

M&F 4th, Chapter 3

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Abstract

Notes, Slide Text, Links, Optional Readings.

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M&F 4th, Chapter 3

Beginning the Client-Lawyer Relationship

In The Beginning . . .

It's like getting married. Be careful. Pick and choose. Is this the kind of person who likes to sue people?

“For certain people, after fifty, litigation takes the place of sex.” –Gore Vidal

Once representation begins, a lawyer assumes duties not easily shed and cases sometimes assume a life of their own.

Lawyers are like other service providers. Rights and obligations governed by torts, contract, agency. But they have other obligations governed by court rules.

The lawyer-client relationship is complicated because of fees and various duties, especially the duties of loyalty and confidentiality.

Access To Justice

Access to justice in America remains elusive for most of the poor and much of the middle class. This concern is not new. In 1919, Reginald Heber Smith wrote that without equal access to the law:

The system not only robs the poor of their only protection, but it places in the hands of their oppressors the most powerful and ruthless weapon ever invented.

Maybe Adam Clayton Powell said it better: “A man's respect for law and order exists in precise relationship to the size of his pay check.”

Without access to justice, the poor have no incentive to respect the law. Clarene Darrow, for one, said, “Laws were made for the exploitation of those who don't understand them or are prevented by naked misery from obeying them.” He harangued juries with this notion of the law: “The men who own the earth make the laws to protect what they have. Laws were never organized or enforced to do justice. Only you, the jury, can give us justice.”

Court Appointments

Courts have the power to *appoint* counsel for indigent or unpopular litigants.

No constitutional provision compels an attorney to represent a client in a civil matter. Congress has not codified compulsory service of attorneys to represent

indigent litigants. Service to the indigent is an essential characteristic of any ethical attorney because:

Model Rule 6.1

Voluntary Pro Bono Publico Service

Every lawyer has a professional responsibility to provide legal services to those unable to pay. A lawyer *should* aspire to render at least (50) hours of pro bono publico legal services per year. In fulfilling this responsibility, the lawyer should:

- Provide a substantial majority of the (50) hours of legal services without fee or expectation of fee to:
 - persons of limited means or
 - charitable, religious, civic, community, governmental and educational organizations in matters that are designed primarily to address the needs of persons of limited means; and
- deliver legal services at no fee or substantially reduced fee to individuals, groups or organizations seeking to secure or protect civil rights....

Model Rule 6.2

Accepting Appointments:

- A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
 - Representing client is likely to result in ethics violation;
 - Unreasonable financial burden on lawyer;
 - Client is so repugnant to lawyer that lawyer probably won't be able to do a good job or get along with the client.

Accidental Clients

Preamble & Scope Comment 17

Lawyers talk to lawyers, nonlawyers, judges, clients, beneficiaries of clients, officers and directors of clients, and on and on. Some of these people are previous clients, some are current clients, others are prospective clients. Some are just friends, but friends become clients, and clients become friends. Who is a client? And what must lawyer or client do to turn a conversation about the law at a cocktail party into an attorney-client relationship?

The [Preamble & Scope](#) to the Model Rules tells us that “principles of substantive law external to these Rules determine whether a client-lawyer relationship exists.” And the cases in our text illustrate that general proposition.

A more important question: When do lawyers owe DUTIES to clients, nonclients, prospective clients, former clients?

Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of [confidentiality under Rule 1.6](#), that attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established. See [Rule 1.18](#). Whether a client-lawyer relationship exists for any specific purpose can depend on the circumstances and may be a question of fact.

RLGL § 14

[RLGL § 14: “Formation of a Client-Lawyer Relationship”](#)

The lawyer-client relationship arises when a person wants the lawyer to provide legal services and EITHER:

- the lawyer consents, OR
- the lawyer FAILS TO MANIFEST LACK OF CONSENT.

Togstadt and Common Sense

A prospective client seeks advice from a lawyer. Afterwards the lawyer may feel like she had no more than a conversation about possible future employment. But if the client comes away with a reasonable belief that the lawyer has taken the case or dispensed legal advice, then presto! The client has the right to rely on the advice dispensed.

Lawyers must learn to be clear about who their clients are. If someone interviews the lawyer about a possible case, and the lawyer declines the representation by saying, “No I can’t take your case” then lawyer should send a [nonengagement letter](#). Otherwise, the lawyer may unwittingly enter into an attorney-client relationship if the client has a reasonable belief that there is such a relationship.

- For example, lawyer says: “I don’t think you have a case, but I’ll talk to my senior partner and get back to you.” (*Togstadt*)
 - While client waits for lawyer to get back to her, the statute of limitations runs.

