

When Lawyers “Merge” with Their Clients: The Ethical Implications of Going Too Far in Working for your Clients

Mark Johnson, Partner
Kansas City
+1 816 460 2424
mark.johnson@dentons.com



Missouri and Kansas Ethical Rules

This discussion applies to the ethical obligations of lawyers who practice in Missouri and/or Kansas;

and to lawyers who practice in-house or at law firms.

The Rules We All Know --

But we conveniently forget --

because we don't want to jeopardize our jobs (if in-house) or continuing the client relationship (if working at a firm)

Why? It's so obvious: we don't want to show any lack of enthusiasm for the client's cause -- even if we really don't have that enthusiasm

Where to Find the Rules

Missouri:

Rules Governing the Missouri Bar and the Judiciary;
Rule 4, Rules of Professional Conduct

Kansas:

Rule 226: Kansas Rules of Professional Conduct

I. What We are Supposed to Do

- Our proper roles: adviser and advocate
 - Missouri Rules 4-2.1 and 4-3.1
 - Kansas Rules 2.1 and 3.1
- Adviser: “In representing a client, a lawyer shall exercise **independent** professional judgment and render **candid** advice.”
- Advocate: “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**...”

Easy to say -- but hard to execute

- We all have faced times when our client has asked us to do things that made us feel uncomfortable -- or would jeopardize the independence of the relationship we're supposed to have with our client
- Ask yourself: what is Attorney General Barr's position vis-à-vis the President?
 - Who is Barr's client? And does he feel he needs to say things that make him uncomfortable?
 - What duty does he owe to the President? To the Country?
- Although we may not have the problems that Barr has, we all understand the “yin and yang” pull between our proper role and the client's desires

II. Gathering Information and Talking to Witnesses

- Missouri Rules 4.3.7 and 4-4.2 through 4-4.4
- Kansas Rules 3.7 and 4.2 through 4.4
- Does the lawyer become a witness? “A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness...”
- Is the witness represented? “..a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter...”
- Is the witness unrepresented? “In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested.”

- If you are a witness, your law firm is likely unable to represent anybody in the matter -- absent consent by all interested parties
- If a witness is represented, don't talk to him/her -- just don't do it, unless you are clear that the witness' lawyer is only involved in other matters for the witness, not the matter about which you are inquiring. Regardless -- still a fine line
- If the witness is unrepresented, it is safer to "Mirandize" the witness -- be very clear who you are and what your interest is. Unrepresented witnesses have a habit of later claiming confusion about what you told them

III. The Extent to Which We Can Rely on our Client

- Missouri Rules 4-3.3 and 4-4.1
- Kansas Rules 3.3 and 4.1
- When dealing with a court: “A lawyer cannot knowingly ... offer evidence the lawyer knows to be false. If .. the lawyer’s client .. has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures .. A lawyer may refuse to offer evidence .. That the lawyer reasonably believes is false.”
- When dealing with a third party: “In the course of representing a client a lawyer shall not knowingly make a false statement of material fact..”
 - Comment: “A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false.”

IV. Rule 11 and the Scope of Inquiry

- Missouri Rules 4-3.1 and 4-3.3
 - Rule of Civil Procedure 55.03
- Kansas Rules 3.1 and 3.3
 - Rule of Civil Procedure 60-211
- Comment to 3.1: “What is required of lawyers .. Is that they inform themselves about the facts of their clients’ cases and the applicable law and determine that they can make good faith arguments in support of their clients’ positions.”
- “The action is frivolous .. If the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person...”

Is It Really Enforced?

- Only in rare circumstances
- The scope of inquiry is not onerous
- But you can't rely solely on what your client tells you
- If the client's information turns out to be faulty, then by signing the pleading you -- the lawyer -- have assumed responsibility for it
- So: read the documents yourself, research the law yourself, and satisfy yourself that the case -- or the defense -- has some merit (apply the smell test?)

V. Taking an Ownership Interest in the Client

- In other words, **really** becoming the client
 - Missouri Rule 4-1.8
 - Kansas Rule 1.8
- Conflict of Interest: Terms must be fully disclosed and informed consent must be given;
 - No business transaction with a client unless terms are fully disclosed, client is advised in writing to seek independent counsel, and client gives informed written consent
 - Just like a contingent fee arrangement

Impact on the Lawyer's Role as an Adviser

- Adviser Role (1.8): doing business with a client can compromise the lawyer's role as adviser to the client: "independent professional judgment" and "candid advice"
- Those tasks are potentially compromised if the lawyer has a financial interest in the operation of the client's business
- It is the lawyer's burden to demonstrate that full disclosure was made and informed consent obtained from the client

But What About Stock as Compensation?

- In-house counsel often receive equity as part of their compensation
- By definition, the terms of the compensation are fully disclosed to the lawyer and the client, and both consent to the arrangement
- And in almost all cases the amount of stock or stock options in the hands of lawyers will be too small to raise conflict issues -- or to affect the advice the lawyers give.
- But lawyers who have large ownership interests in closely-held businesses should avoid representing the company, because the size of their ownership stake could give rise to a perception of conflict.

Questions?

Thank you

大成 DENTONS

Dentons US LLP
4520 Main Street
Suite 1100
Kansas City, MO 64111-7700
United States

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