

The “Good Lawyer” & Rule 2.1

By M. H. Hoeflich
University of Kansas

Introduction

Most of us think of ourselves as fundamentally fair and honest people who want to do the right thing. At the same time we are professionals whose behavior is regulated by the Rules of Professional Conduct as adopted in our state.¹ The fundamental notions underlying the rules are that we must be loyal to our clients, maintain their confidences inviolate, and generally show diligence in representing their interests.²

The Rules of Professional Conduct are generally of three types. There are mandatory rules, which are rules which require that we take certain actions. There are prohibitory rules, which preclude us from taking certain actions. Finally, there are “permissive” or aspirational rules, which tell us that we may and, in some cases should take certain actions, but which, at the same time, are not required of us and for the failure to take such actions we can generally rest assured that we will not be punished. Thus, Rule 1.1 is a mandatory rule, for it requires that all lawyers be competent. Rule 1.6(a) is a prohibitory rule, for it requires that lawyers not reveal client confidences.

FOOTNOTES

1. The Kansas Rules of Professional Conduct are modified from the American Bar Association Model Rules of Professional Conduct and can be found at Kansas Supreme Court Rule 226 <www.kscourts.org/ctruls/atrul226.htm>.

2. In earlier ethics codes lawyers were required to show “warm zeal” in the representation of their clients. The use of the term “zeal” was abandoned in the Model Rules of Professional Conduct for fear that lawyers and clients would misinterpret the term.

Permissive rules such as Rule 1.6(b) are less common. Often they are combined as they are in Rule 2.1 with a mandatory or prohibitory rule. The heading of Rule 2.1 is "The Lawyer as Advisor." The first sentence of the rule is mandatory: "In representing a client, a lawyer shall exercise professional judgment and render candid advice." The second sentence of the rule, however, is permissive: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." Generally, most lawyer disciplinary cases involving Rule 2.1 are concerned with the first, mandatory sentence. But the second sentence, although permissive and not mandatory, is not without significance and potential dangers to the practicing lawyer.

Several of the Comments to Rule 2.1 give a bit more information regarding the permissive portion of Rule 2.1. For instance, the second paragraph states:

Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. Purely technical legal advice, therefore, can sometimes be inadequate. It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be applied.

In practice, the permissive part of Rule 2.1 may come into effect in a number of circumstances, particularly when a client, in the course of representation, wants to follow a path which the lawyer believes may be legal but which carries significant negative, non-legal implications. One need not invoke Rule 2.1, for instance, in deciding not to accept representation. Lawyers generally have the right to accept or reject a particular client as they will. Indeed, if the path a client proposes is "repugnant" to a lawyer on moral or ethical grounds, he should not accept representation.³ If he does, he may later seek to withdraw pursuant to Rule 1.16.⁴ Rule 2.1 is called into play when a client, already represented by the lawyer, proposes to undertake a course of action which the lawyer feels the client may undertake legally, but which troubles the lawyer on some non-legal ground.⁵ Let us explore several types of these situations through a series of hypotheticals.

When I was in law school my corporate law professor was fond of telling the class of law suits brought by family members against other family members where all were shareholders in a close, family corporation. He found these suits fascinating, for often the transactional costs of the suits, legal fees and expenses, far exceeded any possible gains to be won in the litigation. Yet, such suits seem to occur with some regularity. When asked why such suits

continued to be brought, even though they were economically irrational, my professor would smile and utter a single word: hatred. But what are the responsibilities of a lawyer who finds himself counsel to a party in such a suit?

In this first hypothetical situation we find a client who is undertaking litigation for a purpose other than restitution or financial gain. Let us imagine the conversation between the lawyer and the client:

Lawyer: I want you to understand that whether you win or lose this suit, the costs of bringing the suit will almost certainly be greater than any financial award you might win. Would it not make more sense to settle or drop the suit?

Client: I don't care what it costs. I want to prove to my brother that I am right and that he is wrong. That is worth more to me than money.

The lawyer's advice here has gone beyond the technically legal into simple economic analysis. Would the lawyer be violating his responsibilities under the Rules if he failed to give such advice? The answer is clearly "no." But, on the other hand, by volunteering this bit of economic information to his client, the lawyer has served his client's overall interests and has done so with the permission of Rule 2.1.

