

2016

PRACTICE QUESTIONS

FOR

PROFESSIONAL RESPONSIBILITY

COURSE SUPPLEMENT

Prof. Drury Stevenson

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Cover photo: Stone frieze of law professor lecturing while his students sleep, from the main entrance of the Yale Law School. Photo © Rena Tobey, used by permission.

Note for students: These 345 questions have the same format and style as the questions on the current Multistate Professional Responsibility Exam (MPRE). The multiple-choice format also provides a useful way to test students' knowledge of each provision or clause in each of the Model Rules, as well as the drafters' official Comments (which the MPRE tests along with the Model Rules themselves).

This particular archive of questions are a supplement to the author's recently-published *Glannon Guide to Professional Responsibility*. The *Glannon Guide* provides detailed explanations for each of its questions (more than 170 questions), as well as a helpful introduction to each topic. This book provides only an answer key, but has more questions. All the questions will be very useful in preparing for the exam in Professor Stevenson's course, as well as the MPRE itself.

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**PART I:
MATERIAL
COVERED BY
MID-SEMESTER**

CONFLICTS OF INTEREST: Rules 1.7-1.12

Rule 1.7 Conflict of Interest: Current Clients

1. Attorney had been representing Client in a purely transactional matter, drafting incorporation documents for Client's business, as well as other commercial lease and sale agreements. None of Attorney's work for Client has involved information about the Client's finances or assets. As a result, Attorney did not know anything about the average income, assets, or insurance of Client's business, or even for Client personally, except that he has duly incorporated the business under state law. On a wholly unrelated matter, Victim approached Attorney seeking representation for a lawsuit over damage to Victim's expensive car in a parking lot when Client negligently scraped Victim's car while trying to back out of a parking space with his own vehicle. During the initial interview, Victim gave very few details about the accident or the scope of damages, except to identify Client as the intended defendant and that the incident involved a scraped fender in a restaurant parking lot. The attorney believed there was no significant risk that the representation of Client would materially limit the Attorney's responsibilities to Victim, and vice-versa. The attorney's representation of Client involved only the drafting of a few standard documents for Client's business, and Victim's claim did not relate to the business at all, but to Client's conduct outside of work while driving his personal car in a parking lot. Because the attorney believed there was no conflict here, he did not seek consent from either party, although he mentioned to Victim that he had drafted some documents for Client's business, and Client would obviously learn about the representation of Victim when Attorney filed the lawsuit. May an attorney proceed with representing Victim in this case?
 - a) Yes, because there is no conflict when a lawyer acts as an advocate in one matter against a person the lawyer represents in some other matter, as long as the matters are wholly unrelated.
 - b) Yes, because Attorney did not receive any relevant confidential information from either party so far that he could use against the other in the anticipated litigation.
 - c) No, because absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated.
 - d) No, because Attorney already violated the rules of confidentiality by telling Victim about how he drafted business documents for Client.

2. Attorney has been representing Client in a simple adoption of an orphan from Zimbabwe. Corporation then hires Attorney to defend it against a defective-products lawsuit brought by Victim, whom Attorney does not represent. During the discovery phase of litigation, before trial, Victim's lawyers disclose the list of witnesses they plan to call to support Victim's claims of injuries and the scope of damages. Attorney notices that Client, for whom he has been handling an adoption matter, is going to

testify at trial in support of Victim's claims, against Corporation. Client is still unaware that Attorney is representing Corporation, and Client is merely testifying as a friend of Victim about Victim's character traits of caution and care, and the suffering Victim has endured since the incident with Corporation's defective product. Attorney was not aware that Client even knew Victim, and unsurprisingly did not obtain consent from Client, Corporation, or Victim about this issue. Is Attorney subject to disqualification in this case?

- a) Yes, because a lawyer who normally handles adoptions is probably not competent to represent a corporation in litigation over defective products.
- b) Yes, a directly adverse conflict may arise when a lawyer is required to cross-examine a client who appears as a witness in a lawsuit involving another client, as when the testimony will be damaging to the client who is represented in the lawsuit.
- c) No, because Client is merely a witness in the matter and not a party to the litigation, so Client's interests are not directly adverse to Attorney's other client, Corporation.
- d) No, because neither Client nor Attorney were aware, or could have been aware, that Client would end up testifying in a case in support of a party to whom Attorney would be opposing counsel.

3. Attorney is representing two French restaurants located across the street from each other; the restaurants are bitter rivals and have sued each other in the past, using other lawyers. They are the only French restaurants in that area, so they compete for the same customers – their menus, décor, and prices are very similar. The owners were childhood friends who became sworn enemies as adults when one started a restaurant to compete with the other. Attorney represents one French restaurant in a dispute with its landlord, and the other French restaurant in a lawsuit by a former employee who claims she was wrongfully terminated for discriminatory reasons. When each French restaurant learns that Attorney represents the other, they both express deep dismay and some sense of betrayal, given that each is the other's worst enemy. One of the French restaurants believes Attorney has a conflict of interest and complains to the state bar. The other French restaurant, when it loses its lawsuit with its former employee, sues Attorney claiming that he had a conflict of interest in the representation. Does Attorney have a conflict of interest here?

- a) Yes, simultaneous representation in unrelated matters of clients whose interests are economically adverse, such as representation of competing economic enterprises in unrelated litigation, ordinarily constitutes a conflict of interest and requires consent of the respective clients.
- b) Yes, the state bar will use a subjective test for determining a conflict of interest – whether the client would feel betrayed or perceive a conflict in the situation – and could sanction Attorney, but the conflict here does not reach the level of malpractice.
- c) No, the fact that one client resorted to a malpractice tort claim precludes the state bar from pursuing disciplinary action against the Attorney; and the malpractice claim will fail as the lawyer's conduct could not have changed the outcome of the underlying employment case, which depended entirely on statutory rights.

- d) No, simultaneous representation in unrelated matters of clients whose interests are only economically adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients.
4. Big Firm represents hundreds of corporate clients out of a dozen offices in different states. The firm has no formal procedures in place to check for clients at the outset of representation for new clients, but the managing partner of the firm has an incredible memory and has never failed to spot a potential conflict of interest in the past. Attorney agrees to represent a new corporate client that owns many subsidiaries, and checks with the managing partner, who assured Attorney there are no potential conflicts. After the new corporate client had disclosed a substantial amount of confidential information, it emerged that some of its subsidiaries were directly adverse to other clients of Big Firm. Attorney was completely unaware of the potential conflicts at the time he agreed to the representation, despite asking the corporate client a few questions about the opposing parties in pending litigation it might have. Will Attorney be subject to discipline for not declining representation in this case?
- a) Yes, because ignorance caused by a failure to institute reasonable procedures, appropriate for the size and type of firm and practice, will not excuse a lawyer's violation of the Rules regarding conflicts of interest.
 - b) Yes, because there is a presumption that a company owning several subsidiaries will have at least one adverse interest to other clients of a Big Firm.
 - c) No, as he was unaware of the conflict at the time, but now that the conflict is apparent, Attorney must withdraw from representation
 - d) No, because Attorney reasonably relied upon the managing partner's prowess in identifying conflicts, given that the managing partner had never before made a mistake.
5. Attorney sued Company on behalf of Client in a personal injury matter. During the protracted litigation that ensued, Conglomerate bought Company. Attorney was already representing Conglomerate in a regulatory compliance matter before a federal administrative agency. Assuming this development was unforeseeable at the outset of representing Client against Company, will Attorney have the option to withdraw from one of the representations in order to avoid the conflict?
- a) Yes, because one matter is in state court and the other matter is a completely unrelated federal administrative proceeding.
 - b) Yes, but Attorney must seek court approval where necessary and take steps to minimize harm to the clients, and must continue to protect the confidences of the client from whose representation the lawyer has withdrawn.
 - c) No, if a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation of both clients, unless the lawyer has obtained the informed consent of each client at the outset of the representation.

- d) No, because the federal administrative matter would preempt state tort law under the Supremacy Clause.
6. Two successful business partners hired Attorney to help with the dissolution of the partnership, as the two partners no longer want to work together. Attorney was very concerned about the obvious conflict of interest, but the partners insisted that they did not want to complicate matters unnecessarily by hiring separate counsel, and that they were already in complete agreement about how to divide the business. They even signed informed consent statements acknowledging and waiving the conflict. Each partner believed it would be in both of their best interest to use only one lawyer to dissolve the business. The matter was purely transactional at this point, and did not involve any anticipated litigation before a tribunal. One partner had already mentioned to Attorney that he might need his legal services in setting up a new business, as well as handling some estate planning issues for him. Attorney still believed that dual representation was not a good idea, given the complexity of the business and the debatable future value of some of the patents, goodwill, and other intellectual property involved, and because one partner contributed a much larger share of the startup funds years before. The partner who mentioned hiring Attorney to do estate-planning work wanted the dissolution to include assigning his proceeds from the business to his heirs. Attorney proceeded with the dual representation and the dissolution appeared to proceed smoothly. Is Attorney subject to discipline for representing both partners?
- a) Yes, because Attorney did not reasonably believe that he would be able to provide competent and diligent representation to each affected client.
 - b) Yes, because the facts do not mention whether they split the legal fees evenly, and one of them has mentioned giving Attorney some business in the future.
 - c) No, because the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal
 - d) No, because it appears on these facts that there will be no assets in dispute at all, so the theoretical conflict of interest would have no bearing on their case.
7. Husband and wife decide to divorce, and reach an agreement to share the same lawyer in order to save money. They hire Attorney to represent each of them in Family Court for the dissolution of marriage. Attorney explains that there is an obvious conflict of interest here, but Husband and Wife insist, and sign informed consent forms waiving the conflict and their rights to assert any future claims related to the conflict. Husband and Wife have no children, and have always kept separate bank accounts. Each purchased their own car from the money in their own bank account and each car's title is in only one name. They live in an apartment whose lease is expiring soon, so there is no real property to divide. Would it be proper for Attorney to represent both in the divorce?
- a) Yes, because it appears on these facts that there will be no assets in dispute at all, so the theoretical conflict of interest would have no bearing on their case.

- b) Yes, because both clients consented in writing, the dual representation does not violate law, and Attorney could reasonably believe that he will be able to provide competent and diligent representation to each affected client.
 - c) No, because the representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal
 - d) No, because contingent fees are not permissible in divorce cases, and Husband and Wife's sole motivation in sharing a lawyer was to save money.
8. What is the most frequently occurring enforcement mechanism for the rules regarding conflicts of interest?
- a) Disqualification from representation at the request of the opposing party in litigation
 - b) Disbarment or reprimand by the state bar disciplinary authority
 - c) Legal malpractice action (civil suit) against the lawyer
 - d) Court-imposed monetary sanctions or reprimand
9. Three individuals plan to form a joint venture and ask Attorney to represent them in drafting the necessary documents and making the necessary filings with government agencies. They have already agreed that each individual will contribute exactly one-third of the startup funds for the venture, each will own a one-third share, each will have equal control over the Board, and each agrees to indemnify the others for a one-third share of any personal liability related to the joint venture. They have also agreed that they will have no non-compete agreements. The joint venture will hire managers, marketers, and other employees to operate the business. The three individuals are co-owners of a patent that could potentially be very lucrative when they bring it to market, and have known each other and worked together for a long time. The attorney cannot find any current areas of conflict between them, though he knows that it is technically possible that some unforeseen conflict could arise in the future. The shared objectives and goals of the group lead Attorney to conclude that no conflicts of interest are present and that it would be counterproductive to try to convince each member of the group to sign an informed consent form acknowledging that conflicts of interest exist and that Attorney may still represent everyone at once. May Attorney trust his professional judgment and proceed without obtaining separate consent forms from each person in the joint venture?
- a) Yes, as long as Attorney reasonably believes that he will be able to provide competent and diligent representation to each client, because the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.
 - b) Yes, because the mere possibility of subsequent harm does not itself require disclosure and consent.

- c) No, the situation is likely to limit materially Attorney's ability to recommend or advocate all possible positions that each might take because of his duty of loyalty to the others; representing the group's overall interests in effect forecloses alternatives that would otherwise be available to the client.
 - d) No, because the fact that the individuals already decided to create a joint venture, and sought representation together from a single lawyer, constitutes implied consent to the common representation despite any potential conflicts of interest involved.
10. Attorney agreed to represent Seller, who wishes to sell her business to Buyer, a sale already bogged down in protracted negotiations over sale price, outstanding liabilities, and certain trade secrets. Attorney also represents Buyer in unrelated litigation over custody of his children after a divorce. Buyer and Seller are not litigating against each other, and that Attorney represents each in completely unrelated matters. Must Attorney obtain informed consent from each client to undertake representation of Seller in the negotiations over the sale of the business?
- a) Yes, directly adverse conflicts can also arise in transactional matters, and when a lawyer agrees to represent the seller of a business in negotiations with a buyer represented by the lawyer, not in the same transaction but in another, unrelated matter, the lawyer cannot undertake the representation without the informed consent of each client.
 - b) Yes, but only if the confidential information the lawyer will learn from representing Seller in the transaction could be relevant to Seller's child custody dispute, or vice versa.
 - c) No, because Buyer and Seller cannot be adverse parties if there is no litigation pending between them, nor do they plan to commence litigation against each other in the future.
 - d) No, directly adverse conflicts cannot arise in purely transactional matters, as both parties have impliedly consented to the representation by agreeing to negotiate over the transaction; a lawyer can undertake transactional representation without the informed consent of each client.
11. Which of the following is NOT one of the reasons that a conflict of interest might be "nonconsentable" under the Rules of Professional Conduct?
- a) The lawyer does not reasonably believe that the lawyer will be able to provide competent and diligent representation to each affected client;
 - b) The representation is prohibited by law, as where state substantive law provides that the same lawyer may not represent more than one defendant in a capital case
 - c) One of more clients pay the lawyer lower fees than the other(s)
 - d) The representation involves the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal

12. Comment 16 to Rule 1.7(b)(2) describes three examples of “conflicts that are nonconsentable because the representation is prohibited by applicable state law.” Which of the following is NOT one of the examples of conflicts that are nonconsentable because the representation is prohibited by applicable state law?
- a) State substantive law provides that the same lawyer may not represent more than one defendant in a capital case, even with the consent of the clients
 - b) Under federal criminal statutes certain representations by a former government lawyer are prohibited, despite the informed consent of the former client.
 - c) State hate crime statutes prohibit a lawyer who shares the same protected status as the victim from representing the defendant in the criminal proceeding.
 - d) Decisional law in some states limits the ability of a governmental client, such as a municipality, to consent to a conflict of interest.
13. Client owns a partnership share of a closely-held business, and the other partners vote to impose an involuntary buy-out of Client in order to remove him from the firm. Client is very upset about this, but the partnership agreement clearly permits involuntary buyouts by a majority vote of the other shareholders. Client hires Attorney to represent him in the buyout transaction, to review the necessary documents and provide legal counsel about it. No litigation is under consideration yet. Attorney’s sister is also a lawyer in that city, at another firm, and the sister represents the other shareholders in the partnership. Attorney did not disclose that her sister represented the other partners, as she and her sister are not close and rarely speak, and the matter is unlikely to turn into litigation. Is Attorney, or the other lawyers in her firm, subject to disqualification in this matter?
- a) No, because Attorney and her sister are not close enough for there to be a substantial risk that they will share confidential information, and the matter seemed unlikely to turn into litigation.
 - b) No, as long as both sisters give informed consent in writing, and each reasonably believes that she will be able to provide competent and diligent representation to her client
 - c) Attorney would be subject to disqualification, but ordinarily the other lawyers in her firm would not be subject to disqualification.
 - d) Both Attorney and her firm would be subject to disqualification, because the client did not give written informed consent.
14. Attorney has applied to make a lateral move from her firm to Big Firm, and has already gone through the first two of three rounds of interviews for the position. Attorney agrees to represent Client in filing a breach of contract claim against Construction Company over a commercial development project. Big Firm is representing Construction Company, and the firm’s lawyers drafted the contract that forms the basis of Client’s complaint. Client claims that Construction Company breached a particular provision of the contract that is arguably ambiguous; Construction Company is confident that its conduct falls within the contractual language in that provision. Is it proper for Attorney to undertake representation of Client in this case?

- a) Yes, as long as Client gives informed consent to the representation despite the conflict of interest here.
 - b) Yes, because there is no clear conflict of interest here, because Attorney has not yet started working at Big Firm, and could not have been involved at all in drafting the contract provision that is now in dispute.
 - c) No, as during the previous interviews, Attorney probably gleaned some confidential information about Construction Company from Big Firm.
 - d) No, because when a lawyer has discussions concerning possible employment with an opponent of the lawyer's client, or with a law firm representing the opponent, such discussions could materially limit the lawyer's representation of the client.
15. Which of the following is true about conflicts of interest, according to the Model Rules of Professional Conduct?
- a) Most conflicts are waivable by clients, but only if the clients provide informed consent in writing, and there are three types of conflicts that are nonconsentable
 - b) All conflicts are waivable by clients, but only if the clients provide informed consent in writing
 - c) All conflicts of interest subject the lawyer to disqualification, civil liability for legal malpractice, and sanctions by the state bar
 - d) Most conflicts of interest are nonconsentable, but there are three types of conflicts that are waivable by clients, as long as the clients provide informed consent in writing.
16. A group of several individuals seeking to form a joint venture asked Attorney to represent them in drafting the necessary documents and making the necessary filings with government agencies. Two of the individuals were to provide most of the initial funds for the startup; two others were experienced inventors who were to provide new product designs; two others had expertise in business management and were to serve as managers; and two had proven records in high-end sales and marketing. They have not yet resolved the allocation of ownership shares, bonuses for managers, whether to have anti-compete agreements for each participant, whether patents will belong solely to the joint venture or partly to the inventors themselves, and whether sales reps will work on salary or commissions. Each individual says that she wants whatever terms would be best for the joint venture overall, rather than what would be most beneficial for each one individually. The shared objectives and goals of the group lead Attorney to conclude that no conflicts of interest are present and that it would be counterproductive to try to convince each member of the group to sign an informed consent form acknowledging that conflicts of interest exist and that Attorney may still represent everyone at once. May Attorney trust his professional judgment and proceed without obtaining separate consent forms from each person in the joint venture?
- a) Yes, because the mere possibility of subsequent harm does not itself require disclosure and consent.
 - b) Yes, as long as Attorney reasonably believes that he will be able to provide competent and diligent representation to each client, because the representation

does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.

- c) No, the situation is likely to limit materially Attorney's ability to recommend or advocate all possible positions that each might take because of his duty of loyalty to the others; representing the group's overall interests in effect forecloses alternatives that would otherwise be available to the client.
- d) No, because the fact that the individuals already decided to create a joint venture, and sought representation together from a single lawyer, constitutes implied consent to the common representation despite any potential conflicts of interest involved.

17. The ABA Comment to Model Rule 1.7 (entitled "Conflict of Interest: Current Client") mentions a few reasons that, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated. Which of the following, though probably true, is NOT one of the reasons identified in the Comment?

- a) The client as to whom the representation is directly adverse is likely to feel betrayed
- b) Any time that the lawyer bills for the matter would simultaneously go to both clients, meaning the lawyer inevitably will engage in double billing and receive double fees for every hour worked on the case.
- c) The resulting damage to the client-lawyer relationship is likely to impair the lawyer's ability to represent the client effectively.
- d) The client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

18. Three individuals hire Attorney to represent them as co-defendants in a tort action. Attorney tells them that there could be a potential conflict of interest if he represents all three of them, and that they will need to sign informed consent forms, which they do. The three individuals have common goals and interests in the litigation, so they do not hesitate to sign the forms or inquire further about the implications of the potential conflicts. No further discussion occurs about the issue, and Attorney proceeds with the representation. Could Attorney be obligated to withdraw from representation later in the litigation, if the clients gave written consent to the shared representation at the outset?

- a) Yes, when representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved.
- b) Yes, if the liability insurers for the three co-defendants disagree on the terms of settlement, and were not included in the original written consent.

- c) No, because the Attorney dutifully obtained written consent from each client, as required by the Rules of Professional Conduct.
 - d) No, as long as no situations arise where the lawyer obtains confidential information from one client that he could use to harm the interests of another client, and none of the clients files a cross-claim against another co-defendant.
19. Two clients agree to representation by the same Attorney in a civil action, and both provide written informed consent to the potential conflicts of interest. Halfway through trial, the opposing party unexpectedly makes a settlement offer that one client wants to accept. The other client prefers to decline, as he believes that a favorable jury verdict is a certainty and will be much higher. Attorney strongly encourages them to accept the settlement offer, which he believes is generous, given his perception that their chances for a favorable jury verdict are slim. Unable to reach a consensus on whether to accept the settlement offer, one of the clients revokes his consent to the conflict of interest. Assuming there are no other special circumstances in this situation and that the court would not prohibit withdrawal, must the Attorney withdraw from representation?
- a) Yes, Attorney must petition the court to withdraw from representing both clients.
 - b) Yes, Attorney must withdraw from representing the client who did not revoke consent, and continue to represent the client who revoked consent.
 - c) No, given that both clients consented in writing at the outset of representation, and that the trial is already underway, Attorney can and must continue to represent both clients.
 - d) No, Attorney can continue to represent the other client who did not revoke consent, even if the revoking client terminates the representation and hires another lawyer.
20. Husband and Wife wanted to hire Attorney to prepare their wills. Before the formalities of representation were final, husband spoke with Attorney privately by phone and disclosed that Husband had been having an affair, and that his mistress might be pregnant. Husband forbid Attorney to tell Wife about this. Attorney realizes there could be potential conflicts of interest between husband and wife about the wills, distribution of assets, potential challenges to the will by offspring from outside the marriage, and potential claims for child support against Husband's estate. Would it be proper for Attorney to proceed with representing Husband and Wife in preparing their wills?
- a) Yes, as long as each provides written consent after being informed of the potential conflicts that generally emerge in dual representation
 - b) Yes, because this is a transactional matter, not litigation in which adverse claims could arise.
 - c) No, because Attorney cannot violate the duty of confidentiality to Husband, which would be necessary in order obtain informed consent from Wife.
 - d) No, because it would be improper to prepare a will for Husband under such circumstances.

21. Business Manager and Shift Supervisor, who worked at a customer service call-center, became co-defendants in a lawsuit by a disgruntled former employee. The plaintiff claimed to have been the victim of gender discrimination in the form of a hostile work environment, as well as intentional and negligent infliction of emotional distress related to the same factual allegations about her treatment at the workplace. Business Manager hired Attorney to represent both himself and the Shift Supervisor, who had been the plaintiff's direct superior. Based on Business Manager's initial investigation and review of the personnel files of the plaintiff and the Shift Manager, he believes the allegations are baseless and that the suit will end in a dismissal or summary judgment before trial. Shift Supervisor had a spotless work history, but the plaintiff had numerous interpersonal conflicts with her peers, was frequently late for work or missed work completely, and was the subject of several customer complaints. From his consultations with the defendants, Attorney understood that both Business Manager and Shift Supervisor were equally targets of the complaints. Business Manager and Shift Supervisor both gave Attorney written informed consent to the potential conflicts of interest in having Attorney represent both of them. Business Manager obtained tentative permission to have the business cover the legal fees for Attorney. Near the end of the discovery phase, however, plaintiff produced numerous inappropriate love letters to her from Shift Supervisor, many with explicit sexual overtures, and a few that sounded threatening based on her lack of response to previous letters. In addition, several co-workers of plaintiff gave depositions explaining that they had witnessed Shift Supervisor engaging in inappropriate and unwanted touching of plaintiff on many occasions. Several also testified that Shift Supervisor would often accost her for ten or fifteen minutes outside, before she could reach her workstation, and that this was the cause of her tardiness for work. Business Manager had never heard about any of these problems before. Moreover, during depositions the plaintiff explained that she always had very little contact with Business Manager and had no direct complaints about his treatment of her, and acknowledged that she had never complained to Business Manager about Shift Supervisor's harassment of her. She disclosed that Business Manager was a co-defendant only because her attorney believed it was necessary to name someone from upper management in the lawsuit in order to trigger the legal protections of Title VII and other antidiscrimination laws. Business Manager then revoked his consent to the conflict of interest, explaining that he wanted separate representation from Shift Supervisor. Trial was due to begin two weeks later. Would it be proper for Attorney to continue representing either Shift Supervisor or Business Manager, but withdraw from representing the other?
- a) Yes, Attorney can probably continue to represent Business Manager but not Shift Supervisor, because Shift Supervisor engaged in misconduct that was unknown to Business Manager, and Business Manager is the one who arranged for the payment of the legal fees.
 - b) Yes, Attorney can probably continue representing Shift Supervisor but not Business Manager, given the nature of the conflict, the fact that Business Manager revoked consent because of a material change in circumstances, the expectations of Shift Supervisor, and so on.

- c) No, Attorney must petition the court to withdraw from representing both clients, as he has now obtained confidential information about each of them, and one is unwilling to consent to the continued common representation.
 - d) No, Attorney must continue to represent both clients, because it is the eve of trial and withdrawing would be prejudicial to them, and both consented in writing to the potential conflicts involved with using the same lawyer.
22. Attorney specializes in intellectual property law, and regularly represents both inventors and venture capitalists in tech startup businesses. Even though Attorney represents only one or the other side in each transaction, she may represent an inventor in one contract with a venture capitalist and represent that venture capitalist in drafting agreements with other inventors. Attorney has drafted a standardized “waiver of future conflicts” form that she asks all clients to sign along with their retainer agreement at the beginning of representation. The waiver of conflicts form explicitly consents to representation despite any and all conflicts of interest that might arise regarding Attorney’s past, present, or future clients. When an actual conflict of interest or adverse relationship exists between clients at the outset of representation, Attorney carefully explains the situation to new clients and encourages them to seek advice from other counsel about signing the waiver. When no present conflicts are apparent, but only hypothetical potential conflicts are at issue, Attorney merely says that the form is for hypothetical, potential conflicts of interest that probably will not arise in the current transaction. Is Attorney’s standardized “waiver of future conflicts,” when signed by new clients, likely to be effective in this situation?
- a) Yes, because whenever the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.
 - b) Yes, because Attorney explains obvious, existing conflicts to new clients and then uses an all-inclusive, open-ended waiver form for unforeseen conflicts of interest.
 - c) No, because it violates the Rules of Professional Conduct for a lawyer to ask a client to waive future claims such as a conflict of interest, unless the client has representation by outside counsel in deciding whether to sign the waiver.
 - d) No, if the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.
23. Attorney has a private practice in a large rural township, and she specializes in commercial real estate transactions, such as the sale and lease of farmland, stables, granaries, and mills. As the only lawyer in the township with expertise in this area, she has represented most of the parties who buy and sell commercial real estate there. As a result, most of her clients pose potential conflicts of interest with other current, former, or future clients, so Attorney has a standard “waiver of future conflicts” form that explains conflicts of interest that typically arise in commercial real estate transactions, and she asks every client to sign it at the commencement of representation. Client is a major landholder in the township, who inherited extensive tracts of farmland

from his family, who in previous generations were some of the original settlers in the area. Over the years, Client has sold off dozens of small parcels of farmland to neighboring farmers or small businesses such as honey processors, taxidermists, a hardware store, and a veterinarian. Client has also bought properties at times that were adjacent to his existing landholdings. Client has always used other lawyers for these transactions in the past, and in each previous instance, the other party had separate counsel. Client now wants to hire Attorney to sell a parcel to a real estate developer. Buyer (the developer) is also a client of Attorney on unrelated matters, but the Buyer has hired another lawyer to handle this particular matter. Client and Buyer have had a good working relationship in the past and have consummated a few transactions that went smoothly. When Client meets with Attorney to review and sign a retainer for this representation, Attorney includes with the retainer her standard “waiver of future conflicts” form, without additional oral explanation except to mention that she represents Buyer in an unrelated matter. Client reads the form and signs it. As the negotiations for the sale to the developer proceed, an unforeseen conflict emerges between Client’s interests and the unrelated matters for which Attorney has represented the developer, as one will significantly affect the road traffic for the other. Is Attorney’s standardized “waiver of future conflicts,” signed by Client, likely to be effective in this situation?

- a) Yes, if the client agrees to consent to a particular type of conflict with which the client is already familiar, then the consent ordinarily will be effective with regard to that type of conflict.
- b) Yes, because the conflict of interest was unforeseeable at the time the representation began, and Client was aware that Attorney represented the Buyer.
- c) No, because it violates the Rules of Professional Conduct for a lawyer to ask a client to waive future claims such as a conflict of interest, unless the client has representation by outside counsel in deciding whether to sign the waiver.
- d) No, because it violates the Rules of Professional Conduct for a lawyer to use a standard, one-size-fits-all consent form without additional oral explanation

24. Two co-plaintiffs in a personal injury lawsuit hired Attorney to represent them in the matter. The litigation promised to become very complex, with multiple issues pertaining to liability and multiple potential defendants. Attorney had each client sign a detailed “waiver of present and future conflicts of interest” form and carefully explained the specific types of conflicts that can arise between co-plaintiffs in tort litigation, such as indemnification claims, cross-claims, adversarial positions in response to counterclaims from defendants or third-party interveners, and so on. In addition, Attorney encouraged both clients to consult with separate lawyers for consenting to the conflicts, and both did so. Moreover, both plaintiffs were themselves lawyers and were very familiar with the potential conflicts of interest that could arise from this common representation. Attorney reasonably believed that she would be able to provide competent and diligent representation to each affected client. As the trial date approached, a counter-claim by one of the defendants forced one plaintiff to file a cross-claim for indemnification against the other. Will the written, informed consent

to potential conflicts that each client signed be effective in this situation, so that Attorney does not have to withdraw from the representation?

- a) Yes, because both clients are lawyers and have sophisticated knowledge of potential conflicts of interest that could arise, and they consented in writing to the dual representation.
- b) Yes, because each client had the benefit of independent counsel advising them about the risks of consenting to such conflicts of interest in litigation, and Attorney carefully informed them as well.
- c) No, advance consent cannot be effective if the circumstances that materialize in the future are such as would make the conflict nonconsentable, such as the assertion of a claim by one client against another client represented by the lawyer in the same litigation
- d) No, because it violates the Rules of Professional Conduct for a lawyer to ask a client to waive future claims such as a conflict of interest, and a lawyer cannot withdraw from representation in the middle of litigation.

25. On the same day, Attorney agrees to represent Undocumented Immigrant in a visa-revocation matter, as well Victim in a tort action (product defect) against an automobile manufacturer. The two matters are unrelated. In the second case, Attorney anticipates that the defendant automobile manufacturer will argue that extensive federal safety regulations of automobiles, which require certain safety features and specifications, should preempt state tort law and therefore prevent a state court from adjudicating the case. On the other hand, many undocumented immigrants have relied upon federal preemption of state law in challenging onerous state penal statutes targeted at illegal immigrants. If Attorney prevails in his preemption argument in the vehicle manufacturing defect case, and on appeal creates precedent against federal preemption of state law, the precedent would probably be unfavorable to Attorney's other client, Undocumented Immigrant. The state legislature has several bills pending that would impose criminal sanctions on landlords who lease apartments to undocumented aliens, drivers who transport undocumented aliens to work sites, and contractors who hire subcontractors that employ undocumented aliens. Does the fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of the other client create a conflict of interest, for which the lawyer must obtain consent from each client?

- a) Yes, it creates a conflict of interest, but this type of conflict is nonconsentable because it involves questions of law, so the clients cannot consent to it and Attorney cannot represent both.
- b) Yes, but given that the matters are unrelated and that it is uncertain that the lawyer will succeed in creating new precedent, the parties can give informed consent in writing.
- c) No, the mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.
- d) No, because preemption precedent from one area of law like torts could not possibly affect an unrelated area of law like immigration.

26. Two separate clients hired Attorney, signing their retainer agreements one week apart, on unrelated matters, though both involve property owners' rights under the state's common law doctrine of public trust for beaches, which guarantees public access to beaches up to the vegetation line on the shore. In one case, erosion has moved the boundary back on the property owner's lot to the point where his house is now clearly on the public access portion, and he seeks a declaratory judgment that erosion cannot jeopardize the private ownership of a building and its curtilage. Current public trust doctrine in the state would suggest that the property owner has lost all the value in his property, so he needs to seek a change or exception to the current law. The other case involves a property owner whose lots had always been separated from the beach by a small public park, but erosion has eliminated the park and given him water access from his property, which has greatly increased the value of his land under current public trust doctrine. The state government, however, is seeking a declaratory judgment in his case, arguing for an exception or change to the current law that would rob the owner of the windfall he received due to the erosion. Does this situation present a conflict of interest that would require Attorney to obtain informed consent, in writing, from both clients in order to proceed with the representation?
- a) No, the mere fact that advocating a legal position on behalf of one client might create precedent adverse to the interests of a client represented by the lawyer in an unrelated matter does not create a conflict of interest.
 - b) No, given that both are declaratory judgment actions, it is not possible that one client's interests could be adverse to the other's.
 - c) Yes, a conflict of interest exists if there is a significant risk that a lawyer's action on behalf of one client will materially limit the lawyer's effectiveness in representing another client in a different case, as when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.
 - d) Yes, but this type of conflict involves a question of law so it is nonconsentable by the two clients.
27. Attorney represented Client in a residential real estate transaction. At the same time, Attorney agreed to represent the defendant in a large class-action lawsuit, an alcoholic beverage maker that understated the alcohol content of its products on its labels, leading to numerous cases of inadvertent intoxication, liver damage from continuous consumption, and a few deaths from overconsumption that led to alcohol poisoning. Client was an unnamed member of the plaintiff class in the class-action lawsuit against the alcohol producer. Attorney did not inform Client that he was representing the defendant in the class-action lawsuit or seek consent from Client or from the alcohol producer. Plaintiffs' counsel in the class action lawsuit discovered this situation, and asked the court to disqualify Attorney from representing the defendant. Should Attorney be subject to disqualification under such circumstances?
- a) Yes, because Attorney represents clients whose interests are directly adverse, and he did not seek or obtain written informed consent to the conflict of interest.

- b) Yes, because Client will obviously feel betrayed when she learns that Attorney is representing the defendant in the class action lawsuit, and Attorney might have confidential information from representing Client in the real estate transaction that would be prejudicial in the class action lawsuit.
 - c) No, because a lawyer seeking to represent an opponent in a class action does not typically need the consent of an unnamed member of the class whom the lawyer represents in an unrelated matter.
 - d) No, because the interests of Client and the alcohol producer are not adverse, as Client merely hired Attorney to handle a residential real estate matter.
28. Attorney seeks to represent a class of plaintiffs in a class-action lawsuit over lethal effects of a popular energy drink. The class action will have three named plaintiffs and approximately two thousand unnamed plaintiffs. After the class action lawsuit is underway, Attorney has the opportunity to represent another plaintiff in a personal injury case over a traffic accident, and the defendant is one of the unnamed members of the class action lawsuit over energy drinks. Must Attorney obtain written consent of the unnamed class member before representing the second client in suing the unnamed class member?
- a) Yes, because both are technically clients of the same lawyer, and their interests will be directly adverse, and there is no reason that the lawyer cannot seek consent from each client.
 - b) Yes, because the lawyer will inevitably learn confidential information about the unnamed member of the class in the energy drink lawsuit that he could potentially use to the disadvantage of that member in the lawsuit against the member over the traffic accident, such as financial information or a history of litigiousness.
 - c) No, because when a lawyer represents a class of plaintiffs in a class-action lawsuit, unnamed members of the class are not clients of the lawyer for purposes of conflicts rules; the lawyer does not need to get the member's consent before representing a client suing the person in an unrelated matter.
 - d) No, because the conflict in this case is nonconsentable, given that one client is suing another client of the same lawyer, albeit in an unrelated matter.
29. Attorney handles claims against banks for many clients for issues regarding the failure of banks to investigate in a timely manner claims of fraud or unauthorized use of bankcards. Most of Attorney's work consists of sending demand letters, and most cases never actually result in the filing of a suit. Bank, a small local bank, retains Attorney to handle a particular claim against a customer for non-payment of a loan. Attorney has not represented any clients against Bank. Attorney includes in his contract for services a clause in which Bank waives any conflicts that may arise in the future - conflicts that involve Attorney representing clients against Bank for issues regarding failure to investigate claims of fraud or unauthorized use of bankcards. Is Attorney's conduct proper?
- a) Yes, attorneys may include waivers of future conflicts as long as clients are aware of the waiver.

