Rule 2.1: The Difficulty of a Candid Assessment in Government

NAAG Summer Meeting

June 2015
Candid Assessment

• Rule 2.1
  • In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.
  
    – A client is entitled to straightforward advice expressing the lawyer’s honest assessment.
  
    – Maintaining morale cannot distract from the honest assessment
Combines with Other Rules

• Confidentiality (1.6)
• Competence—(Rule 1.1)
• Understand the Scope of Representation (1.2)
  – Does not mean you agree or endorse
• Diligence and Promptness (1.3)
• Communication (1.4)
  – Keep client informed, consult and provide info
What do Clients Want?

• Communication—updates, awareness etc
  – Most common bar complaint—never hear from him/her

• To be heard
  – Second most is not listening/ poor listening
  – Active listening commitment

• Validation
  – Client’s problems are real
  – Difference between professionalism and detachment

• Understand what you are saying
  – Common Complaint—can’t understand attorney
4 C’s of Client Counseling

– Make sure you CONNECT with your client.
– The Client must have CLARITY in your counsel
– Must demonstrate COMPETENCE
– Make the client CONFIDENT in your ability
Different World

• Public v. Private Practice of Law
  – Confidentiality not the same
  – Walls have ears
  – Public Records/ Open Meetings Law
  – Client Identification/ Who makes decisions?
  – The politics of it all...
The Fairness Principle

• Clients generally understand that they will not win every battle, but they do have an expectation that they will be treated fairly and that the process will be a fair one for all involved.

• Any other sense devalues the entire system.
Obstacles to Candid Assessment

• Be aware of Biases
  – Confirmation
  – Post decision rationalization
  – Status Quo Bias
  – Reactive Devaluation
  – Information Bias
  – Hostile Attribution
Ego Threat

- Threat to self-image/ self-esteem
- Attorneys and Government officials are prone
- Similar to Illusory Superiority
  - Lake Wobegon
- This combines with cognitive biases...
  - Entrenchment.
Overcoming Bias

• Focus on law/ data
• Seek out and identify contrary analysis/ideas
  – Great way to more fully understand your position
• Accountability/ Check in points
  – If this happens, check in
• Avoid noise (cheerleaders/ critics etc..)
• Be wary of artificial deadlines
• Complacency...
Dealing with Attorneys

• Understand who the client is…but also…

• Who is the attorney?
  – Name on the door

• Conflict
  – Not a difference of opinion
  – Encourage contrarian views
  – Post decision…come on the team for the big win!

• NO SURPRISES/ PHONE HOME
What Kind of Attorney?

• The Cheerleader
• The Control Freak
• The Law Professor
• The Institutionalized Bureaucrat
• The Director/Department Head
• The Drama King/Queen
Pathway to Candid Assessment

• Small Talk is not a waste of time
• Counsel confidentiality
• Listen/Validate
• Identify areas of agreement
• Identify the “other side” –counter arguments
• The Law is your friend
• Counseling = Problem Solving
• Allow room to exit gracefully
Active Listening Commitment

- Full attention to client
- No devices/ email/ desktops minimized
- Let the client talk without interruption
  - Take notes of things you want to come back to.
  - Understand the talking balance in the meeting
- Recognize body language
  - Folded arms, staring into space, smirking
- Acknowledge that you have heard and understand the client’s issue.
Confidentiality

• Still must adhere to Rule 1.6
• Client usually retains the privilege—Client share = Waiver?
  – Government Attorney may reveal in specific circumstances—crime, harm to public fisc
  – Letters/ E-mails
    • Forward/ photocopy usually enough to waive privilege
    • Must counsel clients on this
    • Essential persons
    • The Cloud...off-site data...networks...information security
Making it Work

• Counsel—explain confidentiality
• Candid Assessment
• Overcome Biases
• Protect confidentiality
• Remember the Fairness Principle
From Good to Great

• Good Lawyer
  – Identifies

• GREAT
  – Solves
Questions

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