CHAPTER 3

LAWYERING FOR AND WITH THE CLIENT

§3.1 CLIENT-CENTERED LAWYERING

One lawyer had this to say about legal representation:

> I represent people, not cases. . . . [W]hen I did criminal defense work[, c]lients came to me with more than just their criminal case. Their families were on welfare, or they'd lose their job if they couldn't make bail. There are drug problems which affect whole families. . . . One time, my client came to court with her three-year-old child, and the judge rolled her up into jail on some technicality. We [later] got her out on a writ, but I couldn't leave the child there [in the courtroom], so I took her with me.
>
> You've got to go the whole nine yards for your clients. If you don't, you're really not meeting their needs. I had a poor client with a big products liability case. She had almost no clothes and had never been in a courthouse, so we went out and bought her a whole wardrobe for trial. When we won big, we [counseled her to] put money in trust for the kids, and buy a nice home but pay in cash so you don't have monthly payments. Otherwise, the money could have been gone in a year. . . .
>
> I don't want to take over their lives or force them to do something they don't want, but I never want to abandon my clients at the courthouse door. I guess that

> means getting emotionally involved in your clients' lives. . . . [T]hat's a price I'll gladly pay to try to help the *person*, not just the case.[1]

A client is not an item of work. You probably dislike it when a doctor treats you as a case of flu rather than as a human being who has the flu. And the problem is more than unpleasantness: a doctor who treats you as a human being with symptoms of the flu might spend enough time with you to learn that you also have other symptoms, and that you therefore do not have the flu, but instead another disease, which should be treated differently. You can imagine much of how a client experiences an interview with a lawyer simply by remembering how you have experienced contact with doctors.

The opposite of treating the client as an item of work is "client-centered lawyering," a phrase that originated in a ground-breaking book by David Binder and Susan Price.[2] It means focusing our efforts around what the client hopes for (rather than what we think the client needs) and treating the client as an effective collaborator (rather than as a helpless person we will rescue). We have no special wisdom about what clients should want, and each client has to live with the results of our work long after the case has faded into the back of our memory. Clients are not helpless, and even if they were, only rarely could we rescue them. A better view is this: the client is a capable person who has hired us to help the client accomplish a particular goal.

The client who is not experienced at hiring lawyers is very different from the client (usually a business person) who hires lawyers routinely. The inexperienced client may have more anxiety and may understand less about how lawyers work. The experienced client may have more sharply defined goals and may think of hiring the lawyer as bringing in a specialist to perform an already defined task.

And the client who wants help with a dispute (suing over an auto accident, for example) can be very different from the client who wants assistance completing a transaction (typically, negotiating a contract). If the transaction is important, the transactional client might be experiencing some stress, which might be replaced with happiness if the transaction is successful. But a dispute client has a greater chance of feeling stress, trauma, and anger.

§3.2 THE CLIENT AS A COLLEAGUE AND COLLABORATOR

Consider two scenes in two different lawyers' offices. In one, the lawyer sits behind a large desk, and the client sits in a chair on the opposite side of the desk. When the client speaks, it is to supply facts the lawyer has asked for. When the lawyer speaks, it is to provide professional advice and judgment. This is often

1. An anonymous lawyer quoted at Richard A. Zitrin & Carol M. Langford, *Legal Ethics in the Practice of Law* 230 (1995).
2. David A. Binder & Susan M. Price, *Legal Interviewing and Counseling: A Client-Centered Approach* (1977). A more recent version is David A. Binder, Paul B. Bergman, Susan M. Price & Paul R. Trembley, *Lawyers as Counselors: A Client-Centered Approach* (2d ed. 2004).

called the traditional model of the attorney-client relationship: the passive client protected by the powerful professional.

In the second scene, the lawyer and client sit together, perhaps at a conference table. They brainstorm, go over documents, and talk about which of several possible strategies would best accomplish the client's goals—and in doing so, they are both active. This has been called the participatory model of the attorney-client relationship: the lawyer assumes that she does not have all the answers, and the client is enlisted to supply an added measure of creativity and an often superior knowledge of the facts.

Most clients today want lawyers who know how to use the participatory model, although a significant minority still prefer the traditional model. The reverse was probably true 40 or 50 years ago. Some clients who still prefer the traditional model do so because they feel reassured turning things over to a trusted authority figure.

