers, §§ 16-30

Client retains authority to decide ends; lawyer has authority to decide means

But in practice, allocation of decision-making authority as between attorney and client depends (in part) on the status of the parties

Heinz & Laumann, *Chicago Lawyers*

- Inverse relationship between degree of lawyer's decisional/operational autonomy and client's status

1.5 Limited Scope of Representation

Rule 1.2(c)

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent, e.g., The lawyer will handle the trial, but not any appeals

But lawyer may not:

- Limit the right of the client to fire the lawyer
- Ask the client to accept "incompetent" representation (e.g., waive claims for ordinary negligence)
- Limit the client's right to settle the case
- Prospectively limit the lawyer's liability for malpractice

Example

L's standard retainer agreement contains the following clause: "Client agrees not to hold Lawyer liable for negligence and agrees not to file suit against Lawyer."

- L is subject to discipline.

1.6 Criminal or Fraudulent Conduct

Rule 1.2(d)

Prohibited:

- Counseling client to engage in crime or fraud
- Assist client in crime or fraud

Permitted:

- Advise client regarding legal consequences of action
- Assist client in determining validity, scope, meaning, or application of law

See *Milavetz, Gallop & Milavetz, P.A. v. U.S.* (US 2010)

Example

Client asks lawyer for advice or assistance in connection with a marijuana-related business, in a state where cultivation, distribution, possession, & use of marijuana for recreational purposes is legal.

- Colorado RPC Rule 1.2, Comment 14: A lawyer may counsel a client regarding the validity, scope, and meaning of Colorado constitution article XVIII, §§ 14 & 16, and may assist a client in conduct that the lawyer reasonably believes is permitted by these constitutional provisions and the statutes, regulations, orders, and other state or local provisions implementing them. In these circumstances, the lawyer shall also advise the client regarding related federal law and policy.
- King County (WA) Bar Association Ethics Advisory Opinion on I-502 & Rules of Professional Conduct; Doug Ende letter

2 Establishing the Relationship

Restatement of the Law Governing Lawyers

§ 14

A relationship of client and lawyer arises when:

- (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either*
 - (a) the lawyer manifests to the person consent to do so; or*
 - (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or*
- (2) a tribunal with power to do so appoints the lawyer to provide the services.*

2.1 Client Retains lawyer

Contractual relationship

Some states require written retainer or fee agreements

- But may arise out of less formalized contact & communication
- Giving advice at a party?

Standard: Would a reasonable person, under the circumstances, conclude, from the lawyer's words and conduct, that the lawyer has agreed to represent the client

- Ambiguity generally goes against lawyer

2.2 Court Appointment

Not contractually created, but same duties apply

2.3 Episodic client:

Where attorney periodically does work for the same client, relationship may be ongoing, even when there is no active work or matter pending.

3 Declining or Terminating Representation

Lawyer must inform the client (preferably in writing) if the lawyer will not handle a matter or is no longer representing the client.

Any reasonable doubts will be resolved in favor of the client (e.g., a client may assume that his or her trial attorney will handle the appeal, unless the lawyer makes clear otherwise).

Example

A visits L's office and asks L to represent him in an automobile accident case. L only handles tax cases, so L declines to represent A. L should:

- Advise A to visit other lawyers;
- Advise A of any impending deadlines (e.g., statute of limitations – if the deadline is about to expire, L may be required to do more, such as filing a complaint for A before declining representation);
- Protect A's confidences; and
- Notify A in writing that he is declining the representation.

Rule 1.16

Representation may terminate

- By agreement of attorney & client
- When lawyer completes the task or matter for which she has been retained
- As specified in the retainer agreement

Reasonableness standard applies to termination as well as formation

Restatement of the Law Governing Lawyers

§32: *Termination of a Lawyer's Authority*

- (1) *A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation and with an order of a tribunal requiring the representation to continue.*
- (2) *Subject to Subsection (1) and §33, a lawyer's actual authority to represent a client ends when:*
 - (a) *the client discharges the lawyer;*
 - (b) *the client dies or, in the case of a corporation or similar organization, loses its capacity to function as such;*
 - (c) *the lawyer withdraws;*
 - (d) *the lawyer dies or becomes physically or mentally incapable of providing representation, is disbarred or suspended from practicing law, or is ordered by a tribunal to cease representing a client; or*
 - (e) *the representation ends as provided by contract or because the lawyer has completed the contemplated services.*

- (3) *A lawyer's apparent authority to act for a client with respect to another person ends when the other person knows or should know of facts from which it can be reasonably inferred that the lawyer lacks actual authority, including knowledge of any event described in Subsection (2).*

§33: Duties When Representation Terminates:

