HOW TO DEAL WITH “THAT” CLIENT:

Ethical Considerations in Handling Difficult Clients

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I. IN GENERAL

A. OUR ROLE

“A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.” RPC Preamble: A Lawyer’s Responsibilities (1)

We are ADVISORS, providing clients with informed understanding…

We are ADVOCATES, zealously asserting the client’s position in an adversarial system…

We are NEGOTIATORS, seeking advantageous results to the client consistent with honest dealings with others…

We are EVALUATORS, examining the legal affairs of client and reporting our findings to the client and others… RPC Preamble (2)

B. OUR DUTY

We should execute our role in a competent, prompt, and diligent manner.

“A lawyer should maintain communication with a client concerning the representation. A lawyer should keep in confidence information relating to representation of a client except so far as disclosure is required or permitted by the Rules of Professional Conduct or other law.” RPC Preamble (4)

C. OUR MISSION

“As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice, and the quality of services rendered by the legal profession…A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who, because of economic or social barriers, cannot afford or secure adequate legal counsel.” RPC Preamble (6), (7), (8), (9), (10)
II. Five Examples of “THAT” client that frustrate us:
   a. The ABSENTEE client (“Your Honor, I have no idea. He never shows up.”);
   b. The MENTALLY DISABLED client (“He just doesn’t seem to get it.” “I think she is crazy.”);
   c. The HOSTILE client (“He and I cannot agree on anything.” “She won’t cooperate.”);
   d. The KNOW-IT-ALL (“She won’t listen to me.” ”He thinks he knows the law better that I do.”);
   e. The COMPLAINER (“She has written the Regional Defender, the Bar, the Judge, the DA, and now the President.”)

III. THE ABSENTEE CLIENT:

   A. What do you say to the judge when a client does not show up at calendar call?

   What do the Rules of Professional Conduct say?

RPC Rule 1.4 Communication:

(a) A lawyer shall
   (1) Promptly inform the client of any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(f), is required by these Rules;
   (2) Reasonably consult with the client about the means by which the client’s objectives are to be accomplished;
   (3) Keep the client reasonably informed about the status of the matter;
   (4) Promptly comply with reasonable requests for information; and consult with the client about the relevant limitation on the client’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.
   (5) Consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comments: Reasonable communication between the lawyer and the client is necessary for the client for the client effectively to participate in the representation.

A lawyer should address with the client how the lawyer and client will communicate, and should respond to or acknowledge client communications in a reasonable and timely manner.

RPC Rule 1.6 Confidentiality of Information:

(a) A lawyer shall not reveal information acquired during the professional relationship with a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information protected from disclosure by paragraph (a) to the extent the lawyer reasonably believes necessary:

1. To comply with the Rules of Professional Conduct, the law, or court order;
2. To prevent the commission of a crime by the client;
3. To prevent reasonably certain death or bodily harm;
4. To prevent, mitigate, or rectify the consequences of a client’s criminal or fraudulent act in the commission of which the lawyer’s services were used;
5. To secure legal advice about the lawyer’s compliance with these Rules;
6. To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client; to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved; or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;
7. To comply with the rules of a lawyer’s or judge’s assistance program approved by the North Carolina State Bar or the North Carolina Supreme Court; or
8. To detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

Comments: This Rule governs the disclosure by a lawyer of information relating to the representation of a client acquired during the lawyer’s representation of the client, whatever its source.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client’s informed consent, the lawyer must not reveal information acquired during the representation. Trust is the hallmark of the client-lawyer relationship.

A lawyer’s use of hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or situation involved.

CPR 300 An attorney, after being discharged, cannot discuss the client’s case with the client’s new attorney without the client’s consent.
CPR 313 An attorney may not voluntarily disclose confidential information concerning a client’s criminal record. RPC 33 An attorney may not disclose confidential information concerning the client’s identity and criminal record without the client’s consent, nor may an attorney misrepresent such information to the court. In response to a direct question from the court concerning such matters, an attorney may not misrepresent the defendant’s criminal record, but is under no ethical obligation to respond. If the client misrepresents his identity or record under oath, the attorney must ask the client to correct the misstatements. If the client refuses, the attorney must seek to withdraw.

RPC 223 under Rule 1.2 (Scope of Representation and Allocation of Authority Between Client and Lawyer)

When a lawyer’s reasonable attempts to locate a client are unsuccessful, the client’s disappearance constitutes a constructive discharge of the lawyer requiring the lawyer’s withdrawal from representation. See Rule 1.16 on Terminating Representation

RPC Rule 3.3: Candor Towards the Tribunal

(a) A lawyer shall not knowingly:
   1) Make a FALSE statement of material fact or law to a tribunal or fail to correct a FALSE STATEMENT of material fact or law previously made to the tribunal by the lawyer;
   2) Fail to disclose to the tribunal LEGAL AUTHORITY in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
   3) Offer evidence that the lawyer KNOWS TO BE FALSE…A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

COMMENTS: This Rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal.

