

Allocation of authority between client and lawyer

by

Kevin T. Slator, Assistant Director

Minnesota Office of Lawyers Professional Responsibility

Reprinted from *Minnesota Lawyer* (May 3, 2010)

A defendant pled guilty to second-degree murder and was sentenced. A few days later, he asked the state public defender for help in appealing his conviction. The public defender reviewed the case and told the person that “nothing could be done by the public defender’s office to help his case and that his file would be closed.”

More than four years later, in *Weldon v. State*, 2009 WL 3078104 (Minn. Ct. App., Sept. 29, 2009), the Minnesota Court of Appeals held that the right to representation on a direct appeal by the public defender’s office (which was not disputed by the state) was not satisfied merely by “receipt of the public defender’s opinion on the merits of [a client’s] case” but must also include the right to “active representation in court.”

The majority observed that the public defender’s consultation and conclusion that there was no basis to appeal was not just ineffective representation, it was no representation at all. The court was careful to note, however, that it was not suggesting that the state public defender was obligated “to pursue a frivolous appeal and to thereby breach ethical standards.”

This case involved the state public defender and the application of certain rules and laws that are specific to criminal appeals. But the particular holding that the state public defender was obligated to file an appeal for a client despite the lawyer’s apparent belief that a good faith basis to do so did not exist raises an important ethical question: How is authority to be allocated between a lawyer and a client?

Rule 1.2(a) of the Minnesota Rules of Professional Conduct — “Scope of Representation and Allocation of Authority Between Client and Lawyer” — provides as follows:

Subject to paragraphs (c) and (d), a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client’s decision whether to settle a matter. In a criminal case, the lawyer shall abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered, whether to waive a jury trial and whether the client will testify.

The rule and accompanying nonbinding comments make it clear that the ultimate authority to determine the purposes of the representation, including the decision as to whether to settle, belongs to the client. In

determining the means to carry out the representation, however, the rules state that the lawyer may, after consulting with the client, “take such action on behalf of the client as is impliedly authorized to carry out the representation.”

Disagreements between lawyer and client about the means to be used to accomplish the client’s objectives will occasionally occur. Both lawyer and client have an important and vital role in resolving such disputes.

Comment 2 to Rule 1.2 states clients “normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives.” Conversely, the lawyer will “usually defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.” But a prescribed method of resolving such disagreements is not practical “because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons.”

An important component of allocating authority between lawyer and client is communication, as provided in Rule 1.4, which requires in part that:

(a) A lawyer shall

(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished; [and]

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the rules of professional conduct or other law.

If the lawyer has communicated with the client as provided in Rule 1.4 and efforts to seek a mutually acceptable resolution of a disagreement with the client are still unavailing, the lawyer may, with certain exceptions, withdraw from the representation as provided under Rule 1.16, although withdrawal might require approval of the tribunal.

Disagreements or disputes with a client over the means to be used by the lawyer to accomplish the client’s objectives will be minimized with a carefully drafted retainer agreement and by maintaining frequent contact with the client as provided in Rule 1.4.

While doing so might not have resolved the issue with the state public defender, in many cases it will avoid lawyer-client conflict and, perhaps, the filing of an ethics complaint by the client.