

**PROFESSIONALISM PROBLEM--ROUND TABLE DISCUSSION**  
**OCTOBER 2005**

David Domestique is a partner in a mid-size law firm and has been practicing domestic law in North Carolina since he graduated from law school in 1990.

His experienced paralegal (Polly Paralegal), who has been with him for five years, asks him to consult with a friend of hers (Marie Mother) who is having a custody dispute with her husband (Freddy Father) regarding their young daughter. David meets with Marie for two hours, bills Marie for the consultation and says he will wait to hear from her.

Marie has repeatedly called the office and talked to Polly during and after office hours about her custody problem. Polly explains to David briefly that she has been answering Marie's questions. David is very busy and does not respond.

Polly then wrote a letter on firm letterhead to Freddy Father that she signed as paralegal, threatening that the firm will file a lawsuit for sole custody for Marie and promising that if Freddy gives Marie sole custody, Marie will waive any claim for child support.

No client file has been opened. The letter was sent without any consultation with David or the firm. David doesn't know about the letter.

Upon receipt of the letter, Freddy Father is furious. Freddy hires an experienced attorney, Dominique Destructor, who brings a custody suit for Freddy. Marie calls Polly at home and Polly tells Marie not to worry, and that Polly will draw up an answer to the suit.

Polly drafts an Answer for Marie to sign pro se using a model form in the firm's computer directory. Polly and Marie meet for lunch and Polly then accompanies Marie to file it at the courthouse.

In the meantime, Freddy complains to social services that Marie has abused the child, and Marie is not allowed any contact with the child.

Marie calls Polly and asks Polly to set up an appointment with David. Polly asks David to meet with Marie and handle her case.

David meets with Marie and agrees to take the case. Marie signs a retainer agreement with the firm. David then has Polly check on the court file. Polly finds that the case has been set for a custody hearing in three weeks and the hearing is during David's pre-paid "second honeymoon" trip to Paris.

Luckily for David, his firm's new Associate, Timothy Titlemeister, is available on the hearing date. Timothy has been a real estate lawyer for five years, but has never appeared in court except for his own divorce case. Timothy has always wanted to be a trial lawyer and is eager to handle this matter. Timothy tells Polly to "do what needs to be done to get the case ready for trial."

After David leaves for his trip, Marie becomes concerned and asks Timothy to obtain a continuance until David can get back. Timothy tells Polly to go to the Courthouse and get the case continued. At calendar call, Polly informs the court that David Domestique is out of town and asks the court to grant a continuance.

**RULE PACKET—PROFESSIONALISM PROBLEM**  
**OCTOBER 2005**

**Rules of Professional Conduct:**

- 1.1 – Competence
- 1.2 – Scope of Representation and Allocation of Authority between Client and Lawyer
- 1.18 – Duties to Prospective Client
- 3.3 – Candor Towards the Tribunal
- 5.1 – Responsibilities of Partners, Managers and Supervisory Lawyers
- 5.2 – Responsibilities of a Subordinate Lawyer
- 5.3 – Responsibilities Regarding Non-Lawyer Assistants
- 5.5 – Unauthorized Practice of Law

N.C.G.S. §§ 84-4 and 84.8

27 N.C.A.C 1G.0101, et seq.

**Questions:**

What legal relationship, if any, did the initial consultation create? See RPC 1.2 and 1.18

Has Polly's continued contact with Marie about her domestic situation created an ongoing attorney-client relationship between Marie and the law firm?

Has Polly's letter writing and legal document drafting created an attorney-client relationship between Marie and the firm?

Is Polly, herself, responsible for any of her conduct? See N.C.G.S. §§ 84.4 and 84.8.  
Would the answers to any of the above change if Polly were certified as a paralegal?

Has David reasonably supervised Polly's conduct as required by RPC 5.3? Is David responsible for Polly's conduct under the RPC (see also RPC 3.3 and RPC 5.5)? Is he liable for it?

Did David violate the Rules of Professional Conduct by taking Marie's case and by passing the case to Timothy Titlemeister? Did Timothy violate any rules?

Are the other members of the law firm responsible for the conduct of Polly pursuant to RPC 5.1?

Are the other members of the law firm responsible for the conduct of the associate, Timothy pursuant to RPC 5.1?

Is the law firm responsible for the conduct of the partner, David Dominique?

If you were David, would you return from Europe?

What other ways could Polly have helped her friend without engaging in the unauthorized practice of law?

### **Rule 1.1 Competence**

A lawyer shall not handle a legal matter that the lawyer knows or should know he or she is not competent to handle without associating with a lawyer who is competent to handle the matter. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

### **Rule 1.2 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.

(1) 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.