A client who prefers the traditional model might reduce anxiety by turning a problem over to a professional, thinking about it as little as possible while the professional works on it, and then following the professional's instructions. That client might trust more easily a professional who resembles an authority figure.

But a client who prefers the participatory model might reduce anxiety by becoming actively involved in solving a problem. That client might more easily trust a professional who is openly accessible and has a problem-solving style that the client understands and respects.

In a pioneering study, Douglas Rosenthal studied a number of personal injury cases to determine whether—personal preferences aside—one model produces better solutions than the other.[3] Rosenthal examined a number of personal injury cases, categorized the plaintiff's attorney-client relationship in each case as either traditional or participatory, and compared the result in each case with an independent evaluation of what the plaintiff's claim was worth. On average, the participatory plaintiff's lawyers got better results. The gap between the participatory and the traditional results was not huge, and Rosenthal's sample was relatively small. But since then, the impression has become widespread that participatory relationships with clients produce better and more satisfying results than traditional relationships do.

Why does the participatory model seem to work better and to satisfy more clients and lawyers? First, because lawyers are human, they make mistakes, and an actively involved client will catch at least some of those mistakes before they cause harm. Many clients can understand more of how to solve their problems than some lawyers give them credit for, and most clients know at least as much or even more about their own needs than a lawyer will. (For both of these reasons, the lawyer and client working together will come up with more and better solutions than the lawyer working alone.) Third, "[t]he participatory model promotes the dignity of clients as citizens" because it "makes the client a doer, responsible for his choices."[4] Fourth, it reduces the client's anxiety because the client is not kept in the dark about what is happening. Fifth, it protects "the integrity of professionals by

3. Douglas E. Rosenthal, *Lawyer and Client: Who's in Charge?* (1974).
4. *Id.* at 168.

liberating them from . . . the burdens imposed [by a] paternal role" and from client suspicion caused by client ignorance.[5] And sixth, it "invites personal contact in a society becoming increasingly impersonal."[6]

The participatory model also carries some burdens. Some clients may find their anxiety increased if they have to think about their problems; they would rather hire a professional and forget about it.[7] A lawyer with an emotional need to be "paternalistic and dominating" will be frustrated and unhappy in participatory relationships with clients. "Lawyers, and perhaps most professionals, seem to have two human needs in disproportionately great measure: the desire to control their environment and aggressive (and competitive) feelings."[8] On the other hand, a dominating but subtle lawyer might manipulate a client into thinking the relationship is participatory when in fact it is not. (Over time, many clients in this situation can figure out that they have been manipulated, although that might not happen until some time after the lawyer has finished the work.) Finally, the participatory model is more expensive.[9] It takes more time, and time is money. And it also takes more effort, in the form of "energy, intelligence, and judgment" from the client and, from the lawyer, "patience and tolerance built on recognition of an obligation to earn the client's cooperation."[10]

In today's law practice environment, a lawyer will be more effective at getting the desired results and satisfy more clients if the lawyer *usually* develops participatory relationships but can nevertheless work within a traditional relationship with those clients who would find a participatory relationship stressful. This book assumes that participatory lawyering is the norm and that traditional lawyering is now the exception.

How can you tell one type of client from another? It usually does no good to ask in the initial interview, "Would you rather have a traditional or a participatory relationship?" Only a rare client would be able to answer that question well, even if you were to explain what the terms mean. A better method is to start on a participatory basis and switch to a traditional relationship if you learn along the way that the client would be happier that way.

Are some types of clients more likely to prefer one type of relationship to the other? It is a commonly held view that, with exceptions, the more educated a client is, the more likely the client will feel comfortable working with a professional.[11] If that is true, a well-educated client might readily acclimate to (or even demand) a participatory relationship, while a less-educated client might prefer a more traditional one. But this question is a minefield in which generalizations can be both true and outrageously false at the same time. Every poverty lawyer can describe wonderful participatory relationships with clients who had little formal education. And Rosenthal found some very well-educated clients who preferred a traditional relationship.[12] A busy and well-educated client might have little time to spare for

5. *Id.* at 169.
6. *Id.* at 170.
7. *Id.*
8. *Id.* at 172–173.
9. *Id.* at 176.
10. *Id.* at 15.
11. *Id.* at 184.
12. *Id.* at 171.

a participatory relationship. Where the client might want involvement but not full participation in decision-making, the lawyer should differentiate between those situations where the client would want to be consulted (or must by law be consulted) and those where the client would prefer that the lawyer simply exercise her expertise.

