ETHICS IN EMPLOYMENT LAW
Three Hypothetical Questions Applying RPC 1.2*
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Introduction

RPC 1.2(a) provides that subject to paragraphs (c) and (d), a lawyer shall abide by a client's decisions **concerning the objectives of representation** and as required by Rule 1.4, shall consult with the client **as to the means** by which they are to be pursued.

A lawyer may take such actions on behalf of the client as is impliedly authorized to carry out the representation.

A lawyer shall abide by a client's decision whether to settle a matter.

In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, **as to a plea to be entered, whether to waive a jury trial and whether the client will testify.**

. . .

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances and the client gives informed consent.

(d) A lawyer shall not 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 and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law (emphasis added).

Under RPC 1.4(a)(3), a lawyer must keep the client "reasonably" informed about the "status" of a matter.

Under RPC 1.4(b), the lawyer must also explain the work to the extent "reasonably necessary" to permit the client to make "informed decisions" regarding the representation.

Comment 2 to RPC 1.2 states that "clients normally defer to the special knowledge and skill of their lawyer with respect to the **means to be used** to accomplish their objectives, **particularly with respect to technical, legal and tactical matters."**

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This comment also explains that lawyers usually defer to clients with respect to "questions such as the expense to be incurred and concern for third persons who might be adversely affected." The RPC does not prescribe how disagreements between lawyers and clients are to be resolved.

The Restatement (Third) of the Law Governing Lawyers §21, comment e, adds that except for decisions reserved for clients, and in the absence of an agreement on these matters, a lawyer may take "any lawful measure within the scope of representation that is reasonably calculated to advance a client's objective. For example, the lawyer may decide whether:

- to move to dismiss a complaint and what discovery to pursue or resist, to accommodate reasonable requests of opposing counsel;

- to object or waive objections to questions during hearings; or

- to decide what questions to ask a witness."

The Restatement suggests that unless a lawyer and client have agreed otherwise, the lawyer, not the client, should make decisions that "involve technical, legal and strategic considerations difficult for a client to assess."

Hypothetical #1 *"Who calls the shots?"*

Your public employee client is suspended for 20 days due to a disagreement with his handling of a subordinate's disability accommodation request. The subordinate obtained counsel, who quickly brought the dispute to the head of your client's department. Your client's manager, angry that client didn't keep her timely informed of an escalated employee complaint, suspends him for 20 days. Client feels singled out for the discipline, which he believes is based on his race, and files a racial discrimination charge with the EEOC.

Six months later, the same manager terminates client without explanation in close proximity to client's whistleblower objection to a change in longstanding practice.

You file a two court complaint alleging LAD race discrimination in the suspension, and CEPA whistleblower retaliation in the termination. With limited corroborating evidence obtained in discovery, the limited (20 days pay) damages involved, and the complications of alleging contradictory motives by the same manager, you recommend that client dismiss the LAD claim.

Client resists, first for purposes of seeking a mediation resolution, and later because he is convinced that his manager is a racist, in addition to having terminated him for whistleblower retaliation.

Yet, client was replaced by someone of his same race, and the facts of the retaliatory discharge, complicated in their own right, are difficult to link to the manager's alleged racial bias.

Once discovery ends, you again ask your client to voluntarily dismiss the LAD race claim. Client refuses to make a decision, especially since mediation was postponed until the end of discovery. He wants to "clear his record" with the long shot hope that defendant would agree to rescind the disciplinary suspension as part of a mediated settlement.

Now, mediation has failed and defendant's summary judgment motion is imminent. You feel steadfast that you don't want to go before a jury with two distinct and inconsistent theories of motivation by the terminating (and suspending) manager.

Question Presented #1

1. Should you insist that the LAD race claim be withdrawn before a ruling on summary judgment?

2. If the LAD race claim should survive summary judgment, should you insist that the LAD race claim be voluntarily dismissed prior to plaintiff's opening statement?

3. As a practical matter, can the **objectives of representation** be readily distinguished from the **means to achieve** those objectives? In which category does voluntarily dismissing your client's LAD race discrimination cause of action fall?

4. Without securing your client's consent, can you announce the voluntary dismissal of your client's LAD race claim at trial?

