

EXAMINERS' ANALYSIS OF QUESTION NO. 5

Michigan Rule of Professional Conduct 8.3 deals with reporting professional misconduct and provides, in part, 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 that lawyer's honesty, trustworthiness, or fitness as a lawyer shall inform the Attorney Grievance Commission. [MRPC 8.3(a).]

The rule also provides that it "does not require disclosure of . . . information otherwise protected by Rule 1.6." MRPC 8.3(c) (1).

MRPC 1.6 provides:

(a) "Confidence" refers to information protected by the client-lawyer privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(b) Except when permitted under paragraph (c), a lawyer shall not knowingly:

- (1) reveal a confidence or secret of a client;
- (2) use a confidence or secret of a client to the disadvantage of the client; or
- (3) use a confidence or secret of a client for the advantage of the lawyer or of a third person, unless the client consents after full disclosure.

(c) A lawyer may reveal:

- (1) confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them;
- (2) confidences or secrets when permitted or required by these rules, or when required by law or by court order;
- (3) confidences and secrets to the extent reasonably necessary to rectify the consequences of a client's illegal or fraudulent act in the furtherance of which the lawyer's services have been used;

(4) the intention of a client to commit a crime and the information necessary to prevent the crime; and

(5) confidences or secrets necessary to establish or collect a fee, or to defend the lawyer or the lawyer's employees or associates against an accusation of wrongful conduct.

(d) A lawyer shall exercise reasonable care to prevent employees, associates, and others whose services are utilized by the lawyer from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by paragraph (c) through an employee.

(1) *Potential False Notarization Issue*: Because the notary was required to witness the signature of the affiant signing the affidavit in person, a lawyer who directs or encourages a notary to notarize a document and represent that the affiant appeared before the notary when that is not true may be in violation of rules prohibiting dishonest conduct and conduct prejudicial to the administration of justice. See *Grievance Administrator v David S. Steingold*, 02-60-GA (ADB Hearing Panel 2002).

Several elements require analysis in deciding whether a lawyer is obligated to report misconduct under MRPC 8.3. First, the lawyer must have "knowledge" that another lawyer has committed a violation of the Rules of Professional Conduct. The Terminology section of the Preamble to Michigan's Rules states: "'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances." The question provides no information with respect to what actual knowledge Lawrence possesses. It does, however, state that he "suspects" that the affidavits were improperly notarized. Therefore, the "knowledge" element of the duty to report is likely missing.

Next, the violation must be significant. There is no indication here that the affiant's statements in the body of the affidavit were untrue or that any other fraudulent conduct was being committed or aided by opposing counsel. If dishonesty is involved, it may be the knowing encouragement by, or direction of, opposing counsel to have his assistant help "cut corners" and falsely attest that the affiant appeared before the notary. There is also the possibility that opposing counsel was simply careless and engaging in a poor practice. Encouraging false notarization has not always resulted in the attorney being found to have committed a violation of MCR 8.4(b) (dishonest conduct).

See, e.g., *Grievance Administrator v Bowman*, 462 Mich 582 (2000). On the other hand, the facts could lend themselves to an interpretation that opposing counsel knowingly directed his employee to swear falsely and commit a violation of notarial law.

Also, the misconduct by the other lawyer must raise "a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer." In this hypothetical, and perhaps in all instances, this element overlaps with the previous one. The comment to Rule 8.3 notes that: "The term 'substantial' refers to the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware." The discussion of this element may mirror the discussion of the previous one, but it should focus primarily on the fitness of opposing counsel. Again, the violation could be a serious one, or it could be one which, under the circumstances, does not warrant the heaviest of sanctions. For example, in *Steingold, supra*, the respondent was reprimanded. In *Bowman, supra*, an order of "no discipline" was imposed.

Finally, no matter how the foregoing elements are resolved, the client may veto the reporting. "A report about misconduct is not required where it would involve violation of Rule 1.6." MRPC Rule 8.3, Comment. The client, Greg, has requested that Lawrence not "tell anyone" so that the client's settlement objectives would not be interfered with. Thus, Greg has requested that the information (or suspected information) Lawrence possesses be "held inviolate" and has indicated that its disclosure would likely be detrimental to the client. It is, therefore, a "secret" as defined in MRPC 1.6(a). On these facts, it does not appear that any exceptions to MRPC 1.6 are applicable. Accordingly, Lawrence may not report opposing counsel's conduct to the AGC. See Michigan Ethics Opinion RI-314 (October 19, 1999).

(2) *Partner's Misappropriation*. The analysis of this part of the question is much more straightforward. Conversion of client funds meets all of the threshold criteria: Lawrence knows of the violation (his partner admitted it), seriousness of the violation (conversion is obviously serious), and the act is a substantial reflection on the partner's trustworthiness, honesty and fitness. Disbarment is the generally appropriate sanction for conversion and will be imposed absent "compelling mitigation," which has not been found even in instances of full restitution *Grievance Administrator v Frederick A. Petz*, 99-102-GA (ADB 2001) (balancing aggravating factor of dishonesty

against mitigating factors including repayment of funds). Accordingly, restitution does not eliminate or minimize much of the seriousness of the violation and the substantial reflection it has upon trustworthiness and honesty. Finally, the question mentions nothing which would implicate MRPC 1.6. Lawrence must report his partner's misconduct. See *Grievance Administrator v Ronald W. Crenshaw*, 97-43-GA (Hearing Panel Report 9/15/1997).

(3) *Andy's Drunk Driving Matter*. This may prove to be a more difficult question. Many writers may analyze this question under MRPC 8.3, touching on the same elements of the rule addressed in parts one and two of the question. However, in terms of getting the right result, these are all red herrings, and more points should be awarded for an answer recognizing that the dispositive rule is MCR 9.120(A)(1), which provides that:

When a lawyer is convicted of a crime, the lawyer, the prosecutor or other authority who prosecuted the lawyer, and the defense attorney who represented the lawyer must notify the grievance administrator and the board of the conviction. This notice must be given in writing within 14 days after the conviction.

Some answers may recognize the important principle reflected in the comment to Rule 8.3, which states, in part, that:

The duty to report professional misconduct does not apply to a lawyer retained to represent a lawyer whose professional conduct is in question. Such a situation is governed by the rules applicable to the client-lawyer relationship.

The comment does not directly apply because Lawrence is representing Andy in a criminal proceeding, not one in which Andy's "professional conduct is in question." (However, a criminal conviction may give rise to a disciplinary action.) The essence of the comment, is that "the rules applicable to the client-lawyer relationship," such as MRPC 1.6, ordinarily preclude the disclosure of confidences and secrets, and some credit may be appropriate for a good discussion of this principle. However, MCR 9.120(A)(1) trumps MRPC 8.3's deference to MRPC 1.6. Therefore, Andy's preference that his conviction not be reported is, like the other elements of MRPC 8.3, not relevant to the correct answer. Given that parts one and two of the question provided an opportunity to discuss the elements of

MRPC 8.3 in different settings, this part of the question is intended primarily to test whether the writer is aware that Lawrence must inform the AGO of Andy's conviction.