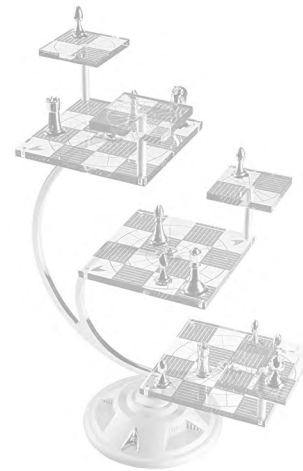


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Legal Ethics as Three-Dimensional Chess: Our Duties to Persons Other Than Our Clients

by Prof. Stephen Sieberson



It's a multitasking life we lead in the 21st century. With our smart phones ever at the ready, we carry an internet full of information in our hands, not to mention emails, voicemails, and texts. As lawyers we handle many projects at the same time, well aware that each of our clients believes that their matter is the most important one on our desk. At the same time, we toggle between billable projects, administrative responsibilities, community service, and, for some us the biggest challenge of all in these pandemic days: home-schooling and caring for our families.

Ethical lawyering requires a certain amount of multitasking as well, although a better metaphor may be three-dimensional chess—the game played by Spock in *Star Trek*. We make one move at a time, but we must keep our eye on multiple layers of our ethical duties. What are these layers?

When we think of the Rules of Professional Conduct,¹ we tend to see them as guidelines for the attorney-client relationship, and that two-dimensional plane is indeed their primary focus. Yet, throughout the RPCs we are reminded that as law-

yers we have responsibilities to other persons. They may be opposing parties and their counsel, the courts, or the public. It is easy to overlook these layers of our obligations, but a closer reading of the Rules makes it clear that our ethical chessboard is indeed three-dimensional.

This article will highlight where the Nebraska RPCs require or at least suggest that we look to the interests of others as we represent our clients. In this analysis, we will review the Preamble and Parts 1 through 4 of the Rules. Part 1 addresses the client-lawyer relationship, Part 2 certain special roles of a lawyer, Part 3 the lawyer as advocate, and Part 4 a lawyer's dealings with persons other than clients. In each of these areas, we will identify where the Rules and their Comments guide our responsibilities to third persons and beyond.

Preamble

The stage is set in Paragraph 5 of the Preamble: "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials." Paragraph 9 then ties this broad mandate to our primary responsibilities to our client, by reminding us that the principles underlying the Rules "include the lawyer's obligation zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system."

Part 1 – The Client-Lawyer Relationship

As its title suggests, Part 1 is focused on our primary relationships—those with our clients. Our obligations to third par-

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ties are of less significance in the scheme of Rules 1.1 through 1.18, but they are nevertheless real.

Rule 1.2: Scope of Representation and Allocation of Authority between Client and Lawyer. We often describe this rule as dividing “objectives and means” or “goals and tactics.” The operative language is in paragraph (a): “Subject to [paragraphs (b) through (f)], 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.” This language is obviously client-oriented, and it emphasizes that a lawyer is the client’s agent, albeit with some measure of independence.

Despite the client-lawyer focus, a caveat as to other persons is found in paragraph (f): “A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent...” This is a command, not a suggestion, and its point is to protect the public at large or particular third persons who might be harmed by the client’s conduct.

Rule 1.3: Diligence. This rule simply states: “A lawyer shall act with reasonable diligence and promptness in representing a client.” We are hired by the client, and we owe them a duty to do the work in a timely fashion, and yet, Comment 1 cautions us that this obligation “does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.” This is stated in permissive terms, but the message is clear enough: we must comport ourselves with courtesy to others. Comment 3 adds that diligence “does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer’s client.” We are not required to agree to continuances, but we should reasonably consider accommodating the other side. The Golden Rule is useful in such circumstances: how would we like to be treated when we ask for a postponement?

Rule 1.6: Confidentiality. This is one of the most important rules in the canon, as it cements the special bond between attorney and client. And yet, much is made of the exception to the rule found in paragraph (b): “A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a crime or to prevent reasonably certain death or substantial bodily harm...” We are not required to break the rule of confidentiality, but we may choose to do so. Comment 6 describes this exception as recognizing “the overriding value of life and physical integrity.” In other words, protecting others from harm may be more important than protecting our client.

