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## **Ethics – The Cost of Confidentiality**

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# THE ETHICS OF NEGOTIATION: THE TRUE COST OF REPRESENTATION

## I. INTRODUCTION

### A. A Very Old Question

The question of ethics in negotiations is not a new one:

[S]uppose, for example, a time of dearth and famine at Rhodes, with provisions at fabulous prices; and suppose that an honest man has imported a large cargo of grain from Alexandria and that to his certain knowledge also several other importers have set sail from Alexandria, and that on the voyage he has sighted their vessels laden with grain and bound for Rhodes; is he to report the fact to the Rhodians or is he to keep his own counsel and sell his own stock at the highest market price? I am assuming the case of a virtuous, upright man, and I am raising the question how a man would think and reason who would not conceal the facts from the Rhodians if he thought that it was immoral to do so, but who might be in doubt whether such silence would really be immoral.

The Famine at Rhodes, Cicero, De OFFICIIS, BOOK III. xi.-xii.

The question raised by Cicero is as relevant today as it was when he first posed it more than 2,000 years ago. While Cicero tells us what he believes the merchant should do in this situation, we are left to wonder what he would say with respect to the merchant's lawyer.

### B. With Continuing Application

#### 1. *Spaulding v. Zimmerman*

On August 24, 1956, David Spaulding was injured when the car in which he was riding collided with another car. *Spaulding v. Zimmerman*, 116 N.W.2d 704, 706 (Minn. 1962). Theodore Spaulding, David's father, filed suit against John Zimmerman, the driver of the car in which David was riding, as well as John Ledermann and Florian Ledermann, the driver and owner (respectively) of the other car involved. David was, at the time, a minor.<sup>1</sup> *Id.*

Following the accident, David was examined by his family physician, Dr. James H. Cain, who diagnosed David as having suffered a severe crushing injury of the chest with multiple rib fractures, a severe cerebral concussion with likely petechial hemorrhages of the brain, and bilateral fractures of the clavicles. *Id.* at 707.

On January 3, 1957, at the suggestion of Dr. Cain, David was examined by Dr. John F. Pohl, an orthopedic specialist. *Id.* Dr. Pohl's examination included an x-ray study of David's chest and his detailed report included the following conclusion, "The lung fields are clear. The heart and aorta are normal." *Id.* Nevertheless, on March 1, 1957, at the suggestion of Dr. Pohl, David was examined again, this time by Dr. Paul S. Blake, a neurologist. *Id.* Consistent with Dr. Pohl's report,

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<sup>1</sup> The age of majority was, apparently, 21, and David was only 19 or 20 at the time of the accident. *Id.*

nothing in Dr. Blake's report indicated anything out of the unusual with respect to David's heart or aorta.

In the interim, on February 22, 1957, at the request of the defendants, David was examined by Dr. Hewitt Hannah, also a neurologist. *Id.* On February 26, 1957, Dr. Hannah issued his report to Zimmerman's attorneys. *Id.* Unlike the plaintiff's physicians, Dr. Hannah found a problem with David's aorta:

The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of Internists. ... Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would case his death.

It would be interesting also to know whether the X-ray of his lungs, taken immediately following the accident, shows this dilatation or not. If it was not present immediately following the accident and is now present, then we could be sure that it came out of the accident.

*Id.*

On March 4, 1957, David's case was called for trial. By that time, the content of Dr. Hannah's report had been provided to counsel for the Ledermanns but not to David, his father, or their attorneys. *Id.* at 706-07. On March 5, 1957, the parties informed the court that they had reached an agreement to resolve the claims of David and his father for \$6,500. *Id.* at 707. David's counsel subsequently presented the court with a petition for approval of the settlement, which described David's injuries as "severe crushing of the chest, with multiple rib fractures, severe cerebral concussion, with petechial hemorrhages of the brain, bilateral fractures of the clavicles." The petition was supported by the affidavits of Drs. Cain and Blake, which included their findings. *Id.* Neither the petition nor its supporting affidavits made any mention of the aneurysm. *Id.* On May 8, 1957, the court approved the settlement. *Id.*

