BOUNDS OF ADVOCACY

American Academy of Matrimonial Lawyers
Standards of Conduct

Preface

The Bounds of Advocacy represents the collective wisdom of the 1,200 Fellows of the American Academy of Matrimonial Lawyers ("AAML"). The Fellows of the AAML have devoted their professional lives to representing husbands, wives and other family members in the throes or aftermath of marital dissolution. These standards emerge as the first attempt by such a voluntary lawyer's association to draft ethical standards for its specific area of practice that go beyond those required by the American Bar Association and state ethics codes.

The idea for the Bounds of Advocacy was conceived in November, 1987, by James T. Friedman of Chicago, Illinois, then president of the AAML. He appointed a committee of practicing matrimonial attorneys from throughout the United States with diverse views and experience. Beginning in early 1988, the committee worked to identify and answer the most significant ethical issues confronting matrimonial practitioners. In addition, questionnaires were sent to all of the Academy Fellows, asking for their ethical concerns. Hundreds of detailed, well-considered and often thought-provoking responses were received. These responses are the foundation upon which the Bounds of Advocacy was created.

The process accelerated when Professor Robert Aronson, a noted expert on legal ethics from the University of Washington, agreed to assist the committee as an advisor. Numerous drafts resulted from this collaboration. Virtually each word of every draft was discussed and sometimes argued much as medieval theologians might have debated their texts. The resulting draft of the standards was sent to Academy Fellows, some other lawyers and judges and members of related professional disciplines for review and critical comment. The committee is indebted to the lawyers, judges, professors and others, for their invaluable help. The committee especially wants to thank Presidents Friedman, Leonard L. Loeb of Wisconsin, Donn C. Fullenweider of Texas and Sanford S. Dranoff of New York for their encouragement and support during this lengthy process.

This work would very likely be different had any of us not served on the committee. However, special acknowledgement belongs to our patient leader, Steve Sessums, and our ivory tower representative, Rob Aronson. Steve led us so well we did not realize we were being led, and Rob distilled our meandering thoughts into a coherent whole.

Finally, we wish to thank the entire Academy for allowing us the pleasure, the honor and the satisfaction of participating in this unique project, creating what we hope we have created, a stimulating and worthwhile publication.

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Preliminary Statement

The primary purpose of the Standards of Conduct is to provide guidance to matrimonial lawyers confronting moral and ethical problems; that is, to establish bounds of advocacy. Existing codes often do not provide adequate guidance to the matrimonial lawyer. First, their emphasis on zealous representation of individual clients in criminal and some civil cases is not always appropriate in family law matters. Second, the existing codes delineate the minimum level necessary to avoid professional discipline, rather than describe optimum ethical behavior toward which attorneys should strive. Third, the rules are often vague and provide contradictory guidelines in some of the most difficult family law situations. The Standards of Conduct are an effort to provide clear, specific guidance in areas most important to matrimonial lawyers.

In many ways, matrimonial practice is unique. Family disputes occur in a volatile and emotional atmosphere. It is difficult for matrimonial lawyers to represent the interests of their clients without addressing the interests of other family members. Unlike most other concluded disputes in which the parties may harbor substantial animosity without practical effect, the parties to matrimonial disputes may be required to interact for years to come. In addition, many matrimonial lawyers believe themselves obligated to consider the best interests of children, regardless of which family member they represent. A survey of Academy Fellows indicated that the harm to children in an acrimonious family dispute was seen as the most significant problem for which there is insufficient guidance in existing ethical codes.

Canon 7 of the ABA Code of Professional Responsibility (CPR) provided: "A Lawyer Should Represent a Client Zealously Within the Bounds of the Law." Ethical Consideration 7-1 indicates that "bounds of the law"' include "Disciplinary Rules and enforceable professional regulations." Many courts, bar disciplinary committees and individual lawyers interpreted the CPR to require an attorney to do everything, short of violating the law, to achieve the client's goals. Attorneys of this persuasion were therefore obligated to carry out even those client directives which the attorney found harsh, ethically distasteful or unnecessarily harmful to opposing parties, counsel or other persons, such as children.

Partly in response to the overzealous representation occasioned by the CPR and overly narrow interpretations of "bounds of the law," the ABA Rules of Professional Conduct (RPC) eliminated the zealous representation language. However, the Rules neither clearly indicate the appropriate level of representation to replace zealousness nor do they "exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."[1]

In recent years, an increasing number of individual lawyers and associations have observed a widening gap between the minimum level of ethical conduct mandated by the RPC and the much greater level of professionalism to which attorneys should aspire. Some attorneys have ignored the caveat that the Rules do not "exhaust the moral and ethical considerations" which characterize the practice of law at the highest level. Local and state bar associations, along with a number of state and federal courts, have adopted codes of professionalism attempting to raise the level of ethical practice above the minimum necessary to avoid discipline.

The RPC are addressed to all lawyers, regardless of the nature of their practices. This generality means that, with rare exceptions, issues relevant only to a specific area of practice cannot be dealt with in detail or cannot be addressed at all.

The Preamble to the RPC states:

> Virtually 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 upright person while earning a satisfactory living.

The RPC's rules of general applicability may not, however, be the most appropriate framework to resolve these conflicting responsibilities for a particular area of practice. Many Fellows of the American Academy of Matrimonial Lawyers have encountered instances where the RPC provided insufficient, or even undesirable, guidance. Most attorneys—and presumably all Academy Fellows—are able to distinguish "black" (unethical or illegal conduct) from "white" (ethical and proper practice). This work, therefore, is directed primarily to the "gray" zone where even experienced, knowledgeable matrimonial lawyers might have doubts.

Conduct permitted by the RPC cannot be the basis for state bar or court discipline. Hence, the Standards here established for matrimonial lawyers use the terms "should" and "should not," rather than must," "shall," "must not" and "shall not." Clearly, since these Standards promote a level of practice above the minimum established in the RPC, their use to establish a duty of care in a malpractice action is inappropriate.

However, the Standards have perhaps weighed certain principles more heavily in the balancing process than previous codes. While reaffirming the attorney's obligation of competent and zealous representation, the Standards promote greater professionalism, trust, fair dealing and concern for opposing parties and counsel, third persons and the public. In addition, they encourage efforts to reduce costs, delay and emotional trauma and urge interaction between parties and attorneys on a more reasoned, cooperative level.

Some Standards elaborate upon RPC rules or relate those rules to issues confronting matrimonial lawyers. Each Standard is followed by a Comment. These do not have the same force as the Standards. Rather, the Comments are intended to explain, provide examples of conduct addressed and, in some instances, suggest limitations of the application of the Standard. To the extent that a Comment appears to conflict with a Standard, the Standard prevails.

In drafting the Standards of Conduct, the Bounds of Advocacy Committee observed a number of conventions:

(1) Whenever the Standards or Comments refer to "an attorney," "lawyer" or "matrimonial lawyer," the reference is to an attorney practicing family law, exclusively or in an individual case. This area of practice is described in many ways, including "divorce," "domestic relations" and "family law." In the absence of a universally accepted designation, the choice was the term used by the AAML —"matrimonial law."

(2) The conduct of attorneys, in general, is covered by the RPC. Therefore, an effort was made to avoid repetition of rules and principles already addressed in the CPR and RPC. For example, the basic conflicts of interest requirements are addressed in the CPR and RPC. The Bounds of Advocacy address only those conflicts where additional guidance is deemed desirable, or where the RPC and CPR do not adequately govern the unique requirements of family law practice. For that reason these Standards do not address the matrimonial lawyer's obligation of honesty and candor in dealing with the Court since that obligation is adequately covered by other bodies of law.

