

Professional Responsibility

Eric M. Fink
Elon Law School
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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: MRPC Rule 1.1;

Diligence: MRPC Rule 1.3

Communication: MRPC Rule 1.4

Confidentiality: MRPC Rule 1.6

Loyalty: MRPC Rules 1.7-1.12 (Conflicts of Interest)

Care: MRPC Rule 1.15 (Client Property)

1.4 Allocation of Decision-Making Authority

MRPC 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: inverse relationship between degree of lawyer's decisional/operational autonomy and client's status

1.5 Limited Scope of Representation

MRPC 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

MRPC 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

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 & Ending the Relationship

2.1 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.*

2.1.1 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

2.1.2 Court Appointment

Not contractually created

- But same duties apply

2.1.3 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.

2.2 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.

MRPC 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.*

2.2.1 Duties continuing beyond termination of the relationship:**Confidentiality**

- May survive death of client (varies by jurisdiction)

Loyalty

- See conflicts involving former clients

3 Competence**3.1 Standard****MRPC 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).

3.2 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

3.3 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.

3.4 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 Diligence & Communication

4.1 Diligence

MRPC 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.

4.2 Communication

MRPC Rule 1.4

- Must promptly respond to client requests for information
- 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)

4.2.1 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.

4.2.2 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)

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
- 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)

Standard (*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."

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

- 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 second prong of *Strickland* standard (whether defendant was prejudiced)