

# **Informed Consent and the Attorney's Obligation to Give Clients Independent Professional Judgment**

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## **I. Introduction**

### **A. Main Theme**

1. The willingness to make a personal sacrifice for one's clients is the essence of professional ethics.

The foundational line of true ethical behavior, its main guiding principle valid across all times and cultures, is the degree of freedom from self-centeredness of thought and behavior, and willingness freely to give up one's own self-interest on behalf of others.

George F.R. Ellis, *Scientific American*, October, 1995, p. 55.

2. Ask questions as we go along. Provide examples to address.

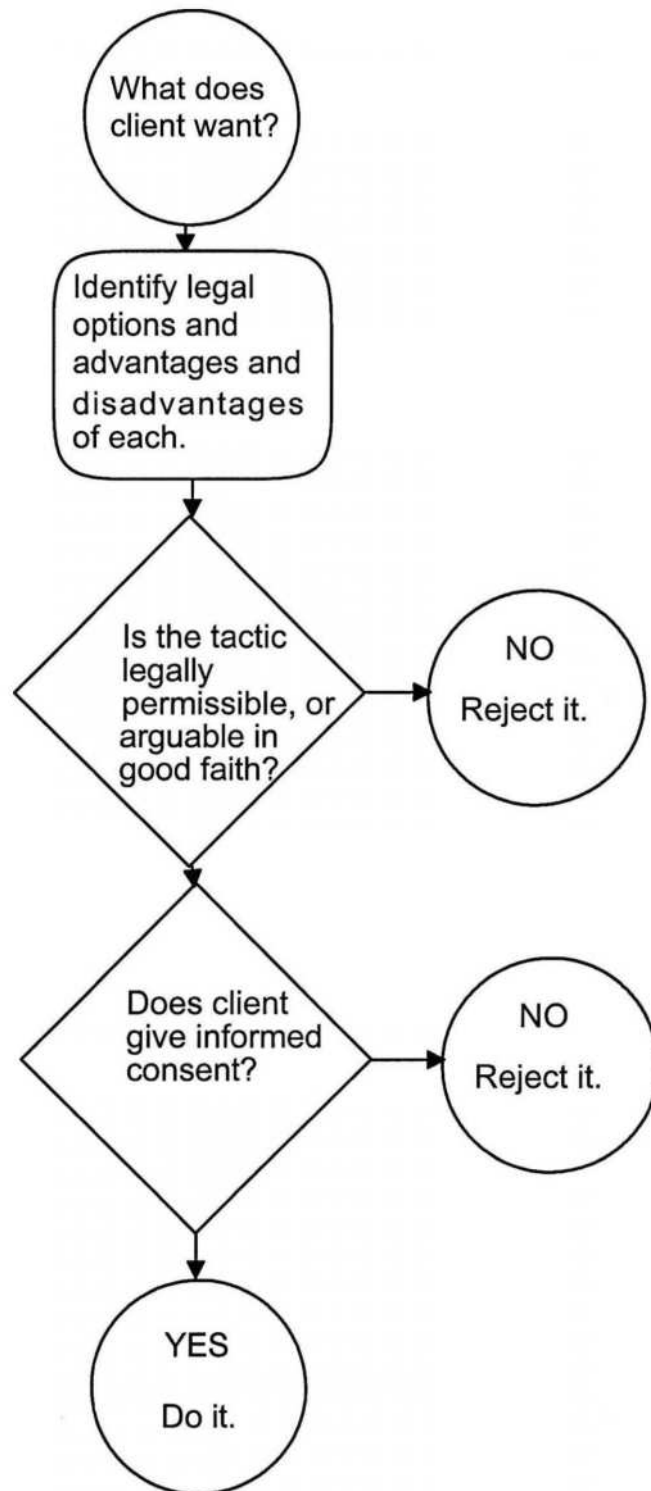
## **II. Informed Consent is the touchstone of a lawyer's duty to the client.**

A. EC 7-7 and 7-8 direct lawyers to obtain the informed consent of clients, comparable to the informed consent doctors must obtain. Ethical Considerations (EC's) are aspirational, and are not required of attorneys. See Preface to Code of Professional Responsibility; *Columbus Bar Assn. v. Schlosser* (1995), 74 Ohio St.3d 174, 177.

B. DR 7-101(A), the mandatory rule, requires only that lawyers refrain from intentionally failing to seek a client's lawful objectives.

1. Where is the duty to inform the client of legal options? Under DR 7-101(A), must a client become informed and send a certified letter to the lawyer to enforce the lawyer's duty to seek the client's objective?

2. Lawyer may decline a position based on lawyer's own belief that the position is unlawful. DR 7-101(B)(2).
3. The following flowchart sharpens the lawyer's job under the duty to provide informed consent:



4. Opinion 88-30

- i. Availability of opinions and index from Board of Commissioners on Grievances and Discipline, 614-644-5800, fax: 614-644-5804.
  - ii. Facts. Client's real estate agent asks attorney to prepare a joint and survivor deed.
  - iii. Attorney should discuss different deeds with the client, and inform client of the effect of each. "[G]enerally the decision-making authority rests exclusively with the client." EC 7-7.
  - iv. If attorney finds no substantial prejudice to the rights of the client, attorney may decide.
- C. Impaired clients may call on the lawyer to make some decisions for the client. If the lawyer does so, those decisions must be made to "advance the interests of the client." EC 7-12.

