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Building Relationships That Work

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ETHICS CONSULT

Building Relationships That Work

The law of legal ethics sheds light on the unique complexities of the lawyer-client relationship.

By Michael K. McChrystal

Two misconceptions frequently plague discussions of the lawyer-client relationship. The first is that it is an agency relationship *simpliciter*, with the lawyer legally bound to follow all client instructions. The second is that by recognizing the client as the party in charge, problems of lawyer overreaching are eliminated. These views are misconceptions because lawyer-client relationships, at their best, have all the complexity of other important human relationships. This includes give-and-take, performing within roles but not being strictly limited to them, and changing over time.

Ethics law is careful to permit complex lawyer-client relationships to flourish. It does so by being flexible about many specifics in the relationship. This flexibility is essential, given the variety of lawyers, clients, and problems subject to regulation by the law of legal ethics.

The diversity of clients is particularly apparent with respect to giving information and getting advice. People have remarkably different notions about how to make decisions. Some people will tell their life story in unabridged detail to anyone who will listen, and then seek their advice. Others keep central details of their life from family and friends and make decisions without anyone else's input. Many of us fall between these extremes and are selective in choosing whom to consult, including whether to confide in professionals, family, or friends and whether to follow the advice we receive.

Perhaps in recognition of these variations, the Model Rules of Professional Conduct for Attorneys defer for the most part to clients to determine who should be brought into the loop, particularly with respect to what information is to be kept confidential and what is not. Decisions about the objectives of the representation are generally for the client to make as well.

The general duty of confidentiality is expressed in Model Rule 1.6 (a) in these terms: "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for dis-

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closures that are impliedly authorized in order to carry out the representation. . . ." The letter and spirit of the rule put the client in charge.

The presumption underlying the lawyer-client relationship is that a client is an autonomous individual who is in a better position than anyone else in the world to make decisions that serve his or her own personal interests. Our experience teaches us that this presumption sometimes proves to be false. The most glaring examples of persons unsuccessful in making decisions in their own lives can be found in prisons. But many quieter examples can be found among our elders, some of whom lead lives of loneliness, poverty, illness, or despair brought about by poor choices made earlier in life. Indeed, older persons are particularly likely by virtue of their longevity to realize the benefits of good prior decisions or to experience the consequences of bad choices.

The philanderer who is now alone, the spendthrift who is penniless, and the alcoholic whose kidneys don't function may be paying a price for earlier decisions. (Of course, it is more likely that the lonely elder has outlived a loving spouse, that the poverty-stricken elder worked for decades for an employer who had no retirement plan, and that the person with kidney disease has an old body that just doesn't work as well anymore.) But truth be told, the presumption that people make the best choices for themselves is usually right and sometimes wrong. Indeed, one of the reasons to get a lawyer is that help may be needed in making important decisions.

Clients Under a Disability

In certain extreme cases, the law recognizes that some persons are unable to make sound decisions for themselves. Parental decision making for minors, the imposition of guardianships, and the use of guardians ad litem all illustrate this recognition.

The law of legal ethics makes special provision for clients who are unable to engage in ordinary decision making by reason of some disability in Model Rule 1.14, Client Under a Disability, which provides:

> (a) When a client's ability to make adequately considered decisions in connection with the representation is impaired, whether because of minority, mental disability or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.
>
> (b) A lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest.

The provision is unusual in calling upon lawyers to treat "abnormal" clients as normally as reasonably possible. In this sense, the rule emphasizes the dominant theme of the law of lawyer-client relationships: act in the client's interest as the client defines that interest to the full extent that the law permits. Clients are granted the autonomy to choose unwisely, and lawyers are not empowered legally to overrule those choices, at least for the most part.[1]

This theme of client autonomy and control is not, however, universally played out in the law of lawyering. Lawyers are expressly empowered by the law of legal ethics to influence client behavior in forceful ways, and not only in representations involving clients under a disability.

The power given lawyers vis à vis their clients partly reflects the more paternal (or parental) role of the professions in an earlier era. Partly, it is a means of protecting lawyers and society from powerful and/or unscrupulous clients. Partly, it reflects the personal dimension of lawyer-client relationships, in which the dynamics between the parties determines the quality of the relationship; in complex human relationships, more is involved than the willingness of one party (the lawyer) to take orders from another party (the client).

The Lawyer's Freedom to Give Advice

The lawyer's power and freedom to give wide-ranging advice is itself a significant form of influence over clients. Lawyers are taught to be persuaders. Moreover, our self-image, as suggested in ethics law, envisions the lawyer as a knowledgeable analyst of many facets of a client's problem that extend well beyond the narrowly legal. Model Rule 2.1, governing the lawyer in the role of advisor, provides:

> In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
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> *Comment*
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> Scope of Advice
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> [1] A client is entitled to straightforward advice expressing the lawyer's honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client's morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.
>
> [2] Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.
>
> [3] A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations.
>
> [4] Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; business matters can involve problems within the competence of the accounting profession or of financial specialists. Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. At the same time, a lawyer's advice at its best often consists of recommending a course of action in the face of conflicting recommendations of experts. . . .

Thus, lawyers are armed with the influence that comes from seeing the big picture, without limitation to the narrowly legal aspect of the client's problem.

The comment to Rule 2.1 quoted here encourages lawyers to bring their whole being to the task of serving their clients. This contrasts sharply with the image of lawyers as technocratic workaholics. We may be workaholics, but we needn't be technocrats.

