

Hit hard, not low

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Ethics and civility standards are seen as deterrents to overzealous advocacy. Consult the codes: If you know the rules well, you can use them against opponents.

Professional rules of conduct become more popular after acts of widespread and far-reaching dishonesty and deception of the public are uncovered. Recent disclosures that executives at some of America's largest companies and widely respected investment analysts misled investors by artificially pumping up stock prices led to a resurgence of ethics-based curricula at business schools.¹

This sudden focus on ethical codes seems equivalent to the religious act of seeking absolution after sinning, like saying so many Hail Marys after confession. The principles embodied in the codes are perceived as a way of making us better people. And they can do that. But legal ethical codes do much more than distinguish between honesty and dishonesty. They can also make us more effective professionals.

Our ethics standards set the boundaries of zealous advocacy, defining what our duties are and, more important, what they are not. And they provide us with both swords and shields to use against opponents in litigation.

Controlled, sustained, and forceful advocacy depends on a thorough knowledge of ethics and civility rules. By clearly defining our duties to clients and fixing the limits of our duties to third parties, these rules permit us to focus on the facts and law of our clients' cases.

The professional rules that apply to lawyers are referred to as "the law of lawyering." They are not found in any one resource. Rather, they can be found in the professional codes adopted by each state's highest court—usually a version of the American Bar Association's (ABA) Model Code of Professional Responsibility or Model Rules of Professional Conduct;² in formal opinions issued by state bar associations;³ and in the common law.

The American Law Institute (ALI) created some uniformity in the standards regulating the practice of law when it adopted the Restatement (Third) of the Law Governing Lawyers in 2000. This restatement has gained wide recognition as a fundamental resource for interpreting ethics codes. Nevertheless, because rules and codes do vary among jurisdictions, lawyers must consult their local laws or rules when ethical questions arise.

Four situations commonly send lawyers scrambling for the ethics treatises: representing a client with diminished mental capacity; handling clients' requests for advances or loans; communicating with witnesses, unrepresented parties, and employees of defendants; and representing multiple clients.

Diminished capacity

Cases involving severe injury, especially catastrophic brain injury, often present the question of whether the client can make adequately considered decisions that are in his or her best interests. Sometimes the plaintiff lawyer must decide whether a guardian or conservator should be appointed.

The model rules require that even when a client suffers from a mentally disabling condition, the lawyer must continue to make every effort to maintain a normal attorney-client relationship. The lawyer has a duty to communicate material facts to a client, even if the client's competence is in significant doubt.⁴

The model rule governing appointment of a guardian acknowledges intermediate degrees of competence and requires the lawyer to continue communicating with the client, even one who is declared legally incompetent. In general, the appointment of a legal guardian is to be avoided unless it is clearly necessary to protect the client's best interests.⁵

For example, if the client has substantial property that should be sold for his or her benefit, effective completion of the transaction ordinarily requires appointment of a legal representative. In many circumstances, however, this may be expensive and traumatic for the client. Evaluation of these considerations is a matter of the lawyer's professional judgment.

The restatement is in basic agreement with the model rules on this issue, but it gives lawyers more guidance and authority in making decisions for clients. It provides that a lawyer may act in the best interests of a client without his or her consent if the client cannot make decisions: "To the extent a client is incapable of doing so and no other person is empowered to make such decisions, the lawyer's role in making decisions will increase."⁶

The burden to seek a guardian is imposed only if doing so is either necessary or desirable and practical: "This section recognizes that a lawyer must often exercise an informed professional judgment in choosing among imperfect alternatives."⁷

In attempting to maintain a "normal client-lawyer relationship," comment c to the restatement's §24 suggests that the lawyer "take reasonable steps to elicit the client's own views on decisions necessary to the representation. . . . The use of a relative, therapist, or other intermediary may facilitate communication."⁸

As a compromise to the expense the client may incur and the embarrassment he or she may feel during the process of appointing a guardian, comment e to §24 suggests that "a general or limited power of attorney may sometimes be used."⁹

Requests for loans

Rule 1.8(e) of the ABA's Model Rules of Professional Conduct provides that

A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation except that: 1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and 2) a lawyer representing an indigent client may pay court costs and expenses of the litigation on behalf of the client.

The practice of lending money or giving financial assistance to the client can be considered a form of champerty—financing a lawsuit in return for a percentage of the recovery—which is prohibited in some states.

Doing so also can create a conflict of interest. An advocate who becomes a creditor may be more inclined to encourage a client to settle a case early to hasten repayment of a loan, and this may not necessarily be in the client's best interests.

