A LAWYER SHALL . . .

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There are essentially three types of rules of professional conduct: mandatory rules that set out obligations that all lawyers must meet ("a lawyer shall"), mandatory rules that prohibit certain conduct ("a lawyer shall not") and rules that give the lawyer discretion ("a lawyer may").Ftn 1 The largest group is the "shall not" rules, and in many instances these rules are easier to apply by practitioners trying to shape their behavior to comply with the rules. The "shall" rules create obligations but often leave some subjective areas of interpretation. Some rules contain both positive and negative mandatory statements, such as Rules 1.5 (fees) and 1.16 (declining or terminating representation).

Are there any discernible reasons for treating some rules as affirmative obligations and others as negative prohibitions? Is a concept somehow more or less important if it is phrased one way as opposed to the other? Or is it just another half-full vs. half-empty debate?

Many of the most fundamental requirements of legal representation are set out in the first rules contained in the Minnesota Rules of Professional Conduct. Competence (Rule 1.1), Diligence (Rule 1.3), and Communication (Rule 1.4) are certainly cornerstones of any solid attorney-client relationship. Equally essential is a lawyer's fiduciary obligation of Safekeeping Property (Rule 1.15). All four of these basic tenets are set out as positive "shall" rules: a lawyer shall provide competent representation, shall act with reasonable diligence, shall inform and consult with clients, and shall deposit all client or third-person funds into a trust account and keep appropriate books and records.Ftn 2 By complying with those four rules a lawyer has gone a long way towards a successful, and ethical, practice.Ftn 3

A Lawyer Shall Not

A far larger number of rules are largely "shall not" prohibitions of certain, often more specific, conduct. The majority of litigation-related rules and most advertising rules fall into this group. For example, lawyers shall not assert nonmeritorious claims or make frivolous discovery requests (Rules 3.1 and 3.4(d)), falsify evidence (Rule 3.4(b)), act as both advocate and necessary witness in the same matter (Rule 3.7(a)), make false statements of fact or law (Rule 4.1), contact represented persons without consent of counsel (Rule 4.2), or make false or misleading statements in advertisements (Rule 7.1).

As noted, some rules are an amalgam of positive and negative statements. Rule 1.16, for example, states in part that a lawyer shall withdraw from representation in some circumstances, may withdraw in others, shall take steps upon termination of representation to protect a client's interests, but shall not withhold a client's file conditional on payment of fees. Rules concerning fees and fee agreements (Rule 1.5) and most conflict-of-interest rules (Rule 1.7 *et seq*.) have both "shall" and "shall not" aspects to them as well.

No doubt the current rules were drafted with the intent of reflecting what ought to be our intuitive actions in most instances. Some things we intuitively know we must do, while others we know we must not do. Thus, we intuitively understand as lawyers that we shall not knowingly reveal confidential client information, just as Rule 1.6(a) demands. Equally intuitively, we desire to carve out permissive exceptions to such a rule to allow disclosure in some limited situations (to rectify consequences of client fraud or criminal activity; to prevent reasonably certain death or bodily harm; to defend ourselves against accusations made by the client).

Is There a Difference?

"Shall" rules set minimum reasonable standards that all lawyers must meet; their conduct must rise above the line set by the rule. Conduct over and above that line may certainly be appropriate and constitute better quality representation (think communication), but failure to provide such extra quality is not a disciplinary matter. "Shall not" rules similarly draw lines, but below which an attorney's conduct may not fall.

Rules governing certain conduct have changed over the years from "shall" rules to "shall not" rules, or vice versa. Present rules on competence and diligence, as already noted, are affirmative in nature. Prior to 1985, however, under the former Minnesota Code of Professional Responsibility, these duties were treated in the negative: "a lawyer *shall not* handle a legal matter which he knows or should know that he is not competent to handle without associating with a lawyer who is competent to handle it," and "*shall not* handle a legal matter without preparation adequate in the circumstances." Likewise, prior to 1985, the rule stated that "a lawyer *shall not* neglect a legal matter."Ftn 4

Such changes in approach may seem inconsequential, but they also signal a shift in emphasis for an attorney's conduct. Neglect was a term that often was difficult to establish. An attorney could fail to take several actions or take a considerable amount of time to complete a matter, yet still argue that he had not "neglected" the matter – "neglect" seemed to require substantial inactivity. Failure to provide reasonable diligence, as an affirmative obligation, however, requires an attorney to do more than just not neglect a legal matter; it requires activity. In this instance semantics do matter.

From both an advisory and disciplinary perspective, neither "shall" nor "shall not" rules are necessarily any more difficult to deal with. Fee agreements for contingent fees shall be in writing – the failure to do so is clearly a rule violation. A lawyer shall not enter into a contingent fee for representing a

defendant in a criminal case – doing so is an equally clear violation.

Application of many other rules, however, whether posited in a positive or negative manner, requires a more nuanced analysis. It can be far easier to state that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest (Rule 1.7(a)) than it is sometimes to determine whether such a concurrent conflict exists. Likewise with former clients, a lawyer shall not represent a client with interests materially adverse to a former client in the same or a substantially related matter (Rule 1.9(a)). Determining whether matters are substantially related, however, can occasionally require detailed analysis. For advisory purposes, therefore, the Director's Office, while perhaps discussing the details of the caller's fact situation, ultimately will try to steer callers inquiring about conflicts towards the safer course.

So . . . shall or shall not. Affirmative or negative. Half full or half empty? Either way, the rules draw a line which can be viewed as requiring conduct above that line and prohibiting conduct below that line. In the end, however drafted, *a lawyer shall* comply with the Rules of Professional Conduct.

NOTES

1 This last group also has been referred to as permissive rules. For a far more scholarly analysis of these permissive rules, see Green and Zacharias, "Permissive Rules of Professional Conduct," *Minnesota Law Review* vol. 91:265 (2006).

2 Rule 1.15 does contain some implicit "shall not" aspects concerning commingling a lawyer's personal funds with client funds, and some discretionary elements as to the particular type of trust account employed to hold funds, depending upon the amount and length of time the funds will be held.

3 Other rules that are predominantly "shall" in nature include attorneys' supervisory obligations of ensuring that subordinates and nonlawyer employees comply with the requirements of the MRPC (Rules 5.1 and 5.3) and the duty to report known, serious misconduct of other lawyers and judges to the proper disciplinary authority (Rule 8.3, subject to certain confidentiality requirements).

4 Former DR 6-101(A)(1),(2),(3), Minnesota Code of Professional Responsibility. As to diligence, the current rule of course also uses the term "reasonable diligence" rather than "neglect," a term that essentially required the use of a negative imperative.