PROFESSIONALISM: THE CLIENT MAY COME SECOND

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Professionalism is more than civility. Professionalism is also recognizing that the client is *not* always right.[1] Practicing law is not the same as retail sales. Lawyers have duties to the justice system that can outweigh their duties to their clients.[2] This principle must be clearly understood and must be followed in practice if we want our profession to be viewed as an honored profession and not as a business concerned only with the bottom line.

While it is true that ours is a service profession, we serve not just our clients — we serve our system of justice and our sense of what is right. We cannot sacrifice our integrity and our moral values in a misguided effort to be zealous advocates if we expect to be trusted and respected. If we will do anything or say anything that we think will help our client, just so long as we do not violate the

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1. *See* SOL M. LINOWITZ, THE BETRAYED PROFESSION: LAWYERING AT THE END OF THE TWENTIETH CENTURY 88 (1994). "Professionalism presumes that in professional relations the customer is *not* always right. Lawyers, not clients, must decide what they will or will not do for the fees they are paid." *Id*.

2. *See* Pesaplastic, C.A. v. Cincinnati Milacron Co., 799 F.2d 1510, 1522 (11th Cir. 1986) (indicating "as members of the bar, and officers of the court, our primary responsibility is not to the client, but to the legal system"); *see also* Malautea v. Suzuki Motor Co., 987 F.2d 1536, 1546 (11th Cir. 1993) (noting: "An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly.").

Rules of Professional Conduct or *Rules of Civil Procedure*,[3] we run the risk of losing credibility and losing our way on the path toward respectability. A true "zealous advocate" works hard, prepares well, thinks creatively, and argues forcefully, but does so without guile, trickery, insulting behavior, sharp practices, or dishonor.

Of course, it is easy to pontificate and be self-righteous so long as we perceive no threat to the relationship with our client and, thus, perhaps our pocketbook. What happens, though, when a conflict arises between what our client tells us to do and what we know is the "right" thing to do? Consider the situation of trial counsel representing an individual defendant. At the end of plaintiff's case, plaintiff's counsel tells the court that he is about to rest his case, but needs a specific witness to authenticate one final document. He says that the witness is in town, can certainly be produced the next day, but is not yet under plaintiff's subpoena and cannot be located at the moment. Plaintiff's counsel requests the court to recess early and resume the next day.

While this exchange is taking place, defense counsel and the defendant know that the very same witness is in the corridor outside the courtroom in response to defendant's subpoena. The defendant whispers to her counsel not to disclose the whereabouts of the witness. If the court denies the request for the recess, defendant will be entitled to a directed verdict. What should defense counsel do?

When recently presented with this hypothetical, a panel of state and federal judges[4] unanimously agreed on the answer.[5] De

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3. Certain aspects of a lawyer's representation are procedural rather than substantive and are within the control of the attorney and not the client. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. 1 (1995) (indicating that "[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues"). For example, "plaintiff's counsel should contact the attorney known to be representing a defendant to determine whether the latter intends to proceed in the matter before causing a default to be entered." Gulf Maintenance & Supply, Inc. v. Barnett Bank, 543 So. 2d 813, 816 (Fla. 1st Dist. Ct. App. 1989); *see also* Sklar v. Brawley, 651 So. 2d 1314, 1314 (Fla. 3d Dist. Ct. App. 1995) (holding that a default should be set aside when a plaintiff, without notice, improperly takes a default after opposing counsel indicates it is his intention to defend the case).

4. Hon. F. Dennis Alvarez, Circuit Court, Hillsborough County, Florida; Justice Harry Lee Anstead, Supreme Court of Florida; Hon. Susan C. Bucklew, United States District Court, Middle District of Florida; Hon. Thomas A. Clark, United States Court of Appeals, Eleventh Circuit; Hon. Peggy A. Quince, Florida Second District Court of Appeal.

5. *See* Panel Discussion of the 1998 Florida Bar Professionalism Seminar: Taking the High Road (Mar. 19, 1998) (seminar information on file with the *Stetson Law Re-*

fense counsel should advise the court the witness is in the hall. Defense counsel's duty to the court and the administration of justice takes precedence over the client's whispered instructions. But don't we have an adversary system? Why should defense counsel help plaintiff's counsel, who failed to subpoena the witness earlier? Doesn't defense counsel have an obligation to be a zealous advocate for defendant? Don't the defendant's rights matter? Doesn't a client have a right to expect her counsel will do everything within the *Rules of Professional Conduct* to advance her cause?

In the first place, disclosing the location of the witness may be the only up-front, honorable, forthcoming, morally right thing to do.[6] In the second place, defense counsel will likely lose all credibility with the court if the disclosure is not made and the court later finds out that counsel knew where the witness was. But should defense counsel sacrifice the interests of his client just to preserve his own credibility? Of course, the defendant herself would like to receive the benefit of credibility the defense counsel has earned over the course of his career. Defendant may expect her counsel to jeopardize his credibility for her, but she has no right to this expectation. If defense counsel had lost credibility by misguidedly doing what a prior client directed, the defendant could suffer the consequences. Similarly, future clients, or the defendant herself in this case or as a client in future cases, could be disadvantaged by defense counsel's loss of credibility in this case.[7]

The facts in the hypothetical can be varied slightly to make the answer easier or harder. Perhaps there really is no right answer. The answer may depend on the perspective of the reader, but at the very least, lawyers need to recognize that there may be differences of opinion among lawyers and between the bench and the bar as to the answer.

We should also recognize that sometimes lawyers use their "duty" to their client as an excuse to justify unprofessional conduct. But the adversary nature of our system of dispute resolution and the

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view) [hereinafter Professionalism Seminar].

6. Having reached this conclusion, we might like to think the inquiry need go no further. But lawyers, who are accustomed to operating within the adversary system, may require further analysis of the issue.

7. These views are consistent with those articulated by the panel of judges described above and particularly those of Justice Harry Lee Anstead. *See* Professionalism Seminar, *supra* note 5.

familiar principle of zealous representation of our clients do not constitute the only guides for our conduct. We must also be guided by our duty to our system of justice, by the rule of law itself, and by our own moral compass. The public, the courts, our colleagues at the bar, and, yes, even our clients should expect no less.