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VEXING STAKEHOLDERS EMPLOYEES

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Introduction

Vex (veks) 1. To give trouble to, esp. in a petty or nagging way; to disturb, annoy, irritate, etc. 2. To distress, annoy or plague.

-Webster’s New World Dictionary, Second College Ed. 1974

All people may be created equal but by the time they call your office and become your client, things likely will have taken a turn. All attorneys deal with clients who have unreasonable expectations regarding strategies, outcomes or the attorney-client relationship itself. Attorneys representing public school employees have unique circumstances that result in special ethical challenges for attorneys.

For example, teachers are, as a group, idealists; and expect that the forces of good (which they individually represent) will invariably win in the end, which can make it challenging for a lawyer discussing the goals of the representation. Most educators, even with a serious problem, also fully intend to continue working at the district and with the people they are having the problems with - but also expect vindication. This can result in questions about the best strategy. Finally, a good deal of legal representation of educators occurs within the grievance process, which is similar to but not the same as the judicial process. This can raise questions about an attorney's responsibilities when a client acts unreasonably, such as providing false information within the district employee grievance process.

The purpose of this paper is to address issues that can arise in the representation of a "vexing" - a difficult or unreasonable public school district employee-client and apply the current Texas Disciplinary Rules of Professional Conduct (TDRPC) to these situations. Not all ethical issues that could arise while representing employees in the public school setting are addressed, the focus here is on those rules that are most relevant to the situations that challenging clients can create.

Regarding the structure of this paper, I would like to explain several choices I have made. It is structured around a number of situations that a difficult client may cause. I then discuss the rules applicable to that situation. In practical situations the rules of the TDRPC are very interconnected. For example, a lawyer's obligation to provide truthful information can affect a client's authority to determine strategy. Where it seemed helpful, I have included references from one section to another to avoid unnecessary redundancy. Finally, I recognized while drafting the paper that adding the acronym "TDRPC" to confirm that the rule discussed was from the TDRPC before every reference to a rule was tiresome for the author and would likely be tiresome for the reader. I have therefore dispensed with it. Please rest assured that all rules discussed are found in the TDRPC.

Challenges in The Attorney – (Vexing) Client Relationship

1. Who decides what to go for – what's the goal? (determining the objectives of the representation)

A client engages an attorney to fix a problem the client perceives and the client expects the lawyer to help fix the problem as the client perceives it. But who decides what has to happen for the problem to be fixed? To use the term from the TDRPC - who determines the objectives of the representation? If a teacher-client's problem is a poor appraisal, the teacher may actually expect and want more than a change to the appraisal scores. The teacher may want the appraiser reprimanded, transferred or even terminated. The lawyer, however, may feel that these goals are not realistic and may believe that they are even counterproductive to the goal of getting the appraisal scores changed. What are the lawyer's obligations and options?

The client determines the objectives of the representation.

The general rule is that a client determines the objectives – the goal of the representation. Rule 1.02(a) provides that, subject to paragraphs (b), (c), (d), and (e), (f), and (g), "a lawyer shall abide by a client's decisions ... concerning the objectives ... of representation."

While the general rule is both sensible and easy to apply, it is possible for a challenging client to complicate the matter by changing goals midstream. A good example is the client who has had all the requested

remedies granted at level 2 in an employee grievance but then decides she does not want to quit, wanting to appeal to the board because she wants the board “to know about it”.

Rule 1.02 provides clarification regarding specific options and duties.

As noted, Rule 1.02(b)-(f) expand on the general rule that a lawyer follows their client’s wishes regarding objectives. Paragraph (b) simply clarifies that a lawyer may limit the objectives if the client consents after consultation. So, the lawyer may try to change the client’s mind by counseling the client that a planned objective is not a wise course. But, Paragraph (b) is also clear that in most cases the final decision remains with the client.

- Fraud or Criminal Acts

Paragraphs (c) – (e) deal with situations where pursuing the client’s desired objective would result in the lawyer assisting the client commit a fraud or criminal act – which is prohibited violation of the TDRPC itself under Rule 8.04. Since this type of assistance is prohibited, a lawyer is prohibited from acquiescing to the client’s wishes in these cases. Finally, Paragraph (f) simply clarifies that a lawyer should inform the client about the limitations imposed by the TDRPC.

When confronted with a client’s demand for an unreasonable objective, a lawyer must convince the client to change the objective, agree to pursue the client’s objective or withdraw from representation.

In a case where the client is intending to use the lawyer’s services to commit a fraud or criminal act. the TDRPC requires the lawyer to withdraw from representation, unless the lawyer can convince the client to change his mind. (See Section 3 regarding withdrawal from representation.)

- Frivolous claims

In a case where the client is wanting to pursue a frivolous claim, the lawyer must also refuse. Rule 3.01 states that a lawyer “shall not bring or defend a proceeding or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so and it is not frivolous.” (See Section 7 for a discussion on the potentially “frivolous” grievance.)

In most cases though, a client’s problematic objective is not criminal or fraudulent, but simply one that the lawyer believes is not in the client’s own best interests. In this case, the lawyer can try to explain why the objective is problematic and convince the client to change his mind. If the lawyer fails though, the lawyer has two choices, follow the client’s wishes and pursue the problematic objective or withdraw from representation, if withdrawal is possible. (See Section 3 regarding withdrawal from representation.)

PRACTICE TIPS:

- Document all consultations with client – so you have a contemporaneous record, should questions arise later.
- Document your objection to the client’s desired objective and share this with the client – for when things “go south” later as you are thinking they will.
- Offer a second opinion from another lawyer if possible – it gives you credibility with your client.

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Title search: Vexing Stakeholders: Employees

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