

M&F 4th, Chapter 5

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Abstract

Notes, Slide Text, Links, Optional Readings.

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M&F4th Chapter 5

Control & Communication

Rule 1.1 Competence

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

After the Ethics 20/20 commission changes in August of 2012, the duty of competence now requires technical competence in using computer technology

To maintain the requisite knowledge and skill, a lawyer should:

- keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology,
- engage in continuing study and education and
- comply with all continuing legal education requirements to which the lawyer is subject.

Changes to Model Rule 1.1 Comment 8 because of technology and outsourcing of technology. Again the language added by the Ethics 20/20 Commission the comments simply makes the reference to technology explicit.

Nothing controversial.

But this definition of competence is incorporated by reference (implicitly or by explicitly) throughout. It reverberates throughout. The other Rules call for competently protecting client confidentiality, competently acting with diligence, and competently avoiding conflicts of interest. ABA is sending up a flare, really. No new rule or modification of a rule can deal with that pervasive and relentless and exponential technological change. But lawyers must be competent in technological know-how.

The Ethics 20/20 Commission intends to establish a site resource where lawyers can go to learn about cloud computing, secure WIFI communications, laptop encryption, biometric fingerprint readers instead of passwords and so on.

Clients too are demanding that their lawyers are technologically competent, because the alternatives are too risky.

Being a Luddite can be expensive, embarrassing, and potentially disastrous for lawyers and clients. Technological incompetence can result in wasted time (and therefore increased cost to the client), loss of money and identity, ethical sanctions, and embarrassment or worse in

the courtroom. Those are high prices to pay for being too proud (or lazy) to learn how the Internet, social media, and that box on your desk work.

[The Consequences of Technological Incompetence](#), by Sam Glover on October 14th, 2015.

Model Rule 1.3

Diligence

A lawyer shall act with reasonable diligence and promptness in representing a client. Often a lawyer can simply get a great result for a client by outworking opposing counsel, by knowing more about the case and the law than anybody else in the room.

Model Rule 1.2

Scope of Representation

In civil cases, client decides whether to settle and for how much. (Other civil decisions are probably “means” to achieve those objectives. See Comment 1.)

In criminal cases, client decides:

- The plea;
- Whether to waive a jury trial;
- Whether client will testify.

In general, abide by client’s decisions about GOALS; consult with client about the MEANS.

Allocation of authority

Chapter 4 begins with references to the [Restatement \(Third\) Of Agency § 1.01 \(2006\)](#) and the [RLGL: § 16 A Lawyer’s Duties to a Client—In General](#).

Review the table at M&F3rd (p. 86) on allocation of authority. This is the ethical rule, but it has deep roots in the common law of agency. It attempts to answer a question as old as the human race: Who’s in charge? Who’s the boss? Answer: Usually the client. The client is the principal; the lawyer is the agent.

The agent (the lawyer) agrees to act on behalf of a principal (the client) subject to the client/principal’s control. The highest standard of care! Super fiduciaries! The authority to *ACT* on behalf of the client/principal imposes on the lawyer/agent

fiduciary duties to ensure that the lawyer/agent acts on the client/principal's behalf and under the client/principal's control.

Under agency law and the law governing lawyers, the lawyer/agent's authority to act for the client/principal may be *actual* or *apparent*:

Agency

Actual authority:

- Implied authority (actual authority circumstantially proved)

Apparent authority:

- Principal ACTS like agent has authority
- Party REASONABLY BELIEVES agent has authority

When Representation Goes Awry

A finding of bad faith or corrupt motive is NOT necessary to constitute a professional misconduct violation ...

Advise & Consent

Communications to Clients:

M&F3rd (p. 98) describes eight events that trigger a lawyer's duty to communicate with clients. Here is an abbreviated summary.