Section 36 of the restatement also prohibits a lawyer from acquiring a "proprietary interest in the cause of action," with the exception of a lien for litigation expenses and a contingent fee.

A client generally may be reimbursed for expenses related to the lawsuit. Most jurisdictions bar lawyers from making loans to clients for nonlitigation costs, such as living expenses.¹⁰

A minority of jurisdictions—including Alabama, Louisiana, Minnesota, Montana, and North Dakota—allow lawyers to advance living expenses to clients so long as the advance is not promised or made before the lawyer is retained.

Some private companies offer nonrecourse funding to plaintiffs during the pendency of the case.¹¹

Most states allow attorneys to provide clients with information about these types of loans as long as the attorney does not profit from the transaction, have an ownership interest in the company, cosign the agreement, or provide a letter of protection.¹²

Communications with nonclients

The restatement sets forth a number of rules on communicating with both represented and unrepresented nonclients.¹³ The lawyer's duty to use great caution and honesty in any permitted communications with nonclients extends to his or her agents. For example, the Oregon Supreme Court recently reprimanded a lawyer for his role in giving instructions and direction to a private investigator who posed as a journalist to interview an opposing party in a potential legal dispute.¹⁴

The Massachusetts Supreme Judicial Court recently held that a plaintiff attorney can contact a defendant's employees directly, as long as they do not have managerial responsibility for the area that is the subject of the litigation, do not have authority to commit the defendant to a given position (like settlement), and are not alleged to have committed wrongful acts at issue in the lawsuit.¹⁵

Another tricky ethical issue is the attorney's relationship with nonexpert witnesses. Witnesses to an injury-causing event may be repeatedly asked what they know by public and private investigators. These same witnesses are then subpoenaed for depositions and trial. The net result is that, by the time of trial, many witnesses are unhappy that they have been forced to spend considerable time and energy on the case and are reluctant to testify. An unhappy witness can be a dangerous witness.

How much can a lawyer do to mitigate the hardship of being a witness? The restatement allows an attorney to compensate lay witnesses for reasonable expenses they incur.¹⁶ The ethical concern here is that these payments may be seen as bribes used to influence the witnesses' testimony. To avoid any appearance of impropriety, consult local laws and rules regarding the compensation of witnesses.

It is especially important to avoid the appearance of impropriety if compensation is to be paid to law enforcement officers for their testimony in a criminal case. Most jurisdictions have laws regulating such payments.

In civil cases, the lawyer should be able to reimburse a witness for actual expenses incurred and for the value of the witness's time. Comment b to the restatement's rule on this issue indicates that child care and transportation costs, lost wages, meals, and hotels are the types of expenses that may be reimbursed.

An interesting question is whether a witness can be paid for lost wages if he or she is unemployed or not scheduled for work the day testimony is scheduled. An ABA ethics opinion seems to allow reasonable compensation for time that is reasonably related to the witness's preparing for and giving testimony.¹⁷

Multiple plaintiffs

A lawyer is often asked to represent two or more people who have been injured in the same event or by the same defendant. This situation includes cases in which the spouse of an injured client claims loss of consortium.

Section 128 of the restatement provides that unless all affected clients consent, a lawyer cannot represent two or more clients in one case if there is a substantial risk that the representation of one client would be materially and adversely affected by the lawyer's duties to another.

A lawyer is also prohibited from representing a client in a claim against or brought by another client whom the lawyer currently represents, even if the matters are not related.¹⁸

As a threshold issue, then, the lawyer must determine whether the parties' interests are adverse. Lawyers should look to their states' versions of Model Rule 1.7 or Disciplinary Rule 5-105 of the Model Code of Professional Responsibility in making this determination.

The restatement also provides some guidance: Comment d(i) to the restatement's §128 states:

No conflict of interest is ordinarily presented when two or more of a lawyer's clients assert claims against a defendant. However, sometimes two parties aligned on the same side of a case as co-claimants might wish to characterize the facts differently. The client-claimants might also have a potential lawsuit against each other. . . . The lawyer must warn clients about the possibilities of such differences and obtain the consent of each before agreeing to represent them as co-claimants.

The issue of obtaining informed consent is covered by §122 of the restatement. Generally, if representation of more than one party is accepted, the lawyer should obtain a written agreement or letter of engagement stating what the lawyer's obligations and rights are if a conflict arises midstream.

Such agreements have been upheld as valid.¹⁹ They also can be an effective way to handle potential marital problems that may arise between clients, which can interfere with a lawyer's ability to handle both a primary claim and a consortium claim.