Discussion #1

In *Jones v. Barnes*, 463 U.S. 745 (1983) the Court allocated the decision-making power between a criminal defendant and his attorney as follows:

> The accused has the "ultimate authority to make certain fundamental decisions," such as "whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." *Id*. at 751. But other decisions are

> "matters[s] of professional judgment" to be determined by defense counsel, in recognition of "the superiority of trained counsel" to make them. *Id*. To allow the defendant personally to override counsel's decision as to such matters would "seriously undermine[] the ability of counsel to present the client's case in accord with counsel's professional evaluation," *Id*., and "disserve the very goal of vigorous and effective advocacy."

Id. at 754. *Accord Jones*, 463 U.S. at 751-52 ("experienced advocates since time beyond memory emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.")

Hypothetical #2 *"You'll settle when I say so or face the consequences."*

Having been burnt by clients who have declined your recommendations to accept lucrative settlement offers, and were either "no caused" at trial or lost on appeal, you are determined to include a "hammer" in your Fee Agreements to minimize this risk.

Potential clauses that you consider including are:

a) Shifting the fee from a complete contingency to a reduced hourly fee credited towards a contingency fee, should client decline your settlement recommendation;

b) Requiring that all outstanding case costs be paid, along with a deposit for reasonably anticipated trial costs, before you will try the case if client declines your settlement recommendation.

c) Mandating that no settlement can be accepted absent the mutual consent of attorney and client;

You recall hearing that "ethics counsel" have discouraged litigators from placing such burdens on the client's decision to settle in a Retainer Agreement. You seek to understand this concern and the downside risks of utilizing the above "hammer" clauses.

Questions Presented #2

1. Under option (a), will a court allow you to change the basis for fee calculation mid-stream, even if you place the triggering contingency (client's refusal of your recommended settlement) into the Retainer Agreement?

2. Under option (b), would a court grant your motion to withdraw as

counsel shortly before trial if your client refuses or fails to pay the accrued and anticipated costs?

3. Under option (c), do you risk the Court's adverse ruling on your request for fee shifting or award of a contingency fee multiplier?

Discussion #2

In *Saffos v. Avaya, Inc.*, 419 N.J. Super. 244 (App. Div.) plaintiff won a substantial jury verdict for age discrimination under the LAD. In appealing plaintiff's counsel fee award, defendants contended that plaintiff was not entitled to any counsel fees from them because the retainer agreement he signed with his attorneys contained an invalid "settlement-veto" provision. They urged that such a provision violated R.P.C. 1.2(a), which provides, "[a] lawyer shall abide by a client's decision whether to settle a matter." Defendants claimed that plaintiff's counsel should not be allowed to profit from actions that were contrary to public policy and unenforceable.

The retainer agreement at issue provided:

> Because we are taking a substantial risk in this litigation and waiving our customary retainer and recognizing that sometimes counsel fees may exceed the value of the case to the litigant, you agree not to accept any settlement figure which would not adequately compensate the Law Firm for the time we have put into the case. In other words, **any settlement accepted by you must be approved by the Law Firm as well**.

Id. at 271 (emphasis added).

The Appellate Division viewed the issue as whether defendants may assert the public policy embodied in R.P.C. 1.2(a) to avoid their own statutory obligation to pay attorneys' fees to plaintiff. It noted that the Supreme Court in *Szczepanski v. Newcomb Medical Center*, 141 N.J. 346 (1985) made it clear that "the reasonable counsel fee payable to the prevailing party under fee-shifting statutes is determined independently of the provisions of the fee agreement between that party and his or her counsel." *Id*. at 358. Thus, the court held that "an unenforceable provision in the retainer agreement does not prevent the award of counsel fees purusant to *N.J.S.A.* 10:5-27 and does not control the fee award that a judge may grant in his or her discretion." *See Id*. at 358-59. The *Saffos* court rejected defendants' argument that the "settlement-veto" provision in the retainer agreement required denial of plaintiff's application for counsel fees. *Id*. at 272.