(3) Citation to legal authority has been kept to a minimum. Where it is appropriate to cite an official code, references are to the ABA Model Rules of Professional Conduct. It is recognized that some jurisdictions retained the Code of Professional Responsibility and others significantly amended the ABA Model RPC. Other states retained the CPR format with amendments to comport with the substance of the RPC. In all situations, attorneys should consult the applicable code in their jurisdictions, along with relevant statutory and case law.

(4) The fact that some clients, lawyers and judges are women and some are men is reflected in the Standards of Conduct. References to gender have been eliminated where possible. In those instances where elimination of gender-specific pronouns would be unduly awkward, sometimes the masculine and sometimes the feminine is used-in roughly equal proportions.

1. Attorney Competence

All lawyers should undertake representation only in matters for which they have the necessary knowledge and skill.[2] Several aspects of the competency requirement are particularly applicable to matrimonial lawyers.

1.1 An attorney is responsible for the competent handling of all aspects of a representation, no matter how complex.

Comment

Matrimonial matters often involve issues beyond questions of divorce, custody and support, such as property, tax, corporations, trust and estates, bankruptcy, and pensions. All matrimonial lawyers should possess knowledge sufficient to recognize the existence of potential issues in the myriad legal areas relevant to the representation. An attorney may properly undertake a matter for which he lacks the necessary experience or expertise if "in good faith he expects to become qualified through study and investigation, as long as such preparation would not result in unreasonable delay or expense to his client."[3] Proper handling might include engaging (with the client's consent) persons knowledgeable in other fields to assist in gathering the knowledge and information necessary to represent the client effectively. An attorney who cannot obtain competence through reasonable study and preparation should seek to withdraw or, with the client's consent, associate with or recommend a more expert matrimonial lawyer. **See Standard 2.4** as to the issue of the client's refusal to give consent or inability to pay for costs. Nothing in this Comment should be construed to require the attorney to advance costs.

1.2 An attorney should be sensitive to common emotional and psychological problems. When an attorney believes that such problems are interfering with effective representation or

with the client's ability to function, he should suggest that the client seek the help of a mental health professional.

Comment

Clients often come to matrimonial lawyers with "emotional baggage" that hinders their ability to make well-considered decisions about their case or interact in a constructive manner with other family members, opposing counsel, or their own attorney. Recognizing and helping the client deal with emotional problems may be essential to an effective attorney-client relationship. Competent representation may require that the attorney recommend that the client consult a mental health professional. See Standards 2.9, 2.10, 2.11 and fn. 22.

1.3 An attorney should not advise a client about a matter concerning which the attorney is not sufficiently competent.

Comment

No attorney has complete command of every field of the law or every issue that may be encountered in a family law matter. Clients, however, often ask matrimonial lawyers to provide psychological or investment counseling or to provide advice on issues of real estate and corporate law. A matrimonial lawyer should recommend that such a client consult more knowledgeable lawyers or other professionals when in the best interest of the client.[4]

1.4 An attorney should be knowledgeable about alternative ways to resolve matrimonial disputes.[5]

Comment

Matrimonial law is not simply a matter of winning or losing. At its best, matrimonial law should result in disputes being resolved fairly for all parties, including children. An alternative to courtroom confrontation may achieve a fair outcome. Parties are more likely to abide by their own promises than by an outcome imposed by a court. In some cases, alternative dispute resolution mechanisms may not be appropriate or workable due to the nature of the dispute or the animosity of the parties. Under certain circumstances, litigation may be the best course, but a negotiated resolution is desirable in most family law disputes.

Alternative dispute resolution mechanisms may establish a positive tone for continuing post-divorce relations by avoiding the animosity and pain of court battles. Parents who litigate their custody disputes are more likely to believe the process had a detrimental effect on relations with the divorcing spouse than parents whose custody disputes are mediated. When resolution requires complex trade-offs, the parties may be better able than the court to forge a resolution that addresses their individual values and needs. Alternatives to litigation are often less expensive; however, the client should be informed that such mechanisms may not necessarily reduce the cost because the matrimonial lawyer may need to prepare the case as thoroughly as for trial. Thus, it is essential that matrimonial lawyers have sufficient knowledge about alternative dispute resolution to enable them to understand its advantages and disadvantages. The attorney may then be able to determine when it is appropriate to recommend alternative methods to the client.

1.5 An attorney should act as a mediator or arbitrator only if competent to do so.

Comment

No one should engage in the mediation or arbitration of marital disputes without adequate education and training.[6] There are many ways to acquire the necessary knowledge and skill, including continuing legal education, formal training programs, informal training by peers, law school training programs and experience.

A matrimonial lawyer is in the best position to understand the likely outcome of the adjudication of a legal dispute and is best able to ensure the validity of any agreement or other legal document resulting from a mediated agreement. Mediation and arbitration are skills that, like trial advocacy, require study and training.

2. The Attorney-Client Relationship

Fees

Many divorce clients have never before hired an attorney and are vulnerable because of fear and insecurity. Matrimonial lawyers and their clients may not have the long-standing relationship out of which business lawyers and their clients often evolve an understanding about fees.

It is not unusual for one party to a divorce to lack sufficient funds to pay an attorney. This lack of resources, various strictures against contingent fee contracts, the unwillingness of some courts to redress the economic imbalance between the parties with fee awards, and the tendency of overwrought clients to misunderstand the fee agreement or to blame their attorneys for undesirable results can make collection of fees extremely difficult.

These factors help to explain why the records of fee dispute committees indicate that the number of disputes arising from family law cases is several times greater than those from any other category. Thus, financial arrangements with clients should be clearly explained, agreed upon, and documented.

2.1 Fee agreements should be reduced to writing.[7]

Comment

At the outset the matrimonial lawyer must tell the client the basis on which fees will be charged[8] and when and how the attorney expects to be paid.[9] Fee agreements should be presented to the client in a manner that allows the client an opportunity to reflect upon the terms, consult another attorney before signing, and obtain answers to any questions in order to fully understand the agreement prior to entering into it.

2.2 An attorney should provide periodic statements of accrued fees and costs.

Comment

This information can be part of the necessary communications concerning the case addressed in Standard 2.6 and Comment. The statement should be sufficiently detailed to apprise the client of the time and charges incurred. In addition, the matrimonial lawyer should comply with fee regulations in his jurisdiction which may be more detailed or restrictive in requiring information

about fees and costs.

2.3 All transactions in which an attorney obtains security for fees should be properly documented.[10]

Comment

All security agreements should be arms-length transactions. When taking mortgages on real property from a client, the client should be independently represented. If an attorney takes personal property as security, it must be appraised, photographed and identified by a qualified appraiser in order to establish concretely its precise identity and value. The attorney must then secure it in a safe place (usually a safe deposit box) where there is no danger that it can be removed, substituted, or lost.[11]

2.4 An attorney may withdraw from a case when the client fails to honor the fee Agreement.

Comment

The fee agreement should set forth the circumstances under which the matrimonial lawyer will be permitted to withdraw for nonpayment. However, the attorney should not seek to withdraw from a case on the eve of trial unless there was a clear prior understanding that withdrawal would result from non-payment.[12] Before withdrawing, the attorney must take reasonable steps to avoid foreseeable prejudice to the rights of the client, allowing time for employment of other counsel, and delivering to the client papers and property to which the client is entitled.[13] Fee disputes which appear destined to result in the matrimonial lawyer's withdrawal should be resolved in advance of the trial.

2.5 If a client fails to honor the fee agreement, an attorney may properly take all steps necessary to effect collection, including mediation, arbitration or suit.

Comment

Lawyers are entitled to be paid fees for services performed pursuant to a valid fee agreement. Alternatives to litigation should be used unless they are unlikely to be effective.

