By Donald R. Lundberg

ETHICS CURBSTONE

It takes two to tango: autonomy and interdependence in lawyer-client decision-making

The Supreme Court reprimanded yet another lawyer for failing to timely tell his client that he lost his criminal appeal. *Matter of Stanko,* ___ N.E.2d ___ (Ind. July 3, 2006), available online at: *www.in.gov/judiciary/orders/atty-discipline/index.html*. It is striking to think that a lawyer would foreclose a client's right to further appeal by not letting the client know the outcome. It caused me to ponder the relationship between lawyers and clients in making decisions about the clients' legal matters.

Decisions, decisions, decisions

Rule of Professional Conduct 1.2(a) describes the proper decision-making relationship between lawyer and client. But that rule does not stand in isolation – it implicates the lawyer's duties to communicate with and counsel the client.

Every representation is laden with a host of decisions. Everything from the trivial (Should I use passive or active voice?) to the weighty (Should an offer of settlement be accepted?) Rule 1.2(a) allocates responsibility for these decisions between lawyer and client. Some decisions explicitly belong to the client: whether to enter a plea, to waive a jury, or to testify in criminal cases; and in civil cases, whether to make or accept an offer of settlement.

Otherwise, Rule 1.2(a) assigns responsibility for decision-making between lawyer and client based on how outcome-critical a decision is. Decisions concerning the objectives of the representation belong to the client. Decisions about the means by which those objectives are to be pursued belong to the lawyer. But wait, there's more! Both species of decision-making are informed by other lawyer responsibilities.

Lawyer as counselor

Even decisions that are assigned to the client do not take the lawyer off the hook. Here's where the duties of communication and counseling come into play. Rule 1.4(b) requires the lawyer to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." For example, it may be the client's decision to take the stand and testify, but it is the lawyer's duty to candidly counsel the client about the prudence of doing so.

This is really the heavy lifting of law practice. The counseling obligation requires the lawyer to display the dispassion needed to be of true value to the client. "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice." Rule of Professional Conduct 2.1. To take this role seriously involves having the backbone to tell the client what he needs to know, not what he wants to hear.

That's not all. Rule 2.1 injects an antidote to the "lawyer as hired gun" canard: "In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation." So lawyers are not moral eunuchs. They are empowered and encouraged to share their broader wisdom and personal values with clients. The overall concept was well conveyed by Elihu Root, the prominent lawyer and Nobel Peace Prize laureate, when he said, "About half the practice of a decent lawyer consists in telling would-be clients that they are damned fools and should stop."

Means and ends

Concerning the means lawyers use to represent clients, Rule 1.2(a) favors lawyer control, but not without limits. Except for inconsequential matters, the lawyer is expected to consult with the client about the means to be used to accomplish the client's objectives. *See, also,* Rule 1.4(a)(2).

What if the client, after consultation, insists on using means that violate the lawyer's sense of professionalism and civility? The client wants scorched-earth tactics; the lawyer would approach the matter less aggressively. We're back to the same give and take between lawyer and client, with the lawyer giving candid advice about the general ineffectiveness of Rambo tactics and bringing the lawyer's commitment to professionalism into play. Comment [3] to Rule of Professional Conduct 1.3 captures this notion: "A lawyer is not bound, however, to press for every advantage that might be realized for a client. ... The lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect." Indeed, in the Jan. 1, 2005, amendments to the Rules of Professional Conduct, the Indiana Supreme Court went even further to encourage lawyers to act as a check on their clients' desires to win at all costs by eliminating all references to zealousness.

Who's in charge here?

Comment [2] to Rule 1.2 foreshadows the occasions when lawyer and client are at loggerheads – whether about objectives or means. In that event, either the client will terminate the representation and the lawyer will be obligated

(continued on page 30)

Donald R. Lundberg
Executive Secretary
Indiana Supreme Court
Disciplinary Commission
Indianapolis, Ind.

The views expressed do not necessarily represent the positions of the Indiana Supreme Court or the Disciplinary Commission.

to withdraw under Rule 1.16(a)(3), or the lawyer will give the client her walking papers by withdrawing (with court permission, if necessary) under Rule 1.16(b)(4). For thoughtful and conscientious lawyers, though, impasses like this will be the rare exception. A lawyer should be able to convincingly convey the prudence and wisdom of the lawyer's recommended approach or alternatively, seek the hidden wisdom in what the client is saying.

When, after consultation, the client disregards the lawyer's advice, the lawyer has to choose: accede to the client's demands, or refuse and probably lose the client. This involves balancing many factors, including personal financial concerns and values. It requires thoughtfully answering fundamental questions like: am I willing to use my time and talent to represent this person or seek this objective, even for a handsome fee? What client demands am I unwilling to fulfill? In the end, as lawyers we are generally free to walk away from representations with which we fundamentally disagree. Rule 1.16(b)(4). Better yet, we should try to foresee problems of this magnitude and avoid taking those cases in the first place.

This is not to suggest that lawyers should be morally accountable for helping clients with whom we disagree. Rule of Professional Conduct 1.2(b) (more an expression of values than a rule) states: "A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities."

It's not the lawyer who goes to jail

Back to the problem of the appellate lawyer who does not timely inform the client that his appeal has been lost: The lawyer has carefully read the opinion and determined that there is little basis for further review action. What's the big deal? Client autonomy is the big deal.

Not just in criminal appeals, but especially so, clients often perceive themselves as powerless victims of a system completely outside their control and understanding – one that has produced an unjust result. When the client's own advocate unilaterally scuttles the case, it reinforces and magnifies the client's feelings of powerlessness.

The lawyer is not necessarily duty-bound to pursue a petition for rehearing or transfer on the client's behalf if the lawyer believes it to be without merit. In the case of private counsel, that is a question that mostly turns on the contract between lawyer and client, tempered by the lawyer's duty under Rule of Professional Conduct 3.1 to refrain from handling frivolous matters. In the case of appointed counsel, it is a question of the scope of the court appointment.

The decision to forego transfer is not a minor procedural step. There are potentially momentous consequences for the client, especially when the appeal presents federal statutory or constitutional law violations. In *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999), the Supreme Court held that failure to avail oneself of discretionary state appellate review constitutes a failure to exhaust state remedies, thereby defeating federal habeas corpus jurisdiction to collaterally attack a state criminal conviction.

Whether one views petitioning for rehearing or transfer as an objective of the representation or a means to obtain the objective, the lawyer's duties are largely the same: Timely inform the client, consult about next steps, and either assist the client going forward or advise the client that you are terminating the representation at a time and in a manner that does not prejudice the client's ability to go forward, with or without the assistance of new counsel. Whether made by the client or the lawyer, unilateral decisions on important matters are often unwise. It *does* take two to tango. ⚖