

2007 WCBA ROUNDTABLE DISCUSSION PROFESSIONALISM PROBLEM

Debbie Defendant was employed as an office manager/bookkeeper at Money Law Firm from 2001 to 2005. While employed at the Money Law Firm, Debbie Defendant was in charge of the law firm's trust account. Peter Partner is one of three senior partners at the firm. The firm has twenty-five lawyers.

In 2003, after having had some health issues and mounting medical bills, Debbie Defendant began transferring funds from the firm's trust account to her personal account. Approximately one year later, Peter Partner asked Debbie Defendant to come to his office to answer some questions he had regarding certain irregularities in the firm's bookkeeping. Debbie Defendant began crying and admitted to transferring funds from the firm's trust account to her personal account but stated that she never intended to keep the money. She begged Peter Partner not to tell anyone and swore that she would pay the firm's trust account back in full. Peter Partner told Debbie that he would not tell anyone provided that she paid the firm back in full. The next day, Debbie sent an e-mail to Peter Partner thanking him for not telling anyone and restating her agreement to repay the firm in full. Following his review of the e-mail, Peter Partner, deleted the e-mail.

Before Debbie Defendant repaid the firm, the firm's trust account was audited and Debbie Defendant was charged with embezzlement. When David Arnold, the Assistant D.A., called the law firm, Peter Partner told the law firm he would handle the matter. The other lawyers in the firm were glad he was handling it because they were all very busy with their practices. Peter Partner cooperated with the David Arnold A.D.A. by turning over all of the firm's bookkeeping records. However, he did not reveal his prior knowledge or arrangement with Debbie Defendant and did not mention the email she had sent him.

Debbie Defendant hired criminal defense lawyer Carlton Lewis, one of Peter Partner's law school roommates, to defend her. Debbie Defendant explained to him that Peter Partner was aware that she had taken funds from the trust account and they had made arrangements for her to pay the firm back without anyone knowing. She gave him a copy of the email that she had printed from her work computer shortly before she was fired. Carlton Lewis filed discovery requests in the criminal case and the ADA requested reciprocal discovery. Carlton Lewis did not turn the email over to the ADA. At the criminal trial, the ADA represented to the judge that all information had been disclosed. Carlton Lewis was present and said nothing.

In the meantime, a long-standing client of the firm, BigWig, hired Larry Lawyer to file a civil action against Debbie Defendant and the Money Law Firm for the loss of his retainer funds. Larry Lawyer quickly served Debbie Defendant and the Money Law Firm with voluminous discovery requests which were prepared by his paralegal using some boilerplate discovery that he had compiled in his fifteen years of civil practice. He served over one hundred (100) Requests for Production of Documents, including but not limited to the following:

1. Produce all bank records for any business bank account in the name of Money Law Firm for the years 1997 to the present.
2. Produce all bank records of every partner, associate, bookkeeper, manager, paralegal secretary and other employee of the Money Law Firm for the past seven years.
3. Produce all e-mail communications or communications of any kind to or from Debbie Defendant.

Additionally, a Request for Interrogatories was served upon Debbie Defendant that included the following:

State whether you have ever been romantically involved with any partner or employee at the Money Law Firm, and if so, state the name, address, time period and extent of the romantic involvement.

Peter Partner objected to the discovery request served on the firm on the grounds that the information sought was irrelevant, overly broad and unduly burdensome, and may also include attorney-client and/or work product information. In addition, Peter Partner contacted Debbie Defendant and told her that he believed Larry Lawyer's discovery requests were overly broad and that she should not respond other than to file an objection.

Larry Lawyer files a Motion to Compel. Peter Partner directs the firm's newest lawyer, Baby Face, to appear and defend the Motion to Compel. At Peter Partner's instruction, Baby Face represented to the court that there were no relevant e-mails.

Prior to the case being called, Debbie Defendant produced the documents requested of her including a copy of the e-mail she sent to Peter Partner confirming their arrangement.

At trial, Larry Lawyer, states to the jury during closing argument that he believes Peter Partner was having an extra-marital affair with Debbie Defendant and that is why he covered for her.

Questions for Discussion -

1. What should Peter Partner have done when he discovered Debbie Defendant had withdrawn funds from the trust account? Is it okay that Peter Partner made repayment arrangements with Debbie Defendant? Should he have deleted the email from her? Did Peter Partner have a duty to inform David Arnold the ADA of his knowledge of Debbie Defendant's embezzlement and his arrangement with her? What duty did Peter Partner have to his client and to his law partners?
2. Was Carlton Lewis, criminal lawyer, obligated to produce the email to the ADA in reciprocal discovery? Should he have remained silent when the ADA represented to the court that all information had been disclosed? Did his failure to act rise to the level of an ethics violation?
3. Did Peter Partner violate any rules of ethics by objecting to the discovery and /or directing Baby Face to represent to the court that there were no relevant e-mails?
4. Did Baby Face violate any rules of ethics by his representations to the tribunal that the firm had no relevant emails? Did Baby Face have a duty to do some investigation of his own before making a representation to the court? If so, how far did the duty of investigation extend? Did the firm at least have a duty to search Debbie Defendant's computer and hard drive and perhaps emails that she had stored on the server? What, if any, duty did the other 23 lawyers in the firm have? Does the duty to supervise extend upward?
5. Did Peter Partner violate any rules of ethics by suggesting that Debbie Defendant object to the discovery?
6. Were Larry Lawyer's Requests for Production of Documents overly broad, irrelevant and unduly burdensome? If so, which ones? Did Larry Lawyer's discovery requests rise to the level of an ethics violation under the new rules?
7. What would you have done if you were Larry Lawyer and had received the email from Debbie Defendant in discovery after Money Law firm represented there was no relevant email?
8. Did Larry Lawyer's closing remarks at trial rise to the level of an ethics violation?