This rule boils down that we cannot lie, misrepresent, or otherwise act dishonestly.

MY OPINION: We need to talk with clients proactively to avoid this mess. We cannot disclose confidential information obtained relating to the representation of the client. As in withdrawal or revealing a criminal record, you do not have an affirmative duty to respond to the court, even when asked. We cannot misrepresent or lie. We need informed consent or implied consent from the client in order to disclose. You may not know what is going on or if your client received notice. Why not just say, “Your Honor, I don’t have any information that I can share at this time, but would you hold it open and allow me an opportunity to contact my client?” You then promoted your client’s interests
without lying and without throwing them under the bus. The client should be your priority, not the Judge or anyone else.

**B. What do you do when a client never shows up for an office appointment and then shows up for court and wants a trial?**

**What You Do In Court:**
1. Move to continue the trial. And then again and again. When the court or the ADA wants to know why, you tell them “I have no information I am able to provide as to why I am moving to continue this matter.”
2. What one should not do is tell the court or the ADA that Mr. Faith-In the System will not see you. I suppose you could ask Mr. Faith for his permission to say that but I cannot see how that would help him.
3. So you have an ADA who is pissed because you agreed to this court date (see below), a judge who does not understand why you won’t say what is really going on.
4. But you don’t represent the ADA or the judge.
5. And you will likely lose the motion and end up going to trial anyway. On a break, you can talk to your client. If you need to be heard on another MTC, do it.

**What You Can Do Before You Get to This:**
1. You should document all of your interactions with your client so that you can better represent that client: remember what was said, what needs to be done, etc. Your goal is to protect your client, not yourself from a claim of IAC. As a lawyer, you think differently when you are playing defense. I think most of our clients are perceptive enough to know when we are preparing to be adversaries. This cannot help a client relationship. Shoot straight with the client from the beginning, possibly handing out something upon appointment, emphasizing the consequences of not meeting and aiding you in preparing a defense. Try to figure out why they are not meeting: lack of child care? Lack of transportation?
2. You can still investigate the case without the client. Get an investigator (who can track down the client if needed), get a DNA expert. Look at the indictments and prior record level for errors. Read the discovery, go to the crime scene, talk to the police officers, call the family, talk to his mother, call the bondsman. Figure out a theory of defense. Mail the client information.
3. When your client comes to court, be ready with waivers for him to sign to get any records you may need, including your client’s prior files from prior attorneys.
4. Don’t agree to move the case through case management or set a trial date if you have not met your client. These will probably be forced upon you but don’t agree to them without your client.
5. Again, you cannot tell the ADA or the court about your client’s strong belief in you and the system. That does not help the client. It may save you some embarrassment and I get that. Still. We should avoid it.
6. I don’t think it helps to fuss at the client when he finally appears. Again, that does not help the relationship in anyway. It only makes him less likely to call you back.

-Regional Defender Tucker Charns
IV. MENTALLY DISABLED CLIENT: What is wrong with this client?

Just because they don’t agree with you does not mean there is something wrong with your client. Ask questions, follow your gut instinct, and get another opinion if you are not sure.

A. Evaluations: Forensic evaluation by forensic screener or ExParte Order for your own Expert?

1. Gather as much information as possible. Get waivers and releases.
2. Get social and educational history.
   - Has your client been evaluated before?
   - Have they ever been in treatment or been hospitalized?
   - Are they currently seeing a therapist or psychiatrist?
   - Should they be taking psychotropic medication?
   - Have they ever been diagnosed? What? By Whom? How long ago?
   - Did they have an IEP or were they in special classes in school?
   - Do they need familial assistance with daily activities? Do they operate independently?
   - Have they been tested previously? Disability?
3. Develop referral questions. Articulate what you want to know.
4. Discuss why this will be helpful with your client, even if you don’t think they understand.

B. RPC 1.14: Client with Diminished Capacity

(a) When a client’s capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer SHALL, as far as reasonably possible, maintain a normal client-lawyer relationship with the client.

(b) When the lawyer reasonably believes that the client has diminished capacity, is at risk of substantial physical, financial, or other harm unless action is taken and cannot adequately act in the client’s own interest, the lawyer may take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take action to protect the client, and, in appropriate cases, seeking appointment of a guardian ad litem or guardian.

