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## **Is the Customer Always Right? The Intersection of Client Direction and Professional Judgment**

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We've all heard the saying from retail sales that "the customer is always right." Although lawyers need to provide good client service, too, our duties are not as one dimensional. Paragraph 1 to the Preamble to the ABA Model Rules of Professional Conduct neatly summarizes our multi-layered responsibilities: "A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice." In short, for lawyers, the client may not always be right.

Sometimes, we simply have disagreements with our clients over matters that might reasonably be approached in different ways. On other occasions, clients may want us to conduct a case in a way that crosses the boundary from "aggressive" to "harassment." Finally, in still other situations, clients may ask us to participate in fraud (or worse) in the course of a representation. In this column, we'll look at each: "the good"; "the bad"; and "the ugly."

### ***"The Good"***

Although clients rely on their lawyers for professional advice, at the end of the day it is the client's case. The client, therefore, is entitled to make the key decisions affecting the case—even if the lawyer might disagree with those decisions. In some areas, this fundamental allocation is confirmed specifically,

such as RPC 1.2(a), which notes that “[a] lawyer shall abide by a client’s decision whether to settle a matter.” In others, the allocation is more general, which is also captured by RPC 1.2(a): “[A] lawyer shall abide by a client’s decisions concerning the objectives of [the] representation[.]”

Especially when a client has chosen a course against the lawyer’s advice, however, it is usually prudent to document that decision. With even the most honorable client, memories fade. With the less than honorable, the all too human tendency to blame others may overtake responsibility for a decision that turned out badly. The documentation does not need to be overly formal or off-putting. A short email acknowledging the client’s direction will often suffice. The key benefit from the risk management perspective is the contemporaneous written documentation so that there is proof—later—about who made the decision that went sour.

***“The Bad”***

Clients sometimes view lawyers as gladiators from a bad movie. They may not like the other side and they want their lawyer to make life as miserable as possible for the opponent. That’s where the notion of “officer of the legal system” quoted above from the ABA Model Rules comes in. Our job is to represent our clients effectively—but within the bounds of the law. OSB Formal Opinion 2005-59 uses the example of a client who wants to sue individual corporate officers even when there is no reasonable basis for doing so. In that

circumstance, Opinion 2005-59 concludes that RPCs 3.1 (which addresses frivolous pleadings) and 4.4(a) (which deals with harassment) prohibit the lawyer from frivolously joining the individual defendants. The consequences of violating the professional rules in this regard are not limited to regulatory discipline. In *Alexander v. Jesuits of Missouri Province*, 175 FRD 556 (D Kan 1997), for example, a lawyer served a non-party witness with a subpoena requiring an appearance on short notice for a deposition to begin at 8:00 a.m. in a city 60 miles away. In quashing the subpoena and sanctioning the lawyer, the court relied specifically on RPC 4.4(a).

The best time to educate a client about what lawyers can—and cannot—do is before you’ve ever agreed to take the case. If a prospective client tells you that he or she wants a “scorched earth” approach and is not willing to listen to an explanation of your professional obligations as a lawyer, the simplest course may be to send them on their way. Even with a client who wants an “aggressive” yet proper defense, it is usually best to inform them of the cost so they will not be upset when they get the first bill and profess surprise that your “shoe leather” is not free.

### ***“The Ugly”***

In some—usually rare—instances, clients suggest that their lawyer participate in what amounts to fraud or worse on the client’s part. OSB Formal Opinion 2005-167 gives the example of a client who attempts to defraud a soon

to be ex spouse by concealing assets during a mediation. Opinion 2005-167 focuses on the bedrock duty of lawyers under RPC 8.4(a)(3) not to engage in “conduct involving dishonesty, fraud, deceit or misrepresentation[.]” Even if the suggestion came from the client, the consequences of participating in fraudulent conduct will be borne by the lawyer. *In re Spencer*, 335 Or 71, 58 P3d 228 (2002), for example, involved a lawyer disciplined for assisting a California couple with falsely registering their motor home in Oregon.

OSB Formal Opinion 2005-34 provides succinct advice for lawyers in this situation: attempt to dissuade the client from engaging in the fraudulent conduct and withdraw if the client insists on proceeding.

## **ABOUT THE AUTHOR**

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