Rules of Professional Conduct

- Rule 1.15-2(o) Duty to Report Misappropriation
- Rule 3.3 Candor Toward the Tribunal
- Rule 3.4 Fairness to Opposing Party and Counsel
- Rule 4.1 Truthfulness in Statements to Others
- Rule 4.2 Communication with Person Represented by Counsel
- Rule 4.3 Dealing With Unrepresented Person
- Rule 5.1 Responsibilities of Partners, Managers and Supervisory Lawyers
- Rule 5.2 Responsibilities of a Subordinate Lawyer
- Rule 8.3 Reporting Professional Misconduct
- Rule 8.4 Misconduct

RULE PACKET—PROFESSIONALISM PROBLEM OCTOBER 2007

Rule 1.15-2(o) Duty to Report Misappropriation

A lawyer who discovers or reasonably believes that entrusted property has been misappropriated or misapplied shall promptly inform the North Carolina State Bar.

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 3.4 Fairness to Opposing Party and Counsel

A lawyer shall not:

(a) unlawfully obstruct another party's access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;

(b) falsify evidence, counsel or assist a witness to testify falsely, counsel or assist a witness to hide or leave the jurisdiction for the purpose of being unavailable as a witness, or offer an inducement to a witness that is prohibited by law;

(c) knowingly disobey or advise a client or any other person to disobey an obligation under the rules of a tribunal, except a lawyer acting in good faith may take appropriate steps to test the validity of such an obligation;

(d) in pretrial procedure,

(1) make a frivolous discovery request,

(2) fail to make a reasonably diligent effort to comply with a legally proper discovery request by an opposing party, or

*(3) fail to disclose evidence or information that the lawyer knew, or reasonably should have known, was subject to disclosure under applicable law, rules of procedure or evidence, or court opinions;**

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, ask an irrelevant question that is intended to degrade a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant, or the guilt or innocence of an accused; or

(f) request a person other than a client to refrain from voluntarily giving relevant information to another party unless:

(1) the person is a relative or a managerial employee or other agent of a client; and

(2) the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

*The recent amendment to the rule

Rule 4.1 Truthfulness in Statements to Others

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

Rule 4.2 Communication with Person Represented by Counsel

(a) During the representation of a client, 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, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order. It is not a violation of this rule for a lawyer to encourage his or her client to discuss the subject of the representation with the opposing party in a good-faith attempt to resolve the controversy.

(b) Notwithstanding section (a) above, in representing a client who has a dispute with a government agency or body, a lawyer may communicate about the subject of the representation with the elected officials who have authority over such government agency or body even if the lawyer knows that the government agency or body is represented by another lawyer in the matter, but such communications may only occur under the following circumstances:

- (1) in writing, if a copy of the writing is promptly delivered to opposing counsel;
- (2) orally, upon adequate notice to opposing counsel; or
- (3) in the course of official proceedings.

Rule 4.3 Dealing with Unrepresented Person

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not:

- (a) give legal advice to the person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client; and
- (b) state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

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.

(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 8.3 Reporting Professional Misconduct

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the North Carolina Judicial Standards Commission or other appropriate authority.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6.

(d) A lawyer who is disciplined in any state or federal court for a violation of the Rules of Professional Conduct in effect in such state or federal court shall inform the secretary of the North Carolina State Bar of such action in writing no later than 30 days after entry of the order of discipline.

Rule 8.4 Misconduct

It is professional misconduct for a lawyer to:

- (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
- (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
- (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;
- (d) engage in conduct that is prejudicial to the administration of justice;
- (e) state or imply an ability to influence improperly a government agency or official;
- (f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
- (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3.

N.C.G.S. § 15A-905. Disclosure of evidence by the defendant – Information subject to disclosure.

(a) Documents and Tangible Objects. – If the court grants any relief sought by the defendant under G.S. 15A-903, the court must, upon motion of the State, order the defendant to permit the State to inspect and copy or photograph books, papers, documents, photographs, motion pictures, mechanical or electronic recordings, tangible objects, or copies or portions thereof which are within the possession, custody, or control of the defendant and which the defendant intends to introduce in evidence at the trial.

N.C.G.S. § 15A-906. Disclosure of evidence by the defendant – Certain evidence not subject to disclosure.

Except as provided in G.S. 15A-905(b) this Article does not authorize the discovery or inspection of reports, memoranda, or other internal defense documents made by the defendant or his attorneys or agents in connection with the investigation or defense of the case, or of statements made by the defendant, or by prosecution or defense witnesses, or by prospective prosecution witnesses or defense witnesses, to the defendant, his agents, or attorneys. (1973, c. 1286, s. 1.)