The Iowa rule contains the same permissive exception, but where death or substantial bodily harm is “imminent,” Rule 1.6(c) states: “A lawyer shall reveal information relating to the representation...” [emphasis supplied]

The Iowa version adopts additional language from the ABA Model Rules of Professional Conduct. Under Iowa’s Rule 1.6, the permissive disclosure of confidential information includes instances in which the lawyer seeks to “prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another” as well as circumstances where the goal is “to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud.” However, each of these exceptions is carefully limited to circumstances in which the client has used or is using the lawyer’s services in committing the crime or fraud.

Rule 1.7: Conflict of Interest—Current Clients; Rule 1.9: Duties to Former Clients. These significant rules address situations in which a lawyer must sort out potentially co-existing duties to clients and other persons. We do not have time or space here to delve deeply into conflicts of interest, but we are reminded that under Rule 1.7(a)(2) we may not represent a client if our representation will be “materially limited” by our responsibilities “to another client, a former client or a third person.” Rule 1.9 elaborates on our duties to former clients, who technically have become third persons to us but with strings attached. Under both 1.7 and 1.9, our ability to take on a client may well be stymied by our duties to others.

Rule 1.13: Organization as Client. An entity such as a corporation, partnership, or limited liability company is a legal person, but it is one that depends on humans to speak for it and make decisions for it. Rule 1.13(a) describes the situation this way: “A lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents.” Note that we represent the organization, but practically speaking our interactions are with the officers, directors, or other individuals. Those are the people we meet with and offer advice to, and along the way there is the potential that they may come to believe that they are the client. Most of the time that confusion is harmless, because those individuals are acting in the best interests of the organization.

The difficulty arises when a constituent sets out to do something to the detriment of the entity or develops a personal conflict of interest with the entity. In such a case, Rule 1.13(f) requires the lawyer to “explain the identity of the client.” Comment 10 adds that we must advise the person that we cannot represent them and that they “may wish to obtain independent representation.” The comment also states: “Care must be taken to assure that the individual understands that, when there is such adversity of interest, the lawyer for the organization cannot provide legal representation for that constituent individual, and that discussions between the lawyer for the organization and the individual may not be privileged.” In other words, we owe a duty to the third person to warn them

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of the consequences of mistakenly treating us as their personal attorney.

Rule 1.15: Safekeeping Property. We are regularly reminded that we are to keep client funds in a bank account—a trust account—that is segregated from our law firm’s operating account. Comingling or misusing a client’s funds is certain to result in discipline. What we don’t hear as often is that the duty to protect funds and other property also runs to third persons. Rule 1.15(d) tells us that if we receive property in which a client or third person has an interest, we “shall promptly notify the client or third person” and “shall promptly deliver” the property to the appropriate person and “render a full accounting regarding such property.” Comment 4 goes on to say that if a third person has a non-frivolous claim to property we are holding, we must “refuse to surrender the property to the client until the claims are resolved.” In such a case, it may be appropriate to file an interpleader action and let the court resolve the competing claims.

Rule 1.18: Duties to Prospective Client. This rule deals with the fact that not everyone we meet in an intake session becomes a client, but the session may result in our receiving sensitive information. The rule carefully sorts out the confidentiality of that information and how our receipt of the information may create a conflict of interest. The point for our analysis

is that prospective clients are technically not clients, but third parties to whom we may have ethical obligations.

Part 2 – Special Roles of Lawyers

Part 2 is titled “Counselor,” although it covers functions such as that of advisor, evaluator for third persons, and third-party neutral—what might be considered as special roles for a lawyer. There are only three rules in Part 2, and one of them is relevant to this article.