- A lawyer may enter into an attorney-client relationship if the lawyer gives legal advice to a person who reasonably relies on it, even at social gatherings or on social media.
- How to Avoid these “accidental clients”?
 - Simple direct statements: “This is not legal advice!” Or, “I cannot be your lawyer!” Then take whatever question the person asked and cast it as a hypothetical.
- Send non-engagement letters.
- Train non-lawyer office staff. Even staff may inadvertently give impression that an attorney-client relationship has been formed, so lawyers must train them to avoid this.

Model Rule 1.2(c)

Providing Limited Representation:

One way to solve the problem of nobody being able to afford a lawyer, make discrete services available. Make unbundled legal services available.

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Thus, things like Brief Ghostwriting, etc. are often permissible unless your jurisdiction requires you to enter appearance on behalf of litigant.

[Nebraska’s version of this Rule](#) explicitly permits limited scope representations.

Comment 6

Agreements Limiting Scope of Representation:

The scope of services to be provided by a lawyer may be limited by agreement with the client or by the terms under which the lawyer’s services are made available to the client.

Although this Rule affords the lawyer and client substantial latitude to limit the representation, the limitation must be reasonable under the circumstances.

Online Legal Services

- [Disruptive Innovation Conference - The Nature of Disruptive Innovation in Professional Services](#). Long to watch but the gist is this:

Moore's Law, Artificial Intelligence (AI), and the future of tech innovation in legal ethics and/or legal services.

Instead of calling it Artificial Intelligence these days they call it "Legal Analytics" and the like, but the idea is the same. Every programmer learns DRY (Don't Repeat Yourself). If you are doing something more than once, write some code to handle the task. Now think about that concept applied to the practice of law or medicine?

Well that idea is behind what this panel calls the 3rd Age of Computing and they have law and medicine as their foremost candidates for disruption.

It's a bit long, but you can skip the keynote speaker Clayton Christensen (hugely famous author of the Innovator's Dilemma, named by the Economist as one of the 6 most important books every written), because he speaks of innovation in general.

I would skip to:

- Mike Rhodin, Senior Vice President, IBM Watson at the 47 minute mark.
- John Suh, CEO of LegalZoom at the 1:05 and
- Sarah Reed, General Counsel, Charles River Ventures (who speaks right after Suh) at the 1:17 mark. She invests in these legal tech companies.

Lest you have any doubts about IBM's commitment to Watson as Lawyer and Watson as Doctor, they have formed a separate unit called the IBM Watson Group and funded it with \$1 billion and 2,000 employees.

- [IBM's Watson Supercomputer Destroys Humans in Jeopardy | Engadget](#)

If you missed this, you should find it online and watch it. For some reason this went relatively under the radar compared to, say, IBM's DEEP BLUE beating chess champion Garry Kasparov in chess in 1997, which by comparison was child's play.

Watson is an artificial intelligence computer system capable of answering questions posed in natural language. Watson is a free standing computer network. The humans who built and programmed the machine were sitting in the audience WATCHING, helpless to assist their creation. And Watson had to speak and understand natural human language and did so with elan.

Ken Jennings, famous for winning 74 games in a row on the TV quiz show, acknowledged the obvious. "I, for one, welcome our new computer overlords," he wrote on his video screen, borrowing a line from a "Simpsons" episode. That was 2011, based on what we've seen, what happens in 2013?

IBM Watson is now being developed to provide medical and, ulp, legal services.

Scott Ferraiola is the lead lawyer for IBM's Watson project and Stephen Gold is the company's vice president of marketing and sales operations for Watson

Solutions. In a discussion about Watson, they point out that the technology has made huge advances since it was displayed on “Jeopardy” in 2011.

“On ‘Jeopardy’ it read 200 million pages of data in three seconds,” says Gold. “Now [the machine] is 90 percent smaller and 24 times faster.” Ferraiuola adds, “One way to think about it is that the machine used on ‘Jeopardy’ filled a room. Now it would fill three pizza boxes.”

Compare to the 90s when Intuit and Quicken and companies came out with Tax Software. The accountants are long gone who said: “You don’t want to use that, you should just use me.”

As opposed to another way to do it. Instead of perceiving it as a threat, explore it, because what might happen is you find a way to BOTH use software together.

Lawyer Autonomy

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][aba1.4]: 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][aba1.14]: 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.](#) ### Model Rule 1.2(b):

representation . . . Does not constitute an endorsement of the client's political, economic, social or moral views or activities.”

Advocate

An ADVOCATE deals with past conduct and takes the facts as he or she finds them.

“It is what it is,” as my entertainment lawyer likes to say. A fatalist with regard to what WAS, the way things are or WERE.

THE PAST - I killed my wife and I buried her body out on Cemetery Road.

Different than the role of *counselor* or *advisor*, where we are usually dealing with the present and future.