Communication and Decision-Making Responsibility

In no area of law is the relationship of trust between attorney and client more important than in matrimonial law. Clients come to matrimonial lawyers when there is a significant problem in the family relationship. Emotions often render rational decision-making difficult. Clients seek the advice and judgment of their attorneys, even about non-legal matters. Therefore, issues of communication and decision-making in the attorney-client relationship arise frequently.

2.6 An attorney should keep the client informed of developments in the representation and promptly respond to letters and telephone calls.

Comment

The duty of keeping the client reasonably informed and promptly complying with reasonable

requests for information,[14] includes the attorney or a staff member responding to telephone calls, normally by the end of the next business day. The client should be informed at the outset, however, that communications with the attorney are chargeable. In addition, the attorney should routinely: send the client a copy of all pleadings and correspondence, except in unusual circumstances;[15] provide the client with frequent statements of costs and fees (**see Standards 2.1-2.5**); provide notice before incurring any major costs; provide notice of any calendar changes, scheduled court appearances, and discovery proceedings; communicate all settlement offers, no matter how trivial or facetious; advise of major changes in the law affecting the proceedings; and provide periodic status reports on progress in the case and major changes in case strategy.

Frequent communication with the client on important matters (1) empowers the client, (2) satisfies the client's need for information about the progress of the case, (3) helps to build a positive attorney-client relationship, and (4) helps the client understand the amount and nature of the work the attorney is performing, thereby reducing concern that nothing is happening and that the attorney is not earning her fees. While the attorney should understand that a pending divorce is usually the single most important matter in the life of the client, the client should understand that a successful lawyer has many clients, all of whom believe their case to be the most important.

2.7 An attorney should provide sufficient information to permit the client to make informed decisions.

Comment

The client should have sufficient information to participate intelligently in deciding the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Clients vary in their ability and willingness to engage in decision-making. Regardless of the extent of participation, they are entitled to be fully informed. Failure to provide complete information is likely to result in criticism or even disciplinary action or a lawsuit. Although relevant information should be conveyed promptly, in rare instances, "a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication."[16]

A difficult question is whether the matrimonial lawyer should provide, either voluntarily or upon request, a negative opinion of opposing counsel, the judge, or the law. For example, should a client be told that a case is assigned to a judge who has demonstrated prejudice against men or women or who has difficulty with complex tax or financial issues, or that the other lawyer seems incapable of settlement and invariably ends up in difficult trials? Although lawyers must use their best judgment in individual cases, some general guidelines are: (1) do not lie or in anyway tell the client less than the whole truth; (2) answer specific questions ("If we go to court, how is the judge likely to rule?", or "What are the risks'?") as diplomatically but as completely as possible; (3) do not criticize the court, opposing counsel, or the system unless necessary for the client to make informed decisions or to understand delays or the necessity of responding to conduct of the court or opposing counsel. Unnecessary criticism of the court, the legal system or opposing counsel undermines the effectiveness and enforceability of judgments, and harms the reputation of all lawyers and judges.

Lawyers who are unwilling to give a client bad news or a realistic assessment of the case may create other problems. It is important to maintain a proper balance between accurately advising the

client and avoiding unnecessary criticism of other participants in the process.

2.8 An attorney should accord clients the respect due mature adults.

Comment

One predicate to a successful attorney-client relationship is the attorney's respect for the maturity and intelligence of lay persons. The matrimonial lawyer should at all times treat the client with the utmost respect for the client's intelligence, judgment and decency.

Clients' concern for their fortunes and, more importantly, their children, entitle them to be physically present at any meeting with the court. This presence and participation are essential to the parties' confidence in their attorneys, the courts, and the ultimate result, and should be sought unless it would be clearly detrimental to the client's best interests. Courts sometimes seek meetings in chambers with counsel in the absence of the parties. To the extent that the rules of a jurisdiction require such meetings in the absence of the parties or the client consents, this Comment does not apply.

2.9 An attorney should share decision-making responsibility with the client, but should not abdicate responsibility for the propriety if the objectives sought or the means employed to achieve those objectives.

Comment

The conduct and resolution of a divorce case require many decisions, from the most mundane (which word to use in a letter) to the most significant (whether to litigate or accept a proposed settlement). During the course of the representation, ultimate decision-making authority may reside with the client, the attorney, or both.

The attorney must abide by the client's decisions as to the objectives of representation, subject to the rules of ethics or other law.[17] Further, the attorney should consult with the client as to the means by which those objectives are to be pursued. "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues" (choosing forum, type of pleadings, or judicial remedy), "but should defer to the client regarding expenses to be incurred and concern for third persons who might be adversely affected."[18]

Thus, although the lawyer is entitled to make "decisions not affecting the merits of the cause or substantially prejudicing the rights of a client,"[19] the attorney and client should jointly make some choices, such as whether to file a costly motion of uncertain success, or whether to retain certain experts. Even when the client has ultimate decision-making authority, the attorney should provide counsel and advice.

It is often difficult to provide appropriate, necessary information and counseling, without usurping the client's right to make important decisions affecting the representation. It should be remembered, however, that a lawyer may counsel a client not only as to the law, but also as to "other considerations such as moral, economic, social and political factors that may be relevant to the client's situation."[20]

Examples:

1. The client insists that the real problem in the marriage was his mother-in-law, and asks the matrimonial lawyer to bring that to the court's attention during the trial. The lawyer knows that the facts which seem so important to the client are irrelevant under the rules of the forum, and counter-productive at trial. The lawyer must rely on her judgment and explain to the client why this is not an appropriate, let alone persuasive, argument. The risk is that the client, unhappy with the ultimate result, may claim that if the lawyer used the argument the client wished, the case would have been won. That is a risk inherent in the practice of law.

2. In a case in a jurisdiction where the wife has a claim for maintenance which the lawyer believes will succeed, the husband offers to pay a larger share of the assets if the wife will waive the right to maintenance, which, under local law, will terminate at the death of either party or at the wife's remarriage. If the client stays unmarried, she will benefit far more from maintenance than the additional assets. Which should she accept? The matrimonial lawyer's role is to educate the client and allow her to make the choice.

3. The guilt-ridden husband offers the wife virtually all of the assets and a support order which will leave him all but penniless. The wife tells her attorney to draft the appropriate documents to finalize his offer. The wife's attorney should fully inform her of the risks of such a one-sided settlement (continual post-judgment litigation, practical unenforceability). If the client insists on a settlement posture that the attorney believes clearly unrealistic, she should put her advice in writing and may, if she chooses, then carry out the client's instructions. The lawyer representing the husband should try to persuade his client to offer less. If the husband insists, the lawyer should consider: (1) putting in writing all of the reasons why the husband's offer is very detrimental to him and that the attorney strongly advises against it; (2) advising that the client obtain the advice of another lawyer, a counselor, or a responsible friend or family member; and (3) withdrawing.

2.10 An attorney should not permit a client's relatives, friends, lovers, employers, or other third persons to interfere with the representation, affect the attorney's independent professional judgment, or make decisions affecting the representation, except with the client's express consent.

Comment

Third persons often try to play a part in matrimonial cases. Frequently, the client has requested that one or more of these persons be present at conferences and consulted about major decisions. The potential conflicts are exacerbated when the third person is paying expenses or the attorney's fee. Neither payment of litigation expenses nor sincere concern about the welfare of the client make those third persons clients. To the extent specifically authorized by the client, the lawyer may discuss choices with third parties, provided all concerned are aware that such discussions may waive any attorney-client privilege. While it is important for persons going through a divorce to receive advice and support from those they trust, the client, with the advice of the attorney, should make the decisions with which the client must ultimately live.