Rule 2.2: Evaluation for Use by Third Persons. Rule 2.2(a) acknowledges that in the course of a law practice, a lawyer “may provide an evaluation of a matter affecting a client for the use of someone other than the client.” A typical example of such an evaluation is the legal opinion of a corporate borrower’s attorney addressed to a lender in a financing transaction. Such a letter may opine as to the borrower’s corporate existence, the propriety of steps taken to approve the borrowing, and the enforceability of the loan documents against the borrower. Obviously, such a letter is given to assist the lawyer’s client, the borrower, but it is addressed to and will be relied upon by the other party, the lender. Interestingly, the focus of the remaining parts of Rule 2.2 is the rights of the client (in our example, the borrower) as its lawyer divulges information to the other party, the lender. Also, while obligations of the lawyer to the



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other party are certainly implied by the nature of the interaction, the only reference to those obligations is in Comment 3: “When the evaluation is intended for the information or use of a third person, a legal duty to that person may or may not arise. That legal question is beyond the scope of this Rule.”

Part 3 – Advocate

Seven of the nine rules in Part 3 address the duties of lawyer to the other party in litigation, to opposing counsel, or to the legal system manifested in a tribunal. The overarching theme in these rules is that in serving as an advocate for a client, the lawyer must at the same time behave with integrity, decorum, and respect for the system of justice. Lawyers are familiar with these obligations, even if their clients may not be, but it is useful to remind ourselves of what the rules require.

Rule 3.1: Meritorious Claims and Contentions. The rule begins: “A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.” This is a shorthand version of what is found in Federal Rule of Civil Procedure 11, which lists a series of implied representations to the court from any attorney who signs a pleading. Comment 1 to Rule 3.1 describes the competing responsibilities of a litigator: “The advocate has a duty to use legal procedure for the fullest benefit of the client’s cause, but also a duty not to abuse legal procedure.” Both the rule and comment offer a more relaxed standard to criminal defense lawyers, a reflection of the constitutional rights of their clients.

Rule 3.2: Expediting Litigation. The opposing party in litigation is protected by Rule 3.2, which offers the following forceful statement: “In the lawyer’s representation of a client, a lawyer shall not file a suit, assert a position, conduct a defense, delay litigation or take other action on behalf of the client when the lawyer knows or when it is obvious that such action would serve merely to harass or maliciously injure another.” Comment 1 looks beyond the opposing party to the system of justice with the following statement: “Dilatory practices bring the administration of justice into disrepute.” The comment adds that failure to expedite is unreasonable even if “similar conduct is often tolerated by the bench and bar,” although it is hard to imagine a disciplinary action based on conduct that is tolerated by the court. For avoidance of doubt, the comment adds: “Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.”

According to Comment 1, the standard for the reasonableness of a failure to expedite litigation is “whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay.” The competent lawyer of that statement is apparently the ethical counterpart of a “reasonable person” in tort law.

Rule 3.3: Candor toward the Tribunal. This rule is all about protecting the integrity of the adjudicative process. Paragraph 3.3(a) prohibits lawyers from making false statements of fact or law to a tribunal, failing to correct previous false statements, failing to disclose controlling contrary legal authority, and offering false evidence. Paragraph (b) requires lawyers to take remedial measures if they learn of criminal or fraudulent conduct related to the proceeding, and paragraph (c) permits disclosure of Rule 1.6 confidential information in meeting the obligations of (a) and (b). Paragraph (d) obligates a lawyer in an *ex parte* proceeding to disclose all material facts, even if adverse to the lawyer’s client. In highly significant language, Comments 2 and 5 to Rule 3.3 state that our duty of candor to the tribunal arises from the fact that we are “officers of the court,” and that our obligation to represent clients with “persuasive force” is qualified by the duty of candor.

Rule 3.4: Fairness to Opposing Party & Counsel. As its title makes clear, this rule creates direct obligations to the client and attorney on the opposite side of litigation matter. Paragraph (a) prohibits “unlawfully” obstructing the other side’s access to evidence, while paragraph (d) prohibits both the making of frivolous discovery requests and the failure to comply with “legally proper” requests from the other side. Comment 1 acknowledges that our adversary system “contemplates that the evidence in a case is to be marshalled competitively by the contending parties.” However, “fair competition” demands playing by the discovery rules and avoiding other misconduct such as improperly influencing witnesses. Comment 2 emphasizes that discovery is “an important procedural right.”