§3.3 WHO DECIDES WHAT

The law of agency, professional responsibility, malpractice, and constitutional criminal procedure provide that certain decisions are reserved to the client and may not be made by the lawyer. The law of agency matters because the client is a principal whose agent is the lawyer. If the lawyer makes decisions reserved to the client, the lawyer can be disciplined under the rules of professional responsibility, or held liable in malpractice, or both.

The client defines the goals of the representation. The client decides whether to accept an adversary's offer of a negotiated settlement,[13] although the client can preauthorize acceptance of an offer meeting a particular description ("if they'll pay anything over $60,000, I'll take it, but don't stop negotiating until you've gotten them as high above that figure as you think you can"). In a criminal case, the client decides whether to plead guilty or not guilty, "whether to waive jury trial and whether the client will testify."[14] But the client makes all these decisions—which are momentous ones—only after the lawyer has counseled by explaining the alternatives and their advantages, costs, and risks.

Traditionally, the lawyer has decided "technical, legal, and tactical matters,"[15] such as where to sue, what theory of the case to rely on, what evidence to submit and witnesses to call, and what arguments to make. The case law allows the lawyer to make these decisions unilaterally, without consulting the client or even over the client's objections. But if you do such a thing, the case law will not stop the client from firing you and telling every other potential client in North America never to hire you. Moreover, the Model Rules of Professional Conduct require not only that a lawyer "abide by a client's decisions concerning the objectives of representation [but also] *consult with the client as to the means by which they are to be pursued.*"[16] And the Model Rules suggest that the lawyer should defer to the client when technical and tactical decisions raise "such questions as the expense to be incurred and concern for third persons who might be adversely affected."[17]

In the participatory model of lawyer-client relations, some of these decisions are made jointly by the lawyer and client: in a surprisingly large number of instances, the client has valuable insights on technical and tactical questions such as where to sue, what theory of the case to rely on, what evidence to introduce and witnesses to call, and what arguments to make. Depending on the client and the

13. Rule 1.2(a) of the Model Rules of Professional Conduct.
14. *Id.*
15. Comment to Rule 1.2(a).
16. Rule 1.2(a) (emphasis added).
17. Comment to Rule 1.2(a).

circumstances, some of those decisions are more effectively made jointly by the lawyer and client, working together. Sometimes this involves a full counseling session as described in Chapter 21. Sometimes it involves a phone call in which the lawyer describes a technical or tactical action the lawyer is considering—making a particular motion, for example—and asks the client whether the client sees any problems in doing so.

What kinds of problems might the client see? The three most typical are (1) the client has information that changes things, (2) the proposed action would cause difficulties for the client or for someone the client would like to avoid harming, and (3) the client might be reluctant to pay for the proposed action. Let's take each in turn.

Suppose the motion would seek an order compelling the other side to turn over certain documents. Some lawyers would consider such a thing so hyper-technical that they would never consult a client about it. It is true that if the lawyer were to call the client, the latter would often say, in a tentative voice, something like "Sounds O.K. to me." But clients appreciate the courtesy of being told, and Model Rule 1.4(a) requires that you "keep the client reasonably informed about the status of a matter." And every once in a while the conversation might lead to very different results:

Lawyer:	[after describing the motion] I just wanted to mention it to you in case you have any thoughts on it.
Client:	Let's back up a minute. Would you describe the documents again?
Lawyer:	[does so]
Client:	I think I might have seen those documents, and I think they don't say what you're hoping they say.
Lawyer:	Since your memory is unclear, maybe the safe thing to do is make the motion anyway and see what they look like when and if we get them.
Client:	I think I know somebody who has a copy of them.
Lawyer:	A complete copy?
Client:	I think so. I'll call him as soon as we get off the phone.

This conversation could change everything in the lawyer's plans.

A lawyer is like an elephant in a china shop. The elephant might not want to break china, but any inadvertent move on his or her part might shatter something precious. There are plenty of ways in which a lawyer, using routine methods of representation, might accidentally damage the client or someone the client wants to avoid harming. A prudent lawyer behaves like an elephant who wants to be able to leave the china shop without having broken anything unnecessarily. Frequent consultation with the client is one of the ways in which effective lawyers assure that.

