

ETHICAL DECISION-MAKING IN SITUATIONS OF UNCERTAINTY

CLE Presentation
2023 Christian Legal Society National Conference
Boston, Massachusetts
October 5-8, 2023

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Presentation Description: The ABA Model Rules of Professional Conduct and the state counterparts include many provisions which expressly give lawyers discretion as to how to act in certain situations. Moreover, the rules themselves address only a small fraction of the ethical situations lawyers face. The ABA rules, in fact, recognize their limited scope and state in the Preamble that “many difficult issues of professional discretion can arise” within the rules’ framework and that “[s]uch issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.” Such *sensitive professional and moral judgment* cannot be done by AI. We thus must consider the questions: What moral principles can best guide lawyers in these situations of ethical uncertainty? How might lawyers apply those principles in a decision-making framework that provides both direction and flexibility? This workshop will identify common ethical situations lawyers face where the rules give them discretion or do not address at all and will outline decision-making frameworks lawyers can draw upon in addressing these situations. The workshop will analyze hypothetical scenarios to operationalize these frameworks and provide attendees with takeaway tools they can use in their practice and in their professional life generally.

I. Emphasis in Ethics Rules on Need for Moral Judgment

a. ABA Model Rules of Professional Conduct Preamble

- i. [7] Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. *However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession's ideals of public service.*
- ii. [9] In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system *and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.* The Rules of Professional Conduct often prescribe terms for resolving such conflicts. Within the framework of these Rules, however, many difficult issues of professional discretion can arise. *Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.* These principles include the lawyer's obligation

zealously to protect and pursue a client's legitimate interests, within the bounds of the law, while maintaining a professional, courteous and civil attitude toward all persons involved in the legal system.

b. ABA Model Rules of Professional Conduct Scope (emphasis added)

- i. [14] The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. *Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.* Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
- ii. [16] Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. *The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.*

c. State rules of professional conduct have similar provisions.

- i. See, for example, the Virginia Rules of Professional Conduct Preamble and Scope (cited below and emphasis added):
 1. Many of a lawyer's professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. *However, a lawyer is also guided by personal conscience and the approbation of professional peers.* A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession, and to exemplify the legal profession's ideals of public service.
 2. In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system *and to the lawyer's own interest in remaining an upright person while earning a satisfactory living.*

The Rules of Professional Conduct prescribe terms for resolving such conflicts. *Within the framework of these Rules, many difficult issues of professional discretion can arise. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules.*

3. The Rules of Professional Conduct are rules of reason. They should be interpreted with reference to the purposes of legal representation and of the law itself. Some of the Rules are imperatives, cast in the terms "shall" or "shall not." These define proper conduct for purposes of professional discipline. *Others, generally cast in the term "may," are permissive and define areas under the Rules in which the lawyer has professional discretion. No disciplinary action should be taken when the lawyer chooses not to act or acts within the bounds of such discretion.* Other Rules define the nature of relationships between the lawyer and others. The Rules are thus partly obligatory and disciplinary and partly constitutive and descriptive in that they define a lawyer's professional role. Many of the Comments use the term "should." Comments do not add obligations to the Rules but provide guidance for practicing in compliance with the Rules.
4. The Rules presuppose a larger legal context shaping the lawyer's role. That context includes court rules and statutes relating to matters of licensure, laws defining specific obligations of lawyers and substantive and procedural law in general. Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance, secondarily upon reinforcement by peer and public opinion and finally, when necessary, upon enforcement through disciplinary proceedings. *The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The Rules simply provide a framework for the ethical practice of law.*

II. Examples Where Model Rules Provide Only General Standards or Give Attorneys Broad Discretion

- a. The importance of how lawyers exercise moral judgement is underscored by the fact that numerous rules of professional conduct provide attorneys with only general standards or expressly give attorneys discretion as to how to act (see the emphasized wording below).
- b. Model Rule 1.1: Competence—"A lawyer shall provide *competent representation* to a client. Competent representation requires the legal

knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

- c. Model Rule 1.3: Diligence—“A lawyer shall act with *reasonable diligence and promptness* in representing a client.”
- d. Model Rule 1.5: Fees—“A lawyer shall not make an agreement for, charge, or collect an *unreasonable* amount for expenses.” (MR 1.5 also provides eight factors in determining whether the legal fee is “reasonable.”)
- e. Model Rule 1.6: Confidentiality of Information—
 - i. “(a) A lawyer shall not reveal information relating to the representation of 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).
 - ii. (b) A lawyer *may* reveal information relating to the representation of a client *to the extent the lawyer reasonably believes necessary*:
 1. to prevent reasonably certain death or substantial bodily harm;
 2. to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
 3. to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
 4. to secure legal advice about the lawyer's compliance with these Rules;
 5. 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;
 6. to comply with other law or a court order; or
 7. 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.”

f. Model Rule 4.1: Truthfulness in Statements to Others—“In the course of representing a client a lawyer shall not knowingly:

- i. (a) make a false statement of *material fact or law* to a third person; or
- ii. (b) fail to disclose a *material fact* to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”
- iii. [2] . . . This Rule refers to statements of fact. *Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.* Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud. . . .”

g. Model Rule 4.4: Respect for Rights of Third Person

- i. “(a) In representing a client, a lawyer shall not use means that have *no substantial purpose other* than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.”
- ii. (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.
- iii. [2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document

or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person. For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

- iv. [3] Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.

