

ANSWER TO QUESTION NO. 5

Several Michigan Rules of Professional Conduct (MRPC) come into play under this scenario.

Various rules prohibit the lawyers from altering the document. MRPC 3.4(a) provides that a lawyer shall not "unlawfully obstruct another party's access to evidence; unlawfully alter, destroy, or conceal a document or other material having potential evidentiary value; or counsel or assist another person to do any such act." The electronic information at issue here (the electronic version of the document including metadata) clearly has evidentiary value.¹ Also, the court has resolved the question as to whether it is a "document" which must be turned over within the meaning of the plaintiff's discovery request. If a LawFirm lawyer alters the electronic version or responds to the discovery request without producing it, or assists in such activity, the question of MRPC 3.4(a)'s applicability depends upon whether this activity is unlawful. As the comment to MRPC 3.4 notes:

"Other law makes it an offense to destroy material for purpose of impairing its availability in a pending proceeding or one whose commencement can be foreseen. Falsifying evidence is also generally a criminal offense. Paragraph (a) applies to evidentiary material generally, including computerized information."

Violation of discovery rules or orders may also establish unlawfulness for purposes of MRPC 3.4(a).²

In addition to violating MRPC 3.4(a), the conduct proposed here could also constitute a violation of other sections of MRPC 3.4, such as MRPC 3.4(b), prohibiting the falsification of

¹See *DC Ethics Op* 341 (2007) ("Because it is impermissible to alter electronic documents that constitute tangible evidence, the removal of metadata [from a document requested in discovery] may, at least in some instances, be prohibited . . . [by DC Rule 3.4(a)].")

²See 2 G. Hazard, W. Hodes & P. Jarvis, *The Law of Lawyering*, §30--4 at 30--7-9 (3d ed). See also *Restatement (Third) of the Law Governing Lawyers* §118(2).

evidence.'

The withholding, destruction, or alteration of the electronic document by Partner or Associate would also constitute a violation of MRPC 3.4(c), which provides that a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists." Failure to produce discoverable evidence constitutes a violation of the Michigan Court Rules on discovery. It is clear from the facts that any such withholding of the document would be a knowing violation of the rule. Finally, it cannot be argued that this would be an open refusal based on an argument that there is no valid obligation to produce the document; the proposed action is surreptitious, not above-board. Also, although MRPC 3.4(c) does not specifically reference the violation of court orders, courts and discipline agencies consistently hold that knowing violation of an order constitutes a violation of this rule.⁴

Yet another provision of MRPC 3.4 would be violated if the CEO's plan were to be carried out. A Michigan lawyer shall not "fail to make reasonably diligent efforts to comply with a legally proper discovery request by an opposing party." MRPC 3.4(d).⁵

Finally, the plan would run afoul of various provisions of MRPC 8.4, which provides that it is misconduct for a lawyer to:

"(b) engage in conduct involving dishonesty, fraud, deceit, misrepresentation, or violation of the criminal law, where such

'Alteration of physician's reports was held to violate Louisiana MRPC 3.4(b) (prohibiting lawyers from falsifying evidence in *In re Watkins*, 656 So 2d 984 (1a 1995)).

⁴See ABA/BNA Lawyers Manual on Professional Conduct; 61:721 ("Courts uniformly apply Rule 3.4(c) to require compliance with court orders even though the text speaks of obeying 'rules.'"). See also, *Grievance Administrator v Stefani*, ADB 09-47-GA (March 2, 2010 Hearing Panel Report of Misconduct), at pp 23-25 (subpoenaing documents from non-party witness in violation of MCR 2.305(A) (5) and court's order constitutes violation of MRPC 3.4[c]). The panel's report is available at: <http://www.adbmich.org/statuts/STEFANI09-47-GA.PDF>

⁵See *Meier v Meier*, 835 So 2d 379 (Fla Dist Ct App 2003) (appellate court cited Florida Bar Rules 3.4(a), (c) and (d) in requiring lawyer to produce documents requested in discovery despite client's instruction to withhold them).

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".

As has been discussed above, falsifying evidence is generally a criminal offense.' The conduct here is also clearly dishonest.' Additionally, the proposed conduct would be prejudicial to the administration of justice.⁸

Thus, Associate may not alter the electronic document by removing the metadata from it.

It is also not permissible for Associate to return the document to the CEO so that he may alter it if the CEO's alteration would violate other law (such as a criminal statute or a discovery rule, which may be applicable to parties). MRPC 1.2(c) provides that: "A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is illegal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client." Return of the document to the CEO might be deemed assistance in light of the fact that Partner and Associate are aware that the original in their possession will be altered if returned to the CEO.' Accordingly, Partner and

'Compare, *In re Watkins*, 656 CO 2d 984 (LA 1995) (lawyer who altered physician reports regarding social security claimant violated not only 3.4(a) and (c) but also 8.4(b) (criminal conduct reflecting adversely on fitness) (c) (conduct that is dishonest, etc.) and (d) (conduct prejudicial to the administration of justice)).

'See, e.g., *Florida Bar v Burkich-Burrell*, 659 SO 2d 1082 (FL 1995) (submission of false interrogatory answers violated Florida Rule 8.4(c), which prohibits a lawyer from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation). Compare *In Re Sealed Appellant*, 194 F2d 666 (CA 5, 1999) (backdating stock certificate to avoid it being considered a fraudulent conveyance violated Louisiana Rule of Professional Conduct 8.4(c) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation".))

⁸*In re Watkins, supra*, n 6.

'See Michigan Ethics Opinion RI-345 (October 24, 2008), available at <http://michbar.org/opinions/ethics/numberedopinions/RI-345.htm>

Associate must determine whether alteration of the electronic document would constitute a violation of law whether conducted by themselves or their client.

LawFirm must withdraw from representing GeneriCorp if the representation will result in violation of the Rules of Professional Conduct or other law. MCR 1.16(a)(1). Thus, if the client insists on alteration of the document by LawFirm (or Partner or Associate, it (they) must withdraw pursuant to MCR 1.16(a)(1) because carrying out this objective of the representation would violate at least the Rules of Professional Conduct discussed about (MRPC 3.4 and 8.4) and possibly criminal law. Also, if GeneriCorp insists on the return of the document and then provides LawFirm with a "corrected" document which does not contain the relevant metadata, LawFirm will have to withdraw under those circumstances as well if such alteration/spoliation is prohibited by criminal law in Michigan (as the comment to MRPC 3.4 suggests). MRPC 1.2(c); MRPC 1.16(a)(1). Continued representation after facilitating the alteration of evidence would not be allowed under MRPC 1.16.

If the plan is carried out, both Partner and Associate will have committed misconduct. Because Partner has direct supervisory authority over Associate, Partner is required to make reasonable efforts to ensure that Associate conforms to the Rules of Professional Conduct. MRPC 5.1(b). That obligation would not be met if the plan is carried out. In fact, because Partner ordered Associate to alter or facilitate the alteration of the document, Partner would be responsible for Associate's violation of the rules. MRPC 5.1(c) (1). The Rules of Professional Conduct bind a lawyer even when he is following orders. MRPC 5.2(a). Associate, as a subordinate lawyer, would escape responsibility for violating the rules of professional conduct only if Associate acts in accordance with his supervisory lawyer's (Partner's) reasonable resolution of an arguable question of professional duty. MRPC 5.2(b). On these facts, including Associate's familiarity with sanctions decisions, the question does not appear arguable and the resolution does not seem reasonable.