Rule 1.4 (Communications): Lawyer must communicate and sometimes obtain client consent before acting on client's behalf, especially to establish the following:

- Fees, scope of representation, client objectives or change of objectives (see engagement letters).
- Waiver of any fiduciary obligations.
- To explain any matter to the extent reasonably necessary to obtain the client's informed consent.
- To make decisions about means to accomplish objectives.
- Updates (e.g. lawyer took money out of trust account).
- When lawyer can't give assistance (because doing so would violate one or more Model Rules or other law)
- When lawyer makes a mistake!
- When client requests information.

Multiple Clients/Dual Representation:

- Appropriate conflict of interest waivers must be in place to represent two or more clients.
- Lawyer owes same duties to BOTH clients regardless of who pays the bill.
- Lawyer must COMMUNICATE with BOTH clients, owes all super fiduciary duties to BOTH.

Representing Entities

Corporations, Organizations

Corporations, Entities, Organizations as Clients

Rule 1.13 (Organization as Client) A L-O-N-G rule and the comments are a big help. When the organization itself is the client, the entity constitutes a distinct legal person apart from any individual constituent or aggregate of individual constituents as a whole.

Who is the corporation? What does the corporation want?

Model Rule 1.13(f)

- In dealing with an organization's [constituents] ... a lawyer shall explain the identity of the client when the lawyer knows ... that the organization's interests are adverse to those of the constituents.

Model Rule 1.13(g)

A lawyer representing an organization may also represent any of its [constituents] subject to the provisions of Rule 1.7.

If the organization's consent to the dual representation is required by Rule 1.7, the consent shall be given by an appropriate official of the organization **other than the individual who is to be represented, or by the shareholders.**

WHO IS THE CLIENT?

This should be flashing orange before your eyes every time there is more than one person or more than one entity or both in the room and at least one of them is your client.

One client? More than one client? Is everyone clear about that?

Penn State

Consider the Penn State/Jerry Sandusky scandal which, aside from the major players, also swept other Penn State officials into legal proceedings.

When several Penn State officials were subpoenaed to testify before the grand jury in the Jerry Sandusky case, they believed they were being represented by the University's General Counsel, Cynthia Baldwin, an ex-State Supreme Court Justice.

But Baldwin maintained that she was present only on behalf of the University.

Penn State University's general counsel during the grand jury investigation of Jerry Sandusky was singled out repeatedly in the [report issued by Louis Freeh last week] (<http://www.post-gazette.com/stories/local/state/penn-states-general-counsel-cited-for-missteps-644744/>) for possible missteps in her handling of the matter.

According to the Freeh report, Ms. Baldwin never sought an expert to lead the university through the criminal investigation or its own internal investigation, and she, along with former President Graham Spanier, appeared to downplay to the university board of trustees the significance of the grand jury investigation.

The biggest question ... was who Ms. Baldwin was representing before the grand jury that was investigating Mr. Sandusky and ultimately recommended charges against him, and former Senior Vice President Gary Schultz and athletic director Tim Curley.

"Baldwin told the Special Investigative Counsel that she went to the grand jury appearances as the attorney for Penn State, and that she told both Curley and Schultz that she represented the university and that they could hire their own counsel if they wished."

However, according to the transcript from the grand jury, both men said they believed Ms. Baldwin was representing them.

"You have counsel with you?" the prosecutor asked Mr. Curley.

"Yes, I do," he answered.

"Would you introduce her, please?" the prosecutor continued.

"My counsel is Cynthia Baldwin."

Mr. Schultz said the same when he was questioned.

"You are accompanied today by counsel, Cynthia Baldwin, is that correct?" the prosecutor asked.

“That is correct,” Mr. Schultz answered.

Ms. Baldwin, who was appointed to the Supreme Court in 2005 and served until elections filled the seat in 2008, also attended Mr. Spanier’s grand jury testimony, again explaining that she represented the university.

Legal experts, though, question Ms. Baldwin’s attendance, saying that as a representative of the university, she had no business at the grand jury, since Penn State, at the time, was not a party to the criminal investigation.

“The most significant matter in terms of ethics is what happened in the grand jury room,” Mr. Ledewitz said. “The first thing you learn in legal ethics is to **know who the client is.**”

If Ms. Baldwin’s intent was to attend as a representative of the university, Mr. Ledewitz said, it was her obligation to correct both Mr. Schultz and Mr. Curley when they said she represented them.

