

ANSWER TO QUESTION NO. 10

The key to analyzing this question is MRPC 1.9(c). That rule restricts a lawyer's use or revelation of information relating to the representation of a former client.

MRPC 1.9(c)(1) prohibits a lawyer from using information relating to the representation of a former client to the disadvantage of the former client with only two exceptions. First, the information may be used if allowed or required by MRPC 1.6 (the rule on confidentiality of information) or 3.3 (requiring candor to a tribunal) with respect to a client. Second, the lawyer may use information that "has become generally known."

MRPC 1.9(c)(2) prohibits a lawyer from revealing information relating to the representation unless MRPC 1.6 or 3.3 would allow or require revelation with respect to a current client.

No exceptions apply to this scenario.

First, MRPC 1.9(c)(1)'s exception for information generally known is not applicable. It is clear from the fact-pattern that Arnie has kept Dan's confidences and secrets inviolate up to this point; the information is not generally known.

Also, none of the exceptions to the duty of confidentiality in MRPC 1.6 are applicable. The facts do not indicate that Dan consented to the disclosure of the information. MRPC 1.6(c)(1). With respect to MRPC 1.6(c)(2)'s exceptions, there is no court order mentioned in this fact-pattern, and the provision as to disclosure of client confidences or secrets when required or allowed by law has not been shown to be applicable; the propriety of disclosure under the rules is analyzed throughout this question and no other law has been suggested in the question. Also, Dan did not use Arnie's services to commit a crime or fraudulent act, so MRPC 1.6(c)(3) does not apply. Further, no future crime is contemplated by Dan, so MRPC 1.6(c)(4) is likewise inapplicable.

Another exception, MRPC 1.6(c)(5), allows revelation of "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." This exception also does not allow Arnie's conduct. Even though a threat to reveal confidential information to the detriment of one's client might, indeed, motivate the client to pay the fee, thus assisting in

collection, the comment to MRPC 1.6 explains the limits of MRPC 1.6(c) (5)'s exception:

"A lawyer entitled to a fee is permitted by paragraph (c) (5) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

In other words, the exception allowing lawyers to reveal confidential information to collect a fee is limited to that which is necessary, for example, to pursue appropriate legal processes such as reducing the claim to judgment and engaging in post-judgment collection proceedings. Even then, care should be taken to reveal only that which is necessary and to minimize disclosure through protective orders or other appropriate means. Threatening to reveal confidences to opposing parties or others who would be likely to harm the client upon revelation is obviously not allowed by this exception.

Finally, MRPC 3.3 does not allow Arnie to use the information confided to him in order to leverage payment of his fees. MRPC 3.3 prohibits the introduction of false evidence and requires a lawyer to remedy the situation, if necessary through disclosure to the tribunal, when he subsequently learns that material evidence he has offered is false. MRPC 3.3(a) (3). This rule is not applicable. Dan pled guilty and the facts contain no mention of any false testimony or other evidence.

Accordingly, Arnie has violated MRPC 1.9(c)(1). See *Grievance Administrator v Paula D. Thornton*, Case No. 05-112-GA (Michigan Atty. Disc. Bd., June 21, 2007), and cases cited therein. His actual revelation of the confidences and secrets would be in violation of MRPC 1.9(c)(2).

Additionally, there is no problem with Arnie insisting, prior to the plea, that the state prove its case even though Dan had confided to Arnie that he committed the charged crime. MRPC 3.1.

An astute applicant might also correctly identify Arnie's conduct as a violation of Michigan's extortion statute, MCL 750.213. Such conduct likely constitutes professional misconduct under MRPC 8.4(b) by "engaging in conduct involving . . . violation of the criminal law, where such conduct reflects adversely on the

lawyer's honesty, trustworthiness, or fitness as a lawyer." It also certainly meets the much lesser standard set forth in MCR 9.104(A)(5) as interpreted by the Michigan Supreme Court in *Grievance Administrator v Deutch*, 455 Mich 149 (1997), which held there is no limitation on the types of criminal violations that are regarded as professional misconduct, regardless of how it reflects on the lawyer's fitness to practice law. An applicant who identifies the potential ethical violation under MRPC 81.4 and/or MCR 9.104(A)(5) is deserving of an additional point or two depending upon the clarity of the discussion.