III. Professional Formation Emphasis in February 2022 Changes to ABA Standards for Approval of Law Schools

- a. The American Bar Association recently recognized in its Standards for Approval of Law Schools the need for legal education to help their students to develop a professional identity, which includes understand the profession’s guiding principles and how those principles can help guide lawyers’ ethical decision-making.
- b. Specifically, Amendment to Standard 303(b) added subsection (3), which requires law schools to foster their students’ professional identity formation. The section reads: “(b) A law school shall provide substantial opportunities to students for: (1) law clinics or field placement(s); and (2) student participation in pro bono legal services, including law-related public service activities; and (3) the development of a professional identity.”
- c. The changes also added Interpretation 303-5: “Professional identity focuses on what it means to be a lawyer and the special obligations lawyers have to their clients and society. *The development of professional identity should involve an intentional exploration of the values, guiding principles, and well-being practices considered foundational to successful legal practice.* Because developing a professional identity requires reflection and growth over time, students should have frequent opportunities for such development during each year of law school and in a variety of courses and co-curricular and professional development activities.”
- d. Difference Between Lawyer Professionalism and Professional Identity

- i. “Although lawyer professionalism has been defined in various ways, its focus historically has been on the outward conduct the legal profession desires its members to exhibit. Lawyer professionalism has often referred to adherence to standards or norms of conduct beyond those required by the ethical rules, and the focus of the current discussion of professionalism largely remains on outward conduct like civility and respect for others.”
- ii. “Civility and respect for others are undeniably important to an emerging lawyer’s professional identity, but *professional identity runs deeper, in that it challenges the developing lawyer to internalize principles and values such that the conduct desired will be a natural outgrowth of the individual’s moral compass.*”

L.O. Natt Gantt, II & Gloria A. Whittico, “The Role of ASP in Developing Students' Professional Identity” *The Learning Curve*, Winter 2014, at 6 (citations omitted) (emphasis added).

IV. Artificial Intelligence Cannot (Yet) Exercise Sensitive Professional and Moral Judgement

- a. Sophisticated artificial intelligence platforms, like ChatGPT, can scour the internet for information on how to exercise moral judgment, but the platforms themselves are not equipped to make such decisions. Exercising such judgment therefore remains the province of the individual, and attorneys should cultivate such judgment so that they can provide better client service and flourish in the profession.
- b. Here is how ChatGPT responded (on April 28, 2023) to the question: “How do you exercise sensitive professional and moral judgment?”

As an AI language model, I do not have a moral or professional judgment of my own, but I can provide some general guidance on how to exercise sensitive professional and moral judgment.

To exercise sensitive professional and moral judgment, you need to have a clear understanding of your values, ethical principles, and professional standards. These should guide your decision-making process and actions.

Here are some steps you can take to exercise sensitive professional and moral judgment:

1. Gather information: Gather as much information as possible about the situation you are facing. This will help you to understand the context and identify the key issues.
2. Analyze the situation: Analyze the situation by applying your values, ethical principles, and professional standards. Consider the potential impact of your decision on all parties involved.

3. Consult with others: Seek the advice of others who may have more experience or expertise in the area you are dealing with. This will help you to gain a different perspective and make a more informed decision.
4. Consider alternatives: Consider alternative courses of action and evaluate their potential consequences. Look for a solution that is consistent with your values, ethical principles, and professional standards.
5. Take action: Make a decision based on the information you have gathered and the analysis you have conducted. Take responsibility for your decision and be prepared to explain and justify it if necessary.
6. Reflect: Reflect on your decision and the outcomes of your actions. Learn from your experiences and consider how you might approach similar situations in the future.

Remember, exercising sensitive professional and moral judgment requires ongoing effort and practice. It involves balancing competing interests and making difficult decisions, often in situations where there is no clear right or wrong answer. By following these steps, you can make more informed decisions that are consistent with your values, ethical principles, and professional standards.

- c. Interestingly, ChapGPT responded to the same question somewhat differently on or about February 20, 2023 (ChatGPT does not automatically record dates for each question posed).

As an AI language model, I don't have personal values or beliefs, but I can provide general guidelines on how to exercise sensitive professional and moral judgment.

1. Gather information: Gather all the relevant information about the situation, the stakeholders involved, and the potential consequences of different actions. Ensure that you have a comprehensive understanding of the situation before making any judgments.
2. Evaluate the situation: Evaluate the situation objectively, considering all the facts and circumstances involved. Consider the potential impact of your actions on all the stakeholders involved, and try to identify any biases or assumptions that may be influencing your judgment.
3. Apply ethical principles: Use ethical principles, such as honesty, fairness, and respect for human dignity, to guide your judgment. Consider the moral implications of your actions and whether they align with your personal and professional values.
4. Consult with others: Seek input from colleagues, supervisors, or other trusted advisors who can offer a different perspective on the situation. Consider their advice, but also evaluate it critically to ensure it aligns with your own ethical principles.
5. Make a decision: Based on your evaluation of the situation, apply ethical principles, and input from others, make a decision that you believe is in the best interest of all stakeholders involved.

6. Monitor the situation: Continuously monitor the situation and reevaluate your decision if new information comes to light or circumstances change. Stay open to feedback and willing to revise your judgment if necessary.

In summary, exercising sensitive professional and moral judgment requires a comprehensive understanding of the situation, an objective evaluation of the facts, and the application of ethical principles to guide decision-making. Consultation with others and continuous monitoring of the situation can also help ensure that decisions align with personal and professional values.