Most courts have held that the possibility of a conflict between potential clients is not enough to prohibit a lawyer from representing the parties.²⁰ However, counsel should be on the alert for conflicts that may obstruct settlement. In a case before the Tenth Circuit, several clients of one lawyer could not agree on a settlement. They took a vote, and those who wanted to settle won. The court said the settlement was invalid because the parties, who had conflicting interests, could not have been adequately represented by one lawyer.²¹

Note that while the restatement presents the view that one lawyer can represent both a driver and a passenger in a collision case as long as all parties consent, some jurisdictions—including New Jersey, Pennsylvania, and the District of Columbia—find this to be a per se conflict that cannot be cured by a client's consent.²²

It is important to understand that the ethical rules sometimes permit conduct that the laws of a jurisdiction may not. It is imperative that attorneys know the requirements of their jurisdictions.

Notes

1. See *A Year of Excess*, WASH. POST, at www.washingtonpost.com/wp-srv/business/includes/biztimeline.html (last visited June 6, 2003).
2. Most states have adopted in whole or in part the ABA's Model Code of Professional Responsibility. A few states, including New York, Ohio, and Oregon, follow the ABA's Model Rules of Professional Conduct. Some states, like Texas, have created a hybrid of rules from both sources.
3. For the ethics opinions of 41 jurisdictions, see www.abanet.org/cpr/links.html.
4. See, e.g., *In re Crane*, 449 N.E.2d 94 (Ill. 1983) (suspending a lawyer for three years for failing to explain the basis of large fees to clients who had just reached legal adulthood); *In re M.R.*, 638 A.2d 1274, 1284-85 (N.J. 1994) (holding that the lawyer for a developmentally disabled person must advocate for the client's stated custody preference); *Quesnell v. State*, 517 P.2d 568 (Wash. 1973) (finding error where, although the accused and her private attorney had made a timely demand for a jury trial, the proceeding was conducted without a jury on the theory that the guardian ad litem, an attorney, had waived such a right).
5. See MODEL RULES OF PROF'L CONDUCT R. 1.14 (1983) (amended 2002).
6. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §24 cmt. b (2000) [hereinafter RESTATEMENT].
7. *Id.*
8. With certain limitations, such facilitators would qualify for attorney-client privilege under the rule set forth in §70 of the restatement.
9. See Paul R. Tremblay, *On Persuasion and Paternalism: Lawyer Decision-Making and the Questionably Competent Client*, 1987 UTAH L. REV. 515, 559-67 (1987) (discussing the pros and cons of seeking guardianship).
10. See, e.g., *In re K.A.H.*, 967 P.2d 91 (Alaska 1998), cert. denied, 528 U.S. 817 (1999); *State ex rel. Okla. Bar Ass'n v. Smolen*, 837 P.2d 894 (Okla. 1992); 1 GEOFFREY C. HAZARD JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 274-75 (2d. ed. 1990).
11. See Jean Hellwege, *David v. Goliath Revisited: Funding Companies Help Level the Litigation Playing Field*, TRIAL, May 2001, at 14.
12. See, e.g., Florida Bar Ass'n, Formal Op. 00-3 (2002).
13. See RESTATEMENT §§99, 101 103.
14. *In re Ostitis*, 430 P.3d 500 (Or. 2002).
15. *Messing, Rudavsky & Weliky, P.C. v. President and Fellows of Harvard College*, 764 N.E.2d 825 (Mass. 2002) (citing with approval §100 of the restatement).
16. RESTATEMENT §117.



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17. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 96-402 (1996).

18. RESTATEMENT §128.

19. See *In re Rite Aid Corp. Sec. Litig.*, 139 F. Supp. 2d 649 (E.D. Pa. 2001) (denying defendant CEO's motion to disqualify a lawyer from representing defendant corporation where the engagement letter indicated that, should conflict develop, the lawyer would withdraw his representation of defendant CEO and continue representing defendant corporation).

20. See, e.g., *Hurt v. Superior Court*, 601 P.2d 1329, 1334 (Ariz. 1979) (finding no conflict of interest for a lawyer to represent both a mother and her child in a suit alleging the wrongful death of the woman's husband but holding that counsel must have special concern for the interests of the minor and honor any request for separate counsel).

21. *Hayes v. Eagleton-Picher Indus.*, 513 F.2d 892 (10th Cir. 1975); see also *In re Guardianship of Lauderdale*, 549 P.2d 42 (Wash. Ct. App. 1976) (ruling it improper to make an aggregate settlement where beneficiaries could not agree on the division or adequacy).

22. See, e.g., *In re Thornton*, 421 A.2d 1 (D.C. 1980) (suspending lawyer for one year for undertaking such representation).