Let us take a second example. A client comes to a lawyer and reveals that he has been charged with a DUI. He explains to the lawyer that he knows that he is an alcoholic and that it is unlikely that he will be able to control his drinking. He asks that the lawyer represent him and do all in his power to protect his license. The lawyer could say nothing of the dangers of drunken driving nor suggest medical treatment. Instead, he could focus on the basic legal issues involved and simply do his best in his courtroom appearance. On the other hand, the lawyer could decide that he should be a "good" lawyer under Rule 2.1 and advise his client that he needs to seek help. He could suggest that until his alcoholism is under control, he should not drive a car for fear that he might injure or kill himself or another.⁶

In both of these cases, there is very little reason why the lawyer ought not to advise his client about the non-legal aspects of the representation. Lawyers who take the extreme "amoralist" view would argue that a lawyer is not trained to give non-legal advice and is an officious meddler when he does so. But it is difficult to see what harm would come from the lawyer offering this type of non-legal counsel. Most lawyers would be comfortable in giving such non-legal advice in these common situations.

Of course, there are caveats which must be noted to give

... "In representing a client, a lawyer shall exercise professional judgment and render candid advice."

3. See, M. Freedman, *Legal Ethics and the Suffering Client*, 36 CATH. UNIV. L. REV. 331 (1987). See, also, comments to Rules 1.2 and 1.16.

4. KRPC 1.16(b)(3)

5. If the client proposes an *illegal* course of action, then the lawyer

is prohibited from assisting by Rule 1.2(d) and by Rule 1.16(a)(4).

6. ABA/BNA, *LAWYER'S MANUAL ON PROFESSIONAL CONDUCT* 31:709 (2000)

ing non-legal advice under Rule 2.1 even in these simple cases. First, is the matter of fees. A lawyer should not attempt to fulfill the role of a minister or physician in order

... if the path a client proposes is "repugnant" to a lawyer on moral or ethical grounds, he should not accept representation.³

to increase his billable charges to his client. Such a tactic could run afoul of Rule 1.5⁷ and its requirement that fees be reasonable. Second, a lawyer must be careful not to cross disciplinary bounds. A lawyer is not a trained psychologist and should not attempt to fulfill this role for his client. Instead, a lawyer who believes that a client needs psychiatric counseling should recommend this to his client, not attempt to do it. Rule 1.1 on competence would prohibit an attorney from rendering counsel incompetently.

By and large we are, today, relatively hesitant to provide clients with non-legal counseling unless we believe that the client's position is seriously questionable. This is actually rather a modern development. One hundred years ago one of the great ethical debates in professional circles concerned how a lawyer should counsel his client about pleading the Statute of Limitations. The question was put this way. Assume a client comes to you and tells you that he contracted a valid debt ten years ago. His creditor has now died and had, during his life, failed to collect the debt he owed. Your client's creditor's widow now finds herself in difficult financial circumstances which would be greatly improved if she could collect the debt. Should you, as a lawyer, counsel your client to plead the Statute of Limitations and, thereby, avoid paying what was otherwise a valid debt? The answer given by many lawyers and legal theorists was that you should not. Although they admitted pleading the Statute was perfectly legal, it was considered immoral.⁸

Today it is hard to imagine a lawyer who would not counsel a client to plead a defense which was available to him. Indeed, to do otherwise would almost certainly be a violation of Rules 1.1, 1.3 and 1.4.⁹ It is difficult to imagine a contemporary lawyer who would, even in the hypothetical circumstances of a starving widow, counsel the client that pleading the Statute raised any moral issues at all.

Although our qualms are, without question, far less today about such matters than those of our professional ancestors a century ago, there are still large numbers of situations which will cause a lawyer to question his moral as well as his professional responsibilities for counseling his client. Let us consider four additional hypothetical situations.

Hypothetical 1: A client comes to his tax attorney and says: I want you to use every legal means possible to reduce the amount of taxes I pay. You know that your client is extremely wealthy and

could easily afford to pay his fair share. You also know that Congress is considering massive budget cuts which will result in serious national hardships.

Hypothetical 2: Your client comes to you and tells you that his wife has just given birth to a baby boy. Your client informs you that he had had a vasectomy only one year ago. He wants to sue the doctor for malpractice and seek the costs of the child's upbringing as damages. You know that such a suit would cause the child significant psychological harm.

Hypothetical 3: Your client, a drug company, tells you that it is exposing its workers to highly dangerous mutated genetic materials. It also informs you that such exposure is legal at the present time. Finally, the company tells you that such exposure may have significant health effects on people who regularly are exposed to such genetic materials, but these effects are likely not to appear for at least twenty-five years, a time lapse which the company believes is too great to be concerned about.

