

Advising Plaintiffs on Financial Matters: A Lawyer's Dilemma

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Beyond the purely legal scope in which lawyers operate daily, many form such bonds of trust with their clients that they begin acting as financial advisers as well. An attorney is authorized to offer more than just legal advice, and good attorneys create financial tools such as trusts or spendthrift provisions to protect a client. The question is just how far an attorney should go in rendering advice on financial matters.

The Scope of Advice

An attorney has an affirmative duty to advise a client beyond the narrow legal scope of the law. Rule 2.1 of the ABA's Model Rules of Professional Conduct allows an attorney great latitude in the areas of advice he or she may offer to a client. (1,2) The Rule states, "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."

The Rule makes fairly clear that an attorney should raise both legal and non-legal issues to a client. As the comment to Rule 2.1 states, "A client is entitled to straightforward advice expressing the lawyer's honest assessment." An attorney can, and should, tell a client when a lump sum payment or other type of settlement is not in his or her best interest. In dispensing financial advice, an attorney can go beyond the realm of pure legal matters by suggesting financial conveniences, such as trusts and spendthrift provisions, that may be beneficial to the client. In discussing the structure of a potential settlement, the attorney can recommend certain tools which can be used to protect the client's long term well-being.

Although an attorney can advise a client as to financial options that are available, there is a level of detail involving finance and investment that attorneys should be careful about entering. The comment to Rule 2.1 states "matters that go beyond strictly legal questions may also be in the domain of another profession.... Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation." A competent attorney must know when to step aside and let a financial planner take over. In essence, financial advice offered should flow from and have a reasonable nexus to the legal advice being rendered. For example, it may be prudent for an attorney to defer to a financial adviser in such areas as investment banking and stock investing. When an attorney advises on purely financial matters, the lawyer may believe that the client is looking to him or her for financial advice, whereas the client may believe the attorney to be acting purely as a lawyer and a fiduciary on the legal aspects of a financial transaction. (3) That may present a liability problem. (4) While an attorney can suggest certain financial options, that attorney should refer the client to a financial advisor for advice on the specific, highly technical world of finance and investment.

Who Decides?

No matter how strongly an attorney believes that a client should seek a long term settlement, there are certain ethical considerations by which that attorney must abide. First the lawyer must always remember that he or she is the agent for the client. Rule 1.2 of the ABA's Model Rules of Professional Conduct states that "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter." Thus even if the attorney disagrees with the client's reasoning, he or she must ultimately comply with the desires of that client. An attorney may advise a client that a settlement offer is not in the client's best interest, but it is the choice of that client whether or not to accept the offer.

In a similar vein, an attorney must inform a client as to any offers for settlement that have been received. In the comments to Rule 1.4 the ABA states "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy . . . should promptly inform the client of its substance unless prior discussions with the client have left it clear that the proposal will be unacceptable." If an attorney receives a settlement offer that does not meet the long term security interests of the client, that settlement offer must still be presented to the client. Withholding such information, even if the attorney believes it to be in the best interests of the client, is a violation for which the attorney can be disciplined.

One course of action an attorney can contemplate when a client refuses to consider long term settlement options is to terminate representation. Rule 1.16 states, "A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if . . . a client insists upon pursuing an objective that the lawyer finds repugnant or imprudent." It is possible that an attorney will feel so strongly that only a long-term security settlement can protect his or her client's interests that withdrawal may be the best course - even if the client disagrees. Care should be taken here as some courts do not regard a client's refusal to accept an attorney's advice on settlement options as sufficient enough grounds to withdraw from the case if such withdrawal will prejudice the client. (5) In such circumstances it appears than an attorney who terminates his or her relationship with a client due to disagreements over acceptance or rejection of a settlement may be sanctioned.

Available Options

So what duty does an attorney owe a client to guarantee his or her long term financial security? Probably nothing beyond the usual scope of advising. It should be noted, though, that during the usual scope of advising, an attorney may have the responsibility of trying to persuade a client to do what is in his or her best interests. In order to fulfill that responsibility, a competent attorney may be compelled to call in a financial advisor.

Possibly the best action an attorney can take is to discuss settlement options early on in the relationship. The attorney should discuss all available options and the repercussions of each option. In many circumstances the earlier the idea of long-term security is mentioned to a client, the greater the likelihood that he or she will accept it. Not only does this help set the scope of future negotiations and the final settlement, but it allows the attorney a possible opportunity to withdraw from the relationship early in the relationship so there will not be any material adverse effect on the interests of the client. An attorney should thus raise the issue of long-term security before an offer of settlement is on the table.

If the attorney does not raise the issue of long-term security until after the final settlement, there is less flexibility for both the attorney and the client. An attorney can still raise the possibility of creating a trust or some other financial instrument which will provide a safety net for the client. However, it may be wiser at this point to refer the client to a financial advisor who has expertise in the areas of finance and investment. A financial advisor will probably be able to offer the client a greater degree of flexibility in investment options and it avoids liability for the attorney in making non-professional investment decisions. Thus, it is probably easier for a financial planner, and not an attorney, to assist a client once a lump sum settlement is finalized. The attorney can even refer the client to a specific advisor as long as the attorney does not obtain a fee from the financial advisor for the referral. (6)

The Bottom Line

From an examination of the Model Rules of Professional Conduct, it does not appear that an attorney owes any special duty to a client who appears likely to squander a large settlement. As with any client, an attorney does owe a duty of competence and diligence. That duty may include the responsibility of trying to persuade the client what is in his or her best interests. The attorney should inform the client as to his or her options prior to settlement, and the attorney should provide any legal, and if so desired,

financial advice that other competent attorneys would provide. The attorney also has the option to refer the client to a professional financial advisor for specific advice on investments.

An attorney should never underestimate the incredibly persuasive position he or she holds vis-à-vis a client. The nature of an attorney-client relationship renders a client susceptible to the professional advice dictated by the attorney. The attorney has the opportunity, and possibly the responsibility, to employ any legitimate rhetorical or persuasive device which will lead the client towards the wisest outcome. Usually, the attorney will be able to convince the client to do the right thing--to act in that client's best long-term interests.

Footnotes

1. ABA Model Rules of Professional Conduct, Rule 2.1.
2. We have used the ABA Model Rules in our analysis as the vast majority of states now use some version of the Model Rules as the basis of regulating and disciplining members of the bar.
3. See, e.g., *In re Pappas*, 768 P2d 1161 (Ariz. 1988). It should be noted that most legal malpractice insurers do not cover recommendations extending to investments, because this is beyond the scope of professional services. See, *General Accidents Insurance Co. v. Namesnik*, 790 F2d 1397 (CA 9 1986).
4. If the attorney is intent on advising the client on which stocks to purchase or which mutual funds will return the highest yield, he or she should make it clear that the advice is not given in his or her capacity as an attorney.
5. See, *Imhoff v. Hammer*, 305 A2d 325 (Del. 1973)
6. If the attorney retains a fee for the referral, it may be deemed a partnership between legal and non-legal professionals and thus subject to different rules. See, ABA Model Rules of Professional Conduct, Rules 5.4, 5.7.