In early 1959, David was required to undergo a physical checkup by the army reserve, of which he was a member. *Id.* David used Dr. Cain for the physical, and this time Dr. Cain noticed the beginnings of the aneurysm in the x-rays taken by Dr. Pohl shortly after the accident. *Id.* Dr. Cain promptly sent David to Dr. Jerome Grismer, who confirmed the presence of the aorta aneurysm and recommended immediate surgery. *Id.* On March 10, 1959, corrective surgery was performed on David successfully at Mount Sinai Hospital in Minneapolis. *Id.*

David had turned 21 and brought suit to set aside the settlement and to seek additional damages. *Id.* The court vacated its prior order approving the settlement, largely based on its view that the defendants had concealed information from the court, as opposed to the plaintiff:

The mistake concerning the existence of the aneurysm was not mutual. For reasons which do not appear, plaintiff's doctor failed to ascertain its existence. By reason of the failure of plaintiff's counsel to use available rules of discovery, plaintiff's doctor and all his

representatives did not learn that defendants and their agents knew of its existence and possible serious consequences. Except for the character of the concealment in the light of plaintiff's minority, the Court would, I believe, be justified in denying plaintiff's motion to vacate, leaving him to whatever questionable remedy he may have against his doctor and against his lawyer.

That defendants' counsel concealed the knowledge they had is not disputed. ... There is no doubt that during the course of the negotiations, when the parties were in an adversary relationship, no rule required or duty rested upon defendants or their representatives to disclose this knowledge [of the aorta aneurysm]. However, once the agreement to settle was reached, it is difficult to characterize the parties' relationship as adverse. At this point all parties were interested in securing Court approval. ...

When the adversary nature of the negotiations concluded in a settlement, the procedure took on the posture of a joint application to the Court, at least so far as the facts upon which the Court could and must approve settlement is concerned. It is here that the true nature of the concealment appears, and defendants' failure to act affirmatively, after having been given a copy of the application for approval, can only be defendants' decision to take a calculated risk that the settlement would be final. ...

To hold that the concealment was not of such character as to result in an unconscionable advantage over plaintiff's ignorance or mistake, would be to penalize innocence and incompetence and reward less than full performance of an officer of the Court's duty to make full disclosure to the Court when applying for approval in minor settlement proceedings.

*Id.* at 709.

## 2. Alton Logan

On January 11, 1982, a security guard at a McDonald's was murdered on the far South Side of Chicago. Northwestern Law, Bluhm Legal Clinic, Center on Wrongful Convictions, <http://www.law.northwestern.edu/cwc/exonerations/ilLoganSummary.html>. The next month, Alton Logan and Edgar Hope were arrested and charged with the guard's murder, based on identifications by a second guard who had been wounded. *Id.*

A few days later, Andrew Wilson was arrested and charged with the unrelated murder of two Chicago police officers. *Id.* After Wilson was arrested, Hope informed his counsel that he had killed the guard with Wilson, not Logan. *Id.* Hope's attorneys then notified Wilson's public defenders, Dale Coventry and Jamie Kunz, what Hope had said. *Id.* As Kunz recalled, "We got information that Wilson was the guy and not Alton Logan. So we went over to the jail immediately almost and said, 'Is that true? Was that you?' And he said, 'Yep it was me.'" 26-Year Secret Kept Innocent Man In Prison, Feb. 11, 2009, [http://www.cbsnews.com/8301-18560\\_162-3914719.html](http://www.cbsnews.com/8301-18560_162-3914719.html). "He just about hugged himself and smiled," Kunz added. "I mean he was kind of gleeful about it. It was a very strange response." *Id.* "He was pleased that the wrong guy had been charged," Coventry added. "It was like a game and he'd gotten away with something. But there was just no doubt whatsoever that it was true. I mean I said, 'It was you with the shotgun – you killed the guy?' And he said, 'yes,' and then he giggled." *Id.*

Unfortunately, Wilson would not permit his attorneys to disclose what he had just admitted. *Id.* After researching the rules of ethics and concluding they could not reveal what they had learned without Wilson's consent, Kunz and Coventry wrote out an affidavit explaining that they had obtained information through privileged sources confirming that Alton Logan was not the killer and that someone else was. *Id.* They then placed the affidavit in a sealed envelope and placed the envelope in a lock box under Coventry's bed. *Id.* Kunz explained, "We wanted to put it in writing, to memorialize, you know, to get a notarized record of the fact that we had this information back then so that if, you know, 20 years later, 10 years later, if something allowed us to talk, as we are now, we could at least ... we ... we'd at least have an answer to someone who says, 'You're just making this up now.'" *Id.*

