Rule 42, ARIZ.R.S.CT., ER 1.4(b): A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

What You Don't Tell a Client Can Get You in Real Trouble

BY DAVID D. DODGE

"Didn't I Explain That

DID YOU KNOW that there is an ethical rule that requires you to explain not only the law to a client but also the benefits and risks of alternate courses of action? The duties of consultation are set forth in ER 1.4(b)1 and were first articulated in 1983, when the ABA adopted its Model Rules. They became part of the Arizona Supreme Court Rules in February 1, 1985.

ER 1.4(b) is potentially one of the greatest sources of malpractice claims against lawyers. That's the bad news. The good news is that there are ways lawyers can protect themselves against claims that they did not adequately explain the risks attendant to the client's chosen course of action.

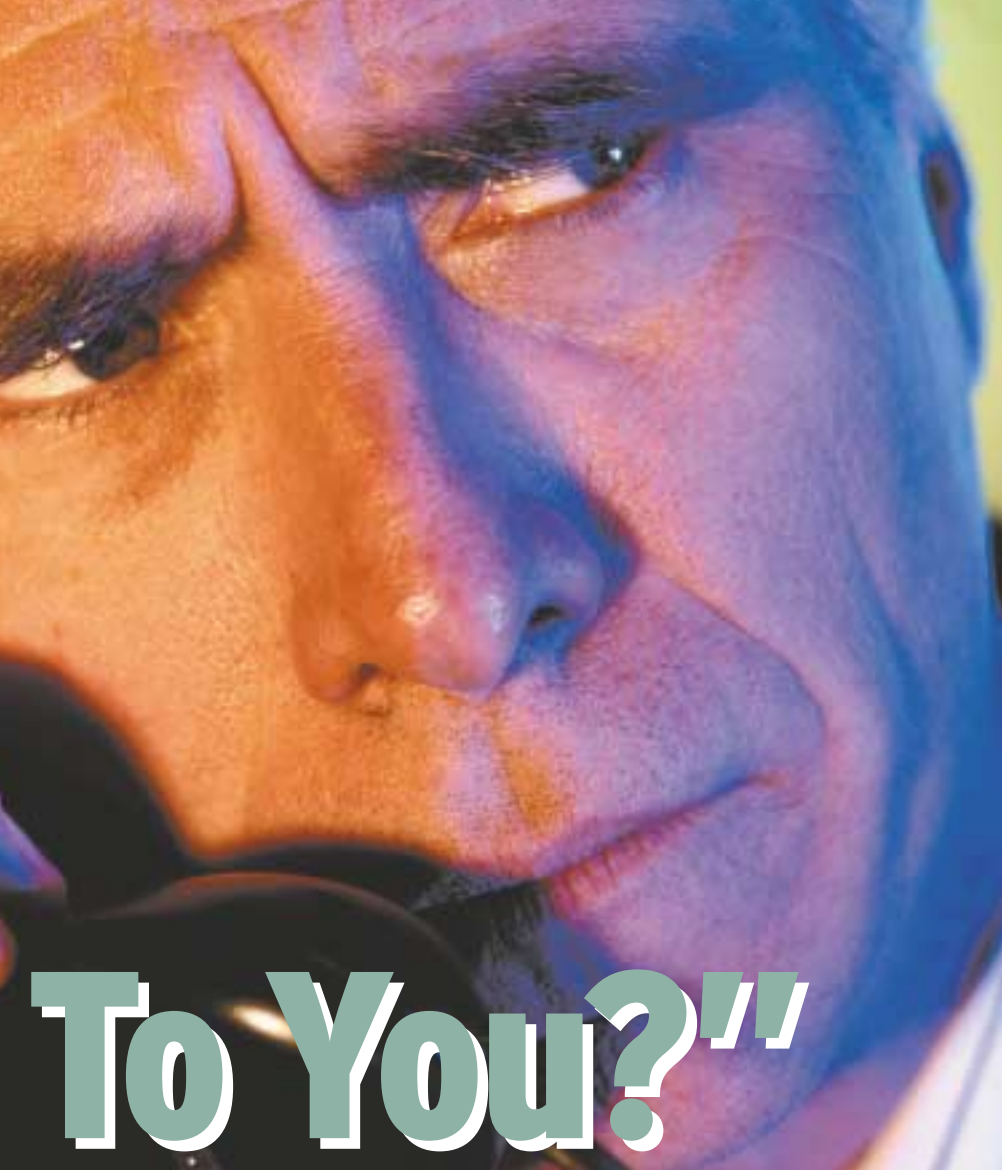
ER 1.4 deals with communication. The first part of the rule, requiring the lawyer to keep the client reasonably informed, includes returning telephone calls and keeping the client abreast of all developments in the matter.[2] We all should be familiar with this part of the rule. But ER 1.4 has a second part that is less well known and 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, did you explain to the client who wants to be an LLC the disadvantages of being a limited liability company compared to a C corporation when it comes to employee benefits such as health care and group life insurance premiums? If you didn't, you probably violated the rule. And if you didn't explain that possibility in writing, you've probably exposed yourself to the risk of a malpractice claim from a disgruntled client whose major identifying characteristic is a case of immediate retrograde amnesia about what you told him.[3]