- d. These responses do not exercise such judgment *per se*, but they do provide guidelines in developing a decision-making framework, discussed in greater detail below.
- e. Moreover, AI cannot substitute for attorneys' skill in *communicating* tough ethical decision to clients. Most notably on this point, the ethics rules expressly allow attorneys to advise their clients on nonlegal considerations.¹
 - i. ABA Rule 2.1: Advisor—"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."
 - ii. Nearly all the states with ethics rules based on the Model Rules have adopted ABA Rule 2.1 without substantial revision. See the comparison charts on the ABA website for information on how each state has modified the ABA Model Rules: https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/?login.
 - iii. The Comment to ABA Rule 2.1 provides, in pertinent part:
 1. "Advice couched in narrowly legal terms may be of little value to a client, especially where practical considerations, such as cost or effects on other people, are predominant. *Purely technical legal advice, therefore, can sometimes be inadequate.* It is proper for a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge

¹ For an extensive article on the topic, see Larry O. Natt Gantt, II, *More Than Lawyers: The Legal and Ethical Implications of Counseling Clients on Nonlegal Considerations*, 18 GEORGETOWN JOURNAL OF LEGAL ETHICS 365 (2005).

upon most legal questions and may decisively influence how the law will be applied.” (Comment 2) (emphasis added).

2. “It is proper a lawyer to refer to relevant moral and ethical considerations in giving advice. Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions and may decisively influence how the law will be implied.” (Comment 2a).
 3. “A client may expressly or impliedly ask the lawyer for purely technical advice. When such a request is made by a client experienced in legal matters, the lawyer may accept it at face value. When such a request is made by a client inexperienced in legal matters, however, the lawyer's responsibility as advisor may include indicating that more may be involved than strictly legal considerations. (Comment 3).
- iv. The Comment to ABA Rule 2.1 is virtually identical to the comments adopted by many states. Some state comments, however, are more expansive. For instance, Virginia includes “moral or ethical” consequences as potentially being required to be discussed under Rule 1.4: “In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal, *moral or ethical* consequences to the client or to others, duty to the client under Rule 1.4 may require that the lawyer act if the client’s course of action is related to the representation.” (Comment 5 (emphasis added)).
- v. Although ABA Rule 8.4(g) has not been widely adopted by the states, attorneys concerned about the rule should consider whether their nonlegal counseling might not be considered the “legitimate advice or advocacy” excepted from the rule’s general prohibition against “harassment or discrimination.”

f. Judicial and Ethics Opinions Encouraging Nonlegal Counseling

- i. Despite the far-reaching implications of Rule 2.1, “[t]his provision only rarely finds its way into court and ethics opinions.” Ellen Bennett et al., *Annotated Model Rules of Professional Conduct* 315 (8th ed. 2015)
- ii. *Friedman v. Commissioner of Public Safety*, 473 N.W.2d 828, 834-35 (Minn. 1991): “If the objective of DWI prosecution is to get drunk drivers off the highways, into treatment, and on the way to sobriety, an attorney can play a very important role. A good lawyer is not only interested in protecting the client’s legal rights, but also in the well-being and mental and physical health of the client. A lawyer has an affirmative duty to be a counselor to his client. . . . The lawyer may be able to persuade a problem drinker to seek treatment.”

- iii. *In re Marriage of Foran*, 834 P.2d 1081, 1089 & n.14 (Wash. Ct. App. 1992): The court referenced Washington Rule of Professional Conduct 2.1 to stress how attorneys should address the nonlegal consideration of “marital tranquility” when they advise their clients on prenuptial agreements.
- iv. *Wooten v. Heisler*, 847 A.2d 1040, 1044 (Conn. App. Ct. 2004): “To be sure, an attorney has an *obligation* to act with reasonable diligence; to communicate with the client to the extent reasonably necessary to allow the client to make informed decisions; and to provide advice on such legal *and nonlegal* matters that are relevant to the client’s situation” (emphasis added).
- v. Ariz. Comm. on the Rules of Prof’l Conduct, Formal Op. 97-06 (1997): “the attorney *has an ethical responsibility* to advise the client of the practical consequences, as well as the legal consequences, of his proposed course of action” (emphasis added).
- vi. N.Y. City Ethics Op. 2011-2 (2011): The opinion referenced New York Rule of Professional Conduct 2.1 to conclude that lawyers whose clients are considering third-party financing for litigation should discuss with their clients the costs and benefits of such financing and consider the clients’ financial resources in advising whether such financing is in the clients’ best interest.

g. Specialized Codes and Other Commentary

- i. American Academy of Matrimonial Lawyers (“AAML”) Standard 1.2 under the “Competence and Advice” section of the AAML Bounds of Advocacy² provides:
 - 1. “An attorney should advise the client of the emotional and economic impact of divorce and explore the feasibility of reconciliation.”
 - 2. The Commentary to the standard recognizes that few attorneys are qualified to conduct psychological counseling but concludes that discussion of these nonlegal impacts is “appropriate.”
- ii. American Law Institute’s Principles of Corporate Governance Section 2.01(b)(2) (1994)³ states:

² These Bounds of Advocacy are available online: https://aaml.org/wp-content/uploads/bounds_of_advocacy.pdf. The latest edition is from 2012.