Deciding Whether the Relationship Will Work

As noted, while principles of legal ethics make clear that the client, for the most part, is in charge, lawyers enjoy considerable power in their dealings with clients. The most important form this power takes is the decision whether and on what terms to undertake the representation. Three types of decisions are involved: whether to represent the client, the terms of the representation, and whether to withdraw from representation.

With very limited exceptions,[2] lawyers are free to decline to represent any prospective client. As most of us know from bitter (or a learning) experience, not all lawyer-client relationships are made in heaven. Some shouldn't be made at all. The mere fact that a client tenders a legal problem to a lawyer (perhaps tendering an acceptable fee as well) does not resolve the question of whether the lawyer should take the case. A client who is unlikely to establish objectives or make decisions that the lawyer can support probably ought to have a different lawyer, for everyone's sake. Certainly, professionalism and business concerns suggest that lawyers should consider the issue carefully before declining a matter. Nevertheless, declining to represent a client is clearly justified when the lawyer is convinced that the client will not be better off as a result of the representation, or even that the relation-

ship just won't work on a personal level.

In less extreme cases, lawyers may negotiate with the client to establish the objectives and means of the representation. The relevant provisions of ethics law are found in Model Rule 1.2, concerning the scope of representation:

> (a) A lawyer shall abide by a client's decisions concerning the objectives of representation subject to paragraphs (c), (d) and (e), and shall consult with the client as to the means by which they are to be pursued. . . .
>
> . . .
>
> (c) A lawyer may limit the objectives of the representation if the client consents after consultation.
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> (d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or 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 make a good faith effort to determine the validity, scope, meaning or application of the law.
>
> (e) When a lawyer knows that a client expects assistance not permitted by the rules of professional conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.
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> *Comment*
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> . . .
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> [4] The objectives or scope of services 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. For example, a retainer may be for a specifically defined purpose. Representation provided through a legal aid agency may be subject to limitations on the types of cases the agency handles. . . . The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent.
>
> [5] An agreement concerning the scope of representation must accord with the Rules of Professional Conduct and other law. Thus, the client may not be asked to agree to representation so limited in scope as to violate [the duty to provide competent representation], or to surrender the right to terminate the lawyer's services or the right to settle litigation that the lawyer might wish to continue.

These provisions permit a lawyer to negotiate with the client for reasonable ground rules under which the representation is to proceed. These ground rules could cover a multitude of issues, including the following:

- Billing and payment schedules
- Frequency and nature of status reports (written or oral, by the lawyer or paralegal, etc.)
- Services performed and excluded
- Actions for which no further client authorization is necessary

Before entering into a retainer agreement containing ground rules of this sort, the lawyer must "consult" with the client, defined by the Model Rules as "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

Retainer agreements that place conditions on the representation are, of course, a potentially dangerous tool for the lawyer to use. Ethics and malpractice principles make clear that the client's interests must remain paramount in the representation. Moreover, unsophisticated clients and clients of modest means are particularly vulnerable to being bullied by their lawyers. At times, we may underestimate the client's ability to see what is in his or her best interest and overestimate our ability to do the same. Nevertheless, appropriate ground rules in a retainer agreement can provide both client and lawyer with a comfort zone for working together. Of course, it is best to put such agreements in writing.

The Rules of Professional Conduct also permit lawyers to withdraw from representation under certain circumstances, although the client may have remedies in contract or tort even if the withdrawal meets ethical standards. Relevant withdrawal provisions under Model Rule 1.16 provide:

(b) except as stated in paragraph (c), a lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if:

. . .

(3) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent;

(4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;

(5) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or

(6) other good cause for withdrawal exists.

. . .

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interests, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled and refunding any advance payment of fee that has not been earned. The lawyer may retain papers relating to the client to the extent permitted by other law.

Withdrawal and the threat of withdrawal are powerful means to influence a client to the lawyer's point of view. This is particularly true where such withdrawal would impose significant financial, emotional, or time costs on the client. The harsh term for withdrawal from representation without client consent is "abandonment." Nevertheless, as Rule 1.16 shows, ethics law permits lawyers to withdraw in a wide array of circumstances, even though there may be a "material adverse effect on the interests of the client." These circumstances extend even to the client insisting on an objective that the lawyer considers "imprudent."

Again, these withdrawal provisions vest in lawyers a powerful tool for influencing clients. It is a tool that should be used sparingly, and usually with the client's interests uppermost in mind.

Conclusion

Contracts, as voluntary exchanges, generally are entered into because both parties expect to benefit. It would be terribly cynical to expect that the personal service contracts entered into between lawyers and their clients benefit lawyers only in financial terms. The legal profession attracts persons of immense talent and great vision because of the public benefits and personal satisfaction available through constructive service in a relationship of trust. Ethics law permits lawyers to help shape the agenda of representation to serve these ends.

Endnotes

1. Not surprisingly, criminal law provides the principal illustrations of when lawyer choice trumps client choice during the course of representation. Generally, the instances of lawyer control involve strategic or tactical decision making in litigation. In nonlitigation settings, paying clients can always dismiss insubordinate lawyers, although often at a financial or emotional cost that may seem prohibitive.

2. See 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:
   >
   > (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
   >
   > (b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
   >
   > (c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

Elder's Advisor

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