Protect yourself against a disappointed client who claims that if he'd known about some of the risks he was taking, he would not have taken them. This article assumes that a jury always will believe the client when he says he didn't know what he was doing. It further assumes that a jury will never believe a lawyer who says that he explained everything to the client but didn't think it was necessary to put it in writing.

Consultation is the Key

The duty to communicate the benefits and risks of legal representation starts with the requirement of effective "consultation," as described in ERs 1.2(a) and (c), providing that the lawyer consult with the client concerning the client's objectives and how they should be pursued, and further providing that the lawyer may limit those objectives only if the client consents after consultation. What many lawyers fail to recognize is that *consultation* is a defined term: the terminology section of Rule 42 states that it means the "communication of information reasonably sufficient to permit the client to appreciate the significance of the matter in question."

The concept of consultation includes the lawyer's obligation to advise the client of legal rights and responsibilities and to counsel the client about the advisability of any action contemplated, including the potential pitfalls.[4] ER 1.4(b) thus makes explicit what ER 1.2(a) merely implies: If the client is to make key decisions about his legal affairs, he must be armed with sufficient knowledge so he can make them intelligently. He gets that knowledge from his lawyer.



To You?"

Getting Down to Cases

A brief look at the reported cases demonstrates what can happen when a lawyer doesn't cover all the bases.

CASE NO. 1: THE HIDDEN HUSBAND

In *Florida Bar v. Jasperson*,[5] the lawyer was disciplined for failing to consult with the client's husband before he filed a bankruptcy petition on their behalf. The lawyer had met only with the wife who, it turned out, forged her unknowing and unconsenting spouse's signature on the petition.

CASE NO. 2: SILENCE SAVED THE DEAL, BUT SANK THE LAWYER

In *Republic Oil Corp. v. Danziger*,[6] the lawyer, who had been hired to do a title examination for the purchaser of real property, failed to inform his client of a financing statement recorded by a power company covering heating and cooling equipment installed on the subject property. The court's opinion implies that the lawyer was anxious for the deal to close, perhaps so he could get paid.

CASE NO. 3: TOO DUMB TO PLEAD GUILTY

In *Mason v. Balcom*,[7] the lawyer was found to have failed to give his client "considered legal advice" and all his options where the lawyer did not ask about the facts of his client's case, did not explain the grand jury process triggered by a not-guilty plea and failed to advise him what his sentence might be. The client's petition for a writ of habeas corpus was granted.

CASE NO. 4: THE HOUSE CAME WITH A PROBLEM

In *Viccinelli v. Causey*,[8] the lawyer neglected to tell his divorce client that, while her case was pending, a judgment rendered against her husband became a lien on the community home. The wife accepted the home as her settlement in the divorce and sued the lawyer after she discovered the lien when selling the home.