- b) Yes, attorneys can include waiver clauses for future conflicts in their contracts if the clients are aware of the waiver and the types of future representations that may arise are limited and detailed in the contract.
 - c) No, attorneys cannot ever include waivers of future conflicts in contracts.
 - d) No, attorneys cannot include waivers of future conflicts in contracts if the types of claims expected to be waived are financial in nature.
30. Client and her estranged husband have lived separately for several years. Client faces charges for involvement in an armed robbery. Client retains Attorney to represent her in the armed robbery case. Client's estranged husband learns that Client faced criminal charges and looks up her attorney's information in the local court records. Client's estranged husband then contacts Attorney and asks to make a payment for Client's representation because he feels guilty for leaving her several years before. Attorney accepts payment from Client's estranged husband. Is Attorney subject to discipline?
- a) Yes, attorneys are required to obtain informed consent from the client before accepting payment from a third party.
 - b) Yes, attorneys are required to obtain informed consent from the client before accepting payment from a third party, and the consent must be in writing.
 - c) No, attorneys may accept payments towards client cases from third persons, as long as the third person is a relative of the client.
 - d) No, attorneys may accept any payments toward client cases as long as they do not disclose information about the case to the third person.
31. Attorney represents Company in a civil suit. During Attorney's representation of Company, Attorney begins a sexual relationship with Receptionist at Company. Receptionist's only duties are to answer the phone, route calls, take messages, and prepare outgoing mailings at Company. Receptionist has no authority in decision-making at the Company. Receptionist's only communication with Attorney as an employee of the company is when he calls Company and Receptionist routes his call to the person with whom Attorney wishes to speak. Is Attorney subject to discipline?
- a) Yes, attorneys shall not have sexual relationships with their clients and when an organization is the client of an attorney, the attorney shall not have sexual relationships with employees of the organization.
 - b) Yes, when attorneys represent organizations, attorneys cannot have sexual relationships with anyone they speak with at the company on a regular basis, including administrative personnel.
 - c) No, attorneys are only restricted from having relationships with members of an organization who are directly or are regularly involved with the attorney concerning the organization's legal matters.
 - d) No, attorneys are not restricted from having relationships with employees of an organization the attorney represents because the employees are not the client.
32. The Workers' Union at a manufacturing plant is having annual collective bargaining negotiations with the Management. Wages and benefits are not in dispute this year, as

the parties reached an agreement in the previous year's collective bargaining about a five-year schedule for wages and benefits that was acceptable to both the Union and Management. The sole issue in dispute this year is hiring: the Workers' Union wants the plant to hire five or six new assembly line workers so that there will be more efficiency and more flexibility for workers requesting days off or changes in their shifts. The Management wants to hire fewer new workers, perhaps two at most, in order to keep payroll costs down and their stock share prices high. The Union and Management agree to hire Attorney, an experienced labor lawyer at an outside firm, to facilitate the collective bargaining negotiations. Neither side is currently expecting a breakdown in bargaining that would lead to litigation. Would it be proper for Attorney to have both the Union and the Management as clients while facilitating the negotiations?

- a) Yes, as long as both clients provide written informed consent, common representation is permissible where the clients' interests generally align, even though there is some difference in interest among them, so a lawyer may seek an agreement between them on an amicable and mutually advantageous basis
 - b) Yes, because conflicts of interest rules do not apply outside the litigation arena, and the parties here are not litigating and do not expect to litigate, but instead are merely hiring Attorney to facilitate negotiations of an issue where the two sides are not far apart.
 - c) No, because the parties' interests are directly adverse, and a lawyer may not seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis.
 - d) No, because conflicts of interest in a negotiation situation are nonconsentable, as no lawyer could reasonably believe that the conflict of interest would not materially limit his ability to represent both sides; this is especially true of collective bargaining in the employment context.
33. A producer of popular energy drinks and the owner of a popular chain of video-rental kiosks wanted to undertake a joint venture to distribute energy drinks and DVD rentals through the same kiosks. They approached Attorney to work out the details of the joint venture and draft the necessary legal documents. Attorney would provide common representation to both as clients in the matter. As part of obtaining informed consent from the clients regarding potential conflicts, Attorney explains that all information would be shared, even information that otherwise would have been confidential information in a normal representation with a single client. Attorney explains he will have to withdraw if one client decides that some matter material to the representation should be kept from the other. The energy drink maker, however, has a secret formula for the drinks, and the DVD kiosk owner has a trade-secret method of tracking the distribution and stocking of the DVDs in the kiosks minute-by-minute. Neither wanted the other to discover their trade secrets, but Attorney may eventually possess the secrets as part of his document review for the joint venture. Neither client actually needs to know the trade secrets of the other, however, in order to proceed with the joint venture. Attorney concludes that failure to disclose one client's trade secrets to another client would not adversely affect the representation in this case, and agrees to keep that

information confidential with the informed consent of both clients. Is Attorney's conduct proper?

- a) Yes, in limited circumstances like this, it would be appropriate for the lawyer to proceed with the representation when the clients have agreed, after being properly informed, that the lawyer will keep certain information confidential.
- b) Yes, because no litigation is pending between the clients and the lawyer has not represented them before in other matters, and both are willing to provide written informed consent to the conflicts inherent in common representation.
- c) No, continued common representation will certainly be inadequate if one client asks the lawyer not to disclose to the other client information relevant to the common representation.
- d) No, because the lawyer has an equal duty of loyalty to each client, and each client has the right to be informed of anything bearing on the representation that might affect that client's interests and the right to expect that the lawyer will use that information to that client's benefit.

34. Two brothers work together in a family landscaping business, and each is a named defendant in a lawsuit over a broken sewage pipe on a client's property where the brothers were digging holes to plant new trees. The two brothers hire their family's lawyer, Attorney, to represent them. Though the brothers get along reasonably well, there are a number of topics they avoid discussing, especially related to family matters and the inheritance, and who is to blame for some lost clients and damaged equipment in the recent past. Attorney explains the potential for conflicts of interest in the common representation and asks if they are willing to sign a waiver to the conflicts. One asks the lawyer privately about the issue of confidentiality and privileged information, because it is possible that litigation could emerge within the family later over various issues – the inheritance, control of the business, liability for business losses, and even a marital dispute. Does the common representation have implications for the attorney-client privilege?

- a) Yes, with regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the privilege does not attach, and lawyers should assume that if litigation eventuates between the clients, the privilege will not protect any such communications.
- b) Yes, with regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, common representation provides extra protections for privileged information, and this is one of the main benefits of sharing the same lawyer.
- c) No, with regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, attorney-client privilege still applies to all communications between each client and the lawyer, so clients sharing a lawyer should know that the lawyer may not disclose to them confidential information from the other clients.
- d) No, with regard to the attorney-client privilege, the prevailing rule is that, as between commonly represented clients, the lawyer may not have ex parte

communications with any of the clients, but all communications must occur when all clients are present, in order to safeguard the privilege.

35. Attorney represents Conglomerate Corporation in a regulatory compliance matter, drafting documents for Conglomerate to file with the Securities and Exchange Commission and the Federal Trade Commission regarding executive salaries (for the SEC) and product market share (for the FTC's antitrust inquiry). Conglomerate Corporation owns or co-owns numerous subsidiaries and affiliates in unrelated industries. Attorney's retainer agreement limits his representation exclusively to the SEC and FTC regulatory matters. Victim hires Attorney to represent him in a personal injury suit against Subsidiary Corporation, partly owned by Conglomerate Corporation, over a slip and fall accident in Subsidiary's parking lot. Is it proper for Attorney to represent Victim in a tort action against an affiliate or subsidiary of his other client, Conglomerate Corporation?
- a) Yes, a lawyer who represents a corporation or other organization does not, by virtue of that representation, necessarily represent any constituent or affiliated organization, such as a parent or subsidiary, and the lawyer for an organization may provide representation adverse to an affiliate in an unrelated matter.
 - b) Yes, as long as Attorney obtains written informed consent from both Victim and the legal representative of Conglomerate Corporation, after explaining the conflict of interest fully to each client.
 - c) No, unless Attorney obtains written informed consent from both Victim and the corporate director of Conglomerate.
 - d) No, because the parties are directly adverse in litigation, and therefore the conflict of interest described here is nonconsentable under the Rules of Professional Conduct.
36. Attorney agrees to represent a group of three individuals in the same matter, a business transaction. Their interests are not directly adverse. Attorney has represented each of the clients in separate matters previously, and is already working under a retainer to do legal work for each under the same hourly rates. Two of the clients are currently traveling overseas, but everyone agrees to the representation by conference call. Attorney explains potential conflicts of interest that could arise in common representation, and all clients consent orally to the common representation despite the potential conflicts. Attorney proceeds with working on their matter for three weeks until all the clients are back from traveling and can sign written consent forms. By that time, Attorney has completed 50 hours of work, and has acquired significant confidential information by and about each of the three clients. Would Attorney be subject to discipline for performing this legal work before obtaining written consent to the conflict by each conflict?
- a) Yes, because common representation requires informed consent in writing from each client at the outset of representation.

- b) Yes, because the fact that it was a transactional matter and not litigation means that Attorney could easily have waited three weeks until all clients could be present to sign written consent forms.
 - c) No, it was not feasible to obtain or transmit the writing at the time the client gives informed consent, so the lawyer could obtain or transmit it within a reasonable time thereafter.
 - d) No, because oral consent to a conflict of interest is sufficient when the parties are not directly adverse and each already has an established relationship with the attorney.
37. Attorney serves as the lawyer for a corporation and also is a member of its board of directors. Which of the following is true regarding this situation?
- a) Attorney is subject to discipline, because the responsibilities of the two roles may conflict, as when Attorney must advise the corporation in matters involving actions of the directors, and there is always a material risk that the dual role will compromise the lawyer's independence of professional judgment
 - b) Attorney must limit his legal representation of the corporation to transactional and regulatory matters, and cannot represent the corporation in litigation against adverse parties, as there is always a material risk that the dual role will compromise the lawyer's independence of professional judgment
 - c) Attorney must have the final word on decisions of the board when he is present as a director, because Attorney bears responsibility for the decisions in the form of potential legal malpractice liability, which does not apply to the other directors who are not lawyers.
 - d) Attorney must advise the other board members that in some circumstances, matters they discuss at board meetings while Attorney is there as a fellow director would not be protected by the attorney-client privilege in later litigation; and that conflict of interest considerations might require Attorney's recusal as a director, or might require Attorney to decline representation of the corporation in a matter.
38. A municipal election for a seat on the city council was very close one year, resulting in a run-off election that was ever closer. Both candidates claimed victory and each accused the opposing candidate of voter fraud and violations of various election rules. There is potential for litigation if the two cannot agree as to a winner in the election, with one or the other conceding. Attorney is a prominent lawyer in the community and has previously represented each candidate in various legal matters. Both candidates would like to hire Attorney to represent them in negotiating a resolution to the election. Each candidate fully understands their adverse interests and the potential conflicts of interest for Attorney, but each is willing to provide written informed consent in order to have Attorney represent them both in facilitating the negotiations. May Attorney represent both candidates in this negotiation?
- a) Yes, common representation is permissible where the clients' interests generally align, even though there is some difference in interest among them, so Attorney may pursue an agreement on an amicable and mutually advantageous basis.

- b) Yes, because conflicts of interest rules do not apply outside the litigation arena, and the parties here are not litigating and no litigation is pending, but instead are merely hiring Attorney to facilitate negotiations of an issue where the two sides are not far apart.
 - c) No, a lawyer may not represent multiple parties to a negotiation whose interests are fundamentally antagonistic to each other, even in a negotiation.
 - d) No, because the fact that Attorney has represented each of the parties in the past means that he would possess confidential information that would make mutual representation nonconsentable in this case.
39. Two sisters are co-tenants of a house that they inherited from their father. They want to sell the house and hire Attorney to handle the real estate transaction. Attorney explains the potential for conflicts of interest in detail, and each sister readily agrees to provide written informed consent in the form of a waiver of future conflicts of interest. After a long period, they finally find a buyer who is interested in the house, but the buyer wants to impose several onerous conditions on the purchase, and engages in unreasonably protracted negotiations over the purchase price. The sisters themselves cannot agree on whether to accept any of the buyer's proposals, further dooming the negotiations. Eventually, one sister becomes frustrated with Attorney over the prolonged, hitherto unsuccessful negotiations, and fires Attorney. The other sister wants Attorney to continue the representation. With regard to the sister who seeks to discharge Attorney, may she do so?
- a) Yes, but only if discharging the lawyer will not be prejudicial to the interests of the buyer, who has already invested a lot of time and energy in the negotiations to purchase the property.
 - b) Yes, each client in the common representation has the right to discharge the lawyer as stated in Rules of Professional Conduct and the accompanying Comments.
 - c) No, because she signed a waiver of future conflicts of interest, which is binding and safeguards Attorney against premature discharge.
 - d) No, because by agreeing to common representation with her sister, she implicitly agreed that discharging Attorney would require assent of both sisters, as they are both clients.
40. Three co-owners of a successful startup business hire Attorney to help with working out the financial reorganization of their enterprise. Attorney seeks to resolve potentially adverse interests by developing the parties' mutual interests. In assenting to represent all the parties as clients simultaneously, Attorney agrees to adjust the relationship between clients on an amicable and mutually advantageous basis. The clients each provide written consent to the potential conflicts of interest. Is it proper for Attorney to represent three clients with potentially adverse interests in a negotiated transaction?

- a) Yes, common representation is permissible where the clients' interests generally align, even though there is some difference in interest among them, so Attorney may pursue an agreement on an amicable and mutually advantageous basis.
- b) Yes, because conflicts of interest rules do not apply outside the litigation arena, and the parties here are not litigating and do not expect to litigate, but instead are merely hiring Attorney to facilitate negotiations of an issue where the two sides are not far apart.
- c) No, because the parties' interests are directly adverse, and a lawyer may not seek to establish or adjust a relationship between clients on an amicable and mutually advantageous basis.
- d) No, because conflicts of interest in a negotiation situation are nonconsentable, as no lawyer could reasonably believe that the conflict of interest would not materially limit his ability to represent both sides; this is especially true of collective bargaining in the employment context.

Rule 1.8 Conflict of Interest - Current Clients: Specific Rules

41. Attorney represents Client in a civil suit. Client and Attorney often discuss their hunting trips and have gone hunting together on several occasions. Client tells Attorney he is purchasing a piece of property for hunting with five other people and asks Attorney if he would like to go in on the purchase. Attorney tells Client he would like to join in the purchase and he provides Client with a check for his portion of the purchase price. Is Attorney subject to discipline?
- a) Yes, attorneys shall not enter into transactions with clients that result in joint ownership of property.
 - b) Yes, attorneys shall not engage in social activities with current clients or enter into transactions that result in joint ownership of property.
 - c) No, attorneys are not restricted from entering into transactions with clients as long as the transactions are not related to the current representation of the client and the client gives informed consent.
 - d) No, attorneys are allowed to enter into fair and reasonable business transactions with clients as long as the client is informed in writing of the benefit of seeking advice from independent counsel and gives informed consent, in writing and signed by the client, of the transaction details.
42. Attorney represents Client in a civil matter, and has represented Client several times before. Client and Attorney purchase a piece of property together, with an appraisal value of \$4 million. Each contributes fifty percent to the purchase price. Client received a five percent interest in the property and Attorney receives a ninety-five percent interest in the property. Attorney received a greater interest in the property as payment for representing Client for several traffic citations recently, with the total fees being around \$2000, but the value of the representation is far less than the value of the

additional interest Attorney received in the property. Client was represented by independent legal counsel for the property purchase. Is Attorney subject to discipline?

- a) Yes, the business transaction must be fair and reasonable even when the client obtains representation by independent legal counsel, though representation by counsel will be a factor in determining the fairness of the transaction.
- b) Yes, attorneys cannot accept an interest in an asset of a client as a fee for representation.
- c) No, any requirement that the business transaction be fair and reasonable is eliminated when the client is represented by independent legal counsel, as we always presume that the client's independent counsel will detail the unfairness and discourage transactions that are unfavorable to the client.
- d) No, attorneys can enter into business transactions with clients as long as they are unrelated to the current matter for which the attorney is representing the client.

Rule 1.8 Cmt. 4

43. Client hires Attorney in high-profile murder case in which Client is the defendant. Client is unable to pay the fee, but offers Attorney full media and literary rights in exchange for representation. Attorney agrees, but specifically states in contract that no media or literary rights shall be used by Attorney until the case concludes. Is Attorney subject to discipline?

- a) Yes, attorneys cannot make an agreement with a client giving the lawyer media and/or literary rights in exchange for representation before the conclusion of the case.
- b) No, attorneys can accept media and/or literary rights as long as they do not use such rights until after the conclusion of the case.
- c) Yes, attorneys shall not ever accept media and/or literary rights in exchange for services provided to a client.
- d) No, attorneys are authorized to accept media and/or literary rights in exchange for services and may immediately use such rights if they are given in exchange for representation.

44. Client is represented by a lawyer in a law firm for a malpractice suit against a doctor. Client incurred significant medical bills and expenses after a surgery went unusually wrong. Attorney, who works in the same law firm as the lawyer representing Client, offered to give Client a set amount of money each month until the case ended. Client could then repay this attorney with his recovery from the lawsuit. Is Attorney subject to discipline?

- a) Yes, attorneys cannot provide financial assistance to their clients and this rule applies to other attorneys in the firm.
- b) Yes, attorneys can provide financial assistance to clients but not if the funds are subject to reimbursement.
- c) No, attorneys not directly representing a client can provide financial assistance to clients of other attorneys.

- d) No, attorneys can provide financial assistance to clients as long as the funds are subject to reimbursement.
45. Attorney represents Client, a non-relative of Attorney, in legal matters and has done so for many years. Client retains Attorney to prepare a will for Client. Client asks Attorney to include in the will a substantial amount of money be given to Attorney as a gift of appreciation for Attorney's years of service, though not as any form of payment for services rendered. Attorney asks Client to seek independent legal counsel prior to including the gift in the will. Upon obtaining advice from independent legal counsel, Client asks Attorney to proceed with the will as directed. Attorney includes the gift in the will. Is Attorney subject to discipline?
- a) Yes, attorneys shall not prepare legal instruments such as wills for clients if the will contains a substantial gift to that attorney.
 - b) Yes, attorneys shall not accept any substantial gift from a client.
 - c) No, attorneys may include any gifts from clients in a will prepared by the attorney, regardless of whether the client receives advice from independent legal counsel, as long as the gift is not solicited by the receiving attorney.
 - d) No, attorneys may include substantial gifts to themselves when preparing a will for a client if directed by a client, as long as the client receives advice from independent legal counsel and the gift is not solicited by the receiving attorney.
46. Attorney, a partner at a law firm, prepares a will for Sister. In the will, Sister directs Attorney to receive a substantial part of her estate. Attorney also recommends Sister appoint Attorney as the executor of the will because of his knowledge in this field. Attorney explains to Sister the role of the executor and the pay the executor of the estate will receive, and discussed alternative executor choices with her. Attorney recommends Sister seek independent legal counsel regarding the issue of the executor. Sister does so, and then she asks Attorney to list him as executor in the will. Is Attorney subject to discipline?
- a) Yes, attorneys cannot include substantial gifts to themselves in legal instruments such as wills prepared by the attorney for the client.
 - b) Yes, attorneys cannot recommend that a client appoint the attorney as the executor unless the client obtains the advice of independent legal counsel and gives informed consent confirmed in writing.
 - c) No, attorneys are not prohibited from including gifts to themselves in a will prepared by an attorney for a person related to the attorney, even if the gift is substantial.
 - d) No, an attorney may recommend the client appoint the attorney as executor as long as the client receives advice from independent legal counsel regarding the appointment of the attorney as executor prior to signing the will.
47. Attorney represents Client, a wealthy executive, for the first time in a divorce case. Attorney learns that Client intends to purchase and develop several parcels of land in

an undeveloped area on the outskirts of the city. Attorney also represents Physician in an estate planning matter. Attorney and Physician have a longstanding relationship. Attorney mentions the parcels of land that are for sale on the outskirts of the city, which Client brought to Attorney's attention. Attorney recommends that Physician also try to buy one of the parcels of land as an investment for the estate, knowing that the area will soon see development and the property values will increase. Even in the short term, Attorney knows that Physician could probably make a quick profit by buying a parcel and selling it to Client when Client gets around to purchasing the parcels. Attorney did not mention to Physician that Client was the individual planning to purchase and develop the parcels, or reveal anything about his representation of Client. Is Attorney subject to discipline?

- a) Yes, because using information gleaned from representation of a client to the disadvantage of the client violates the lawyer's duty of loyalty, even when the lawyer uses the information to benefit a third person, such as another client.
- b) Yes, because Attorney should have given Client's contact information to Physician so that Physician could inquire more directly about the plans for development, and see if Client would be interested in purchasing the parcels together.
- c) No, because Attorney was careful not to divulge Client's identity or any confidential information about Client's case and Attorney is acting in the Physician's best interest, not engaging in self-dealing.
- d) No, because Attorney is merely recommending to another client that he buy a parcel of land, using information from one client to help another client, and there is no conflict of interest here.

48. Attorney represents several clients in various matters before the Federal Trade Commission. In one proceeding, the FTC adopts a new interpretation of a recently enacted statute about unfair trade practices, and this becomes the rule of the case. Attorney has some new clients who are at the beginning stages of an FTC inquiry of their business pertaining to the requirements of the unfair trade practices statute. Without mentioning the identity of the other client or the exact nature of the proceedings, Attorney informs the new clients that the FTC has just adopted a particular interpretation that could be very favorable to the new clients in their interactions with the agency, as long as the clients conduct certain internal audits and recordkeeping. Is Attorney subject to discipline for sharing with new clients this information he learned during the representation of the other client?

- a) Yes, because using information gleaned from representation of a client to the advantage of another client violates the lawyer's duty of loyalty, even when the lawyer uses the information to benefit a third person, such as another client.
- b) Yes, because it violates public policy for lawyers to exploit government agency interpretations used against one regulatory violator to help other potential violators gain an advantage against the agency.
- c) No, the conflict of interest rules do not prohibit uses that do not disadvantage the client, so a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients.

- d) No, because the other clients could eventually have discovered the FTC's new interpretation of the statute without Attorney providing the information, given that some written decision of the agency ruling would eventually be available.
49. Attorney obtained a successful outcome in Client's matter, and Client was grateful. Client sent Attorney a gift basket that year as a holiday gift, containing high-quality fresh fruit, sample-size jars of gourmet fruit preserves, and a few other delicacies. The gift basket cost Client \$50. Is it proper for Attorney to accept this gift, or must Attorney refuse it?
- a) Yes, because as long as a lawyer does not solicit the gift, there is no restriction on lawyers accepting unsolicited gifts from clients.
 - b) Yes, a lawyer may accept a simple gift such as a present given at a holiday or as a token of appreciation.
 - c) No, a lawyer shall not accept any substantial gift from a client, unless the lawyer or other recipient of the gift is related to the client.
 - d) No, because the lawyer's entire compensation for obtaining the favorable outcome should have been in the original retainer agreement and its schedule of fees, so any additional compensation or transfers from a client to a lawyer constitute an unwritten modification of the retainer agreement.
50. Client hires Attorney to represent her in business litigation. Another lawyer in the firm, unknown to Attorney, approaches Client with a proposal for an unrelated business transaction, the sale of a parcel of real estate adjacent to the lawyer's own land. Client agrees to sell the other lawyer in the firm the parcel of real estate for a reasonable price. The lawyer is not involved at all in the representation of client and works exclusively in the estate-planning department of the firm, rather than in litigation. Must the lawyer nevertheless advise the client in writing of the desirability of seeking the advice of independent legal counsel, and obtain written informed consent from the client before proceeding with the purchase?
- a) Yes, because a prohibition on conduct by an individual lawyer under the conflicts of interest rules would automatically apply to all lawyers associated in a firm with the personally prohibited lawyer, even if the first lawyer is not personally involved in the representation of the client.
 - b) Yes, because the fact that the lawyer owns the adjacent real estate to the client's parcel of land means that he has a special conflict of interest with the client that would not necessarily apply to the other lawyers in the same firm.
 - c) No, because the lawyer who is buying the real estate from Client is not involved in the representation of Client, and the Rules of Profession Conduct would not impute Attorney's potential conflicts of interest to the other lawyers in the firm.
 - d) No, because the lawyer is willing to pay a fair and reasonable price for the parcel of land, so there is no risk that the transaction will be to the disadvantage of the client.

Rule 1.9 Duties to Former Clients

51. Attorney represented Husband in a divorce case against Wife. Several years later, Wife contacted Attorney regarding filing an enforcement against Husband for Husband's failure to pay child support. Attorney called Husband at a phone number provided by Wife. Attorney discussed the conflict with Husband and Husband advised that he was not opposed to Attorney representing Wife. Attorney then accepted the case and filed the enforcement. Is Attorney subject to discipline?
- a) Yes, attorneys shall not represent persons whose interests would be materially adverse to those of a prior client.
 - b) Yes, attorneys shall obtain informed consent, confirmed in writing, if representing a person in a case in which that person's interests would be materially adverse to a previous client's interests.
 - c) No, attorneys may represent a person whose interests are materially adverse to those of a prior client, as long as the attorney advised the person seeking to retain the attorney and makes a reasonable effort to contact the prior client.
 - d) No, attorneys are not prohibited from representing adverse parties as long as both parties give informed consent.
52. Client manufactures a new generation of magnetic-resonance imaging machines for medical diagnostics in hospitals. The machines sell for nearly one million dollars apiece. Three years ago, Client hired Attorney to draft a Purchase and Sale Contract for Client to use whenever Client sells one of the devices to a hospital. Attorney's representation of Client ended after drafting a model contract, and Attorney has done no legal work for Client since. Last week, Hospital Administrator hired Attorney to handle a dispute with the manufacturer of one of its high-end diagnostic machines. Attorney quickly learns that the faulty device is one of Client's magnetic-resonance imaging machines, and that the Hospital Administrator consummated the purchase by signing one of the contracts that Attorney had drafted. Hospital Administrator merely seeks to rescind the contract and return the machine for a full refund; the hospital has not yet incurred damages due to the faulty machine, but the device is unusable and was very expensive. Would it be proper for Attorney to represent Hospital Administrator in this case?
- a) Yes, because Attorney's representation of the manufacturer ended three years ago, so there is no conflict of interest or direct adversity between Attorney's current clients.
 - b) Yes, because the hospital is not seeking any damages besides a refund of the purchase price in exchange for returning the faulty machine, which merely puts the manufacturer back in the same place as if the sale had never occurred; therefore, Attorney's representation of the Hospital Administrator would not be materially prejudicial to the manufacturer.
 - c) No, because under the Rules of Professional Conduct, a lawyer could not properly seek to rescind on behalf of a new client a contract drafted on behalf of the former client.

- d) No, because under the Rules of Professional Conduct, if a period of three years or more has elapsed since the termination of representation for a former client, no conflict of interest exists between the former client and new clients the lawyer undertakes to represent.

53. Attorney previously represented Client in securing environmental permits to build a shopping center. State and federal agencies granted the necessary permits. Construction of the shopping center, however, did not begin immediately, because demolishing the outdated structures on the land and clearing the debris exhausted Client's initial supply of investment funds. Attorney's representation of Client ended once the environmental permits were securely in hand. Two years later, Client found another investor and was ready to begin construction. In the meantime, the residents of the neighborhoods around the shopping center had turned against the project, out of concerns for the increase in traffic and litter that it could bring to the area, as well as the flooding of adjacent yards that would result from the rainwater runoff from a new parking lot. The "Not In My Back Yard Association" (NIMBY Assoc.) formed and learned that the rezoning of the property by municipal authorities to permit a shopping center was still pending, with an upcoming public hearing on the schedule. NIMBY Assoc. hired Attorney to represent the neighbors in opposing the rezoning on the basis of environmental considerations. Would it be proper for Attorney to represent the neighbors in this matter?

- a) Yes, because Attorney's representation of Client terminated more than a year and a day prior to this, so there is no potential for betraying a current Client's confidential information by representing the adverse interests of the neighbors.
- b) Yes, because Attorney's prior representation of Client involved securing environmental permits from state and federal authorities, and the new representation would involve a rezoning hearing before a municipal authority.
- c) No, because the matters are "substantially related," as there is a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter, such as detailed reports about the potential environmental impact of constructing the shopping center.
- d) No, because the neighbors are acting in their own self-interest rather than thinking about the greater good that would result from constructing the shopping center, and even among the group of neighbors there are probably conflicts of interest depending on who lives closest to the proposed shopping center.

Rule 1.9 Cmt. 3

54. Attorney previously represented Client in securing environmental permits to build a shopping center. State and federal agencies granted the necessary permits. Construction of the shopping center, however, did not begin immediately, because demolishing the outdated structures on the land and clearing the debris exhausted Client's initial supply of investment funds. Attorney's representation of Client ended once the environmental permits were securely in hand. Two years later, Client found

another investor, overcame neighborhood opposition to the construction, obtained favorable rezoning for the parcel, and constructed the shopping center. Several business tenants moved in and operated in the shopping center. Eighteen months later, one of the tenants, an organic pet food store, was unable to pay rent for her unit for two consecutive months, so the property manager commenced eviction proceedings. Tenant hired Attorney to represent her in the eviction proceedings, but the shopping center's lawyer filed a motion to have Attorney disqualified due to the substantial relationship between his previous work in securing environmental permits for the building and the present legal dispute with one of the shopping center tenants. Is Attorney subject to disqualification from representing Tenant?

- a) Yes, because he previously represented the developer who constructed the shopping center, and is now representing a party with directly adverse interests to the shopping center.
- b) Yes, because the confidential information Attorney learned in the process of securing environmental permits prior to construction would certainly be substantially related to the nonpayment of rent by a tenant a few years later, after the shopping center is operational.
- c) No, because as a public policy matter, it is difficult for small business owners to find and afford legal representation, especially when facing something as potentially devastating as an eviction.
- d) No, the matters are not substantially related because they do not involve the same transaction or legal dispute, and the confidential information Attorney learned in the process of securing environmental permits prior to construction would not relate to the nonpayment of rent by a tenant a few years later, after the shopping center is operational.

Rule 1.9 Cmt. 3

55. Businesswoman hired Attorney to represent her in a tax dispute with the government, in which the government accused her of hiding assets in overseas accounts and failing to report income from certain obscure investments. During this representation, Attorney learned extensive private financial information about Businesswoman, but the representation ended at the resolution of the tax case. Several years later, after the termination had ended, the husband of the Businesswoman filed for divorce. Attorney was the only lawyer the husband knew, so he retained Attorney to represent him in the divorce against Businesswoman. Businesswoman's lawyer moves to have Attorney disqualified from representing the husband, but Attorney claims that the matters were not substantially related enough to merit disqualification. Is Attorney correct?

- a) Yes, because resolving disputes with a government entity involves numerous procedural protections and administrative burdens of proof that are inapplicable in divorce proceedings in Family Court.
- b) Yes, because Attorney's representation of Businesswoman terminated at the resolution of the tax matter, so there is no potential for betraying a current client by representing Businesswoman's husband.
- c) No, matters are "substantially related" if there is a substantial risk that confidential factual information that would normally have been obtained in the prior

representation would materially advance the client's position in the subsequent matter, such as personal financial information.

- d) No, because Businesswoman's troubles with the government over unpaid taxes are probably what led to the divorce from her husband, and the stress that the tax case put on the marriage is likely to be a major issue in the divorce proceeding.

Rule 1.9 Cmt. 3

56. Attorney worked for a small plaintiffs' firm in Dallas, Texas. The firm undertook the representation of Victim, who suffered severe injuries in a traffic accident with a large truck, allegedly due to the truck driver's negligence. Attorney was not involved in the case at all; another associate at the firm represented Victim in the lawsuit. Big Firm, which has offices in several states, is defending the trucking company in the personal injury lawsuit brought by Victim. Attorney's small firm has a single office and a computer network that allows the five lawyers there to share documents and files from all their cases with each other. Any lawyer in the firm could access all of the other lawyers' documents, which saved time as lawyers could copy and paste from various motions and pleadings that other lawyers had drafted previously on unrelated matters. Every Thursday afternoon, there was a mandatory meeting of the lawyers in the firm, in which they discussed whether to accept the cases of new potential clients, and they discussed how the pending litigation of each lawyer was proceeding. The lawyers exchanged advice and suggestions for one another's cases. Attorney did not make partner at the small firm, so he left and went to the Kansas satellite office of Big Firm instead. Big Firm assigned Attorney to work on the trucking company case, the same case in which his previous firm represented the opposing party. Attorney had not worked previously on the case and had heard about it only in passing during the weekly litigation meetings at his previous firm, and now remembers almost nothing from the conversations. Should Attorney be subject to disqualification from defending the trucking company?

- a) Yes, if a lawyer has general access to files of all clients of a law firm and regularly participates in discussions of their affairs, it creates an inference that such a lawyer in fact is privy to all information about all the firm's clients, and the burden of proof should rest upon the firm whose disqualification is sought.
- b) Yes, because Attorney is familiar with all the litigators at the firm of opposing counsel and knows each of their strengths and weaknesses as litigators and what strategies they like to use, which would give Attorney an unfair advantage in any case in which they serve as opposing counsel.
- c) No, if a lawyer while with one firm acquired no knowledge or information relating to a particular client of the firm, and that lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or a related matter even though the interests of the two clients conflict.
- d) No, because Attorney now works for a firm in Kansas and the opposing counsel has its office only in Texas, so Attorney would not be subject to disqualification, but not the other lawyers in the new firm would be if they have a Texas law license.

Rule 1.9 Cmt. 5

57. Attorney worked at Big Firm, which was disqualified from representing Client in a case because one of the other lawyers at the firm had a conflict of interest regarding a former client, and this conflict was imputable to the entire firm. The firm was not timely in implementing screening measures and became subject to disqualification. Attorney was at the firm during this time, but was not involved in the matter and did not learn any confidential information about Client. Attorney left that firm and went to work at another firm. It turned out that Attorney's new firm is representing Client instead – Client hired the new firm after the previous firm was subject to disqualification. The new firm has no measures in place to screen Attorney from participation in the matter, though Attorney is not in fact participating in the representation. Will the new firm be subject to disqualification now, because Attorney joined the firm from another firm that was subject to disqualification?
- a) Yes, because the “taint” that Attorney brings from being part of a firm disqualified from the matter will now be imputable to the other lawyers in the new firm, without adequate screening measures in place.
 - b) Yes, unless the opposing party gives informed consent, confirmed in writing, to the new firm's representation of Client despite Attorney's presence at the firm.
 - c) No, there is no doctrine of double-imputation that would impute a purely imputed conflict from Attorney onto the other lawyers in the new firm.
 - d) No, as long as Attorney receives no part of the fees received for the representation.