- (1) *In terminating a representation, a lawyer must take steps to the extent reasonably practicable to protect the client's interests, such as giving notice to the client of the termination, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee the lawyer has not earned.*
- (2) *Following termination of a representation, a lawyer must:*
- (a) *observe obligations to a former client such as those dealing with client confidences (see Chapter 5), conflicts of interest (see Chapter 8), client property and documents (see 44-46), and fee collection (see 41);*
- (b) *take no action on behalf of a former client without new authorization and give reasonable notice, to those who might otherwise be misled, that the lawyer lacks authority to act for the client;*
- (c) *take reasonable steps to convey to the former client any material communication the lawyer receives relating to the matter involved in the representation; and*
- (d) *take no unfair advantage of a former client by abusing knowledge or trust acquired by means of the representation.*

3.1 Compulsory Withdrawal

Rule 1.16(a)

Problems

Lawyer, a partner in the Smith Law Firm, represents A in litigation. When A receives a document production request, A instructs Lawyer to destroy some relevant documents. Lawyer explains to A that such destruction is illegal and unethical, but A insists that Lawyer destroy the documents.

- What are Lawyer's ethical obligations?
- May A fire Lawyer and, if so, does Lawyer have any recourse?

Lawyer represents A in a large business transaction. Over the past few years, Lawyer has become addicted to illegal drugs. The addiction has reached a point where Lawyer is unable to concentrate for more than a few minutes at a time. A's business transaction is very complicated and will take nearly one hundred hours to complete.

- What are Lawyer's ethical obligations?

3.2 Permissive Withdrawal

Rule 1.16(b)

Problems

A hires Lawyer to represent A in a products liability suit. Within the first week, A and Lawyer realize that they are incompatible. Accordingly, they agree that it would be best for A to find a new lawyer. The litigation is in its early stages and thus A will not be prejudiced by a change of lawyers.

- May A withdraw?

Lawyer, a partner in the Smith Law Firm, represents A in litigation. When A receives a document production request, A decides to destroy some relevant documents. Lawyer learns of A's plans and explains to A that such destruction is illegal and unethical, but A insists on destroying the documents.

- Must Lawyer withdraw?
- May Lawyer withdraw?

An attorney experienced several instances when clients failed to pay their fees in a timely manner, but it was too late in the representation to withdraw without prejudicing the clients. To avoid a recurrence of this situation, the attorney has drafted a stipulation of consent to withdraw if fees are not paid according to the fee agreement. She proposes to have all clients sign the stipulation at the outset of the representation. Is it proper for the attorney to use the stipulation to withdraw from representation whenever a client fails to pay fees?

- A. Yes, because a lawyer may withdraw when the financial burden of continuing the representation would be substantially greater than the parties anticipated at the time of the fee agreement.
- B. Yes, because the clients consented to the withdrawal in the stipulation.
- C. No, because a client's failure to pay fees when due may be insufficient in itself to justify withdrawal.
- D. No, unless clients are provided an opportunity to seek independent legal advice before signing the stipulation.

Client has retained Attorney to represent Client in a contract suit. Attorney's retainer agreement provided that Attorney's fees would be based on a fixed hourly rate, payable at the end of each calendar month. Two months before trial, Client fell behind in the payment of Attorney's monthly billing for fees. Attorney included the following statement on Attorney's last bill to Client: "Your account is more than thirty days past due. If amounts due are not paid promptly in accordance with our agreement, I will terminate the representation. If you cannot pay the amount due, I will accept an assignment of your cause of action as security for your fee to me." Two weeks after the last billing, Attorney telephoned Client and told Client that Attorney would withdraw from representing Client if the bill was not paid within forty-eight hours or adequate security given for its payment. Forty-eight hours later, the client has neither paid the bill nor given security.

- May Attorney move the court for permission to withdraw?
- May Attorney turn Client's file over to another experienced lawyer in town and notify Client that Attorney no longer represents Client?
- May Attorney accept an assignment of Client's cause of action as security for Attorney's fees?

For many years, Attorney served as outside counsel for Corp. Shortly after a change in management, Attorney discovered what she reasonably believed to be a material misstatement in a document she had drafted that Attorney was about to file on Corp's behalf with a government agency. Attorney advised Corp's Board of Directors that filing the document was probably criminal. However, the Board disagreed that there was any material misstatement and directed Attorney to proceed with filing. When Attorney indicated her intention to resign, Corp argued that resignation at this time would send a signal that there was a problem with the filing. Corp urged Attorney to continue representation, but offered to use in-house counsel to complete the work on the filing. Although she does not know for certain that filing the document is illegal, Attorney reasonably believes that it is. In any event, Attorney is personally uncomfortable with the representation and wants to withdraw. May Attorney withdraw from her representation of Corp?

- Must Attorney withdraw?

When may an attorney who represents a plaintiff on a contingent fee basis withdraw because of an "unreasonable financial burden"?