CASE NO. 5: THESE HEIRS WEREN'T LAUGHING

In *Ramp v. St. Paul Fire & Marine Ins. Co.*,[9] the lawyer represented the children of the decedent's first marriage, all of whom had been left out of the will in favor of the third wife. He neglected to tell his clients they could take against the will, causing them damages when they unknowingly settled for a very small amount.

CASE NO. 6: THE LESSER INCLUDED OFFENSE

In *In re Wolfram*,[10] the lawyer failed to consult with his client on the critical decision of whether to offer the jury to find his client guilty of a lesser included offense rather than to offer them a single guilty–not guilty option on a felony child abuse indictment. The court held that, "A lawyer has an obligation to explain the problem, lay out the significant choices, and help the client make an informed, rational decision."[11] The lawyer was suspended from the practice of law for 18 months.

There Are Limits To How Much Need Be Said

Not all cases go against the lawyers. Three cases illustrate the limitations against suits by clients who claim their lawyer didn't tell them enough.

In *Smith v. St. Paul Fire & Marine Ins. Co.*,[12] the lawyer advised his clients that they could sell their deceased mother's home within a year of her death and still take advantage of the alternative valuation provisions of the Internal Revenue Code, which resulted in a lower valuation of stock in their mother's estate. At the time the lawyer gave this advice, the law in Louisiana was unsettled as to the effect of a transfer by what was known as a "judgment of possession" and whether it constituted a "distribution" that otherwise would destroy the opportunity to take an alternative valuation on other estate property. Shortly thereafter, a U.S. district court in Louisiana held that it was a

distribution, surprising the lawyer and apparently a number of other Louisiana practitioners. The U.S. district court described the litigation as presenting "a novel question" and held that the lawyer did not fall below the standard of care of lawyers in Louisiana practicing at the time the advice was given.[13] However, the court held that if a lawyer has reason to believe, or should have reason to believe, that there could be some adverse consequences from the course advised, he is obligated to so advise his client. On the other hand, and as in this case, if there is no reasonable ground for the lawyer to believe that his advice is questionable, he has no obligation to advise clients of every remote possibility that might exist.[14]

Again, in *Lamb v. Barbour*,[15] the lawyer represented the buyer of a bakery business. The court reversed a lower court ruling that the lawyer should have questioned his clients' business judgment and their lack of experience in the bakery business and should have cautioned his clients against buying the business. The court held that there was no duty imposed on the lawyer to advise his clients that they lacked the experience needed to run the business and that they should therefore not make the purchase. Although

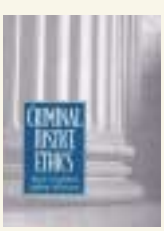
The Practitioner's Toolbox – Recent Ethics Titles

In the Interests of Justice
Reforming the Legal Profession
by Deborah L. Rhode
Oxford University Press, 2001
288 pages, $27.50, ISBN 0-19-512188-0
Available at http://www.oup-usa.org/index.html

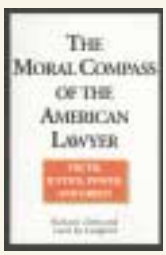
Deborah L. Rhode performs a systematic study of the structural problems confronting the legal profession and examines why the law often fails lawyers and the public. She dissects the adversary system, commercialization, disciplinary processes by state bars, race and gender bias, and legal education. Rhode is a past president of the Association of American Law Schools (and senior counsel for the House Judiciary Committee during President Clinton's impeachment proceedings), and she argues that bar self-regulation must be replaced by oversight that puts the public's interests above the profession's and above economic self-interest. She also recommends more flexible legal education, with less expensive programs for paralegals, who could then provide low-cost assistance.

