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Inviting You to An Experience Elsewhere: The Ethics of Dealing with Difficult Clients

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1. Introduction

The author thanks the planning committee for the opportunity to write and present on such an important practice and ethics topic in the category of managing the client-attorney relationship. The weight of the attorney-client relationship can be the source of daily anxiety and stress when it becomes “difficult”—either because the attorney is dealing with a difficult client or a difficult client relationship or both. This paper attempts to unpack how we think about what is difficult, how we assess it, and how we respond to it. As a result of this thought project, the author hopes that it will inspire development or modification of workflows, firm policies, and strategies that are practically implementable in daily practice.

a) Disclaimer

To the extent that the author addresses ethics issues in this paper, the author is providing his interpretation as applied in the paper, which may or may not apply to the reader’s individual practice or situation. It is important for the reader to review the applicable rules, ethics opinions, and other authorities cited to create their own response to their unique situation.

b) Articles of Recommended Reading

The author recommends the following resources as invaluable resources in the development of proactive and reactive responses to client relationship management issues:

1. Don’t Come to My Office with Suing Me on Your Mind – Ethical Engagement Letters; Building Blocks of Wills and Probate 2022; Moorman, Hall; TexasBarCLE
2. Who is My Client; Handling your First (or Next) Medicaid or Elder Law Case 2022; Leshner, Christina; TexasBarCLE
3. New Rules and Ethics Opinions Affecting Your Practice (2022); Knapp, Pam, Meredith, John, and Sampson, Gregory W.; Law Practice Management; TexasBarCLE
4. The Cycle of the Gift: Family Wealth and Wisdom (2012); Massenzio, Susan E., Whitaker, Keith, Hughes, James E. Jr.; Bloomberg
5. AARP and National Alliance for Caregiving (NAC) (September 19, 2022), Caregiving in the U.S. 2020, available at <https://www.aarp.org/content/dam/aarp/ppi/2020/05/full-report-caregiving-in-the-united-states.doi.10.26419-2Fppi.00103.001.pdf>

2. History of the Rules of Ethics

Before the turn of the nineteenth century in the United States, there were no codes of ethics that regulated lawyer’s conduct. In 1908, however, the American Bar Association (“ABA”) adopted the Canons of Professional Ethics.¹ State bar associations began to develop, which regulated lawyer’s conduct. The ABA’s later codification of the Model Code of Professional Responsibility

¹ See, A Brief History of Legal Ethics; Family Law Quarterly, American Bar Association (Fall 1999), Vol. 33, No. pp. 637-645. See also, Canons of Ethics, 33 A.B.A. Rep. 575 (1908).

in 1970 and the Model Rules of Professional Conduct in 1983 added mechanisms regarding the enforcement of ethical standards.²

The development of 20th Century legal ethics theory came in two principal waves—moral and later, political.³ The first wave of legal ethics considered the lawyer’s profession in light of moral norms like what a lawyer ought to be doing considering concepts of moral values. The second wave of legal ethics considered, however, the lawyers profession in light of a pluralist society to resolve conflicts as an agent of a client while abstaining from moral judgment about the client.⁴ Some speculate a third wave of legal ethics development may include considerations of behavior, virtue, or fiduciary theory.⁵ What we are left with, nevertheless, are rules of theory that we must extrapolate to operate law businesses and navigate client relationships to address the daily issues a lawyer faces. In its preamble, the Texas Disciplinary Rules of Professional Conduct acknowledge that “Virtually all difficult ethical problems arise from apparent conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interests.”⁶ Though the author believes good ethics makes good business (which will be addressed later), the rules of ethics do not address all aspects of operating a modern law business. Therefore, as this author suggests, it is up to every lawyer, then, to provide a framework and response for the realities of the practice of the law that comply with the ethical rules but also tailor them to how the lawyer and their law practice operates. Further, it is incumbent upon each lawyer to see the rules of ethics as compliance guidelines (or foundational safeguards) for the operation of a law practice and not an operation manual in and of themselves.

3. The Etymology and the Etiology of “Difficult” Clients and Relationships

a) Etymology

Etymology is the origin story of a word and the historical development of its meaning. The origin story of the word “difficult” begins in the 14th century. In middle English, difficult finds its roots in the word “difficulty,” which likely stems from the word “difficulte.”⁷ Difficulty borrows from the Anglo-French and Latin words meaning “hard to do, troublesome, intractable.”⁸ In later alternate meanings, difficult has also come to mean “hard to deal with, manage, or overcome” and “hard to understand.”⁹

b) Etiology

² See, Russell G. Pearce, Rediscovering the Republican Origins of the Legal Ethics Codes, 6 Geo. J. Legal Ethics 241 (1992-1993) available at: https://ir.lawnet.fordham.edu/faculty_scholarship/312.

³ See generally, Luban, David and Wendel, W. Bradley, "Philosophical Legal Ethics: An Affectionate History," 30 Georgetown Journal of Legal Ethics 337 (2017).

⁴ Id.

⁵ Id.

⁶ Tex. R. Disc. P. Preamble, para. 7.

⁷ Merriam Webster available at <https://www.merriam-webster.com/dictionary/difficult>.

⁸ Merriam Webster available at <https://www.merriam-webster.com/dictionary/difficulty>.

⁹ Merriam Webster available at <https://www.merriam-webster.com/dictionary/difficult>.

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