³ These principles have not been updated since 1994. The American Law Institute is currently drafting a *Restatement of the Law, Corporate Governance* on the subject. See <https://www.ali.org/projects/show/corporate-governance/> (accessed May 1, 2023).

1. “Even if corporate profit and shareholder gain are not thereby enhanced, the corporation, in the conduct of its business: [m]ay take into account ethical considerations that are reasonably regarded as appropriate to the responsible conduct of business.”
2. The comment adds, “Corporate officials are not less morally obliged than any other citizens to take ethical considerations into account [in making decisions], and it would be unwise social policy to preclude them from doing so.” *Id.* § 2.01 cmt. h.
- iii. Legal ethicist Monroe Freedman and other scholars underscore how competent attorneys should, when appropriate, provide nonlegal counseling to their clients. *See, e.g.*, Monroe H. Freedman & Abbe Smith, *Understanding Lawyers’ Ethics* 87 (2d ed. 2002) (“[W]hile representing a client, the lawyer should counsel the client regarding the moral aspects of the representation.”)

V. Three Broad Types of Ethical Theory⁴

- a. Below are three broad categories of normative theories that can guide attorneys in exercising their discretion in ethical decision-making.
- b. Consequentialist Theories—“primarily concerned about the ethical consequences of particular actions”
 - i. Utilitarian Approach
 - ii. Egoist Approach
 - iii. Common Good Approach
- c. Non-Consequentialist Theories—“tend to be broadly concerned with the intentions of the person making ethical decisions about particular actions”
 - i. Duty-Based Approach (sometimes called deontological ethics)
 - ii. Rights Approach
 - iii. Fairness or Justice Approach
 - iv. Divine Command Approach

⁴ The information in this section is from Brown University’s Program in Science, Technology, and Society. *See* Program in Science, Technology, and Society, Brown University, *A Framework for Making Ethical Decisions*, available at <https://www.brown.edu/academics/science-and-technology-studies/framework-making-ethical-decisions> (accessed May 1, 2023).

- d. Agent-centered Theories—“unlike consequentialist and non-consequentialist theories, are more concerned with the overall ethical status of individuals, or agents, and are less concerned to identify the morality of particular actions.”
 - i. Virtue Approach
 - ii. Feminist Approach

VI. Professional Values to Inform Attorneys’ Decision-Making Framework

- a. Given the focus in the ABA professional identity standards and in the professional formation literature on “values,” it is appropriate to identify the values, virtues, and moral principles that can guide an attorney decision-making.

- b. Institutional Values of the Profession Proposed by Gantt and Madison

- i. Integrity—Being True to Self
- ii. Honesty
- iii. Diligence/Excellence
- iv. Fairness/Seeking Justice & Truth
- v. Courage/Honor
- vi. Wisdom/Judgment
- vii. Compassion/Service/Respect for Others
- viii. Balance

Larry O. Natt Gantt, II and Benjamin V. Madison, III, *Teaching Knowledge, Skills, and Values of Professional Identity Formation in BUILDING ON BEST PRACTICES: TRANSFORMING LEGAL EDUCATION IN A CHANGING WORLD* (2015).

- c. Six Virtues of the Professional Lawyer Proposed by Longan, Floyd, and Floyd

- i. Competence—“I am an excellent lawyer, who has the knowledge, skill, diligence and judgment to assist my clients.”
- ii. Fidelity to the Client—“I am a lawyer who fulfills my duties of utmost good faith and devotion to my client, and I do not permit my personal interests or the interests of others to interfere with those duties.”
- iii. Fidelity to the Law—“I am a lawyer who is faithful and upholds the law and the institutions of the law.”

- iv. Public-Spiritedness—“I am a lawyer who practices in the spirit of public service. I seek to ensure access to justice and to regulate the legal profession for the benefit of the public. I do my share to represent unpopular people and causes, and I seek to improve the law.”
- v. Civility—“I am a lawyer who is civil to everyone with whom I come in contact as a lawyer. I am courteous, cooperative, and honest, and I do not engage in abusive tactics.”
- vi. Practical Wisdom (“Master Virtue”)—“I am a lawyer who cultivates the practical wisdom that I need in order to deploy my other virtues, both personal and professional, in particular situations in the right amounts, in the right way, and for the right reasons.”

PATRICK EMERY LONGAN, DAISY HURST FLOYD & TIMOTHY W. FLOYD, *THE FORMATION OF PROFESSIONAL IDENTITY: THE PATH FROM STUDENT TO LAWYER* 5-8 (2020).

VII. Developing Decision-Making Frameworks

- a. Identifying professional and personal values informs an attorney’s decision-making framework, but the attorney must also outline the steps in that framework.
- b. Numerous ethicists have offered such frameworks, and attorneys should formulate the decision-making process that best reflects their professional identity and moral compass and remains consistent with the professional values as outlined in the rules of professional conduct.

VIII. Madison Decision-Making Framework⁵

- a. Identify the conflicting values or dilemma.
- b. Search for sources to inform your conscience.
- c. Dialogue with someone.
- d. Reflect on the resolution you find most compatible with your moral compass.