Clients worry constantly about the cost of legal work. Some lawyers are oblivious to that. Others try carefully to deal with their clients' concerns. If the client is being billed by the hour, the discovery enforcement motion discussed

above would cost the client money in lawyer billing time. When a large corporation hires outside litigation counsel, it might initially impose a budget and later want to know things such as how this motion would affect the budget. Even without a budget, the client is entitled to ask how much the motion will cost, what it will probably accomplish, and whether the probable benefit is worth the cost. A lawyer who can answer those questions intelligently, precisely, and nondefensively can earn the loyalty of clients, so that they become repeat customers. A lawyer who cannot do that well risks losing clients to the first kind of lawyer.

To summarize: The client should, of course, decide questions that the law gives the client the right to decide. And even for questions that by law a lawyer can decide unilaterally, you should consult with the client anyway if there is a possibility that the client might be able to add information or ideas or if the client might have preferences about how the question is handled. If in doubt, err on the side of consulting with the client. Not only does consultation improve the odds of getting good results, but it reduces the chances of friction between lawyer and client. Lawyers who often consult with clients seem to have fewer ethics complaints and malpractice actions brought against them. And if the client has preferences on a technical or tactical question that by law the lawyer can decide unilaterally, follow the client's preferences.

The boss is the one who gets to hire and fire. The client hires and can fire the lawyer, not the other way around.

§3.4 WHAT CLIENTS *DISLIKE* IN A LAWYER

Charles Dickens' novel *Bleak House*[18] concerns, among other things, a lawsuit to divide up an estate. The suit has "become so complicated that no man alive knows what it means."[19]

All the parties to the suit are oppressed by it. One of them complains, "We are always appearing, and disappearing, and swearing, and interrogating, and filing, and cross-filing, and arguing, and sealing, and motioning, and referring, and reporting. . . . Law finds it can't do this, Equity finds it can't do that; neither can so much as say it can't do anything, without this solicitor instructing and this counsel appearing for A, and that solicitor instructing and that counsel appearing for B; and so on through the whole alphabet."[20] The same person exclaims, "The Lawyers have twisted [the lawsuit] into such a state of bedevilment that the original merits of the case have long since disappeared from the face of the earth."[21]

Finally, nearly 800 pages later, the lawyers declare that the suit is over because the estate is now empty, everything in it having been spent on lawyers' fees.[22]

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18. Charles Dickens, *Bleak House* (1st ed. 1853) (page numbers in the next few footnotes are to the Penguin 1971 edition edited by Norman Page).
19. *Id.* at 52.
20. *Id.* at 145–146.
21. *Id.* at 145.
22. *Id.* at 920–924.

This is the subliminal fear of everyone with a problem that might have something to do with the law—that if you hire a lawyer, you will have two problems. The first will be the original problem, and the second will be the lawyer.

Clients intensely dislike lawyers who make promises they cannot keep, brag, speak in legal jargon, are pompous and patronizing, and talk too much and listen too little. Clients hate having to fight to get their lawyers' attention. When you and a client are talking together, an interrupting knock on your office door or telephone call demeans the client. Making a client wait is a form of disrespect. Clients "who are made to drive across town and wait with children in a crowded room while their attorney is an hour late for their brief interview may not know whether their attorney is technically knowledgeable, but they certainly understand how little [the attorney] cares about their needs. . . ."[23]

Corporations have general counsel departments made up of in-house lawyers. A general counsel will hire law firms for work better done outside the corporation. Huge national and international law firms earn their revenues primarily by doing this work. A general counsel is thus both a lawyer, advising the corporation as an in-house employee, and a client, retaining outside lawyers as needed. A survey of corporate general counsels asked, "What is the one thing your outside counsel does that just drives you crazy?" More than half the answers can be categorized as bad communication—not keeping the client informed, not listening to clients and focusing on client needs, communicating arrogance, making decisions without getting client authorization or even informing the client, and giving vague and unclear advice.[24] These are among the factors that cause corporate general counsel to replace their outside law firms.[25]

Some of the characteristics that lawyers consider indicia of competence are actually considered by clients to be indicia of *incompetence*. For example, the English legal profession is divided into barristers and solicitors, and a study of solicitors quotes this client:

> I went to [her] because of her reputation and expertise. . . . She listens for part of what I have to say, and then interrupts, saying something like "OK, I've got the picture, what we'll do is. . . ." and she hasn't really got the picture, she's only got half the picture. I think it's partly because she so busy, and also because she's simply not used to giving clients a voice. . . . I am about to change to another solicitor.[26]

Many lawyers on both sides of the Atlantic would assume that this solicitor is a decisive professional who gets results because she determines quickly what to do. But on the same evidence, the client is ready to fire her.

