

Who is Your Client?

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“They say the only purpose of a law is to remind people what they ought to do.”
Sir Thomas More, Utopia, 1516

Introduction

Black’s Law Dictionary describes legal ethics as the “minimum standards of appropriate conduct within the legal profession, including duties that attorneys owe one another, their clients, and the courts.”

The minimum ethical requirements that govern the conduct of Florida lawyers are found in the Florida Rules of Professional Conduct. Some of the core principles highlighted for lawyers in the Client-Lawyer Relationship section are competence, communication, confidentiality, and conflict of interest.

Competence (Rule 4-1.1) requires that lawyers have the knowledge, skill, thoroughness and preparation necessary to competently represent their clients.

Communication (Rule 4-1.4) obliges lawyers to promptly inform the client of any decision which requires the client’s informed consent; to consult with the client about the means by which the client’s objectives may be accomplished; to keep the client informed; to comply with requests for information and consult with the client about any improper limitation on the lawyer’s conduct not permitted by the Rules or law.

Confidentiality (Rule 4-1.6) entails the duty of lawyers to maintain the confidences and secrets of their clients.

Conflict of Interest rules describe the lawyer’s obligations of loyalty and confidentiality to multiple clients. A conflict exists if the representation of one client is directly adverse to another client, or if there is a substantial risk that the representation of one client will be materially limited by the lawyer’s responsibilities to another current client (Rule 4-1.10), a former client (Rule 4-1.9) a third person or by a personal interest of the lawyer. There are some specific rules which explain the responsibilities of the lawyer under certain circumstances in Rule 4-1.8.

Lawyers cannot meet these ethical obligations to represent the client competently, to protect the confidentiality of information, to communicate effectively, and to avoid any improper conflicts of interest, if they do not know who the client is. We will explore the rules of professional

conduct as to the identity of the client for lawyers who are accepting payment from third parties, lawyer who have duties to former clients, lawyers who are dealing with organizational clients, and lawyers who are representing clients with disabilities.

Terminology

It is important at this point to review the definitions found in the Terminology section of the Florida Rules of Professional Conduct. Each of the definitions in the Terminology section is incorporated by reference into each of the rules every time the terms appear. Some important terms to consider in identifying the client and the responsibilities of the lawyer to each client are: informed consent, confirmed in writing, reasonable and reasonable belief.

"Informed Consent" denotes an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

"Confirmed in writing," when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent.

"Reasonable" or "reasonably" when used in relation to conduct by a lawyer denotes the conduct of a reasonably prudent and competent lawyer.

"Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

In addition, the terms "Informed consent" and "Confirmed in writing" each have a long explanation in the Comment section of Terminology.

Accepting Payment from Third Parties

The Florida Rules of Professional Conduct consider accepting payment from third parties so important the topics is addressed in several places: Compensation by Third Party (Rule 4-1.8), Conflict of Interest: Current Clients Rule (4-1.7), and Professional Independence of a Lawyer (Rule 4-5.4).

Compensation by Third Party - Rule 4-1.8 (f)

Who is your client when accepting compensation from a third party? Under Rule 4-1.8, a lawyer shall not accept compensation for representing a client from someone other than the client unless the client gives informed consent; there is no interference with the independent professional judgment of the lawyer or with the client-lawyer relationship; and any information from the client is protected by the rule on confidentiality.

The Comment "Person Paying Lawyer's Services," reiterates that there must not be any interference with a lawyer's independent professional judgment. It explains that because the third party payer, such as a liability insurance company, frequently has interests that differ from those of the client, (such as minimizing the amount spent and learning how the representation is going) lawyers are prohibited from accepting or continuing representation unless the lawyer determines that there will be no interference with the lawyer's independent professional judgment and there is informed consent from the client.

Representation of Insureds - Rule 4-1.8 (j)

Who is your client when representing insured clients? Rule 4-1.8 (j) on representation of insured clients, requires that the Statement of Insured Client's Rights be provided to the insured at the commencement of the representation whenever a lawyer undertakes the defense of an insured at the expense of an insurance company in regard to an action based upon tortious conduct. In addition, the lawyer must sign the statement certifying the date on which the statement was provided to the insured.

The Statement of Insured Client's Rights explains that an insurance company has selected a lawyer to defend a lawsuit and highlights some of the insured client's rights regarding the legal representation. The statement gives details on: fees and costs, directing the lawyer, litigation guidelines, confidentiality, conflicts of interest, settlement, the insured's risk, hiring a separate lawyer and reporting violations. Sending the Statement of Insured Client's Rights to the client goes a long way in establishing that the insured has given "informed consent."

