

EXAMINERS' ANALYSIS OF QUESTION NO. 4

INTRODUCTORY COMMENT

Pat has violated several rules requiring honesty and candor. One applicable rule, MRPC 4.1, requires honesty in dealing with a third person (opposing counsel in this question). Another rule, MRPC 3.3(a)(1), requires truthfulness in dealing with a tribunal (the court in which the case was pending here). Candidates should be able to discuss the applicability of these rules to this fact pattern. Candidates should also recognize that Michigan's general rules (MRPC 8.4(b) prohibiting dishonest conduct also apply to statements or omissions to both a tribunal and third persons. Pat has also violated MRPC 1.2(a) and 1.4(a) by not conveying the initial settlement offer to his client. Other potential rule violations may also be identified by candidates.

SPECIFIC ACTIONS

1. Pat's response to defense counsel's initial offer of \$82,500.

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." MRPC 8.4(b) prohibits conduct involving dishonesty, fraud, deceit, and misrepresentation. Rule 1.2 provides that a lawyer must abide by his client's decision whether to accept an offer.

Pat's statement that the value of the claim is easily more than \$50,000 greater than defense counsel offered is not a false statement of fact. It is Pat's opinion and acceptable posturing. Similarly, Pat said "I cannot accept that." He did not say "my client won't accept that," which, even though false, may still be permissible according to some authorities. In any event, Pat's statement clearly does not represent a factual statement about the client's bottom line. The comment to MRPC 4.1 states: "Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party's

intentions as to an acceptable settlement of a claim are in this category." Pat's "puffing" or posturing did not amount to a false statement but the decision whether to accept a settlement offer belonged to the client.¹

2. Pat's failure to convey the initial settlement offer to his client.

By not conveying the defendant's initial offer (of \$82,500) to his client, Pat violated MRPC 1.4(a) which requires a lawyer to "keep a client reasonably informed about the status of a matter" and "notify the client promptly of all settlement offers, mediation evaluations, and proposed plea bargains."² The offer should have been conveyed to the client especially where it was \$2,500 over what the client said he was willing to accept.

3. Pat's demand letter.

MRPC 4.1 also, and most significantly on these facts, comes into play with regard to Pat's failure to inform defense counsel of his client's death. Courts and discipline agencies have held that failure to divulge the death of a client while continuing to pursue litigation on the (nonexistent) client's behalf can be dishonest or tantamount to an affirmative misrepresentation.³ Violation of MRPC 4.1 may be predicated on silence or upon

¹ See ABA Formal Ethics Op 06-439 (2006), opining that counsel for plaintiff "might insist that it will not agree to resolve a dispute for less than \$200, when, in reality, it is willing to accept as little as \$150 to put an end to the matter." Although it could be argued that the foregoing is a misrepresentation of fact with respect to counsel's actual settlement authority, such a statement was not made by Pat in this scenario. Here, Pat made no representations about what his client would accept. Instead, he stated that he would not accept the offer.

² MRPC 1.2(a) is also relevant. See *Frasco, Caponigro, Wineman & Scheible, PLLC v IGC Management, Inc.*, unpublished opinion per curiam of the Michigan Court of Appeals, issued April 16, 2013 (Docket No 308405), p 2.

³ ABA Formal Ethics Op 95-397 (1995); ABA Formal Ethics Op 06-439 (2006); *Virzi v Grand Trunk Warehouse*, 571 F Supp 507 (ED MI, 1983); *Grievance Administrator v Russell G. Slade*, ADB 150-89 (HP Report 4/11/1991), aff'd (ADB 1991); *Kentucky Bar Ass'n v Geisler*, 938 SW2d 578 (Ky, 1997).

affirmative representations in this regard.⁴
actions go beyond mere silence.

Here, Pat's

Pat's demand letter, sent after the death of the client without disclosing that occurrence, is "tantamount to making a false statement of material fact within the meaning of [Model] Rule 4.1(a)," which is identical to Michigan's Rule 4.1.⁵ This is especially so because the demand includes compensation for future pain and suffering. The demand letter also violated Rule 8.4(b) because concealing the client's death involved dishonesty, fraud, and deceit.

4. The pretrial statement.

The pretrial statement is another instance of failure to disclose a material fact to opposing counsel and, in this instance, to the court. Pat listed the deceased client as a live witness. The pretrial statement also repeats the misrepresentation regarding future damages and adds a new express falsehood, i.e., that the client will testify. These false statements are now made to a tribunal because the pretrial statement is filed with the court. This conduct violates MRPC 3.3(a)(1), which provides that a lawyer shall not knowingly "make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer." Arguably, the mere filing of a paper with the court without disclosing the death of the client constitutes a violation.⁶ But, listing the client as a witness and continuing to seek future damages makes the violation even more clear. Seeking future damages also violates Rule 3.1 which forbids making frivolous claims and Rule 8.4(b) which forbids conduct involving dishonesty, fraud and deceit.

⁴ *Id.* Also, the comment to MRPC 4.1 provides that: "A lawyer is required to be truthful when dealing with others on a client's behalf, but generally has no affirmative duty to inform an opposing party of relevant facts." The comment also states that: "Making a false statement may include the failure to make a statement in circumstances in which silence is equivalent to making such a statement."

⁵ ABA Formal Op 95-397.

⁶ See ABA Formal Op 95-397, *Virzi, supra*, and the comment to the Michigan rule which states, in part: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation."

5. The final negotiations.

Pat's continued negotiation immediately prior to the agreement with defense counsel is a third violation of MRPC 4.1. Each of the foregoing actions or omissions advance the unstated premise that the client would still be able to testify at trial and thereby have an impact on any award by a judge or jury, and that future damages could be properly awarded.⁷

A violation of MRPC 8.4(b) (prohibiting conduct involving dishonesty, fraud, deceit, and misrepresentation) would also be supported by these facts,⁸ as well as a violation of MCR 9.104(3) (conduct that is contrary to justice, ethics, honesty, or good morals).

OTHER RULE VIOLATIONS

Candidates may receive additional credit for identifying and discussing a number of other rule violations.

Pat's conduct toward opposing counsel and toward the tribunal in particular would also likely be held to be prejudicial to the administration of justice, and therefore in violation of MRPC 8.4(c) and MCR 9.104(1).⁹

Additionally, it has been found that similar conduct violates a rule analogous to MRPC 3.4(a), which prohibits unlawfully obstructing another party's access to evidence.¹⁰

Pat may also have violated MRPC 8.4(b)'s proscription against criminal conduct if the conduct fell within the

⁷ Compare *Virzi, supra*, p 508 (defense counsel accepted mediation because he believed the deceased client would have been an excellent witness at trial).

⁸ See ABA Formal Op 95-397, and *Sage, supra*. Compare *Grievance Administrator v Michael L. Stefani*, 10-113-GA (ADB 2013), pp 10, 15.

⁹ See, e.g., *Sage, supra*, and *Stefani, supra*.

¹⁰ See *In Re Forrest*, 730 A2d 340 (NJ 1999) (attorney obstructed opposing counsel's access to potentially valuable evidence when he failed to reveal client's death; attorney also served answers to interrogatories and discussed settlement after client's death).

parameters of a criminal statute pertaining to obtaining money by false pretenses, such as MCL750.218.¹¹

Perhaps few candidates will perceive the applicability of these rules of professional conduct to the facts in this question. In light of the infrequency with which these particular violations have been prosecuted or discussed in ethics opinions under these facts applicants will not be penalized for failing to identify or discuss these rules.

¹¹ Compare *In Re Rosen* 198 P3d 116 (Colo, 2008).