

American Bar Association Young Lawyers Division The Young Lawyer

The Nuremberg Defense?

By H. Clay Smith III

You have landed your first real job out of law school. You have been with the firm for less than a year, and you actually enjoy the work. The partners and senior associates are giving you substantial responsibility for the cases you are working on. This is where you want to be for your entire legal career. Then it happens

A civil action that is filed by a popular partner at the firm is dismissed, without prejudice, due to her failure to effect timely service of the complaint. The partner asks you to assist her in reinstating the case.

She tells you that the client is one of the most important to the firm but is very demanding and scrutinizes the firm's work product with a fine-tooth comb. She confides that she does not intend to disclose the dismissal of the civil action to the client and has no intention of filing a motion to reinstate the case with the court. Instead, the partner instructs you to prepare a new civil complaint, to carefully copy the client's signature onto the pleading, and to refile it with the court.

You have all of the respect in the world for the partner and are flattered that she confided in you and is seeking your assistance. You are sure that by helping the partner you will be advancing the interests of the client, the firm, and your prospects for tenure. (Indeed, if you don't follow the partner's instructions, you may find yourself seeking a new employer.) On the other hand, the partner's strategy for reinstating the case doesn't feel quite right to you.

You remember your law school ethics teacher rambling about a lawyer's duty to communicate even adverse events to a client (under the general umbrella of the duty to keep the client informed found in Rule 1.4 of the ABA Model Rules of Professional Conduct (Model Rules)). You remember him saying that signing a legal document on behalf of a client without his or her knowledge and consent is dishonest (and misconduct under Model Rule 8.4 (c)) or may even constitute the criminal act of forgery (possible misconduct under Model Rule 8.4 (b)). Consequently, by assisting the partner in reinstating the case, you could be subject to discipline by your state bar.

Despite your misgivings, you remember that following World War II, a number of German soldiers defended themselves against war crime charges in Nuremberg by asserting that they were "just following orders." This became widely known as the "Nuremberg Defense." Here, the partner has given you specific instructions. You ask yourself, will the Nuremberg Defense work for you?

Model Rule 5.2 describes the ethical obligations of a subordinate lawyer in such a dilemma:

- (a) A lawyer is bound by the Rules of Professional Conduct notwithstanding that the lawyer acted at the direction of another person.
- (b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervising lawyer's reasonable resolution of an arguable question of professional duty.

If the answer to your dilemma is still not clear, you might consider taking a refresher course on ethics.

To resolve your dilemma, you should decline the partner's entreaty to withhold information from a client, to forge the client's signature on a pleading, and to file such pleading with the court. There can be no "reasonable resolution" to these clear violations of the rules of professional conduct. Moreover, should you learn that the partner engaged in such conduct, notwithstanding your refusal to help, Model Rule 8.3 (a), requires that "[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." You also should consider reporting the partner's misconduct to another partner at the firm, which can allow the firm to mitigate in a timely manner any possible liability it might face.

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