IX. Gantt Flow Diagram for Christian Ethical Decision-Making

- a. This diagram developed by the author involves yes/no questions decision-makers ask themselves as they assess an ethical dilemma. The framework is designed to help decision-makers prioritize moral principles when it seems that

⁵ Professor Benjamin Madison at Regent University School of Law uses this framework in assessing student reflections on the ethical scenarios presented in his book *Civil Procedure for All States: A Context and Practice Casebook* (2010).

making certain decisions places different moral principles at odds with each other. The framework's steps involve:

- i. PREPARATION—Establish moral convictions based on study of Scripture, prayer, and other spiritual disciplines.
 - ii. DILEMMA EMERGES—Gather the facts surrounding the decision. Pray for guidance and freedom from unbiblical self-interest in making the decision.
 - iii. Does a biblical moral principle clearly apply and not conflict in application with another principle? If no, proceed below.
 - iv. Consider competing principles in light of God's character of holiness-justice-love. Can a creative solution be applied that aligns holiness-justice-love?
 - v. Consider prioritization through the Kohlberg-Trueblood six-stage framework. Can the conflicting principles be prioritized based on the level of moral reasoning which supports them (using a qualitative and quantitative analysis)? (Rule out any hint of self-interested motives.)
 - vi. Consider prioritization through emphasizing the Great Commandment. Is there an option that glorifies God and demonstrates biblically other-centered love?
 - vii. Consider doing nothing at this time. Pray for additional guidance. If inactivity amounts to unethical behavior, select the action with the fewest ethical violations. Know that God is concerned with motives, not just outcomes. Pray for God's grace for all involved in the situation.
- b. The initial preparation stage is key because attorneys may not have time to deliberate on ethical decisions and may need to act quickly (such as when in trial). Reflecting on ethical decision-making and practicing it in dialogue with others can lead to a "trained sensitivity" to ethical issues that enable individuals to discern such issues and respond to them thoughtfully when they arise.⁶

X. Hamilton Research on Good Judgment

- a. Neil Hamilton has surveyed legal employers to identify the four major elements that employers report as signaling good judgment in a legal professional setting:

⁶ The Brown University framework, referenced above, points to the importance of this "trained sensitivity." See Program in Science, Technology, and Society, Brown University, *A Framework for Making Ethical Decisions*, available at <https://www.brown.edu/academics/science-and-technology-studies/framework-making-ethical-decisions> (accessed May 1, 2023).

- i. “Recognition and evaluation of risks and problems, and alternative courses of action, with a recommendation on the most reasonable course of action among the alternatives.
 - ii. “Creativity and strategic thinking.
 - iii. “Understanding the client’s best interests in the larger context of the client’s situation and the client’s business.
 - iv. “Asking for guidance or help/seeking feedback and dialogue with other lawyers to gain insight.”⁷
- b. Professor Hamilton has formulated specific ethical decision-making frameworks, which are included in Attachment A along with others.

XI. Hypotheticals for Discussion (Attachment B)

⁷ NEIL W. HAMILTON, ROADMAP: THE LAW STUDENT’S GUIDE TO MEANINGFUL EMPLOYMENT 115-16 (2d ed. 2018).

ATTACHMENT A

Selected Ethical Decision-Making Frameworks

Creative Problem-Solving Template – Stakeholder Analysis

Neil Hamilton

**Patricia and Thomas Holloran Professor of Law
University of St. Thomas Law School**

In any problem, a lawyer should help the client:

1. Identify the relevant stakeholders and try to articulate what is truly motivating each stakeholder in the situation in terms of their motivations, concerns, interests and fears. What are the benefits and costs the stakeholders face in the situation? What critical facts does the client need to know to do a competent stakeholder analysis?
2. Identify the principles, norms and duties (of the client and then of the lawyer – see below) most applicable to the facts.
3. Articulate the principal issue(s) in the problem.
4. Articulate the principal realistic options the client has to address the problem.
5. Tentatively select the best option (this is, the client's initial tentative selection of the best option).
6. Test the client's reasoning at each stage through hypothetical fact situations and if possible feedback from others.
7. Give as much time as is practicable for reflection during this process.

A lawyer's focus as a servant leader is to help the client through these steps, but the lawyer should do the same steps for him or herself. The client may want counsel on what the lawyer would do if the lawyer were in the same situation. In addition, the lawyer's own analysis will create an outer boundary if the client chooses a course of action which presents so much conflict with the lawyer's own ethics that the lawyer cannot serve as the client's zealous advocate.