Rule 1.10 Imputation of Conflicts of Interest: General Rule

58. Attorney is a managing partner in a law firm, and owns \$100,000 worth of stock in Conglomerate Corporation, the named defendant in a new antitrust suit. Attorney's total compensation from the firm is around \$120,000 per year, including bonuses, and his stock holdings in Conglomerate are his most valuable asset besides his home, which is worth about \$300,000 but Attorney has very little equity in it. Attorney supervises, at least indirectly, all the associates in the firm. Another lawyer in the firm seeks to represent the plaintiffs in the antitrust action against Conglomerate Corporation, which is not a client of the firm. Would it be proper for the firm to represent the plaintiffs in litigation against Conglomerate Corporation?
- a) Yes, as long as Conglomerate provides written informed consent to the potential conflict of interest, and the firm carefully screens Attorney from the case.
 - b) Yes, as long as the plaintiffs provide written informed consent to the potential conflict of interest, and the firm carefully screens the other lawyer representing them from the rest of the firm.
 - c) No, because the personal interest of the firm's managing partner in Conglomerate is so great, relative to his earnings and assets, that there is a significant risk of materially limiting the representation of the plaintiffs in their cause of action against Conglomerate.
 - d) No, because it is a nonconsentable conflict of interest for firm to represent both adverse parties in litigation.
59. Attorney recently moved laterally to a new firm. Attorney's previous firm represented Conglomerate Corporation and Attorney occasionally worked on some of Conglomerate's legal matters. Attorney's new firm has recently decided to represent Plaintiffs in a lawsuit against Conglomerate, and the cause of action arises from a new consumer protection statute that the state legislature passed in its last session. Attorney had left the previous firm before the new lawsuit began, and will not work on the new lawsuit at all. Would it be proper for Attorney's new firm to represent the Plaintiffs in an action that is directly adverse to Conglomerate Corporation?
- a) Yes, as long as the new firm screens Attorney from the case, and provides written notice to Conglomerate about its screening procedures, as well as periodic certifications that the firm is indeed following the screening procedures regarding Attorney.
 - b) Yes, as long as the new firm obtains written informed consent from Conglomerate, and screens Attorney from the case, providing written notice to Conglomerate about its screening procedures, and periodic certifications of compliance with the screening protocols.
 - c) No, unless the firm obtains written informed consent from both the Plaintiffs and from Conglomerate Corporation, and declines representation of the plaintiffs in this case.
 - d) No, because Attorney has enough confidential information from working on Conglomerate's previous legal matters that there is a substantial risk that the firm will have an unfair advantage in the litigation.

60. Attorney's new firm agrees to represent Client in an action against Corporation, which Attorney's previous law firm has represented for many years, and continues to represent in the present matter. Conglomerate's lawyers, that is, Attorney's previous firm, moves to disqualify Attorney's new firm from representing Client. The partners at Attorney's new firm were unaware that Attorney's previous employer represented Conglomerate, and the partners at her new firm first learned of this when they received the motion to disqualify their firm. The firm immediately implemented screening procedures to keep Attorney from working on the case or receiving or sharing any confidential information about the case or about Conglomerate's other legal matters. The firm provided notice to opposing counsel about the screening procedures and plans to provide periodic certifications of compliance as well. Should Attorney's new firm be subject to disqualification under these facts?
- a) No, because they implemented appropriate screening procedures as soon as they learned of Attorney's conflict of interest, and provided notice to the opposing party.
 - b) No, because at this point disqualification would be very disruptive to the litigation and prejudicial to Client.
 - c) Yes, unless Client provides written informed consent to waive the potential conflict of interest.
 - d) Yes, because the new firm did not implement the screening procedures soon enough.

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

61. The Comment to Rule 1.11, "Special Conflicts of Interest for Former & Current Government Officers & Employees" offers several policy interests that the rule seeks to balance. Which of the following is NOT one of the state policy interests?
- a) "A lawyer should not be in a position where benefit to the other client might affect performance of the lawyer's professional functions on behalf of the government."
 - b) "Unfair advantage could accrue to the other client by reason of access to confidential government information about the client's adversary obtainable only through the lawyer's government service."
 - c) "If experience in government service makes lawyers excessively marketable thereafter in the private sector, or results in excessive financial rewards for lawyers with government experience once they enter the private sector, lawyers may enter government service for the wrong reasons or out of self-interest, rather than acting in the public interest."
 - d) "The rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."

Rule 1.11 Cmt. 4

62. Attorney worked for Big Firm for several years, during which he represented Conglomerate Corporation on several matters. At the beginning of representation in each matter, Attorney obtained written informed waiver of future conflicts of interest from Conglomerate Corporation, specifically including the possibility that Attorney might later represent the government in unrelated matters adverse to Conglomerate Corporation. Attorney eventually left Big Firm and went to work for Federal Regulatory Agency, in its enforcement and litigation division. On behalf of Federal Regulatory Agency, Attorney then brought an enforcement action against Conglomerate Corporation for some very recent regulatory violations. The new matter was mostly unrelated to any previous work Attorney performed for Conglomerate Corporation. Is Attorney subject to disqualification in this matter?
- a) Yes, because as a government lawyer Attorney will presumably gain confidential government information about Conglomerate Corporation that he could use to Conglomerate's disadvantage.
 - b) Yes, because Attorney's experience in representing Conglomerate Corporation before being a government lawyer gives Attorney an unfair advantage in the current litigation, as Attorney is now familiar with Conglomerate's litigation strategies and corporate hierarchy
 - c) No, as long as the appropriate government agency gives its informed consent, confirmed in writing.
 - d) No as long as Conglomerate Corporation ratifies its earlier waiver of future conflicts of interest.

Rule 1.11(d)(2)(i)

63. Attorney spent several years working for Big Firm in its business litigation division. While there, Attorney represented Client in an action against Conglomerate Corporation alleging unfair trade practices and antitrust violations. Attorney eventually left Big Firm and accepted a position at a federal regulatory agency. There, Attorney's first assignment was to bring an enforcement action against Conglomerate Corporation for violating antitrust laws and unfair trade practice laws. Attorney obtained written informed consent from his previous Client to pursue a related matter against Conglomerate, but not from the agency itself or from Conglomerate Corporation. Is it proper for Attorney to represent the government in an enforcement action against his prior opponent, if the matter is substantially related?
- a) Yes, because the interests of Attorney's previous Client and his new employer align, rather than being adverse, so there is no conflict of interest.
 - b) Yes, because the conflict of interests rules apply to attorneys leaving government service for private practice, but here, Attorney has done the opposite, going from private practice to government service.

- c) No, a lawyer who has pursued a claim on behalf of a private client may not pursue the claim on behalf of the government, unless the appropriate government agency gives its informed consent, confirmed in writing.
- d) No, because Attorney did not obtain written informed consent from Conglomerate Corporation at the outset of the new enforcement action, even though the action is directly adverse to Conglomerate Corporation.

Rule 1.11 Cmt. 3

64. A subcontractor on a highway construction project negligently damaged the General Contractor's equipment and simultaneously inflicted property damage on a state building storing the equipment. The relevant state office, along with the general contractor, hire Attorney to represent them in a lawsuit against the subcontractor. The state client and the private party each provide written informed consent to potential conflicts of interest in the form of a waiver. Is it proper for Attorney to represent both the government and a private party at the same time?
- a) Yes, the fact that the state represents the public interest cancels out and potential conflict of interest on the part of the private party and makes the Rules of Professional Conduct inapplicable.
 - b) Yes, The Rules of Professional Conduct do not strictly prohibit a lawyer from jointly representing a private party and a government agency
 - c) No, because the general contractor's interests are purely financial, while the state's interests involve a balancing of various competing interests of the general public.
 - d) No, unless the subcontractor also provides written informed consent to Attorney's joint representation of the two parties that were once contractual partners with the subcontractor.

Rule 1.11 Cmt 9

65. Attorney worked for several years as a city attorney for a large municipality in its employment litigation division, defending the municipality against employment-related lawsuits from city employees, including discrimination claims. Attorney then left that position and went to work for a federal regulatory agency, the Equal Employment Opportunity Commission. The EEOC is sometimes an adverse party to the municipality where Attorney once worked. Even when not involved in the same matter or litigation, their goals and interests are often adverse, as the city attorneys are usually arguing for limitations on employer liability in discrimination cases, while the EEOC generally seeks to expand protections for workers against discrimination by employers. At her new position, Attorney has no assignments that are the same cases or matters in which she participated as a city attorney, but there are a number of cases pending in the office that are adverse to the interests of her former employer, and some in which they are opposing parties in the same litigation. Must the EEOC screen Attorney from such cases in the same way that a private firm would need to do under the Rules of Professional Conduct?

- a) Yes, because when a lawyer is disqualified from representation, no lawyer in the agency with which that lawyer is associated may knowingly undertake or continue representation in such a matter without screening measures in place.
- b) Yes, because Attorney may know confidential government information that would provide an unfair advantage to the lawyers at the EEOC.
- c) No, when a lawyer is employed by a city and subsequently is employed by a federal agency, the latter agency is not required to screen the lawyer.
- d) No, because it is more important, from a policy standpoint, to stop employment discrimination everywhere than it is to protect the legal interests of one municipality against its own employees.

Rule 1.11 Cmt. 5

66. After law school, Attorney worked for two years as a judicial clerk for a federal district judge. A few months before her clerkship was to end, Attorney applied for positions at several law firms in the area and interviewed with them for a position as an associate. All of these firms had matters pending before the federal district court, but Attorney did not tell the firms that she was aware that they had some matters on her judge's docket, and the interviewers at the firms did not bring up that they were appearing regularly before the judge that currently employed Attorney as a clerk in chambers. In each case, however, the employers were impressed that Attorney had obtained a judicial clerkship and asked her general questions about how she liked her experience at the courthouse. Attorney submitted to each firm a recommendation letter written on her behalf from the judge before whom they had pending matters. The judge knew that Attorney was interviewing with these firms and did not object or correct her about it at all. Is Attorney subject to discipline for seeking employment with firms that have pending matters before the judge for whom she works as a clerk?
- a) Yes, because a lawyer working for the government may not negotiate for private employment with any person who is involved as a party or as lawyer for a party in a matter in which the lawyer is participating personally and substantially
 - b) Yes, because Attorney failed to disclose that she knew the firms had matters pending before her judge, and failed to tell the firms what she knew about their cases.
 - c) No, a lawyer serving as a law clerk to a judge, other adjudicative officer, or arbitrator may negotiate for private employment in the manner described here.
 - d) No, because the firms failed to disclose to her that they had pending matters before the federal judge that currently employed Attorney as a judicial clerk.

Rule 1.11(d)

ANSWER KEY: CONFLICTS

Rule 1.7 Conflict of Interest: Current Clients

1. c	11.c	21.b	31.c
2. b	12.c	22.d	32.a
3. d	13.c	23.a	33.a
4. a	14.d	24.c	34.a
5. b	15.a	25.c	35.a
6. a	16.c	26.c	36.c
7. c	17.b	27.c	37.d
8. a	18.a	28.c	38.c
9. b	19.a	29.b	39.b
10.a	20.c	30.a	40.a

Rule 1.8 Conflict of Interest - Current Clients: Specific Rules

41.d
42.a
43.a
44.a
45.d
46.c
47.a
48.c
49.b
50.a

Rule 1.9 Duties to Former Clients

51.b
52.c
53.c
54.d
55.c
56.a
57.c

Rule 1.10 Imputation of Conflicts of Interest: General Rule

58.c
59.a
60.d

Rule 1.11 Special Conflicts of Interest for Former and Current Government Officers and Employees

61. c
62. c
63.c
64.b
65.c
66.c

THE CLIENT-LAWYER RELATIONSHIP

(10–16%, 6-9 Questions of the 60 on MPRE)

- Scope, objective, and means of the representation – Rule 1.2
- Decision-making authority—actual and apparent – Rule 1.2
- Counsel and assistance within the bounds of the law – Rule 1.4
- Communications with the client – Rule 1.4, Rule 1.14
- Formation of client-lawyer relationship – Rule 1.4-1.5
- Client-lawyer contracts – Rule 1.5
- Fees – Rule 1.5
- Termination of the client-lawyer relationship – Rule 1.16

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

67. Parent retains Attorney to represent Defendant, who is Parent's 16-year-old child accused of shoplifting. Because Parent is paying for his services and because Defendant is a minor, Attorney generally communicates with Parent about the proceedings, options for disposing of the case, and other case-related issues. After speaking with Parent about a plea deal that would allow Defendant to do several community service hours and have the case dismissed, Parent advises Attorney that Defendant will take the deal. Attorney contacts the prosecutor who sends the paperwork for Defendant to complete and then cancels the court appearance, advising the Court that a plea deal has been reached. Are Attorney's actions proper?
- a) No, attorneys are required to continue a normal relationship with their client as much as possible, even if the client has diminished capacity.
 - b) Yes, minor children are considered incapacitated, and attorneys can deal solely with the parents or guardians of a minor when handling cases for the minor.
 - c) Yes, as long as the deal is not unreasonable to the minor, attorneys have no obligation to work directly with their client's capacity is diminished.
 - d) No, attorneys are not required to continue communication with a client with diminished capacity, but are required to allow the client to make the final decision on the client's case, even if client's capacity is diminished.
68. Attorney represents Defendant in a criminal case in which Defendant is accused of assault causing bodily injury. Defendant details the events that led to the charge to Attorney. Attorney believes Defendant is not guilty and has defeated such charges against other clients in the past. Defendant asks Attorney to get him the best possible plea deal and explains that he does not want to take the case to trial. Attorney contacts Prosecutor who offers Defendant a reasonable settlement, but it requires the Defendant to serve jail time. Attorney refuses the offer and tells Defendant they are taking the case to trial because Prosecutor did not offer ideal plea. Is Attorney subject to discipline?
- a) Yes, because attorneys shall abide by client decisions regarding plea deals, regardless of the attorney's opinion about the guilt or innocence of the defendant.
 - b) Yes, because attorneys are not authorized to make any decisions or give advice based on his or her own opinions about the case.
 - c) No, because attorneys shall not accept plea deals in criminal cases if the attorney believes his or her client is innocent.
 - d) No, because attorneys are impliedly authorized to refuse plea deals if they do not find them acceptable.
69. Attorney has always practiced exclusively in the area of business transactional work and has no litigation experience. Client has used Attorney's services on a number of occasions related to her business transactions. In one instance, Attorney prepared a

detailed non-compete agreement for client to use with a nationally known mathematician whom Client hired to work on Client's predictive coding algorithms. The mathematician, however, left Client's firm and began working for Client's main business rival, apparently in violation of the non-compete agreement. Client asked Attorney to bring an enforcement action against the mathematician. Attorney declined to represent Client in the litigation, and reminded Client that their previous retainer agreement over the non-compete agreement specifically stated that Attorney's representation would include only the drafting and related transactional work, and would not include litigation to enforce or nullify the non-compete agreement. Would Attorney be subject to discipline for including this provision in his agreement to represent Client?

- a) No, because a lawyer may reasonably limit the scope of the representation, by informed agreement with the client, at the beginning of the representation, and refusing to do litigation is a typical limitation on the scope.
- b) No, because the Attorney has no litigation experience and could not competently have represented Client in the enforcement action.
- c) Yes, because under the Rules of Professional Conduct, a client has the sole right to determine the scope of the representation.
- d) Yes, because the Rules of Professional Conduct forbid lawyers from preparing non-compete agreements or similar documents that limit employees' ability to practice in their field.

70. Attorney represented Defendant in a criminal case involving serious felony charges. Defendant rejected all proffered plea bargains from the prosecutor, and insisted upon a jury trial, and he then expressed his desire to testify at his trial to assert his innocence. Attorney knew that it would be a disaster for Defendant to testify. First, Defendant initially confessed to the crime, but Attorney managed to have the confession excluded due to a technical defect in the Miranda warnings; Attorney believed that the otherwise excluded confession will become admissible for impeachment purposes if Defendant took the stand and tried to assert a contradictory version of the facts. Defendant also has a long record of prior convictions involving fraud and embezzlement, which also would otherwise be inadmissible at trial, but will become admissible to impeach Defendant's credibility if Defendant actually testifies. Even worse, Attorney has confidential information that Defendant committed several related crimes to those charged in the case, and the prosecutor would probably be able to elicit testimony implicating Defendant in additional crimes if Defendant waives his Fifth Amendment rights and insists on taking the stand. Attorney knows the prosecutor in the case is notorious for aggressive cross-examination of witnesses at trial, and even teaches special training courses to other litigators on how to conduct merciless, devastating cross-examination. Finally, Defendant is not very articulate; he constantly uses street slang, gratuitous profanity, and incorrect grammar when speaking, which combined with his odd mannerisms, would be very alienating for most jurors. Attorney angrily explains all of this to Defendant, and then reminds Defendant that he already rejected several generous plea offers, insisted on a jury trial in a case where a bench trial would have been more strategic, and now is about to lose any chance of winning at trial due to his insistence about testifying. Attorney ends by saying, "There is no way I will

allow you to testify in this case; it would be malpractice on my part.” Defendant understands this to mean that he has no choice, so he gives up and does not testify. The trial went well and the jury acquitted Defendant of all charges. Would Attorney be subject to discipline under these circumstances?

- a) Yes, because he spoke angrily with his client and made unnecessary references to the client’s speech and mannerisms, showing extreme insensitivity and disrespect; he also deprived the client of a good opportunity to explain his side of the story about all the previous cases in which he received convictions.
- b) No, because Clients have a right to dictate the overall objectives of the representation, but the lawyer has a right to decide the means of achieving that objective, and leaving out the client’s testimony shortened the trial time and thereby reduced the legal fees the client would owe to the lawyer.
- c) Yes, in a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to whether the client will testify.
- d) No, because the defendant suffered no harm from the Attorney’s decision, as the jury gave a complete acquittal, and Attorney was clearly correct in his reasoning about why it would backfire if Defendant testified at trial.

Rule 1.2(a)

71. Client hired Attorney to represent her in a personal injury lawsuit in which Client is the plaintiff. After an initial consultation and two meetings to review the main evidence in case and to discuss the nature of the claims, Attorney drafted the initial pleadings, served the opposing party, and filed the pleadings in the appropriate court. Attorney did not allow Client to review the pleadings before filing them, and afterward, Client expresses disappointment that she did not have the opportunity to review the pleadings beforehand and make suggested edits, given that it is her case and that Attorney is working for her. Was it proper for Attorney to draft the pleadings based on conversations with the plaintiff and file the documents without first having the plaintiff review them?

- a) Yes, because a lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.
- b) Yes, unless Client is an English teacher or a professional editor, and might therefore have special expertise in proofreading texts for grammatical errors and stylistic problems.
- c) No, because a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.
- d) No, because Attorney may have to spend time later revising the pleadings, which could affect the legal fees in the case, and such revisions may have been unnecessary if someone else had proofread Attorney’s draft before filing it.

Rule 1.2(a)

72. Client is the leader of a radical religious group that protests at the funerals of soldiers who died tragic combat deaths overseas. The protests are not against the war, however,

but against society's increasing tolerance of homosexuality and gay marriage. Client and his followers stand outside the funerals as grieving family members arrive, and they hold large picket signs emblazoned with hateful sayings against homosexuals, some of which use shocking language. They also hold signs indicating they are happy that American soldiers die frequently, because they believe these deaths validate their point that the country is on the wrong course morally, and has become evil by being more tolerant. The group heckles those attending the funerals, but then disperses once the funeral ceremony starts. The group receives regular national media coverage because of the intentionally sensational and shocking nature of their protests. Client now faces a tort lawsuit by the father of a deceased soldier whose funeral the group picketed; the plaintiff claims intentional and negligent infliction of emotional distress. Client is certain that his First Amendment rights trump such subjective-harm tort claims, and has a recent Supreme Court case supporting his position. Client asks Attorney to represent him in the matter. Attorney reluctantly agrees to take the case and the trial court gives an unfavorable verdict against Client. After the case, reporters interview Attorney asking how he could represent such a client and Attorney states during the interviews that he did not necessarily endorse the client's religious, social, moral, or political views, but was merely providing representation. Are Attorney's actions proper in this case?

- a) Yes, because Attorney did not win the case on behalf of this client, so justice was served in the end, as this client advocates intolerance of others in our society.
- b) No, because Attorney has a duty under the Rules of Professional Conduct to refuse representation of a client if he cannot endorse the client's political, social, or moral views, especially those who preach intolerance and hate.
- c) No, because Attorney lost the case, and then tried to justify himself in the media by denying any endorsement of the client's political, social, and moral views.
- d) Yes, because a lawyer's representation of a client does not constitute an endorsement of the client's political, economic, social, or moral views or activities.

Rule 1.2(b)

73. Defendant was indigent and received court-appointed defense counsel, Attorney, in his felony larceny case. Defendant insisted that he was completely innocent and that he would not accept any plea bargains, because he wanted an opportunity to prove his innocence at trial. When Defendant told Attorney his expectations, Attorney explained that there is a special type of plea called an "Alford Plea," in which a defendant may agree to accept a conviction while still contesting his guilt or maintaining his innocence. Defendant refused, and told Attorney, "Do not even contact me with offers from the prosecutor for a guilty plea. I will not plead guilty, but will prove my innocence in a court of law!" The prosecutor indeed made several plea offers, and each time Attorney presented the offer to Defendant, who rejected it and reminded Attorney that he did not want to be bothered with any offers to "make a deal." Defendant's hard line proved effective as a negotiating strategy, and eventually the prosecutor called Attorney to say they would reduce the charges to a misdemeanor and the sentence to "time served" if Defendant would plead guilty. Attorney thought this was a ridiculously generous offer but simply rejected it without consulting his client. Client

proceeded to trial and the jury convicted him, and he received the maximum possible sentence for the crimes charged. Was it proper for Attorney to reject the final plea bargain offer without informing the client?

- a) Yes, because Clients have a right to dictate the overall objectives of the representation, but the lawyer has a right to decide the means of achieving that objective.
- b) Yes, because the client has previously indicated that the proposal will be unacceptable and has authorized the lawyer to reject the offer.
- c) No, because a lawyer who receives from opposing counsel a proffered plea bargain in a criminal case must promptly inform the client of its substance.
- d) No, because the ultimate result was a conviction and a severe sentence for Defendant, which he could have avoided by accepting the final plea offer.

Rule 1.2 Cmt 3

74. Attorney represents Defendant in a murder case. At trial, the jury convicted Defendant and sentenced him to death, and the appellate courts upheld the conviction as well as the sentence. Attorney has now offered to file a habeas corpus petition in federal court in order to appeal the case to the United States Supreme Court, if necessary. Defendant, however, has developed terminal cancer, and does not expect to live another six months. Defendant tells Attorney to drop the appeals because even if they won, Defendant would not live long enough to enjoy his freedom. Defendant does not terminate the representation, however, because he wants Attorney to handle his estate planning matters while he is on death row, and he has some administrative complaints in progress against the prison where he is living. Attorney is passionately opposed to the death penalty and believes his client is innocent, so he files the habeas petition anyway. While the habeas petition is making its way through the federal appellate process, Defendant succumbs to his illness and dies in prison. Is Attorney subject to discipline for filing the habeas petition, despite the client's reservations?

- a) Yes, because the appeals are clearly a waste of public resources in a case where the defendant will die anyway before the appeals process would be complete.
- b) No, because filing appeals is merely a matter of strategy and methods, and lawyers do not have to defer to the client about strategy and methods.
- c) No, because the client died before the Attorney's actions produced any real results that could affect the client.
- d) Yes, because a lawyer shall abide by a client's decisions concerning the objectives of representation and shall consult with the client as to the means by which they are to be pursued.

75. An attorney represents criminal defendants. One day, a client appeared in the attorney's office and explained that he had been blackmailing his former employer for the last year. The client had hired a prostitute to seduce the former employer in a room with hidden cameras, then showed the embarrassing photographs to his former employer and demanded monthly payments of \$500, which the employer paid, not wanting to destroy his marriage. The prostitute subsequently died of a drug overdose.

The client's former employer eventually tired of making the monthly blackmail payments, and went to the police about the matter. The client is now worried that he will face charges for blackmail, which would violate his parole and result in a lengthy incarceration. Client retained the only copies of the photographs, as he merely showed them to the former employer a year ago in order to extort the payments. After the client explained all this to his attorney, he gave the attorney the documents and instructed the attorney to destroy them or hide them so that the police could not find them. Attorney put the photos in a folder marked ATTORNEY WORK PRODUCT - PRIVILEGED AND CONFIDENTIAL, and sent the folder to a secret overseas document storage service in the Caymans. The police obtained an arrest warrant for the client based on the former employer's affidavit, and at trial, the prosecutor obtained a conviction based on the employer's testimony and the bank records showing the monthly transfers. Is the attorney subject to discipline?

- a) Yes, because the lawyer was clearly incompetent or negligent if he lost the trial even without the prosecutor having the photographs or the prostitute's testimony to admit as evidence.
- b) Yes, because a lawyer shall not assist a client in conduct that the lawyer knows is criminal or fraudulent, such as destroying evidence when there is a pending criminal investigation.
- c) No, because the court convicted the client anyway, so the lawyer's feeble attempt to help the client made no difference to the outcome.
- d) No, because once the client told the lawyer about the matter privately and gave him the documents, they were covered by attorney-client privilege.

Rule 1.2(d)

76. Client hired Attorney to research the legality of a musical "mash-up," a sound recording that includes brief sound clips and samples from many other artists' commercial recordings. The client's particular approach puts it in the gray area around "fair use" and "composite works of art" under prevailing copyright law, and no court has yet ruled on the precise issue, though the question has been the subject of seventeen lengthy law review articles in the last two years, reaching a range of different conclusions. No litigation is pending and Client has not yet undertaken any activity that could constitute a copyright infringement; he is seeking reassurance before proceeding that he would not face liability for copyright infringement. Because Client primarily wants a memoranda of law answering his hypothetical legal question, he asks Attorney to limit his research and writing to two hours of billable time. Attorney agrees, spends an hour reading and an hour writing, and gives the Client a short memoranda. Given that the client's objective was limited to securing general information about the law the client needs, was it improper for Attorney to agree to this limitation on the scope of representation up front?

- a) Yes, because given the complexity of the subject and the uncertainty about this particular point of law, two hours was not a reasonable amount of time to yield advice upon which the client could rely.

- b) Yes, because the other artists have a right to receive compensation for their creative work, and Attorney is helping Client potentially infringe on other artists' copyrights.
- c) No, because the client's objective was limited to securing general information about the law the client needs, so the lawyer and client may agree that the lawyer's services will be limited to an hour of research and an hour of writing.
- d) No, because Client probably cannot afford to have Attorney read through seventeen tedious law review articles and try to formulate some kind of synthesis of the positions they advocate.

Rule 1.2 Cmt. 7

77. Client calls Attorney to ask if it is possible to apply for an extension on filing his annual tax returns, if the deadline for filing returns is still two weeks in the future. Attorney offers to research the matter for a few hours and write a formal legal memoranda for Client about filing extensions. Even so, off the top of his head, Attorney can assure the Client over the phone that it is indeed possible to apply for an extension and that the IRS routinely grants them if they receiving the application for extension before the regular deadline. Attorney practices in the area of tax law and is familiar with the rules. Client thanks the Attorney and says that he is satisfied with the "short answer," and that he does not want Attorney to do any more research or writing about it, but rather to send a bill for the phone call. Attorney agrees and bills Client for the telephone conversation, and conducts no further research on the matter. Is it proper for Attorney to limit his representation to a single telephone call like this?

- a) Yes, because Client's objective is limited to securing general information about the law the client needs in order to handle a common and typically uncomplicated legal problem, so the lawyer and client may agree that the lawyer's services will be limited to a brief telephone consultation.
- b) Yes, because the lawyer should defer to the client about costs and the objectives of the representation, and should not assist a client in committing a crime or fraud, such as tax evasion.
- c) No, because such a limitation on the representation does not allot sufficient time to yield advice upon which the client could rely, and the client could face devastating fines for being late with his tax returns.
- d) No, because such an agreement ignores the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.2 Cmt. 7

78. Husband hired Attorney to represent him in a divorce; the husband and wife had three adult children. Husband was quite upset when he met with Attorney, because his wife had filed for divorce and he felt deeply betrayed. The couple had a prenuptial agreement that clearly delineated the division of assets in case of divorce, and child custody is not an issue as the children are in their twenties. As part of his routine consultation questions, Attorney asked if there had been any marital infidelity on the

part of either the husband or wife. Husband admitted to Attorney that he once had an affair many years ago, that the wife never discovered, and that he wanted to keep secret, if possible. He then speculated that he had no idea if his wife had ever had an affair, then became very emotional as he considered the possibility. Within minutes, he had convinced himself that his wife had been having affairs with other men for years, though he never knew it, and that the three children were probably not even his offspring. Attorney had already looked at Husband's photograph of his children, and their resemblance to their father (Husband) was remarkable. Attorney finds repugnant the idea of subjecting the adult children to paternity tests, which would probably traumatize them unnecessarily, regardless of the result. Attorney also believes that accusing the wife of infidelity would be imprudent, as it will ensure that the family would discover Husband's previous affair, which otherwise might not happen. Without the accusations of infidelity, all the issues of the divorce would come under the prenuptial agreement and not be in dispute. Attorney insists on limiting his representation to the divorce, and wants to include in the retainer agreement that there will be no accusations of infidelity or paternity testing of the children, unless the other side initiates in this regard. After Husband calms down, he agrees to Attorney's conditions of representation. Is it proper for Attorney to insist on such conditions of representation?

- a) Yes, because it would be fraudulent for the husband to accuse the wife of marital infidelity, of which there is no evidence, while hiding the fact that he himself had an affair.
- b) No, because there is always a chance that the other party in a divorce was guilty of marital infidelity, and the children should get to know with absolute certainty who is their real father.
- c) Yes, the terms upon which representation is undertaken may exclude specific means that might otherwise be used to accomplish the client's objectives, such as actions that the lawyer regards as repugnant or imprudent.
- d) No, because the lawyer should always defer to the client about the objectives of the representation, while the client should defer to the lawyer about the means of achieving the goals of the representation.

Rule 1.2 Cmt. 6

79. Client explains to Attorney that he is operating an illegal website where users can anonymously upload and download pirated music and videos, in violation of copyright laws and other anti-piracy statutes. The website is very lucrative for its operator, and Client has become a multimillionaire by founding and operating the site. Client is concerned about potential criminal charges or civil lawsuits over the website. Attorney explains to Client how he could use a series of dummy limited liability corporations, mail forwarding addresses, and offshore bank accounts in order to avoid detection. Each of the steps of the process Attorney describes is technically legal – creating the corporate entities, purchasing real mail-forwarding services, and opening bank accounts in Belize. Attorney decides not to charge Client for this advice session, but bills Client for other transactional work performed. Is Attorney subject to discipline?

- a) Yes, because Attorney did not bill Client for the consultation, apparently in violation of their regular retainer agreement.
- b) No, because the individual steps that Attorney proposed would be legal in isolation, and merely gave an honest opinion about the actual consequences that appear likely to result from a client's conduct.
- c) Yes, because a lawyer must avoid assisting a client in fraudulent or criminal activity, which includes suggesting how the wrongdoing might be concealed.
- d) No, because Attorney did not bill the client for the advice, and therefore did not benefit personally from counseling the Client

Rule 1.2 Cmt 10

80. After Attorney has been representing Client in a transactional matter for six months, Client asks Attorney to draft and deliver some documents that Attorney knows are fraudulent. Attorney tries to dissuade Client, but Client insists. Attorney believes the recipient of the documents will probably realize they are fraudulent before irreparable harm happens to the recipient. Client is willing to sign a private document for Attorney in which Client takes full responsibility for the fraud and states that Attorney was merely following orders and is not blameworthy in the matter. Would it be improper for Attorney to acquiesce, and draft and deliver the documents according to Client's instructions?

- a) Yes, because the waiver of responsibility document that the Client signed constitutes a personal transaction between the lawyer and client, for which Client should have had the advice of outside counsel.
- b) Yes, because a lawyer is required to avoid assisting the client, for example, by drafting or delivering documents that the lawyer knows are fraudulent.
- c) No, because the Model Rules of Professional Conduct confer upon the client the ultimate authority to determine the purposes to be served by legal representation.
- d) No, because Attorney reasonably believes that the recipient of the documents will suffer no irreparable harm, and Client is will to assume full responsibility for the action, confirmed in writing.

Rule 1.2 Cmt. 9

81. Attorney explains to Client that certain features of Client's business proposal would constitute money laundering under current federal statutes. Attorney explains the statute in detail, and explains why the course of action would meet the statutory definition of money laundering. Attorney explains the various monitoring and reporting mechanisms that federal enforcement agencies have in place to detect money laundering, in an attempt to convince Client that he would not escape arrest and prosecution if he proceeds. Client absorbs the information and uses it to structure a more elaborate money-laundering scheme that exploits some ambiguity in the statute and the reporting requirements to make his enterprise much more difficult to detect, and complicates enforcement and prosecution efforts against him. Attorney's advice turned out to be incredibly useful to Client in avoiding detection and expanding his criminal enterprise. Is Attorney a party to Client's course of action?

- a) No, because Attorney's subjective intentions were not wrong in the situation.
- b) No, because the fact that a client uses advice in a course of action that is criminal or fraudulent of itself does not make a lawyer a party to the course of action.
- c) Yes, because there is no distinction between presenting an analysis of legal aspects of questionable conduct and recommending the means by which a crime or fraud might be committed with impunity.
- d) Yes, because a lawyer may not discuss the legal consequences of any proposed criminal course of conduct with a client and or counsel a client to determine the validity, scope, meaning or application of the law.

Rule 1.2 Cmt. 10

82. Client is an inexperienced drug dealer and consults with Attorney about the legal ramifications of his business. Without explicitly endorsing or encouraging Client in his criminal enterprise, Attorney conducts research at Client's request about various drug laws and sentencing guidelines. Attorney writes a detailed memorandum of law explaining that certain threshold quantities of drugs, according to the relevant statutes, create a presumption of "intent to distribute" or trigger a significant sentencing enhancement. Similarly, Attorney explains that statutes and sentencing guidelines impose higher-grade charges and severe sentencing enhancements if a drug dealer brings a firearm to a transaction. Client mulls over the information and decides to change his business model from bulk sales of narcotics to selling smaller quantities in more individual transactions, such that each sale constitutes only the lowest-level misdemeanor. Client also instructs all his subordinates to avoid carrying firearms and instead to refill pepper spray devices with hydrochloric acid, which they spray in the face of their opponents in any altercation, causing severe disfigurement. Is it proper for Attorney to provide such legal advice to Client?

- a) Yes, because a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.
- b) Yes, because the Rules of Professional Conduct confer upon the client the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations.
- c) No, because off attorney-client privilege and the duty of confidentiality.
- d) No, because a lawyer is required to avoid assisting the client in criminal activity by suggesting how the wrongdoing might be concealed.

Rule 1.2(d)

83. Attorney represents Client in a drug trafficking case. Client asks Attorney to deliver a package to a friend of Client. Client tells Attorney that the package contains illegal drugs but assures Attorney he will not reveal that Attorney made the delivery if police discover that the transfer was made. Attorney advises that he will not participate in the transfer. Attorney does not advise the Court of Client's request and remains Client's attorney on the drug trafficking case. Are Attorney's actions improper?

- a) No, because an attorney is not required to decline or withdraw from cases unless the client demands that the attorney engage in illegal conduct.

- b) No, because attorney has no obligation to withdraw from a case as long as he does not engage in illegal activity with or for a client.
- c) Yes, because an attorney must decline or withdraw from representing a client if the client asks that the attorney engage in illegal conduct.
- d) Yes, because an attorney must notify the court if his client asks or demands that he engage in illegal activity.

Rule 1.4 Communications

84. Attorney represents Client in a transactional matter, a complex business merger. The parties have agreed in advance, by contract, to engage in good-faith negotiations, but that if an agreement does not emerge within six months, either party can abandon the deal and cease negotiations. Three months into the negotiations, the parties are very close to a final agreement. Attorney has been conducting the negotiations without Client present, checking in with Client from time to time. One day, the other party presents a detailed proposal that would resolve all remaining issues, and would give each side most of what it wants, but also requires a few concessions from each party. Attorney calls Client immediately and gives a brief overview of the new proposal, hitting most of the highlights and carefully explaining the bottom-line concerning the final buyout price to complete the merger. Client gives Attorney consent to consummate the agreement. Could Attorney be subject to discipline for how he handled the final agreement?

- a) Yes, because it is improper for a lawyer to make an agreement in advance to reach a settlement or other final agreement by a certain date, so that parties will abandon negotiations after that point.
- b) Yes, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement, and the facts suggest that Attorney did not necessarily explain all the concessions that Client would have to make.
- c) No, because Attorney was impliedly authorized by Client to work out all important provisions of the agreement, and Client does not need to know all the details.
- d) No, because Attorney obtained Client's consent about the bottom line before proceeding to a final agreement.