3.3 Notice to/Permission of Tribunal & Protection of Client's Interests

Rule 1.16(c) & (d)

3.3.1 Attorney's Lien

An attorney's lien is a security interest that a lawyer may assert against client's property to ensure payment of fees. In most states, attorney's liens are codified by statutes; in others, they are recognized under common law.

There are two varieties of attorney's lien, distinguished by the type of client property to which they apply:

Retaining Lien

Applies to client property and money currently in the lawyer's possession. This includes funds advanced by the client and funds that the lawyer has received from someone else for the client). It also includes the client's file.

- e.g., Oregon Rev. Stat. § 87.430: “An attorney has a lien for compensation whether specially agreed upon or implied, upon all papers, personal property and money of the client in the possession of the attorney for services rendered to the client. The attorney may retain the papers, personal property and money until the lien created by this section, and the claim based thereon, is satisfied, and the attorney may apply the money retained to the satisfaction of the lien and claim.”
- North Carolina courts and the NC State Bar Ethics Committee have declined to recognize an attorney’s right to a retaining lien. See, 2006 Formal Ethics Op. 18 (Proviso in NC RPC 1.16(d) permitting “lawyer [to] retain papers relating to the client to the extent permitted by other law”, does not permit assertion of retention lien absent statutory or common law recognition of such a lien in NC).

Charging Lien

Applies to funds that the client will receive in the future as the result of a judgment or settlement.

- North Carolina courts have recognized an attorney’s right to assert a charging lien, but only if the attorney represents the client at the time of final judgment or a settlement. See *Mack v. Moore*, 107 N.C. App. 87, 418 S.E.2d 685 (1992)

Problems

Lawyer was retained by Client to defend Client in a pending criminal case. Client has failed to pay Lawyer’s monthly fees for six consecutive months. After numerous warnings, Lawyer would like to withdraw. Lawyer files a motion with the court seeking leave to withdraw, but the court denies the motion.

- What are Lawyer’s obligations to Client and the court?
- Assuming the court grants Lawyer leave to withdraw, what actions must Lawyer take to end her relationship with Client?
- If Client fails to pay the past-due fees to Lawyer, is there anything Lawyer may do to ensure payment?

3.4 Duties continuing beyond termination of the relationship:

Confidentiality

- May survive death of client (varies by jurisdiction)

Loyalty

- See conflicts involving former clients

4 Duty of Care to Client

4.1 Competence

Rule 1.1

“Competent representation requires the legal knowledge, skill, thoroughness and preparation necessary for the representation.”

- Required proficiency is usually that of a general practitioner in the jurisdiction

Example: L represented A in the case of A v. B. B prevailed at the trial court. Under the applicable rules, A has 30 days to file a notice of appeal. Because of a vacation and a busy schedule, L failed to comply with the 30-day deadline and A is now barred from pursuing an appeal. If the appeal had been filed, A would have prevailed.

- L is subject to discipline and subject to civil liability (i.e., malpractice).

4.1.1 Achieving Competence

Consultation with other lawyers

A lawyer may be required to consult with another lawyer if the matter calls for some specific expertise, such as patent law or admiralty, that the ordinary lawyer does not possess - Note: fee-splitting with attorneys outside the lawyer's firm requires written consent of the client (infra).

Consultation with non-lawyer experts

A lawyer may retain a "consulting expert" in a field other than law to assist the lawyer in representing a client

- Consulting expert's opinions, etc. are generally protected from disclosure under FRCP 26
- Consulting expert can sit at counsel table, attend depositions, attend settlement negotiations, etc.

Study and research

- A lawyer should engage in continuing study and education of the law, even if not compulsory
 - Formal CLE is not required by the Rules, but is required by most state bars

4.1.2 Emergencies

A Lawyer may give advice or assistance on issues on which the lawyer is not fully competent, where the client faces an emergency

But the lawyer should refer the client to a competent lawyer or associate with a competent lawyer as soon as practical; the lawyer should also limit emergency advice to that reasonably necessary

Example: A tax lawyer may assist a client with bail for a DUI at 2:00 a.m. when no other lawyers are available, but should refer the case to another lawyer as soon as practical.

- If the tax lawyer mishandles the bail issue, the lawyer will probably not be disciplined, because it was an emergency.

4.1.3 Declining representation

A lawyer must decline representation if the lawyer believes that she is not (and cannot become) competent to effectively represent the client

4.2 Diligence

Rule 1.3

Opposition, obstruction, and personal inconvenience to the lawyer do not relieve the lawyer of this duty

A lawyer breaches this duty even if the lack of diligence does not harm the client

A lawyer may agree to ordinary continuances, etc., where the client will not be prejudiced (even if the client generally opposes delays)

Example: L repeatedly fails to meet discovery deadlines for no legitimate reason. Although her clients are not injured by such actions, L would be subject to discipline.