Milestone Model on Client-Centered Problem-Solving and Good Judgment

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Sub-competencies of Client-Centered Problem-Solving/Good Judgment	Novice Learner Level 1	Intermediate Learner Level 2	Competent Learner Level 3	Exceptional Learner Level 4
1. Seeks Deep Understanding of Client's Context (Business), Values, and Preferences	Rarely seeks deep understanding of client's context (business), values and preferences Rarely demonstrates active listening with client	Sometimes seeks deep understanding of client's context (business), values, and preferences Sometimes demonstrates active listening with client	Often seeks deep understanding of client's context (business), values, and preferences Often demonstrates active listening with client	Consistently seeks deep understanding of client's context (business), values, and preferences Consistently demonstrates active listening with client
2. Partnering with the Client, Defines Problem	Rarely demonstrates an ability to partner with the client to construct a complete problem statement with the relevant contextual factors.	Sometimes demonstrates the ability to partner with the client to construct a complete problem statement with relevant contextual factors.	Often demonstrates the ability to partner with the client to construct a complete problem statement with relevant contextual factors.	Consistently demonstrates the ability to partner with the client to construct a complete problem statement with all relevant contextual factors.
3. Partnering with the Client, Identifies Strategies and Proposes Solutions	Rarely identifies a strategy and proposes a clear solution for solving the problem.	Sometimes identifies a strategy and proposes a solution that is "off the shelf" rather than individually designed to address the specific contextual factors of the problem.	Often identifies multiple strategies and proposes one or more solutions that indicate comprehension of the problem. Solutions are sensitive to contextual factors.	Consistently identifies multiple strategies and proposes one or more solutions/hypotheses that indicate a deep comprehension of the problem. Solutions are sensitive to contextual factors.
4. Partnering with the Client, Helps Client Evaluate Potential Solutions	Rarely goes beyond superficial evaluation of solutions (for example, contains cursory, surface level explanation) in terms of the history of the problem, logic/reasoning, feasibility of solution, and impacts of solution.	Sometimes goes beyond superficial evaluation of solutions but evaluation is brief (for example, explanation lacks depth) in terms of the history of the problem, logic/reasoning, feasibility of solution, and impacts of solution.	Often, evaluation of solutions is adequate (for example, contains thorough explanation) in terms of the history of the problem, logic/reasoning, feasibility of solution, and impacts of solution.	Consistently, evaluation of solutions is deep and elegant (for example, contains thorough and insightful explanation) and is deep and thorough in terms of the history of problem, logic/reasoning, feasibility of solution, and impacts of solution.
5. Assists Client in Implementing Solutions	Rarely implements the client's solution in a manner that directly addresses the problem statement.	Sometimes implements the client's solution in a manner that directly addresses the problem statement.	Often implements the client's solution in a manner that directly addresses the problem statement.	Consistently implements the client's solution in a manner that directly addresses the problem statement.

Many legal educators define legal analysis and reasoning and problem solving to include some version of the IRAC formulation familiar to law students -- Issue correctly identified from facts, Rule correctly identified and explained, Application providing a well-reasoned discussion relating the facts to the rules, and Conclusion explained logically convincingly.⁸ A later-stage IRAC skill is foundational for legal analysis and reasoning and problem-solving but Goal 3's "client-centered problem-solving and good judgment" involve additional skills beyond IRAC. Those competencies include deeply understanding the client's context (and where applicable, business), values, and preferences. Client-centered problem solving and good judgment also involve career-long habits of: (1) trying to understand legal issues in broader contexts; and (2) seeking challenging professional experiences and reflecting on them to continually improve.⁹

This Milestone Model on client-centered problem solving and good judgment that is adapted from the American Association of Colleges and Universities Problem-Solving Value Rubric.¹⁰ Building on a version of legal analysis and reasoning like IRAC, client-centered problem solving and good judgment involve a process of partnering with the client to define the problem, identify strategies, propose solutions, evaluate the potential solutions, and assist in implementing the solutions.

⁸ See Kelley Burton, *Using a Legal Reasoning Grid and Criterion-Referenced Assessment Rubric on IRAC (Issue, Rule, Application, and Conclusion)*, 10 J. LEARNING DESIGN (No. 2 2017) (providing a stage development model on IRAC) <https://www.jld.edu.au/article/view/229/283.html>.

⁹ See PATRICK EMERY LONGAN, DAISY HURST FLOYD & TIMOTHY W. FLOYD, *THE FORMATION OF PROFESSIONAL IDENTITY: THE PATH FROM STUDENT TO LAWYER* 106-11 (2020).

¹⁰ This Milestone is an adaptation of the AAC&U's Problem-Solving Value Rubric available at <https://www.aacu.org/value/rubrics/problem-solving>. The VALUE rubrics were developed by teams of faculty experts representing colleges and universities across the United States through a process that examined many existing campus rubrics and related documents for each learning outcome and incorporated additional feedback from faculty. The rubrics articulate fundamental criteria for each learning outcome, with performance descriptors demonstrating progressively more sophisticated levels of attainment.

Character-Based Decision-Making Model

University of San Diego Ethics Awareness

<https://blink.ucsd.edu/finance/accountability/ethics-awareness.html#The-Decision-Making-Model>¹¹

The “Character-Based Decision-Making Model” model, developed by the Josephson Institute of Ethics, can be applied to many common problems and can also be used by most individuals facing ethical dilemmas.

It involves three steps:

1. **All decisions must take into account and reflect a concern for the interests and well being of all affected individuals (“stakeholders”).**

The underlying principle here is the Golden Rule — help when you can, avoid harm when you can.

2. **Ethical values and principles *always* take precedence over nonethical ones.**

Ethical values are morally superior to nonethical ones. When faced with a clear choice between such values, the ethical person should always choose to follow ethical principles.

Perceiving the difference between ethical and nonethical values can be difficult. This situation often occurs when people perceive a clash between what they want or “need” and ethical principles that might deny these desires. If some rationalization begins to occur, this situation is probably present.

3. **It is ethically proper to violate an ethical principle only when it is clearly necessary to advance another true ethical principle, which, according to the decision-maker's conscience, will produce the greatest balance in the long run.**

Some decisions will require you to prioritize and to choose between competing ethical values and principles when it is clearly necessary to do so because the only viable options require the sacrifice of one ethical value over another ethical value. When this is the case, the decision-maker should act in a way that will create the greatest amount of good and the least amount of harm to the greatest number of people.

¹¹ This website was accessed May 1, 2023.