Conflict of Interest: Current Clients - Rule 4-1.7 (e) Representation of Insureds

A third rule, Rule 4-1.7 (e) explains that a lawyer's first responsibility upon undertaking the representation of an insured client at the expense of the insurance company, is to ascertain "whether the lawyer will be representing both the insurer and the insured as clients, or only the insured, and to inform both the insured and the insurer regarding the scope of the representation." In either instance, it is clear that the insured policy holder is the client. (Emphasis added.)

The first Comment to this rule, "Loyalty to a client," states that "loyalty and independent judgment are essential elements in the lawyer's relationship with a client."

The Comment, "Interest of person paying for a lawyer's service," also makes it clear that a lawyer may be paid from a source other than the client, but only "if the client is informed of that fact and consents and the arrangement does not compromise the lawyer's duty of loyalty or independent judgment to the client."

Professional Independence of a Lawyer - Rule 4-5.4 (d)

Finally, the Rule on the Professional Independence of a Lawyer, rule 4-5.4 (d), reminds lawyers that the third party payer may not interfere with the lawyer's exercise of independent professional judgment on behalf of the client. "A lawyer shall not permit a person who

recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services.”

Duties to Former Clients - Rule 4-1.9

We begin with Rule 4-1.9, Conflict of Interest: Former Client, which sets forth the circumstances under which lawyers may represent another client after the termination of the client-lawyer relationship. A lawyer cannot represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client. A lawyer cannot use confidential information to the disadvantage of a former client. And a lawyer cannot reveal confidential information of the former client.

The Comment to Rule 4-1.9 notes that the scope of the “matter” depends on the facts of the particular situation as well as the degree of representation. The Comment also distinguishes between confidential information obtained during the representation of the former client and information that has been widely disseminated to the general public. Of course, the provisions of this rule are for the protection of clients and can be waived if the former client gives informed consent.

But we need to go back to Rule 4-1.6, Confidentiality of Information; a lawyer shall not reveal information relating to the representation of a client. The duty of confidentiality continues even after the lawyer-client relationship has ended, even after the lawyer or other employee no longer works at the law firm, in fact, forever.

Recognizing the principles of confidentiality and loyalty are critical for an understanding of the lawyers' duties to former clients. Lawyers have a duty of confidentiality and loyalty to their clients. Under the Comment “Former client” of Rule 4-1.6, it states, “the duty of confidentiality continues after the client-lawyer relationship has terminated.”

The Comment “Loyalty to a client” under Rule 4-1.7 on Conflict of Interest: Current Clients explains that loyalty and independent judgment are essential elements in the lawyer's relationship with a client and warns that conflicts of interest can arise from the lawyer's responsibilities to a former client.

The Organization as Client - Rule 4-1.13

Who is your client when representing a corporation? And just as importantly, who is not your client when representing a corporation? Questions have been raised about the legal and professional relationship that a lawyer for a corporate client bears to a corporation as a legal entity as opposed to the lawyer's relationship with the officers, directors, employees, and other possible constituencies. The dilemma is real even if the circumstances are surreal.

In the corporate arena, the lawyer lives in an “Alice in Wonderland” world. The client to which he owes undivided loyalty, fealty, and allegiance cannot speak to him except through voices that may have interests adverse to his client. He is hired and may be fired by people who may or may not have interests diametrically

opposed to those of his client. And finally, his client is itself an illusion – a fictional “person” that exists or expires at the whim of its shareholders, whom the lawyer does not represent. Who is the Client: The Corporate Lawyer’s Dilemma, Ralph Jonas, 39 Hastings L.J. 617 (1988)

A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents under Rule 4-1.13 (a). The Comment states that an organizational client is a legal entity, but it cannot act except through its officers, directors, employees, shareholders and other constituents. “Other constituents” are those in positions equivalent to officers, directors, employees and shareholders for organizational clients that are not corporations.

The duty of confidentiality is also discussed in the Comment to Rule 4-1.13, explaining that when one of the constituents of the client organization communicates with the organization’s lawyer in that person’s organizational capacity, the communication is protected by the rule on confidentiality. So if an organization asks its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents are covered by the rule on confidentiality. “That does not mean, however, that constituents of the organizational client are clients of the lawyer.”

A lawyer representing an organization may also represent any of its directors, officers, employees, members, shareholders or other constituents subject to the provisions of the rule on conflict of interest under Rule 4-1.13 (e). But if the organization’s consent to the dual representation is required by rule on conflict of interest, the consent shall be given by an appropriate official of the organization other than the individual who is to be represented, or by the shareholders. (Emphasis added.)