Studies have shown that lawyers who communicate infrequently or badly with their clients have more fee disputes with clients, are sued more often for malpractice, and are complained about more often to bar disciplinary authorities. A study

23. Martin J. Solomon, *Client Relations: Ethics and Economics*, 23 Ariz. St. L.J. 155, 175 (1991).
24. Clark D. Cunningham, *What Do Clients Want from Their Lawyers?*, 2013 J. Disp. Resol. 143, 144 (reporting a 2005 study by the BTI Consulting Group).
27. *Id.*
26. *Id.* at 148 (quoting Hilary Sommerlad, *English Perspectives on Quality: The Client-Led Model of Quality—A Third Way?*, 33 U.B.C. L. Rev. 491, 509–510 (2000)).

showed that how doctors talk to patients is the strongest predictor of how frequently the doctors will be sued for malpractice.[27] Those who take the time and effort to deal with the patient's thoughts and feelings get sued less than doctors who don't, regardless of the number and severity of the mistakes the doctors make in diagnosis and treatment. Rule 1.4(a) of the Model Rules of Professional Conduct provides that "[a] lawyer shall keep the client reasonably informed about the status of the matter [and] promptly comply with reasonable requests for information." The less clients know about what is happening, the more anxious and unhappy they are.

Many lawyers don't explain to their clients what will happen in court. Clients arrive at court baffled by what people there are doing, why they are doing it, and what the consequences can be. Clients describe feeling like furniture—even though they actually are the most important people in the courtroom. They experience the court system as a bureaucracy that cares nothing about the burdens that litigation imposes on them, and they often feel as though their own lawyers are part of that bureaucracy.

Clients especially hate not knowing how much their lawyers will cost. Corporations can impose budgets on lawyers. But human clients usually cannot. In the billable hour system, lawyers do things they have not explained to their clients; send bills to their clients demanding to be paid; and then do more things their clients do not understand and send more bills. As in *Bleak House*, this sometimes seems to many clients to have no end. Clients become all the more outraged if they fear that a lawyer will lose commitment unless paid promptly and without complaint.

§3.5 WHAT CLIENTS *LIKE* IN A LAWYER

Obviously a client will appreciate a lawyer who does none of the things clients hate. And obviously every client wants a lawyer who wins a lawsuit or in some other way produces a good result.

But getting results is not the most important factor clients typically use in judging their lawyers. The most important factor is how a client *experiences* working with the lawyer. As Clark Cunningham points out, "[m]any lawyers equate client satisfaction with the outcome achieved; however, studies over the past three decades in three different countries have produced impressive evidence that clients evaluate their lawyers' competence more in terms of the *process experienced* by them in the representation than the outcome."[28]

Clients prefer lawyers who truly hear and understand. *One of the most powerful forces in life is validation from being heard and understood.* Partly this is a function of the lawyer's listening skills. But mostly it is a function of empathy—seeing the world through the client's eyes.

Clients want their lawyers to talk with respect and in plain language. Again, English clients describing their solicitors:

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27. Malcolm Gladwell, *Blink: The Power of Thinking without Thinking* 39–43 (2005).
28. Cunningham, *supra* note 24, at 146 (italics added).

> "She talked to me, as a person, with respect."
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> "I can have a chat with her, I trust her . . . [she's] much better than other solicitors I've had. . . . The other solicitor—I was just a file for him, but for her I'm a real person and that comes across in court."
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> "[My current solicitor is] very easy to talk to—some solicitors can be intimidating."[29]

Most of what clients like is a good human being—with emotional intelligence, maturity, and integrity—who can do high-quality legal work. That is the lawyer they want to hire.