Rule 1.4 Cmt 5

85. Attorney represents Client in a litigation matter. Client was not present during the last pre-trial hearing at which the lawyers argued about whether certain experts on each side could testify at trial. The trial was to start the following week. At the end of the hearing, the opposing counsel asked the court to have the record sealed in the upcoming trial, and to have reporters banned from the courtroom. He explained that the testimony at trial would necessarily reveal some of his client's trade secrets, and it was important to the client to keep the trial records sealed. The judge was amenable to this suggestion and asked Attorney if he had any objections. Attorney tried to call Client, but Client did not answer his phone right then. Attorney could not think of a compelling reason

for Client to oppose the motion, so he agreed, and the judge set the matter for a sealed-record trial. Client never returned Attorney's call, and Attorney did not explain what had transpired until they arrived at the court for the first day of trial. Client was dismayed because he had planned to use this litigation as a test case for subsequent litigation over the same type of issue, but Attorney explained that it would now be difficult to get the judge to reverse course on this point. Is Attorney subject to discipline in this case?

- a) Yes, because even when an immediate decision must be made during trial, and the exigency of the situation may require the lawyer to act without prior consultation, the lawyer must promptly inform the client of actions the lawyer has taken on the client's behalf.
- b) Yes, because the importance of the action under consideration and the feasibility of consulting with the client meant the lawyer's duty required consultation prior to taking action.
- c) No, because the opposing party's request was reasonable, and even if Attorney had asked Client and Client disapproved, Attorney could not have ethically objected to the request.
- d) No, because it was proper for the lawyer to defer to the judge on this question, lest he risk angering the judge or unnecessarily inconveniencing the opposing party.

Rule 1.4 Cmt 3

86. Attorney represents Client in a litigation matter. Client was not present during the last pre-trial hearing at which the lawyers argued about whether certain experts on each side could testify at trial. The trial was to start the following week. At the end of the hearing, the opposing counsel asked the court to have the record sealed in the upcoming trial, and to have reporters banned from the courtroom. He explained that the testimony at trial would necessarily reveal some of his client's trade secrets, and it was important to the client to keep the trial records sealed. The judge was amenable to this suggestion and asked Attorney if he had any objections. Attorney tried to call Client, but Client did not answer his phone right then. Attorney could not think of a compelling reason for Client to oppose the motion, so he agreed, and the judge set the matter for a sealed-record trial. Three hours later, Client returned Attorney's call, and Attorney explained what had transpired. Client was dismayed because he had planned to use this litigation as a test case for subsequent litigation over the same type of issue, but Attorney explained that it would now be difficult to get the judge to reverse course on this point. Was it proper for Attorney to agree to the request without obtaining Client's prior consent?

- a) Yes, because the opposing party's request was reasonable, and even if Attorney had asked Client and Client disapproved, Attorney could not have ethically objected to the request.
- b) Yes, because during a trial, when an immediate decision must be made, the exigency of the situation may require the lawyer to act without prior consultation, as long as the lawyer promptly informs the client of actions the lawyer has taken on the client's behalf.

- c) No, because the importance of the action under consideration and the feasibility of consulting with the client meant the lawyer's duty required consultation prior to taking action.
- d) No, because a lawyer must promptly consult with and secure the client's consent prior to taking action unless prior discussions with the client have resolved what action the client wants the lawyer to take.

Rule 1.4 Cmt 3

87. Client is a second-year law student at a state law school. Client's Professional Responsibility professor forbid the use of the Internet by students during class sections. The school's student handbook also strictly forbids use of the school's wireless computer network, which provides the only Internet access inside the building, during class sessions unless the professor permits it. Client visited a social networking site during a class session, and when the professor discovered it, he had the student arrested for violating the state's Computer Fraud and Abuse Act, which imposes civil and criminal penalties for unauthorized use of a government computer network. Client, the student, hires Attorney to represent him. Attorney is shocked that the police and prosecutor are involved in such a ridiculous case, and is reasonably certain a judge would dismiss the charges before trial. The prosecutor calls Attorney and explains that the District Attorney regards this as an important test case and wants to bring it to trial, but they will offer a plea bargain of only twenty years in prison if the student will plead guilty and accept responsibility. Attorney blurts out a profanity and hangs up on the prosecutor. He does not even mention the offer to Client, out of fear that it would upset him, and instead drafts a motion to dismiss. The court grants the motion and dismisses the charges against Client. Is Attorney subject to discipline?

- a) Yes, because a lawyer should show respect and decorum toward opposing parties and lawyers, and using profanity or hanging up on someone is a clear violation of the Rules of Professional Conduct.
- b) Yes, because a lawyer who receives from opposing counsel a proffered plea bargain in a criminal case must promptly inform the client of its substance unless the client has previously indicated that the proposal will be acceptable or unacceptable or has authorized the lawyer to accept or to reject the offer.
- c) No, because the prosecutor's offer was unreasonable and the case was frivolous, so there was no duty to discuss such an offer with the client.
- d) No, because the dismissal of the charges in this case meant that the client was far better off than if he had considered the plea bargain offered by the prosecutor.

Rule 1.4 Cmt 2

88. Attorney represents Client in a guardianship proceeding. Client is an adult with Down's Syndrome and has an IQ far below average, in the "mental retardation" range of the DSM-IV. Client's family is trying to have Client institutionalized involuntarily, and Client is fighting this, wanting instead to live semi-independently in a group home. With the help of a social worker, Client has hired Attorney to defend him against the legal proceedings to have Client institutionalized permanently. Having researched this

type of case, Attorney knows that case precedents give Client a small chance of prevailing in regular state court, but a good chance of prevailing if Attorney can change the venue to family court or probate court. Attorney has not discussed with Client his decision to seek a change of venue that would be more favorable to Client under that jurisdiction's recent appellate decisions. Switching venue, however, will mean traveling much further (more than an hour) to the proceedings. Is it proper for Attorney to leave Client out of this decision entirely?

- a) Yes, as long as the lawyer explains to the Client that the probate or family court is much further away.
- b) Yes, fully informing the client according to the usual ethical standards may be impracticable, because the client suffers from diminished capacity.
- c) No, because a lawyer should always provide information that is appropriate for a client who is a comprehending and responsible adult.
- d) No, because Attorney should defer to the client's parents, given that the client has diminished capacity.

Rule 1.4 Cmt 6

89. Attorney represented client in a criminal matter. Client had a history of mental illness, and the court ordered a psychological examination to determine if Client would be competent to stand trial. The case did not involve an insanity defense or a defense of diminished capacity. The psychologist who evaluated Client spoke privately to Attorney, and explained that Client was indeed competent to stand trial, but that in his opinion, Client also suffered from delusional narcissism, paranoia, and oppositional-defiant syndrome. The psychologist pleaded with Attorney not to tell Client about this diagnosis, because the disclosure could harm the client, triggering an episode of paranoia in which the client would suspect that everyone around him was conspiring to institutionalize him, and he would become uncooperative at trial and mistrustful of his own lawyer. Attorney told Client that the psychologist had deemed him competent to stand trial and did not disclose the rest of the psychologist's assessment. Was it proper for Attorney to conceal the psychologist's diagnosis from Client?

- a) Yes, a lawyer may be justified in delaying transmission of information when the client would be likely to react imprudently to an immediate communication, including a psychiatric diagnosis of a client when the examining psychiatrist indicates that disclosure would harm the client.
- b) Yes, because the psychologist's duty was only to evaluate for competence to stand trial, so his additional diagnosis was outside the scope of his assignment.
- c) No, because the information to be provided is that appropriate for a client who is a comprehending and responsible adult, and if Client is competent to stand trial, he is competent to receive the rest of the psychologist's diagnosis.
- d) No, because full communication between the lawyer and the client is necessary for the client effectively to participate in the representation.

Rule 1.4 Cmt 7

Rule 1.5 Fees

90. How does a contingent fee work, outside of plaintiff's personal injury cases?
- a) In contract litigation, sometimes the lawyer's fee depends on the amount saved, rather than the award; in some stock offerings, fees depend on capital generated
 - b) No state allows contingent fees outside personal injury litigation
 - c) The fees are all-or-nothing – the lawyer either keeps the entire jury award, or receives no payment whatsoever
 - d) The fees are a flat hourly rate instead of the percentage of the verdict-award
91. What is wrong with charging a contingent fee in a criminal case, according to the ABA Model Rules of Professional Conduct?
- a) The Comments to the Model Rules do not articulate a clear rationale for this prohibition, but it is a longstanding tradition
 - b) The Comments to the Model Rules explicitly base the prohibition on concerns that lawyers will have an incentive to suborn perjury
 - c) The Comments to the Model Rules imply that the prohibition is related to concerns that no lawyers will represent defendants in close cases
 - d) The Comments to the Model Rules state that the prohibition is meant to prevent money laundering by lawyers at the behest of criminal defendants.
92. A new federal Treasury Regulation provides that attorneys who prevail in tax cases on behalf of their clients against the Revenue Service are entitled to attorneys' fees at the fixed rate of \$100 per hour, not to exceed \$100,000. Attorney lives in a state that allows "reasonable" fees, and he makes a written fee agreement with Client for an additional \$100 fee per hour, on top of whatever fees the Treasury Regulations allow in their case. If the Client provides written informed consent, could Attorney be subject to discipline for this fee agreement?
- a) Yes, because state rules about legal fees are subject to limitations by applicable law, such as government regulations regarding fees in certain tax matters.
 - b) Yes, because tax matters require a contingent fee agreement, not an hourly rate, lest attorneys have a temptation to drag out the case in order to drive up their collectable fees.
 - c) No, as long as the fee agreement incorporates the federal regulation by reference, it is permissible for clients and lawyers to make a private agreement for additional compensation to the lawyer.
 - d) No, as long as the total fees paid do not exceed \$100,000.
- Rule 1.5 Cmt 3
93. Can a contingent fee be unreasonably high?
- a) No, because all contingent fees involve risk for the lawyer
 - b) No, many states allow lawyers to charge up to 90% contingent fees for routine personal injury cases

- c) Yes, and reasonableness is measured at the time of making the contingent fee agreement, not after the fee is due.
- d) Yes, and reasonableness is measured after the fee is due, depending on success, not at the time of making the contingent fee agreement.

Rule 1.5 Cmt 3

94. Suppose the lawyer knows at the outset that the case is a sure winner – is a contingent fee proper?
- a) The validity of contingent fees has nothing to do with the assumption of risk by the lawyer, so the odds of winning should have no bearing on the appropriateness of a contingent fee
 - b) No, because the Model Rules require lawyers to take zero-risk cases on a pro bono basis.
 - c) In theory, a disciplinary board could conclude that a contingent fee is unreasonably high in a case involving zero risk for the lawyer, if such a case existed
 - d) It depends whether the client is a plaintiff or defendant.

Rule 1.5 Cmt 3

95. A state bar adopted a new ethical rule for lawyers that forbid contingent fees higher than 30%. Attorney agrees to represent Client in a tort case that is in federal court due to diversity jurisdiction. Attorney and Client form a written fee agreement that provides for a 33% contingent fee, which is still legal in most jurisdictions. Is Attorney subject to discipline for this contingent fee agreement?
- a) No, because the case is entirely in the federal court system, which means that local laws or rules about contingent fees are inapplicable.
 - b) Yes, because contingent fees are not proper in diversity cases brought in federal court.
 - c) Yes, because applicable state law may impose limitations on contingent fees, such as a ceiling on the percentage allowable, or may require a lawyer to offer clients an alternative basis for the fee.
 - d) No, as long as client provided informed, written consent to the fee arrangement.

Rule 1.5 Cmt 3

96. Client sought to have Attorney represent her as the defendant in a litigation matter. Client had previously retained another lawyer in the same matter, but two weeks before trial was to begin, the opposing counsel had moved to have her lawyer disqualified due to her lawyer having a conflict of interest with the opposing party, who was the lawyer's former client. She needed a new lawyer immediately as the trial date was now only ten days away. Attorney agreed to represent her for a much higher fee than he would customarily charge, which was also much higher than the customary fee for legal services in that locality. Client was upset about the seemingly exorbitant fee, and she said that she felt that Attorney was exploiting her predicament. Attorney carefully explained that the fee agreement was hourly, and client would be responsible for all costs and expenses in addition to the hourly fees, and would even have to reimburse

Attorney for in-house expenses such as photocopying. Attorney never memorialized the agreement in writing; it was merely an oral agreement for fees, and Attorney commenced his representation. Attorney did not prevail at trial and Client had to pay the plaintiff an enormous amount of damages. Was Attorney's conduct proper?

- a) No, because Attorney did not put the agreement in writing, even though it was a fee related to litigation.
- b) No, because Attorney did not prevail at trial, despite charging a high fee, so Client had to pay both the exorbitant fee and the damages awarded to the plaintiff.
- c) Yes, because the reasonableness of a fee depends in part upon the time limitations imposed by the client or by the circumstances.
- d) Yes, because it was another lawyer's fault for agreeing to represent the client previously despite having a conflict of interest, which risked a potential disqualification order on the eve of trial.

Rule 1.5(a)

97. What is the difference between a static contingent fee and a sliding contingent fee?

- a) A static fee is the same for every case and every client, while a sliding fee adjusts the percentage based on the type of case or type of client
- b) A static fee is one that parties establish at the outset of representation, while a sliding fee allows the percentage to fluctuate throughout the course of the representation depending on how well things seem to be going
- c) A static fee has a fixed percentage rate regardless of the apparent merits of the case, while a sliding fee adjusts the percentage depending on the strength or weakness of the case, judged at the outset.
- d) A static fee has a fixed percentage rate, while a sliding fee has the percentage increase with either how long the case takes or the amount of the recovery.

98. Which of the following is NOT one of the factors listed by the Rules of Professional Conduct that lawyers should use in determining the reasonableness of a fee?

- a) "the nature and length of the professional relationship with the client"
- b) "the novelty and difficulty of the questions involved"
- c) "the fee customarily charged in the locality for similar legal services"
- d) "the client's financial situation or ability to pay"

Rule 1.5(a)

99. Client hired Attorney to represent him in suing his employer for wrongful termination. Attorney proposed a fee arrangement that made the fees contingent on the outcome, and included in the fee agreement that Attorney would advance the costs of litigation. Attorney lost the case at trial, and Client then refused to pay back the costs that Attorney had advanced beforehand. Can Attorney force Client to repay the litigation costs that Attorney advanced to him?

- a) Yes, because even where the fee agreement stipulates that it is a contingent fee, this does not apply to litigation costs that a lawyer advances to a client.

- b) Yes, because losing the case nullified the contingent fee agreement and created a quantum meruit situation.
- c) No, because under the fee agreement, the client was only obligated to repay the attorney if they won the case.
- d) No, because the parties never made a legally binding fee agreement.

100. Attorney agrees to represent Client, and obtains Client's written consent to divide the fees with a lawyer in another state, as the trial will occur in the other jurisdiction, but most of the discovery and pre-trial work will occur in the state where Client and Attorney reside. The other lawyer, a well-known litigator and courtroom advocate, will handle the actual trial, but Attorney will handle nearly all of the discovery, settlement negotiations, and pre-trial motions. The case settles the day before the trial was to begin, so the other lawyer did not have to do anything except his usual trial preparation. Attorney had agreed beforehand with the other lawyer to divide the fees in half between them, and that Attorney would take full responsibility for the representation as a whole. Client had agreed to this beforehand, in writing. Attorney sends Client the expected bill at the resolution of the matter, with half the fee going to Attorney and half the fee going to the other lawyer. Could Attorney, or the other lawyer, be subject to discipline for this fee arrangement?

- a) Yes, because Attorney should not have asked Client to agree to pay another lawyer in another jurisdiction whom Client has never met.
- b) Yes, because division of a fee between lawyers who are not in the same firm may be made only if the division is in proportion to the services performed by each lawyer, if they do not assume joint responsibility for it.
- c) No, because Client agreed to the arrangement beforehand in writing.
- d) No, because the other lawyer's reputation as a trial advocate may have influenced the opposing party to settle the case before going to trial.

Rule 1.5(e)(1)

101. Client asked Attorney to defend him in a small litigation matter. Client explained that he had very limited funds available, and wondered if Attorney could handle the case for \$2000. Attorney's usual hourly rate is \$200. Attorney explained that he would handle the case for \$2000, but would do a maximum of ten hours of work on the case. Attorney expected the case to settle before trial, so ten hours seemed like a reasonable amount of time to draft a demand letter, file the pleadings, and conduct some preliminary discovery, at which point the matter would probably resolve itself in a settlement. Client agreed and they formalized this agreement in writing. Unfortunately, the matter did not settle, and Attorney had already spent ten hours on the case three months before the trial date. Attorney explained that his representation in the matter had terminated and withdrew from the case. Would Attorney be subject to discipline in a situation like this?

- a) Yes, because a lawyer may not withdraw from representation three months before trial.

- b) Yes, because a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client.
- c) No, because the Client agreed to this arrangement in writing.
- d) No, because Attorney fulfilled the terms of the written agreement with Client, and Client had proposed buying limited representation due to his financial constraints.

Rule 1.5 Cmt 5

102. Attorney agreed to represent Client in a litigation matter. During their discussions of the case, Attorney mentioned to client that one of the points in the litigation seemed to involve a novel question of law, for which Attorney may need to seek advice from another lawyer with more expertise in that area. At the resolution of the matter, Attorney sent Client a bill that included Attorney's agreed-upon fee, as well as a reasonable fee for three hours of work performed by the expert attorney for research and a brief memorandum. Attorney reduced his own fee by the same amount, so that Client's total bill was the same. Client had been unaware that he would have to pay the other lawyer as well, but reluctantly agreed and paid the bill. Could Attorney be subject to discipline for this additional fee?

- a) No, because Client's total bill was exactly what Client expected, so there was no harm done in dividing the fee with another lawyer.
- b) No, because Client agreed to pay the bill in the end instead of disputing it, which would have triggered an inquiry from the state disciplinary authorities.
- c) Yes, because Attorney should not have reduced his own fee below the agreed-upon rate if some of his own work is now uncompensated as a result.
- d) Yes, a division of a fee between lawyers who are not in the same firm may be made only if the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing.

Rule 1.5(e)(2)

103. Attorney met with potential clients, a husband and wife, about seeking legal guardianship and power-of-attorney for the wife's elderly mother, who was suffering from early-stage senile dementia. The couple had taken the wife's elderly mother into their home, and needed to be able to help manage her assets and finances as her situation deteriorated. Attorney proposed a flat fee for his legal services, which was reasonable, and the couple agreed. At the close of their meeting, Attorney said he would formalize their fee arrangement in a written document and send them a copy, but a sudden crisis in another unrelated case distracted him, so he forgot to prepare a written fee agreement. Eventually, Attorney drafted and filed the necessary documents to place the elderly mother under the legal custodial care of the couple, including a brief probate proceeding. When the matter reached its conclusion, Attorney sent the couple a bill. The bill included Attorney's flat fee, as the couple had agreed, plus

administrative filing fees and court costs, which were accurate and reasonable. Is Attorney subject to discipline for his actions?

- a) Yes, because Attorney neglected to formalize the fee agreement in writing at the outset of the representation.
- b) Yes, because Attorney did not explain to the clients that they would be responsible for administrative fees and court costs in addition to his legal fees.
- c) No, because written fee agreements are unnecessary, though preferable, if the case does not involve a contingent fee.
- d) No, because all of the fees and costs were reasonable, and the central tenant of the Rules of Professional Conduct pertaining to fees is that they are reasonable.

104. Which of the following is NOT one of the factors listed by the Rules of Professional Conduct that lawyers should use in determining the reasonableness of a fee?

- a) “the nature and length of the professional relationship with the client”
- b) “the experience, reputation, and ability of the lawyer or lawyers performing the services”
- c) “whether the fee is fixed or contingent”
- d) “when the fee will actually be due”

Rule 1.5(a)

105. Which of the following IS one of the factors listed by the Rules of Professional Conduct that lawyers should use in determining the reasonableness of a fee?

- a) “the financial situation of the client or the client’s ability to pay fees in advance”
- b) “the current financial resources of the lawyer or the lawyer’s usual fees”
- c) “the skill requisite to perform the legal service properly”
- d) “whether the payment of the fees will be due at the commencement of representation or at the resolution of the client’s matter”

Rule 1.5(a)

106. Which of the following is NOT one of the factors listed by the Rules of Professional Conduct that lawyers should use in determining the reasonableness of a fee?

- a) “the amount involved and the results obtained”
- b) “the time limitations imposed by the client or by the circumstances”
- c) “that the acceptance of the particular employment will preclude other employment by the lawyer”
- d) “whether the fee will involve cash payments or the exchange of goods or services”

Rule 1.5(a)

107. Attorney specialized in aviation law and airline litigation. Client sought to have Attorney represent her smaller airline in a high-stakes antitrust action against the four largest national airlines. The matter was likely to go on for more than two years.

Attorney explained that taking the case would present him with a conflict of interest against the largest airlines in the country, and possibly with their affiliates, suppliers, contractors, and subsidiaries as well, which would severely limit Attorney's ability to represent any other clients in his area of specialty for a long time. He would have to seek to withdraw from representing a few existing clients, which was feasible, and would have to decline numerous future cases and matters. Client insisted on having Attorney handle her case, however, due to his specialized knowledge of the field. Attorney then offered to represent Client for quadruple his usual fee, or five times the fees customarily charged in the locality for regular legal services. In addition, Attorney explained that Client would have to pay a large retainer sum up front, against which Attorney would draw fees. Finally, Client would have to reimburse Attorney for every penny of expenses and costs incurred in-house, such as photocopies and telephone calls, plus any costs and expenses incurred from outside services providers such as court reporters or experts. Client was astonished at the exorbitant fees, which she realized would quickly run into hundreds of thousands or millions of dollars, but she reluctantly agreed because she felt she had no real choice. Attorney memorialized their agreement in writing, and obtained client's signature on it. Was the fee agreement reasonable, according to the Rules of Professional Conduct?

- a) Yes, because it was apparent to the client that the acceptance of the particular employment will preclude other employment by the lawyer
- b) Yes, because the client had no other real choice
- c) No, because the fee is quadruple the lawyer's usual fee, and five times as high as regular legal fees in that locale
- d) No, because the lawyer is forcing the client to reimburse him for routine operational overhead costs, such as photocopying and phone calls.

Rule 1.5(a)(2), Cmt 1

108. Attorney was a new law school graduate, and had recently moved to a new town and opened a practice there. Client met with Attorney to discuss representation in a rather simple personal injury lawsuit against the town's largest company and major employer, with the municipal government and local hospital added as co-defendants. Client explained that she had already gone to consultations with every other plaintiff's firm in the town, and that each one declined her case because it presented conflicts of interest for them, as many of their other clients worked for, or were under the ownership or control of, either the town's largest company, the city government, or the local hospital. Attorney quickly realized that he was probably the only lawyer in town who could represent Client in this action, as he was too new in town to have any conflicts of interest. The other potential clients of the lawyer were all domestic relations cases that presented few hurdles with conflicts of interest. Attorney offered to represent Client for four times his usual fee, which would be five times the fees customarily charged in the locality for regular legal services. In addition, Attorney explained that Client would have to pay a large retainer sum up front, against which Attorney would draw fees. Finally, Client would have to reimburse Attorney for every penny of expenses and costs incurred in-house, such as photocopies and telephone calls, plus any costs and expenses

incurred from outside services providers such as court reporters or experts. Client was astonished at the exorbitant fees, but she reluctantly agreed because she felt she had no real choice. Attorney did memorialized their agreement in writing. Is Attorney subject to discipline for this fee agreement?

- a) Yes, because the fee is unreasonably high and is merely exploiting the client's predicament.
- b) Yes, because the lawyer is forcing the client to reimburse him for routine operational overhead costs, such as photocopying and phone calls.
- c) No, as long as the fee customarily charged for legal services in that locale is unusually low compared to other parts of the country.
- d) No, because of the experience, reputation, and ability of the lawyer or lawyers performing the services

Rule 1.5(a)

ANSWER KEY: RULES 1.2, 1.4, 1.5

Rule 1.2 Scope of Representation and Allocation of Authority Between Client and Lawyer

67. a

68. a

69. a

70. c

71. a

72. d

73. b

74. d

75. b

76. a

77. a

78. c

79. c

80. b

81. b

82. a

83. a

Rule 1.4 Communications

84. b

85. a

86. b

87. b

88. b

89. a

Rule 1.5 Fees

90. a

91. a

92. a

93. c

94. c

95. c

96. c

97. d

98. d

99. c

100. b

101. b

102. d

103. b

104. d

105. c

106. d

107. a

108. a

Rule 1.16: Declining or Terminating Representation

109. Client hired Attorney to handle several real estate transactions, and once the representation was underway, Client explains that the transactions are all part of a money laundering scheme and that the money ultimately is being used to fund terrorist activities. May Attorney continue with the representation, if each individual transaction appears to be technically legal?

- a) Yes, because Attorney was not aware of the criminal purpose of the transactions when he consented to the representation.
- b) Yes, but Attorney may also withdraw if he finds the course of action repugnant.
- c) No, Attorney must withdraw because the transactions involve a conflict of interest.
- d) No, Attorney must withdraw from representation if the client demands that the lawyer engage in conduct that is illegal

Rule 1.16 Cmt. 2

110. Attorney injured his back and leg badly in a car accident. In the aftermath, Attorney became chemically dependent on prescription pain medications. This addiction progressed until it began to affect Attorney's relationships and work habits. The partners in his firm eventually insisted that Attorney seek professional help, so he enrolled in an outpatient rehab program and a twelve-step support group for painkiller addicts. The supervising psychiatrist in the outpatient program expressed concern about Attorney's complete dependence on the painkillers and his diminished ability to function physically or mentally. He advised Attorney to take a leave of absence from work, because he did not believe Attorney could competently fulfill his obligations to his clients. This same concern had prompted Attorney's partners to insist that he seek professional help. Just before enrolling in the outpatient program, a new client had approached Attorney about representing her in a tax dispute with the Internal Revenue Service. Attorney had handled such cases before, but it was not his specialty. Client is so desperate that he tells Attorney privately that he is considering shredding documents to hide some of his tax fraud from the IRS, which Attorney says he should not do, but worries that Client might do it anyway. May Attorney undertake the representation?

- a) Yes, as long as Attorney can acquire the necessary knowledge or expertise through additional research to handle the complexity of the matter on Client's behalf.
- b) Yes, because Attorney is getting help for his addiction problem and should recover soon.
- c) No, because the Client has proposed engaging in fraud or criminal activity.
- d) No, because at the moment, physical or mental condition materially impairs the lawyer's ability to represent the client.

Rule 1.16(a)(2)

111. Client, a convicted felon, is serving a thirty-year sentence in prison. Client discharged the lawyer who lost his criminal trial, and recently hired Attorney to handle his appeal in federal circuit court. Attorney has filed a preliminary notice of appeal, but briefs in the appeal are not due for several months, and oral argument will not occur until two or three months thereafter. Yesterday, Attorney received court appointments to handle last-minute appeals in three high-profile death penalty cases, in which the executions are on the schedule for the next few weeks. Attorney also took on a complex class-action suit by prisoners against the state Department of Corrections, which if successful would pay the Attorney several million dollars in statutory legal fees. Given the urgency of the death-penalty cases and the potential fees from the class action suit, Attorney decides to transfer Client's appeal of his life sentence to another competent lawyer, who is glad to take on the case. Client refused to grant Attorney permission to withdraw as counsel, though. Attorney mailed a letter to Client explaining that he was withdrawing from the case, and included all documents and papers relating to the representation; Attorney also filed the appropriate notice with the appellate court. Is Attorney subject to discipline for withdrawing from the case over Client's objection?
- a) Yes, because a lawyer must comply with the rules requiring permission of a client when terminating a representation.
 - b) Yes, because Attorney agreed to represent Client first, and could have declined the subsequent cases if he were fulfilling his duty of loyalty to the client.
 - c) No, because if the client is actually guilty of the crime, it would be using the lawyer's services to perpetrate a fraud for the lawyer to reverse the client's conviction.
 - d) No, because the withdrawal of representation in this case presents no material adverse effect on the interests of the client.

Rule 1.16(b)(1)

112. Attorney represents Client in a family law matter. A hearing is set for Monday. On the Wednesday prior to the scheduled hearing, Client calls Attorney and advises that Client no longer wants to be represented by Attorney and that Attorney's representation is considered terminated as of the date and time of the call. Client advises that she intends to retain another attorney prior to the hearing. After receiving the call from Client, Attorney schedules another matter for Monday, does not appear at the hearing, and does nothing further on the case. Is Attorney subject to discipline?
- a) Yes, if representation has begun, attorney is required to withdraw from the case and take reasonable steps to mitigate consequences to client if discharged by client.
 - b) Yes, attorney is required to continue representation of client until attorney receives notice of discharge in writing and signed by client.
 - c) No, if attorney receives notice of discharge directly from client, whether oral or in writing, attorney can cease work entirely on the case as long as client is aware of all hearings or other important dates that are scheduled as of the date of the discharge.
 - d) No, if attorney reasonably believes client will be represented by other counsel in a reasonable time and that client will not have any consequences as a result of the immediate discharge, attorney may discontinue all work on case.

113. Attorney agreed to represent a tenant in an eviction proceeding in housing court. Client was facing eviction for nonpayment of rent. Attorney formalized his representation agreement with Client, and filed an appearance in the local housing court, where the eviction was on the docket. The court docket had Client's hearing scheduled for one month later. Four days after filing his appearance, Attorney received a phone call from Client saying she no longer wanted him to represent her, because she wanted to represent herself instead. She offered no reason for discharging Attorney, and conceded that he had done nothing wrong. Attorney tried to persuade her to change her mind, but she was insistent, so Attorney said he would send her all the documents from her case. Attorney then drafted a letter acknowledging the termination of representation, and sent it along with copies of the court documents he had pertaining to Client's case. The letter returned three days later to Attorney, marked "Undeliverable: Not At This Address." Concerned, Attorney tried calling Client, but her phone number was no longer in service. Attorney even tried visiting her apartment, but no one answered the door. Attorney did receive, however, a postcard reminder from the clerk at the housing court about the upcoming hearing. On the date of the hearing, Attorney decided he should appear in person to notify the judge that Client had discharged him and that he was withdrawing from the case. Attorney arrived at housing court, but Client never appeared. When the clerk called Client's case, Attorney stood and explained to the judge that Client had fired him a few weeks prior, and that he needed the court to approve his withdrawal from representation. The judge refused to permit Attorney to withdraw from the case and ordered him to proceed with the representation, because otherwise a default judgment would enter against the tenant for failure to appear. The hearing then proceeded as scheduled, in Client's absence, with Attorney presenting the same defense for nonpayment of rent that he would have presented even if Client had not discharged him. Ultimately, the court ruled in favor of the landlord and ordered the eviction of the tenant. Was it improper for Attorney to represent Client at the hearing after Client had discharged him?

- a) Yes, because a client has a right to discharge a lawyer at any time, with or without cause, subject to liability for payment for the lawyer's services.
- b) Yes, because Attorney failed to ensure that Client had received proper documentation of the discharge, and had failed to notify the court before the hearing of the termination of representation.
- c) No, because the court ruled against the tenant anyway, so Attorney's representation did not make any difference either way.
- d) No, because the court refused to grant Attorney leave to withdraw from the case, despite the Client's attempt to discharge the lawyer.

Rule 1.16(c)

114. Attorney has represented Client on a number of matters. Most recently, Attorney has represented Client in a litigation matter against the city's largest manufacturer. The manufacturer, whom Attorney is suing on behalf of Client, is both the city's largest employer and the largest purchaser of goods and services from small businesses in the area. As the discovery phase winds to a close and the court sets a trial date, Attorney learns that Client misused Attorney's services in the past to perpetrate fraud by having

Attorney submit falsified documents to government entities and to insurance companies. Attorney is furious and yells at Client, using profanity. Attorney then petitions the court to let him withdraw from the representation, stating the reasons in general terms that do not betray specific client confidences. Client strongly objects to Attorney withdrawing from the representation, because the trial is only two months away, and all the other litigation firms in the city have conflicts of interest that prevent them from taking a case against the large manufacturer. It is indisputable that the withdrawal is materially prejudicial to Client, who may have to proceed into the trial pro se or have to find a new lawyer from out of town. The court is willing to postpone the trial by three weeks to give Client time to find a new lawyer or prepare to represent himself. Is it proper for Attorney to withdraw from representation in this case, if the court has no objection?

- a) Yes, because if a court or tribunal has no objection to a lawyer withdrawing from a case, then the lawyer has no ethical duty to continue the representation.
- b) Yes, because withdrawal is permissible if the client misused the lawyer's services in the past, even if the withdrawal would materially prejudice the client.
- c) No, because a lawyer cannot withdraw from representation, if doing so would have a materially adverse impact on the client.
- d) No, because the lawyer yelled at the client and used profanity, which is completely unprofessional.

Rule 1.16 Cmt. 7

115. Attorney works as a public defender, and she feels completely overwhelmed. Her caseload is so heavy that she has started to double-book two or more trials for the same day, counting on one or more of them to resolve in a plea-bargain agreement before trial. Most clients meet her only for a few minutes before their plea bargaining session, and she emphatically insists with her clients that they accept the prosecutor's second or third offer for a deal. When her cases go to trial, she must waive *voire dire* entirely, and often does no factual investigation or case research – yet she still wins acquittals in many cases because she is very gifted at destroying the credibility of hostile witnesses during cross-examination. It is now clear to her that she cannot meet the basic ethical obligations required of her in representation of her existing clients. Must Attorney withdraw from representing some of her current clients?

- a) Yes, if she cannot fulfill her ethical duties, she must not continue representation of her current clients.
- b) Yes, as long as her clients and the court both consent to her withdrawal.
- c) No, she is not required to withdraw, but she may seek to withdraw if it would not materially prejudice a client and the court allows.
- d) No, because as long as she takes no new clients, her current cases will resolve soon and her caseload will become more workable.

ABA Formal Ethics Op. 06-441

116. A trial judge is going through a divorce, and he hired Attorney to represent him. Attorney's law firm partner is representing another client who is appearing before the

same judge in his personal injury lawsuit. The judge and the litigation client both give written informed consent to the representation despite the potential conflicts of interest. Even so, the judge is trying to keep the divorce quiet until after the upcoming elections, because this occurs in a state with elected judges. The judge therefore refuses to disclose to the parties in the personal injury case that counsel for one side is from the same firm as the lawyer representing the judge in his pending divorce. Neither Attorney nor his partner can reveal to opposing counsel in the personal injury case that their firm represents the judge, due to their duty of confidentiality. The judge believes he will be unbiased in the personal injury case, despite the fact that he is the client of a partner of one of the lawyers in the case, so the judge does not need to disqualify himself from the case. The Code of Judicial Ethics does require, however, that the judge disclose the representation to the litigants appearing before him, which the judge has refused to do at this time. Can Attorney continue representing the judge in his divorce?

- a) Yes, if the judge and the litigation client both provided written, informed consent, then Attorney can continue with the representation.
- b) Yes, because in a case where the judge does not need to disqualify himself, the lawyers would not need to withdraw merely because the judge refuses to disclose the representation to the other litigants appearing before the judge in the tort case.
- c) No, because the lawyer would need the judge's permission to withdraw from representing him in the divorce case, and the judge is unlikely to agree to that.
- d) No, because the lawyer is obligated to withdraw from the representation of the judge under these circumstances.

ABA Formal Ethics Op. 07-449

117. Attorney agreed to represent plaintiff in a lawsuit. Attorney was in the middle of a three-week trial at the time, however, so he did not start working on the new client's case immediately. By the time Attorney began investigating the case and drafting the pleadings, he discovered to his horror that he had already missed the statute of limitations for filing the lawsuit. Attorney files the pleadings anyway, knowing that the other party will file a motion to dismiss the case based on the statute of limitations within a month or so. Must Attorney withdraw from representation at this point?

- a) Yes, as long as the client agrees and the court approves the withdrawal of representation.
- b) Yes, Attorney must terminate the representation and must notify the client promptly of his malpractice.
- c) No, because there is a chance that the opposing party and the judge will not notice that the statute of limitations has passed.
- d) No, because withdrawing from the representation would not help the client at this point, and is likely to be prejudicial to the client.