Meanwhile, a jury convicted Logan of murder and considered whether to give him the death penalty. *Id.* "I was in court the day they were dealing with the death penalty," Coventry recalled. "Cause I had this information and the jury was deciding whether they're gonna kill him or not. ... It was just creepy. Knowing I was looking at the jurors thinking, 'My God, they're going to decide to kill the wrong guy.'" *Id.* In the end, the jurors voted 10 to 2 in favor of the death penalty, which was not sufficient to impose the death penalty under Illinois law. *Id.*

According to Kunz, if the jury had imposed the death penalty, he and Coventry would have come forward. "Morally there's very little difference and we were torn about that, but in terms of the canons of ethics, there is a difference, you can prevent a death," Kunz explained. *Id.* When asked whether they could have leaked the information, Kunz explained, "The only thing we could have leaked is that Andrew Wilson confessed to us. And how could we leak that to anybody without putting him in jeopardy? It may cause us to lose some sleep. But, but I lose more sleep if I put Andrew Wilson's neck in the noose." *Id.* When asked whether it mattered that Wilson was guilty and Logan was not, Kunz explained why it did not: "[T]hat's up to the system to decide. It's not up to me as his lawyer to decide that he was guilty and so he should be punished and Logan should go free." *Id.* When asked if he had been worried about being disbarred if he came forward, Coventry responded, "I don't think I considered that as much as I considered my responsibility to my client. I was very concerned to protect him." *Id.*

Distraught by their predicament, Coventry and Kunz continued to work on Wilson, and Coventry eventually convinced Wilson to allow them to reveal that Wilson was the killer after Wilson's death. *Id.* In late 2007, Wilson died and Coventry and Kunz immediately came forward. *Id.* In April 2008, approximately five months after Coventry and Kunz came forward, Logan was finally released from custody. *Id.*

On January 15, 2013, the City of Chicago approved a \$10.25 million settlement to Logan. Fran Spielman, Chicago to pay \$10.25 million in another Burge case, Jan. 15, 2013, <http://www.suntimes.com/news/metro/17576309-418/city-to-pay-1025-million-in-another-burge-case.html>. When asked if he felt any responsibility for the settlement, Coventry said he did not. "I was doing what I needed to do as an attorney," Coventry explained. "I had a responsibility to do what I needed to do for my client." *Id.*

## **II. THE RULES OF "ETHICS"**

In some arenas, such as philosophy, "ethics" are closely tied to "morals":

“[Ethics is] the philosophical study of morality. The word is also commonly used interchangeably with ‘morality’ to mean the subject matter of this study; and sometimes it is used more narrowly to mean the moral principles of a particular tradition, group, or individual. Christian ethics and Albert Schweitzer’s ethics are examples.”

John Deigh, “Ethics,” in *The Cambridge Dictionary of Philosophy*, Robert Audi (ed.), 1995.

### **A. Aspiration v. Prohibition**

To be clear, the fragment quoted above focuses specifically on the relation of ethics, as a branch of philosophy, to morals, not the general relationship between the two. Email from John Deigh to Jason Boulette, March 9, 2011. (“That is, morality is what philosophers who are working in ethics study.”). With respect to legal ethics, Professor Deigh suggested the more useful distinction may be the difference between prohibitions and aspirational ideals.<sup>2</sup>

There seems to be little doubt that the Texas Disciplinary Rules of Professional Conduct represent a set of prohibitions, rather than aspirations. Texas lawyers are, after all, governed by the “Texas Disciplinary Rules of Professional Conduct,” not the “Texas Ethical Rules of Professional Conduct” or the “Texas Moral Rules of Professional Conduct.” Indeed, the Preamble to the Texas Disciplinary Rules specifically notes that the Rules represent “minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 7 (1989). In short, the Rules do not even hold themselves out as being aspirational standards for “right” or “moral” behavior but instead characterize themselves as more of a penal code:

7. In the nature of law practice, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from apparent conflict between a lawyer’s responsibilities to clients, to the legal system and to the lawyer’s own interests. The Texas Disciplinary Rules of Professional Conduct prescribe terms for resolving such tensions. They do so by stating minimum standards of conduct below which no lawyer can fall without being subject to disciplinary action. Within the framework of these Rules many difficult issues of professional discretion can arise. The Rules and their Comments constitute a body of principles upon which the lawyer can rely for guidance in resolving such issues through the exercise of sensitive professional and moral judgment. In applying these rules, lawyers may find interpretive guidance in the principles developed in the Comments.

TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 7 (1989).

Indeed, the Rules invoke notions of “moral judgment” and a lawyer’s “conscience” when encouraging attorneys to hold themselves voluntarily to a higher standard than the Rules do:

9. Each lawyer’s own conscience is the touchstone against which to test the extent to which his actions may rise above the disciplinary standards prescribed by these rules. The desire for the respect and confidence of the members of the profession and of the society

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<sup>2</sup> This same distinction was suggested to the author first by Phil Durst, one of the great thinkers of Austin, Texas, and subsequently by Michael Rubin, a wonderful speaker and writer on the issue of ethics in negotiations.

which it serves provides the lawyer the incentive to attain the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

*Id.* at n. 9.

## **B. The Rules Applied to Negotiations**

The Preamble indicates that lawyers should pursue “advantageous” results for their clients in a manner that is consistent with the “requirements of honest dealing with others.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Preamble: A Lawyer’s Responsibilities, n. 2. (1989).

### 1. Rule 4.01, Truthfulness in Statements to Others

Oddly, however, the Rules do not actually require what any lay person would understand to be “honest dealings with others.”<sup>3</sup> Rather, Rule 4.01 prohibits a lawyer from making a false statement of “material” fact or law to a third party. TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 4.01(a) (1989). As the comments to Rule 4.01 make plain, the “material” modifier contained in this prohibition is significant, particularly in the context of negotiation:

1. Paragraph (a) of this Rule refers to statements of material fact. Whether a particular statement should be regarded as one of material fact can depend on the circumstances. For example, certain types of statements ordinarily are not taken as statements of material fact because they are viewed as matters of opinion or conjecture. Estimates of price or value placed on the subject of a transaction are in this category. Similarly, under generally accepted conventions in negotiation, a party’s supposed intentions as to an acceptable settlement of a claim may be viewed merely as negotiating positions rather than as accurate representations of material fact. Likewise, according to commercial conventions, the fact that a particular transaction is being undertaken on behalf of an undisclosed principal need not be disclosed except where non-disclosure of the principal would constitute fraud.

TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 4.01, cmt. 1 (1989).

This nuanced understanding of “material” may be one of the (many) reasons the Rules forbid an attorney from dealing with a represented party without the consent of counsel and require an attorney to disabuse any unrepresented party of any sense that the attorney is disinterested in the outcome of dealings on behalf of a client. Accord TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 4.02(a) (dealings with represented parties) and Rule 4.03 (dealings with unrepresented parties).

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<sup>3</sup> The Rules impose heightened obligations of honesty and candor on lawyers dealing with a tribunal. *See* TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 3.01 *et. seq.* As the *Spaulding* case illustrates, once negotiations have concluded and an attorney begins dealing with a court, the attorney should be mindful of his or her obligations as an officer of the court. *Compare id. with supra*, pp. 2-3.



## 2. Rule 1.05, Confidentiality of Information

Rule 4.01 draws an explicit distinction between affirmative misrepresentations of material fact or law, on the one hand, and the mere withholding of material information, on the other. *See id.* at Rule 4.01 (1989). Although a lawyer is prohibited from making a false statement of material fact or law to a third party, the lawyer is not required to disclose material information to a third party, unless such disclosure is necessary to avoid making the lawyer a party to a criminal act or knowingly assisting a fraudulent act perpetrated by a client. *Id.*

In fact, the Rules generally prohibit a lawyer from disclosing or using any “confidential information” of a client without the client’s consent. *Id.* at Rule 1.05(b)(1). It is important to understand that “confidential information” under Rule 1.05 is an extremely broad concept, encompassing all information privileged under Rule 503 of the Texas Rules of Evidence, as well as “all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client—to the disadvantage of the client.” *Id.*

