



[Click to Print](#) or Select '**Print**' in your browser menu to print this document.

Page printed from: [New Jersey Law Journal](#)

---

# Walking the Line

Living on the edge of the RPCs

Marc Garfinkle, New Jersey Law Journal

May 4, 2016

The Rules of Professional Conduct are rules of general application, and attorneys are presumed to know them. While most of the rules seem natural and sensible and easy to follow, sometimes they appear unnecessary or even counterproductive. Attorneys must decide whether the RPCs apply in a given situation or whether they may be safely disregarded. Consider, if you will, the following scenarios.

- You are an experienced plaintiff's personal injury lawyer. You're standing in for a colleague, "putting through" a "friendly hearing," approving the settlement of her infant client's injury claim. A one-page memo, clipped to the file, informed you that six year-old Roy was injured when his mother's car was rear-ended by an uninsured driver who was texting. Roy and his siblings, two year-old twins Polly and Anna, were also injured. All were properly secured in approved child safety seats. The suit is against the mother's UM policy, which had liability limits of \$15,000 per person and \$30,000 per accident. Another law firm had settled the mother's case for \$15,000. Your friend represents the three children. The twins' cases were previously settled for \$4,500 each (below the \$5,000 amount which would require a "friendly") and Roy's case settled for \$6,000, subject to court approval.

In reviewing the file, including the sub-files for Polly and Anna, you notice that the police report described the children as "restrained and uninjured" and that Roy did not go with his mother to the emergency room. Roy and the twins first sought treatment from Jack Crepitus, D.C., for "neck pain" three weeks after the accident. You read the doctor's report, confirming that it contains the preferred language about permanency.

You are surprised that such young children received chiropractic treatment without any emergency room attention or a visit to their pediatrician. You see immediately that the three reports are identical; only the names are changed. In two places, the doctor referred to Roy as "she." You also notice that Roy apparently had a doctor's appointment on Feb. 29, 2015, which was not a leap year.

You meet Roy and his parents for the first time on the day of the hearing. They are charming, hard-working immigrants struggling to find the American dream. The father tells you proudly that the money will become the down-payment on a two-family home, perhaps allowing his family to live rent-free and finally get ahead. You speak to Roy, who is shy, and you ask about his health, his daily activities, his physical complaints and so forth. He seems to have little recollection of the crash, except that his sisters cried a lot. He doesn't remember much about the chiropractor or the treatment he received. Counsel for the carrier approaches. He asks whether you have any questions before you submit the paperwork to the court. You do not. The settlement is approved. Everyone is happy.

- You are retained counsel in an intellectual property case involving the alleged illegal use of your client's proprietary technology by competitors. For almost three years, you have researched the technology, the law and the facts of your case. You have been paid a modest hourly fee all along, and your hybrid retainer agreement provides for a generous contingent fee from any settlement or verdict. With your experts, you have assembled a list of 38 companies possibly infringing on your client's rights. You put them all on notice of your claim and intend to sue them all, expecting to release some quickly, to settle cheaply with others and to litigate with the rest.

While researching the financial strength of your various defendants, you discover that one of them is a wholly-owned subsidiary of Glomex, the multinational corporation where your brother's wife is employed and owns stock. The following day, you receive a call from the attorney from Glomex. He produces ample evidence to suggest that there was no actual appropriation of your client's intellectual property rights by his client. He threatens to countersue your client for abuse of process if you sue. You relay this to your client, who agrees with your suggestion to release Glomex. Of course, you do.

Although you have no financial interest in any defendant, you learn that one of them, Kashkow Co., is a component company in a mutual fund where your wife has a small position. Not wishing to risk a conflict of interest by taking Kashkow to court, you reach out to their corporate counsel to see whether they might be interested in settling the case prior to suit. They make a tempting offer. You call your client and explain that such a settlement would obviate the need to sue Kashkow and could be used to fund the remaining litigation. Your client decides to accept their offer.

- Your new client, Charles, was picked up by the police on his 15th birthday with three friends as they were enjoying a campfire in the woods behind the middle school. A good student, he was hoping to someday attend law school and become a defense lawyer like you. The boys would not have been busted had not another friend been stopped by police on the edge of the woods carrying a bottle of whiskey intended for the group. The boys had planned to celebrate Charles's birthday in a very grown-up way. Charles really didn't care about the booze—he told you that he probably would have only tried a sip, if at all. He was happy enough just being around the fire and having the flames warm his face as they licked at the sky.

The boys were all charged with arson and underage drinking. The matters were referred to Juvenile Court, and all were being handled by the same prosecutor. Charles's parents ask you what will happen to their son. You explain that the outcome depends, in part, upon whether the state regards the matter as an arson event involving alcohol or an alcohol-related event involving a campfire. You explain that arson might have more serious consequences, especially for Charles, who had lit the fire, but, like his chums, had not gotten to taste the booze. Although you said nothing, you thought that Charles's matter might be referred to the "Firebug" program that works with youthful arsonists.

In court, the prosecutor met with all counsel together and immediately proposed a universal resolution of the case. The boys would all participate in a three-session program for youthful alcohol offenders, and, upon completion, all the charges would be dismissed. Your client and his parents are delighted with the offer. You accept.

- Years ago, you had prepared a new will for your mother's best friend, Jean, after her husband, Luke, had died. They had three sons, whom you have known all your life. Since boyhood, the three have always been very close with each other, so you were surprised when Jean told you she wanted to leave no bequests "in kind" to anyone. "Don't let anyone take even a thimble or a needle," she said. "Sell everything, everything, everything, and divide the proceeds three ways. What you can't sell, give to the Salvation Army." Jean was not afraid that her sons would fight over her modest estate, but she feared that their *wives* would. She said she could easily imagine her daughters-in-law arguing over the breakfront, the good china or Luke's stamp collection.

Thimbles and needles. All her life, Jean had sewn most of the clothes she wore. At 6'2" tall, she and her identical twin sister, Lola, could never find ready-to-wear clothes that fit them, especially as young

women back in the 1940s and '50s. As a result, both women became expert seamstresses, often wearing each other's clothes.

A few weeks after her death, Jean's sons come to you to probate her estate. There are no apparent issues. You list her house for sale and arrange for an "estate sale" of her personal property. The sons and their wives were planning a cruise together somewhere and would not be returning until after Jean's affairs were settled. The day before the sale, Lola called you and asked you whether she could have some of Jean's dresses. They were special to her, and besides, they fit her. She had even personally made a few of them. You reflect only briefly, and then tell her to come and take whatever dresses she wants. She takes them all.

As lawyers, no one is watching us or monitoring our decisions for compliance with the rules. Still, each of us has an internal ethics monitor that tells us where the line is. It is up to us to decide when we are crossing it. For many of us, our ethical compass is powered by our fear of getting caught. For others, it is our religion, our training or our tolerance of risk that controls how close to line we will walk. However you choose, be prepared to defend any decision you make that brings you close to the line. If you cannot defend it, your choice should be clear. •

*Next Week...*

ADR

---

*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.*

---

---

Copyright 2016. ALM Media Properties, LLC. All rights reserved.