

## 2008 WCBA ROUNDTABLE DISCUSSION PROFESSIONALISM PROBLEM

(This year's problem is based loosely on the facts of the *GMAC Bank v. HTFC Corp.*, 248 F.R.D. 182 (E.D. Pa. 2008))

MegaBucks Bank had entered into a contract with MiniBank for the sale of certain loans. MegaBucks filed a lawsuit against MiniBank alleging that MiniBank breached its contract by selling them loans that were improperly underwritten and refusing to repurchase these loans. MiniBank filed a counterclaim for tortious interference with contract.

Larry Lawyer represented MegaBucks Bank. Just three days before the deadline to complete discovery, Larry Lawyer served a subpoena on Eddie Entrepreneur a client of MiniBank asking him to produce all documents in his possession related to the loan from MiniBank at his office within three days. There was no hearing or deposition pending.

Eddie Entrepreneur first contacted Larry Lawyer and left him a voicemail that he would not be able to comply with the subpoena. Larry Lawyer returned his call and left him a voicemail saying that if he did not comply with the subpoena that he would have him thrown in jail. Eddie Entrepreneur then contacted MiniBank's Attorney, Andy, and told him that he did not have any such documents in his possession. Andy Attorney said he would take care of it. Andy Attorney failed to serve any formal objections to the subpoena or a motion for a protective order. However, when Larry Lawyer filed a motion to compel, Andy Attorney argued at the hearing that the subpoena was not issued in good faith since it provided for less than three days to produce the documents. At the subsequent motion for contempt, Andy Attorney argued that Eddie should not be held in contempt because he didn't have any documents in his possession and therefore could not comply with the subpoena.

Larry Lawyer then scheduled the out-of-state deposition of MiniBank's chief executive officer, Mr. Rich. Mr. Rich was properly served with the notice of deposition and request for documents. At the deposition, Larry Lawyer asked Mr. Rich what documents he was producing responsive to the subpoena. Mr. Rich testified that he did not have time to get the requested documentation together. Larry Lawyer proceeded with the deposition. Larry Lawyer asked the following questions and obtained the following responses:

Q: This is your loan file. Can you tell me what Eddie Entrepreneur does for a living?

A: You tell me. You're the big lawyer.

Q: Turn to page 3 of this document. How was this loan application prepared?

A: Looks like it was prepared by a typewriter to me.

Q: Have you spoken to Mr. Entrepreneur about the subpoena he received for documents?

A: He mentioned it to me. He laughed at you.

Q: What did he say?

A: You really want to know? He said you were a no good shark who should go back to chasing ambulances for a living.

Q: What financial information did you review before you offered a loan to Eddie Entrepreneur?

A: I object. Our internal procedures are confidential. Nice try, ask your next question.

Q: Isn't it true that Mega Bucks has already signed a confidentiality agreement with MiniBank regarding such matters?

A: I don't f\_\_ know. Tell it to the judge – I'm not answering your question.

Q: I'm handing you a document that has been marked as Plaintiff's ex. 1. Is this a true and accurate copy of the confidentiality agreement signed by you on behalf of MiniBank?

A: Look a\_\_hole. I've told you I'm not answering your question so quit threatening me.

Andy Attorney interjects – Can you ask your next question?

Q: Turn to page 20 of Plaintiff's ex. 1. Is this your signature?

A: Let's take a break. I can't listen to this a\_\_hole anymore.

Q: Mr. Rich, could you please answer the question that is pending before you take a break?

A: No. It's not my signature. It must be a forgery. How's that for an answer.

Andy Attorney speaks to Mr. Rich at a break in private and says, "Mr. Rich, I know that your testimony is not truthful. I personally watched you sign the confidentiality agreement ( Plaintiff's ex. 1). You really need to correct your misstatement."

Following the break, after a day and a half of similar questions and answers, Larry Lawyer suspends the deposition and files a Motion to Compel. At the hearing, Andy Attorney contends that while the client was at times out of line, such behavior is easily understood in light of the fact that Mr. Rich suffers from schizophrenia and had not taken his medicine the morning of the deposition. In addition, the information sought by Larry Lawyer was irrelevant and confidential.

Questions:

- 1) Did Larry Lawyer violate any rules of professional conduct by issuing a subpoena to Eddie Entrepreneur when there was no pending deposition or hearing and by providing only three days for the production of documents?  
**Rule 1.3; Rule 3.4(d)(1)**
- 2) Was it a conflict of interest for Andy Attorney to represent Mr. Rich at his deposition as well as MiniBank?  
**Rule 1.7(a) (1) and (2).**
- 3) Did Andy Attorney violate any rules of professional conduct for his behavior at Mr. Rich's deposition?  
**Rule 1.14(b); Rule 1.16(a)(1) and 1.16(b)(4),(5); Rule 2.1(1),(5); Rule 3.2; Rule 3.3(a)(1),(3); Rule 3.4 (a)-(d); Rule 3.5(4)(a), (b); Rule 4.1(2); Rule 4.3(a), Rule 8.4(a)-(c).**
- 4) What could Andy Attorney have done at Mr. Rich's deposition?
- 5) Should Andy Attorney and/or Mr. Rich be sanctioned for their behavior at the deposition? **Yes.**
- 6) Did Andy Attorney violate any rules of professional conduct for his legal argument to the court at the motion to compel following Mr. Rich's deposition?  
**Rule 1.14; Rule 3.3(a)(1), Rule 3.5(4) and Rule 8.4(a)-(c)**
- 7) Does Andy Attorney have any further duty with respect to the known misstatement made by Mr. Rich at his deposition?  
**Rule 3.3(a)(1), Rule 3.4**
- 8) Did Larry Lawyer have an obligation to report Andy Attorney to the State Bar for misconduct?  
**Rule 8.3(a), Rule 8.4 (a)-(c)**

Suggested Rules of Professional Conduct:

Rule 1.3 Diligence  
Rule 1.14 Client with Diminished Capacity  
Rule 1.16 Declining or Terminating Representation  
Rule 1.7 Conflict of Interest  
Rule 2.1 Advisor  
Rule 3.2 Expediting Litigation  
Rule 3.3 Candor Toward the Tribunal  
Rule 3.4 Fairness to Opposing Party and Counsel  
Rule 3.5 Impartiality and Decorum of the Tribunal  
Rule 4.1 Truthfulness in Statements to Others  
Rule 4.3 Dealing with an Unrepresented Person  
Rule 8.3 Reporting Professional Misconduct  
Rule 8.4 Misconduct