

The lawyer as advisor

by

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The Preamble to the Minnesota Rules of Professional Conduct (MRPC) identifies four main representational functions performed by attorneys. Most people understand that lawyers act as advocates for their clients' interests and negotiators on their behalf, and indeed these are two of the major roles set out in the preamble.

Lawyers also act as evaluators of their client's legal affairs. The fourth function that lawyers are expected to perform is that of being a counselor or advisor to their clients. Often overlooked in the MRPC is Rule 2.1, which deals with this fourth function.

Client counselor

Just what does it mean to be an advisor consistent with the ethics rules? Rule 2.1 provides that "[i]n representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to the law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation." Of special note is that the role of advisor is not in fact mandatory (despite the term "shall"), but once advice is requested and/or given, then independent and candid advice is mandatory.

The unofficial comment to Rule 2.1 offers substantial guidance on the scope of this rule. Among the "nuggets" of wisdom in the comment are the following:

- In general, a lawyer is not expected to give advice until asked by the client;
- A lawyer ordinarily has no duty to initiate investigation of a client's affairs or give advice that the client has indicated is unwanted;
- A lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client;
- Advice couched in narrow legal terms may be of little value to a client;
- When a request is made by a client inexperienced in legal matters, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations;
- When a matter is likely to involve litigation, it may be necessary to inform the client of forms of

dispute resolution that might constitute reasonable alternatives to litigation; and

- Where consultation with a professional in another field is 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.

The lawyer's ability to provide independent legal advice is sufficiently important to require protection elsewhere in the rules. Rule 1.8(f)(2) of the MRPC, for example, allows a person other than the client to pay for the representation, but only if there is "no interference with the lawyer's independence of professional judgment."

There are some limitations in the rules on an attorney's ability to provide advice. Principally, Rule 1.2 states that 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."

The Restatement Third, The Law Governing Lawyers, sec. 94, defines "counseling" for purposes of this rule as meaning to provide advice to the client about the legality of contemplated activities with the intent of facilitating or encouraging the client's action. "Assisting" refers to providing services, with a similar intent, such as preparing documents, drafting correspondence, negotiating with nonclients or contacting government agencies.

Complaints examined

The Director's Office receives very few complaints dealing with a lawyer as advisor that result in discipline or even investigation. Criminal defendants too often complain that their attorney wrongly advised them to plead guilty. Such complaints are usually summarily dismissed as being ineffective assistance of counsel claims and the complainant is referred to his post-conviction remedies; similar complaints from non-criminal clients about advice received are dismissed as being malpractice-type complaints better left to the civil courts. Likewise, complaints from a party (frequently in marital dissolution matters) that the opposing counsel is giving her client bad advice (perhaps wisely to not agree to waive child support or the like) will not get much attention in our office.

Prosecutors or police officers have occasionally complained that a defense lawyer illegally advised a person arrested for possible DWI to refuse to permit a blood or breathalyzer test, which is itself a crime. (See Minn. Stat. sec. 169A.20, subd. 3. Consistent with Rule 1.2, a lawyer cannot advise a client to commit a crime). The lawyer may, however, discuss the implications of refusing the test. Of course, testimony from the affected clients would be necessary to prove what the lawyer told them, and they were almost always intoxicated during the conversation, making proof almost impossible even if the allegation was in fact true.

While all four functions of being a lawyer are important, the role of counselor or advisor is one that clients sometimes forget or don't expect, but that lawyers should competently and fearlessly fulfill.