A Framework for Ethical Decision Making

Markkula Center for Applied Ethics at Santa Clara University¹²

<https://www.scu.edu/ethics/ethics-resources/a-framework-for-ethical-decision-making/>

Identify the Ethical Issues

1. Could this decision or situation be damaging to someone or to some group, or unevenly beneficial to people? Does this decision involve a choice between a good and bad alternative, or perhaps between two “goods” or between two “bads”?
2. Is this issue about more than solely what is legal or what is most efficient? If so, how?

Get the Facts

3. What are the relevant facts of the case? What facts are not known? Can I learn more about the situation? Do I know enough to make a decision?
4. What individuals and groups have an important stake in the outcome? Are the concerns of some of those individuals or groups more important? Why?
5. What are the options for acting? Have all the relevant persons and groups been consulted? Have I identified creative options?

Evaluate Alternative Actions

6. Evaluate the options by asking the following questions:
 - Which option best respects the rights of all who have a stake? (The Rights Lens)
 - Which option treats people fairly, giving them each what they are due? (The Justice Lens)
 - Which option will produce the most good and do the least harm for as many stakeholders as possible? (The Utilitarian Lens)
 - Which option best serves the community as a whole, not just some members? (The Common Good Lens)
 - Which option leads me to act as the sort of person I want to be? (The Virtue Lens)
 - Which option appropriately takes into account the relationships, concerns, and feelings of all stakeholders? (The Care Ethics Lens)

Choose an Option for Action and Test It

7. After an evaluation using all of these lenses, which option best addresses the situation?
8. If I told someone I respect (or a public audience) which option I have chosen, what would they say?
9. How can my decision be implemented with the greatest care and attention to the concerns of all stakeholders?

Implement Your Decision and Reflect on the Outcome

10. How did my decision turn out, and what have I learned from this specific situation? What (if any) follow-up actions should I take?

¹² This framework for thinking ethically is the product of dialogue and debate at the Markkula Center for Applied Ethics at Santa Clara University. Primary contributors include Manuel Velasquez, Dennis Moberg, Michael J. Meyer, Thomas Shanks, Margaret R. McLean, David DeCosse, Claire André, Kirk O. Hanson, Irina Raicu, and Jonathan Kwan. It was last revised on November 5, 2021.

ATTACHMENT B

Decision-Making Hypotheticals for Discussion

Confidentiality Hypothetical

Exercising Discretion Regarding Confidential Information

When should you divulge information about your client?

You have been representing Magda Enterprises in various matters for several years. Magda is a small privately-held company that imports rugs and other home furnishings and sells them to home stores and boutiques. You've handled numerous matters for Magda, but your work for the company has focused on drafting the various contractual agreements between Magda and its customers. Magda is your biggest client and accounts for approximately 50 percent of your firm's monthly receipts.

Last year, you became suspicious of Magda's dealings because the company seemed to be landing new contracts, outperforming its larger competitors, even though you knew that other competitors had greater access to suppliers than did Magda. You nevertheless continued to draft all the sales contracts for the new business.

A week ago, you were in a meeting with the owner, Bob Magda, and were talking with him about the success of the business. "I thought the import home goods and Oriental rug market was down, but you seem to be cornering the market," you say. "How do you do it?"

"You've been with me a long time," he says. "You've been more than just an attorney; you've been a loyal advisor to me and to the company on so many of our legal issues over the years. I feel I owe it to you to tell you something that's been weighing on me for some time. . . . I've been misrepresenting our supplier base to our customers—that's how we've been so successful. Our customers think that we're importing hand-made rugs and items from India and Turkey, but some of our rugs have actually been machine-made rugs from China and some of our home goods are manufactured in China as well. I've felt convicted about this and recently decided that I'm going to stop misrepresenting our supplier base to our customers in the future, but we have done this for several years—and to many of our customers."

You're shocked by his admission; you thought you knew the owner so well and didn't think he would engage in such fraud. You also are well-connected in your community and know personally the owners of some of the local stores to which Magda has supplied rugs and items. Although none is your client, you almost feel like you have a duty to let them know of the fraud because you're sure they currently have Magda products in their stores.

DISCUSSION

What do you do? What do you say to Bob? Do you say anything to Magda's customers?

Consider ABA Model Rule of Professional Conduct 1.6(a) and (b)(2):

Confidentiality of Information

(a) A lawyer shall not reveal information relating to the representation of 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 relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services

In Virginia, as one example, common-law fraud arises when the speaker makes “a false representation of a material fact, made intentionally and knowingly, with intent to mislead” and that the misled party relies on that misrepresentation and suffers damages. *Elliott v. Shore Stop, Inc.*, 238 Va. 237, 244, 384 S.E.2d 752, 756 (1989); *see also Sales v. Kecoughtan Housing Co., Ltd.* 279 Va. 475, 481, 690 S.E.2d 91, 94 (2010).

Supervisory Hypothetical

Subordinate and Supervisory Attorney Duties

When should you refuse to obey a supervisor’s instruction regarding an ethical issue?

You recently began working for a firm known for its aggressive lawyering practices. You thought you knew what you were getting into but now are wondering. Your supervising partner, for instance, asks you to object broadly to any discovery request and to deny a fact in a complaint if it is not stated with the utmost accuracy. You think you’ve been able to comply with her requests without violating any ethics rules and you want to respect your supervisor, who is much more seasoned in her practice. At the same time, you feel that you are very, very close to the ethical line and are uncomfortable with some of the tactics you are adopting.

