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The Way You Do the Things You Do

by Marc Garfinkle

Consider if you will, the following five stories:

- Alice was a college sophomore. Arrested for theft, she and her roommate were stopped in the mall parking lot by store security with a bag full of store merchandise, but no receipts. She is young and afraid. She should be—she is a criminal justice major, and conviction of a theft offense will cast a long shadow on her future. She was referred to you by Chris, an attorney in your networking group who has a general practice. This is your first referral from Chris.

Alice advises that her parents will pay your fee, and that you may call them to arrange payment. You deduce from her "permanent address" that they can afford it. You sign her up. She leaves.

You call Chris and say, "Thanks for the referral. I'm sure I can help. It looks like the roommate may have been working alone. I'll keep you posted." You won't need to. Chris represents the roommate, which is why you received the referral. Oops!

Alice's parents call you first. They seem pleasant, but ask why your fee is twice what they paid Alice's lawyer the last time she got into trouble. You didn't know about that one, so you address the charges against their daughter this time. There is silence.

Apparently, the last time Alice was arrested was for a minor motor vehicle offense. This time, she had told her parents that this was a similar matter. Oops!

- George and Martha were your clients, and had been for almost 30 years. You had handled their closings, drafted their wills, and handled a dog-bite case for their son. They have referred their friends and family to you. This time, they wanted codicils amending their wills to include their out-of-wedlock grandchild in their estates. You sent them drafts, which they approved, and now they called, wanting to come to your office to sign them. Unfortunately, Martha had just broken her ankle and was confined to home.

Over the phone, you confirm with Martha, whose voice you know well, that she had read the codicil and understood it, and that it reflects her wishes. Satisfied, you say she may sign it and have George bring it with him to your office tomorrow. When George arrives the next day, you notarize both signatures.

You couldn't have known, but after you spoke with her, Martha signed the codicil, as she had planned. However, she changed her mind *again* before George left for your office. George, who

felt strongly the other way, was tired of arguing with her about it, and said, "Fine, dear," and assured her that he would only bring *his* codicil to your office. He lied. He figured, "No harm, no foul," because it was almost certain that Martha would never find out.

He was correct. Oops!

- You, as plaintiff's counsel, had been working on the Peterson family's horrific accident case for almost three months before you were even allowed to see the police report; the accident was under investigation by the prosecutor's vehicular homicide division. When you finally reviewed the report, you immediately recognized the unforgettable name of the defendant cement-truck driver who probably was responsible. Years ago, as a young lawyer in a plaintiff's personal injury law firm, you sat in on depositions and sometimes participated in the negotiation and settlement of soft-tissue injury cases. You remember that the truck driver here was the plaintiff in one such matter.

Were it not for the party's odd name, you would never have remembered the matter at all. Although you remember very little about the case, you would have had significant contact with the plaintiff. Still, he would have no reason to remember you. You keep the case.

Almost three years later, on the eve of the civil trial, the defendant truck driver's thoughts drift back to his own plaintiff's case of years ago. Suddenly, he remembers why *your* name sounded familiar. At five minutes to nine the next morning, he tells his lawyer. Oops!

- Mike and Ike were twins. Mike was a tough guy with a long rap sheet. Ike was more refined, with a job and a clean record. Their father was a hard-working gravedigger who was beat up during work by a much bigger, younger gravedigger with whom he had argued. This was not the first dispute between the men, but it was the first time anyone had gotten hurt.

One night, as the old man's assailant was leaving the graveyard, he was jumped and stabbed by a man who fit the description of both Mike and Ike. Everyone there knew who was responsible. The police were looking for Mike, even as the twins sat in your office.

Although it seemed improbable, Ike admitted to you that *he* had stabbed the man. That was fortunate in one sense—if Mike were to stand trial, a jury would convict him in a minute, and any plea bargain or sentence would contemplate his record for violent crime. Ike, on the other hand, would be a much more sympathetic defendant, would be able to testify on his own behalf and, if convicted, would undoubtedly receive a more lenient sentence than his twin.

The twins said they didn't have money to retain you right now, but they might have some money in a few days. Right now, they just wanted to know what to do. You tell Ike to turn himself in, to refuse to answer questions, and to request to see an attorney immediately. You start explaining the booking procedure, but Mike takes over and explains the protocol quite clearly to his brother. As they are leaving your office, you think you notice some small reddish smears on Mike's work boots. You let the twins leave.

You are not retained. Six months later, you read that Ike was beaten to death in prison. Oops!

- You are in-house counsel and vice president of legal affairs for CorpX, a Fortune 1000 firm. Pat, your childhood friend and college sorority sister, is the chair and CEO. It was Pat that alerted you to the job opening three years ago, and, based on her recommendation to the board, you were awarded the best job you will ever have. The board knows that you and Pat are friendly, but they may be unaware of your close personal bond.

Three weeks ago, while searching in the system for a document in a "deleted email" folder, your loyal secretary stumbled across an email between Pat and the CEO of a competitor. He made a screen shot of the email, which he thought you should see. You reviewed the document and asked the secretary whether anyone else knew about it. He assured you that you and he are the only ones that know. You told him that you will look into it, and you asked him to say nothing to anyone.

It seemed clear from the email that Pat was planning to refer some potential Corp-X clients to the competitor, ScamO, in exchange for some ScamO stock options to be issued to Pat's husband. You show it to Pat, who says, "I'm not going through with that deal, but if you say anything, we will both lose our jobs, and worse." She is right, so you say nothing to the board.

Yesterday, your secretary told you that he received a subpoena to testify before a RICO grand jury looking into corrupt activities at ScamO. Oops!

Each of these scenarios involves the Rules of Professional Conduct, which establish guidelines and protocol for attorney behavior, ostensibly to protect our clients, but ultimately protecting us. The RPCs anticipate the common ethical dilemmas we face and prescribe our responses. We lawyers don't always appreciate their mandate, but selective compliance is a risky path.

There are times when adherence to a particular RPC does not seem necessary. There are times when the rules don't seem fair. A hundred considerations can militate against strict compliance in a given circumstance, especially when compliance means giving up a case or a client or a fee. Still, for lawyers, the rules are the rules.

Dear reader, in the examples above, I ascribed to you various decisions which involve the rules. Perhaps an example touched upon your practice area. Regardless, you should be able to identify the RPCs at issue in each scenario and to explain their applicability. If not, I strongly suggest that you put down what you are reading and pick up your copy of the rules. •

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