Both the client and the person paying for the representation must be informed at the outset

that nothing related by the client in confidence will be disclosed without the client's consent. The duty to protect confidential information also requires that the attorney raise the issue of the effect on confidentiality of the parents, friends, lovers, children or employers' being present. Usually, the presence of a third person not necessary to the rendition of legal services waives the attorney-client privilege. For this and other reasons, an attorney should discourage family members and other third persons from participating in client conferences. In addition to the potential loss of confidentiality, a more accurate account of the client's desires and best interests can usually be obtained when third persons are not present.

Examples:

1. An attorney represents an elderly woman. The son of the client, who is paying the attorney's fee, instructs the attorney to establish a trust to manage the client's assets. The attorney must ignore the son's request and explain the attorney's obligation to act only as requested by the client. In addition to acting only after consultation with and consent by the client, the attorney may not accept payment from the son unless he can avoid interference with the client-lawyer relationship and preserve the confidentiality of communications with the client.[21] Even if the son's wishes are not necessarily adverse to the client's interest, the attorney must assure that he has independently determined the best course for the client. The client should be directed to make her own decisions wherever possible.

2. The minor daughter of an old friend asks the lawyer to find a jurisdiction that will allow her to marry without parental consent. The lawyer is personally convinced that the marriage will be disastrous for the daughter and feels strong obligations to her and to her parents to prevent her doing something foolish. Under current ethical rules as well as under these Standards, the lawyer may not inform the parents or act in any way contrary to the client's stated desires. However, it is appropriate for the lawyer to point out practical, moral, and other non-legal considerations and to attempt to convince the child that the proposed course of action is not in her best interests.

2.11 When the client's decision-making ability is affected by emotional problems, substance abuse, or other impairment, an attorney should recommend counseling or treatment.

Comment

The economic and emotional turmoil caused by marital disputes often affects a client's ability to make rational decisions in his own best interest. The extremes range from young children or mentally incompetent adults, to otherwise reasonable adults who demand that the attorney engage in warfare over such "family treasures" as plants and library tables. The lawyer for an incompetent person must seek appointment of a guardian.[22] But the lawyer for a person whose ability to make reasonable decisions is severely impaired by overwrought emotions faces a more difficult dilemma.

For example, it is not unheard of for a party to reject a settlement offer that is, overall, superior to what can be expected at trial and to fight over the pots and pans. At the other end of the spectrum are the guilt-ridden clients who insist on giving the other party "everything," or at least far more than the client will regard as fair after the dust has settled. The trauma of marital breakdown, and sometimes substance abuse, lessens or even eliminates some clients' ability to make rational

decisions.

If these emotionally distraught persons or substance abusers fall short of being legally incompetent, the lawyer is not compelled to follow their directives, no matter how irrational and potentially harmful. It would normally be improper for the attorney to seek appointment of a guardian in such a situation. Not only is there a strong presumption that the attorney should maintain a normal client-lawyer relationship to the extent reasonably possible ,[23] but any effort to seek appointment of a guardian may be expensive, traumatic and may adversely affect the client's interest.[24]

The lawyer must oppose a hot-headed client's illegal or improper decision ("I don't care what the court says, I won't pay her a cent"). In the more common domestic relations case, an angry client may demand a course of action that will escalate costs, prolong litigation, irritate the judge and raise the animosity level—but a course entirely within his or her legal rights. Even though the ultimate decision must be that of the client, before accepting a clearly detrimental decision, the attorney should attempt to dissuade the client and, if that fails, urge the client to counsel with others who might have a stabilizing influence: family, friends, therapists, doctor or clergymen. When rejection of the attorney's advice is likely to adversely affect the client's interests, the attorney should document both the advice and the client's refusal to follow it. Such documentation makes the risk even more clear to the client and protects the attorney from subsequent allegations of complicity in the conduct. In appropriate cases, the attorney may withdraw from representation.

2.12 An attorney should advise the client of the emotional and economic impact of divorce and the possibility or advisability of reconciliation.

Comment

The duty of vigorous advocacy in no way prohibits the matrimonial lawyer from counseling the client to be cautious in embarking on divorce. The divorce process exacts a heavy economic and emotional toll. An attorney should ask if reconciliation might be possible, or at least whether the client is receptive to counseling. If the client exhibits uncertainty or ambivalence, the lawyer should assist in obtaining a counselor. In no event should an attorney urge a client to file suit, unless necessary to protect the client's interests.

It is generally assumed that a lawyer's role in family matters is to act not only as an advocate, but to some extent as a counselor or advisor. And the RPC specifically permit the lawyer to address moral, economic, social and political factors, which may be relevant to the client's situation.[25] Further, [w]here consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation."[26] Although few attorneys are qualified to do personal counseling, a thorough discussion of the probable emotional and monetary repercussions of divorce is permissible.

If the client has begun counseling in hopes of reconciliation, the matrimonial lawyer should attempt to mitigate litigation-related activities that might prejudice marital harmony. It is important, however, for the attorney to be mindful that clients may make damaging admissions during joint marriage counseling. One spouse may use a "breathing spell" afforded by counseling to deplete the marital estate. The lawyer should advise the client of these risks and take precautions to protect the

client in the interim.

Predivorce Planning

A client is entitled to know what laws govern divorce and the consequence of those laws on a dissolution of his marriage. A matrimonial lawyer should advise a client about the repercussions of any matrimonial litigation, including factors that are likely to be considered in economic and custody determinations. However, predivorce planning carries the potential for fraud.

2.13 An attorney should never encourage a client to hide or dissipate assets.

Comment

It is improper for an attorney to "counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client. . . ."[27] Whether the client proposes opening up an out-of-state bank account or having a family member hold sums of cash for the purpose of concealment, the advice to the client must be the same: Don't do it." Hiding assets is a fraud upon the client's spouse and likely to result in a fraud upon the court. However, advice to protect, rather than hide, assets is appropriate. The client must also be advised not to conceal data about his property, fail to furnish relevant documents, insist on placing unrealistic values on properties in, or omit assets from, sworn financial statements.

On the other hand, "[t]here is a critical distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity."[28] It may sometimes be difficult to determine whether a client's questions concerning legal aspects of predivorce planning are asked to facilitate an improper purpose. Although the attorney should initially give the client the benefit of any doubt, later discovery of improper conduct mandates that the attorney cease such assistance and may require withdrawal from representation.[29]

2.14 An attorney should advise the client of the potential effect of the client's conduct on a custody dispute.

Comment

Predivorce conduct of the parents may significantly affect custody decisions. The client is entitled to advice where there is a custody issue. Conduct conforming to such advice often will benefit both the children and the client's spouse, independent of any custody dispute. Suggesting that the client spend more time with the child and consult from time-to-time with the child's doctor, teacher, and babysitter is appropriate. It is also proper to describe the potentially harmful legal consequences of an adulterous relationship, substance abuse, or other inappropriate behavior.

The lawyer must consider whether the custody claim will be made in good faith. If not, the lawyer must advise the client of the harmful consequences of a meritless custody claim to the client, the child, and the client's spouse.[30] If the client still demands advice to build a spurious custody case or to use a custody claim as a bargaining chip or as a means of inflicting revenge (**see Standard 2.25 and Comment**), the lawyer should withdraw.[31]

Settlement

2.15 An attorney should encourage the settlement of marital disputes through negotiation, mediation, or arbitration.

Comment

The litigation process is expensive and emotionally draining. In matrimonial matters, the highly charged atmosphere makes a speedy, cooperative resolution of disputes highly desirable. In many cases, the parties will have continuing contact with each other and need to cooperate for years to come. There is evidence that parties to a matrimonial dispute are more willing to abide by an agreement voluntarily entered into than by a court-ordered resolution following litigation. And, there is increasing evidence of the destructive effect on the children of protracted, adversarial proceedings between the spouses. It is therefore in the family's interest to seek to settle disputes cooperatively.