Accidental Clients

10 different kinds! (pages 80-81)

Prospective clients by far the largest category of “accidental” representation.

Legal Malpractice v. Ethics Violation:

Ethics violations are not independently actionable, but the ethics rules provide guidance in determining the fiduciary duty owed to client.

[RLGL § 49: Breach of Fiduciary Duty](#)

Legal Malpractice

1. Existence of an atty-client relationship;
2. Atty, by acting or failing to act, breaches that duty;
3. Atty’s breach proximately causes the injury to the client;
4. Client sustains actual injury, loss or damage.

Model Rules & Malpractice

Although violations of [the Rules of Professional Conduct] do not create a private cause of action for a client, the rules provide guidance in determining the fiduciary duty owed to a client by an attorney.

Model Rules Scope - paragraph 20:

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 ...

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 a Model Rule violation is not proof of a breach of legal duty, but it is EVIDENCE of a breach.

Before 2002 amendments, the Rules flat out DENIED any relation between the Rules and civil liability.

RLGL §49

In addition to the other possible bases of civil liability . . . a lawyer is civilly liable to a client if the lawyer breaches a fiduciary duty to the client . . . and if that failure is a legal cause of injury . . .

Model Rule 2.1

Comment 5

When a matter is likely to involve litigation, it MAY be necessary under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation ...

Model Rule 1.4

Communication

A lawyer shall:

- promptly tell the client about anything requiring informed consent under these rules . . .
- consult with the client about the means . . .
- keep client informed about the status of the matter;
- promptly comply with requests for information; and
- tell the client that the lawyer cannot offer assistance not permitted by the Rules or other law.

SEE THE NICE LIST of WHEN lawyers must initiate information and consent process on PAGE 98 (M&F 3rd)

Model Rule 1.4(b)

Communication

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

Model Rule 1.0(e)

Terminology

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Ineffective Assistance of Counsel

- Different than legal malpractice!

Strickland v. Washington (Sct. 1984)

Ineffective Assistance of Counsel

Elements (*Strickland v. Washington* (Sct. 1984))

To justify reversal in a criminal case, the defendant must show:

1. Lawyer’s acts or omissions were outside the wide range of professional competence;
2. Actual prejudice (I would have won or gotten a lighter sentence or some other meaningful disposition BUT FOR the lawyer’s incompetence).

Strickland the leading case on “ineffective assistance of counsel.”

“It is not enough for the defendant to show that the errors had some conceivable effect on the outcome ...”

“Defendant must show that ... But for counsel’s unprofessional errors, the result of the proceeding would have been different.”

Stickland makes prejudice difficult to show. D must show “actual prejudice.”

First, the defendant must show that counsel’s performance was “deficient,” such that counsel’s errors were “so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.”

Second, this deficient performance must be so serious as to deprive the defendant of a fair trial.

Without these two showings, “it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.”

Some examples

- *Cottle* - Ineffective assistance of counsel to fail to tell a criminal client about a plea offer from the prosecutor.
- *Burdine* – ineffective assistance of counsel where the lawyers slept through large parts of a capital murder trial.
- *Glover* – Failure to “group” charges results in 6-21 months extra sentence.

Burdine – The court distinguished an unconscious attorney, who is essentially absent from the proceedings, from a drunk or impaired attorney, who may be capable of giving some assistance. Thus, the court was willing to presume prejudice and overturn the original conviction.

Recommended Reading & Viewing

- [Proposed Opinion on E-Discovery and Ethics Cautions Lawyers Not to Be Overly Confident](#)
- *The Verdict* directed by Sidney Lumet, starring Paul Newman. On reserve.
- *Margin Call* starring Zachary Quinto (“Spock!”), Kevin Spacey, Demi Moore, Jeremy Irons, Paul Bettany. Great cast and no better movie about how hard it is sometimes to serve the CORPORATE CLIENT instead of its powerful individual constituents. On reserve.