(c) Information relating to the representation of a client with diminished capacity is protected by Rule 1.6. When taking protective action pursuant to paragraph (b), the lawyer is impliedly authorized under Rule 1.6(a) to reveal information about the client, but only to the extent reasonably necessary to protect the client’s interests.
COMMENTS: (2) The fact that a client suffers a disability does not diminish the lawyer’s obligation to treat the client with attention and respect. Even if the client has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication.

C. Statutory duty: N.C.G.S. 1001-1008

NCGS § 15A-1001. No proceedings when defendant mentally incapacitated; exception.

(a) No person may be tried, convicted, sentenced, or punished for a crime when by reason of mental illness or defect he is unable to understand the nature and object of the proceedings against him, to comprehend his own situation in reference to the proceedings, or to assist in his defense in a rational or reasonable manner. This condition is hereinafter referred to as "incapacity to proceed."

NCGS § 15A-1002. Determination of incapacity to proceed; evidence; temporary commitment; temporary orders.

(a) The question of the capacity of the defendant to proceed may be raised at any time on motion by the prosecutor, the defendant, the defense counsel, or the court. The motion shall detail the specific conduct that leads the moving party to question the defendant's capacity to proceed.

Don’t forget that you are their attorney and have a duty to promote your client’s interests, not a best interest advocate, even if treatment may be in the client’s best interest. Discuss treatment options with your client, but abide by the client’s wishes.

D. See attached ex parte motion to hire an expert

V. THE HOSTILE CLIENT: Why is he so hostile? I cannot deal with him!

A. Anger Management: Remain calm. Listen. Try to resolve.

RPC Rule 1.3 DILIGENCE

A lawyer shall act with reasonable diligence and promptness in representing a client.

COMMENTS:

(1) A lawyer shall pursue a matter on behalf of a client despite opposition, obstruction, or personal inconvenience to the lawyer, and take whatever lawful and ethical measures are required to vindicate a client’s cause or endeavor. A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf. A lawyer is not
bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter may be pursued. See Rule 1.2. The lawyer’s duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.

(2) ...unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. (7) ...A pattern of delay, procrastination, carelessness, and forgetfulness regarding client matters indicates a knowing or reckless disregard for the lawyer’s professional duties. For example, a lawyer who habitually misses filing deadlines and court dates is not taking his or her professional responsibilities seriously. A pattern of negligent conduct is not excused by a burdensome caseload or inadequate office procedures.

B. WHAT SHOULD YOU DO WHEN FACED WITH THE DIFFICULT CLIENT WHO INSISTS UPON ACTIONS THAT THE ATTORNEY KNOWS ARE UNETHICAL, ILLEGAL, OR HARMFUL TO THE CLIENT? See Rule 1.2 Rule 1.4(a)(5) and discussion below.

VI. THE KNOW-IT-ALL CLIENT: She is driving me crazy with the jailhouse lawyering!

A. RPC Rule 1.2 SCOPE OF REPRESENTATION AND ALLOCATION OF AUTHORITY BETWEEN CLIENT AND LAWYER

(a) 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 action on behalf of the client as is impliedly authorized to carry out the representation.

(1) 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 jury trial, and whether the client will testify.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer’s representation of a client, including representation by appointment, does not constitute an endorsement of the client’s political, economic, social, or moral views or activities.

(c) A lawyer may limit the scope of representation if the limitation is reasonable under the circumstances.

(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.

COMMENTS: (2) A lawyer and client may disagree about the means to be used to accomplish the client’s objectives...the lawyer shall consult applicable law and consult with the client to seek a mutually acceptable resolution of the disagreement. If such efforts are unavailing and the lawyer has a fundamental disagreement with the client, the lawyer may withdraw from the representation. Conversely, the client may resolve the disagreement by discharging the lawyer. (14) If a lawyer comes to know or reasonably should know that a client expects assistance not permitted by the Rules of Professional Conduct or other law or if the lawyer intends to act contrary to the client’s instructions, the lawyer must consult with the client regarding the limitations on the lawyer’s conduct. See Rule 1.4(a) (5)

B. RPC 1.16 DECLINING OR TERMINATING REPRESENTATION

(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, representation has commenced, SHALL withdraw from the representation of a client if:

1. The representation will result in violation of law or the Rules of Professional Conduct;
2. The lawyer’s physical or mental condition materially impairs the lawyer’s ability to represent the client; or
3. The lawyer is discharged.