### **III. Lawyers must exercise independent professional judgment.**

- A. Opinion 88-30. No one other than the client may influence the attorney. DR5-107, EC5-21. It is an easy rule to state, but a hard one to follow.
- 1. Not real estate agents. Opinion 88-30, discussed above.
  - 2. Not judges. EC 2-26 and 2-27 recognize the personal sacrifice lawyer's make when they disagree with judges.
  - 3. Not bosses. See DR 2-103(D), EC 5-23, 5-24.
  - 4. Not insurance adjusters. See Opinion 97-7 (flat fee for insurance defense permissible with caveat that attorney must exercise independent professional judgment).
  - 5. Not the attorney's spouse or significant other.
- B. Following orders is not a defense.
- 1. It is well recognized that no lawyer may follow any directions from a partner, supervisor, or even the client, to perform a clearly unethical act. Attorneys who obeyed unethical orders can and have been disciplined for professional misconduct. *Disciplinary Counsel v. Caywood* (1996), 74 Ohio St.3d 596, 598; *In re Callahan*, 442 N.E.2d 1092, 1094-95 (Ind. 1982); *Attorney Grievance Comm'n v. Kahn*, 290 Md. 654, 431 A.2d 1336 (1981).
  - 2. There is no "Nuremberg" or "superior orders" defense for attorneys who violate DR 5-107(B), 2-103(D), or any other rule of the CPR. See also, Model Rule 5.4(c).
  - 3. In addressing subsidies that legal services programs make to private attorneys, the Board held that, "the desires of third persons should not be allowed to impair the lawyer's free judgment." Opinion 89-25, citing EC 5-21.
  - 4. In disciplining an attorney for representing both parties to a divorce, the Court stated that, "No man can serve two masters." St. Matthew 6:24." *Geauga Bar Assn. v. Psenicka* (1991), 62 Ohio St. 3d 35, 36.
- C. Employers cannot interfere with a lawyer's independent professional judgment.

1. The high court of New York has held that an attorney's professional obligations do form part of that attorney's obligations to the employer. *Wieder v. Skala*, (1992), 80 N.Y.2d 628, 593 N.Y.S.2d 752. The Court held in paragraph 3 of its syllabus that, "In any hiring of attorney as associate to practice law with firm there is implied an understanding so fundamental to relationship and essential to its purpose as to require no expression: that both associate and firm in conducting practice will do so in accordance with ethical standards of profession." The Court explains as follows at 593 N.Y.S.2d 755:

Associates are, to be sure, employees of the firm but they remain independent officers of the court responsible in a broader public sense for their professional obligations. Practically speaking, plaintiff's duties and responsibilities as a lawyer and as an associate of the firm were so closely linked as to be incapable of separation.

2. The U.S. Supreme Court has held that public defenders do not act under color of state law (subject to liability under 42 U.S.C. 1983), because, "that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective and independent advocate." *Polk County v. Dodson* (1981), 454 U.S. 312, 322, 70 L.Ed.2d 509, 519.
3. Under the Model Rules, the subordinate attorney has the option of deferring to the judgment of a superior attorney on matters that are not clearly unethical. Model Rule 5.2(b). Ohio's CPR contains no such escape clause.

#### D. Corporations do not practice law.

1. No chain of command is allowed in the practice of law. This is the essence of independent professional judgment.
2. *Akron Bar Assn. v. Greene* (1997), 77 Ohio St.3d 279, 280; *State ex rel. Green v. Brown* (1962), 173 Ohio St. 114, 18 O.O. 2d 361 (Rule XIV of the Rules of Practice of the Supreme Court of Ohio provides that only natural persons may be admitted to the practice of law in Ohio.)
3. The Board of Commissioners has rejected a claim that a teachers' association could represent its members through a legal services plan. "[T]he attorney-client relationship must exist between the attorney and the individual plan participant and not between the attorney and the teachers' association." Opinion 89-08. Contracts in Ohio, therefore, cannot alter the personal attorney-client relationship of the attorney to the client.
4. ABA Opinion 334 assumed that a legal services organization could practice law as an organization. The opinion's conclusion explains the ABA's own recognition of its limits as follows:

To say, as we have sometimes done, that a particular restriction upon the staff of a legal services office is not forbidden by the disciplinary rules is not to say that such a restriction is wise or is consistent with applicable ethical considerations. See EC 2-25 ...



Viewing the problems discussed above on the aspirational level of the Code's ethical considerations, we stress that all lawyers should use their best efforts to avoid the imposition of any unreasonable and unjustified restraints upon the renditions of legal services by legal services offices for the benefit of the indigent and should seek to remove such restraints where they exist. All lawyers should support all proper efforts to meet the public's need for legal services.