Tex. Ethics Op, 593 (2010)

118. Attorney represents Client, who is a defendant in a prosecution for rape. Client turned down several other experienced criminal defense lawyers who offered to take the case and hired Attorney to represent him. Client saw the victim early in the evening on the

date when the rape occurred, but he has a solid alibi, supported by multiple credible witnesses, that he was nowhere near the scene where the rape occurred at the time that it happened, and no DNA tests link Client to the rape. The only evidence against Client, in fact, is the victim's memory of seeing him early that evening and feeling uncomfortable around him, as if she could sense that he was a sexual predator. Her rapist wore a mask, so she could not identify his face, but he was the same height and build as Client, so she is convinced he is the perpetrator. Despite the weakness of the evidence against him and his airtight alibi, Client is furious about the false accusation and wants to teach the victim a lesson. He informs Attorney that he plans to take the stand and testify that the victim has a reputation among his friends for being promiscuous, that when he saw her that evening she was wearing provocative clothing, and that he believes she was "asking to be raped." Attorney finds this repugnant, but he believes Client is truly innocent of the rape in this case, and will probably receive an acquittal with or without this testimony attacking the victim's character and reputation. Attorney believes the court will allow him to withdraw from the case and that Client could easily hire one of the other lawyers to take over the representation. Is it improper for Attorney to withdraw from the representation, if he agrees with the objectives Client is pursuing (acquittal), but disagrees with the actions Client plans to take?

- a) Yes, because even though a lawyer may withdraw from representation only if the client is pursuing an objective that the lawyer finds repugnant, a disagreement about a single action the client takes does not justify withdrawal.
- b) Yes, because a lawyer cannot ethically withdraw from representation in a criminal case, even with a court's permission, if the trial preparation phase is already underway.
- c) No, because even where the lawyer agrees with the overall objectives of the client, a lawyer may withdraw from a case if the client insists upon taking action that the lawyer considers repugnant.
- d) No, because a lawyer may withdraw from representation at any time if a court or tribunal permits it.

Rule 1.16(b)(4)

ANSWER KEY: Declining or Terminating Representation

- 109. d
- 110. d
- 111. d
- 112. a
- 113. d
- 114. b
- 115. a
- 116. d
- 117. b
- 118. c

**Rules 3.1-3.9 - Litigation and other forms of advocacy
(10–16%, 6-9 MPRE Questions)**

- Rule 3.1 Meritorious Claims and Contentions**
- Rule 3.2 Expediting Litigation**
- Rule 3.3 Candor toward the Tribunal**
- Rule 3.4 Fairness to Opposing Party and Counsel**
- Rule 3.5 Impartiality and Decorum of the Tribunal**
- Rule 3.6 Trial Publicity**
- Rule 3.7 Lawyer as Witness**
- Rule 3.8 Special Responsibilities of a Prosecutor**
- Rule 3.9 Advocate in Nonadjudicative Proceedings**

Rule 3.1 Meritorious Claims and Contentions

119. Attorney agreed to defend Client in a lawsuit over the breach of an oral agreement to sell a particular breeding cow, which turned out to be already pregnant at the time the parties made their agreement. Client had agreed to sell the cow to another rancher, and received payment, but before delivery of the cow to the purchaser, Client claims the cow became pregnant. Client now wants to renege on the agreement because delivering a pregnant cow to the purchaser would be like giving the purchaser one animal (the expected calf) for free, which he cannot afford to do. Client wants Attorney to assert a mistake of fact defense to the oral contract, claiming that neither he nor the purchaser knew or could have known that the cow was pregnant at the time of sale or would somehow become pregnant in the short time between payment and delivery. Attorney conducts some research on prior court decisions and concludes that mistake of fact claims usually lose in scenarios like this. Worse, in his various discussions with Client, the story has changed a little each time, so that Attorney now suspects Client either is lying or is so confused that he will not be a credible witness at trial. Attorney would like to withdraw before filing an answer to the lawsuit asserting a defense of mistake of fact, because he knows they will probably not win, and he is not even sure now if his client is telling the truth. Client insists that Attorney should file the answer before withdrawing from the case, so that Client does not miss the deadline and face a default judgment, but does not mind if he must find another lawyer to handle the discovery and trial phase. Would it be improper for Attorney to file the answer to the pleadings, asserting a mistake of fact defense?

- a) Yes, because Attorney suspects his client is either lying or is confused about the facts.
- b) Yes, because Attorney's research has led him to the conclusion that courts usually disfavor such defenses as a rule.
- c) No, because filing the answer contradicts the lawyer's duty of candor to the court.
- d) No, because the client's defense has some basis in fact and law, even if it seems improbable in both regards.

120. Associate Attorney works at a law firm. The Supervising Attorney, who is a partner at the law firm, directs Associate Attorney to prepare a petition for a civil case. Associate Attorney contacts the client and discusses the facts of the case. Associate Attorney discovers that the suit he was directed to file is frivolous and there are no facts to support the claim. Associate Attorney discusses his concerns with Supervising Attorney. Supervising Attorney directs Associate Attorney to file the suit and indicates that he expects it will settle prior to trial. Following Supervising Attorney's direction, Associate Attorney files the suit. Are Associate Attorney's actions proper?

- a) Yes, because when an attorney is directed to file a suit by a partner at the firm for which he works, full responsibility for the filing lies with the partner.
- b) Yes, because an attorney who makes efforts to discourage a partner of a firm from having a frivolous suit filed is relieved of his responsibility and the responsibility lies with the partner of the firm.

- c) No, because an attorney is responsible for any violations, including the filing of frivolous suits, even if directed to file such suit by a partner of the firm at which the attorney works.
- d) No, because an attorney who is directed to file a frivolous suit must refuse to file the suit and also report the partner who directed him to file such suit to the court in which the case would be filed.

121. Client was an indigent defendant and received court-appointed counsel for his trial. The trial ended in a conviction. Attorney served as his appointed counsel in the case. Client wanted to appeal his conviction, but Attorney reasonably believes that there is no merit to an appeal. Client insisted that Attorney file an appeal before he missed the deadline, and agreed that Attorney could withdraw from the case without Client's objection if he would simply file the appeal and provide Client with the opportunity to pursue the appeal pro se or with another lawyer. Attorney presented a "no-merit" letter to the appellate court explaining that his client was appealing his conviction but that Attorney could see no merit in the appeal. Was Attorney's conduct proper, according to the United States Supreme Court?

- a) Yes, because a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.
- b) Yes, as long as the letter preserves the client's right to proceed with the appeal on his own, and client has agreed to terminate the representation after that.
- c) No, because if the lawyer reasonably believed there was no merit to the appeal, he had an ethical duty to refuse to file the appeal or do anything to facilitate the defendant's abuse of the court system.
- d) No, because a lawyer must prepare a brief referring to anything in the record that might arguably support the appeal, and leave it to the appellate court to decide whether the appeal is truly frivolous.

Anders v. California, 386 U.S. 738 (1967)

122. Attorney and his partner sued Conglomerate Corporation in a Nicaraguan court for injuries sustained by local farmers from the toxic effects of a pesticide made by Conglomerate Chemical Company, a closely held affiliate of Conglomerate Corporation. Both companies have headquarters in Texas. Conglomerate Chemical Company was not a party in the litigation in Nicaragua, and the Nicaraguan court rejected Conglomerate Chemical Company's attempt to intervene in the case. Nevertheless, at the end of the case, the Nicaraguan court was confused and entered a billion-dollar judgment against Conglomerate Chemical Company, which had manufactured the pesticide, rather than Conglomerate Corporation, which had participated in the lawsuit. Attorney and his partner then brought an action to enforce the judgment against Conglomerate Chemical Company in Texas courts. Conglomerate Corporation, which actually participated in the litigation, is now judgment proof. The trial court dismissed the enforcement action because Conglomerate Chemical Company was not a party to the litigation that ended in the judgment that Attorney sought to execute. Attorney then appealed the decision, still hoping to execute the

billion-dollar judgment against the wrong legal entity. Are Attorney and his partner subject to discipline for bringing a frivolous action and appeal?

- a) Yes, because they pursued the attempt to execute a foreign judgment in the United States against a company that had not participated in the litigation.
- b) Yes, because they should have stipulated to the intervention of Conglomerate Chemical Corporation in the litigation instead of opposing it.
- c) No, because they are seeking enforcement of a foreign judgment based on the facial reading of the foreign court's entered judgment.
- d) No, because they are seeking to enforce a judgment for damages against the firm that actually manufactured the pesticides that were the subject of the litigation.

In re Girardi, 611 F.3d 1027 (9th Cir. 2010)

123. Client hired Attorney to represent her federal court litigation, defending against antitrust enforcement actions by the Federal Trade Commission and the Department of Justice. Attorney adopts a “quagmire” strategy, burying the government lawyers in several dozen motions to limit or compel discovery, to compel admissions or stipulations, to limit the admissibility of certain evidence or witness testimony, and so on. On a few occasions, Attorney even re-filed a motion after the court ruled on the motion in the government's favor, merely to make the government lawyer spend the time filing objections or replies based on the court's previous ruling on the same issue. The government lawyers filed a complaint against Attorney with the state bar authorities, but the state disciplinary authority decided not to pursue the matter, in part because it was in federal court and involved exclusively federal issues. Could Attorney also face sanctions or penalties under federal law, if the state bar rejected the complaint?

- a) Yes, but only because some of the motions were redundant, and may have been re-filed after the state disciplinary authority rendered its no-action decision.
- b) Yes, a federal statute authorizes federal courts to require a lawyer to pay all the excess costs, expenses, and legal fees incurred because of the lawyer “unreasonably and vexatiously” multiplying the proceedings.
- c) No, because discipline of lawyers over frivolous or vexations litigation is exclusively a matter of state law, so the judge should simply refer the matter again to the state disciplinary authorities, who are more likely to take it seriously if it comes from a federal judge.
- d) No, because the Free Speech Clause of the constitution gives lawyers an absolute right to file motions on their clients' behalf in federal court.

28 U.S.C.A. § 1927

124. A billionaire business owner decided to run for high-level public office. The billionaire candidate's platform includes a strong commitment to use military force, if necessary, to protect international human rights in foreign nations, especially rights for women, children, and grown men. A college student who operated a radical political blog wrote a blog post saying that the billionaire is “the real face of international

terrorism” because the student strongly disagreed with the candidate’s foreign policy commitments involving military force. The blog post also called the candidate “another Hitler,” who would probably bring “another Holocaust in the nation of Africa.” The insults deeply hurt the billionaire candidate’s feelings, so he filed a defamation suit against the student blogger, who had not even bothered to spell the billionaire’s name correctly. He also vowed that if he were to win the election, he would seek to revoke the citizenship of the blogger, who was born in the United States, and have him deported as an illegal alien to “some hostile nation, such as France.” The student immediately filed a motion to dismiss under the state’s anti-SLAPP statute, requested a stay of discovery, and asked that the billionaire should have to pay the student’s legal costs and fees. Could the billionaire suffer all these adverse results for his defamation suit?

- a) Yes, because anti-SLAPP (“strategic litigation against public participation”) statutes are very common and often impose such penalties on public figures who file defamation suits.
- b) Yes, because the billionaire’s threats about revoking the citizenship of natural-born citizens and deporting them to France show that his political ideas are ridiculous.
- c) No, because the anti-SLAPP statute is probably unconstitutional and violates the First Amendment.
- d) No, because the blogger overstepped his legal rights by calling the candidate a terrorist, and undermined his credibility by referring to the 54 countries in Africa as a single nation.

Tex. Civ. Prac. & Rem. Code Ann. §§ 27.001-27.011 (West 2011)

Rule 3.2 Expediting Litigation

125. Client hired Attorney to represent Client in a litigation matter, but after he filed the notice of representation and the initial pleadings in the case, the opposing party hired Big Firm to represent it. Attorney has already completed three rounds of job interviews with Big Firm and is now simply waiting for their answer, which he hopes will be an offer of employment. Rather than notify the client that an unforeseen conflict of interest has possibly emerged, Attorney simply slows down his work on the case, because if the job offer comes through, he will have to transfer Client’s case to another lawyer anyway, and if he does not receive an offer, the potential conflict disappears and he can proceed with the litigation. Attorney thus waits until the last possible day to respond to any filings or discovery requests, and frequently calls the opposing party asking for more time, which they always grant. Is it proper for Attorney to stall the progress of the case for a while, to allow time for the conflict either to disappear or for him to need to transfer the case to some other lawyer?

- a) Yes, because the conflict of interest will disappear if Big Firm rejects Attorney’s application for employment before the case proceeds any further.
- b) Yes, because Attorney may need to transfer the case to another lawyer anyway, and addressing the potential conflicting of interest directly, instead of simply stalling, could create unnecessary expenses for the client.

- c) No, because a lawyer has a duty to make reasonable efforts to expedite litigation consistent with the interests of the client.
- d) No, because a lawyer has a duty to withdraw from the representation immediately if a potential conflict of interest emerges.

ABA Formal Op. 96-400

126. Client hired Attorney to represent him in litigation because of Attorney's reputation for being the meanest, most aggressive litigator in town. Client is the defendant and Attorney bills by the hour. The judge in the case orders the parties to participate in a "caucused mediation" to encourage a settlement before trial. Attorney begins the mediation by declaring that his client is unwilling to compromise at all, even though Client had told him that they might settle the case for a reasonable amount. Attorney overstates the strength of Client's case and grossly understates the strength of the opposing party's position in what everyone knows is a close case. Attorney is merely posturing or bluffing in an effort to obtain a more favorable settlement for his client. Due to Attorney's hardline approach, the mediation drags on for several sessions spanning several days, and ultimately proves to be futile, so the parties schedule a trial. Is Attorney potentially subject to discipline for this approach in court-ordered mediation?

- a) Yes, because overstating the strength of his case or downplaying his client's willingness to compromise are misstatements of material fact.
- b) Yes, because even if the statements were not material facts, lawyers must make reasonable efforts to expedite litigation consistent with the interests of the client.
- c) No, because a lawyer can advocate zealously in order to obtain the most favorable outcome possible for his client.
- d) No, because this is court-ordered mediation, meaning the parties did not willingly agree to it and therefore have no duty to negotiate in good faith.

ABA Formal Op. 06-439 fn. 18

Rule 3.3 Candor Toward the Tribunal

127. While preparing for trial, Client tells Attorney that he intends to lie on the witness stand. Attorney tries to dissuade him, but Client insists. May Attorney allow Client to take the stand and conduct direct examination of Client as a witness under these circumstances?

- a) Yes, because Attorney fulfilled his ethical duty by trying to dissuade his client from perjury, and the opposing lawyer will have an opportunity to cross-examine the client to catch him in his lies.
- b) Yes, as long as the untruthful testimony is not material to the case and is unlikely to affect the outcome of the litigation.
- c) No, Attorney must either disclose the contemplated perjury to the tribunal, or have the client testify in a narrative mode without direct examination.

- d) No, Attorney must withdraw from representation before the testimony occurs.

Rule 3.3(b)

128. Client committed perjury on the witness stand during his trial, but Attorney did not know it at the time. Client won his case and there was no appeal of the verdict. Client boasts to Attorney after the representation ends that he successfully lied to the court and won the case as a result. Does Attorney have an ethical duty to remonstrate with the client or disclose to the tribunal that the perjury occurred?

- a) Yes, because if a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
- b) Yes, because when a lawyer represents a client in an adjudicative proceeding and knows that a person has engaged in fraudulent conduct related to the proceeding shall take reasonable remedial measures.
- c) No, because a lawyer's duty to take remedial measures after perjury occurs, continue only to the conclusion of the proceeding.
- d) No, unless the judge at some later time specifically asks Attorney if his client committed perjury.

Rule 3.3(c)

129. While conducting research on a litigation matter, Attorney finds a very new case from the highest court in a neighboring jurisdiction that is directly adverse to his client's legal position in the case. The issue presents a case of first impression in Attorney's own jurisdiction, where the case is taking place. The opposing party did not mention the case in its briefs, and Attorney realizes that the opposing party's lawyer has been recycling his firm's briefs for this type of case for several years without updating his research. Does Attorney have an ethical duty to disclose the unfavorable authority precedent to the court?

- a) Yes, because it is very common for litigators to recycle their briefs for years at a time, and everyone should help each other out with updating their legal research on issues that arise frequently in that area of litigation.
- b) Yes, because a lawyer must disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.
- c) No, because the case is not controlling authority in that jurisdiction.
- d) No, because it would be a breach of Attorney's duty of loyalty to his own client to disclose a case unnecessary that undermines their position.

Rule 3.3(a)(2)

130. During a deposition, Client gives testimony that Attorney, who is representing Client, knows is false. Does Attorney have an affirmative duty to take remedial measures to correct the false statements offered by Client?

- a) Yes, the ethical duty to take remedial measures when a client offers false statements applies when the lawyer is representing a client in an ancillary proceeding conducted pursuant to the tribunal's adjudicative authority, such as a deposition.
- b) Yes, unless it appears that opposing counsel already knows that the statements are false and is planning to impeach the witness.
- c) No, because a lawyer has a duty to protect client confidentiality and a duty of loyalty to the client that prohibits such a disclosure.
- d) No, because the client was testifying in a deposition, which is merely an ancillary proceeding to a trial, rather than committing perjury during the trial itself.

Rule 3.3 Cmt. 1

131. Attorney submitted a brief to the court arguing against the opposing party's motion for summary judgment. In his brief, Attorney never mentioned specific cases that were controlling authority in that jurisdiction and that were adverse to Attorney's position, because the opposing party's brief already discussed all adverse controlling authority. Instead, Attorney focused on a few outlier cases that supported his side, and dismissively referred to all the contrary authority, discussed at length in the opposing party's brief, as "easily distinguishable from the present case on factual grounds." No objective reader would have thought that Attorney presented a fair, even-handed exposition of the law relevant to the case, and no objective reader would have found Attorney's brief convincing. Has Attorney violated an ethical duty by writing such a one-sided brief?

- a) Yes, because there are special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process.
- b) Yes, because the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false.
- c) No, because no objective reader would have found the brief convincing, so there is no chance that the brief will mislead the tribunal about the controlling law in that jurisdiction.
- d) No, because a lawyer in an adversary proceeding is not required to present an impartial exposition of the law.

Rule 3.3 Cmt. 2

132. Client hired Attorney to represent him in litigation, and explained to Attorney his version of the incident that gave rise to the dispute with the other party. Attorney took notes on the account that Client provided, and drafted pleadings that alleged the facts as alleged by Client. Attorney did no investigation before filing the pleadings to provide independent verification of Client's version of the story, because he thought that discovery would bring to light the necessary facts to reveal the truth of the matter. Similarly, Attorney submitted as evidence the various documents client provided to

him, without doing his own assessment of the authenticity of the evidence so that he could vouch for the evidence himself. It turned out, as the other side submitted its evidence, that Client's account of what happened was full of fabrications, and some of the evidence was invalid. Attorney did not know the Client was being untruthful, but he neglected to make any efforts to verify Client's story before presenting it in court. Could Attorney be subject to discipline for undermining the integrity of the adjudicative process?

- a) Yes, because the lawyer as an advocate is responsible for pleadings and other documents prepared for litigation, and therefore must have personal knowledge of matters asserted therein.
- b) Yes, because a lawyer in an adversary proceeding has an ethical duty to vouch for the evidence submitted in a cause of action.
- c) No, because the discovery phase and the trial will bring to light which side is telling the truth.
- d) No, because a lawyer need not have personal knowledge of matters asserted in pleadings, for litigation documents ordinarily present assertions by the client, and not assertions by the lawyer.

Rule 3.3. Cmt. 3

133. During litigation, a judge issued an order that the parties could not transfer any assets out of the jurisdiction. Two weeks later, Attorney learns from Client's spouse that Client has transferred hundreds of thousands of dollars to secret offshore bank accounts in the Cayman Islands. Although neither Attorney nor Client have made any affirmative representations to the court about following the court's order, it is clear to Attorney that the court and the opposing party are under the impression that both parties are complying with the court's order, and are relying upon that fact in the ongoing proceedings. Client did not use Attorney's services in any way to make the transfers, and Attorney did not recommend it or know about it until after it occurred. Would it be proper for Attorney to do nothing and say nothing about the matter at this time, in order to protect the client's confidential information?

- a) Yes, because Attorney has not made any material misrepresentations to the court.
- b) Yes, because Client has not made any false statements to the court.
- c) No, because a lawyer always has a duty to inform the court if a client is engaged in illegal or fraudulent conduct, even if it is unrelated to Attorney's representation.
- d) No, because this is a circumstance where failure to make a disclosure is the equivalent of an affirmative misrepresentation.

Rule 3.3 Cmt. 3; ABA Formal Op. 98-412

134. Attorney must testify briefly at Client's trial about a point that is uncontested but necessary as an antecedent point for the issues in the case. Attorney testified to facts that he believed were true at the time he testified. Later, before the conclusion of the proceedings, Client discharges Attorney, and then informs Attorney of previously

unknown facts that compel the conclusion that Attorney's testimony was incorrect. Does Attorney have a duty to take remedial measures to rectify the false statements?

- a) Yes, because a lawyer shall not fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer
- b) Yes, because Client discharged Attorney, and no duty of confidentiality remains after the termination of representation.
- c) No, because the lawyer has a duty of confidentiality that continues even after a client discharges the lawyer.
- d) No, because Attorney was not aware at the time that the statements were false, and therefore did not knowingly mislead the tribunal.

Rule 3.3(a)(1)

135. Attorney represents Client in a civil litigation matter. As they prepare for trial, at which Client will testify as a witness on his own behalf, Attorney realizes that Client is probably not going to tell the truth, even though Client insists he will be completely truthful. Attorney believes there is some chance that Client is indeed telling the truth, but he is about 70% certain that Client is being untruthful, despite Client's protestations. Does Attorney have an ethical duty to try to prevent Client from presenting testimony that Attorney believes is probably false?

- a) Yes, a lawyer cannot suborn perjury, or even risk that the testimony he is eliciting via direct examination is perjury.
- b) Yes, a lawyer must disclose to the court that he does not believe Client's testimony and have the court give the client an opportunity to testify in a narrative mode.
- c) No, because the prohibition against offering false evidence only applies if the lawyer knows that the evidence is false, and a lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact.
- d) No, because the opposing party will have an opportunity to impeach the witness and the testimony during cross-examination.

Rule 3.3 Cmt. 8

136. Client is a defendant in a criminal prosecution, and Attorney is his court-appointed defense lawyer. Client wants to testify at his own trial, despite Attorney's recommendations that he not do so. As they are preparing for trial, Attorney asks Client what he plans to say on the stand. Client's story seems suspicious to Attorney – he has serious doubts about its veracity – but Client insists that he is telling the truth, and Attorney is not sure. Does Attorney have an ethical duty to allow Client to give this improbable testimony at trial?

- a) Yes, because in a criminal case, a lawyer cannot refuse to offer the testimony of a client where the lawyer reasonably believes but does not know that the testimony will be false; unless the lawyer knows that the testimony will be false, the lawyer must honor the client's decision to testify.

- b) Yes, because a lawyer cannot control what a client will say once the Client is on the stand under oath.
- c) No, because a lawyer should refuse to offer testimony or other proof that the lawyer reasonably believes is false; offering such proof may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate.
- d) No, because the lawyer has a duty of candor to the court and cannot allow a criminal defendant to abuse the legal process by testifying falsely in order to obtain a wrongful acquittal.

Rule 3.3. Cmt. 9

137. Attorney is a criminal defense lawyer, and he represents Client, who is facing charges for burglary of a private residence. Client has asserted an alibi – he claims that on the evening of the burglary, he was 100 miles away on a romantic getaway with his girlfriend. Attorney interviews Client’s girlfriend, who recounts a similar story about being on a romantic getaway, but a few details do not match Client’s account, such as what they ordered for dinner when they stopped at a restaurant, and whether they had to stop for gas along the way. Attorney suspects the girlfriend is lying to protect Client, and that they rehearsed an alibi story without working through the fine details together. Attorney lectures both Client and his girlfriend about the wrongfulness of perjury and the fact that they do not have to testify at all, as well as the hazard of having their stories crumble under rigorous cross-examination. Is it permissible, under the Rules of Professional Conduct, for Attorney to call Client and his girlfriend as witnesses during trial?

- a) Yes, because Attorney does not know with certainty that they are lying, he must allow Client to testify, and it is permissible to call the girlfriend as a witness as well.
- b) Yes, because a lawyer in a criminal case has no duty to screen witnesses based on whether they plan to tell the truth.
- c) No, because Attorney may not call the girlfriend as a witness, but he has no choice about allowing Client to testify.
- d) No, because it would be improper for Attorney to call either Client or the girlfriend to testify if he is not reasonably certain that each one will tell the truth.

Rule 3.3 Cmt. 9

Rule 3.4 Fairness to Opposing Party and Counsel

138. Client is on trial for a theft case. Witness was with Client at the time police state that Client committed the crime at a location far from the crime scene. Client chooses to take the case to trial. For Witness's attendance at trial, Attorney pays Witness a lump sum amount. Are Attorney's actions proper?

- a) Yes, because witnesses can be paid for their attendance and expenses incurred for attending and testifying at a hearing or trial.
- b) Yes, because contingency fees are the only kinds of fees not allowed to be paid to witnesses for their attendance and testimony at a hearing or trial; lump sum payments are allowed.
- c) No, because a witness cannot be paid to attend and testify at a hearing or trial.
- d) No, because an attorney cannot pay for witnesses' attendance at a trial or hearing; rather, the fees must be paid directly from the client to the witness.

139. Attorney responded to a distressed call from Client asking that he meet him immediately on the street behind Attorney's office. Attorney rushes downstairs to meet Client outside his building. Client is very distraught and has blood splattered on his clothes, hands, and face, and is holding a pistol. Client stammers, "You will not believe what just happened." Attorney takes the pistol and throws it down the closest storm gutter on the street, and they can hear the gun clanging against concrete as it tumbles deep down into the storm sewer. Attorney says, "It is late and you are too upset to talk. Go home and clean yourself up, and do your laundry – you are a mess. We can discuss this tomorrow morning when you are in a better frame of mind." Client goes home to shower and launder his clothes, and Attorney returns to his office and resumes his work on the brief he was writing. Was Attorney's conduct a violation of his ethical duties?

- a) Yes, because he had a duty to inquire about what had happened and to call the police or emergency services if someone had been hurt.
- b) Yes, because Attorney concealed or obstructed the police's access to potential evidence by discarding the gun, and he counseled Client to destroy the evidence on his clothes.
- c) No, because Attorney does not know if Client has perpetrated a crime or if he was the victim of a crime, so he has not destroyed evidence knowingly; perhaps Client just saved someone else from a violent attacker.
- d) No, because the gun is still retrievable from the storm sewer, and Attorney could still testify about his observations of Client's appearance when they met.

Rule 3.4(a)&(b)

140. In preparation for trial, Attorney and Client sat down together to go over Client's upcoming testimony. Client mentioned, as he recounted his version of the facts, something that Attorney knew would constitute an admission of fault on a critical point in the case. Attorney interrupted Client and said, "If you admit that, you will have

forfeited your entire case.” Client nods to show his comprehension of what Attorney said. Client testified at trial and changed his story significantly, carefully omitting the statement that Attorney had identified as a legal admission of guilt. Did Attorney violate the Rules of Professional Conduct in preparing Client for his testimony in this way?

- a) Yes, because a lawyer should not prepare a witness for testimony at trial at all, due to the risk of manipulating the witness or coaching the witness on the testimony.
- b) Yes, because a lawyer must not counsel another person to conceal a matter with evidentiary value.
- c) No, because the lawyer did not actually coach the witness to make a false statement, but merely to refrain from making certain unfavorable admissions.
- d) No, because one of the main values of having representation in litigation is to have advice and counsel as one prepares to testify at trial.

Rule 3.4(a)

141. After much effort, Attorney located an expert witness who could substantiate his client’s claims and could refute the testimony of the opposing party’s expert witness. The expert witness, however, demanded a large retainer fee to review the case documents and a fee of \$1000 per hour of courtroom time. Was it proper for Attorney to agree to pay the expert witness a princely sum to testify at the trial?

- a) Yes, it is proper to compensate an expert witness on terms permitted by law.
- b) Yes, as long as the lawyer did not select this expert merely because he expects his testimony to be favorable to his client’s position.
- c) No, a lawyer may not offer an inducement to a witness, especially an expert witness, who is supposed to provide a purely objective assessment.
- d) No, a lawyer may not hire an expert witness unless he pays the witness a contingent fee that depends on the outcome of the case.

Rule 3.4 Cmt. 3

142. During trial, the plaintiffs complained that Attorney’s client had not fully complied with certain production requests during discovery. The judge ordered Attorney to produce the specific records. Attorney believed that his client had no legal obligation to produce the records in question, because they included important trade secrets and were not relevant or material to the current litigation in any way. Attorney openly refused to produce the records and explained his position to the judge. The judge disagreed and ordered Attorney to bring the records to the courtroom the next day. Attorney did not obey the judge’s order. Apart from any potential contempt-of-court sanctions, could Attorney be subject to discipline for violating the Rules of Professional Conduct?

- a) Yes, because a lawyer must not knowingly disobey an obligation under the rules of a tribunal.
- b) Yes, because the proper response would be to produce the records and then object to their admissibility at trial.

- c) No, because a lawyer may disobey an order from a tribunal when the lawyer has made an open refusal based on an assertion that no valid obligation exists.
- d) No, because in an adversarial proceeding, the judge should rely on the evidence that the parties present, rather than meddling with discovery and production of evidence.

Rule 3.4(c)

143. Attorney represents a small business in an enforcement action brought by the National Labor Relations Board over violations of the laws protecting unionized workers. Attorney meets with the employees of his client, in groups of four or five at a time, and explains that there is litigation pending, that government lawyers are representing the NLRB, and that they should simply decline to discuss the case with anyone, especially lawyers from the government. Was it proper for Attorney to ask the employees not to talk to the other party?

- a) Yes, the Rules of Professional Conduct permit a lawyer to advise employees of a client to refrain from giving information to another party, for the employees may identify their interests with those of the client.
- b) Yes, because each of those individuals is still free to ignore the lawyer and talk to whomever they want about the case or about the company.
- c) No, because the lawyer could not reasonably believe that the employees' interests will not be adversely affected by refraining from giving such information.
- d) No, because the Rules of Professional Conduct require a lawyer to encourage every potential witness to talk openly and honestly with the lawyers on both sides of the case.

Rule 3.4(f)(2)

144. Client hired Attorney to represent her in litigation over the custody of her children following a divorce. Client was concerned about her former best friend, in whom she had confided for many years about her struggles with substance abuse and mental illness. The friendship had ended, because of an intense argument over Christmas presents, even before Client married and had children, and Client had been free from substance abuse since she married, and was now managing her mental health issues very well. Her former friend knew many of her darkest secrets. Attorney located the former friend, explained that Client was fighting for custody of her children, and that he expected the ex-husband's lawyer to call her to testify at the hearing about Client's former troubles. Attorney pleaded with her to show some consideration for the years of good friendship and good memories she shared with Client, and to refuse to betray her former friend's confidence and reveal all her dark secrets. The former friend felt deeply moved by this entreaty and agreed to stay out of the litigation. Was Attorney's conduct proper?

- a) Yes, because a lawyer may request that someone refrain from voluntarily giving relevant information to another party.
- b) Yes, as long as the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.

- c) No, because a lawyer may not request a person other than a client to refrain from voluntarily giving relevant information to another party, except for certain cases that do not apply here.
- d) No, because the lawyer has a duty to think about the best interests of the children in this case, rather than his client's convenience or feelings.

Rule 3.4(f)

145. Client hired Attorney to represent her in litigation over the custody of her children following a divorce. Client was concerned about her older sister, in whom she had confided for many years about her struggles with substance abuse and mental illness. Her good relationship with her sister had ended, because of an intense argument over Christmas presents, even before Client married and had children, and Client had been free from substance abuse since she married, and was now managing her mental health issues very well. Her sister knew many of her darkest secrets. Attorney located the sister, explained that Client was fighting for custody of her children, and that he expected the ex-husband's lawyer to call her to testify at the hearing about Client's former troubles. Attorney pleaded with her to show some consideration for the years of good relationship and good memories she shared with Client, and to refuse to betray her sister's confidence and reveal all her dark secrets. The sister felt deeply moved by this entreaty and agreed to stay out of the litigation. Was Attorney's conduct proper?
- a) Yes, because a lawyer may request that a relative of the client refrain from voluntarily giving relevant information to another party.
 - b) Yes, as long as the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such information.
 - c) No, because a lawyer may not request a person other than a client to refrain from voluntarily giving relevant information to another party, except for certain cases that do not apply here.
 - d) No, because the lawyer has a duty to think about the best interests of the children in this case, rather than his client's convenience or feelings.

Rule 3.4(f)(1)

146. During the discovery phase of business litigation, Conglomerate Corporation receives a discovery request asking for "all documents, memoranda, emails, or other internal correspondence related to the transaction that is the subject of this dispute." Attorney represents Conglomerate Corporation. Thousands of documents stored in electronic format on Conglomerate's computers and servers would arguably fall under this request for production. Attorney proposes to opposing counsel that they produce the requested documents in electronic form on a set of compact discs, and the opposing counsel readily agrees. Long before the litigation began, Attorney began using software to scrub the metadata from documents – electronically embedded information about the name of the user whose computer created the document, the date and time of creation,

redlined changes from each stage of editing, and comments that other readers added to the document before it took its final form. Proposed contracts, letters to business partners, and correspondence with opposing counsel are all free from embedded metadata. Was it proper for Attorney to scrub the metadata from electronic documents that could potentially be subject to a discovery or production request in future litigation?

- a) Yes, because the printed copies of the documents would not have had such information.
- b) Yes, because a lawyer may take measures to eliminate metadata from documents that could later fall into the hands of an opposing party.
- c) No, because the main reason for scrubbing metadata is to conceal information that might be useful to an opposing party or tribunal in the future.
- d) No, because the metadata is often necessary for determining who created a document, when they created it, or how the document changed from its original draft to its final form.

ABA Formal Op. 06-442

147. During the discovery phase of business litigation, Conglomerate Corporation receives a discovery request asking for “all documents, memoranda, emails, or other internal correspondence related to the transaction that is the subject of this dispute.” Attorney represents Conglomerate Corporation. Thousands of documents stored in electronic format on Conglomerate’s computers and servers would arguably fall under this request for production. Attorney proposes to opposing counsel that they produce the requested documents in electronic form on a set of compact discs, and the opposing counsel readily agrees. After receiving the production request, Attorney began using software to scrub the metadata from documents – electronically embedded information about the name of the user whose computer created the document, the date and time of creation, redlined changes from each stage of editing, and comments that other readers added to the document before it took its final form. Proposed contracts, letters to business partners, and memoranda between managers all have their embedded metadata erased. Was it proper for Attorney to scrub the metadata from electronic documents before delivering them to the other party in response to a discovery request?

- a) Yes, because the printed copies of the documents would not have had such information.
- b) Yes, because a lawyer may take measures to eliminate metadata from documents that could later fall into the hands of an opposing party.
- c) No, because the main reason for scrubbing metadata is to conceal information that might be useful to an opposing party or tribunal in the present litigation.
- d) No, because the metadata is often necessary for determining who created a document, when they created it, or how the document changed from its original draft to its final form.

ABA Formal Op. 06-442

Rule 3.5 Impartiality and Decorum of the Tribunal

148. Police arrested several protestors who were advocating a cause that Attorney strongly supported. One of the protestors had a violent altercation with police, and she was facing criminal charges. Attorney practices corporate transactional law and not litigation. The news media reported that jury selection would begin the following Monday in the protestor's prosecution. Attorney waited outside the courthouse where prospective jurors were reporting for jury service, and a long line formed at the metal detectors for entering the courthouse. Attorney waited in line and started conversations with the prospective jurors in front of him and behind him in the line, during which he explained that he was a lawyer and that the case against the protestor was ridiculous from a legal standpoint. He told them that he hoped the jury would follow the laws of the state and acquit the protestor. Once Attorney made it through the security line, he walked out of the courthouse and got back in the security line again, and had similar conversations with more prospective jurors. During voir dire, the prosecutor asked the prospective jurors if anyone had spoken to them directly about the case, and three people mentioned their conversations with a lawyer in the security line waiting to get into the building. None of the individuals with whom Attorney spoke ended up on the jury in the case. The prosecutor eventually determined Attorney's identity and filed a grievance with the state disciplinary authority. Could Attorney be subject to discipline?

