

## The Role of the Lawyer in Relation to the Client: Boss, Humble Servant or Dr. Phil?

---

*David A. Tracy*  
*Naylor, Williams & Tracy, Inc.*  
*1701 South Boston Avenue*  
*Tulsa, Oklahoma 74119*  
*918-582-8000*  
*918-583-1210 (fax)*  
*davidtracy@gabrielmail.com*  
*www.nwtlaw.com*

*There's a time to take a stand and a time to find a way.  
Good lawyering is knowing the difference.<sup>1</sup>*

## INTRODUCTION

When dancing, one member of the couple has to lead. That person generally leads throughout. The choreography of the attorney-client relationship is not so clearly delineated. When does the client make the decision, and when does the attorney have control? In the case of the ABA Model Rules of Professional Conduct<sup>2</sup> (“Model Rules”), the rules giveth, and the comments taketh away.

A traditional rule of practice has been to allocate decision making as to “ends” and “means.” The client makes the decisions regarding the ends to be achieved in the legal matter, and the attorney decides the means to achieve those ends.<sup>3</sup> As any lawyer with a modicum of practical experience knows, the line between ends and means is often not distinct. The Preamble to the Model Rules sets forth a lawyer’s multiple obligations as a representative of a client, an officer of the Court, and a public citizen.

What decisions does the client control? At what point does the attorney have the right to decline to carry out client requests that are not illegal or unethical? Can one make

---

<sup>1</sup>Justice Harold G. Clarke, Ga. Supreme Court, *Professionalism, Repaying the Debt*, 25 GA. St. B. J., 169, 171 (1989) (quoting a court colleague, Justice Hardy Gregory)

<sup>2</sup>Reference is made in this presentation to the 2006 version of the Model Rules which is available on-line at [http://www.abanet.org/cpr/mrpc/mrpc\\_toc.html](http://www.abanet.org/cpr/mrpc/mrpc_toc.html).

<sup>3</sup>M. Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 Amer. B. Found. Res. J. 1003.

enforceable rules regarding such an intimate relationship? This paper explores these questions.

### **THE MODEL RULES AND THE ATTORNEY-CLIENT RELATIONSHIP**

The attorney-client relationship is governed primarily by Model Rule 1.2, appropriately titled, “Scope Of Representation And Allocation Of Authority Between Client And Lawyer:”

“(a) Subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”<sup>4</sup>

The rule appears to clearly give the client control of the ends, and the attorney control of the means, in consultation with the client. The comment to the rule muddies the waters. While at once giving “ultimate authority” to the client to determine the purposes to be served by legal representation, the attorney has “implied” authority to invoke those methods necessary to accomplish those ends, always in consultation with the client.

If the attorney and client disagree regarding the means to accomplish an end, the comments are less instructive.

“Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved. Other law, however, may be applicable and should be consulted by the lawyer. The lawyer should also consult with the client and seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. See Rule 1.16(b)(4).

---

<sup>4</sup>Model Rule 1.2(a).

Conversely, the client may resolve the disagreement by discharging the lawyer. See Rule 1.16(a)(3).<sup>5</sup>

While there are certain ethical rules that do apply in specific circumstances, the majority of these disputes with a client concerning means, or process, must be resolved in the context in which they arose. This involves client relations and client management. These are realities of contemporary family law practice for which law school did not prepare us. The field of family law is maturing into multi-door dispute resolution options, and increasingly requires multi-disciplinary skill sets. If we do not keep up, we will increasingly be perceived as not meeting client needs. This is an essential element of core competence in family law.<sup>6</sup>

#### **HOW WE ARE FAILING AT CLIENT RELATIONS, AND WHAT WE CAN DO ABOUT IT.**

A recent negotiation study found that, compared with a similar study 25 years ago, the percentage of lawyers perceived as adversarial as has gone up, and the number of lawyers perceived as ineffective has also increased.<sup>7</sup> In addition, family law had the highest percentage of lawyers rated as adversarial, and the lowest percentage of lawyers rated as problem-solving attorneys, compared to any other practice area.<sup>8</sup>

---

<sup>5</sup>Model Rule 1.2 Comment.

<sup>6</sup>See Model Rule 3.1

<sup>7</sup>Schneider, Mills, What Family Lawyers Are Really Doing When They Negotiate, 44 Fam. Ct. Rev. 612, 613 (2006).

<sup>8</sup>Id, at 617.