There are exceptions, of course. For example, Rule 1.05(c) would permit (but not require) a lawyer to reveal confidential information without the client’s consent (1) when the lawyer has reason to believe the revelation is necessary to prevent the client from committing a criminal or fraudulent act, or (2) to the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.<sup>4</sup> *Id.* at Rule 1.05(c)(7), (8). Any such disclosure adverse to the client’s interest should, however, be no greater than the lawyer believes necessary to the purpose. *Id.* at Rule 1.05, cmt. 14.

Likewise, Rule 1.05(d) would permit (but not require) a lawyer to disclose unprivileged confidential information when the lawyer has been impliedly authorized to do so to carry out the representation or has reason to believe it is necessary to do so to carry out the representation effectively.<sup>5</sup> *Id.* at Rule 1.05(d). As with the discretionary disclosure of privileged confidential information, however, any such disclosure of unprivileged confidential information adverse to the

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<sup>4</sup> Rule 1.05(c) provides that a lawyer may reveal confidential information: (1) when the lawyer has been expressly authorized to do so in order to carry out the representation; (2) when the client consents after consultation; (3) to the client, the client’s representatives, or the members, associates, and employees of the lawyers firm, except when otherwise instructed by the client; (4) when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law; (5) to the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client; (6) to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer’s associates based upon conduct involving the client or the representation of the client; (7) when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act; (8) to the extent revelation reasonably appears necessary to rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services had been used.

<sup>5</sup> Rule 1.05(d) provides that a lawyer may reveal unprivileged confidential information: (1) when impliedly authorized to do so in order to carry out the representation; (2) when the lawyer has reason to believe it is necessary to: (i) carry out the representation effectively; (ii) defend the lawyer or the lawyer’s employees or associates against a claim of wrongful conduct; (iii) respond to allegations in any proceeding concerning the lawyers representation of the client; or (iv) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

client's interest should be no greater than the lawyer believes necessary to the purpose. *Id.* at Rule 1.05, cmt. 14.

All of this said, apart from situations involving tribunals and Rule 4.01's limited disclosure requirements discussed above, a lawyer is only required to reveal confidential information if the lawyer has confidential information "clearly establishing" that a client is likely to commit a criminal or fraudulent act that is likely to result in "death or substantial bodily harm to a person," and even then the lawyer is only required to reveal confidential information to the extent "revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act." *Id.* at Rule 1.05(e).

### **C. The True Cost of Representation**

Lest there be any doubt, the comments to the Rules explain in no uncertain terms that a lawyer must preserve client confidential information, including unprivileged information, even if it means exposing others to serious and potentially irreparable harm:

9. In becoming privy to information about a client, a lawyer may foresee that the client intends serious and perhaps irreparable harm. To the extent a lawyer is prohibited from making disclosure, the interests of the potential victim are sacrificed in favor of preserving the client's information—usually unprivileged information—even though the client's purpose is wrongful. On the other hand, a client who knows or believes that a lawyer is required or permitted to disclose a client's wrongful purposes may be inhibited from revealing facts which would enable the lawyer to counsel effectively against wrongful action. Rule 1.05 thus involves balancing the interests of one group of potential victims against those of another. ...

*Id.* at Rule 1.05, cmt. 9.

#### **1. Rule 1.02, The Limits and Obligations of Representation**

That said, the Rules prohibit a lawyer from assisting or counseling a client in conduct that the lawyer knows is criminal or fraudulent. *Id.* at Rule 1.02(c). Although a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel and represent a client in connection with the making of a good faith effort to determine the validity, scope, meaning, or application of the law, the lawyer may not advise a client on how to break the law. *Id.* Indeed, the lawyer must give his or her client an honest opinion about the actual consequences that appear likely to result from the client's conduct.<sup>6</sup> *Id.* at Rule 1.02, cmt. 7. Fortunately for the lawyer, the fact that a client uses a lawyer's 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. *Id.*

Similarly, if a lawyer has confidential information "clearly" establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in "substantial" injury to the financial interests or property of another, the lawyer must promptly make reasonable efforts to dissuade the client from committing the crime or fraud, even if the lawyer is not required to disclose confidential