Your concerns have come to the forefront in a recent case that has landed on your desk. The case involves defending a local corporation in an employment discrimination lawsuit filed by a discharged employee. In response to the complaint, your supervising partner has asked you to file an answer in which you are to raise every possible defense. You believe you can respond aggressively—and ethically—by raising several defenses. She specifically has added, though, “I want to throw this plaintiff and his attorney off guard. Let’s file a counterclaim in which we allege that the plaintiff has defamed our client by making false statements about it online. I know there have been some recent internet defamation cases in the press right now, and I did see where the plaintiff said some negative things about our client on Facebook. . . . Don’t ask me how. Our client hasn’t suffered any damages to my knowledge, but just claim it has—and claim a lot. I think we can simply scare the plaintiff by raising controversial issues like this in response. This case could be messy, and I want to get rid of it quickly.”

DISCUSSION

1. *What should the associate lawyer do? What should the lawyer say to her supervising attorney?*
2. *What if the supervising attorney instructs the associate lawyer to continue in a manner with which that associate lawyer no longer feels comfortable?*
3. *Will associate lawyer still be held to the same ethical standards if her supervising attorney instructed her on what to do?*
4. *What rules govern the associate lawyer?*

Consider ABA Model Rules of Professional Conduct 3.4 and 5.2:

Rule 3.1 Meritorious Claims And Contentions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Rule 5.2 Responsibilities Of A Subordinate Lawyer

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty.

North Carolina law, as one example, provides the following elements for defamation: “In order to recover for defamation, a plaintiff must allege and prove that the defendant made false, defamatory statements of or concerning the plaintiff, which were published to a third person, causing injury to the plaintiff's reputation.” *Boyce & Isley, PLLC v. Cooper*, 211 N.C. App. 469, 478, 710 S.E.2d 309, 317 (2011) (quoting *Tyson v. L'eggs Products, Inc.*, 84 N.C. App. 1, 10–11, 351 S.E.2d 834, 840 (1987)).

Discovery Hypothetical

Handling Inadvertently Sent Materials

How should you respond when the opposing counsel inadvertently sends you a document that appears to be privileged?

Opposing Counsel inadvertently sends you a document that appears subject to the attorney-client privilege between the opposing counsel and his client. Opposing Counsel disclosed the document to your law firm in response to a discovery request for production of documents in a litigation matter. You recognize the document was disclosed in error. What should you do? What should you say to your client?

Consider the following ethical rules of professional conduct and accompanying comments.

ABA Model Rule 4.4 of Professional Conduct

Respect For Rights Of Third Persons (Emphasis Added)

- (b) A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Comment

[2] Paragraph (b) recognizes that lawyers sometimes receive a document or electronically stored information that was mistakenly sent or produced by opposing parties or their lawyers. A document or electronically stored information is inadvertently sent when it is accidentally transmitted, such as when an email or letter is misaddressed or a document or electronically stored information is accidentally included with information that was intentionally transmitted. If a lawyer knows or reasonably should know that such a document or electronically stored information was sent inadvertently, then this Rule requires the lawyer to promptly notify the sender in order to permit that person to take protective measures. *Whether the lawyer is required to take additional steps, such as returning the document or electronically stored information, is a matter of law beyond the scope of these Rules, as is the question of whether the privileged status of a document or electronically stored information has been waived. Similarly, this Rule does not address the legal duties of a lawyer who receives a document or electronically stored information that the lawyer knows or reasonably should know may have been inappropriately obtained by the sending person.* For purposes of this Rule, “document or electronically stored information” includes, in addition to paper documents, email and other forms of electronically stored information, including embedded data (commonly referred to as “metadata”), that is subject to being read or put into readable form. Metadata in electronic documents creates an obligation under this Rule only if the receiving lawyer knows or reasonably should know that the metadata was inadvertently sent to the receiving lawyer.

[3] *Some lawyers may choose to return a document or delete electronically stored information unread, for example, when the lawyer learns before receiving it that it was inadvertently sent. Where a lawyer is not required by applicable law to do so, the decision to voluntarily return such a document or delete electronically stored information is a matter of professional judgment ordinarily reserved to the lawyer. See Rules 1.2 and 1.4.*

ABA Model Rule 1.2 of Professional Conduct

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. 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.

Fees Hypothetical

Setting Legal Fees in a New Community

What principles should you use in setting your fees in particular matters? Is it just a matter of the “going rate” in your community or should other principles guide the process?

Your spouse recently received an excellent new job offer in another state, and you two decide to relocate the family and that you will open up a law practice in the new state (where you

are also admitted to practice). You will be able to bring a few clients with you to the new state but will certainly need to attract new clients. In setting up your practice, you are seeking to establish guiding principles for how to set your fees for the various general practice services you will be offering (e.g., criminal defense, civil litigation (not personal injury), corporate formation and contract drafting, and estate planning). How much is your time worth? What other considerations might be relevant beyond the factors in the ethics rules? Will you charge clients different fees based on their ability to pay?

Consider the following ethical rule of professional conduct.

ABA Model Rule 1.5 of Professional Conduct

Fees

(a) A lawyer shall not make an agreement for, charge, or collect an unreasonable fee or an unreasonable amount for expenses. The factors to be considered in determining the reasonableness of a fee include the following:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services;
- and
- (8) whether the fee is fixed or contingent.