Conflicts of interest

Conflict of interest dilutes a lawyer's loyalty to the client.[32] A lawyer's loyalty may be diluted by a number of personal interests (financial security, prestige, and self-esteem) and interests of third persons (family, friends, business associates, employer, legal profession, and society as a whole). Under the RPC, a conflict exists if the representation of a client "may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests."[33] The key to preventing unintentional violations of the conflict of interest rules lies in anticipating the probability or possibility that a conflict situation will develop.

The influences that might dilute a matrimonial lawyer's loyalty to a client are unlimited. The interests of the children, relatives, friends, lovers, employers and the opposing party, along with a perceived obligation to the court and the interest of society, may be compelling in a given case. In family law matters, where "winning" and "losing" in the traditional sense often lose their meaning, determination of the appropriate ethical conduct can be extremely difficult.

2.16 An attorney should never have a sexual relationship with a client or opposing counsel during the time of the representation.

Comment

Persons in need of a matrimonial lawyer are often in a highly vulnerable emotional state. Some degree of social contact (particularly if a social relationship existed prior to the events that occasioned the representation) may be desirable, but a more intimate relationship may endanger both the client's welfare and the lawyer's objectivity.

Attorneys are expected to maintain personal relationships with other attorneys, but must be sensitive to the threat to independent judgment and the appearance of impropriety when an intimate relationship exists with opposing counsel or others involved in the proceedings.

2.17 An attorney should not allow personal, moral or religious beliefs to diminish loyalty to the client or usurp the client's right to make decisions concerning the objectives of

representation.

Comment

Attorneys would not be human without strong personal beliefs concerning issues affecting family law practice. No lawyer should be expected to ignore strongly held beliefs. But the matrimonial lawyer may only limit the objectives of the representation if the client consents after consultation.[34] The client even has the right to be consulted about the means by which the objectives are to be pursued, matters normally within the lawyer's discretion.[35] Therefore, the lawyer should withdraw from representation if personal, moral or religious beliefs are likely to cause the attorney to take actions that are not in the client's best interest. If there is any question as to the possible effect of those beliefs on the representation, the client should be consulted and consent obtained. **See Standard 2.9 & Comment.**

2.18 An attorney should not permit relationships with relatives, friends, or other third persons to interfere with the representation or affect the attorney's independent professional judgment.

Comment

Attorneys often are asked to represent friends and relatives in family law matters. The potential for undermining objective analysis and advice should cause a matrimonial lawyer to be wary about representing anyone with whom the lawyer shares a close personal relationship. The attorney should also avoid being unduly influenced or pressured by the person referring the client. Finally, the attorney should resist any community pressure or influence that may occur in high visibility cases.

2.19 An attorney's should not communicate with the news media about the representation except with the client's prior consent.

Comment

Statements to the media by an attorney representing a party in a matrimonial matter are potentially improper because they tend to prejudice an adjudicative proceeding.[36] An attorney's interest in obtaining publicity should not be allowed to obstruct settlement, cause embarrassment, diminish the opportunity for reconciliation, or harm the family. Nor should an attorney attempt to gain an advantage for the client by providing information to the media to embarrass or humiliate the opposing party or counsel.

2.20 An attorney should not represent both husband and wife even if they do not wish to obtain independent representation.

Comment

The temptation to represent potentially conflicting interests is particularly difficult to resist in family disputes. Often the attorney is the "family lawyer" and previously represented husband, wife, family corporations, and even the children.[37] Serving as an intermediary between husband and wife is not prohibited by the RPC.[38] However, it is impossible for the attorney to provide impartial advice to both parties, and even a seemingly amicable separation or divorce may result in bitter litigation over financial matters or custody. A matrimonial lawyer should not attempt to

represent both husband and wife even with the consent of both.

The attorney may be asked to represent family members in a non-litigation setting. If separation or divorce is foreseeable or if one of the parents desires defense in a battered child action, the lawyer may see her role as counselor or negotiator for all concerned. This temptation should be resisted. However, this Standard does not apply in adoption proceedings or other matters where the spouses' positions are not adverse.

2.21 An attorney should not advise an unrepresented party.

Comment

Once it becomes apparent that an opposing party intends to proceed without a lawyer, the attorney should, at the earliest opportunity, inform the opposing party in writing as follows:[39]

1. I am your spouse's lawyer.
2. I do not and will not represent you.
3. I will at all times look out for your spouse's interests, not yours.
4. Any statements I make to you about this case should be taken by you as negotiation or argument on behalf of your spouse and not as advice to you as to your best interest.[40]
5. I urge you to obtain your own lawyer.

2.22 An attorney should not simultaneously represent both a client and a person with whom the client is sexually involved.

Comment

A matrimonial lawyer is often asked to represent a client and the client's lover. Joint representation may make it difficult to advise the client of the need to recover from the emotional trauma of divorce, the desirability of a prenuptial agreement, or the dangers of early remarriage. The testimony of either might be adverse to the other at deposition or trial. In addition, the client may desire to waive support payments because she believes she is going to marry her lover. The inherent conflicts in attempting to represent both the client and her lover render such representation improper. Even when the client's new partner is not represented by the attorney, but wishes to participate in consultations and other aspects of the representation, the attorney must be alert to the danger of the client's undermining her own best interests in an effort to accommodate her new partner.

Children

One of the most troubling issues in family law is determining a lawyer's obligations to children. The lawyer must represent the client zealously, but not at the expense of children. The parents' fiduciary obligations for the well-being of a child provide a basis for the attorney's consideration of the child's best interests consistent with traditional adversary and client loyalty principles. It is accepted doctrine that the attorney for a trustee or other fiduciary has an ethical obligation to the beneficiaries to whom the fiduciary's obligations run. To the extent that statutory or decisional law imposes a duty on the parent to act in the child's best interests, the attorney for the parent might be considered to have an obligation to the child that would, in some instances, justify subordinating the express wishes of the parent. For example, "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."[41] For this analysis to be of benefit to practitioners, however, a clearer mandate must be adopted as part of the ethical code or its official interpretations.

2.23 In representing a parent, an attorney should consider the welfare of children.

Comment

Although the substantive law in most jurisdictions concerning custody, abuse, and termination of parental rights is premised upon the "best interests of the child," the ethical codes provide little (or contradictory) guidance for an attorney whose client's expressed wishes or interests are in direct conflict with the well-being of children. This provision stresses the welfare of a client's children.

2.24 When issues in a representation affect the welfare of a child, an attorney should not initiate communication with the child, except in the presence of the child's lawyer or guardian ad litem, with court permission, or as necessary to verify facts in motions and pleadings.

Comment

Issues affecting a child's welfare may arise before, during, and after legal proceedings. There is a significant risk of injury to the child from an attorney's contacts and attempts to involve the child in the proceedings. Advice to or manipulation of the child by a parent's lawyer has no place in the lawyer's efforts on behalf of the parent. Information properly to be obtained from a child regarding the parents and the parents' disputes should be obtained under circumstances that protect the child's best interests.

2.25 An attorney should not contest child custody or visitation for either financial leverage or vindictiveness.

Comment

Clients in contested dissolutions sometimes ask attorneys to contest custody even though they concede that the other spouse is the better parent. It is improper for the matrimonial lawyer to assist the client in such conduct. Proper consideration of the welfare of the children requires that they not be used as pawns in the adversary process. If despite the attorney's advice the client persists, the attorney should seek to withdraw.