Advisor

Model Rule 2.1

Candid advice & professional judgment

Model Rule 2.1

Duties as Advisor to Client:

- Lawyer shall:
 - Exercise independent professional judgment and render candid advice;
- Lawyer May:
 - Refer not only to LAW, but other considerations, including (1) moral (2) economic (3) ethical (4) social and (5) political factors.
- May include information from non-lawyer professionals.
- If the matter involves litigation, lawyer SHOULD also inform client of alternative dispute resolution, but so far NOT REQUIRED. Still a very good idea, depending on the circumstances.

Comment 3: “. . . may include . . . more . . . than strictly legal considerations.”

Comment 4: If the advice needed is in “the domain of another profession,” such as “social work,” the lawyer should recommend . . .

“[T]he lawyer’s responsibility as an advisor . . .”

Candor may require that the lawyer find a way to remind her of her children’s interests. And even suggest getting someone to represent THEIR interests.

Why are senior partners paid more than associates?

Because the partners can Shephardize cases faster?

Because they are better at legal research?

It’s because clients respect their JUDGMENT.

Antony Kronman *THE LOST LAWYER* that PRACTICAL WISDOM. What should I do? VERSUS What can I get away with?

. . . a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors . . .

Any obligation to accept unsavory clients?

Under the old Code, Ethical Canon 2-26 stated: “a lawyer should not lightly decline proffered employment.”

Lawyer should accept her “share of tendered employment which may be unattractive both to her and the bar generally.”

ABA Model CODE of Professional Responsibility (1969-1983)

Closest thing in Rules is 6.2: “Accepting Appointments.”

Really?

How do you feel about this?

What If Client Refuses An Appointed Lawyer’s Services?

ABA Formal Op. 07-448

Appointed Counsel’s Relationship to a Person Who Declines to be Represented, concluded:

A lawyer whose would-be client never has accepted the client-lawyer relationship, therefore, has no such relationship, and the unwilling client has no representation, at least at that term is used in the Rules. Any legal obligation owed by the lawyer to the defendant, which may be analogous to those embodied in the ethics rules, arises from the authority of the appointing tribunal and includes whatever obligations the tribunal may identify. The lawyer’s ethical duties are limited to complying with the Rules defining a lawyer’s obligations to a person other than a client.

Accidental Clients

Model Rule 1.18

Duties To Prospective Clients

a person who discusses with a lawyer the possibility of forming a client-lawyer relationship . . .

EVEN WHEN NO CLIENT LAWYER RELATIONSHIP ENSUES . . .

a lawyer shall not USE OR REVEAL that information . . .

a lawyer . . . shall not represent a client with adverse interests in the same . . . matter if the lawyer received information from the prospective client that could be . . . harmful to that person in the matter . . . same goes for the firm!

So this is one of those areas where it's possible, at least in terms of email and websites to use just a little technological common sense and avoid this whole problem entirely.

RLGL §14

Formation of Lawyer-Client Relationship

The lawyer-client relationship arises when a person wants the lawyer to provide legal services and EITHER:

- the lawyer consents OR
- the lawyer “FAILS TO MANIFEST LACK OF CONSENT”

Totally Optional Reading & Viewing

- [A Mockery of Justice for the Poor](#), *The New York Times*, 29 April 2016, by John Pfaff.

In Fresno, Calif., for instance, public defenders have caseloads that are four times the recommended maximum of around 150. In Minnesota, one public defender followed by a reporter estimated that he had about 12 minutes to devote to each client that day. There is no way these lawyers can manage the cases being thrown at them.

- [Venerable Firm in Spotlight for Holocaust Assets Case Role](#) (LATimes article on Cravath's decision to represent Credit Suisse in Holocaust assets case)
- [Wealth Inequality In America](#)
 - We don't discuss income inequality. Rather, this supports my belief that half the country can't afford legal services under the traditional billable-hour, fee-for-service model. See also: [Time Magazine: Half of Americans Live Paycheck-To-Paycheck](#)

- I believe that your generation of lawyers will leverage technology and find a way to serve these clients. The new client-service models and fee arrangements will involve the usual [creative destruction](#) and [disruptive innovation](#) we see across the board in other industries. It's just that law and lawyers are way behind the curve.
- [Walmart heirs own more wealth than bottom 40 percent of Americans](#) (“If you’ve no debts and have \$10 in your pocket you have more wealth than 25 percent of Americans”).
- [Is There Such A Thing As An Affordable Lawyer?](#)
- [The People Versus Larry Flynt](#) (stars Woody Harrelson, Ed Norton, and Courtney Love).
 - This is a love song to the First Amendment directed by Czech director Milos Forman telling the tale of Jerry Falwell’s landmark Supreme Court case against Larry Flynt. But it’s also really good on lawyer-client relationships (DVD on reserve in Schmid Law Library).
- [California Supreme Court Says Journalist and Serial Liar Can’t Be Lawyer](#)
- [Stephen Glass, Dishonest Journalist Not Admitted to Bar](#)
- [Iowa Toys With Abolishing Bar Exam Requirement](#)