In case a divergence of interests arises between the corporate entity and one of its constituencies, how should the corporate lawyer handle the attendant conflict of interest problem? Rule 4-1.13 (d) cautions lawyers dealing with an organization’s directors, officers, employees, members, shareholders, or other constituents to explain the identity of the client, (which is the corporation) when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the constituent with whom the lawyer is dealing. (Emphasis added.)

Sometimes when a corporation and its directors or employees are involved in a controversy in which they have conflicting interests, the corporation may provide separate legal representation of the directors or employees, if the clients consent after consultation and the arrangement ensures the lawyer’s professional independence. See the Comment on “Interest of person paying for a lawyer’s service” to Rule 4-1.7.

And when the organization’s interests become adverse to those of one or more of its constituents the lawyer should advise the constituent of the conflict or potential conflict of interest, explain that the lawyer cannot represent the constituent and advise that the person may wish to obtain independent representation. Rule 4-1.13 Comment “Clarifying the lawyer’s role.” “Care must be taken to assure that the constituent understands that, when there is such adversity of interest, the

lawyer for the organization cannot provide legal representation for that constituent and discussions between the lawyer for the corporation and the constituent may not be privileged.”

The Comment goes on to say that “whether such a warning should be given by the lawyer for the organization to any constituent may turn on the facts of the case.” This may not be entirely true. The so-called Upjohn or corporate Miranda warning should be given to warn the constituent that the lawyer represents the corporation and not the employee, and to make it clear that the anything said by the employee is protected by the company’s attorney-client privilege and confidentiality, which can be waived by the company in its sole discretion. (Emphasis added.) In fairness to the Comment, it should be noted that Upjohn Co. v. United States, 449 U.S. 383 (1981) also states that this should be decided on a case by case basis.

The Florida Rules of Professional Conduct also advise lawyers on discussions with an unrepresented client such as an employee of an organization that the lawyer represents. Rule 4-4.3 (a) states that in dealing with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or should know that the unrepresented person misunderstands the lawyer’s role, the lawyer shall make reasonable efforts to correct the misunderstanding. This would seem to be true whether the employee is an officer or a lower level employee. Finally, the lawyer should not give legal advice to an unrepresented person, other than the advice to secure counsel.

Client Under a Disability – Rule 4-1.14

Who is your client when your client is under a disability? This is almost an impossible situation. The lawyer wants to competently and diligently represent the client but believes that the client may not be competent to make appropriate decisions and an incapacitated person may have no power to make legally binding decisions.

First, Rule 4-1.14 (a) requires that when a client’s ability to make decisions is impaired because the client is a minor, has a mental disability or for some other reason, the lawyer must maintain a normal client-lawyer relationship with the client as far as reasonably possible. Then the Comment advises that the normal client-lawyer relationship assumes that the client is capable of making decisions about important matters. But the lawyer has already come to the conclusion that the client is not capable of making such decisions.

At the point when a lawyer “reasonably believes that the client cannot adequately act in the client’s own interest” the lawyer may seek the appointment of a guardian following Rule 4-1.14 (b). As to who is the client, the Comment advises that if a legal representative has been appointed for the client, the lawyer should look to the representative for decisions on behalf of the client. But it also cautions that if the lawyer represents the guardian as distinct from the ward and is aware that the guardian is acting adversely to the ward’s interest, the lawyer may have an obligation to prevent or rectify the guardian’s misconduct.

The Comment also recognizes that while a client lacking legal competence may have no power to make legally binding decisions, some often have the ability to understand, deliberate upon, and reach conclusions about matters affecting the client’s own well-being. And some persons

can be quite capable of handling routine financial matters while needing special legal protection concerning major transactions.

A limited guardianship, in which only some of the rights of the client are removed, may offer a solution in some cases. Examples of these limitations are the right to: contract, marry, vote, determine residency, travel, seek employment, give gifts, apply for benefits and consent to treatment. (See Florida Statutes §744.00 Guardianship; and Florida Statutes §393.12 Appointment of Guardian Advocate.)

And if no legal guardian has been appointed, the lawyer must often act as a de facto guardian. Other considerations include: if the appointment of a legal representative may be expensive or traumatic for the client or if disclosure of the client's disability may adversely affect the client's interests. The Comment suggests the lawyer may seek guidance from an appropriate diagnostician.

One final concern is the determination of whether sufficient "informed consent" can be attained by a client with a diminished capacity. "Informed consent" is an agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct. When the client's ability to understand the material risks and reasonably available alternatives is in question, there may not be an informed consent, even assuming that the lawyer has communicated adequate information and explanation.

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