

M&F 3rd, Chapter 1

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Abstract

Notes, Slide Text, Links, Optional Readings.

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M&F 3rd, Chapter 1

Lawyers: Role & Regulation

ABA Model Rules

- Preamble & Scope
- Model Rule 1.2: Scope of Representation & Allocation of Authority Between Client & Lawyer
- Model Rule 3.1: Meritorious Claims
- Model Rule 3.3: Candor to the Tribunal

Preamble & Scope

The Preamble tells us that the lawyer is:

- a member of the legal profession,
- a representative of clients,
- an officer of the legal system
- and a public citizen having special responsibility for the quality of justice.

This says a lot. But what happens when being a representative of a client (who just lied on the witness stand) clashes with being an officer of the legal system (owing a duty to of candor to the tribunal)? What happens to the lawyer's special responsibility for the quality of justice when she successfully defends a sex offender or a drunk driver, who then "goes free," only to drink, drive, and injure or kill others by driving under the influence?

Preamble & Scope Comment 3

As we'll soon learn, an attorney may be disciplined for fraud or dishonesty, even if the fraud was unrelated to the practice of law.

For example, a lawyer who commits fraud in the conduct of a business is subject to discipline for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. See [Model Rule 8.4](#).

Preamble & Scope Comment 20

A lawyer violates one or more Model Rules while representing client. Is the client now entitled to file a malpractice suit against the unethical or incompetent lawyer? Lawyers have fought this notion for decades.

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached.

Sounds like the answer is no, but it comes with a lawyerly caveat:

Nevertheless, since the Rules do establish standards of conduct by lawyers, *a lawyer's violation of a Rule may be evidence* of breach of the applicable standard of conduct.

So if the lawyer is sued for malpractice, the client may introduce the Model Rules as evidence of the standard of conduct?

Model Rule 1.2

Scope of Representation and Allocation of Authority

Model Rule 1.2(a)

- Client controls (in all cases):
 - The goals, objectives and purposes of representation.
 - Settlement decisions.
- Client controls (in criminal cases):
 - What plea is entered.
 - Whether to waive jury trial.
 - Whether client will testify.
- Lawyer Controls:
 - The means to achieve the client's goals.
 - But lawyer must consult with the client about the MEANS or HOW TO achieve those goals. [Model Rule 1.4](#): Duty To Consult/Communicate with Client.
- Lawyer may be impliedly authorized to take action on behalf of client even without client's informed consent [Model Rule 1.14](#): Client With Diminished Capacity), but this is unusual.
- A lawyer may take such action on behalf of the client as she is impliedly authorized to carry out.

Model Rule 1.2(b)

- A lawyer *represents* a client. This does not mean that the lawyer endorses the client's political, economic, social or moral views or activities.

Model Rule 1.2(c)

- “A lawyer may limit the scope of the representation if the limitation is reasonable . . . and the client gives informed consent.”
- The client may wish to represent himself *pro se* and only wants preliminary legal advice. Or the client may agree to have the lawyer look only at tax matters, and no estate or business planning matters.

Model Rule 1.2(d) - The biggie!

- A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer *knows* is criminal or fraudulent (knowledge requirement).
 1. Lawyer cannot COUNSEL by giving client a how-to or tutorial in criminal or fraudulent behavior.
 2. Lawyer cannot ASSIST client (e.g. by submitting documents to obtain a settlement on an insurance claim the lawyer knows is 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 determine the validity, scope, meaning or application of the law.
- Consider the difference between “testing” the constitutional validity of the segregation laws under *Brown v. Board of Education* versus answering the client’s detailed questions about how client might go about concealing assets from a bankruptcy judge.

For an excellent example of how hard (or easy) it is to know when the client is looking for help to break the law, watch this 60 Minutes Episode on money-laundering: [Anonymous, Inc. - See what happens when hidden cameras capture New York lawyers being asked to move highly questionable funds into the U.S.](#)

What Do You Do?

