

WHO'S IN CHARGE? THE ETHICS OF LISTENING, AND NOT LISTENING, TO CLIENTS

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Why this course is Important - Many clients and lawyers are not clear when a lawyer may make a decision that a client may not agree with

- Not many ethics opinions on this subject matter
- Does not make it to an ethics problem usually because one side will get fired
- Lawyers do have a lot of discretion
- 95% of ethics complaints and disputes stem from communication problems between lawyers and clients

ABA Rule 1.14a. Dealing with clients with diminished capacity

- Everything said about rule 1.12 applies to rule 1.14

Who's In Charge? Three Possible Answers:

- Lawyer
 - May be different lawyers within a firm - not usually an issue
- Client
 - May be difficult to understand with corporate clients and who makes those decisions
- Somebody Else
 - Relatives, Corporate Constituents, Guardians, Medical Personnel
 - 3rd party payers - rules are not allowed they dictate decisions on behalf of the client.
 - Insurance companies may insist on a settlement. Usually pursuant to an contract

Who's In Charge: Complication

- Organizational Client;
- Conflicts of Interest;
 - Two plaintiffs suing the same defendant and each plaintiff wants the lawyers to do something different
 - Clients with Diminished Capacity
 - 50% more people over the age of 85 by 2030

- More attorneys needed to deal with Diminished capacity

Rule 1.2(a) - Primary rule which allocates responsibility between attorney and client

- “A lawyer shall abide by a client’s decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued. . . .” -
- This Is The Primary Ethics Rule Which Allocates Power and Responsibility As Between Attorney And Client.
- **What rule is all about:** Client state's goals and attorney figures how to get there. Example - Like telling a taxi cab where to go and the driver charts out the course. Attorney still needs to consult with client how the goal is pursued. Lawyer should keep client informed of all decisions

Rule 1.2a Hypos

- Client who has employment discrimination case against a company with 11 employees. Most cases need 15 employees for federal claim. Probably don’t have a federal claim. May have some viable claim. Client insists on federal claim but attorney thinks only state claim is viable. But if there is only 11 employees - attorney may turn down representation or file against state even if the client insists against the federal. Similar issues will come up on defense side - issues that may come up is: who is a real employee for the company - that is where things may get murky.
- A lawyer does not need to file a motion that is weak or counterproduction

The Key Issue *Where Do We Draw The Line Between Listening To Our Clients and Using Our Best Judgment and doing something that maybe clients don't want?

- Two different models -
- Deferential Model - where lawyer tries to listen to client wherever you can
 - Lawyers can face liable
- Paternalistic - take a legal problem and figure out how to get there. Lawyer is really in charge and telling them what to do
 - Lawyers can face lying witness and clients and competency problems
- Lawyers Give Clients Varying Levels of Deference -- Both Extremes Raise Ethical Issues

Rule 1.2(a) And Expenses

- Clients Have Greater Power Over Decisions Which Cost Money;
 - Even though lawyer has means of representation - if they are going to cost more money the client has more power.

- Client's Power Over Budgetary Issues Is Tempered By Attorney's Duties Of Competence and Diligence;
 - Rule 1.1 and rule 1.3
 - Client can not restrict lawyer to spend money if it hinders the lawyer handling the case competently.
- Hypos
 - What About The Lawyer Who Wants To Take An Additional Deposition? Ultimately it depends on the importance of the deposition. Need to see if it is critical to the case. If lawyer believes case can't survive without the depo - difference between winning and losing the attorney can insist on the depo and take it.
 - Drafting 50 Interrogatories being sent to the other side and send it over to the client and the client wants to wait to send them to surprise the other side at trial. Lawyer would like to send them now and have those answers before trial. Lawyer is ultimately able to make this decision. A pure judgment call.

Rule 1.2(a) And Settlements

- Client Has Absolute Right To Decide Upon What Terms To Settle;
- Lawyer Can Obtain Advance Approval of A Range Of Acceptable Terms, But Cannot Settle A Case On The Strength Of A Client's Directive To "Negotiate The Best Deal Possible."

When A Lawyer And Client Do Not Agree

- Lawyer Can Usually Withdraw Under Rule 1.16;
 - Lack of prejudice
 - Lawyers must take protective measure for client - give client 45 to 60 days to find another attorney
 - Look at retainer agreement and what it says
 - Retaining liens are commonly used by attorneys. Lawyer will keep files under client pays all bills. Not very useful to attorneys these days. Lawyer doesn't have much leverage anymore. Just upsetting client - they really don't need file to continue with the matter.
- Client Has Absolute Right To Fire Attorney

Limits To Attorney's Deference: Rule 11

- Deals with frivolous conduct and frivolous claims.
- Client may want to assert which the lawyer does not.

- A Signature On A Federal Court Filing Is A Certification That "to the best of the signer's knowledge, information and belief formed after reasonable inquiry, [the paper] is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law ..."; and is not interposed for an improper purpose

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Ethics Rule

- Model Rule 3.1(a) – A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous....;
- Just Because A Claim Or Issue Is Not Frivolous Does Not Mean The Lawyer Has To Assert It.
- This is narrower than rule 11. Rule 11 is an objective standard.
- Duty not to abuse legal procedure
- Filing is not frivolous even if the client's decision will not prevail and the lawyer doesn't think it will.
- Example
 - Alan Dershowitz with regards with Jeffrey Epstein case
 - Issues
 - Lawyers should have known charges were not true
 - Public charges had little connection with the lawsuit

A Proper Factual Basis: Alan Dershowitz's Example

- Can You Rely Solely On A Client's Say so?
 - Yes – If You Are In A "He Said, She Said" Situation. But Not If Reasonable Investigation Will Test Your Client's Story;
 - The Upshot – Whenever Possible, Corroborate Your Client's Version of Events.