Hypothetical 4: Your client, a chemical company, tells you that it intends to purchase pollution rights and wants your assistance. The president of the company reveals that these rights will permit the company to release significant toxins into the atmosphere which will almost certainly hasten global warming and accelerate negative climatic changes.

In which of these four scenarios ought a morally responsible and ethical lawyer speak out to his client and attempt to counsel him on the non-legal aspects of his plans?

The first situation is a fairly common one. It is long established in our tax jurisprudence that every citizen has a right to engage in legal tax avoidance. While you may believe that your client should pay more taxes, your view is undoubtedly not his nor that of a majority of tax lawyers. Further, there is very little likelihood that your arguments will be effective. Thus, this would seem to be a situation under Rule 2.1 in which you need not advise on non-legal matters.

The second hypothetical situation poses a somewhat more difficult problem. While what your client proposes is legal, he is unlikely to prevail and, furthermore, his proposed suit might have significant negative psychological impact on his child when he is older. Most of us would feel obliged to say this to our client. We would counsel not only on the legal point that such a suit would most likely

7. KRPC 1.5(a).

8. See, M.H.Hoeflich, *Legal Ethics in the Nineteenth Century: The Other Tradition*, 47 UNIV. KS. L. REV. 793 (1999).

9. KRPC 1.1,1.3,1.4 ("Competence" "Diligence" "Communications with Client")

fail, but also that the very filing of such a suit might permanently damage his child.¹⁰ Many lawyers would simply decline to represent a client in such a case.

The third hypothetical problem is, at least for some, even more difficult. Here, it is clear that the client is acting within the law, as in the first hypothetical scenario. Given the facts presented, a cautious lawyer might well counsel his client that such behavior might instigate tort liability at some point. At the same time, the client has made clear that twenty-five years is too long a period for it to be concerned with. On the other hand, the moral issue is not insignificant. It is clear that the client is doing significant harm to numbers of people and is doing so knowingly. In this situation most lawyers, I believe, would express some serious concerns to the client and might even be drawn to seek to withdraw from representing the client on the grounds that the client's actions were repugnant.

The fourth hypothetical case is probably a fairly easy one for most lawyers, at least those without a heightened sense of environmental sensitivity. Here what the client is doing is, again, within its legal rights. Moreover, the pollution which it is producing has been specifically foreseen by Congress and deemed acceptable [so long as the company purchases the necessary transferable rights]. I believe that most lawyers would not attempt to advise their corporate client of the long-term effects of the pollution. Clearly, the client is aware of these but has decided not to act to protect the environment. While this may be, over the long run, a catastrophic decision for humanity, most lawyers would believe that they did not have a responsibility to advise their clients of this.

What do these four hypothetical situations tell us? First, I believe that those which would most likely result in a lawyer giving some form of non-legal advice are those in which there is a danger of specific harm to identifiable individuals [the child, the company's employees]. It is not insignificant that one is also a case where there is a greater possibility of future tort liability. I believe that most lawyers will be less likely to give their clients non-legal advice when the potential damage is more tenuous and those damaged less easily identified.

These hypothetical situations also suggest that when it is clear that the client is sophisticated and has made up his mind as to a specific course of action and understands fully the consequences of that action, a lawyer is going to be less inclined to give non-legal advice. In effect, I think that most lawyers will and should provide non-legal advice when they believe that their clients have not considered these non-legal factors fully. Rule 2.1 permits a lawyer to give advice, but it does not justify a lawyer attempting to "bully" his client.¹¹ Further, once a client has made an informed decision as to how to proceed, there is little the lawyer stands to gain by arguing with the client.

We may best understand the dynamics of Rule 2.1 illustrated in these four hypothetical situations, by speaking in

terms of client autonomy. Lawyers owe their clients loyalty, confidentiality, and diligence, but they are not their clients' consciences. Clients are autonomous moral and economic beings. If they choose to follow a path which a lawyer finds morally or economically troubling, then the lawyer may choose not to represent them but he should not take it upon himself to deprive them of the right to make decisions or to have him fully carry out their instructions.

At some point the lawyer's hesitancy or disagreement with his client may well call into question his diligence as required by Rule 1.3 as well as the traditionally held notion that a lawyer owes his client zealous representation. Advice about non-legal matters should be given pursuant to Rule 2.1 when the lawyer believes that the client has not fully thought out his decision or when the lawyer believes that the decision was not made in a cool, rational manner, in other words if the client's decision is not, or ought not to be, final. If this is not the case, and the client's decision is informed and final, then I believe that a lawyer may not attempt to force his own morals on his client.