2.26 An attorney should disclose evidence of a substantial risk of physical or sexual abuse of a child by the attorney's client.

Comment

While engaged in efforts on the client's behalf, the matrimonial lawyer may become convinced that the client has abused one of the children. Or the client, who seems a good parent, has a live-in lover who has abused one of the children. Under traditional analysis in most jurisdictions, the attorney should refuse to assist the client. The attorney may withdraw if the client will not be adversely affected and the court grants any required permission.

It may also be appropriate to seek the appointment of a guardian ad litem or attorney for the children.[42] The entire thrust of the family law system is intended to make the child's well-being the highest priority. The vindictiveness of a parent, the ineffective legal representation of the spouse, or the failure of the court to perceive sua sponte the need to protect the child's interests do not justify an attorney's failure to act. However, even the appointment of a guardian or lawyer for the child is insufficient if the matrimonial lawyer is aware of physical abuse or similarly extreme parental deficiency. Nor would withdrawal (even if permitted) solve the problem if the attorney is convinced that the child will suffer adverse treatment by the client.

In the most extreme cases, the attorney may reveal information reasonably believed necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm."[43] Many states permit the attorney to reveal the intention of the client to commit any crime and the information necessary to prevent it. The rules do not appear to address, however, revelation of conduct that may be severely detrimental to the well-being of the child, but not criminal.

Notwithstanding the importance of the attorney-client privilege, the obligation of the matrimonial lawyer to consider the welfare of children, coupled with the client's lack of any legitimate interest in preventing his attorney from revealing information to protect the children from likely physical abuse, requires disclosure of a substantial risk of abuse and the information necessary to prevent it. If the client insists on seeking custody or unsupervised visitation, even without the attorney's assistance, the attorney should report specific knowledge of child abuse to the authorities for the protection of the child.[44]

2.27 An attorney should refuse to assist in vindictive conduct toward a spouse or third person and should not do anything to increase the emotional level of the dispute.

Comment

Although the client has the right to determine the "objectives of representations" after consulting with the client the attorney may limit the objectives and the means by which the objectives are to be pursued.[45] The matrimonial lawyer should make every effort to lower the emotional level of the interaction between the parties and their counsel. Some dissension and bad feelings can be avoided by a frank discussion with the client at the outset of how the attorney handles cases, including what the attorney will and will not do regarding vindictive conduct or actions likely to adversely affect the children's interests. Although not essential, a letter to the client confirming the understanding, before specific issues or requests arise, is advisable. To the extent that the client is unwilling to accept any limitations on objectives or means, the attorney should decline the representation.

If such a discussion did not occur, or the client despite a prior understanding asks the attorney to engage in conduct the attorney believes to be imprudent or repugnant, the attorney should attempt to convince the client to work toward family harmony or the interests of the children. Conduct in the interests of the children or family will almost always be in the client's long term best interests.

3. The Relationship Between Opposing Counsel

Candor, courtesy and cooperation are especially important in matrimonial matters where a high emotional level can engulf the attorneys, the court, and the parties. Allowing the adverse emotional climate to infect the relations between the attorney and the opposing counsel and parties inevitably harms everyone, including the clients, their children, and other family members. Although lawyers cannot ensure that justice is achieved, they can facilitate the administration of justice.

Overzealous, discourteous, abrasive, "hard ball" conduct by matrimonial lawyers is inconsistent with both their obligation to effectively represent their clients and their duty to improve the process of dispute resolution. Good matrimonial lawyers can be cordial and friendly without diminishing zealous advocacy on behalf of their clients. In fact, candor, courtesy and cooperation (1) facilitate faster, less costly, and mutually-accepted resolution of disputes; (2) reduce stress for lawyers, staff, and clients; (3) reduce waste of judicial time; and (4) generate respect for the court system, the individual attorney, and the profession as a whole.

3.1 An attorney should strive to lower the emotional level of marital disputes by treating the opposing party and counsel with respect.

Comment

Some clients expect and want the matrimonial lawyer to reflect the highly emotional, vengeful relationship between spouses. The attorney should explain to the client that discourteous, uncivil and inhumane conduct is inappropriate and counterproductive, that measures of respect are consistent with competent and ethical representation of the client, and that it is unprofessional for the attorney to act otherwise. Examples of appropriate measures of respect include; refraining from attacking, demeaning or disparaging opposing counsel, the court, or the opposing party; promptly answering phone calls and correspondence; meeting with opposing counsel to reduce issues and facilitate settlement; cooperating with voluntary or court-mandated mediation; and advising opposing counsel at the earliest possible time of any perceived conflict of interest.

The attorney should make sure that no long-standing adversarial relationship with or personal feelings toward another attorney interferes with negotiations, the level of professionalism maintained, or effective representation of the client. Although it may be difficult to be courteous and cooperative when opposed by an overzealous lawyer, an attorney should not react in kind to unprofessional conduct. Instead, discourtesy should be met with courtesy.

Candor

3.2 An attorney should never deceive or intentionally mislead opposing counsel.

Comment

Attorneys are entitled to believe statements by opposing counsel. They should be able to assume that the matrimonial lawyer will correct any misimpression caused by an inaccurate or misleading prior statement by counsel or her client. Although an attorney must maintain the client's confidences, the duty of confidentiality does not require the attorney to deceive, or permit the client to deceive, opposing counsel.[46] When the opposing party or counsel specifically requests information which the attorney is not required to provide and which the attorney has been instructed

to withhold or which may be detrimental to the client's interests, the attorney should refuse to provide the information, but should not mislead opposing counsel.

Examples:

1. The matrimonial lawyer is approached by opposing counsel, who asks: "Although my client realizes there is no hope for reconciliation, he is desperate to know whether his wife is seeing another man. Is she?" The attorney knows that the wife has been having a series of affairs with a number of men. It would be proper for the attorney to indicate an unwillingness or inability to answer that question, but it would be improper either to suggest that the client has not had affairs, or to tell opposing counsel lurid details on the condition that they not be disclosed.[47]

2. The attorney believes that the opposing party has engaged in activity which the party would not want made public. It is improper to bluff the other side into settlement by hinting that the matrimonial lawyer will use damaging evidence of the conduct, when no such evidence exists. It is also improper to threaten public disclosure if the evidence exists, but would likely be inadmissible or irrelevant at trial. See Standard 2.19 and Comment.

3.3 An attorney should not induce or rely on a mistake by opposing counsel as to matters agreed upon to obtain an unfair benefit for the client.

Comment

The need for trust between attorneys, even those representing opposing sides in a dispute, requires more than simply avoiding fraudulent and intentionally deceitful conduct. Misunderstandings should be corrected and not relied upon in the hope they will benefit the client. Thus, for example, the attorney reducing an oral agreement to writing not only should avoid misstating the understanding, but should correct inadvertent errors by opposing counsel that do not reflect prior understandings or agreements. Whether or not conduct or statements by opposing counsel that are not necessarily in her client's best interests should be corrected may not always be clear and will depend on the particular facts of a case. The crucial consideration should be whether the attorney induced the misunderstanding or is aware that opposing counsel's statements do not accurately reflect any prior agreement. It is thus unlikely that tactical, evidentiary or legal errors made by opposing counsel at trial require correction.[48]

Examples:

1. In an effort to compromise a dispute over maintenance (alimony), the parties agree that payments be made which are deductible by the husband and taxable to the wife. While reviewing the agreement, the attorney realizes that the language will not create the tax consequences both sides had assumed and will, in fact, benefit his client because the payments will be treated neither as deductible alimony to the husband nor as taxable to the wife. The matrimonial lawyer should disclose this discovery to opposing counsel.

