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Pop Quiz: What Would You Do?

Marc Garfinkle, New Jersey Law Journal

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This week's column is inspired by the soul-searching television program "What Would You Do," which prods the sensitive nerves at the fissure between what we *should* do and what we actually will do in an uncomfortable situation. We shall look at a relatively simple factual pattern involving issues of legal ethics, and then consider how a lawyer should respond in that situation. Think then about how *you* would respond. Perhaps this little quiz will let you open a dialogue with yourself. No one is monitoring your thoughts or your behavior or sitting on your shoulder telling you what to do. There are only the rules, your conscience, and your personal fears and motivations.

One would think that Legal Ethics is a subject lawyers know cold, in view of its importance to us and the limited quantity of its substantive content. We studied Professional Responsibility in law school, we passed a test on it for bar admission and we reinforce our Ethics knowledge annually with CLE. Still, the truth is that few lawyers are comfortable issue-spotting or analyzing legal ethics questions, no matter how forthright they appear. We all seem to understand the, "Thou shalt not steal" part, but exactly what constitutes a taking or what promptness looks like in action is not always clear. Lawyers encounter complex ethics issues frequently, and we must respond in accordance with the Rules.

Here Are Some Rules

- *RPC 1.15 Safekeeping Property.*

... (b) Upon receiving funds or other property in which a client or third person has an interest, the lawyer shall promptly notify the client or third person. Except as stated in this Rule or otherwise permitted by law or agreement with the client, a lawyer shall promptly deliver to the client or third person any funds or other property that the client or third person is entitled to receive.

- *RPC 5.1. Responsibilities of Partners, Supervisory Lawyers and Law Firms.*

... (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

(c) A lawyer shall be responsible for another lawyer's violations of the Rules of Professional Conduct if: (1) the lawyer orders or ratifies the conduct involved....

- *RPC 5.3. Responsibilities Regarding Nonlawyer Assistants.*

With respect to a nonlawyer employed or retained by or associated with a lawyer:

... (c) a lawyer shall be responsible for conduct of such a person that would be a violation of the Rules of Professional Conduct if engaged in by a lawyer if: (1) the lawyer orders or ratifies the conduct involved;....

In your analysis, remember the mandates of RPC 8.3 and the parameters set by RPC 8.4.

- *RPC 8.3 Reporting Professional Misconduct.*

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

- *RPC 8.4 Misconduct.*

It is professional misconduct for a lawyer to:

(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or to do so through the acts of another;

(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice;....

Here Are Your Facts

You are senior partner in a small general practice firm. In 2014, the firm had been audited by the Office of Attorney Ethics, and, as a result, your bookkeeping is compliant and current, including monthly three-way reconciliations of your attorney trust account. That account is principally used for real estate transactions and for distributing the proceeds of personal injury plaintiffs' matters. Although most funds move swiftly through this account, there is usually a balance comprising escrows from transactions and funds held for various clients' doctors as copayments, deductibles and liens. The latter can be considerable.

Your friend and junior partner, JP, handles the books for the firm. He is scrupulously honest. (Last year, you even provided a letter of character reference for him in connection with his pending application to serve on a state bar committee.) His assistant, Sharon, who has been with the partnership from the beginning, writes all the checks and reconciles the accounts. One day, when JP was out of the office, Sharon mentions that a certain Dr. Lee's office had called, acknowledging receipt of payment on the Mbagwe case. You think it strange, because that case had settled months ago. That check normally would have issued within a week or so after receipt of the insurance money, even if the firm had negotiated the lien for the client. Curiosity piqued, you go to the account books.

In the receipts column of Mbagwe's client trust ledger, you see the initial deposit from the defendant's insurance company and then an additional \$50,000 deposit, dated almost two months later. The source of those funds was "JP" and the notation said, "Adjustment." In the disbursements column, you see Mbagwe's check, your firm's check and a handful of checks to doctors, all dated about a week after the insurance checks were deposited. Then there was a \$70,000 check to Dr. Lee, dated two months after the others. On second glance, the amount of your firm's fee seemed inflated.

Upon JP's return, you confront him with the strange transaction and asked him for an explanation. Unflustered, he replied, "It looks worse than it is. No trust balance went negative. No client's funds

were invaded. Here's what happened: My kids' tuitions were due and I needed a quick \$50,000. Our business account balance was too low for me to borrow from the firm, but we had already settled Koi, the drowning case, and that million-dollar fee was guaranteed to arrive within the month. I also knew that we were holding \$70,000 for Dr. Lee on Mbagwe, and that Dr. Lee never checks on her liens and doesn't care when she gets paid.

"So, when we distributed the proceeds, I gave Mbagwe his full recovery, but I told Sharon to write our check with an extra \$50,000. Since that was less than the amount we were holding for Dr. Lee, no client accounts were invaded. As soon as I deposited the trust check into our business account, I wrote myself a business check for the fifty. So, Mbagwe was paid as agreed, we got our full fee, my kids' tuitions got paid, and a month or so later I replenished the trust account and sent the doctor her money. There was never any commingling of client funds or a negative balance in trust... Unless we get audited again in the next year or two—and we won't—no one will ever be the wiser."

Those are your facts. Before you answer, bear in mind that reporting your JP will almost certainly cost him his license. Under *In re: Wilson*, any taking of trust funds for a personal purpose will result in disbarment. There is no excuse that will justify the abuse of trust. There is no credit for *de minimis* offenses. There is not a "no harm, no foul" rule.

Then, consider as ground rules the following comments of the Model Rules Committee, intended to guide practitioners in the implementation of Model RPC 8.3., the prototype of our RPC 8.3: 1) *The term "substantial" ["a substantial question as to that lawyer's honesty..."] refers to the seriousness of the possible offense and not to the quantum of evidence of which the lawyer is aware.* 2) *An apparently isolated violation may indicate a pattern of misconduct that only a disciplinary investigation can uncover.* 3) *Reporting a violation is especially important where the victim is unlikely to discover the offense.*

Here is the quiz: Believing that was a one-time occurrence, that there was no true victim, and that the transaction will not be otherwise detected, do you report JP to the OAE? Would you tell your other partners? Would you tell the state bar committee to whom you had written the character reference? Or do you just sit tight and hope it blows by?

You know the facts and the law, dear reader. Now, what would *you* do?•

Next Week...

Environmental Law

Garfinkle practices in Morristown, focusing exclusively on legal ethics, attorney discipline, bar admission and judicial misconduct. He is also an adjunct professor at Seton Hall University School of Law.

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