- a) Yes, because Attorney should have explained both sides of the case as fairly as possible to the prospective jurors.
- b) Yes, because a lawyer shall not seek to influence a judge, juror, or even a prospective juror.
- c) No, because he spoke to prospective jurors, and they did not end up serving on the case.
- d) No, because he was not representing a party in the case, and was not even a litigator.

Rule 3.5(a)

149. A judge lost his temper with Attorney and spoke very abusively to him in open court, in front of a jury, using profanity and calling Attorney "an embarrassment to the profession and a menace to his own clients." Attorney shot back that the judge was completely out of line, that the judge should have retired years ago; Attorney also made a mildly obscene gesture at the judge. Eventually, both calmed down and apologized to each other profusely. Opposing counsel reported Attorney to the state bar disciplinary authority, but did not report the judge, before whom opposing counsel appears regularly. Could Attorney be subject to discipline?

- a) Yes, because he escalated the fiery exchange by making an obscene gesture.
- b) Yes, because a lawyer may stand firm against abuse by a judge but should avoid reciprocation; the judge's default is no justification for similar dereliction by an advocate.

- c) No, because the opposing counsel who reported the matter did not report the judge, who instigated the exchange, and presumably reported Attorney merely to make trouble for his opponent in litigation.
- d) No, because the Attorney apologized to the judge immediately, and a lawyer is not required to passively accept abuse or inappropriate attacks from a judge or other lawyer.

Rule 3.5 Cmt. 4

150. Attorney received a call from his cousin, who lives in another city, one evening after work. The cousin was serving on a jury in a misdemeanor criminal case, and deliberations were set to begin the following morning. The cousin explained that part of the jury instructions focused on whether the defendant committed the act “knowingly.” She is confused about whether that means that the defendant knew that he was committing the act, or that the defendant knew he was doing something illegal at the time. She called Attorney hoping for some clarification. Attorney practiced real estate law and had never handled a criminal case, but he vaguely remembered something about this from his first-year law school course in criminal law. Given that there was no time for him to research the subject, or to create an agreement for representation, and the fact that he had very limited information, Attorney offered the best explanation he could. Was it proper for Attorney to answer her question under these circumstances?

- a) Yes, because he has no involvement with the case, and the juror is his relative.
- b) Yes, because the Supreme Court has held that any restrictions in this area violate the First Amendment.
- c) No, because he communicated with a juror about a pending case.
- d) No, because there is a chance his cousin could repeat a garbled version of his informed opinion to the other jurors during deliberations.

Rule 3.5(b)

Rule 3.6 Trial Publicity

151. Defendant was facing charges for a high-profile crime, and he was the subject of constant negative media coverage, strongly presuming Defendant's guilt. Attorney was the criminal defense lawyer representing Defendant. When a reporter asked Attorney for a comment on the case, Attorney replied, "The only one guilty of anything here is the media." Was Attorney's comment proper?

- a) Yes, because it was unlikely to have a materially prejudicial effect on an adjudicative matter.
- b) Yes, because a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.
- c) No, because a lawyer should not publicly express any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration.
- d) No, because a lawyer participating in a criminal proceeding shall not make any extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication

Rule 3.6 Cmt. 5(4)

152. A lawyer is representing the defendant in a highly publicized civil trial between two celebrities. On his way into the courthouse on the day of jury selection, reporters gather around the lawyer hoping for comments. The lawyer explains that his client has agreed to take a polygraph test proving that he is telling the truth about the disputed matter, but that the opposing party has refused to take a polygraph test, which suggests that the other person is hiding something. The lawyer has his client's permission to talk to the media. Opposing counsel is standing nearby waiting for his turn to talk, and he expresses no objection to the first lawyer giving interviews like this, or to the lawyer's comments. Were the lawyer's statements proper?

- a) No, because there is a presumption of prejudicial effect on the proceedings when a lawyer comments publicly about the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test.
- b) Yes, because the other lawyer is present and did not object to the comments at the time.
- c) No, because it violates the rules to talk to crowds of reporters near a courthouse entrance on the day when potential jurors are entering the building for voir dire.
- d) Yes, because polygraph tests are inadmissible in court in almost every state, so commenting on these tests is irrelevant to the trial itself.

Rule 3.6 Cmt. 5(3)

153. A lawyer is representing the defendant in a highly publicized criminal trial. On his way into the courthouse on the day of jury selection, reporters gather around the lawyer hoping for comments. The lawyer explains that his client is still considering whether to enter a guilty plea to lesser charges, as the prosecutor's offer is still open, and that

they are waiting to see how jury selection goes before deciding whether to plead guilty or proceed to trial. The lawyer also explains that his client has never actually confessed to the crime charged, despite several lengthy interviews with the police and the client's admitting that he was near the scene of the crime when it occurred. The lawyer has his client's permission to talk to the media, and the prosecution has expressed no objection to him giving interviews like this on the courthouse steps in previous cases. Were the lawyer's statements proper?

- a) No, because there is a presumption of prejudicial effect on the proceedings when a lawyer comments publicly about the possibility of a guilty plea, or a party's refusal to confess to a crime
- b) Yes, because the rules about trial publicity explicitly allow the lawyer to explain the offense or defense involved, and the prosecutor has not objected.
- c) No, because it violates the rules to talk to crowds of reporters near a courthouse entrance on the day when potential jurors are entering the building for voir dire.
- d) Yes, because the lawyer's statements clearly fall under the protection of his First Amendment rights, and he has his client's consent.

Rule 3.6 Cmt. 5(2)

154. A lawyer is representing the defendant in a highly publicized trial. On his way into the courthouse on the day of jury selection, reporters gather around the lawyer hoping for comments. The lawyer explains that his client has a perfectly clean criminal record, while the state's star witness is already serving time on a felony drug conviction. In his personal opinion, he says, the client is innocent and should receive an acquittal, but he does not explain the defense theory of the case. The lawyer declares that he has his client's permission to talk to the media, which is true, and that the prosecution expressed no objection to him giving interviews like this on the courthouse steps in previous cases. Were the lawyer's statements proper?

- a) No, because the official Comment to the Model Rules says that expressing an opinion about a party's guilt or innocence, or about the criminal record of a party or witness, is more likely than not to have a material prejudicial effect on a proceeding.
- b) Yes, because the rules about trial publicity explicitly allow the lawyer to explain the offense or defense involved, and the prosecutor has not objected.
- c) No, because it violates the rules to talk to crowds of reporters near a courthouse entrance on the day when potential jurors are entering the building for voir dire.
- d) Yes, because the lawyer's statements clearly fall under the protection of his First Amendment rights, and he has his client's consent.

Rule 3.6 Cmt. 5(4)

155. Attorney defended Client in a criminal proceeding that attracted low-level media attention on the local evening news and a few local-interest blogs. A semi-retired reporter for the local evening news called Attorney at his office and asked for a quote about Client's case. Attorney stated that Client had no prior criminal record and that

they planned to put on a rigorous defense, and he hoped the prosecutor would drop all the charges before trial. Was it improper for Attorney to make these statements?

- a) Yes, because lawyers involved in a criminal proceeding may not make any statements to the media about the case or the parties involved.
- b) Yes, because a lawyer should not make extrajudicial comments about the criminal record of a party during a criminal matter.
- c) No, because a lawyer may state the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved.
- d) No, because the matter received only low-level media attention and the reporter was semi-retired.

Rule 3.6 Cmt. 5(1)

156. Attorney defended Client in a criminal proceeding that attracted low-level media attention on the local evening news and a few local-interest blogs. One of these bloggers called Attorney at his office and asked for a quote about Client's case. Attorney stated that a member of the local clergy, as well as the Principal of the local high school, would testify as to Client's good character and volunteer activities. Was it proper for Attorney to discuss such things with a blogger?

- a) Yes, because a local-interest blogger is not an official public communication and does not constitute dissemination by means of public communication.
- b) Yes, because a lawyer may state the expected testimony of a party or witness in a criminal matter.
- c) No, because in a criminal matter, it is presumptively prejudicial for a lawyer to make extrajudicial statements about the expected testimony of a party or witness.
- d) No, because a criminal defense lawyer may not make any extrajudicial statements except to state the claim, offense or defense involved and, except when prohibited by law, the identity of the persons involved.

Rule 3.6 Cmt. 5(1)

157. At a press conference about the prosecution of an accused serial killer, the prosecutor stated that the defendant was single and lived with his mother in a particular apartment complex in the city, and that the defendant worked as a butcher. Was it proper for the prosecutor to disclose such information about the case to reporters?

- a) Yes, because a lawyer in a criminal case may state the identity, residence, occupation, and family status of the accused.
- b) Yes, because a prosecutor represents the people, and the public disclosures are necessary communications between a lawyer and his clients, the taxpayers.
- c) No, because the defendant is on trial for murder, so special ethical duties automatically apply to the prosecutor's public statements.
- d) No, because a lawyer in a criminal case may not disclose the residence, occupation, or family status of the accused.

Rule 3.6(b)(7)(i)

158. At a press conference about the prosecution of an accused serial killer, the prosecutor stated that the police arrested the defendant at the scene of one of the crimes soon after the crime occurred, at 11 pm on Saturday. Was it proper for the prosecutor to disclose such information about the case to reporters?

- a) Yes, because a lawyer in a criminal case may state the fact, time, and place of arrest.
- b) Yes, because a prosecutor represents the people, and the public disclosures are necessary communications between a lawyer and his clients, the taxpayers.
- c) No, because the defendant is on trial for murder, so special ethical duties automatically apply to the prosecutor's public statements.
- d) No, because a lawyer in a criminal case may not disclose the time and place of arrest

Rule 3.6(b)(7)(i)

159. At a press conference about the prosecution of a notoriously vice-prone celebrity, the prosecutor stated that the District Attorney's office had filed charges against the celebrity for shoplifting and drug possession. The prosecutor then said he had no further comments and took no further questions. Was it proper for the prosecutor to disclose such information about the case to reporters?

- a) Yes, because the prosecutor took no further questions and merely stated the nature of the case.
- b) Yes, because in a criminal case, a prosecutor may state publicly that a defendant has been charged with a crime, as long as he does not include a statement that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.
- c) No, because a prosecutor should not make any public statement about a criminal case, unless the prosecutor has express authorization from a tribunal.
- d) No, because in a criminal case, it is presumptively prejudicial for a prosecutor to state publicly that a defendant has been charged with a crime, unless he includes a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

Rule 3.6 Cmt. 5(6)

Rule 3.7 Lawyer as Witness

160. Attorney normally represents Client in commercial litigation matters, but in one particular case, Attorney had to testify as a witness during the trial, so he arranged for another firm to represent Client during the trial at which Attorney testified. Client prevailed at trial, and the opposing party filed an appeal. Attorney's testimony from the trial is not an issue in the appeal; instead, the appeal focuses on the apportionment of fault and certain guarantees in a commercial contract. The firm that handled the trial did not do appellate work and ended their termination of Client after the trial ended in a favorable verdict. May Attorney represent Client in the appeal, even though Attorney testified at the trial?

- a) Yes, because the advocate-as-witness rule generally applies only to representation during the trial, unless the lawyer's testimony is an issue on appeal.
- b) Yes, because the opposing party brought the appeal after Attorney's client obtained a favorable verdict at trial using other trial counsel.
- c) No, because a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.
- d) No, because combining the roles of advocate and witness can prejudice the tribunal and the opposing party and can also involve a conflict of interest between the lawyer and client.

Rule 3.7

161. Attorney was a criminal defense lawyer and she represented Client, who was a defendant in a criminal prosecution. The prosecution called Attorney to the witness stand to authenticate a piece of evidence, which Attorney was willing to do because the authenticity of the evidence was not really in dispute; Attorney planned to use alibi evidence to defeat the charges against Client, which would make this piece of evidence relatively unimportant to the case. May Attorney testify in this manner in a case in which she represents the defendant?

- a) Yes, because the testimony relates to an uncontested issue.
- b) Yes, because testifying as a witness will give the lawyer a good opportunity to advocate on behalf of his client.
- c) No, because a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.
- d) No, because this is a criminal prosecution.

Rule 3.7(a)(1)

162. Client is an indigent criminal defendant and Attorney is his court-appointed counsel. The trial is taking place in a rural county where only a handful of lawyers practice law. Before appointing Attorney to represent Client, the court had tried to appoint five other local criminal defense lawyers, one after the other, but each was unable to provide representation due either to a conflict of interest or because their current caseload would

have precluded them from providing competent representation. In fact, Attorney was the last lawyer on the court appointments list. Unfortunately, Attorney also needed to serve as a witness during part of the trial, in order to authenticate a piece of evidence, and the authenticity of the evidence was a matter of dispute in the case. In addition, Attorney realized that his testimony would radically contradict the testimony of his own client, though Attorney still believed he could obtain an acquittal by impeaching the prosecution's star witness. May Attorney continue to represent Client and testify as a witness in this matter?

- a) Yes, because the testimony relates to a contested issue, so the ambiguities in the dual role are purely theoretical.
- b) Yes, because disqualification of the lawyer would work substantial hardship on the client.
- c) No, because there is likely to be substantial conflict between the testimony of the client and that of the lawyer, so the representation involves a conflict of interest that requires compliance with the conflicts rules.
- d) No, because a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness, and it may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.

Rule 3.7 Cmt. 6

163. Attorney is representing himself in his divorce proceeding. Would it be proper, under the advocate-witness rule, for Attorney to testify as a witness on his own behalf in the proceeding in which he represents himself?

- a) Yes, because disqualification of the lawyer either from representing himself or from testifying would work substantial hardship on the client.
- b) Yes, because the advocate-witness prohibition does not apply to pro se litigants who are attorneys.
- c) No, because a lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness.
- d) No, because he will be unable to make objections to improper questions by opposing counsel during cross-examination.

See *Ayres v. Canales*, 790 S.W.2d 554 (Tex. 1990); *Horen v. Bd. Of Educ.*, 882 N.E.2d 14 (Ohio Ct. Appl. 2007); Conn. Informal Ethics Op. 05-03 (2005)

164. A famous professional athlete faced charges for allegedly murdering his wife and her male companion one evening outside their Beverly Hills home. The defendant assembled a legal "dream team" of the five most famous criminal defense lawyers from around the country. One of the lawyers was in possession of a handwritten letter from one of the murder victims saying that a drug cartel had been making death threats against the victim for a few weeks. The evidence would have been somewhat exculpatory for the defendant, but the lawyer would have to take the witness stand briefly during the trial to authenticate the document or explain how he received it. The document was a hotly contested piece of evidence in the case, but was not the only

evidence pointing toward the defendant's innocence or guilt. The prosecutor wanted the court to disqualify the lawyer from representing the defendant if he testified about the letter. The defendant insisted that this would work a substantial hardship on him, because this particular lawyer was the only criminal defense lawyer in the county with an undefeated record – he had obtained acquittals in hundreds of criminal trials and had never lost a case. Should the court side with the defendant in this case and allow the lawyer to continue as part of his defense team?

- a) Yes, because disqualification of the lawyer would work substantial hardship on the client.
- b) Yes, because this is a criminal prosecution and the client has a Sixth Amendment right to counsel.
- c) No, because disqualification of the lawyer would not work substantial hardship on the client.
- d) No, because a lawyer may act as advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness.

Rule 3.7(a)(3)

ANSWER KEY

- | | | |
|--------|--------|-------------------|
| 119. d | 135. c | 151. c |
| 120. c | 136. a | 152. a |
| 121. d | 137. a | 153. a |
| 122. a | 138. c | 154. a |
| 123. b | 139. b | 155. b |
| 124. a | 140. b | 156. c |
| 125. c | 141. a | 157. a |
| 126. b | 142. c | 158. a |
| 127. c | 143. c | 159. d |
| 128. c | 144. c | 160. a |
| 129. c | 145. a | 161. a |
| 130. a | 146. b | 162. c |
| 131. d | 147. c | 163. b |
| 132. d | 148. b | 164. b |
| 133. d | 149. b | 165. a |
| 134. a | 150. c | |

Competence, Legal Malpractice, & Other Civil Liability

(6–12%, 3-7 MPRE Questions)

- Maintaining competence – Rule 1.1
- Competence necessary to undertake representation – Rule 1.1
- Exercising diligence and care – Rule 1.3
- Civil liability to client, including malpractice – Rule 1.8
- Civil liability to nonclients – Rule 2.3
- Limiting liability for malpractice – Rule 1.8
- Malpractice insurance and risk prevention – Rule 7.2

Rule 1.1 Competence

165. Attorney normally does business transactional work for clients, and has done so for a decade. One of Attorney's clients recently injured another driver in a car accident, and he asked Attorney to defend him in the personal injury lawsuit over the incident. Attorney has never taken a case to trial, but took trial advocacy courses in law school, and has served as second chair on other lawyer's commercial litigation trials. Attorney would like to keep the client and would not mind expanding his practice into a new area. Which of the following would be an improper course of action?

- a) Attorney could decline to represent the client in the matter, explaining that he specializes in transactional work and does not do trials, and could encourage the client to find another lawyer.
- b) Attorney could refer his client to another lawyer and charge the other lawyer a substantial referral fee.
- c) Attorney could research personal injury lawyers in the area, refer his client to the one who seems most reputable, and charge the client for the time spent finding a suitable referral.
- d) Attorney could take the case, conduct research to master the relevant points of precedent or statutory law, and represent the client to the end of the litigation.

Rule 1.1 Cmt 1

166. Attorney gave a consultation to Client, who wanted Attorney to represent him in a regulatory takings case over changes in zoning and land use rules that interfered with Client's intended use of his property. Attorney was a recent law school graduate, and had her own small law firm. She had never handled a regulatory takings case before, which she explained to Client. Nevertheless, Attorney agreed to take Client's case and to do the research necessary to get up to speed on the law in that area. As Attorney began researching the area, she found it terribly confusing, and eventually called a friend from law school for help, another lawyer in the area. The other lawyer had an impressive familiarity with the law of regulatory takings, and offered to join Attorney as co-counsel in the case in exchange for an even split in the fees. Attorney agreed to this arrangement privately with the other lawyer, though Client was not aware of it, and together they achieved exactly the result that Client sought in the case. Attorney's bill to Client at the end of the representation was exactly what they had agreed in the retainer, and Client paid. Attorney then split the amount with the other lawyer who helped her. Is Attorney subject to discipline in this situation?

- a) No, because it was proper for Attorney to bring in co-counsel with more expertise in the area of law.
- b) Yes, because Attorney did not know the area well enough to provide representation, and was unable to teach herself the relevant law as she promised Client she would do..

- c) No, because Attorney did, in fact, make a good-faith effort to learn the area of law as she had promised.
- d) Yes, because before a lawyer retains or contracts with other lawyers outside the lawyer's own firm to provide or assist in the provision of legal services to a client, the lawyer should ordinarily obtain informed consent from the client and must reasonably believe that the other lawyers' services will contribute to the competent and ethical representation of the client

167. Attorney worked as in-house counsel for a petroleum refinery. One day, after weeks of stalemate in a round of collective bargaining, the refinery workers decided to go on strike to demand higher wages and more vacation time. The workers abandoned their workstations and picketed on the sidewalk in front of the building. Late in the evening, some of the picketers moved their protests onto the refinery compound, including some hazardous areas. The usual safety personnel were also on strike, so there was a substantial risk of an explosion at the refinery if the protestors engaged in vandalism, and a risk for injuries to the protestors. At midnight, the management called in Attorney to ask if it would be legal for them to call in a private security force and have all the picketers arrested and removed from scene, or if federal labor laws and Free Speech laws protected their right to protest. Attorney initially suggested that they simply remove the protestors from the hazardous areas of the compound, but the management believed that the protestors on the sidewalk would simply migrate over to the same areas to fill the gaps from those removed, and then pose an ongoing safety risk. Attorney knew nothing about protester rights or the rights of striking workers, because all of his legal work up to that point has involved reviewing contracts with suppliers and distributors for the refinery. Attorney tried to call one or two lawyers he knew who might know the answer, but nobody answered his calls given the late hour. Attorney then guessed that it would be fine for the management to remove the picketers by force, and advised accordingly. Unfortunately, during the ensuing scuffle with the private security force, several workers and security offers received serious injuries, and it turned out that Attorney's advice about labor laws was incorrect given the special circumstances surrounding the collective bargaining. The refinery was subject to substantial liability both to the injured individuals and faced fines from the federal labor board. Should Attorney be subject to discipline in this situation?

- a) No, because the management made the final decision and should bear the full responsibility for it.
- b) Yes, because a lawyer should provide competent representation to a client, and competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
- c) No, because in an emergency a lawyer may give advice or assistance in a matter in which the lawyer does not have the skill ordinarily required where referral to or consultation or association with another lawyer would be impractical.
- d) Yes, unless the management provided a waiver, confirmed in writing, that exonerated Attorney from responsibility for their decision.

ANSWER KEY - Rule 1.1 Competence

165. b

166. d

167. c

Rule 1.3 Diligence

168. Attorney represents Client in a civil matter. Client's case went to trial and Client lost. Client wished to appeal the matter. Attorney did not file an appeal because there was no agreement that the attorney would handle the appeal. The period of time in which Client could file an appeal expired and no appeal was filed. Is attorney subject to discipline?

- a) Yes, because an attorney must discuss the possibility of an appeal prior to relinquishing responsibility for a client's case if there were no prior discussions regarding whether or not the attorney would handle the appeal process.
- b) Yes, because an attorney shall complete an entire case for a client, including the appeal process, unless the parties have agreed in writing that the attorney's employment terminates after trial.
- c) No, because an attorney is not required to continue working on a case for a client after trial unless the attorney and the client specifically agreed that the attorney would continue to be employed as the attorney for the appeal process.
- d) No, because an attorney is not required to continue working on a case for a client after trial unless the attorney and the client specifically agreed, in writing, that the attorney would continue to be employed as the attorney for the appeal process.

Rule 1.3 Cmt. 4

169. Attorney works as a public defender. The office is always under-funded, meaning they cannot afford to hire enough staff attorneys, and the current attorneys all carry an overload of cases. Attorney feels that she is unable to provide full representation to each client, as she must conduct about seven plea bargaining sessions for different clients per weekday, and usually meets the clients for the first time about fifteen minutes before each plea bargain session. Each plea bargain takes about an hour, with short breaks in between. Attorney strongly encourages nearly all of her clients to accept a plea bargain, because taking one case to trial will mean that the public defender's office must turn away about two dozen indigent clients. Attorney and her colleagues believe that it is better for defendants to have a little representation rather than none at all, and that most defendants would lose at trial anyway. Does Attorney have an ethical problem, under the Rules of Professional Conduct?

- a) Yes, because a lawyer must control her workload so that each matter can be handled competently.
- b) Yes, because it would be better for clients to have no lawyer at all than to rely upon a lawyer who is providing minimal or inadequate representation.
- c) No, if most of the clients would, in fact, fare worse if they went to trial, then Attorney's representation is their best option.
- d) No, because there is a special exception for public defenders in the Rules of Professional Conduct regarding diligence.

Rule 1.3 Cmt. 2

170. Attorney has taken on many new clients recently, and is having trouble managing her time and meeting deadlines, though she has not missed any deadlines yet in any client matter. At one pre-trial hearing, opposing counsel asks for a two-month postponement of the previously scheduled trial, to Attorney's great relief. Attorney readily agrees, because the postponement will enable her to attend to other urgent client matters and will give her more time to prepare for the trial. After she returns to her office from the courthouse, Attorney calls her client to notify him about the trial postponement. Client is upset about the postponement because he wanted the matter resolved as quickly as possible, and he accuses Attorney of putting her own scheduling needs ahead of his interests. Attorney explains that they have not lost anything through the postponement, and that Attorney will now have more time to prepare for the trial, so the delay is probably advantageous for Client's case, both from a strategic and a preparation standpoint. Client accepts Attorney's answer but still feels disappointed that Attorney did not ask him first, in which case he would have expressed his will to contest the postponement. Is Attorney in compliance with her ethical duties under the Rules of Professional Conduct?

- a) Yes, because a lawyer has an ethical duty to accommodate opposing counsel's request for a postponement or continuance, as long as the delay will not prejudice the client in the final outcome.
- b) Yes, a lawyer's duty to act with reasonable promptness does not preclude the lawyer from agreeing to a reasonable request for a postponement that will not prejudice the lawyer's client.
- c) No, because Attorney failed to ask Client about the postponement before agreeing to it in the courtroom.
- d) No, because a client's interests often can be adversely affected by the passage of time or the change of conditions, and unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Rule 1.3 Cmt. 3

171. Attorney represented Husband in a transactional matter twenty years ago, which involved incorporating a small business that Husband later sold to an acquaintance. The proceeds from the sale went to fund college tuition for Husband's grown children. Wife recently retained Attorney to represent her in a divorce action against Husband. Husband and wife both provided Attorney with informed consent, confirmed in writing, waiving any conflicts of interest. Husband barely remembered Attorney, in fact, and the previous representation has no bearing on the current divorce or marital property. Wife then told Attorney, in confidence, that Husband had a homosexual affair last year with a man at his health club, and this was a major factor in her deciding to file for divorce. She explains that it is very important to her that Husband's affair be a centerpiece in the divorce proceedings, as this will give her closure and will help both her parents and her grown children to understand why she felt compelled to end the marriage. Attorney believes her, but finds this allegation unsavory, and does not want to embarrass Husband, especially given that Husband is a former client. Attorney

halfheartedly files the divorce petition without any mention of the affair, stipulates to the Husband's request for a sealed record without discussing this move with Wife, and resolves the matter as discreetly as possible. Ultimately, Wife accepts the settlement recommended by Attorney, but is deeply disappointed that the affair has been kept secret, and the family will not believe her about it. Is Attorney subject to discipline for handling the matter in this way?

- a) Yes, because the Wife was disappointed at the end of the case, though she consented to the final settlement.
- b) Yes, because a lawyer must act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf.
- c) No, because a lawyer has an ethical duty to preserve the privacy of opposing parties, especially when protecting against the potential for bigotry against homosexuals.
- d) No, because Attorney a lawyer is not bound, however, to press for every advantage that might be realized for a client.

Rule 1.3 Cmt. 1

172. Attorney represents Client in patent infringement litigation. Client is a longtime business rival of the opposing party, and has successfully sued the opposing party before over an unrelated matter. The opposing party still loses his temper whenever someone brings up the previous lawsuit he lost, because he felt it was completely unfair and he nearly went bankrupt over it, and his marriage even failed due to the stress from the case and the burdensome verdict. On the eve of trial, Attorney mentions to Client that the opposing party will actually take the stand to testify in the case. Client instructs Attorney to bring up the time that Client won another lawsuit against the opposing party during cross-examination, merely to make the opposing party get upset. He assures Attorney that the opposing party will lose his temper on the stand, and will at least lose credibility before the jury, and may even slip and say something that would undermine his position in the case. Attorney simply refuses to bring up a matter merely to provoke an outburst from the opposing party during trial. Client believes Attorney has a duty to provide zealous advocacy and to pursue every advantage for Client's interests. Would it be proper for Attorney to refuse to bring up the prior unrelated lawsuit during his cross-examination, despite Client's instructions to do so?

- a) No, because a lawyer has a duty to provide zealous advocacy and to pursue every advantage for Client's interests.
- b) No, because provoking a hostile witness into an angry outburst on the stand violates the lawyer's strict duty to preserve the decorum of the proceedings.
- c) Yes, because a lawyer's duty to act with reasonable diligence does not require the use of offensive tactics or preclude the treating of all persons involved in the legal process with courtesy and respect.
- d) Yes, as long as Attorney expects that opposing counsel would object to the line of questioning, and that the court would probably sustain the objection.

Rule 1.3 Cmt 1

ANSWER KEY:

Rule 1.3 Diligence

- 168. a
- 169. a
- 170. b
- 171. b
- 172. c

LEGAL MALPRACTICE QUESTIONS FROM CLASS

173. As mentioned in class, what is currently the most frequently alleged malpractice error in Law Professional Liability claims?
- a) Missing Filing Deadlines/Statute of Limitations
 - b) Conflicts of interest
 - c) Breach of Confidentiality
 - d) Failure to Communicate
174. As mentioned in class, what is currently the practice area generating the largest number of Law Professional Liability claims?
- a) Wills & Trusts
 - b) Immigration
 - c) Real estate
 - d) Criminal Law
175. As mentioned in class, what is currently the trend for the number of malpractice claims?
- a) Steadily increasing
 - b) Steadily decreasing
 - c) Plateaued
 - d) Cyclical and varying wildly
176. As mentioned in class, how many major malpractice insurers report that they have paid LPL claims over \$100 million?
- a) Less than half
 - b) More than half
 - c) All
 - d) None
177. As mentioned in class, what is currently the average hourly rate for defense counsel in legal malpractice claims?
- a) Most pay more than \$300 per hour
 - b) Most pay more than \$1000 per hour
 - c) Most pay more than \$100 per hour
 - d) Most of the work is done by in-house counsel at the insurance companies and is therefore not billed at an hourly rate
178. Legal malpractice lawsuits require proving that the plaintiff would have prevailed but for the lawyer's negligence, and proving damages. As mentioned in class, which of the following is necessary to prove these elements of a typical malpractice action?
- a) A trial within a trial
 - b) Reverse bifurcation of the trial
 - c) Expert testimony by experienced judges
 - d) A decision from the state bar disciplinary authority about whether the lawyer's conduct violated the Rules of Professional Conduct

ANSWERS: MALPRACTICE

- 173. b
- 174. c
- 175. a
- 176. b
- 177. a
- 178. a

Rule 1.6 - Client confidentiality

(6–12% MPRE, 3-7 questions)

- Attorney-client privilege
- Work-product doctrine
- Professional obligation of confidentiality - general rule – Rule 1.6
- Disclosures expressly or impliedly authorized by client – Rule 1.6
- Other exceptions to the confidentiality rule – Rule 1.6

Rule 1.6 - Confidentiality

179. Attorney works in a law firm with other attorneys. Attorney is handling a case for Client, and Client instructs Attorney not to share any of the case details or any of Client's personal details or information with other attorneys in the firm. While preparing for a hearing, Attorney goes to another attorney in the firm and discusses the case. Attorney advises the attorney with whom he discusses the case that Client would prefer that other attorneys in the firm not be involved in the case. Attorney uses the information and guidance provided by the other attorney to successfully win the hearing. Are Attorney's actions proper?

- a) Yes, because attorneys are authorized to make disclosures when reasonably necessary or when it is in the client's best interest, even if the client instructs the attorney otherwise.
- b) Yes, because an attorney may discuss with other members of the firm at which he is employed any issues regarding a case that is being handled by that firm.
- c) No, because attorneys shall not discuss a client's case with other attorneys of the firm handling the client's case if instructed by a client not to do so.
- d) No, because an attorney shall not discuss a client's case with anyone, including other attorneys of the firm that is handling the case, unless specifically authorized to do so by the client.

Rule 1.6 Cmt. 5

180. Client hired lawyer to defend him in a criminal matter regarding the murder of Client's girlfriend. During Attorney's interviews and investigation for this case, he learns that Client has also been committing identity theft and credit card fraud, obtaining credit cards in the names of other individuals, and running up charges on the cards without paying the bills, so that the individuals whose names are on the cards will have to pay instead. Attorney urges Client to stop this practice, and Client merely laughs at him. Attorney continues his representation of Client and wins an acquittal on the murder charge. The representation is now over. May Attorney warn some of the individuals in whose names Client has obtained credit cards, according to the Model Rules of Professional Conduct?

- a) Yes, because the lawyer's representation of client has ended, and the information he wants to disclose is unrelated to the matter for which he represented the client.
- b) Yes, because a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another.
- c) No, because the information he wants to disclose is unrelated to the matter for which he represented the client, and it is not certain that substantial injury to the financial interests of others will occur.
- d) No, because the exception that permits disclosure to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another applies only when the client has used or is using the lawyer's services in furtherance of the crime or fraud.

Rule 1.6(b)(2)

181. Client hired Attorney to represent him in a criminal matter. Client faces charges over corporate fraud that he perpetrated two years before when he was the Chief Financial Officer of a large, publicly traded corporation. Attorney learns during his interviews with Client that the fraud will have some far-reaching consequences for investors and another large corporation in the area, consequences that the prosecution and regulatory authorities have overlooked so far. Attorney realizes that if he discloses this information now, he could prevent substantial injury to the financial interests or property of innocent people, and that harm is reasonably certain to result otherwise. According to the Model Rules of Professional Conduct, may Attorney disclose the information in order to prevent this substantial injury to the financial interests of others?
- a) Yes, because a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent substantial injury to the financial interests or property of innocent people.
 - b) Yes, because a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary when the client has committed a crime or fraud that is reasonably certain to cause substantial financial injury to others.
 - c) No, because a lawyer may never reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary when the client has committed a crime or fraud that is reasonably certain to cause substantial financial injury to others.
 - d) No, because the exception that permits disclosure to prevent substantial financial harm to others does not apply when a person who has committed a crime or fraud thereafter employs a lawyer for representation concerning that offense.

Rule 1.6 Cmt. 8

182. Attorney represents Mr. Sharp in several contract dispute cases regarding services for which Mr. Sharp was paid but which were not provided. The local District Attorney's office recently indicted Mr. Sharp on offenses related to a financial investments fraud run by Mr. Sharp. Mr. Sharp retains Attorney for representation for his criminal case as well. During a meeting that Attorney had with Mr. Sharp to discuss his criminal case, Mr. Sharp tells the attorney in confidence about some financial transactions he made recently that are the cause of the criminal charges. Specifically, Mr. Sharp advises that he solicited and accepted money from Ms. Mayfield, a 75-year-old widow, for a financial investment company that did not exist. Mr. Sharp explained that his construction business ran into financial troubles and he used this scheme to obtain money to pay his construction company's expenses. Mr. Sharp explained that he would not do this again. What may Attorney do in this situation?
- a) He may disclose the information because it is fraud committed that resulted in substantial injury to the financial interests of another.
 - b) He can disclose because an attorney may make any disclosures that relate to anticipated fraud or crime by his client.

- c) He cannot disclose the information because the client retained the attorney to represent him on the matter and the details provided are confidential.
- d) The attorney may not disclose because disclosure of the financial scheme is not reasonably certain to prevent death or substantial bodily injury.

Rule 1.6

183. Client met with Attorney for a free consultation, and explained that she had met with two other lawyers for consultations and that she planned to hire one of the three to provide the legal services necessary to set up her professional business. Attorney needed to make a good impression on Client, so he mentioned a few prominent accountants and physicians in town whom Attorney had represented and helped with incorporating their partnerships or practice groups. These former clients had never explicitly authorized Attorney to disclose his representation of them in these matters. Client hired Attorney, and Attorney provided the legal services necessary to set up her business. Unfortunately, a dispute arose between Client and Attorney over the fees, and this fee dispute turned into litigation between Attorney and Client. In order to support his claims and defenses in the fee dispute, Attorney had to disclose to the tribunal exactly what he did for Client and the complexity of the issues involved, which necessarily involved the disclosure of confidential information. Was it proper for Attorney to disclose this confidential information about Client merely to prevail in a fee dispute?

- a) Yes, because the representation of Client ended when the fee dispute began, so Attorney has no remaining duty of confidentiality to Client.
- b) Yes, a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client.
- c) No, because the former clients did not authorize Attorney to disclose that he had represented them or the nature of the matters involved in the representation.
- d) No, because the duty of confidentiality continues after the client-lawyer relationship has terminated, including the prohibition against using such information to the disadvantage of the former client.

Rule 1.6(b)(5)

184. Client hired Attorney to represent him in a criminal matter. Client faces charges for abducting a young girl from her home three months ago. Attorney learns from Client that Client indeed abducted the girl, that the girl is probably still alive and hidden in a secluded location, and that the child was left alone, locked in a car trunk, with some food and water two weeks ago when police arrested Client. Client refuses to disclose the location of the girl to authorities. There is a chance that someone may happen upon the car where the girl is trapped and help her. Does Attorney have a duty to disclose the location of the girl to authorities or the parents in order to save the girl's life? (Answer according to the Model Rules of Professional Conduct, NOT the Texas rules governing this situation).