In another recently-reported study<sup>9</sup>, a group of attorneys, alternative dispute resolution professionals, judges, custody evaluators, law professors, law students, and others rated the skills they thought were most important to family law practice:

<b>Skill</b>	<b>Rating (%)</b>
Listening	97.0
Setting realistic expectations for clients	93.6
Involving clients in decision-making	93.1
Identifying clients' interests	91.3
Problem solving	88.6
Negotiating	88.0
Keeping clients informed of case progress	87.4
Working with clients in emotional crisis	80.5
Recognizing and resolving ethical dilemmas	77.8
Interviewing	77.7
Conveying empathy	72.7
Client counseling	67.4
Explaining ADR processes for client consideration	65.2
Organization and management of legal work	60.9

---

<sup>9</sup>Heeden, Salem, What Should Family Lawyers Know? Results of A Survey of Practicioners And Students, 44 Fam. Ct. Rev. 601, 606 (2006).

Legal analysis and reasoning came in 17<sup>th</sup> on the list of important skills, at 59.1%.

Courtroom advocacy was listed 19<sup>th</sup>, at 43.0%.<sup>10</sup>

Respondents were also asked to rank a list of knowledge areas by importance to family law practice. Socratic skills and advocacy again fall down the list.

<b>Knowledge Area</b>	<b>Rating (%)</b>
Understanding financial issues related to divorce	85.9
Impact of separation and divorce on children	85.3
Ethical dimensions of family law practice	82.4
Governing law, statutes	80.8
Family court procedure	76.5
Impact of separation and divorce on parents	76.0
Understanding dynamics of domestic violence	74.9
Understanding the dynamics of child abuse and neglect	72.4
Understanding mediation process	71.9
Understanding the role of the mediator	71.1
Understanding the role of mental health professionals	66.9
Understanding the lawyer's role in mediation	66.2
Understanding the role of a child's lawyer	60.9
Knowledge of services and other resources available in your community	58.6
Understanding typical practices in your community	57.8 <sup>11</sup>

---

<sup>10</sup>Id.

<sup>11</sup>Id., at 606.

Social psychologist Tom Tyler, a former research fellow at the American Bar Foundation, has found that lawyers and clients have differing perceptions of what matters in a divorce case. According to Tyler, attorneys think clients are most interested in whether they've "won" than how the problem was solved. Clients report different perceptions.

"Clients care most about the *process* by which their problems or disputes are resolved. In particular, they place great weight on having their problems or disputes settled in a way that they view as fair. The second most important issue to clients is achieving a *fair or equitable settlement*. The *least* important factor is the number of assets they end up winning."

Tyler 1988: 40 (emphasis added).

Tyler's claim about what matters most to clients is based on a very large body of social science research about what is termed "procedural justice," going back to the mid 1970s.

These survey and study results reflect the growing recognition of the importance of non-courtroom alternatives to dispute resolution, and the utility of a multi-disciplinary approach to helping clients through the divorce process. What we spent years learning in law school may not be the most important aspect of the divorce client's dilemma. While we are expected to know domestic relations law and trial procedure, today's family law client is looking for more. Professionalism and the need to improve the image of attorneys as problem-solvers dictate that we effectively manage domestic relations client contact regarding legal ends *and* means to achieving them. A few humble suggestions follow.

*A. Listen actively - let the client talk*

We must obviously engage our clients in the decision-making process, regarding means and ends, but that engagement must take into consideration the client's emotional state. Clients in various stages of grief over the loss of their relationship may be

alternatively feeling angry, guilty, controlling, withdrawn, in a state of denial, competitive or overly-accommodating. The client may be suffering from a mental impairment or disability.<sup>12</sup> Although few lawyers receive any formal training in dealing with a client's mental or emotional dynamic, we are forced to deal with it on a regular basis. The client's emotional state can affect our advice to the client, but we are often guessing as to how the client's emotional state should affect our presentation to the client.

One of the best ways to appeal to the higher-functioning client is to ask open ended questions. Your client interviews are not cross-examination. When you ask a client a "yes ro no" questions, or questions requiring only a rote information, that is the answer you will likely receive. It tells you very little. Consider the information to be gleaned from the following examples:

<b>Closed Question</b>	<b>Open-ended Question</b>
How old are your children?	Tell me about your children.
Do you write any checks?	Describe for me how you and your spouse have historically handled family finances.
Do you and your spouse fight?	Please give me an example of how you and your spouse handle conflict between the two of you.
Do you want you or your spouse to leave the house?	What concerns do you have as you look ahead to separating from your spouse?
Do you have any questions regarding . . . ?	What questions do you have regarding this subject?

---

<sup>12</sup>The Model Rules invoke special considerations for clients under a disability. See Model Rule 1.14.