Criminal Justice Ethics
Edited by Paul Leighton and Jeffrey Reiman
Prentice Hall, 2001
544 pages (paper)
ISBN 0-13-085129-9
Available at http://vig.prenhall.com/

This collection of essays gives vent to varying moral beliefs about the relation between criminal and social justice and about the primacy of individual ethical behavior. Included are hypothetical cases and actual court opinions, and the book encourages the reader to examine and defend his or her own positions. There are also debates between experts (for example, O.J. Simpson attorney Johnnie Cochran argues with Yale Law Professor Akhil Reed Amar, and feminist scholar Catherine MacKinnon argues with the International Committee for Prostitutes' Rights). Sections address criminal guilt, law enforcement, punishment, and technology and media.

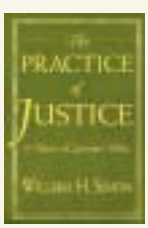


The Moral Compass of the American Lawyer
Truth, Justice, Power and Greed
by Richard A. Zitrin and Carol M. Langford
Ballantine Books, 2000
274 pages (paperback)
$14.00, ISBN 0-449-00671-9
Available at http://www.randomhouse.com/



The authors are practicing lawyers and law professors, and they try to answer the question "Why do lawyers behave the way they do?" Using expert analysis of actual cases, they investigate lawyers' behavior and its impact on the legal system. They provide a defense of American justice, but they also note the ethical catastrophes caused by adversarial process excesses. The authors offer suggestions to improve the practice, including more public input into standard-setting and more teaching of ethics in law school.

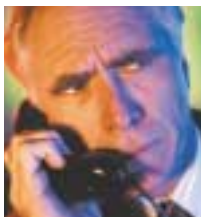
The Practice of Justice
A Theory of Lawyer Ethics
By William H. Simon
Harvard University Press, 2000
264 pages, $36.50 (hardback)
ISBN: 0-674-69711-1
$18.95 (paper) ISBN 0-674-00275-X
Available at http://www.hup.harvard.edu/



Simon cites a variety of cases, including the Leo Frank murder trial and the Lincoln Savings & Loan scandal, to reexamine the ethics of lawyering. He explores what he believes to be the critical weakness of the standard legal approach and proposes an alternative, a rethinking of professional responsibilities. He examines the scope of loyalty to clients, the duty to promote justice and obligations to protect third-party rights. Simon views legal ethics as closely connected with the justice-serving goals of the legal system and argues that the traditional answers to ethical legal questions are part of an incoherent structure.

the clients may have been dependent on the lawyer for financial and legal guidance, the court said it would have been presumptuous for him to have tendered such a recommendation because that decision was properly left to the exercise of the clients' own business judgment.[16] In short, although the lawyer could have been more diligent in his representation of his clients, his failure to tell them that they did not have the experience to buy the business was not one of his professional duties.

Finally, in *Darby & Darby, P.C. v. VSI International, Inc.*, the trial court held that a law firm may have committed malpractice for failing to investigate and advise the client whether the client's insurance policies covered potential liability in certain patent and trademark litigation.[17] The trial court was reversed on appeal.[18] It was held that although there may be particular circumstances—such as personal injury litigation arising out of automobile collisions—in which a lawyer has an obligation to discuss with the client the existence (or nonexistence) of insurance applicable to the claim, there was no authority for the proposition that a lawyer retained to defend a business client in intellectual property litigation has a duty to inquire into all of the client's insurance policies to see if one might apply. This was especially so when the coverage issue was unsettled, as it was in *Darby*.



"a client should be advised of as many **reasonable** considerations, including alternatives, as a competent lawyer can provide."

How To Protect Yourself

Remember how sorry we felt for surgeons when the courts began holding that patients had to be told all the risks of an operation before they could be held to have given their "informed consent"? Unfortunately, we aren't that far away from being held to the same standards.