The greatest danger for a lawyer who wishes to provide non-legal advice to a client is when the lawyer's advice deals with a controversial moral or religious issue such as abortion. This thorny question was recently considered by the Tennessee Board of Professional Responsibility.¹² The question presented was whether counsel, appointed to represent a minor in a proceeding to bypass judicially the parental consent otherwise required for that minor to have an abortion, could ethically "advise the minor seeking an abortion about alternatives and/or advise her to speak to her parents or legal guardian about the abortion."

Such advice would seem to be permitted under Rule 2.1. Further, many lawyers who are religiously or ethically opposed to abortion might feel that they had a religious or moral obligation to provide additional information. In relation to the four hypothetical cases given above, this would seem to be a situation where the potential harm was both imminent and to a specific individual [mother and child] and, further, where the client might not have fully and rationally considered all of the ramifications of her proposed actions.

The Tennessee Board of Professional Responsibility sounded a note of caution to those lawyers who would be inclined to give non-legal advice in this situation. The Board stated that whether such non-legal advice was "ethically appropriate" would require a "case by case analysis."

***By and large
we are, today,
relatively
hesitant to
provide
clients with
non-legal
counseling
unless we
believe that
the client's
position is
seriously
questionable.***

10. See, *Shabeen v. Knight*, 11 Pa. & C.2d (1957).

11. A bizarre example of such "bullying" is to be found in *Florida Bar v. Johnson*, 511 So.2d 295, 296 (Fla.1987) where the lawyer, also an ordained minister of the Church of Christ, threatened his ex-client

"with a variety of biblical curses."

12. TN ETH. OP. 96-F-140 (1996), 1996 WL 340719 (Tenn. Bd. Prof. Resp.)

If the minor is truly mature and well-informed enough to go forward and make the decision on her own, then counsel's hesitation and advice for the client to consult with others could possibly implicate a lack of zealous representation...

In trying to assess how lawyers should follow the permissive portion of Rule 2.1, it is clear that there are not always easy answers. On the one hand, a "good" lawyer will provide his client with non-legal advice when the client asks for it, he feels competent to give it and he charges reason-

ably for it. In those cases where the client does not ask, a lawyer must take greater care.

Generally, if a lawyer feels that a client's decision to take a proposed course of action is not definite or has not been made in a cool and fully informed manner, then the lawyer may give non-legal advice. Also, as stated above, potential harm to the client and/or an identifiable other person will also be a significant factor. If he does decide to give non-legal advice, however, he must be certain not to "bully" the client nor, by giving such advice, fail in his obligations of competence, diligence and loyalty.¹³

13. For a case in which a lawyer's good intentions went wrong, see, *In re Brantley*, 260 Kan. 605 (1996).

ABOUT THE AUTHOR

Michael Hoeflich has a B.A. and M.A. from Haverford College, an M.A. from Cambridge University, and a J.D. from Yale Law School. He has taught at the University of Illinois, Syracuse University, and the University of Kansas. He also served as dean of the College of Law at Syracuse University for six years and as dean of the School of Law at the University of Kansas for six years. He stepped down from the deanship at KU on July 1, 2000. He is currently the John H. & John M. Kane Distinguished Professor of Law at the University of Kansas. He has published six books and over sixty major articles. He teaches and writes in the areas of legal history, legal ethics, contract law, and technology law, among others.

NOTICE OF INTENT TO REAPPOINT BANKRUPTCY JUDGE

The current term of office of James A. Pusateri, United States Bankruptcy Judge for the District of Kansas at Topeka, is due to expire on December 7, 2000. The United States Court of Appeals for the Tenth Circuit is considering the reappointment of Judge Pusateri to a new term of office and has determined that he appears to merit reappointment subject to public notice and opportunity for public comment.

Upon reappointment, Judge Pusateri would continue to exercise the jurisdiction of a bankruptcy judge as specified in title 28, United States Code; title 11, United States Code; and the Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, §§ 101-122, 98 Stat. 333-346. In bankruptcy cases and proceedings referred by the district court, Judge Pusateri would continue to perform the duties of a bankruptcy judge that might include holding status conferences, conducting hearings and trials, making final determinations, entering orders and judgments, and submitting proposed findings of fact and conclusions of law to the district court.

Members of the bar and the public are invited to submit written comments for consideration by the court of appeals regarding the reappointment of Bankruptcy Judge Pusateri to a new term of office. All comments will be kept confidential and should be directed to Robert L. Hoecker, Circuit Executive, Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257.

Comments must be received no later than Friday, August 25, 2000.