In [Plato’s *Gorgias*](#), several famous ancient Greek orators and philosophers have brought Socrates to watch Gorgias, the most famous teacher of rhetoric and oratory in Athens, put on a display of his oratorical powers.

Gorgias is eager to get started displaying his rhetorical prowess, but Socrates won’t let him, because Socrates keeps asking Gorgias difficult questions about this “high art” of which he speaks.

“What is it you do?” Socrates asks Gorgias. “Cobblers make shoes, and coaches train athletes, and doctors heal the sick, but what do you do? You teach oratory and rhetoric? Are those knacks or crafts? Or are they higher arts? Professional skills?”

Socrates also says, “Tell me, Gorgias, do you teach your young orators about about right and wrong?”

Gorgias says essentially: Not my department. “I teach rhetoric. I’m not responsible if my students take that skill use it to commit a wrong.”

How convenient. But Socrates won’t let that pass unchallenged, and the whole dialogue is really a discussion among professionals about the ethics of teaching and employing rhetorical skills.

Those in attendance revere Gorgias, and Gorgias is not the least bit modest about his powers of persuasion.

When Socrates asks him what is the highest good? Gorgias answers: That’s easy! The power of rhetoric is the greatest good and the only expertise any orator need master.

Well, Socrates asks, “What about health or business or politics? What do orators (lawyers) really know about those?”

Gorgias says orators don’t need to know about any of those, because once you master rhetoric: “You will have the doctor as your slave, and that businessman? He will be working for you.”

This is an early display of what might be called a classic lawyer’s superiority complex.

Lawyers are super fiduciaries above and beyond everything else, but lawyers are also human beings, often with moral scruples. We don’t leave that part of ourselves behind when we practice law.

Socrates ultimately wants Gorgias to answer the ancient question: Does rhetorical might make right?

Possible Lessons

Socrates/Plato. Not enough to have skills without thinking about right or wrong?

Freedman and Smith: Is there a single point of view that can be identified as “the moral” one?

Two parts of client/attorney relationship

- Client autonomy, client has a right to decide own interests.
- Lawyer’s zeal, in maintaining and defending client’s rights/interests

Rhode: Lawyers should assess their obligations in light of all societal interests at issue in particular practice contexts.

ABA: Have to balance lawyer’s interests with the bar’s image, “justice” and the client’s interests

The time to have a moral dilemma is to when you’re deciding whether or not to take the client.

Types/Roles of Lawyers

- Instrument – “Hired Guns” Tool for the clients; lawyer is limited only by law and legal system.
- Director – “Moral Actors” Legal expert capable of determining how to handle client’s affairs with little client input. Also often “Lawyer to the Situation,” instead of Lawyer to the Client.
- Collaborator – Client is best able to make decisions for self but needs perspective of lawyers to know both their own interests and the effect of those decisions on others

- Obey your own conscious, not your clients?

Recommended Reading & Viewing

- [RLGL “Professional Discipline” § 5](#)
- [Plato’s *Gorgias*](#) - Probably the oldest book we have about lawyers, though in ancient Greece they were called *orators*. We read *Gorgias* in Law and Literature, a course Professor Lawson or I teach every other year. I talk just a little about *Gorgias* in our first Legal Profession class. [Gorgias at Wikipedia](#).
- [To Kill A Mockingbird by Harper Lee \(1960\)](#) and [the 1962 movie version](#), starring Gregory Peck (DVD on reserve in Schmid Law Library).
- [Malcom Gladwell’s “The Courthouse Ring: Atticus Finch and the limits of Southern liberalism,”](#) *The New Yorker* (10 August 2009). Deified as the epitomy of legal rectitude for fifty years, Atticus Finch has recently come in for reexamination. He plainly violates at least one of the Model Rules, shows no compunction whatsoever about employing the she-wanted-it defense to defend his appointed client in a rape trial, and some believe accommodates racial prejudice more than he fights it. Malcom Gladwell summarizes some of the recent criticism in his article in [The New Yorker](#).