- a) Yes, because the disclosure is reasonably necessary to prevent reasonably certain death or substantial bodily harm.
- b) Yes, but only if the lawyer discloses the location as an anonymous tip, and is reasonably certain that the discovery of the girl will not be prejudicial to the client's case.
- c) No, the Rules of Professional Conduct do not require the lawyer to reveal the client's misconduct or the girl's location.
- d) No because the girl could survive indefinitely in the trunk of the car until she finds a way to escape or someone happens to find her.

Rule 1.6(b)(2) & Cmt. 7 & 17

185. Attorney is a partner in a seven-lawyer firm. Client retained Attorney to handle his workers' compensation matter. Attorney did not discuss with Client that he would normally disclose to the other partners in the firm some of the details about his cases and clients. At the weekly meeting of the partners, as everyone discussed their pending cases, Attorney explained Client's case and solicited input from the partners. One partner had an ingenious suggestion that would have been very helpful to Client's case. Attorney mentioned to Client in their next phone call that one of his partners had made a brilliant suggestion that could turn the case in Client's favor. Client was upset that Attorney had discussed the case with anyone else. Is Client correct that Attorney should not have discussed the case with the others at the firm?

- a) Yes, because a lawyer has a duty to preserve the confidentiality of client information, even from other lawyers in his law firm, unless the client expressly authorizes disclosure.
- b) Yes, because the disclosure automatically created potential conflicts of interest for the other lawyers in the firm who might represent clients with adverse interests to this client.
- c) No, because lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.
- d) No, because in this case the disclosure yielded a brilliant suggestion from another lawyer that was very helpful to the case, which offsets any potential injury to the client from thme disclosure.

Rule 1.6 Cmt. 5

186. Client paid his legal fees to Attorney in cash. The total fees were \$11,100, and Client paid Attorney in bundles of twenty-dollar bills. The Internal Revenue Code, 26 U.S.C. § 6050, requires that lawyers disclose, through Form 8300, the identities of clients, amounts, and payments dates of all cash fees in excess of \$10,000. Client already forbid Attorney to disclose the information to the IRS. Must Attorney disclose Client's name, the amount, and the dates of payment on Form 8300?

- a) Yes, the Internal Revenue Code supersedes the Rules of Professional Conduct regarding the duty of confidentiality, so the lawyer should make such disclosures as are necessary to comply with the law, after informing the client.

- b) Yes, because payment of the fee is not confidential client information and could not be prejudicial to the interests of the client in the representation.
- c) No, a lawyer must comply with the client's express wishes regarding the disclosure, as the punishment for failing to file Form 8300 will probably fall on the client, not the lawyer.
- d) No, the Rules of Professional Conduct permit, but do not require disclosure to comply with other law, so Attorney may file Form 8300, but it is not correct to say Attorney "must" do so.

Rule 1.6(b)(6) & Cmt. 12

187. Attorney represented Client, who was suing his former employer over wrongful discharge. The former employer claimed that the termination was necessary because the job involved high-level security clearance, and the employer learned that Client had a prior felony conviction that Client had not disclosed on his job application. The phrasing of the question on the job application was confusing and a subject of dispute in the case. The former employer also claimed that they would have needed to terminate Client regardless of whether he was untruthful on his job application, because his prior conviction disqualified him from the necessary security clearance. During a preliminary hearing, the judge asked Attorney if it was true that Client had a prior conviction, and if so, what was the crime. Attorney conceded that Client had a grand larceny conviction in that jurisdiction and had served a two-year jail sentence, which was a matter of public record. Attorney then explained that their theory of the case was that the employer never clearly asked about prior convictions, and that the conviction actually did not disqualify client from the necessary security clearance for his position, but rather than this was a mere pretext for a racially discriminatory termination. Did Attorney violate his duty of confidentiality to Client by making this admission?

- a) Yes, unless the client expressly authorized the disclosure, prior convictions are confidential information that a lawyer should protect.
- b) Yes, because a lawyer has no duty to answer a direct question from a tribunal if the answer could constitute a fatal admission in a case.
- c) No, because the duty of confidentiality does not apply to disclosures made during a colloquy between a judge and a lawyer during a preliminary hearing.
- d) No, because a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.

Rule 1.6 Cmt. 5

188. Attorney was a well-known criminal defense lawyer, and he agreed to represent Client, a celebrity who is a defendant in a high-profile murder case. Attorney filed the proper notice with the court and the prosecutor's office that he was representing Client. Attorney also filed a motion to exclude Client's confession that he gave to the police on the night of the murder while Client was somewhat intoxicated, in which he concedes the intoxication and contends that this nullifies the voluntariness of the confession for Fifth Amendment purposes. The news media thereby learned that

Attorney was representing Client, and news commentators began to speculate that Client must be guilty if he hired such a notorious defense lawyer. Client was furious that anyone knew that he had hired a lawyer, which he claims was confidential. Was it proper for Attorney to make these disclosures without Client's express authorization?

- a) Yes, because a lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority.
- b) Yes, because Client is already in the public light as a celebrity and therefore has a lower reasonable expectation of privacy, and he knew he was hiring a well-known defense lawyer.
- c) No, because a lawyer has an ethical duty to receive express authorization from a client before taking any action that could disclose a client's confidential information.
- d) No, because Attorney was raising a constitutional issue in the motion that has greater importance than the duty of confidentiality to a client.

Rule 1.6 Cmt. 5

189. An insurance company hired Attorney to represent one of its policyholders. The insurance company requires periodic updates and detailed billing statements about the matter from Attorney, as part of its agreement to provide representation for its insured. In addition, the insurance company requires Attorney to submit detailed billing statements to a third-party auditor, designated and paid by the insurance company. Client is unaware of these reporting requirements and did not provide explicit consent to either of them. The third-party auditor receives no information except the name and policy number of the client and the time spent by Attorney on various tasks necessary for the representation. Could Attorney be subject to discipline for disclosing confidential information?

- a) Yes, because both the disclosures to the insurance company and the third-party auditor violate the lawyer's duty of confidentiality toward the client.
- b) Yes, even though the policyholder impliedly authorized the Attorney to provide updates and billing statements to the insurance company, submitting the bills to the third-party auditor constitutes an unauthorized disclosure of confidential information.
- c) No, because the lawyer has implied authorization from the fact that the insurance company hired him to represent the policyholder to make all of the disclosures described above.
- d) No, because billing information is not privileged and its disclosure could not prejudice the client.

ABA Formal Op. 01-421

190. Client, a large auto dealer, retains Attorney to represent him in a bankruptcy case. Attorney's firm represents a bank, through which Client has several large loans that covered loans for the dealership. The loans are all contained in the bankruptcy. Attorney is concerned about whether there is a conflict, so he contacts a lawyer friend

of his. While explaining his dilemma, Attorney tells Friend the name of the dealer. Is Attorney subject to discipline?

- a) Yes, because the attorney disclosed more than what details were necessary to accomplish his purpose.
- b) Yes, because attorneys shall not discuss client matters with other lawyers not also serving as counsel for their client.
- c) No, because attorneys may discuss their cases with other lawyers to ensure they are following the rules of professional conduct.
- d) No, because the restrictions regarding confidentiality only apply in criminal cases.

191. Attorney represents Client before an Administrative Law Judge in a regulatory enforcement matter. The Administrative Law Judge orders Attorney to disclose whether Client had received legal counsel about the regulatory requirements in question before the violation occurred. Client forbids Attorney to answer the question. Should Attorney object and try to assert various claims that the order is not authorized by law, or that the information is not relevant to the proceeding, or that the information is covered by the attorney-client privilege?

- a) Yes, because a lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law.
- b) Yes, because the information relates only to what the lawyer told the client, not to what the client told the lawyer, so the duty of confidentiality does not apply.
- c) No, because an Administrative Law Judge is not a court or tribunal for purposes of the exceptions to the confidentiality rules that might permit disclosures in response to a court order.
- d) Yes, because a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.

Rule 1.6(b)(6) & Cmt. 15

192. Ms. Mathis hired Attorney to represent her in a burglary charge. During a meeting with Attorney and with the understanding that any information would be confidential, Ms. Mathis advised Attorney about a murder she committed in which another person was on trial. Eventually, Attorney was able to negotiate a plea deal for Ms. Mathis on her burglary charge. Shortly after the plea deal was reached and Attorney's representation of Ms. Mathis concluded, Attorney discovered that the person who was on trial for the murder to which Ms. Mathis admitted was found guilty by a jury and sentenced to life in prison without the possibility of parole. Attorney contacted the District Attorney's office that handled the murder trial and left an anonymous tip stating that Ms. Mathis confessed to committing the murder. Was Attorney's conduct proper?

- a) Yes, because attorneys have a duty to reveal information, even if confidential, that relates to a crime or fraud committed by his client.
- b) Yes, because attorneys no longer have a duty not to disclose information relating to the representation of a client once the attorney's representation of that client terminates.

- c) No, because an attorney must not leave such tips anonymously, but must make themselves available to be questioned and for testifying if making any tip regarding a crime or fraud committed by one of his clients.
- d) No, because attorneys cannot disclose client representation information and the death had already occurred, therefore, the disclosure would not prevent certain death or substantial bodily injury.

193. Attorney is representing a client who is a notorious celebrity-turned-criminal in a criminal case involving drug charges. Attorney is confused about whether he may publicly disclose information that he learned in confidence from his client if the information is already a matter of public record, and his research indicates there is a split of authority on this question. Attorney calls another lawyer who specializes in lawyer malpractice and lawyer disciplinary matters to seek advice about what course of action would comply with the Rules of Professional Conduct. The other lawyer, an expert in legal ethics, agrees to provide an opinion and to keep the conversation a secret. Attorney tries to use a hypothetical to explain the problem, but given the client's national reputation and celebrity status, the other lawyer knows immediately who the client is, and can easily surmise the nature of the confidential information. In addition, Attorney mentions that his client is secretly a bisexual and has been having an affair with both the male and female hosts of a nationally televised morning talk show, though neither of them is aware that the other is having an affair with the same person. Is Attorney subject to discipline for disclosing confidential information about his client?

- a) Yes, because Attorney used a hypothetical that was obvious enough that the other lawyer immediately knew the identity of the client and the client's information that the Attorney was supposed to protect.
- b) Yes, because the lawyer revealed more client information than was necessary to secure legal advice about the lawyer's compliance with the Rules
- c) No, because a lawyer may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with the Rules, even when the lawyer lacks implied authorization to make the disclosure.
- d) No, because a lawyer may generally disclose confidential information to another lawyer as long as the other lawyer promises to keep the conversation secret, and the other lawyer has a reputation for complying with the ethical rules.

Rule 1.6(b)(4) & Cmt 9

194. Client hired Attorney to represent him in a divorce proceeding and custody battle over Client's children. At one point, Client explains to Attorney that if he loses custody of the children to his estranged spouse, he has detailed plans to murder the spouse and make it look like a suicide, so that he can regain custody of his children. Attorney believes that Client could plausibly carry out this plan successfully, and Attorney is reasonably certain that Client will indeed lose custody of the children in the current proceeding. May Attorney immediately warn the estranged spouse, the tribunal, or the police about Client's plan?

- a) Yes, because a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.
- b) Yes, because Client's plan falls outside the scope of Attorney's representation in the current proceeding, and therefore the information does not come under the duty to protect client confidentiality.
- c) No, because whenever practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure.
- d) No, because the far-fetched plan is still contingent on losing custody of the children, and therefore it does not constitute reasonably certain death or bodily injury, and thus fails to trigger the exception to the duty of confidentiality.

Rule 1.6 Cmt. 16

195. Attorney represents the family members of one of several people who died when a section of a sports arena collapsed. Attorney sent an investigator to talk to the property management company that operated the arena, and that conversation led the investigator to a former employee of the management company, who explained that he had lost his job for insisting that the property managers address some structural problems and maintenance issues in the part of the arena that eventually collapsed. The disgruntled former employee gave the investigator copies of reports he had submitted to his employer, the property managers. Later, the lawyers representing the property management company and the sports arena owners learned that this investigator had talked to their former employee, and asked the court to disqualify Attorney from representing the plaintiffs in the case. They based their motion for disqualification on the ex parte communication with their former employee and taking receipt of a copy of the internal reports about the arena's maintenance problems. Under the Rules of Professional Conduct, should the court grant the motion to disqualify Attorney?

- a) Yes, because the former employee appears to be unrepresented and could become a party to the litigation.
- b) Yes, because the reports that the former employee had submitted to the property managers were privileged and confidential.
- c) No, because the fact that there are co-defendants negates any claim of privilege and therefore nullifies the motion for disqualification.
- d) No, because the former employee is no longer working for the property management company, and the reports are not privileged.

196. Small Firm is considering hiring Attorney, who currently works for Big Firm, in a lateral move. Attorney is a transactional lawyer, so none of the information he possesses is "privileged" in that it was not in anticipation of litigation. In order to check for conflicts of interest, Attorney discloses to Small Firm the clients he has represented while at Big Firm. This includes the names of persons and issues involved in the matters, as well as names and issues for matters handled by other lawyers in the firm about which Attorney had overheard or otherwise acquired some confidential information. Small Firm uses the information solely for checking about potential

conflicts of interest before making an offer of employment to Attorney. Attorney did not ask any of the clients for authorization to disclose the representation or the nature of the issues involved in their matters. Was it proper for Attorney to disclose this confidential information without the consent of the clients?

- a) Yes, as long as Attorney informs the clients subsequently that such disclosures have occurred.
- b) Yes, because Attorney disclosed the information solely to detect and resolve conflicts of interest arising from the lawyer's change of employment.
- c) No, because Attorney did not obtain consent or authorization from the clients before disclosing this information.
- d) No, because Attorney disclosed not only the clients that he himself represented, but also clients of other lawyers in his firm.

Rule 1.6(b)(7); ABA Formal Op. 09-455

197. Attorney represents a chemical manufacturer. A regional vice-president recently informed Attorney that there was an unfortunate chemical spill that released hundreds of gallons of toxic substances into a stream that ran into the town's nearby water supply reservoir. The spill occurred because a newly hired employee turned the wrong valve during a training exercise at the plant. Attorney explained that the corporation could face civil liability in either tort actions or regulatory actions by governmental entities at the state and federal levels, and urged the vice-president to report the spill immediately, if it was still unreported. The vice-president replied that they could not afford the negative publicity and the impact it would have on their share prices. He reminded Attorney that the upper management of the company received most of its compensation in the form of preferred stocks and options, so it seemed unfair to penalize them through a loss in share price, when the fault was some recently hired manual laborer. Attorney explained that he would have to withdraw from representation and would report the incident to the necessary public health officials, which he did, despite the vice-president insisting that this was confidential information. Is Attorney subject to discipline?

- a) Yes, because the company's conduct may not have been criminal and did not yet result in anyone's death or serious bodily injury.
- b) Yes, because the Attorney disclosed confidential information and betrayed his duty of loyalty to the client.
- c) No, because the lawyer believed the company's disposal of waste products was likely to cause serious injury to others.
- d) No, because Attorney believed that the bad publicity and decrease in share price would be even worse if it emerged that there was an attempted cover-up after the chemical spill.

Rule 1.6(b)(1)

198. Attorney works for a state-operated legal aid clinic, which under a state statute counts as a social service agency. The state has a mandatory reporting law for child abuse, which statutorily requires employees of social service agencies to report any instances

of child abuse they discover among their clients or constituents. Attorney met with a prospective client and her child to discuss possibly representation at a welfare termination hearing. The prospective client did not meet the agency's guidelines to be eligible for free legal representation, however, so Attorney had to decline the case. Nevertheless, it was evident during the interview that the prospective client's child was the subject of serious physical abuse – a black eye, cigarette burns on her arms and neck, bruises on the backs of her legs, and a demeanor of cowering in fear around adults. Attorney wanted to talk to the mother about it, but has been unable to reach her since declining to represent her. Must Attorney report the prospective client for child abuse?

- a) Yes, because the mother was only a prospective client who was ineligible for representation by Attorney, so Attorney owed her no duty of confidentiality.
- b) Yes, because state law requires the disclosure, and a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to comply with other law.
- c) No, because the exceptions to the duty of confidentiality merely permit disclosure, so Attorney "may" report the incident, but there is no duty to do so.
- d) No, because Attorney met the prospective client only once, and does not know if the abuse occurred at the hands of her mother, or if the child was the victim of a crime at the hands of someone else, and it is not the mother's fault.

Rule 1.6(b)(6)

199. Attorney agreed to represent Client, a foreign national living in the United States. Client explained to Attorney that he was a business owner who owned and operated several small grocery stores catering to immigrants from Client's home country. Nothing seemed suspicious to Attorney until they were about to consummate a deal on the purchase of a small parcel of commercial real estate, and Client insisted on paying with cash, arriving at the closing with duffle bags containing bundles of twenty dollar bills. The parties completed the sale and title transferred to one of Client's businesses, 7777777 LLC. Attorney was then suspicious that Client might somehow be laundering money through such transactions. Would it be proper for Attorney to inform the FBI about the transaction without Client's consent?

- a) Yes, a lawyer functions as a gatekeeper to the financial system and has an ethical duty to report any suspicion of money laundering.
- b) Yes, a lawyer may disclose confidential information to prevent the client from committing a crime or fraud that the lawyer suspects might result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.
- c) No, because there is no indication here that the transaction could lead to reasonably certain death or serious bodily injury.
- d) No, because the Rules of Professional Conduct do not mandate that a lawyer perform a gatekeeper role in this context, and mandatory reporting of suspicion about a client is in conflict with the duty of confidentiality.

ABA Formal Op. 13-463

ANSWER KEY: CONFIDENTIALITY

- 179. c
- 180. d
- 181. d
- 182. c
- 183. b
- 184. c
- 185. c
- 186. a
- 187. d
- 188. a
- 189. b
- 190. a
- 191. a
- 192. d
- 193. b
- 194. c
- 195. d
- 196. b
- 197. c
- 198. b
- 199. d

PART II:

MATERIAL COVERED IN THE SECOND HALF OF THE SEMESTER

Regulation of the legal profession

Rules 5.1-5.5, & 8.1-8.5

Rule 5.2-5.3 - Responsibilities of a Partner or Supervisory Lawyer

200. Attorney works for a mid-size law firm that employs two or three law students every year as summer associates. The manager of the student associates assigns one of them to work on Attorney's pending antitrust case, in addition to assignments for other lawyers at the firm. While researching an important issue in the case, the summer associate discovered an older Supreme Court decision that was unfavorable to their client. The summer associate decided not to tell anyone about the case, as the opposing party seemed to have overlooked it in their briefs. Attorney was not aware of any of this. The hearing went well for their side, and the associate never said a word about "burying" that Supreme Court case he had found. After winning at the hearing, Attorney complimented the summer associate for his fine work and rewarded him by treating him to lunch at an expensive restaurant. The judge's clerks, however, found the case, and the judge queried the lawyers about how they could have missed it. Opposing counsel admitted he had been negligent in doing legal research on the matter, and summer associate then recounted how he hid the case from Attorney. Is Attorney now subject to discipline for what the summer associate did?

- a) Yes, even though he was unaware of the violation at the time, Attorney ratified the summer associate's conduct by complimenting him on his work and buying him an expensive lunch.
- b) No, because Attorney did not know about the associate's conduct at the time it occurred, or while submitting briefs, or even when the hearing began.
- c) Yes, because lawyers are automatically liable for the misconduct of nonlawyer employees at their firm; the lawyer had an affirmative duty to find the case himself and disclose it.
- d) No, because opposing counsel was negligent in failing to research the issue, and if he had, he would probably have discovered the case on his own.

201. Attorney works for a mid-size law firm that employs two or three law students every year as summer associates. The manager of the student associates assigns one of them to work on Attorney's pending antitrust case, in addition to assignments for other lawyers at the firm. While researching an important issue in the case, the summer associate discovered an older Supreme Court decision that was unfavorable to their client. The summer associate decided not to tell anyone about the case, as the opposing party seemed to have overlooked it in their briefs. Attorney was not aware of any of this until they were on a break during their hearing. The hearing was going well for their side, and the associate boasted to Attorney about "burying" that Supreme Court case he had found. Attorney said, "Well, you should have told me about it at the time, but there is no point in bringing it up now, as it appears opposing counsel overlooked it and the hearing is going our way." The judge's clerks, however, found the case, and the judge queried the lawyers about how they could have missed it. Opposing counsel admitted he had been negligent in doing legal research on the matter, and Attorney recounted the story about the summer associate hiding the case from him. Is Attorney now subject to discipline for what the summer associate did?

- a) Yes, because lawyers are automatically liable for the misconduct of nonlawyer employees at their firm; the lawyer had an affirmative duty to find the case himself and disclose it.
- b) Yes, even though he was unaware of the violation at the time, Attorney ratified the summer associate's conduct after he learned about it.
- c) No, because Attorney did not know about the associate's conduct at the time it occurred, or while submitting briefs, or even when the hearing began.
- d) No, because opposing counsel was negligent in failing to research the issue, and if he had, he would probably have discovered the case on his own.

202. Attorney hired Receptionist because of her good looks and because her brother was in Attorney's college fraternity, but he did not check into her background at all or ask for references. Receptionist

had access to all files, records, and accounts in the firm, and three months later, there arose a problem with funds missing from client trust accounts. Circumstantial evidence pointed to Receptionist as the culprit, and at this point Attorney learns that Receptionist has an arrest record for theft and embezzlement on several occasions in the past. Attorney lectures Receptionist about it but allows her to keep her job because nobody can prove her guilty - the firm does not keep the type of records that would enable anyone to prove where the missing funds went. When additional complaints arise over misappropriated client trust funds, would Attorney be subject to discipline?

- a) Yes, because lawyers face strict liability (automatic responsibility) for misappropriations of client trust funds.
- b) Yes, because he was negligent in the hiring and supervision of nonlawyer employees.
- c) No, because Attorney could not reasonably have known about the arrest record of someone merely interviewing for a receptionist position, and there is still no way to prove that Receptionist actually stole the money.
- d) No, because Receptionist is not a lawyer and therefore not subject to the Rules of Professional Conduct.

203. Attorney is a fifth-year associate at a large national law firm. As a senior associate, Attorney can attend business meetings of the firm, but cannot vote on any decisions. Attorney is aware that the firm has no measures in effect that would give reasonable assurance that the paralegals are observing the confidentiality and conflict of interest rules that are part of the professional obligations of lawyers. Attorney mistakenly believes, however, that the rules apply only to the lawyers in the firm, not to the clerical staff of paralegals. When a paralegal in a separate practice group from Attorney violates the rules and the state disciplinary authority investigates the firm's ethical compliance measures, will Attorney be subject to discipline?

- a) Yes, because any attorney with enough seniority to attend firm business meetings with the partners has shared responsibility to ensure that measures are in effect to keep the paralegals in compliance with the rules.
- b) No, because Attorney is not a partner nor in a comparable managerial position to implement such measures, nor does it appear that the paralegal was under Attorney's direct supervision
- c) Yes, because Attorney is aware that the firm has no measures in effect that would give reasonable assurance that the paralegals are observing the confidentiality and conflict of interest rules
- d) No, because Attorney honestly believed that the Rules of Professional Conduct do not apply to the paralegals, and therefore falls under the good-faith exception to the rule.

204. Attorney employs an experienced legal assistant to manage administrative matters in the firm, including the client trust accounts. Attorney provided the legal assistant with detailed instructions about client trust accounts, including the specific kinds of records to keep, what funds to deposit there, and under what circumstances to withdraw funds. Attorney also sent the legal assistant to attend CLE courses and workshops on IOLTA accounts and managing firm records. Due to the legal assistant's thorough training, competence, and experience, Attorney reviewed the client account books cursorily once a year during the annual review of the employee. Eventually, an audit by the state disciplinary authority revealed numerous discrepancies in the bookkeeping regarding the IOLTA accounts and some prohibited commingling of client funds with the firm's funds. Attorney had no actual knowledge of the discrepancies or problems regarding the client trust accounts. Is Attorney subject to discipline?

- a) Yes, because Attorney must manage all client trust accounts personally and cannot delegate such matters to support staff at the firm.
- b) Yes, because Attorney did not make reasonable efforts to ensure that the legal assistant's conduct was compatible with the professional obligations of a lawyer.

- c) No, because Attorney made reasonable efforts to ensure that the legal assistant's conduct was compatible with the professional obligations of a lawyer by providing extensive training and periodic reviews.
- d) No, because Attorney lacked actual knowledge of the discrepancies, and the legal assistant is not subject to the Rules of Professional Conduct.

Rule 5.4 - Professional Independence of a Lawyer

205. Attorney was part of a partnership before he died. He left his nephew as his sole heir. The partnership agreement, as written, provides that the firm should pay the certain amounts to the nephew. Those amounts are \$210,000, for Attorney's share of the firm's assets; a \$500,000 death benefit, provided for all shareholders in the partnership; and \$17,500 for fees that Attorney earned on recent cases, but had not yet received. Under the Model Rules, which of the following represents the most that the firm may properly pay to the decedent's nephew?
- a) Only the \$210,000 for Attorney's share of the firm's assets.
 - b) \$727,500, for Attorney's share of the firm's assets, his of uncollected fees, and the death benefit
 - c) Only \$17,500 for Attorney's uncollected fees.
 - d) Only \$500,000 for the death benefit, as death benefits come under a special exception under the Rules of Professional Conduct.
206. The American Liberties Foundation, a tax-exempt 501(c)3 nonprofit corporation, hired Celebrity Attorney to represent a class of defendants who want to eliminate federal decency standards that prohibit frontal nudity and pornographic sex scenes on broadcast television, as promulgated and enforced by the Federal Communications Commission. Celebrity Attorney prevailed in the case, winning the class members the right to broadcast pornography to school-age children on broadcast television in the afternoon. The court also awarded substantial attorney fees to the prevailing party in the case. Celebrity Attorney shares the fees with the American Liberties Foundation, and gives 85% of the fees to the nonprofit. Which of the following is true about this action by Celebrity Attorney?
- a) The fee-sharing arrangement is improper because Celebrity Attorney gave most of the money to the nonprofit, rather than splitting it evenly as the Rules require.
 - b) The fee-sharing arrangement with the nonprofit entity is proper.
 - c) The fee-sharing arrangement is improper because the Foundation is not a law firm or owned by lawyers, so this action constitutes sharing legal fees with nonlawyers.
 - d) The fee-sharing arrangement would have been proper only if the Foundation collected all the fees awarded by the court, and then paid Attorney a reasonable pro rata share based on the number of hours worked and the customary lodestar rate in that state.
207. Attorney could not find a full-time job after law school, so instead he works on a contract basis for other firms. Attorney also signs up with a legal temp-work agency, a company owned by nonlawyers that places lawyers in temporary assignments at law firms that need an extra associate on a short-term basis. Law firms contact the legal temp-work agency when they need lawyers for a special project or assignment, and the agency sends them several resumes from which to choose the temporary associates they want. Through this temp-work agency, Attorney receives a three-month assignment at Big Firm conducting document review as part of litigation discovery. The firm pays Attorney \$75 per hour, and pays the temp-work agency a placement fee of 7% on whatever Attorney earns. Big Firm, in turn,

passes the Attorney's \$100/hour fees and the 7% placement fee through to its clients as an item on the client's bill. Is this arrangement proper?

- a) It is proper for Big Firm to hire Attorney on an hourly, short-term contract basis and to pass his fees through to the client, but it is improper for Big Firm to pay the temp-work agency a percentage, as this constitutes sharing legal fees with the nonlawyers who own the temp-work agency.
- b) It is proper for Big Firm to pay Attorney and the temp-work agency, but it is improper for Big Firm to pass the costs through to their clients.
- c) It is proper for Big Firm to pay the placement fee to the agency, to pass the fees through to the clients, and to pay Attorney's hourly rate out of the fees it receives from clients.
- d) It is proper for Big Firm to pay a temp-work agency and to pass these costs through to the clients, but it is improper for Attorney to work on a case on an hourly-fee basis without becoming an associate at Big Firm.

[see ABA Formal Opinion 88-356]

208. After a long, distinguished career as a solo practitioner in a major city, an elderly attorney agrees to join a newer law firm on the condition that the firm would pay \$1000 per month after the attorney's death to his sister, who is 74 years old, until her death. The attorney's sister is not a lawyer. The firm agrees to this arrangement, in addition to making the attorney a partner with a 15% share in the firm. Is this arrangement proper?

- a) No, because the sister is not a lawyer and therefore cannot share in the legal fees received by the firm.
- b) No, because payments that continue until the sister's death could go on indefinitely, and this goes beyond the Model Rules' stipulation of "a reasonable period of time."
- c) Yes, because it is the payment of money over a reasonable period of time after the lawyer's death to a specified person.
- d) Yes, because the Contracts Clause of the Constitution guarantees the freedom of contract, so lawyers and firms can make whatever compensation arrangements they want.

209. Attorney agrees to buy the successful law firm of a fellow attorney who recently succumbed to terminal cancer. The sale includes the office building, the library and furnishings, and the good will of the firm, and conforms to the provisions of Rule 1.7. The purchasing attorney pays \$100,000, the agreed-upon purchase price, to the executor of the deceased attorney's estate, but the executor is not a lawyer. The funds for the purchase came from the contingent fees in a recent personal injury case won by the purchasing attorney. Was this transaction improper?

- a) Yes, because the lawyer is sharing legal fees with a nonlawyer, the executor.
- b) Yes, because the funds for the purchase came from a contingent-fee case.
- c) No, because a lawyer purchasing the firm of a deceased lawyer may pay the executor the agreed-upon purchase price.
- d) No, because even a nonlawyer executor of a firm functions temporarily in the role of a lawyer for purposes of the Model Rules.

210. Three law partners have decided to incorporate their firm instead of continuing as a partnership, as their malpractice insurer has offered them a lower rate on their premiums if they incorporate and thereby reduce some of their joint liability. They also want to make a clearer track for associates to become shareholders after reaching certain performance benchmarks. The articles of incorporation provide that when a shareholder dies, a fiduciary representative of the estate may hold stock in the

corporation for a reasonable time during administration of the estate before transferring it to the heirs. Which of the following may the partners properly do as they incorporate?

- a) They may incorporate their law practice and convey an interest in the corporation to their heirs, such as spouses or children.
- b) They may stipulate that the corporation will hold all funds in a single operating account, and thereby avoid holding client funds in separate IOLTA accounts.
- c) They may provide, as stated, that when a shareholder dies, a fiduciary representative of the estate may hold stock in the corporation for a reasonable time during administration of the estate before cashing out the shares and transferring the funds to the heirs.
- d) They may not have a plan whereby associates acquire shares merely by working at the firm for a certain number of years and bringing in a certain number of clients.

Rule 5.4(d)(1)

211. Holy Trinity Church retains Attorney to challenge a new zoning regulation that would prohibit the church from constructing a new, expanded sanctuary on its property, attached to the existing church. The church cannot afford to pay Attorney, and it is seeking only a declaratory judgment (that the regulation is invalid) rather than money damages. Attorney agrees to take the case and then split any court-awarded legal fees with the church if they prevail. They win a favorable judgment; the court declares the regulation unconstitutional and awards legal fees, which Attorney shares with the church. Is the fee sharing proper?

- a) No, because a lawyer or law firm shall not share legal fees with a nonlawyer.
- b) No, because the award of legal fees to a church violates the separation of church and state, and a lawyer is under oath to uphold the Constitution.
- c) Yes, because a lawyer may share court-awarded legal fees with a nonprofit organization that retains the lawyer in a matter.
- d) Yes, as long as the lawyer takes only 30% of the legal fees, and does not claim a tax deduction for the 70% shared with the church.

Rule 5.5 - Unauthorized Practice of Law; Multijurisdictional Practice of Law

212. Attorney is a licensed lawyer in a New England state, but has an office and represents clients exclusively in a southern state. Attorney confines her practice to immigration law, representing foreign-born clients in immigration hearings. A relevant federal statute permits nonlawyers to appear as representatives for immigrants when they appear before the immigration agency. Many of Attorney's clients have applied for a spousal visa after marrying an American citizen, and some clients had a Notary Public from their home country or an un-ordained lay minister from their home church conduct their wedding ceremony. In addition, some were previously married and divorced in their home country, where such transactions are informal and have no official documentation. There is often some question about whether the marriage is valid under local state law, which is a prerequisite for obtaining certain types of visas. Which of the following is correct?
- Attorney's conduct is proper, because she is merely providing services authorized by federal law, which preempts state licensing requirements.
 - Attorney's conduct is proper because she has specialized in immigration law, which is entirely federal and involves no questions of state law.
 - Attorney is probably subject to discipline for the unauthorized practice of law in this southern state.
 - Attorney's conduct is improper if she does not file a pro hac vice appearance in each case.
213. A husband and wife are both attorneys in Puerto Rico, though they attended law school in Florida. They have practiced in Puerto Rico for ten years and are duly admitted to the bar there. Last year, they moved to Florida, where the wife took the state bar exam and gained admission to the Florida bar. They have now opened a law office in Florida with both of their names listed on the firm letterhead, followed by the phrase "Attorneys at Law." The husband confines his practice exclusively to Puerto Rican clients who are living in Florida or are visiting there; the wife handles all other legal matters. It is proper for them to use such letterhead?
- Yes, because Puerto Ricans are U.S. Citizens, and they both attended an American law school.
 - Yes, because the husband confines his practice to Puerto Rican immigrants and visitors, whom he would be able to represent if they were back in Puerto Rico.
 - No, because the letterhead reveals that the wife is aiding her husband in the unauthorized practice of law.
 - No, because identifying themselves as law firm partners is misleading, and does not apprise readers to the fact that they are actually married.
214. Attorney has a license to practice in the state in which his firm operates. He hires as an associate a law school friend who does not have a license in the state, but holds a license to practice in a neighboring state with similar laws and precedents. Attorney gives the associate attorney only simple cases that require mostly scrivener's work (paperwork) for the clients, but he allows the associate to interview clients and to prepare and file client forms and paperwork. About once a week, Attorney checks with the associate and asks how his work is going, and the associate always says everything is fine, and occasionally asks questions about local laws or rules. Any clients whose matters seem to require actual litigation go to Attorney; the associate handles only non-litigation forms and filings for clients. Is Attorney subject to discipline for this arrangement?
- No, because the associate handles only non-litigation matters like forms and filings for the clients.
 - No, because the associate is a duly licensed attorney in a neighboring state with similar laws.
 - Yes, because it is inappropriate for an attorney to hire a friend from law school as an associate, rather than interviewing and hiring the most qualified available candidate.
 - Yes, because he is assisting another person in the unlicensed practice of law in his jurisdiction.

215. A nonlawyer social worker contacts Attorney asking for advice about how to help poor tenants in the neighborhood in disputes with landlords over housing code violations and unreturned security deposits. The social worker also needs guidance about how to appeal an adverse decision from a welfare agency against one of her constituents. Attorney provides extensive advice on specific procedures the tenants can follow to have a court hold their rent in escrow until the landlords remedy the housing code violations, and explains how to file claims for unreturned security deposits plus treble damages. Attorney does none of the legal work, but explains to the social worker exactly what to do, and is available to answer follow-up questions by the social worker about how to complete the relevant legal forms and documents. Attorney coaches the social worker on how to represent her constituent at an administrative hearing as a nonlawyer representative. The landlord even meets with one of the social worker's constituents and explains how to proceed as a pro se defendant against a landlord in an eviction action. Several landlords trace the chain of excellent advice back to Attorney and file a grievance with the state bar, accusing Attorney of assisting others (especially the social worker) in practicing law without a license. Is Attorney subject to discipline?

- a) No, because none of the actions Attorney advised are sufficiently law-related.
- b) Yes, because all the actions Attorney advised were essentially the practice of law by nonlawyers.
- c) Attorney is not subject to discipline for advising the social worker, but he is subject to discipline for actually meeting with a pro se defendant and giving legal advice about how to handle her own case.
- d) No, because lawyers may provide professional advice and instruction to nonlawyers whose employment requires knowledge of the law, including social workers.