In *Levinson v. D'Alfonso & Stein*, 320 N.J. Super. 312 (App. Div. 1999), a legal malpractice case where the plaintiff failed to procure an expert opinion in compliance with the Affidavit if Merit statute, the court addressed the underlying personal injury action. It quoted from the underlying Retainer Agreement which provided as to responsibility for costs:

> IN THE EVENT that attorney advises client to accept a sum in settlement but client requests attorney to try this case, and in the further event that a verdict is returned against client, or a verdict is returned in an amount less than that offered as settlement, then client agrees to pay attorney 33 1/3 percent of that sum offered in settlement as this fee . . .

Id. at 319. Judge Wecker's concurring opinion specifically criticized this provision.

> [o]ne provision purports to entitle the lawyer to the amount of contingent fee that otherwise would have been earned, if the client does not approve a recommended settlement and the case is lost or concluded for an amount less than the recommended settlement. *See Cohen v. Radio-electronics Officers Union, Dist. 3, NMEBA*, 146 N.J. 140, 156 (1996)(discussing reasonable fee provisions in retainer agreements.)

Id. at 325 n.1.

Hypothetical #3 *"Purloined Employer documents have criminal implications."*

A new whistleblower client consults with you while she is still employed. She has objected to a practice of filling in favorable customer service ratings when customers leave certain rating categories blank, and was soon thereafter placed on a final warning for not being a team player. Her termination appears to be imminent.

Once the ratings are entered into a computerized tally by the Integrity Unit, the original customer-completed rating sheets are shred. Your client tells you that the only way to document the falsified rating sheets is to take possession of them before they are sent to the Integrity Unit.

She proposes to remove 100 altered original customer rating sheets to prove the "fraud on the company" that she protested and to possibly hand them over to the FTC's Bureau of Consumer Protection for further investigation. She invites your legal counsel on this plan and asks if

you would hold and safeguard the original documents for her as an "officer of the court."

Questions Presented #3

1. Can you counsel your client as to her potential criminal removal of original employer documents"

2. Should you inspect the original documents purloined, what risks or exposures do you face?

3. Are any federal whistleblowing statutes helpful to permit your client to prove her case by taking documents that will otherwise be destroyed in the normal course of business?

Discussion #3

Under RPC 1.2(d), a lawyer may discuss a potentially unlawful course of conduct with a client, but may not counsel or assist that conduct unless the client is seeking to test the validity or meaning of the law in question. *See Id*. and comment 12. If the client insists on advice or action by the lawyer that would constitute assistance with a criminal or fraudulent act in violation of the ethics code, the lawyer must withdraw from representation. *See* RPC 1.16(a)(1).

In *State v. Saavedra*, 222 N.J. 39 (2015), the Court disallowed self-help in employment discrimination cases as an alternative to legal processes. It allowed the criminal prosecution for theft of documents to go forward where the documents removed from the school's premises were individual student records removed in violation of federal and state confidentiality laws. Further, the Court distinguished between criminal prosecutions and retaliatory civil actions which may still be barred pursuant to a multi-factor balancing test. *See Quinlan v. Curtiss-Wright Corp.*, 204 N.J. 230 (2010).

In the 2008 Securities Safety Act, better known as "Sarbanes-Oxley" or "SOX," PUBLIC LAW 107-204-July 30, 2002 116 Stat. 745, employees with knowledge of violations of securities laws by financial investment management firms are required to retain any documentary materials that support or could support a finding that those laws have been violated.

While traditional theories continue to arise in decisions regarding documents, with the advent of Sox, courts are beginning to look more closely at detail and to construct alternative standards of review. One clear point of guidance recently articulated by the Ninth Circuit in a False Claims Act context is that documents removed or copied from employer files must be demonstrably related to potential violations of law. In

Cafasso v. General Dynamics C4 Sys. Inc., 637 F.3d 1047 (9th Cir. 2011), an employee copied tens of thousands of documents onto a compact disk or thumb drive, without even examining a sampling. She told the court that she had looked at file titles, and if they suggested materials might be present bearing on a violation, she simply copied the entire file. This resulted in the copying of countless papers, including at least one where the US Patent Office had entered a secrecy order. The court declined to condone this massive document removal notwithstanding the Sox defense.

Conclusion

The applicable Rules of Professional Conduct, with comments and related Restatement commentary, are important guideposts when confronting ethical conflicts in employment law and litigation. Employment counsel should try to line up ethics counsel consultations in difficult situations which may arise.

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