Who decides, Client or Attorney?

By Chris G. McDonough and Joel R. Brandes

Certain rights and obligations are conferred solely upon attorneys concerning the actions they take when representing clients. However, in litigated matters, there are competing ethical obligations between a lawyer's right to take independent action and the obligation to involve clients in decision-making after they are fully informed by counsel about the ramifications of the decision to be made. The dividing line between the competing duties delegated to counsel and those reserved for the client remains somewhat unclear. In this article, we will discuss the interaction between these respective duties within the context of litigation, and the limits on them.

An attorney derives the authority to manage the conduct of litigation on behalf of a client "[f]rom the nature of the attorney-client relationship itself" (Hallock v State, 64 N.Y.2d 224, 230, 485 N.Y.S.2d 510, (1984); Matter of Barrow v Penn, 247 A.D.2d 813, 669 N.Y.S.2d 452 (3 Dept., 1998)). This includes the authority to make certain procedural or tactical decisions (Gorham v. Gale, 7 Cow. 739, 744; Gaillard v. Smart, 6 Cow. 385, 388). Equally rooted in the law is the principle that, without a grant of authority from the client, an attorney cannot compromise or settle a claim (see Kellogg v. Gilbert, 10 Johns. 220; Jackson v. Bartlett, 8 Johns. 361). Settlements negotiated by attorneys without authority from their clients have not been binding. (Hallock v State, supra).

Although the independent authority granted to an attorney is limited, an attorney "may, and ought to exercise his discretion in all the ordinary occurrences, which take place in relation to the cause. He may make stipulations, waive technical advantages, and generally assume the control of the action. It has been held, that the attorney's consent to an arbitration, will bind the client." (Gorham v Gale, 1827 WL 2489 (Sup Ct, 1827)).

In Matter of Barrow v Penn (supra) the Appellate Division stated that it is beyond cavil that an attorney may not settle a claim without appropriate client authority, either express or implied. If an attorney was without authority to enter into a settlement, "no contract ever came into being."

The gray area between “ordinary occurrences” as discussed in Gorham v. Gale (supra), where an attorney can exercise his discretion, and those instances where an attorney must have a specific grant of authority from the client, can be a confusing space.

Rule 1.4 of the New York Rules of Professional Conduct (“RPC”), provides that “A lawyer shall: (1) promptly inform the client of (i) any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(j), is required by these Rules; (ii) any information required by court rule or other law to be communicated to a client; and (iii) material developments in the matter including settlement or plea offers.” Moreover, the lawyer is required to “reasonably consult with the client about the means by which the client's objectives are to be accomplished”. (RPC 1.4(a) (2)). “A lawyer must explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” (RPC 1.4(b)).

Not specifically stated but inferred from Rule 1.4(b), by the definition of ‘informed consent’ (RPC 1.0(q)) and Comment [1] to RPC 1.4, is that all communication with the client regarding decisions must be in a manner that ‘adequately’ explains the situation and supplies the client with the information necessary to make a reasoned decision. This means the use of an interpreter, if necessary, and the use of language that corresponds to the education and experience of the individual client. While not required, it is in counsel’s best interest to always memorialize communications concerning material decisions.

Rule 1.2(e) reserves specific rights to the lawyer to make certain ‘non-material’ decisions and directs the lawyer to act in accord with local rules and customs.

Rule 1.2 (e) permits a lawyer to exercise professional judgment to waive or fail to assert a right of a client or accede to reasonable requests of opposing counsel in such matters as court proceedings, settings, continuances, and waiver of procedural formalities, as long as doing so does not prejudice the rights of the client. Like paragraphs (f) and (g) of RPC 1.2, paragraph (e) effectively creates a limited exception to the lawyer's obligations under Rule 1.1(c) (a lawyer shall not intentionally “fail to seek the objectives of the client through reasonably available means permitted by law and these Rules”). If the lawyer is representing the client before a tribunal, the lawyer is

required under Rule 3.3(f)(1) to comply with local customs of courtesy or practice of the bar or a particular tribunal unless the lawyer gives opposing counsel timely notice of the intent not to comply.

Interestingly, Rule 1.2(a) of the American Bar Association Annotated Model Rules of Professional Conduct (9th Edition, 2019) differs from the New York Rules of Professional Conduct in that ABA Rule 1.2 (a) provides in the second sentence that "A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation." This sentence does not appear in the New York Rules.

