

Professional Responsibility

Eric M. Fink
Elon Law School
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Scope of Representation & Authority

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

- May survive death of client (varies by jurisdiction)

Loyalty

- See conflicts involving former clients

2 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

2.1 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.

2.2 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