If, however, counsel's mistake goes to a matter not discussed and agreed upon, the obligation to the client precludes disclosure of the mistake without the client's permission. Thus, if alimony was agreed upon without any discussion of tax consequences, the wife's lawyer would not be

obligated to provide the language necessary to make payments tax deductible by the husband and includable by the wife.

2. The lawyer for the wife prepares a stipulation erroneously providing for the termination of maintenance upon the remarriage of either party. If the husband asks his attorney if it is really true that by his remarriage he can terminate his liability to pay any further maintenance, the attorney should correct the mistake in the stipulation or a judgment entered upon it. The lawyer should bring it to the attention of opposing counsel.[49]

3.4 An attorney should not overstate his authority to settle nor represent that he has authority which he does not have.

Comment

In either case presented in the Standard, the attorney has improperly induced reliance by opposing counsel that could damage the attorney-client relationship. A matrimonial lawyer who is uncertain of his authority—or simply does not believe that opposing counsel is entitled to such information—should either truthfully disclose his uncertainty, or state that he is unwilling or unable to respond at all.

3.5 An attorney should discourage the client from interfering in the spouse's effort to obtain effective representation.

Comment

Clients who file or anticipate the filing of a divorce proceeding occasionally telephone or interview numerous attorneys as a means of denying their spouse access to effective representation. The attorney should discourage such practices and should not assist the client, for example, by responding to the client's request for a list of matrimonial lawyers if improper motives are suspected. When the client has already contacted other lawyers for the purpose of disqualifying them, the client's attorney should attempt to persuade the client to waive any conflicts so created.

Professional Cooperation and the Administration of Justice

Many jurisdictions have elaborated upon the general principles in this section by adopting codes of professional courtesy. In jurisdictions where such codes have been adopted, matrimonial lawyers should adhere to them scrupulously.

3.6 An attorney should cooperate in the exchange of information and documents whenever possible. An attorney should not use the discovery process for delay or harassment, or engage in obstructionist tactics.

Comment

As a basic rule of courtesy and cooperation, attorneys should try to conduct all discovery by agreement, never using the discovery process to harass opposing counsel or their clients. This principle applies both to attorneys attempting to obtain discovery and to those from whom discovery is sought.[50] The discovery rules are designed to eliminate or reduce unfair surprise, excessive delay and expense, unnecessary and futile litigation, and the emotional and financial cost of extended

and overly-adversarial litigation. In addition, pretrial discovery often results in settlements more beneficial than protracted litigation. In no area of the law are these benefits more important than in matrimonial law, where the necessity of future dealings between the parties and the interest in protecting the emotional and psychological stability of children necessitate avoiding unnecessary litigation and acrimony. It is in the interest of all parties (including the client) to assist, rather than resist, legitimate discovery.

In an effort to effectuate the interests of their clients, attorneys may be tempted to wear down the opposing party or counsel by means of "hardball" tactics. These tactics do not support the legitimate interests of clients, and are clearly improper.[51] Excessive, unreasonable, or otherwise improper discovery conduct under this Standard includes: overly narrow construction of interrogatories or requests for production (coupled with refusal to respond); improper assertion of privilege; direction to parties and witnesses not to respond to deposition questions without adequate justification; and, requests for unnecessary information which bears no reasonable relationship to the issues in the case.

3.7 An attorney should grant to opposing counsel reasonable extensions of time that will not have a material, adverse affect on the legitimate interests of the client.

Comment

The attorney should attempt to accommodate opposing counsel who, because of her schedule, personal considerations, or heavy workload, requests additional time to prepare a response or comply with a legal requirement. Such accommodations save the time and expense of unnecessary motions and hearings. No lawyer should request an extension of time to obtain an unfair advantage.

3.8 An attorney should clear times with opposing counsel and cooperate in scheduling hearings and depositions.

Comment

Good faith attempts by attorneys to avoid scheduling conflicts tend to avoid unnecessary delays, expense to clients, and stress to attorneys and their staff. In return, opposing counsel should confirm the availability of the suggested time within a reasonable period, and should indicate conflicts or unavailability only when necessary. As prior consultation concerning scheduling is a courtesy measure, it is proper to schedule hearings or depositions without agreement if opposing counsel fails or refuses to respond promptly to the time offered, raises unreasonable calendar conflicts or objections, or persistently fails to comply with this Standard.

3.9 An attorney should provide notice of cancellation or depositions and hearings at the earliest possible time.

Comment

Adherence to this Standard will avoid unnecessary travel, expense, and expenditure of time by opposing counsel and will also free time for the court for other matters. The same principles apply to all scheduled meetings, conferences and production sessions with opposing counsel.

3.10 An attorney should promptly submit proposed orders to opposing counsel before

submitting them to the court. When submitted, opposing counsel should promptly communicate approval or objections.

Comment

Proposed orders following a hearing should generally be submitted at the earliest practicable time, preferably no later than the following business day.

3.11 An attorney should not seek an ex parte order without prior notice to opposing counsel except in exigent circumstances.

Comment

There are few things more damaging to a client's confidence in his lawyer, or to relationships between lawyers, than for a party to be served with an ex parte order about which his lawyer knows nothing.[52] Even where there are exigent circumstances (substantial physical or financial risk to the client), or local rules permit ex parte proceedings, notice to, or the appearance of, opposing counsel usually will not prevent appropriate relief from issuing.

3.12 An attorney should not attempt to gain advantage by delay in the service of filed pleadings or correspondence upon opposing counsel.

Comment

When pleadings or correspondence are mailed or delivered to the court, copies should normally be transmitted on the same day and in the same manner to all other counsel of record. An identical method need not be employed, so long as delivery on the same day will be achieved. For example, if the court is one block from counsel's office and opposing counsel's office is 50 miles away, it would be acceptable to hand deliver a document to the court and fax it to counsel so that it will arrive on the same day.

3.13 An attorney should stipulate to undisputed relevant matters unless it would be inconsistent with the client's legitimate interests.

Comment

The attorneys' stipulation to undisputed matters avoids unnecessary inconvenience and wasted court time. The attorney seeking a stipulation should do so in writing, attempting to state the true agreement of the parties while avoiding the inclusion of terms which are neither desired nor insisted upon by her client. Opposing counsel should promptly indicate whether or not the stipulation is acceptable.

3.14 An attorney should promptly and completely comply with all reasonable discovery requests.

Comment

This may require convincing the client of the necessity of full compliance with such discovery requests as document production and answers to interrogatories and that concealing information is detrimental to the client's own case.

[1] RPC, Scope section.

[2] RPC 1.1.

[3] CPR, EC 6-3.

[4] See ABA Comment to RPC 2.1: "Matters that go beyond strictly legal questions may also be in the domain of another profession. Family matters can involve problems within the professional competence of psychiatry, clinical psychology or social work; . . . Where consultation with a professional in another field is something a competent lawyer would recommend, the lawyer should make such a recommendation." For example, it may be appropriate for a professional with counseling training to deal with custody or visitation issues, whereas a competent financial expert might be needed to deal with certain property questions. To the extent that the resolution of property issues requires an understanding of the legal issues or likely outcome of proceedings in court, mediation by an experienced attorney may be necessary.

[5] Commonly employed means of alternative dispute resolution include mediation, negotiation, arbitration and intermediation. This section neither provides a comprehensive list of various alternatives to litigation nor indicates a preference for any particular form.

[6] It is assumed in this Standard that the attorney does not represent either of the parties to the dispute. Cf. RPC 2.2 (intermediaries).

[7] Matrimonial lawyers and clients would normally enter into a mutually executed fee agreement. However, some attorney-client relationships would justify the attorneys drafting a letter confirming an oral agreement. Such a confirming letter would be permissible under this Standard, provided that the client indicates approval in writing.