4.3 Communication

Rule 1.4

Lawyer must promptly respond to client requests for information

Lawyer must keep client informed (even absent a request by client) about:

- Status of the matter
- Decisions requiring the client's consent

- Limitations on the lawyer's conduct mandated by the Rules

Examples

Lawyer for defendant serves discovery requests on lawyer for plaintiff. Lawyer must promptly notify client and provide copies of the requests.

Lawyer for defendant makes settlement offer to lawyer for plaintiff. Lawyer must promptly notify client, even if lawyer believes offer is inadequate, unless client has previously told lawyer such an offer would not be acceptable.

- Decision whether to accept settlement or plea offer belongs to the client (see below)

Lawyer for plaintiff receives check from lawyer for defendant, representing amount of judgment or settlement. Lawyer must promptly notify client (and must deposit check in client trust account)

4.3.1 Provisions for Lawyer's Unavailability

A solo practitioner should make arrangements for another lawyer to review files and contact clients in the event the solo practitioner suddenly becomes disabled or dies unexpectedly.

4.3.2 Delaying & Withholding Communication

In extraordinary circumstances, a lawyer may delay communication if the lawyer believes the client may react imprudently (e.g., if a mental health worker has advised the attorney that the client may become violent or suicidal upon learning the information)

A lawyer must withhold information from a client if so ordered by the court (i.e., an "attorneys' eyes only" protective order)

4.4 Exercise of Judgment

Rule 2.1

Problems

Lawyer represents ABC Corp. ABC has a very good breach of contract action against one of its regular customers, XYZ Corp. ABC hires Lawyer to sue XYZ. Lawyer advises ABC's president that, "although you have a great lawsuit and I'm prepared to file the complaint, I do not think it is a wise business decision for you to sue a regular customer?"

- Did Lawyer act properly?

Lawyer represents A in a child custody dispute. A is the custodial parent of three children. A's former spouse, B, has filed the child custody suit in an attempt to obtain custody of the children. A is a heavy drinker and has had considerable difficulty raising the children. Lawyer advises A: "I think you should seek treatment for your drinking and attend some parenting classes."

- Did Lawyer act properly?

4.5 Evaluation for Use of Someone Other Than Client

Rule 2.3

Problems

Lawyer, a partner in the Smith Law Firm, represents ABC Corp. in tax matters. ABC works with other companies ("customers") to reduce their income tax exposure. ABC has created a new type of transaction which purportedly has significant tax advantages. ABC would like to market this new transaction to its customers. In order to make the new transaction more appealing to customers, ABC has asked Lawyer to prepare an opinion letter in which Lawyer opines on the tax advantages. ABC will give this opinion letter to customers and potential customers.

- May Lawyer prepare the opinion letter?
- What should Lawyer do if she disagrees with ABC as to the tax advantages of the new transaction?

5 Civil Liability for Attorney Conduct

5.1 Liability to Clients

5.1.1 Attorney Malpractice

Elements (similar to negligence)

- Breach of the duty of care
- Cause in Fact
- Proximate Cause
- Damages

Standard of Care

Ordinary standard

- Level of care similar to that of an ordinary, prudent general practitioner within the jurisdiction

Specialist standard

- Level of care of an ordinary, prudent specialist within the jurisdiction

Relevance of ethics rules

- The ethics rules do not establish the applicable standard of care, but are relevant in determining whether there has been a breach

5.1.2 Other Potential Claims

- Breach of Contract
- Breach of Fiduciary Duty
- Fraud
- Intentional Torts
- Statutory Claims

5.2 Liability to Others

A lawyer may be liable to persons other than a client for harm resulting from lawyer's conduct

Malpractice

- Third-party beneficiary of representation: e.g. beneficiary under a will or trust

Fraud and other intentional torts

Statutory claims

5.3 Professional Liability Insurance

Coverage is not mandatory. But some jurisdictions require that attorney inform client whether the attorney has coverage.

6 Ineffective Assistance of Counsel

Raised by a criminal defendant seeking post-conviction relief

Not a basis for attorney liability (though the same conduct may give rise to malpractice or other claims)

Padilla v. Kentucky, 130 S.Ct. 1473 (2010)

Court restates the standard adopted in *Strickland v. Washington*

- Attorney did not provide competent representation
 - Representation “fell below an objective standard of reasonableness”
 - Based on “prevailing professional norms”
- Prejudice resulting from attorney’s error
 - “[A] reasonable probability that, but for counsel’s unprofessional errors, the result of the proceedings would have been different.”

Representation did not meet constitutional standard of competence where criminal defense lawyer’s failed to advise client regarding immigration consequences of guilty plea

Court does not address the second prong (whether defendant was prejudiced).