The closed questions may give you information you need, but they do little to relieve the client's angst in the unfamiliar environment of your office. Open-ended questions give the client an opportunity to present an oral narrative history to you in a manner more likely to relieve client stress (or at least less likely to exacerbate it). It also promotes a positive attorney-client relationship.

The following very helpful tips will assist in promoting positive client relationships, even during difficult conversations:

**“Minimize distractions** - There are many types of barriers to effective communications. The wise lawyer will try to minimize the physical barriers. This means that there should be a policy of "No interruptions, except for emergencies" during client interviews. It also means making sure there are no preventable distractions like a noisy air conditioning unit or having a room temperature too hot or too cold.

**“Maintain eye contact** - Looking someone in the eye while they are talking assures them you are the focus of their attention. Appearing as if you are reading something on your desk or computer screen while the client is talking is a very poor practice.

**“Act like you are paying attention** - Have you ever seen a TV reporter interview someone? They are animated, encouraging the interview subject with nods and other positive nonverbal feedback. Practice being an active listener, rather than a passive one. Your actions and expressions should encourage your client to tell their story. This is one reason to minimize note-taking at first. When a serious matter is mentioned, it is appropriate to have a more serious expression.

**“Be alert for non-verbal cues** - Most people make assumptions based on the body language of the speaker. Everyone has had the experience of listening to someone make statements while their body language and mannerisms practically scream out, "I'm lying. I'm lying." Observing your client's posture, tone and expression may help your initial communication process. Seasoned trial lawyers know that jurors often give more weight to the way a witness says something than to precisely what was said.

**“Repeat back what was said** - One of the best ways to verify understanding in communications is to rephrase and repeat back the message. This technique reassures the client that you did understand what was said, and may provide an opportunity to correct a misunderstanding.”<sup>13</sup>

*B. Don't feed the angry client*

It is often tempting to defuse our client's anger by marching to the courthouse with another poison missive, blaming the other spouse (or other lawyer) for the problem. When the client calls in anger and wants to know what you will do about it right then, that is a good time to wait for instructions from the higher-functioning client who you hope will surface shortly. The aspirational standards of the American Academy of Matrimonial Lawyers state that attorneys “should refuse to assist in vindictive conduct” toward the other side, and “should strive to lower the emotional level” of the dispute.<sup>14</sup> If the angry client persists in exacerbating conflict, seek to turn the client's anger over to the professional most able to manage it, that is, a mental health professional.

For most of us, however, clients who are not already in counseling voluntarily will rarely visit with a mental health professional at their lawyer's suggestion. You may be convinced that a session or two with a counselor would clarify the client's thinking and improve the attorney-client relationship, but convincing a client to go can be problematic. One recent publication suggests requiring therapy or coaching for new clients, and reframing the concept to make it appear more useful or appealing to the client.

---

<sup>13</sup>Calloway, *The Initial Client Interview*, 73 Okla. B. J. 21 (2002).

<sup>14</sup>American Academy of Matrimonial Lawyers, *Bounds of Advocacy*, §1.3

“I explain that I require therapy not because I think they are mentally disturbed but because they are going through perhaps the worst experience of their lives and so should have a well-trained person to guide them through it. As an example, I describe Mammoth Cave, a huge cavern in Kentucky that is beautiful, with unimaginable and wondrous sites. But it is also a dangerous labyrinth, which, if entered without a guide, could prove deadly. A counselor, then, serves as a guide to help you get through your crisis safely, and perhaps even see some of the beauty along the way. Most people understand advice couched in those terms.”<sup>15</sup>

You will obviously want to develop your own metaphor to require or suggest a divorce coach. It would also help to develop a relationship with one or two professionals who will receive the bulk of your referrals for divorce adjustment therapy or coaching. However you do it, getting the client to a mental health professional is one of the best ways to improve the attorney-client relationship. It provides a much more effective outlet for the grieving client, and promotes more healthy dialogue concerning those matters which the attorney has special expertise.

If your client simply will not get qualified help, use the active listening techniques described above. Let the client vent frustrations, angers, fears or anxieties to you (within reason). Venting may help the client defuse the impairment-inducing effects of these toxic sentiments or feelings.

Know and enforce your limits for this type of client management, lest the toxic effect spill onto you.

*C. Promoting realistic client expectations*

---

<sup>15</sup>Chinn, *How to Build And Manage A Family Law Practice*, American Bar Association (2006)

One way to enhance client communication is to restate and repeat your advice over time, and to document each occasion and the advice given. In addition, you should document your client's reaction to the advice on each occasion. This will help you establish a pattern of client behavior which may prove useful as the attorney-client relationship matures. In addition, if client promises to take advice do not translate into action, you will have written as well as oral reminders of what transpired in the relationship.