Rule 3.5: Impartiality and Decorum of the Tribunal. Moving from discovery to the courtroom, Rule 3.5(a) prohibits attempts to improperly influence judges, jurors, and prospective jurors. That includes *ex parte* communications and “conduct intended to disrupt a tribunal.” Interestingly, Comment 4 describes these obligations as “a corollary of the advocate’s right to speak on behalf of litigants.” In other words, our license to practice in the courts is accompanied by an obligation to do so with fairness and courtesy.

Rule 3.6: Trial Publicity. Another aspect of the requirement of proper behavior in litigation is the Rule 3.6 prohibition of public statements that could prejudice a fair proceeding. Comment 1 recognizes the importance of freedom of expression under the First Amendment, but it states that curtailment of public statements may well be necessary to ensure a fair trial. This balancing protects the opposing side in a matter but also the adjudicative process overall.

Rule 3.8: Special Responsibilities of a Prosecutor. Prosecutors represent the state, and their job is to protect the public. Even so, their work is subject to limits under Rule 3.8, and those limits are intended to benefit the opposing party, the defendant in a criminal action. The rule prohibits prosecuting

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a charge if it is not supported by probable cause, it requires prosecutors to ensure that the accused has access to counsel, and it imposes a duty to disclose all mitigating evidence to the defense. Comment 1 pointedly and somewhat poetically declares: “A prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence.”

Part 4 – Transactions with Persons Other than Clients

There are four rules in this part, all of which are for the benefit of third persons.


Rule 4.1: Truthfulness in Statements to Others. “In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.” Comment 1 notes that there is generally “no affirmative duty to inform an opposing party of relevant facts,” but at the same time it cautions us not to duck the black letter of the rule by making “partially true but misleading statements or omissions.” Comment 2 permits some fudging during negotiations, such as “my client would never agree to less than X” when that might not be true, but fudging must not rise to the level of tortious misrepresentation. The overall point of Rule 4.1 is that in our dealings on behalf of clients we should display honesty and integrity, and not harm third persons through our own words and actions.

Rule 4.2: Communication with Person Represented by Counsel. This one is quite simple: “In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.” Comment 1 explains that the rule is intended to protect a represented person “against possible overreaching by other lawyers who are participating in the matter.” Comment 2 adds details about which constituents of an organization are covered by this protection and which are not. In all instances, note that it is the opposing attorney, and not the third party, who may waive the no-contact rule.

Rule 4.3: Dealing with Unrepresented Person. Some people choose to do their own legal work, and this can create a delicate situation for us as we represent a client on the other side of a matter. Rule 4.3 attempts to provide a workable balance between our obligations to our client and the risk that we might take advantage of the third person. The rule permits contact with the unrepresented person, while cautioning us to avoid a situation where the third person may look to us for advice. The rule says that we “shall not state or imply” that we are disinterested, and we must correct any misunderstandings in that regard on the part of the third person. If we know that the person’s interests are in conflict with our client’s interests, we are also instructed not to give the person any legal advice or any advice at all other than to obtain counsel. That said, Comment 2 affirms that we may proceed to deal with the unrepresented person, and those dealings may include preparing documents that both sides will sign. We may even explain how we interpret the documents and their legal ramifications. The gist of Rule 4.3 is that if we must deal with a voluntarily unrepresented person, we may do so, but carefully.

Rule 4.4: Respect for Rights of Third Persons. This rule contains a broad prohibition on tactics “that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.” The point is that third persons deserve fair treatment from us, and the following language in Comment 1 nicely summarizes our overall duty to third persons: “Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons.”

Conclusion

Most of us have never played three-dimensional chess, and really, there are enough complexities in law practice to keep us occupied. Our ethical responsibilities can also be complicated, but, as this article has attempted to demonstrate, much of the guidance we need for dealing with third persons can be gleaned from the Rules of Professional Conduct—if only we take the time to read them. 

Endnote

¹ The Nebraska Rules of Professional Conduct are codified as Neb. Ct. R. of Prof. Cond. §§ 3-501.0 to 3-508.5.