Although lawyers probably don't have to be quite as pessimistically informative as the folks who dream up the warnings for lawn mowers and chainsaws, clients need to be warned of what they are getting into. This is especially important if they are litigants and their cases fall within one of Arizona many fee-shifting scenarios. As the cases indicate, clients need to have alternative courses of action explained to them in probate and estate matters, in criminal matters, and in every case in which reasonably realistic alternatives need to be explored in order for the client to be able to make an informed decision regarding the lawyer's representation. How many alternatives and how inventive their nature are basically functions of a lawyer's skill, knowledge and experience.

As we saw, a client does not have to be told everything a lawyer might think about a client's plans, but a client should be

advised of as many reasonable considerations, including alternatives, as a competent lawyer can provide. The difficulty with this rather straightforward proposition is that the lawyer must be right when he decides which alternatives the client needs to consider.

The cases also teach us two other lessons:

• It is very wise to confirm in writing to the client those warnings and alternatives you have given him because a lawyer should plan on losing any credibility contest involving what was said to a client. A written explanation to the client goes a long way toward protecting the lawyer against later misunderstandings, most often encountered when the deal "goes south" or the case is lost.

• A lawyer is allowed to limit the scope of the representation to defined issues and defined areas of expertise.[19] By confining the lawyer's responsibilities to certain aspects of a client's problems, the lawyer can limit the risks and alternatives he or she is ethically obligated to explain concerning the representation. Any such limitation, and the client's consent thereto, should be confirmed in writing. Without such a limitation clearly expressed, a client has the right to expect that the lawyer will protect all his interests and advise him accordingly.[20]

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ENDNOTES

1. Rule 42, ARIZ.R.S.CT.
2. David Dodge, *Want to Save $1,000,000?,* ARIZ. ATTORNEY, May 2000, at 20.
3. Violations of ethical rules can be evidence of malpractice. *Elliot v. Videan*, 791 P.2d 639 (Ariz. 1989).
4. ABA Informal Op. 1523 (1987).
5. 625 So.2d 459 (Florida 1993).
6. 400 N.E.2d 1315 (Mass. Ct. App. 1980).
7. 531 F.2d 717 (5th Cir. 1976).
8. 401 So.2d 1243 (La. Ct. App. 1981).
9. 269 So.2d 239 (La. 1972).
10. 847 P.2d 94 (Ariz. 1993).
11. 847 P.2d at 101.
12. 366 F. Supp. 1283 (M.D. La. 1973).
13. *Cf. Wood v. McGrath, North, Mullin & Kratz,* 580 N.W.2d 103 (Neb. 1999), in which the lawyer was found to be negligent because he did not advise his divorce client of her rights, though unsettled, to her husband's unvested stock options and to exclude capital gains taxes when determining her share of the couple's stock. The court said the lawyer should have advised her of the state of law of these subjects and let her determine whether to proceed.
14. 366 F. Supp at 1290.
15. 455 A.2d 1122 (N.J. Super. Ct. 1982).
16. *Cf. Spector v. Mermelstein,* 361 F. Supp. 30 (S.D.N.Y. 1972), *aff'd in part and rev'd in part,* 485 F.2d 474 (2nd Cir. 1973), in which the lawyer, who was retained to investigate the feasibility of his client's loan to the borrower, neglected to tell his client that the borrower was in financial difficulty and was unable to pay ongoing obligations with its existing cash flow. The opinion indicates that the lawyer, who was held to have been negligent in not telling his client these facts, was supposed to get some stock if the deal went through, making this case a potential ER 1.7(b) (conflict of interest) violation as well.
17. 678 N.Y.S.2d 482 (App. Div. 1998).
18. 268 A.D. 2d 270 (N.Y. App. Div.), *aff'd,* 739 N.E. 2d 744 (N.Y. App. Div. 2000).
19. ER 1.2(c), Rule 42, ARIZ.R.S.CT.
20. *Nicholas v. Keller,* 19 Cal. Rptr. 2d 601 (Ct. App. 1993) (lawyer must fully advise client on all aspects of case unless he has specifically limited the representation and fully advised the client of potential consequences).