[8] When appropriate, this information might include the fact that total fees and costs cannot be predicted. RPC 1.5(a) provides that the factors in determining a reasonable fee include:

(1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;

(3) the fee customarily charged in the locality for similar legal services;

(4) the amount involved and the results obtained;

(5) the time limitations imposed by the client or by the circumstances;

(6) the nature and length of the professional relationship with the client;

(7) the experience, reputation, and ability of the lawyers performing the services; and

(8) whether the fee is fixed or contingent.

[9] See RPC 1.5(b). According to the Comment to RPC 1.5:

It is not necessary to recite all the factors that underlie the basis of the fee, but only those that are directly involved in its computation. It is sufficient, for example, to state that the basic rate is an hourly charge or a fixed amount or an estimated amount, and to identify the factors that may be taken into account in finally fixing the fee. When developments occur during the representation that render an earlier estimate substantially inaccurate, a revised estimate should be provided to the client. A written statement concerning the fee reduces the possibility of misunderstanding.

[10] As stated in the Comment to RPC 1.5: "A lawyer may accept property in payment for services, such as an ownership interest in an enterprise, providing this does not involve acquisition of a proprietary interest in the cause of action or subject matter of the litigation contrary to Rule 1.8(j). However, a fee paid in property instead of money may be subject to special scrutiny because it involves questions concerning both the value of the services and the lawyers special knowledge of the value of the property." Some jurisdictions prohibit an attorney from taking a security interest in a client's property. In those jurisdictions which do permit such a security interest, the attorney should be sensitive to the need of the client to use the property involved. In matrimonial law matters where marital property is the subject of litigation, the potential for conflict is increased.

[11] See RPC 1.15.

[12] RPC 1.16(b) provides that a lawyer may withdraw if able to do so "without material adverse effect on the interests of the client, or if: . . . (4) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled."

[13] See RPC 1.16(d).

[14] RPC 1.4(a).

[15] For example, in jurisdictions in which retaining liens are available, the duty to provide correspondence may not be applicable.

[16] ABA Comment, RPC 1.4.

[17] RPC 1.2(a).

[18] ABA Comment, RPC 1.2.

[19] CPR, EC 7-7.

[20] RPC 2.1.

[21] R.P.C. 1.8(f). Accord, DR 5-107(A)(l).

[22] See RPC 1.14 and ABA Comment. Under RPC 1.14(b). "[a] lawyer may seek the appointment of a guardian or take other protective action with respect to a client only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest." But cf. RPC 1.14(a) providing that the lawyer "shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." See also ABA Comment to RPC 1.14: "In many circumstances, however, appointment of a legal representative may be expensive or traumatic for the client." And the matrimonial lawyer must be certain that the client's best interests, rather than the lawyer's personal moral or religious views, motivate the lawyer's conduct.

[23] RPC 1.14(a).

[24] ABA Comment, RPC 1.14.

[25] RPC 2.1.

[26] ABA Comment, RPC 2.1.

[27] RPC 1.2(d).

[28] ABA Comment, RPC 1.2. The Comment also provides that the attorney "is required to give an honest opinion about the actual consequences that appear likely to result from a client's conduct. The fact that a client uses advice in a course of action that is criminal or fraudulent does not, of itself, make a lawyer a party to the course of action."

[29] See RPC 1.16(a) & (b); ABA Comment, RPC 1.2.

[30] See RPC 2.1 and previous discussion indicating that it is proper for an attorney to refer to moral, economic and social, as well as legal, factors relevant so the client's situation.

[31] RPC 1.16 requires that the attorney withdraw if the representation "will result in violation of the rules of professional conduct or other law," and permits withdrawal if the client "insists upon pursuing an objective that the lawyer considers repugnant or imprudent."

[32] ABA CPR Ethical Consideration 5-1 provides:

> The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute the loyalty to his client.

[33] RPC 1.7(b).

[34] RPC 1.2(c).

[35] RPC 1.2(a). See ABA Comment: "In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected."

[36] RPC 3.6.

[37] ABA Comment to RPC 1.7. For example, an attorney representing a husband's business would be precluded from representing his wife against him in an unrelated dissolution of marriage or custody proceeding.

[38] However, the ABA Comment. Rule 2.2 states:

In considering whether to act as intermediary between clients, a lawyer should be mindful that if the intermediation fails the result can be additional cost, embarrassment and recrimination. In some situations the risk of failure is so great that intermediation is plainly impossible. For example, a lawyer cannot undertake common representation of clients between whom contentious litigation is imminent or who contemplate contentious negotiations. More generally, if the relationship between the parties has already assumed definite antagonism, the possibility that the clients' interests can be adjusted by intermediation ordinarily is not very good.

Rule 2.2 does not apply to a lawyer acting as arbitrator or mediator between or among parties who are not clients of the lawyer, even where the lawyer has been appointed with the concurrence of both parties.

[39] See RPC 4.3.

[40] See ABA Comment, RPC 4.3 ("During the course of a lawyer's representation of a client, the lawyer should not give advice to an unrepresented person other than the advice to obtain counsel."). Accord, DR 7-104(A)(2).

[41] ABA Comment to RPC 1.14. See also ABA Comment to RPC 1.2: "Where the client is a fiduciary, the lawyer may be charged with special obligations in dealings with a beneficiary."

[42] In some jurisdictions, however, such an effort would be prohibited as conduct adverse to the client and based on confidential information.

[43] RPC 1.6(b)(1). The ABA Comment to Rule 1.6 states:

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes

necessary to the purpose.

[44] Standard 2.26 and the Comment reflect the collective judgment of the Fellows of the Academy and should be followed to the extent possible under the law of the jurisdiction. If the law of the jurisdiction prohibits disclosure, the Standard does not apply.

[45] RPC 1.2. See also ABA Comment to Rule 1.2: "[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that a lawyer do so. . . . The terms upon which representation is undertaken may exclude specific objectives or means. Such limitations may exclude objectives or means that the lawyer regards as repugnant or imprudent."

[46] RPC 4.1 provides that a lawyer shall not knowingly: "(a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6." As noted in the Comment to Standard 2.27, jurisdictions differ concerning the scope of the exception to the duty of confidentiality for client criminal conduct or fraud. An attorney may be permitted to reveal confidences necessary to avoid a future crime or fraud, and, in some jurisdictions, a past fraud committed during the course of the representation or with the lawyer's assistance. Even if a jurisdiction would not permit disclosure of past crimes or frauds, the attorney would be obligated to advise the client to rectify the fraud. If the client refuses, the attorney must withdraw from the representation. RPC 1.16(a); 8.4(c). See RPC 1.2 and ABA Comment: "A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent. Withdrawal from the representation, therefore, may be required.

[47] See RPC 1.6.

[48] But cf. RPC 3.3(a)(3) (duty to disclose to the court "legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel").

[49] See RPC 4.1; 8.4.

[50] Cf. RPC 3.4(d). Protection of the client and sound pretrial practice often dictate that information be obtained under oath. Nothing in this Standard or Comment is intended to suggest that cooperation in the exchange of information should be informal when that is not appropriate..

[51] See, e.g., RPC 3.2; 3.4(d). The ABA Comment to RPC 3.2 concerning delay is equally applicable to other obstructionist tactics:

> Dilatory practices bring the administration of justice into disrepute. Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good

faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

[52] Even when authorized by law, ex parte proceedings present the potential for unfairness since "there is no balance of presentation by opposing advocates." ABA Comment, RPC 3.3(d). The lawyer for the represented party has a duty to make disclosure of "material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse." RPC 3.3(d). Fairness and professional courtesy call for notice to opposing counsel as well.