

Challenging clients in challenging times

We all know these are not the typical halcyon days of summer. Between the continuing covid-19 pandemic, community wounds from George Floyd's death, and the economic recession, people are struggling in many ways. Recently I was talking with Joan Bibelhausen, the executive director of Lawyers Concerned for Lawyers, and she suggested an article on a topic she knows some lawyers find particularly challenging these days: clients and boundaries. Joan approaches this topic from a wellbeing perspective; I will address it from an ethics perspective.

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 client's interests and negotiators on their client's behalf, and these are two of the four roles set out in the preamble.¹ Lawyers also act as evaluators of their client's legal affairs. The fourth function that lawyers are expected to perform is to serve as counselor or advisor to their clients. Often overlooked is Rule 2.1, MRPC, which provides good guidance regarding this role.

The advisor's duty

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." The comments to Rule 2.1 expand on what this looks like.



SUSAN HUMISTON is the director of the Office of Lawyers Professional Responsibility and Client Security Board. Prior to her appointment, Susan worked in-house at a publicly traded company, and in private practice as a litigation attorney.

✉ SUSAN.HUMISTON@COURTS.STATE.MN.US

- 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, especially where practical considerations such as cost or effects on other people are predominant.
- 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.

■ 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 from experts.

Boundary issues

All this probably seems straightforward enough. Because we are problem solvers at heart, however, our role as advisor can lead to blurred lines and boundary issues with clients. This may be particular true in times of upheaval. It's very difficult to give candid advice that may be unpalatable to someone who is already struggling. Perhaps this means you put off that difficult conversation. Time passes and it becomes even more difficult to have that conversation, because you also have to acknowledge your lack of diligence in not calling sooner. No matter how many times we tell ourselves that bad news does not get better with age, the self-talk does not make it easier to pick up the phone. While most clients appreciate your candor, some do not—a fact that should not deter you from your ethical obligation to give that candid advice. Nothing good comes from attempting to shelter a client from news they may not like.

Challenging times lead to other forms of boundary issues. Sometimes lawyers, when business slows down, take on matters they know in their heart they should not undertake. Good client screening remains as important today as at any time. Listen to those internal warning signs. Are you lawyer number three? Is the main complaint about prior counsel fee-related? Are you having a difficult time getting enough information to really understand the status of the matter? Even though business may be slow, think very carefully before you ignore your instinct just because someone is willing to pay you.

Another boundary issue is the urge to discount your services in challenging times. So many people are struggling, and of course it is difficult to afford a lawyer. I have been fortunate to make a good living and I would hate to have to pay any rate I have ever charged for my legal services. While you may be tempted to discount your fees, think twice before doing so. A bad financial arrangement between a lawyer and client can end poorly, and all too often proves the maxim that no good deed goes unpunished. This is not to say that financial adjustments should not be made as a courtesy, given the extraordinary times in which we find ourselves; just be careful.

Zealous advocacy has its own boundary challenges. Sometimes in discipline cases we see lawyers who are so invested in their client's matter that they forget their own role, as stated in Rule 2.1, MRPC: to exercise independent professional judgment. Should you really be supporting your client's desire to

leave no stone unturned and only rubble behind you? As the comments to Rule 2.1 suggest, have you discussed with your client reasonable alternatives? I know it's nice to have someone paying you to turn over all those stones, but is that consistent with the exercise of your independent judgment? And have you provided your candid advice on the topic? The first comment to Rule 1.3, MRPC, reminds us that "[a] lawyer is not bound... to press for every advantage that might be realized for a client." Pursuing a matter with "commitment and dedication" does not mean no holds barred, and it certainly does not include offensive tactics or preclude courtesy and respect toward all.

This is always true, but it takes on particular import in these times when almost everyone is struggling in some manner. Do not forget to afford others the courtesies you hope will be afforded to you. Your opposing counsel may be caring for stir-crazy minor children, bad-tempered teens, or parents who are not taking the care they should. Or your opposing counsel may be alone, sad, and feeling disconnected. I know your client might not care, but you have professional discretion. Are you exercising it wisely and appropriately?

Boundaries are necessary not only to manage our own well-being but as a precaution against complaints and discipline. Each year the most frequently violated rules are Rule 1.3, MRPC, on diligence, and Rule 1.4, MRPC, on communication. This makes sense. It's hard to force yourself to work on a file where the client is a challenge, you have

to deliver bad news, or nothing can really be done to help. If you are losing money on the deal, it becomes even more challenging. If you have not established good boundaries, it can be particularly difficult. Each time I speak on this topic, my advice is to pick up the file you hate that sits on the corner of your desk and just face it, warts and all. Sometimes, if boundaries are really an issue, the best thing you can do for yourself and your client is to withdraw, provided you can do so consistent with Rule 1.16, MRPC.

We have an ethical duty as advisors to exercise independent professional judgment and render candid advice. This is not an easy task, and can be particularly hard in challenging times. Please make sure you are taking care of your own well-being and maintaining good client boundaries. If you need assistance, be sure to check out the resources of Lawyers Concerned for Lawyers at www.mnlcl.org. (And remember, all communications with Lawyers Concerned for Lawyers are confidential, and Rule 8.3(c), MRPC, exempts communications with lawyer assistance programs from the duty to report professional misconduct.) They have several resources related to covid-19 and well-being. You also can always call our ethics hotline at 651-296-3952. We are here to help you navigate these boundaries ethically. ▲

Notes

¹ See also Martin Cole, *The Lawyer as Advisor*, Minnesota Lawyer, at lprb.mncourts.gov/articles