*D. Discuss non-court alternatives during the first client meeting*

A lawyer can wear many hats in the course of representing a client:

“[2] As a representative of clients, a lawyer performs various functions. As **advisor**, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As **advocate**, a lawyer zealously asserts the client's position under the rules of the adversary system. As **negotiator**, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an **evaluator**, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others.”<sup>16</sup>

None of these roles, advisor, advocate, negotiator, or evaluator, is superior to the other. We best meet our ethical obligations to our clients by having an open discussion about our client's goals and the best means to achieve those goals. Many family law clients, given complete information concerning process options, may opt for more cooperative, less competitive approach to resolving their disputes. As attorneys we owe them that opportunity to participate fully in the dispute resolution process.

A recent study indicates that clients want to discuss alternative problem-solving techniques early in the attorney-client relationship. After extensive interviews with parents

---

<sup>16</sup>Model Rules, Preamble (emphasis added).

involved in the court system in Connecticut, researchers found that only 12 percent of parents felt they had achieved somewhat positive results from the legal process. Parents' primary suggestions to attorneys were to give clients legal counsel concerning dispute resolution options, and which option would be the best direction for that family, and to conduct negotiations to reach solutions as soon as possible.<sup>17</sup>

*E. Invite third party involvement, but beware the Greek Chorus*

The Greek Chorus is a creation of ancient Greek theater. A small choir empathetic to the main character would sing about the virtues, plight or transformation of the main characters in the play. While engaged through song in the fortunes or misfortunes of the pivotal characters, still it stood separate from the direct action of the play. Sometimes the Greek Chorus highlights sympathetically the flaws or foibles of the protagonist; at other times it casts authority figures causing trouble for the protagonist in a negative or sarcastic light.

Clients often have their own Greek Chorus. Friends and relatives with the best of motives are ready to offer emotional support, and opinions concerning the client, the attorney, or others involved in the case. The Greek Chorus can be a useful tool in client management. It can also put a strain on the attorney-client relationship.

*F. Suggest a second opinion*

One method of self checking is an assessment by a disinterested colleague. If you can find a fellow attorney who is not involved in your case or your firm who is willing to

---

<sup>17</sup>Pruett, Jackson, The Lawyer's Role During The Divorce Process: Perceptions of Parents, Their Young Children, and Their Attorneys, 33 Fam. L. Q., 283-303-304 (1999).

discuss your attorney-client dilemma, your professional colleague may be able to provide perspective on your relationship with a particular client. If you feel the client could benefit from a different perspective, suggest that the client solicit a second opinion from another professional. This can reaffirm your advice to the client, or provide additional perspective for both attorney and client. In either event, it demonstrates attorney confidence and should enhance the attorney-client relationship.

*G. Withdraw from the case*

If you cannot either persuade your client toward your suggested method of case management, or reconcile yourself to following client instruction on a matter, it is time to consider withdrawing from a case. If you are not an attorney of record, you may communicate directly with the client regarding withdrawal. If you are an attorney of record, the court must grant permission for a withdrawal. In either event, withdrawal must be accomplished so as not to prejudice the client's rights.<sup>18</sup>

## CONCLUSION

When a family enters the legal system, the family system often takes a back seat. As lawyers, we are trained to deal with the legal system, not the family system. The formalities of the legal system and our tendency to mechanize our legal practice can blind us to the real needs and interests of our clients. As a result, and despite our best intentions, we increase the anxiety level of our clients and exacerbate conflict. Instead of starting each case in litigation mode and backing into alternative dispute resolution methods, we should be explaining to each client at the outset the dispute resolution options available to them, and

---

<sup>18</sup>Model Rule 1.16.

allow the client to self-select the problem-solving techniques to be applied to their case. There will certainly be some cases calling for formal litigation process. However, given the choice, many clients would opt for a less formal, less mechanistic attempt at problem solving that takes more into consideration the family dynamic. Ironically, giving the client more responsibility in determining process and outcome will broaden, not inhibit, the attorney's capacity to assist in creative and effective problem solving. This will provide us the opportunity to best meet our clients needs in a more time efficient and cost effective way.

We must also take precautions to avoid the role of rescuer, protect the overly-accommodating client, and avoid feeding the angry or shadow client. All of this requires sensitivity to our client's family dynamic, and client communications that create a context for effective shared decision-making between attorney and client. Our individual and collective professional reputations depend upon it.

*Let it be a dance we do.  
May I have this dance with you?  
Through the good times and the bad times, too,  
Let it be a dance.  
– Ric Masten*