The Texas Lawbook

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When Clients Make Bad Decisions: What's a Lawyers' Duty?

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It's no secret that most of my practice involves allegations of lawyer misconduct. And two of the biggest losses I have ever had involved allegations that the lawyer failed to adequately discourage a client's bad decision.

So, what is the lawyer's duty in those situations? Our ethical rules do not seem to address this issue directly, but there are at least three, maybe four, ethical obligations (we'll call them touchstones) that dance around an answer to the question.

We all know the subject matter of the representation belongs to the client. It is, therefore, hardly surprising when Rule 1.02(a)(1) obligates the lawyer to "abide by a client's decisions concerning the objectives and general methods of representation." And that is our first touchstone: The client decides, and the lawyer abides. But it doesn't end there.

The client makes the decisions per Rule 1.02(a), but 1.02(b) permits the lawyer to limit the scope, the objectives and the general methods, so long as the "client consents after consultation." That sounds a lot like just changing the client's mind, but it is our second touchstone: The lawyer can limit the duty to abide by client decisions with the client's informed consent. But note that this rule only permits limitation — it does not address the lawyer's duty when the client is making a decision that the lawyer knows will harm the client. The rule seems to give the lawyer the right to try to limit the duty to implement the client's bad decision, but the rule does not expressly impose the duty to do so.

Our third touchstone gets closer to our issue. It is found in Rule 1.03 (b): "[A] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." Not wise decisions, not good decisions, just "informed" decisions. The lawyer has a duty to explain so that the client can make a "informed" decisions, but again it fails to expressly impose a duty to recommend for the good or against the bad decisions once the lawyer has explained the matter reasonably.

And the fourth potential touchstone is Rule 2.01. That obligates a lawyer to "exercise independent professional judgment and render candid advice." Comments to this rule talk about advice that might be unpalatable to the client (like, "you're making a big mistake") and mentions that "purely technical legal advice" may be inadequate. But neither the rule nor the comments go so far as to expressly require a lawyer to confront and advise against decisions the lawyer thinks are unwise and not in the client's interest. Now, let's apply these touchstones to a couple of hypotheticals.

Hypothetical 1

A Texas company hires a Colorado lawyer to assist in the purchase of a plot of expensive Colorado mountain land to be developed. The company has in-house lawyers and tells the Colorado lawyer that they will handle the negotiation and the contract. The Colorado lawyer interprets this limitation on her job as including review of the title opinion. But she knows, through years of experience, that there are multiple complicated but subtle legal impediments to development in the mountains of Colorado — important issues that in her experience Texas lawyers often fail to appreciate. She accepts the limitation and says nothing. (Client decides, lawyer abides.)

You see where this is going, don't you? The title opinion arrives, pregnant with one of those subtle "no development here" issues. Although the opinion is in her file, the Colorado lawyer does not look at it. Predictably, the Texas lawyers do not recognize the pregnancy, and the company pays millions for a tract of land that can only be used as a park.

Hypothetical 2

A wealthy client hires a lawyer to structure a trust for the benefit of his children into which he will transfer millions of dollars in life insurance. Through this device, the client will avoid $10 million in estate taxes, so long as he lives more than three years after the creation of the trust. There is an additional procedure, minor in cost and burden, which

would eliminate this three-year risk. The lawyer tells the client about the procedure but makes no recommendation one way or the other, even though she knows the client has a risky lifestyle and a history of drug abuse. The client shrugs off the option, and the lawyer is again silent. And, of course, the client dies from a drug overdose before three years pass. His children lose $10 million to estate taxes as a result.

Hypothetical 3

A lawyer is hired by a doctor to prosecute a medical malpractice case against a hospital for the death of the doctor's wife. The doctor/client tells the lawyer that he does not want to incur the expense of an expert witness, adding that he will personally testify to the negligence of the hospital. The lawyer tells the client that his opinions may not be admissible against the hospital, but she accepts the client's limitation and goes to trial. The trial court reserves a ruling on the admissibility of the doctor's expert opinions until after the verdict. The jury returns a defense verdict and jurors later say they discounted the doctor's opinions because of his obvious interest in the outcome of the case.

So, what should the lawyers do in these three situations to comply with the applicable standard of care?

- In hypothetical 1, we have a client who has already made a decision to limit the scope of the representation before even retaining the lawyer. That decision may have even been based on consultation with the in-house Texas lawyers.

- In hypothetical 2, the lawyer told the client about the additional procedure to avoid the three-year risk, but she made no recommendation. She simply accepted the client's limitation on the scope of the representation.

- And in hypothetical 3, the lawyer informed the client of one risk from the client's decision not to hire an expert, but she failed to inform of a lessor second risk.

But none of the three lawyers told the clients that they were making a mistake. None of them advised the client against the risk they were willingly accepting. Did they violate the standard of care?

It is easy to say what the "best practice" would be. All three lawyers would have advised their clients against what they believe to be a decision that is inconsistent with the client's objectives. All three would write a letter, documenting their advice — and recommendation — against the decision, commonly referred to as a "CYA" letter. And all three would continue to monitor the issue throughout the course of the representation, looking for additional opportunities to change the client's mind. But is that the standard of care or just best practices?

Keep in mind that we as a profession set our own standard of care. If a lawsuit is filed, it will be other lawyers testifying to the standard of care to which the defendant lawyer is held. But there is case law out there that says something like the standard of care is that level of conduct that a careful person would exercise in the handling of their own affairs.

With that thought, one of the tools I use to evaluate the standard of care is to ask: What would these lawyers do if they were working on a contingent fee? Would a lawyer participating in the development of the Colorado land advise against having a Texas lawyer review the title opinion? Would a careful lawyer sharing in the estate taxes simply accept the wealthy client's decision to French kiss the risk of the three-year rule? Would a lawyer on a contingency fee go to trial in a medical malpractice case without an expert witness other than the defendant? I think the answer to all three questions is no.

My answer to our question is that all three violated the standard of care. It is my belief that Rule 2.01, which obligates a lawyer to exercise independent professional judgment and render candid advice, combined with Rule 1.03, which obligates a lawyer to explain a matter sufficiently to allow the client to make informed decisions, includes the implied obligation to make recommendations against foolish decisions. We continue to believe that these are good cases for the client. But I add quickly that more than one arbitrator or jury has disagreed with me on cases that were similar in concept to these hypotheticals.

So, if you find yourself in a lawsuit alleging that you failed to adequately discourage a client from the client's own foolish decision, will you win or lose? I don't know. But I do know that is the wrong question to ask. The proper question is: Do you want to be sued and then win that lawsuit, or do you want to avoid being sued? And I can unquestionably tell you that to avoid being sued, you need to advise against the bad decisions of your client and document your advice in the proverbial CYA letter.

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