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<sup>6</sup> "The Comments do not, however, add obligations to the rules and no disciplinary action may be taken for failure to conform to the Comments." TEX. DISCIPLINARY RULES OF PROF'L CONDUCT, Preamble: A Lawyer's Responsibilities, n. 10 (1989).

information to prevent the crime or fraud under Rule 1.05(e) and has chosen not to disclose confidential information to prevent the crime or fraud under Rule 1.05(c)(7). Compare *id.* at Rule 1.02(d) with Rule 1.05(c)(7), (e).

Likewise, if a lawyer has confidential information “clearly” establishing the lawyer’s client has already committed a criminal or fraudulent act, the lawyer must make reasonable efforts to persuade the client to take corrective action, if the lawyer’s services were used in the commission of the criminal or fraudulent act, even if the lawyer is not required to disclose client confidential information under Rule 1.05(e) and has chosen not to disclose such information under Rule 1.05(c)(8). Compare *id.* at Rule 1.02(e) with Rule 1.05(c)(8), (e).

The comments to Rule 1.02 recognize the tension created by the lawyer’s sometimes competing obligations to avoid furthering a client’s criminal or fraudulent act, dissuade a client from committing a criminal or fraudulent act, correct a criminal or fraudulent act that was previously committed using the lawyer’s services, and maintain client confidences:

When a client’s course of action has already begun and is continuing, the lawyer’s responsibility is especially delicate. The lawyer may not reveal the client’s wrongdoing, except as permitted or required by Rule 1.05. However, the lawyer also must avoid furthering the client’s unlawful purpose, for example, by suggesting how it might be concealed. 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. See Rule 1.15(a)(1).

*Id.* at Rule 1.02, cmt. 8.

## 2. Rule 1.15, Declining or Terminating Representation

In light of the foregoing, it seems that the Rules implicitly encourage attorneys to be careful in selecting those they choose to represent. This subtle encouragement finds explicit voice, to some degree, in Rule 1.15, which provides that a lawyer must decline or withdraw from representation if the representation will result in the lawyer violating the rules or applicable law, the lawyer’s physical, mental, or psychological condition renders the lawyer unfit, or the client fires the lawyer.<sup>7</sup> *Id.* at Rule 1.15(a). Otherwise, a lawyer may not withdraw unless:

- (1) withdrawal can be accomplished without material adverse effect on the interests of the client;
- (2) the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes may be criminal or fraudulent;
- (3) the client has used the lawyer’s services to perpetrate a crime or fraud;

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<sup>7</sup> However, “[t]he lawyer is not obliged to decline or withdraw simply because the client suggests such a course of conduct; a client may have made such a suggestion in the ill-founded hope that a lawyer will not be constrained by a professional obligation.” TEX. DISCIPLINARY RULES OF PROF’L CONDUCT, Rule 1.15, cmt. 2 (1989).

- (4) a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent or with which the lawyer has fundamental disagreement;
- (5) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services, including an obligation to pay the lawyer's fee as agreed, and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled;
- (6) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
- (7) other good cause for withdrawal exists.

*Id.* at Rule 1.15(b).

Regardless of the basis for termination, a lawyer must take steps to the extent reasonably practicable to protect a client's interests upon termination, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payments of fee that has not been earned. *Id.* at Rule 1.15(d). Notwithstanding this obligation, the comments to Rule 1.05 suggest a lawyer may be permitted to effect a "noisy" withdrawal from representation. *See id.* at Rule 1.05, cmt. 21 ("Neither this Rule nor Rule 1.15 prevents the lawyer from giving notice of the fact of withdrawal, and no rule forbids the lawyer to withdraw or disaffirm any opinion, document, affirmation, or the like.").

### **III. CONCLUSION**

Far from aspirational, the Texas Disciplinary Rules of Professional Conduct represent a bare minimum standard of conduct below which no lawyer may fall. Given the weighty obligations a lawyer undertakes by agreeing to represent a client, lawyers are well advised to understand a potential client's objectives and expectations in advance, before the attorney-client relationship begins.

**This paper is not intended as legal advice.**