

EXAMINERS' ANALYSIS OF QUESTION NO. 5

Sam: Sam's conduct violates MRPC 3.4 (a) and (c), 4.1, 4.2, 4.4, 6.5(a), and 8.4.

MRPC 3.4(a) provides that "a lawyer shall not unlawfully obstruct another party's access to evidence." Sam violated this prohibition by taking Walter's deposition without giving Phil notice of the deposition.

MRPC 3.4(c) provides that, "A lawyer shall not . . . knowingly disobey an obligation under the rules of the tribunal except for an open refusal based on an assertion that no valid obligation exists[.]" Under the Michigan Court Rules, "A party desiring to take the deposition of a person on oral examination must give reasonable notice in writing to every other party to the action." MCR 2.306(B)(1). Phil had appeared in the lawsuit on behalf of DEF. Therefore, Sam disobeyed an obligation under the Court Rules to provide Phil with written notice of the deposition.

MRPC 4.1 provides that, "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." Sam, in representing his client, made at least two false statements of fact to Walter: (1) that Sam was a buyer interested in DEF's products rather than an attorney who had filed suit against DEF; and (2) that DEF's counsel had been notified of the deposition, when Phil had not been notified.

MRPC 4.2 provides that, "in representing a client, a lawyer shall not communicate about the subject of the representation with a party whom the lawyer knows to be represented in the matter by another lawyer, unless the lawyer has the consent of the other lawyer or is authorized by law to do so." In this case, Sam communicated with the manager of a corporate party whom Sam knew to be represented by Phil (see Comment to MRPC 4.2), without obtaining Phil's consent, on at least three occasions: (1) on the phone where Sam questioned Walter about the product at issue in the lawsuit; (2) by serving on Walter an ex parte subpoena and deposition notice in the lawsuit; and (3) by proceeding with an ex parte deposition in the lawsuit.

MRPC 4.4 provides that, "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person, or use methods of obtaining evidence that violate the legal rights of such person." Here, Sam obtained a deposition of Walter under false pretenses, engaged in abusive behavior during the deposition, and engaged in assault and battery to attempt to prevent Walter from leaving the deposition.

MRPC 6.5(a) provides that "A lawyer shall treat with courtesy and respect all persons involved in the legal process." While this rule did not prohibit Sam from speaking bluntly in pursuing his client's interest with diligence (see Comment to MRPC 6.5), the rule did not permit Sam to use impermissible rudeness in pursuing Walter's testimony, such as repeatedly accusing Walter of perjury without any basis and engaging in assault and battery.

MRPC 8.4 provides "It is professional misconduct for a lawyer to: (a) violate or attempt to violate the Rules of Professional Conduct . . . (b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such conduct reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer; (c) engage in conduct that is prejudicial to the administration of justice. . . ."

Sam violated several Rules of Professional Conduct, in violation of MRPC 8.4(a). He also engaged in dishonesty and fraud by using an alias and misrepresenting his profession and reason for telephoning Walter for information, and by misrepresenting that he had given notice of the deposition to Phil when he had not, in violation of MRPC 8.4(b). And Sam violated MRPC 8.4(c), by yelling, screaming, and accusing Walter of perjury, as well as physically attacking Walter. This is especially true in light of evidence that Sam engaged in similar conduct in several other cases.

Phil: If Phil had any ethical responsibility, it would arise under MRPC 8.3. MRPC 8.3(a) provides that "a lawyer having knowledge that another lawyer has committed a significant violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission." The Comment to MRPC 8.3 provides that whether a violation is significant is a judgment

call because a rule that requires reporting of all violations has proved unenforceable. Thus, the Comment instructs that "this rule limits the reporting obligation to those offenses that a self-regulating profession must vigorously endeavor to report." Here, Sam arguably violated six rules, not just one, and his misconduct was a repetition of misconduct in prior cases, which weighs in favor of finding that his misconduct is a significant violation.

There is also the issue of whether Sam's violation of the Rules "raises a substantial question as to [his] honesty, trustworthiness, or fitness as a lawyer," which, per the Comment to MRPC 8.3, "refers to the seriousness of the offense and not the quantum of evidence of which the lawyer is aware." The fact that Sam lied about who he was to an opposing witness, lied about why he was contacting the witness, procured an ex parte deposition without notice to his opponent, lied to the witness about having provided notice, berated and accused the witness of perjury without basis, and then physically attacked the witness when the witness attempted to leave, all raise a serious question about Sam's trustworthiness or fitness to practice which should be reported. Add to that, Phil's discovery of Sam's earlier similar misconduct in other cases, and it appears a report to the Attorney Grievance Commission would be the more prudent exercise of judgment.