§3.6 HOW TO WORK BETTER WITH CLIENTS

When answering client questions, do not just give an answer that makes sense to you. Give an answer that makes sense to the client, and make sure that the client understands what you've said. Ineffective lawyers toss out quick answers to client questions and then move on to something else, as though the client's worries are marginal to the lawyer's work. Clients notice that, although they might not say anything about it at the time. Clients do not want to fight with their lawyers, but when they reach a point of dissatisfaction, they quietly take their business elsewhere.

When communicating with clients, talk and write in plain English. If you have to use a term of art, explain its meaning without condescending. Use concrete, precise language and not vague generalities. Behave in ways that encourage clients both to tell you things that you need to know and to ask questions about things that make the client anxious. More than anything else, that means be a good listener.

When a client calls, if you cannot come to the telephone immediately, return the call within hours or, if you are in court or its equivalent, have another lawyer or a paraprofessional do so. A law office should be accessible and responsive, not a bureaucracy.

Introduce the client to the people in your office who will do work on the client's behalf, including secretaries. If it's not obvious, explain to the client the role each person will play.

Unless a client would prefer otherwise or there are special reasons not to, send copies to the client of all court papers and your correspondence with other people concerning the client. And whenever a document would not be self-explanatory to a layperson, tell the client why it exists and what it means.

Get to know the client so that you can understand what the client really needs from you. How risk-averse is the client, for instance? The client will have to live with what you do long after you drop out of the picture. If the client is a business,

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29. *Id.* at 149–150 (quoting Hilary Sommerlad, *English Perspectives on Quality: The Client-Led Model of Quality—A Third Way?*, 33 U.B.C. L. Rev. 491, 503–505 (2000)).

get to know the business as well as the industry in which it operates. For example, you cannot possibly do good general legal work for a symphony orchestra unless you are familiar with things like how grants are obtained from foundations, where the market for classical music recordings is headed, and perhaps even what second violinists are typically paid.

How can you learn about your client's business and industry without embarrassing yourself? You can go to a library and read books on the industry. You can read the relevant trade magazines; every industry has at least one. And you can read articles in the general press, which you can find through an Internet search. You can also visit the client's place of business to get a feel for it physically and organizationally. And you should read as much as you can on your client's website.

Large corporations hire law firms to solve problems that are usually quantifiable in money terms. From the client's point of view, this might be a pure business transaction without any emotional content whatsoever, and the only concerns are results and efficiency. But individuals and small businesses go to lawyers for two reasons. The first is to solve a problem, which might be quantifiable in money terms. The second is for relief from fear and pain. These clients consider it your responsibility to deal with both, and if you want clients to recommend you to their friends and neighbors, you will need to be able to deal with both.

In the end, clients are loyal if you

1. get results;
2. do so efficiently, in both time and cost;
3. reduce their anxiety and frustration while they await results; and
4. are considerate, likeably human, and in other ways a pleasure to work with.

§3.7 CONFIDENTIALITY

The duty to keep a client's confidences secret is one of the central obligations of ethics law.

In most states, the obligation is defined by Rule 1.6 of the Model Rules of Professional Conduct: "A lawyer shall not reveal information relating the representation of a client." Rule 1.6 provides several exceptions. Some of them have been controversial, and in your state's version of Rule 1.6 the exceptions might differ from the ones presented here. The most recent ABA version of Rule 1.6 sets out the following exceptions (in the words of Rule 1.6):

- the client gives informed consent
- the disclosure is impliedly authorized in order to carry out the representation
- the lawyer reasonably believes [disclosure] necessary . . .
  - to prevent reasonably certain death or substantial bodily harm;
  - 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;

- 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;
- to secure legal advice about the lawyer's compliance with these Rules;
- 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; or
- to comply with other law or a court order.

Rule 3.3 provides two additional exceptions. First, under Rule 3.3(a)(3), if the client testifies falsely and refuses to confess the falsity to the court, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal." Where the client is a criminal defendant, somewhat different principles might govern because of the client's constitutional right to decide whether to testify. The Comment to Rule 3.3 notes that jurisdictions differ on how they handle this problem. Second, Rule 3.3(b) provides that if the client "intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding"—such as bribing a witness—the lawyer again must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal."

These ethical duties are separate from the evidentiary attorney-client privilege, which prohibits an attorney or an attorney's employee from testifying to communications from a client made for the purpose of obtaining legal advice when the client has treated the communications as confidential and has not waived the privilege.

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