What Does A Reasonable Investigation Look Like (Pre-Suit)?

- How Much Investigation Was Feasible?
- How Much Time Was There?
 - What if it was on the eve of the Statute of Limitations? Lawyer is justified on lack of investigation.
- How Complex Are The Issues?
 - More complex the harder it will be to prove a violation
- Were Publicly Available Documents Ignored?
 - Sometimes learn things during case.

- Documents lawyers had or should of had - court expects those documents were revised before filing the case.
- Were Supposedly Friendly Witnesses Interviewed?
- *Must Investigate Claims And “Obvious” Defenses

Rule 11 Post-Filing

- A Case That Is Not Frivolous At Inception Can Become So At Any Time
- Adverse Information From The Other Side Must Be Considered;
- Is Client’s Position Still Tenable Given Documents Obtained In Discovery, Witnesses and Experts As Case Progresses?
- Ex: Child v. State Farm Case
 - Insurance Fraud
 - Lawyer should not have taken the case to trial

What Is A Proper Legal Basis?

- Warranted By Existing Law; OR
- Nonfrivolous Argument for Extension, Modification or Reversal. ***** Every legal argument has to be in one of these two boxes. For either box, there must be a reasonable inquiry into the law.**
- Either way - you there will always need to be a reasonable inquiry into the law

Other Limitations On Deference - empowering lawyers by allowing the lawyer to tell the client what they want can’t be done

- Rule 1.2(g) Gives The Lawyer The Right To Be Punctual, Courteous and Respectful To Others;
 - Client may want lawyer to show up late to put other side on edge. Lawyer may refuse this.
- Rule 3.2 Tells Lawyers Not To Delay For Delay’s Sake;
- Rule 1.2(e) Gives Lawyers The Right To Exercise Judgment and Not Assert Every Possible Position For A Client, Including Granting Extensions.
 - Clients may say they don’t want any more extensions for the other side. Lawyer may give extensions provided it will not prejudice the client

Limitations On Deference, Continued

- Rule 3.4 – Don’t Ask Irrelevant Questions Or Unnecessarily Seek To Degrade or Embarrass Witnesses;
 - Can’t intimidate witness
- Rule 8.4(g) -- Don’t Threaten Bar Discipline or Criminal Complaint To Obtain Civil Advantage;

- Rule 8.2 – Don't Defame A Judge

Civility

- Civility Is Expected In Litigation;
 - Not a subject of disciplinary rules
- To Some Extent, However, Civility Is In The Eye Of The Beholder, And Within Reason A Lawyer Should Seriously Consider A Client's Wishes For A Sharper Approach.

REVERSE GHOSTWRITING

- Occasionally A Client Will Want To Write All Or Part Of A Brief;
 - Trend is towards acceptance for ghostwriting
- Howard Shipley's Supreme Court Case Shows That Lawyers Cannot Let This Happen Without Possible Consequences;
- Work Submitted Under A Lawyer's Signature Should Reflect That Lawyer's Work.

ETHICS OF GHOSTWRITING

- Many Are Unable To Afford Counsel
- Many Lawyers Cannot Find Jobs;
- "Ghostwriting" Can Be A Match Made In Heaven;
- But It Can Be Deceptive;
- Varying Cases and Ethics Opinions, But Trend Is Towards Acceptance, As Least With Disclosure.

Introducing Diminished Capacity Of The Client To The Equation

- Rule 1.14 Says To Retain A Normal Attorney-Client Relationship If Reasonably Possible;
- But The Rule Contemplates More Paternalism Than Would Otherwise Be Appropriate.
 - Be careful with being over deferential.
 - Make more decisions with client with diminished capacity. May rely on adult children (problematic with a will)

Options For Attorneys When Capacity Is An Issue

- Take A Stronger Hand With The Client;
- Seek Decision-Making Assistance From Third Parties, e.g., Family Members, or Medical Personnel;
- In An Extreme Case, Seek A Guardian Or Other Court Protection.

- Client lawyer relationship is based on the assumption client is able to make decision on important matters.
- Problems with attorneys making these determination on who has capacity and who does not?
 - Clients are presumed to be able to make decisions
 - Need to assess the client's ability to reason as the case goes forward
 - Example
 - Case where a plaintiff client and lawyer decided case is loser but 5% of a win. And If win damages are \$5 million. Client says they want to go for it -like buying a lottery ticket - This is an example that is a decision that is well reasoned. This is evidence of capacity.
 - Be worried about a client who has different decisions on different days. Wants to drop case one day and proceed the next.
 - Conder consistency of clients goals
- Rule 1.6a - Best Interest of client
 - Client consent is not always necessary
 - Implied authorization
 - Be careful before withdrawing from representation with client with diminished capacity. If reason that withdrawal is diminished capacity - is unethical and may be illegal.