(b) Except as stated in paragraph (c), a lawyer MAY withdraw from representing a client if:

1. Withdrawal can be accomplished without material adverse effect on the interests of the client; or
2. The client knowingly and freely assents to termination of the representation; or
3. The client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent;
4. The client INSISTS upon taking action that the lawyer considers repugnant, imprudent, or contrary to the advice and judgment of the lawyer, or with which the lawyer has a FUNDAMENTAL DISAGREEMENT; or
5. The client has used the lawyer’s services to perpetrate a crime or fraud; or
6. The client fails to substantially fulfill an obligation to the lawyer regarding the lawyer’s services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; or
7. The representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or
8. The client INSISTS upon presenting a claim or defense that is not warranted under existing law and CANNOT BE SUPPORTED BY A GOOD FAITH argument for an extension, modification, or reversal of existing law; or
9. Other good cause for withdrawal exists.

(c) A lawyer must comply with applicable law requiring notice to or permission of a tribunal when terminating a representation. WHEN ORDERED TO DO SO BY A TRIBUNAL, A LAWYER
SHALL CONTINUE REPRESENTATION NOTWITHSTANDING GOOD CAUSE FOR TERMINATING THE REPRESENTATION.

(d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests, 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 advanced payment of fee or expense that has not been earned or incurred.

COMMENTS: (3) When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority. Similarly, court approval or notice to the court is often required by applicable law before a lawyer withdraws from pending litigation. Difficulty may be encountered if withdrawal is based on the client’s demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer’s statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient. Lawyers should be mindful of their obligations to both clients and the court under Rules 1.6 and 3.3.

Comment (5)—Whether a client can discharge appointed counsel may depend on applicable law. A client seeking to do so should be given a full explanation of the consequences. These consequences may include a decision by the appointing authority that appointment of successor counsel is unjustified, thus requiring self-representation by the client.

Comment (6)—If the client has severely diminished capacity, the client may lack the legal capacity to discharge the lawyer, and in any event the discharge may be seriously adverse to the client’s interests. The lawyer should make a special effort to help the client consider the consequences and may take reasonably necessary protective action as provided in Rule 1.14.


Defendant claimed that the trial court violated his right to counsel by allowing his attorneys to accede to his desire to not strike a juror, over their objections. The Court observed that “[n]o person can be compelled to take the advice of his attorney.” Normally, “tactical decisions, such as which witnesses to call, ‘whether and how to conduct cross-examinations, what jurors to accept or strike, and what trial motions to make are ultimately the province of the lawyer…’” However, when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client’s wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship.” Where there is such a disagreement, counsel should make a record of it. Here, counsel proceeded properly, therefore there was no error. State v. Ali, 329 N.C. 394 (1991); accord State v. Freeman, 690 S.E. 17 (N.C. App. 2010). The absolute impasse rule applies only when the defendant’s wishes with regard to trial strategy are lawful. State v. Williams, 191 N.C. App. 96, 104-05 (2008) (even if
there was an absolute impasse as to jury selection tactics, defense counsel could not defer to the defendant’s wishes to engage in racially discriminatory jury selection)


This deference to the client’s wishes does not solely apply to voir dire, but also has been held to apply to the calling of witnesses over the objection of an attorney

VII. THE COMPLAINER CLIENT

Most of the complaints that I see involve lack of communication between attorneys and clients. All that you can do is your best.

HOW WOULD YOU WANT TO BE REPRESENTED?

BE PROACTIVE. See your client at the jail within 72 hours of receipt of your appointment and regularly thereafter. Keep the client informed.

ESTABLISH TRUST. Don’t make promises you cannot or will not keep.

DON’T AVOID THE DIFFICULT CLIENT.

DON’T GET ANGRY AT THE CLIENT OR RETALIATE BECAUSE OF A COMPLAINT. Seek to discover the issue and do your best to resolve it with the client.

HAVE A SENSE OF HUMOR. LET IT ROLL OFF YOUR BACK.

SEEK ASSISTANCE. YOU ARE NOT ALONE.

VIII. GENERAL ADVICE ABOUT DIFFICULT CLIENTS

1. Never avoid the client or his/her issues.
3. Set up clear expectations. Be clear in your communications. Explain how long the process may take. Use common language-not legalese.
4. Invest the time. Show them that their case is important. Especially if they are in jail, even if you don’t have discovery yet, drop in and see how they are doing and if they have a question. 5 minutes may make all the difference to that client.
5. Don’t investigate and try the case without them.
6. Remember that this is THEIR life on the line and their ONLY case.(How would you feel?)
7. Don’t just withdraw. Try to address the issue first. Withdrawal is the last resort especially if it is not in client’s best interest.
9. LISTEN to them.
10. Analyze to discover the REAL issue.
11. Be patient. Let them talk. Try to understand where they are coming from.
14. Get help from family and friends. You don’t have to reveal confidences in order to gain information from them.
15. Bring in support. (Investigator, Regional Defender, Colleague)
   Tucker and Valerie are always available to talk with clients with you.

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