E. Co-counsel must let the client resolve disputes.

1. EC 5-12: Inability of co-counsel to agree on a matter vital to the representation of their client requires that their disagreement be submitted by them jointly to their client for his resolution, and the decision of the client shall control the action.

F. Lawyers must inform clients about the effects of allocations.

1. Lawyers do not have to subsidize the client's financial needs. DR5-103.
2. The Board of Commissioners on Grievances and Discipline, in its Opinion 89-004, addressed the specific circumstances of a lawyer employed by a legal services program. The issue arose from an employer's plan to limit representation of domestic violence victims to civil protection orders, and not divorces. The Board held that while a limitation can be imposed if the client agrees to it before representation begins, "once representation is undertaken both DR 5-107(B) and DR 7-101 prohibit interference with that representation."

#### **IV. A lawyer must represent a client within the bounds of the law.**

A. Surveyors do not mark out the boundaries of the law. EC 7-2.

B. Assessing the boundaries depends on the lawyer's role. EC 7-3.

1. Advocate.
  - i. As an advocate, the lawyer assesses past facts.
  - ii. An advocate argues the law in the most favorable light. Doubts about the law are resolved in the client's favor. The client may give informed consent to adopt a less favorable position on the law.
2. Advisor.
  - i. As an advisor, the lawyer helps the client decide on future conduct.
  - ii. The lawyer considers the possible judicial outcomes, and the likelihood of each. The cautious lawyer resolves doubts against the client to protect the lawyer from the client's wrath.

C. The lawyer makes the assessment about what the bounds of the law are.  
DR7-101(B)(2).

D. The lawyer must betray the client if required to do so by law.

1. DR 7-102.

2. Opinion 90-7 required a lawyer to preserve a confidence about a client's fraud when the lawyer had not participated in presenting the fraud to the court.
  3. Ohio Supreme Court adopted the opposite position in *Disciplinary Counsel v. Heffernan* (1991), 58 OhioSt.3d260, 261.
- E. Attorney-employee can be discharged in retaliation for protest which violates professional ethics code. *Douglas v. Dyn McDermott Petroleum* (5th Cir 12/15/98)
1. Original panel decision (06/18/98):  
<http://www.ca5.uscourts.gov/opinions/pub/96/96-30883-CV0.HTM>
  2. Dissent from denial of en banc rehearing (12/15/98):  
<http://www.ca5.uscourts.gov/opinions/pub/96/96-30883-CV1.HTM>
  3. In refusing an en banc rehearing, the 5th Circuit judges exposed an internal rift over how to handle a Title VII retaliation claim in which an attorney-employee's protest included the disclosure to third persons of the employer's confidential information. In the original decision (06/18/98) a three judge panel ruled against the employee. The employee was an attorney who was in-house counsel. She wrote a letter detailing her complaints of race and sex discrimination, and also discussing other internal company matters. She sent the letter to her supervisor, and also to other employees and to an employee of the Department of Energy (but not as a whistleblowing complaint). The employer discharged the attorney; she sued; a jury found in her favor on her Title VII retaliation claim. The three judge PANEL (06/18/98) reversed, finding that the attorney had disclosed client confidences in violation of Louisiana professional ethics rules, and that she was discharged for those unethical disclosures rather than for participating in protected activity. The court denied a motion for rehearing and for rehearing en banc (07/23/98). On 12/15/98 the court announced that the court had been polled and a majority voted against rehearing en banc.
  4. Five judges DISSENTED from the denial of an en banc rehearing, and two of them signed a stinging opinion arguing as follows: (1) The panel overruled, in part, the Supreme Court's McDonnell Douglas-Burdine-Hicks framework by creating a mandatory rule of law that an attorney is denied the opportunity to demonstrate that the employer's proffered reason for discharge was a pretext. Holding that an attorney's "unethical conduct, per se and as a matter of law, places the employee's opposition to unlawful employment practices outside the protection of Title VII [is] manifestly contrary to the Supreme Court decisions." (2) The panel used an improper standard for reviewing a jury's findings, and substituted its own mandatory rules of law. "The panel found the facts of the case de novo, and applied its own new mandatory rules of law to those facts." (3) There was sufficient evidence for a jury to find that the employer's "proffered reasons for the discharge were false and that the employee's opposition to unlawful employment practices was a determinative reason" for her discharge. (4) The panel decision overrules two previous 5th Circuit decisions. (5) The panel misinterpreted the Louisiana rule of ethics (Rule 1.6 on client confidences).
  5. One judge responded by saying that the dissent "is unnecessarily overwrought" by the panel decision. The panel decision "merely holds that when an attorney pursues

claims under Title VII, she must do so in a manner that does not violate her profession's ethical code."

## **V. The case of the most direct sacrifice for a client.**

A. *Cleveland Bar Assn. v. Mineff* (1995), 73 Ohio St.3d281, 284.

1. The purpose of DR 5-103(B) is to prevent the unsightly display of lawyers trying to outbid each other for a percentage of a client's claim.
2. George Mineff made payments totaling \$5300 to help a client who was visibly starving and facing eviction.
3. The letter of the law is more important than the spirit. Make sacrifices for your clients as long as you don't give them your money or otherwise violate the letter of the law.

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