(2) A lawyer does not violate this rule by acceding to reasonable requests of opposing counsel that do not prejudice the rights of a client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

(3) In the representation of a client, a lawyer may exercise his or her professional judgment to waive or fail to assert a right or position of the client.

(b) A lawyer's representation of a client, including representation by appointment, does not constitute an endorsement of the client's political, economic, social or moral views or activities.

(c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances.

(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

### **Rule 1.18 Duties to Prospective Client**

(a) A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client.

(b) Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would permit with respect to information of a former client.

(c) A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the

### **Rule 1.18 – Continued**

matter, except as provided in paragraph (d). If a lawyer is disqualified from representation under this paragraph, no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter, except as provided in paragraph (d).

(d) Representation is permissible if both the affected client and the prospective client have given informed consent, confirmed in writing, or:

- (1) the disqualified lawyer is timely screened from any participation in the matter; and
- (2) written notice is promptly given to the prospective client.

### **Rule 3.3 Candor Toward the Tribunal**

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

### **Rule 5.1 Responsibilities of Partners, Managers, and Supervisory Lawyers**

(a) A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority, shall make reasonable efforts to ensure that the firm or the organization has in effect measures giving reasonable assurance that all lawyers in the firm or the organization conform to the Rules of Professional Conduct.

### **Rule 5.1 – Continued**

(b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

(1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

### **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.

### **Rule 5.3 Responsibilities Regarding Nonlawyer Assistants**

With respect to a nonlawyer employed or retained by or associated with a lawyer:

(a) a partner, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm or organization shall make reasonable efforts to ensure that the firm or organization has in effect measures giving reasonable assurance that the nonlawyer's conduct is compatible with the professional obligations of the lawyer;

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the nonlawyer's conduct is compatible with the professional obligations of the lawyer; and

(c) a lawyer shall be responsible for conduct of such a nonlawyer that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if:

(1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved; or

(2) the lawyer is a partner or has comparable managerial authority in the law firm or organization in which the person is employed, or has direct supervisory authority over the nonlawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action to avoid the consequences.

## **Rule 5.5 Unauthorized Practice of Law**

(a) A lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted to practice in another jurisdiction, but not in this jurisdiction, does not engage in the unauthorized practice of law in this jurisdiction if the lawyer's conduct is in accordance with these Rules and:

(1) the lawyer is authorized by law or order to appear before a tribunal or administrative agency in this jurisdiction or is preparing for a potential proceeding or hearing in which the lawyer reasonably expects to be so authorized; or

(2) other than engaging in conduct governed by paragraph (1):

(A) the lawyer provides legal services to the lawyer's employer or its organizational affiliates and the services are not services for which pro hac vice admission is required; a lawyer acting pursuant to this paragraph is not subject to the prohibition in Paragraph (b)(1);

(B) the lawyer acts with respect to a matter that arises out of or is otherwise reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice;

(C) the lawyer acts with respect to a matter that is in or is reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's representation of a client in a jurisdiction in which the lawyer is admitted to practice and are not services for which pro hac vice admission is required;

(D) the lawyer is associated in the matter with a lawyer admitted to practice in this jurisdiction who actively participates in the representation; or

(E) the lawyer is providing services limited to federal law, international law, the law of a foreign jurisdiction or the law of the jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer shall not assist another person in the unauthorized practice of law.

(e) A lawyer or law firm shall not employ a disbarred or suspended lawyer as a law clerk or legal assistant if that individual was associated with such lawyer or law firm at any time on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

## **Rule 5.5 – Continued**

(f) A lawyer or law firm employing a disbarred or suspended lawyer as a law clerk or legal assistant shall not represent any client represented by the disbarred or suspended lawyer or by any lawyer with whom the disbarred or suspended lawyer practiced during the period on or after the date of the acts which resulted in disbarment or suspension through and including the effective date of disbarment or suspension.

## **SUBCHAPTER G**

### **Certification of Paralegals**

#### **.0100 The Plan for Certification of Paralegals**

#### **.0117 Conferred and Limitations Imposed**

The board in the implementation of this plan shall not alter the following privileges and responsibilities of lawyers and their non-lawyer assistants.

- (1) No rule shall be adopted which shall in any way limit the right of a lawyer to delegate tasks to a non-lawyer assistant or to employ any person to assist him or her in the practice of law.
- (2) No person shall be required to be certified as a paralegal to be employed by a lawyer to assist the lawyer in the practice of law.
- (3) All requirements for and all benefits to be derived from certification as a paralegal are individual and may not be fulfilled by nor attributed to the law firm or other organization or entity employing the paralegal.
- (4) Any person certified as a paralegal under this plan shall be entitled to represent that he or she is a "North Carolina Certified Paralegal (NCCP)", a "North Carolina State Bar Certified Paralegal (NCSB/CP)" or a "Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification."