

What Would You Do If You Were On The Committee Or Board

Scenario #1:

Attorney Jim E. Retirement is a young lawyer who has been licensed in Virginia for about 6 and a half years doing a variety of legal work. Mr. Retirement has a background in finance. Over the course of his career, he has represented Ms. Ivana Dostoyevsky on an assortment of legal matters including a child custody battle, a contract dispute with Ms. Dostoyevsky's landlord, and a divorce or two. Ms. Dostoyevsky consulted with Mr. Retirement concerning the sudden death of her third husband and the large inheritance she was to receive. Ms. Dostoyevsky was not a U.S. citizen so any funds she received from her husband's estate would be taxed at a very high rate which she wished to avoid. Mr. Retirement suggested that the funds be put into a trust to avoid these tax consequences, advice Ms. Dostoyevsky accepted, and she insisted that Mr. Retirement serve as Trustee. The trust instrument was prepared by another attorney and it provided for Mr. Retirement to be paid an annual fee for his service. In addition, the trust instrument specifically absolved Mr. Retirement of any claims that Ms. Dostoyevsky may assert against him for his services as Trustee.

For the next several years, Mr. Retirement conservatively invested the trust funds and the market return was marginal as a result. Mr. Retirement therefore suggested that Ms. Dostoyevsky loan him funds from the trust at a much higher rate of interest, with the loan being secured by a Deed of Trust on Mr. Retirement's residence which he owned free and clear and in which he had ample equity. Ms. Dostoyevsky agreed to this arrangement and appeared unannounced - in a great hurry - at Mr. Retirement's office to sign the Loan Agreement and a waiver of conflict of interest form presented to her by Mr. Retirement. Mr. Retirement recommended that she take the time to consult with independent counsel prior to signing the loan agreement and the waiver, but she refused to do so because she was in such a rush. Ms. Dostoyevsky hurriedly signed the documents, which were undated, and left the office. Over the course of the next several years, Mr. Retirement borrowed \$150,000.00 from the trust to renovate his home. Mr. Retirement did not provide Ms. Dostoyevsky with periodic statements of account, nor did she request them.

Years later, Ms. Dostoyevsky filed suit against Mr. Retirement claiming that she first learned he had been taking money out of her trust fund after receiving a call from her bank advising that the account was nearly depleted. Her first case was non-suited and, prior to re-filing, Mr. Retirement paid all of the funds he had borrowed back into the trust, with generous interest, in accordance with the terms of the undated loan agreement.

Ms. Dostoyevsky re-filed her suit and the matter proceeded to trial. Following Ms. Dostoyevsky's case in chief, Mr. Retirement's counsel moved to strike. The motion was granted since the court found that Ms. Dostoyevsky's claims that she knew nothing about the loan, and that she had signed the loan agreement only after Mr. Retirement had removed funds from her trust, were incredible.

After her suit was dismissed, Ms. Dostoyevsky filed a complaint with the bar. Mr. Retirement failed to file a written response to the bar complaint, but did schedule an in-person interview with the Virginia State Bar Investigator assigned to the case. During this interview, he informed the Virginia State Bar Investigator that, at all times, Ms. Dostoyevsky's funds were fully protected by the equity in his home, and that she had profited greatly from the loan transactions.

Mr. Retirement's disciplinary record consists of one Dismissal de minimus based upon a finding that his letterhead was misleading insofar as it indicated that he had an associate when he did not.

QUESTIONS FOR SCENARIO #1:

If you were to prosecute the case, or were a member of the Subcommittee that voted to go forward with the case, what RPCs would you charge? In Scenario #1, will Mr. Retirement's status as a relatively young lawyer have any relevance to your decision as to what RPCs to charge? What about his background in finance?

What would you consider in deciding whether or not to prosecute or go forward with this case? What impact does the judge's finding that Mrs. Dostoyevsky's testimony was not credible have on your decision?

Do you believe that the factual record is sufficient to support a finding by clear and convincing evidence of the violations of the RPCs you note?

If you were a member of the adjudicatory panel, would you vote in favor of finding that all of the RPCs charged were violated? What sanction would you impose? Would you consider any terms? If so, what term would you impose?

What would you consider to be aggravating and mitigating circumstances? What are the differences, if any, on the above questions among your team?

Scenario #2:

Toward the end of his career, Mr. Retirement began taking on criminal defense work. He was retained to represent a young man, Gary Gross, accused of luring susceptible teenage girls into a prostitution ring run by his gang. Mr. Gross was indicted on ten counts of sex trafficking of a juvenile. Mr. Retirement had known Mr. Gross and his family since he was a juvenile delinquent, also representing his brothers on various other criminal matters over the years. The evidence against Mr. Gross was overwhelming and, given the 10-count indictment and victim impact testimony which was expected, Mr. Gross faced life in a federal penitentiary. During plea negotiations, Mr. Retirement and the Assistant United States Attorney handling the case agreed to a plea bargain whereby Mr. Gross would plead guilty to one count of the indictment and thereafter cooperate with the F.B.I. gang task force by fingering some of his fellow gang members. Mr. Retirement took this offer to his client and explained that, if Mr. Gross took the plea deal and cooperated with the government, the AUSA would pursue a Rule 35 motion seeking a reduction in Mr. Gross's sentence provided he cooperated. Mr. Gross refused.

Because Mr. Retirement had known Mr. Gross for many years, he prevailed upon his family to help convince him to accept the plea deal. After some very difficult jailhouse discussions, during which Mr. Gross vacillated between accepting the plea bargain and demanding to go to trial, Mr. Retirement and Mr. Gross's family finally convinced him that if he ever wanted to see the outside of a jail cell again, he had to take the deal.

Subsequently, Mr. Retirement and Mr. Gross appeared in court and, after a colloquy with the judge during which Mr. Gross acknowledged that he was pleading guilty because he was in fact guilty, that he was satisfied with his attorney's counsel, and that he was waiving his right to appeal, Mr. Gross's guilty plea was accepted. After the colloquy, Mr. Gross leaned over and whispered to Mr. Retirement that he had something he wanted to say, but Mr. Retirement ignored him. The judge then sentenced Mr. Gross to 40 years in prison. Mr. Retirement left the next day for a much needed vacation. While he was away, Mr. Gross changed his mind again and wrote to Mr. Retirement, demanding that his conviction be appealed. When the letter arrived, Mr. Retirement was still out of the country and, upon his return, the time period within which to file Mr. Gross's appeal had expired.

Some months later, Mr. Gross filed a complaint with the Virginia State Bar alleging that he had instructed Mr. Retirement to file an appeal on his behalf but that he had failed to do so. Mr. Retirement responded to the complaint by explaining the facts leading up to the guilty plea, his client's waiver of an appeal, and the fact that he pled guilty voluntarily with the intention of offering cooperation so that a Rule 35 motion could be filed. In his response, Mr. Retirement also denied that he had ever been instructed by his client to file an appeal following his guilty plea.

Mr. Gross then filed a petition seeking habeas corpus relief on the grounds of ineffective assistance of counsel, which was granted. In its Order, the Court specifically found that Mr. Gross had indeed written to Mr. Retirement to demand an appeal and that Mr. Retirement's failure to follow through was per se ineffective assistance. The court noted that Mr. Retirement was traveling at the time the letter came in and while he, ". . . did not have to maintain a vigil at the office," he should have made a contingency plan during the brief 14-day window within which an appeal had to be noticed. Mr. Gross was thus given the right to file an appeal out of time. His appeal was fully considered and denied.

The Order finding that Mr. Gross had received ineffective assistance of counsel was sent to the Virginia State Bar by Mr. Gross and the complaint was reopened. In his subsequent response, filed by counsel, Mr. Retirement explained that he had previously informed the bar that his client had never instructed him to file an appeal because he had forgotten about the letter in his file and he had not reviewed his file prior to responding to the original complaint.

Mr. Retirement has received a Dismissal de minimus, as described in Scenario #1, as well as the discipline your team would have imposed as a result of Mr. Retirement's conduct in Scenario #1 and Scenario #2.

QUESTIONS FOR SCENARIO #2:

If you were to prosecute the case, or were a member of the Subcommittee that voted to go forward with the case, what RPCs would you charge? Do the facts that Mr. Gross was ultimately able to file appeal his appeal, which was denied, have relevance to your analysis?

What would you consider in deciding whether or not to prosecute or go forward with this case? What impact, if any, would Mr. Retirement's failing to review his file before responding to the bar complaint have on your decision?

Do you believe that the factual record is sufficient to support a finding by clear and convincing evidence of the violations of the RPCs you note?

If you were a member of the adjudicatory panel, would you vote in favor of finding that all of the RPCs charged were violated? What sanction would you impose? Would you consider any terms? If so, what term would you impose?

What would you consider to be aggravating and mitigating circumstances? What are the differences, if any, on the above questions among your team?