The ABA annotation to Rule 1.2 (a) observes, and to some degree explains the additional language in ABA Rule 1.2. The annotation informs that the general division of authority between lawyer and client is along the lines of "objectives" versus "means". ABA Rule 1.2(a) provides that a lawyer must "***abide by***" the client's instructions regarding the ***objectives*** of the representation and that the lawyer, "as required by Rule 1.4," must "***consult*** with the client" about the ***means*** by which such objectives are to be pursued. [emphasis added] Hence, the ABA Rule gives the client ultimate authority over the objectives, but somewhat less authority over the means employed. Perhaps this sentence was not adopted in New York because the amount of authority a client has regarding "means" is not entirely clear. Nor is it always possible to distinguish between whether a particular decision relates to the "objectives" or the "means", as these concepts do overlap.

Not discussed herein, but clearly one of the most obvious and important Rules setting forth when a lawyer may not act is RPC 3.1 (Non-Meritorious Claims and Contentions). This Rule prohibits lawyers from engaging in frivolous conduct, regardless of the client's directives.

There is tension between Rules 1.2, 1.4, and 3.1. A New York lawyer must respect the client's decision-making authority. She is obligated to communicate certain facts to the client in a manner reasonably intended to facilitate the client making informed decisions on material factors. At the same time, the rules reserve to the attorney the right to make certain litigation decisions.

RPC 1.4(a)(1) sets out the lawyer's duty to promptly inform clients about decisions involving informed consent, court rule or law, or "material developments",

while RPC 1.4(a)(2) sets out the requirement that a lawyer must reasonably consult with clients about the means of accomplishing the client's objectives, keep the client informed, and respond to client's requests for information. Note the somewhat loose language in the RPC stand-alone Rule.

Although not adopted by the Appellate Divisions, but relevant as guidance, the New York State Bar Associations Comments to Rule 1.4 explain that Rule 1.4 (a) confers upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations. Rule 1.4(a)(iii) specifically requires that the client be promptly informed of all 'material developments' in their matter (yet only refers to settlement or plea offers under the penumbra of 'material developments').

While Rule 1.4 focuses on communication between lawyer and client, it does not explain how any disagreement between them should be resolved. As a practical matter, the lawyer should first consult with the client and seek a mutually acceptable resolution of the disagreement. If those efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. (*See* Rule 1.16(c)(4)). Likewise, the client may resolve the disagreement by discharging the lawyer, in which case the lawyer must withdraw from the representation. (*See* Rule 1.16(b)(3)).

The Takeaway

The Rules of Professional Conduct do not actually state that the client must make material decisions, only that the lawyer must "reasonably consult with the client" about those decisions (RPC 1.4(a)(2)). Yet, it is unassailable that the lawyer must allow the client to make material decisions. NYSBA Comment [2] to RPC 1.4 states "… paragraph (a)(1) requires that the lawyer promptly consult with the client and secure the client's consent prior to taking action…".

The reality is that the client must be as involved in their case as much as they desire and must be able to make all material decisions, although they may delegate all, most, or some of their authority to the lawyer, prior to action being taken. Lawyers have discretion regarding extending courtesy to adversaries, observing local rules and

customs of practice, developing strategies for prosecuting a case, and determining legal argument, but all 'material decisions' not reserved to the lawyer must include the client in the decision-making process.

In our opinion, Rule 1.4 must be read very broadly. The wise practitioner will err on the side of frequent communication with the client clearly explaining the decisions that have to be made, and answering any questions the client may have about those decisions. All those communications and decisions by the client should be memorialized in writing. While clients are generally honest, memory can be tricky. Many client recollections get hazy over time or biased in their favor if a disagreement should arise. If a disagreement results in a grievance, keep in mind that the burden of proof in disciplinary proceedings is on the attorney. Memorialization goes a long way to prove that the client made the decisions after full disclosure by counsel.

Chris McDonough is Special Counsel to Foley Griffin LLP. in Garden City. He has practiced over 30 years exclusively in the field of attorney grievance defense. He also counsels lawyers and firms on defensive practice and risk management, and is a frequent lecturer and author on matters of professional ethical practice. He can be reached at Chris@FoleyGriffin.com.

Joel R. Brandes practices matrimonial law in New York City concentrating on appeals. He is the author of a new twelve-volume treatise, Law and the Family New York, 2021- 2022 Edition, and Law and the Family New York Forms, 2021 Edition (five volumes), both published by Thomson Reuters, and the New York Matrimonial Trial Handbook (Bookbaby). He can be reached at joel@nysdivorce.com or at his website at www.nysdivorce.com.