

THE LITIGATOR

PUBLISHED BY THE NCBA'S LITIGATION SECTION

Volume 26, Number 3 ■ May 2006 ■ www.ncbar.org

NORTH CAROLINA
BAR ASSOCIATION
SEEKING LIBERTY & JUSTICE

It's the Lawyer's Call

Maintaining Professionalism in Conflicts with Clients over Strategy

BY THOMAS C. KILPATRICK

We've all had the difficult client who doesn't want to listen to our advice. Perhaps, the client is fired up and, being driven by "the principle of the matter," is indignant about possibly showing any sign of compassion. Often, the difficult client is also a major client of your law firm and believes that everything he or she says goes. Sometimes, the client knows just enough law to be dangerous, or wants to fight over petty and irrelevant issues. God forbid, the client is also a lawyer.

For example, the client wants to immediately obtain an entry of default on the 31st day without first alerting defense counsel regarding the status of the Answer; or the client wants no informal extensions of time for discovery responses; or the client wants to unilaterally notice depositions at inconvenient times for opposing parties and their witnesses.

In each of these circumstances, it is important for the lawyer to distinguish—if only for himself or herself—those decisions that are within the lawyer's control from those that belong to the client. Understanding the areas we control as lawyers encourages us to practice law in a professional manner and helps us to stand up to a client when being pushed beyond our personal notions of professionalism.

The mandates of the ethics rules provide: "[t]he lawyer shall abide by a client's decisions concerning the objectives of representation and . . . shall consult with the client as to the means by which those objectives are to be pursued." Revised Rule of Professional Conduct 1.2(a). Thus, the client gets to make the big decisions, such as: whether to settle, whether to waive certain claims or affirmative defenses, or whether to have a jury trial. The attorney must consult with the client as to the means—the strategy—to obtain the client's objectives. Thereafter, it is up to the attorney to "take such action on behalf of the client as is impliedly authorized to carry out the representation." RPC 1.2(a).

Although the lawyer must consult with the client as to the strategy to obtain those objectives, the client will usually defer to the lawyer on the strategy. That expertise is, after all, why the client came to the lawyer. Conversely, the lawyer will typically defer to the client regarding the expense of undertaking a certain action or whether a certain strategy would adversely affect a third party. See Comment to RPC 1.2.

Unfortunately, when the lawyer and the client disagree as to the strategy decisions, the rules provide little specific guidance. The Comment to RPC 1.2 suggests that if the lawyer and client cannot work it out, then the lawyer should withdraw or the client should discharge the lawyer. If we stop the analysis there, the lawyer may feel unnecessary pressure to give in to the unreasonable client's demands, and perhaps take an action that the lawyer feels is unprofessional.

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This pressure to give in to the client's demands increases as lawyers compete for clients and strive to meet the lawyer's (or the firm's) financial goals. A recent CLE by a Philadelphia lawyer on marketing stressed to lawyers that the "client is king" and that the lawyer is the "service provider." If we only look at it in that way, the "king" is going to rule all the strategy decisions, even those that call for unprofessional tactics. Fortunately, we do not practice in the "Kingdom of Philadelphia."

If the fees paid by the client are significant to the lawyer, or to other lawyers in the firm (isn't this almost always the case?), then the lawyer will justifiably be hesitant to withdraw. For the client, the decision to change horses is difficult because it will be expensive and may delay the ultimate resolution of the case. Given the practical financial pressures, the lawyer is often going to want to stay in the case and appease the client.

The Preamble to the Rules of Professional Conduct provides, in part, that "[v]irtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living. The Rules of Professional Conduct often

prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. These principles include the lawyer's obligation zealously to protect and pursue a client's legitimate interest, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system." RPC 0.1 [12].

In the midst of a dispute with a client over strategic decisions, the lawyer cannot forget that he is to be a professional at all times. That means making strategic decisions consistent with the rules and principles of professionalism both when it is easy, such as granting an extension of time for discovery responses (which, by the way, doesn't require consultation or approval of the client) and when it is difficult, such as explaining to the client why we should first attempt to contact opposing counsel regarding the status of their Answer before obtaining an entry of default. The lawyer cannot cede to the client decisions as to whether the lawyer is to act professionally.

Since the decision to act professionally or not is always within the lawyer's control, the lawyer should feel confident and be assured when choosing to act in a professional manner. If the strategy dispute turns on a matter of professionalism, the lawyer must be confident that he or she gets to make that call, not the client. It is the lawyer's call, and it is that lawyer's professionalism that will be judged by other lawyers and judges.

Fortunately, in the North Carolina litigation community, professionalism is still the norm. Thus, clients do not have a great deal of leverage to discharge one lawyer and thereafter find another lawyer who is willing to act unprofessionally. This is obviously a fragile norm, and one that must be protected.

If we all act professionally, then we give unreasonable clients less leverage to demand unprofessional tactics. We all benefit. Not only do we have the pleasure of dealing with each other in a professional way, but we also will be less concerned about losing clients to lawyers who are reputed to be willing to act unprofessionally. ■

KILPATRICK IS WITH MANNING,
FULTON & SKINNER, P.A. IN RALEIGH.