216. Attorney obtained a license to practice law in the state where she attended law school. After a few years, Attorney took a job in a neighboring state, moved there, and obtained a license to practice law in her new state. She kept her original license, in her former state, but went on inactive status there in order to avoid the burdensome annual bar membership fees in a state where she no longer practiced. Eventually, her new firm loses its anchor clients and recommends that Attorney drum up some new business among her former clients. Attorney sends letters to all of her former clients in her former state, offering to represent them in any new legal matters they have, or in updating wills or contracts that she previously did for them. She travels about once per week to her home state and meets with clients in a library study room at the law school she attended. A few of her former clients refer her to friends or relatives who become new clients, and Attorney's new employer is thrilled. Which of the following is true?

- a) Attorney is subject to discipline for practicing law in her home state while on inactive status, but her supervising lawyer is not subject to discipline because she was admitted in that state at the time he hired her.
- b) Neither Attorney nor her supervising lawyer would be subject to discipline, because she merely went on inactive status in the other state, but she still holds her license there.
- c) Only the supervising lawyer is subject to discipline, because he encouraged his subordinate to solicit out-of-state clients in a state where he is unlicensed, but Attorney can still practice law there.
- d) Both Attorney and her supervising lawyer are subject to discipline because she is on inactive status in her home state, but is soliciting clients and handling their matters there regularly.

217. Client retains Attorney, who has represented Client in the past, to represent him in litigation in another state, where Attorney is unlicensed. The matter requires some knowledge of the law of the state where the trial will occur. Attorney files a pro hac vice appearance in the matter, which the local court accepts,

and begins preparing for trial there. Attorney and Client never discuss the particulars of filing a pro hac vice appearance; nor did they discuss why it would be necessary. Client never asked if Attorney could practice law in the other jurisdiction, and Attorney never explained the licensing requirement and that he would need permission from the court there in order to handle the case. Attorney prevailed in the matter on behalf of the client, kept his agreed-upon contingent fee, and gave the client the remaining proceeds and unused retainer funds. Which of the following is true?

- a) Attorney is subject to discipline for accepting a contingent fee in a proceeding in another state where Attorney does not have a license to practice law.
- b) Attorney's conduct was proper, as the court accepted the pro hac vice appearance, and it made no difference to the Client whether the Attorney had a license to practice there on an ongoing basis, or could appear only on a pro hac vice basis.
- c) Attorney's conduct was proper, as long as Attorney can acquire the necessary knowledge of local laws with a reasonable amount of study.
- d) It was improper for Attorney to fail to disclose to Client that he was unlicensed in the other state and would need to file a pro hac vice appearance, especially given that the matter required some knowledge of local laws.

218. Attorney is a joint-owner of a collection agency. Whenever the agency's initial efforts to collect prove unsuccessful, the staff at the agency sends the delinquent debtor a demand letter on Attorney's law firm letterhead, threatening to commence litigation if the matter is not resolved within 30 days. Attorney authorized the staff at the agency to send these demand letters, but Attorney is too busy to review all the letters himself. The collection agency staff signs the letters on behalf of Attorney's firm. Will Attorney be subject to discipline for authorizing these letters?

- a) Yes, because the letter contains a specific threat of litigation and the facts do not specify whether Attorney will actually follow through and file any claims in court.
- b) No, because the collection agency has other owners besides Attorney, so it is not necessarily his responsibility to supervise the employees there.
- c) No, because the staff at the collection agency are acting on Attorney's behalf with his explicit authorization
- d) Yes, because Attorney is essentially facilitating the collection agency in the unauthorized practice of law.

219. Attorney hired a second-year law student as a clerk. The law student is not licensed. Attorney has the law student perform a variety of tasks. Which of the following tasks, if performed by the law student, would mean that Attorney is subject to discipline?

- a) Conducting online legal research and writing research memoranda.
- b) Drafting a customized retainer agreement for Attorney to use with clients pursuing claims against a government agency
- c) Interviewing accident witnesses and potential character witnesses, and asking them to certify the accuracy of the student's written notes.
- d) Reaching settlement agreements with insurance companies before Attorney actually files any lawsuit in the matter.

Rule 5.5(b) & Cmt 2

Rule 5.6 - Restrictions on Rights to Practice

220. Attorney wants to retire from practice due to a chronic illness, and decides to sell his practice to another lawyer. The sale agreement complies with the Model Rules regarding the sale of a law practice. As part of the sale agreement, however, Attorney stipulates that he will not resume the practice of law in that jurisdiction, even if medical breakthroughs cure his chronic illness and restore him to perfect health. The purchaser of the firm is aware that research for a cure of Attorney's illness is well underway, and is concerned because it is foreseeable that Attorney would recover and want to return to the practice of law in a few years. Is it proper for Attorney and his buyer to include this provision of the sales agreement for the law firm?
- Yes, because the rule against restrictions on the right to practice does not apply to the sale of a law practice.
 - No, because a lawyer shall not participate in offering or making an agreement that restricts the right of a lawyer to practice.
 - No, because a lawyer shall not participate in offering or making an agreement in which a restriction on the lawyer's right to practice is part of the settlement.
 - Yes, because the Contracts Clause of the U.S. Constitution would prohibit a state from restricting the right for a lawyer to include certain contract provisions in a sale agreement.
221. Attorney is 60 years old and owns his own firm. He hires New Partner, a younger lawyer, to help manage the growing caseload. The partnership agreement provides that after Attorney retires, at age 65, the firm will pay him \$5000 per month as a benefit as long as Attorney does not re-enter law practice anywhere. Which of the following is true regarding this partnership agreement?
- The agreement is unenforceable, according to the Rules of Professional Conduct.
 - The agreement is proper, according to the Rules of Professional Conduct.
 - Attorney is subject to discipline for creating this partnership agreement, in which he agrees never to practice law again as a condition of receiving a retirement benefit.
 - New Partner is subject to discipline for entering into this type of partnership agreement, which restrains Attorney from practicing law.
222. Attorney agrees to join a new firm as one of its shareholders, and to merge his practice with that of the new firm. The shareholder agreement includes a provision that if Attorney retires from the firm and begins collecting the firm's retirement benefits, he cannot practice law with another firm, government entity, or as a solo practitioner. Otherwise, the agreement stipulates, Attorney will forfeit the retirement benefits. The firm is concerned that Attorney will want to represent clients occasionally in his retirement, and may steal some clients from the firm. Is this agreement proper?
- No, because prohibiting a lawyer from practicing after retiring from the firm is a restriction on the right of the lawyer to practice, in violation of the Model Rules.
 - No, because it is motivated by a desire to keep Attorney from "poaching" clients, and thus limits the freedom of clients to choose a lawyer.
 - Yes, because the Contracts Clause of the U.S. Constitution would prohibit a state from restricting the right for a lawyer to include certain contract provisions in a sale agreement.
 - Yes, because the rule against restrictions on the right to practice have an exception for agreements concerning benefits upon retirement.

Rule 5.7 - Responsibilities Regarding Law-related Services

223. Attorney specializes in estate planning. Besides being a lawyer, she is a certified public accountant. One of her clients hires her to prepare a will and handle the planning for a complex estate, which will involve creating two charitable trusts and other maneuvers for avoiding hefty estate taxes. The estate planning in this case involves some transfers to create the trusts in the current calendar year, which will be reportable on the current year tax returns. Client asks Attorney to prepare her tax returns for the current year, given that Attorney is handling all the estate planning, and already has all the documentation about the finances and assets of Client. Attorney agrees to prepare the returns as a C.P.A., and creates a separate retainer agreement with the client for the preparation of the tax returns, one that complies with all IRS requirements for tax preparers, and that stipulates this retainer shall be for accounting work, not legal services. Five years later, Client runs for Congress, and during a contentious campaign, a reporter asks Attorney how much Client paid in taxes in the year that Attorney prepared the tax returns. Attorney answers the question in detail. Client complains that this constitutes a breach of lawyer confidentiality, but Attorney defends her actions by explaining that the amount of taxes paid that year was information derived solely from her work as a C.P.A., under a separate retainer with due disclosures, and not as a lawyer. Who is correct here – Client, or Attorney?

- a) Client is correct because the circumstances were such that the non-legal accounting services were not distinct from the legal services Attorney was providing at the time.
- b) Client is correct because lawyers have a duty of confidentiality toward clients even for information acquired outside the legal representation of the client.
- c) Attorney is correct because Client is obviously a sophisticated individual with a complex estate, as long as the separate retainer provided adequate disclosure that the Rules of Professional Conduct for Lawyers would not apply to the preparation of the tax returns.
- d) Attorney is correct because candidates have a duty to disclose how much they pay in taxes.

224. Attorney practices corporate securities law in a Wall Street firm. Attorney is also one of three owners of a financial forecasting consulting firm, Trends Tomorrow, which employs several well-known economists and financial analysts. Attorney refers clients to this firm when they need consultants to advise them about the timing of new stock offerings, projections for share price and profit forecasts, and so on. Attorney duly discloses to clients before referring them that she is a part owner of the consulting firm and that they are free to shop around and hire other consultants if they prefer; she also explains that the Trends Tomorrow is not a law firm and provides only financial forecasting services. Trends Tomorrow is located in the building next door to Attorney's Wall Street firm, and when clients go there, Trends Tomorrow explains as part of their service contract that they provide no legal services. Eventually, complaints emerge that Trends Tomorrow has been leaking confidential client information to the press, and that the consulting firm appears to have conflicts of interest, advising competing clients about strategies to encroach on each others' market share. Attorney faces disciplinary charges for these violations, but Attorney claims that the complaining clients need to show that the disclosures provided were inadequate to apprise them of the fact that the Rules of Professional Conduct for lawyers would not apply to Trends Tomorrow. Who has the burden of proof on this issue?

- a) Clients have the burden of proof to show that the lawyer failed to take reasonable measures to ensure that clients had adequate information about the inapplicability of the Rules of Professional Conduct.
- b) Attorney has the burden of proof to show that the lawyer has taken reasonable measures under the circumstances to communicate the desired understanding.

- c) The burden is on the disciplinary authority to show that the lawyer failed to take reasonable measures to ensure that clients had adequate information about the inapplicability of the Rules of Professional Conduct.
- d) The burden is on the press to show that the lawyer failed to take reasonable measures to ensure that clients had adequate information about the inapplicability of the Rules of Professional Conduct.

225. Which of the following is one of the listed “law-related services” found in the official Comment to Rule 5.7, related to lawyers providing such services?

- a) Photocopying the transcripts of depositions and hearings
- b) Preparing a client to testify before a government agency
- c) Environmental consulting
- d) Providing clients with a complete accounting of the use of retainer funds during the course of representation

226. Which of the following is NOT in the list of “law-related services” found in the official Comment to Rule 5.7, related to lawyers providing such services?

- a) Economic analysis
- b) Social work
- c) Psychological counseling
- d) Photocopying the transcripts of depositions and hearings

227. Attorney has expertise in launching new businesses. His undergraduate major was entrepreneurship, and he has numerous connections among investment bankers, and venture capitalists in the area. Entrepreneurs seek him out to incorporate their new businesses and help them find loans and equity investors for startup. Attorney drafts articles of incorporation and bylaws, handles name registration with the Secretary of State, and arranges meetings with local commercial bankers and potential investors, and helps write business plans and market analysis in anticipation of these meetings. Which of the following is true regarding Attorney’s activities?

- a) Both the legal services (incorporating) and the law-related related services (writing business plans and arranging investor meetings) would be subject to the requirements of the Rules of Professional Conduct.
- b) It is improper for Attorney to provide both the legal services and the law-related services.
- c) The legal services (incorporating) would be subject to the requirements of the Rules of Professional Conduct, but the law-related related services (writing business plans and arranging investor meetings) are not subject to the Rules.
- d) Only the law-related related services (writing business plans and arranging investor meetings) would be subject to the requirements of the Rules of Professional Conduct, and not the legal services (incorporating).

228. Attorney practices commercial real estate law in the state capitol, but also provides legislative lobbying services for some clients, especially for firms seeking lucrative government contracts. For example, working on a retainer, Attorney successfully lobbied his state legislature to privatize most of its prison system, and to give his client the contract to operate the private prisons. His client continues to pay the retainer and Attorney continues to lobby for longer statutory minimum sentences for crimes, so that the private prisons remain full. Attorney uses a separate retainer agreement for lobbying work, which specifies that he is not representing the client as their lawyer, but only as a lobbyist, and is not providing legal advice or legal services under their agreement. Meanwhile, one of attorney’s other clients faces

charges of securities fraud and hires Attorney to handle his appeal, which includes arguing that the mandatory minimum sentences are unconstitutional. The criminal defendant signs a written waiver of the potential conflict of interest the Attorney has over the mandatory sentencing issue, but the Attorney fails to obtain a similar waiver from the private prison client on whose behalf he lobbied for the mandatory sentencing laws. If Attorney is successful in having mandatory sentencing laws declared unconstitutional on behalf of his criminal client, will he be subject to discipline for the conflict of interest with his lobbying client?

- a) No, because lobbying is a law-related service that a nonlawyer could do, and is distinct from the lawyer's legal services, according to the retainer, so the conflict of interest rules do not apply.
- b) Yes, because he lobbied for people to suffer longer periods of incarceration merely to help his corporate clients earn more profits, which is unconscionable.
- c) Yes, because the fact that his legal client signed a waiver of the conflict of interest means that a reciprocal waiver was necessary from the lobbying client.
- d) No, because lobbying the legislature receives special constitutional protection due to its integral part in a functioning democracy.

ANSWER KEY – RULES 5.1-5.7

200.	b	210.	c	220.	a
201.	b	211.	c	221.	b
202.	b	212.	c	222.	d
203.	b	213.	c	223.	a
204.	b	214.	d	224.	b
205.	b	215.	d	225.	c
206.	b	216.	d	226.	d
207.	c	217.	d	227.	a
208.	c	218.	d	228.	a
209.	c	219.	d		

Regulation of the Profession, cont. ...

Rules 8.1-8.5 - Maintaining the Integrity of the Profession

Rule 8.1 Bar Admission and Disciplinary Matters

Rule 8.2 Judicial and Legal Officials

Rule 8.3 Reporting Professional Misconduct

Rule 8.4 Misconduct

Rule 8.5 Disciplinary Authority; Choice of Law

Rule 8.1 Bar Admission and Disciplinary Matters

229. A recent law school graduate has applied for admission to the bar in her home jurisdiction. The application forms ask applicants to list all arrests and convictions for misdemeanors or felonies. The graduate had two minor convictions for underage drinking or possession of alcohol when she was in high school, eight years earlier, and her attorney told her at the time that the state would expunge her records when she turned 18, meaning she would never have to report the convictions. In addition, she had one arrest in college where a shop owner mistakenly thought she was a shoplifter who had visited the store the day before, but the district attorney had not pressed charges once it became obvious that this was a case of misidentification. On her bar application, the applicant did not report the convictions from high school or the arrest from college, because she thought the earlier convictions were no longer on her record, and she had cleared herself of all wrongdoing after the arrest, resulting in dropped charges. Nevertheless, the state bar discovered the convictions and arrest during its comprehensive criminal background check, which it conducts for all applicants. The state bar admissions board denied her application, and filed a grievance against the applicant for making a false statement on her application. Did the applicant violate the Model Rules of Professional Conduct in this case?
- Yes, because she knowingly made a false statement of material fact on her application for admission to the state bar.
 - Yes, but only regarding the convictions from high school, as the arrest was clearly a case of misidentification that did not result in formal criminal charges.
 - No, because the applicant is not yet a lawyer, and the ethical rules governing lawyers did not yet apply to her during the application stage.
 - No, because the earlier convictions occurred when she was a minor, and the state promised to expunge her records, and the arrest during college did not result in formal criminal charges.

230. An attorney agreed to write a recommendation letter for admission to the bar on behalf of the law student who had worked for him part-time throughout law school. The student had behaved appropriately, and in compliance with the ethical rules for lawyers and law firms, at all times during her employment. On one occasion, the student intern had confided in the attorney that she had faced academic discipline for plagiarism on a law school seminar paper, and that she was very ashamed of herself about the incident and had accepted a failing grade in the class. She took an overload of courses the following semester to make up for the lost credits from the course she failed. The attorney did not mention this incident at all in his “character and fitness” recommendation to the state bar, because he felt it was out of character and did not represent the way the student normally behaved at the workplace. He also assumed the student would report it herself or that the bar would inquire about the failing grade on her law school transcript. The bar admissions board eventually learned about the incident only from the law school administration, which turned over the student’s disciplinary records. Could the attorney who wrote the favorable recommendation be subject to discipline for failing to mention or address the incident?
- Yes, because the attorney had a conflict of interest in the situation, as it would be in his best interest for his own employee to gain admission to the bar.

- b) Yes, because he did not disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter in connection with an admission to the state bar.
- c) No, because the attorney had no duty to report the incident, given that the bar could easily discover it from another source (as it did), and because the attorney reasonably believed the incident did not reflect the true character of the applicant.
- d) No, because the student intern had told him about the incident in confidence, and it was not related to her work at the firm, so the attorney had a duty of confidentiality under Rule 1.6.

231. An attorney faced a grievance over a client complaint regarding his neglect of the client's matter. The attorney knew that he had never actually agreed to represent the client, but instead had met with the client once, determined that he had a conflict of interest, and he had refused to represent the potential client by both oral and written communication. The client failed to hire another lawyer, and mistakenly (unreasonably) believed that the attorney she had met with was, in fact, representing her. Because he knew the case was without merit, he did not respond to the state bar when the disciplinary authorities requested a formal response from him. Ultimately, the client withdrew her complaint and the disciplinary authorities dismissed the grievance as frivolous. The board then commenced disciplinary proceedings against the attorney for failing to respond to its requests in the case it had dismissed. Was the attorney's refusal to respond permissible in this case?

- a) Yes, because he knew the case was without merit as he had never agreed to represent the complainant, and the board's determination vindicated him in this regard.
- b) Yes, because it was improper for the board to commence new proceedings that it based on prior proceedings that it had dismissed for being without merit.
- c) No, every lawyer has the right to refuse to answer, according to the Fifth Amendment.
- d) No, because in connection with a disciplinary matter, a lawyer must not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.

Rule 8.1(b)

232. An attorney agreed to represent an applicant to the state bar – a recent law school graduate – in her hearing before the state bar admissions board, which had tentatively denied her application for making false statements on her bar application. The board formally requests the applicant and her attorney make full disclosures about the events in question to help resolve the matter. The client (bar applicant) explains the entire situation to her attorney, including some self-incriminatory information – it turned out that the applicant's misbehavior had been much more serious than the board was aware. The attorney did not disclose this new information, which would have made it much clearer to the board that the applicant lacked the character and fitness to practice law. Could the attorney be subject to discipline for this action?

- a) Yes, because a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.

- b) Yes, because the lawyer knows that the applicant actually lacks the requisite integrity to be a lawyer.
- c) No, because a lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship, including the duty of confidentiality.
- d) No, because the state bar cannot ask other attorneys to disclose unfavorable information about third party applicants.

Rule 8.1 Cmt. 3

233. An attorney faced a disciplinary action over accusations that she had neglected a client matter and had failed to communicate adequately with the client. The state disciplinary authority requested a written account of her version of what happened, and asked her ten or twelve probing questions during the hearing. At the conclusion of the hearing, the disciplinary tribunal decided that the client complaint was without merit and cleared the attorney of all charges in that regard. At the same time, it also concluded that the attorney had answered one question during the hearing untruthfully, and had made a minor misrepresentation regarding dates in her written statement to the board. The tribunal therefore filed a separate grievance against the attorney for these misrepresentations. Could the attorney be subject to discipline for incidental misrepresentations to the grievance committee if the same committee had decided that the underlying case had no merit and issued a dismissal?

- a) Yes, because it is a separate professional offense for a lawyer to knowingly make a misrepresentation or omission in connection with a disciplinary investigation of the lawyer's own conduct.
- b) Yes, because her the dismissal of the original complaint may have been in reliance upon some of her false statements, making it seem that the original complaint was probably valid as well.
- c) No, because the board lacks jurisdiction to commence disciplinary proceedings when there is not a client complaint pending.
- d) No, because the misstatements were part of a proceeding that has ended in a complete dismissal.

Rule 8.1 Cmt. 1

234. An attorney faced disciplinary action over a client grievance. The disciplinary tribunal asked the attorney several probing questions about her handling of client funds. The attorney actually used some client funds to pay off a gambling debt, so she is less worried about a temporary suspension of her law license than about potential criminal charges for embezzlement. The attorney, therefore, invokes her Fifth Amendment privilege against self-incrimination and refuses to answer the questions. The disciplinary tribunal then determines that it lacks substantial evidence that the attorney mishandled client funds, but commences disciplinary proceedings over the attorney's refusal to answer some of its questions. Could the attorney be subject to discipline for refusing to answer the questions in this scenario?

- a) Yes, because a lawyer must not knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority.

- b) Yes, because the board found no evidence that the attorney had mishandled client funds, and the attorney had an affirmative duty to clarify any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.
- c) No, because the rules requiring attorney candor to disciplinary authorities are subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions.
- d) No, because the committee did not read the attorney her Miranda rights, according to this fact scenario.

Rule 8.1 Cmt. 2

235. An attorney faced disciplinary action over a client grievance. The disciplinary tribunal asked the attorney several probing questions about her handling of client funds. The attorney actually used some client funds to pay off a gambling debt, so she is less worried about a temporary suspension of her law license than about potential criminal charges for embezzlement. The attorney, therefore, simply refuses to answer the questions, without offering any explanation. The disciplinary tribunal then determines that it lacks substantial evidence that the attorney mishandled client funds, but commences disciplinary proceedings over the attorney's refusal to answer some of its questions. The attorney now claims she was merely exercising her Fifth Amendment right to refrain from self-incriminating statements. Could the attorney be subject to discipline for refusing to answer the questions in this scenario?

- a) Yes, because a lawyer can never refuse to respond to a lawful demand for information from an admissions or disciplinary authority.
- b) Yes, a person relying on such constitution protections in response to a question must do so openly and not use the right of nondisclosure as a justification afterward for failure to comply with the rules requiring disclosures to the disciplinary authorities.
- c) No, because the rules requiring attorney candor to disciplinary authorities are subject to the provisions of the Fifth Amendment of the United States Constitution and corresponding provisions of state constitutions.
- d) No, because the committee did not read the attorney her Miranda rights, according to this fact scenario.

Rule 8.1 Cmt. 2

ANSWER KEY - Rule 8.1

229. a

230. b

231. d

232. c

233. a

234. c

235. b

Rule 8.2 Judicial and Legal Officials

236. An attorney was upset when he lost a high-stakes bench trial. When friends and acquaintances asked him about it in the following weeks, he would bitterly complain that the judge must have received a bribe from the opposing party, because there was no way that a reasonable judge could have ruled against the attorney's own client, given the evidence in the case. The attorney has no reason to think that the judge accepted a bribe except that he was shocked when he lost the case. Could the attorney be subject to discipline for making such comments?

- a) Yes, because a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.
- b) Yes, but only if the attorney makes the statements in the public media, that is, to a reporter or in a press release.
- c) No, because the First Amendment protects the attorney's right to free speech, and these are merely complaints made to friends and acquaintances.
- d) No, because such comments implicate slander or libel doctrine in tort law, rather than disciplinary actions by a state bar.

Rule 8.2

237. In Texas, state trial judges are elected by popular vote. A well-known liberal-progressive judge is running for reelection. An attorney who is a staunch conservative is campaigning for the opposing candidate from the other party. At a campaign rally, the attorney declares that the liberal judge (seeking reelection) is completely unqualified and incompetent to serve in the judiciary, and that he is an activist judge who uses his court to push a particular political and social agenda. The judge graduated from a prestigious law school, was formerly a partner at a large law firm, and is active in the state bar. He does, however, give consistently lenient sentences to criminal defendants who are black or Hispanic, and has always ruled in favor of unions when he adjudicated cases involving collective bargaining agreements. The judge learns of these remarks by the attorney and files a grievance. Could the attorney be subject to discipline?

- a) Yes, because the judge is doing the right thing and conservatives like the attorney in this case are criticizing officials merely for upholding civil liberties and seeking justice and equality.
- b) Yes, because a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge.
- c) No, because the comments occurred in the context of a political campaign, where speakers regularly resort to overstatement and soaring rhetoric.
- d) No, because the claims appear to be true.

Rule 8.2

238. A would-be judge asked his former law school classmate, a practicing lawyer, to write a recommendation letter for him as part of his application and vetting process for a judicial appointment. The attorney obliged and wrote a glowing recommendation, entirely favorable, even though he personally knew that his friend (the one seeking to be a judge) was an alcoholic. Was it proper for the attorney to write such a letter?
- a) Yes, as long as the attorney believes his friend will be a fair judge.
 - b) Yes, because the attorney has no duty to disclose confidential information he knows about a friend.
 - c) No, because assessments by lawyers are relied on in evaluating the professional or personal fitness of persons being considered for appointment to judicial office, so expressing honest and candid opinions on such matters contributes to improving the administration of justice.
 - d) No, because an attorney should not write a recommendation letter for a prospective judge if there is any chance that the attorney will someday appear in that judge's court representing a client.

Rule 8.2 Cmt. 1

ANSWER KEY – RULE 8.2

236. a

237. b

238. c

Rule 8.3 Reporting Professional Misconduct

239. An attorney discovers that a partner at his own firm has violated the Rules of Professional Conduct by failing to disclose adverse binding precedent to a tribunal, and by depositing client funds into his own bank account instead of a client trust account. Does the attorney have a duty to report the partner from his own firm to the state bar disciplinary authority?

- a) Yes, but he must make an anonymous complaint to the state bar.
- b) Yes, because a lawyer who knows of a violation of the Rules that raises serious questions about the other attorney's honesty must report it to the state disciplinary authority.
- c) No, because lawyers do not have to report violations or misconduct by their own superiors, as this would put the reporting attorney in a difficult position at his workplace.
- d) No, because a lawyer is not required to report violations, but instead is merely permitted to do so.

Rule 8.3

240. An attorney works at a large firm and sees almost daily violations or potential violations of the Rules of Professional Conduct, though nearly all of them are minor and cause no harm or injury to the clients, third parties, or anyone else. For example, some lawyers represent co-defendants in cases where conflicts could arise at some point in the litigation, though the cases always seem to settle before any such scenarios develop. In other instances, certain lawyers seem to do minimal research on their cases or sometimes neglect client matters for weeks at a time, but again there has not been a case that was particularly serious. Does the attorney have a duty to report these violations to the state disciplinary authority?

- a) Yes, because a lawyer who knows of a violation of the Rules that raises serious questions about the other attorney's honesty must report it to the state disciplinary authority.
- b) Yes, but he must make an anonymous complaint to the state bar.
- c) No, because he does not have actual knowledge of the violation.
- d) No, because a lawyer must report only those offenses that a self-regulating profession must vigorously endeavor to prevent; if a lawyer were obliged to report every violation of the Rules, the failure to report any violation would itself be a professional offense.

Rule 8.3 Cmt 3

241. An attorney discovers that another lawyer has been stealing clients' funds, but he cannot prove it, as he learned about it from another party who was involved and who has since disappeared. He has some evidence, but not enough to prove that the other lawyer stole the clients' funds. When he confronted the other lawyer, the other lawyer admitted it privately but said he would deny it if there was any attempt to expose the matter. Does the attorney who knows about the violation, but could probably never prove it, have a duty to report the violation to the state disciplinary authority?

- a) Yes, because it does not matter how serious the misconduct is, it merely matters that there is some evidence of misconduct.
- b) Yes, because the duty to report misconduct depends upon the seriousness of the possible offense and not the quantum of evidence of which the lawyer is aware.
- c) No, because if the lawyer cannot prove the misconduct with a preponderance of evidence, he does not have “knowledge” of the misconduct for purposes of the Rules of Professional Conduct.
- d) No, because the duty to report depends on the quantum of proof of which the lawyer is aware, not the seriousness of the possible offense.

Rule 8.3 Cmt. 3

ANSWER KEY - RULE 8.3

239. b

240. d

241. b

Rule 8.4 Misconduct

242. A trial attorney agreed to represent a client in a high-profile criminal case, and asked at the outset for the client to give the attorney literary rights to write a book or screenplay about the case after its conclusion, in lieu of part of the attorney's normal fees. The client refused, so the attorney represented the client for his normal hourly rate. The evidence in the case was very unfavorable to the client, so the trial ended in a conviction and the client hired a different lawyer to represent him on appeal. At some point, the client told his appellate lawyer that the trial attorney had requested literary rights in the case at the outset of the representation. The appellate lawyer believed this was a violation of the Rules of Professional Conduct, and reported the trial attorney to the state disciplinary authority. When disciplinary proceedings commenced, the trial attorney maintained that he had not actually violated the Rules of Professional conduct, because the client had refused to grant him literary rights related to the case. He maintained that even if he had attempted to violate the Rules, he was unable to achieve his goals and therefore no actual violation occurred. Is the trial attorney correct?
- a) Yes, because his request merely constituted an attempt to violate the Rules of Professional Conduct, and the Rules do not impose discipline for attempts or inchoate violations.
 - b) Yes, because the client refused to grant him literary rights, so the complaint is not ripe.
 - c) No, because the lawyer should not have requested literary rights at the outset of litigation, but could have waited until it was clear how the trial was going before asking for literary rights.
 - d) No, because under the Rules, even an attempt to violate the Rules of Professional Conduct independently constitutes professional misconduct.

Rule 8.4(a)

243. A trial attorney knew he cannot have ex parte communications with the judge in his case, but he wanted to explain a point about the case to the judge without opposing counsel present. The attorney happened to attend an alumni reception at his law school, and one of his former classmates mentioned to him that she would be having lunch with the judge the next day. The attorney explained his case to his former classmate and asked her to explain a particular point to the judge privately during the lunch, and she agreed to do it as a favor. Could the attorney be subject to discipline in this case?
- a) Yes, because it is professional misconduct for a lawyer to violate or attempt to violate the Rules of Professional Conduct through the acts of another.
 - b) Yes, because the attorney knew that the classmate should not have lunch with a judge.
 - c) No, because the attorney did not personally have ex parte contact with the judge, so there was no risk of manipulation or coercion.
 - d) No, because the classmate consented to talk to the judge.

Rule 8.4(a)

244. A lawyer faced prosecution for failing to file tax returns over a five-year period. The attorney worked for a legal aid clinic and never charged clients any legal fees, as the clinic provided free representation to the indigent. The attorney received a modest salary from the legal aid clinic, the funds for which came from the state's IOLTA program and from a federal Legal Services Corporation (LSC) grant. Could the attorney face suspension of his license to practice law?
- a) Yes, because the lawyer's salary comes from a commingling of state IOLTA funds and federal LSC funds.
 - b) Yes, because it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty.
 - c) No, because the lawyer's illegal conduct did not pertain to his representation of any of his clients.
 - d) No, because none of the lawyer's income derived from legal fees collected from clients.

Rule 8.4(b) & Cmt. 2

245. An attorney was an immigrant from a country that permits polygamy – men can have up to four wives. The attorney had two wives, which his religion permitted, as did the laws of his homeland. Nevertheless, his multiple marriages constituted bigamy in the American jurisdiction where he practiced law, and eventually a court convicted him of bigamy and imposed a fine. Could the attorney be subject to professional discipline for committing this illegal act?
- a) Yes, because it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty.
 - b) Yes, because having multiple wives significantly increases the opportunities to have conflicts of interest with various clients.
 - c) No, because offenses concerning personal morality, such as bigamy and comparable offenses, have no specific connection to fitness for the practice of law.
 - d) No, because his bigamy does not reflect negatively on his character or morality if his religion permits it.

Rule 8.4 Cmt. 2

246. After practicing for two years, an attorney enrolled in an LL.M. program at a local law school, taking night classes. During his second semester, the attorney faced academic discipline for plagiarism in a seminar paper; the school permitted him to graduate, but he received a failing grade in the class and had to make up the credits with another course. As the attorney already has a license to practice law in the jurisdiction, could he be subject to discipline if the state disciplinary authorities learned of the plagiarism?
- a) Yes, because it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the lawyer's honesty.
 - b) Yes, because it is professional misconduct for an attorney to engage in conduct involving dishonesty, fraud, deceit or misrepresentation.

- c) No, because the attorney already obtained admission to the bar, so his courses now have no bearing on his application for admission to the bar.
- d) No, because the incident does not pertain to his representation of a client, so the disciplinary rules do not apply.

Rule 8.4(c)

247. While cross-examining a Hispanic witness during a trial, a defense attorney grew frustrated at the witnesses' evasive answers, and finally asked the witness if "his people" or others "in his community" regularly lie under oath on the witness stand. The prosecutor immediately objected and the judge sustained the objection, so the attorney withdrew the question. The witness then stated that he did not feel offended by the question because he understood that the lawyer was simply ignorant and relying on stereotypes. Three of the jurors were also Hispanic. Could the attorney be subject to discipline for this question?

- a) Yes, because it is professional misconduct for a lawyer in the course of representing a client to say things that manifest bias or prejudice based upon race or national origin.
- b) Yes, because the judge sustained the objection and there were Hispanics serving on the jury.
- c) No, because the witness claimed that he did not feel offended.
- d) No, because the lawyer immediately withdrew the question.

Rule 8.4(d) Cmt. 3

248. Partly out of a desire to impress a potential client during an initial consultation, and partly to reassure a potential client who was visibly upset about her pending criminal charges, the attorney said that he knew the judge in the case. He explained that they were close friends, former law school classmates, and that he could talk to the judge privately and "take care of the problem." Is it permissible for a lawyer to make such a claim to a potential client?

- a) Yes, as long as the claim is true and the lawyer is not misleading the client or create false expectations.
- b) Yes, because there is not yet a lawyer-client relationship before the commencement of representation, and the situation here occurred during an initial consultation.
- c) No, because it is a potential client, and the lawyer is using inappropriate manipulation to try to get business instead of allowing the client to make a fair decision about which lawyer to hire.
- d) No, because it is professional misconduct for a lawyer to state or imply an ability to influence improperly a judge or to achieve results by means that violate the Rules of Professional Conduct or other law.

Rule 8.4(e)

249. A judge asks the two lawyers in a case to help him conduct some first-hand investigation of the facts. At the judge's request, the plaintiff's lawyer and the defendant's lawyer together drive the judge to the location where the accident occurred that became the subject of the litigation, and allowed the judge to take measurements and photographs of the scene from different angles. They also accompanied the judge to interview several witnesses at their homes, off the record. Both lawyers felt awkward about this, but they were afraid to contradict or confront the judge, out of respect for the judicial office. Could the lawyers be subject to discipline for this conduct?

- a) Yes, because it constitutes ex parte communication with the judge.
- b) Yes, because it is professional misconduct for a lawyer to assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law.
- c) No, because the lawyers did this activity at the judge's behest, and possible under orders from the judge.
- d) No, because it furthers the ends of justice and accurate case outcomes for judges to have more complete understanding of the facts of a case.

Rule 8.4(f)

ANSWER KEY – RULE 8.4

242. d

243. a

244. b

245. c

246. b

247. a

248. d

249. b

Rule 8.5 Disciplinary Authority; Choice of Law

250. An attorney had a license to practice law in two jurisdictions – his home state where he lived and had his main office, and a neighboring state where he represented several clients each year. The attorney committed serious professional misconduct in his home state, and received a public reprimand from the state disciplinary authorities. All of the conduct took place in his home state, the client resided in the state, and the representation took place entirely within his home state. The lawyer’s conduct would have violated the rules in either of the jurisdictions where he had a license to practice law, because it involved commingling client funds with his own money, and the states had nearly identical rules concerning this activity. After the attorney received a public reprimand in his home state, where the misconduct occurred, the state bar disciplinary authority in the neighboring state (where he also practiced) then commenced disciplinary proceedings against him as well. Ultimately, the neighboring state bar suspended his license for six months in that state, a much more severe sanction than the public reprimand he received in his home state, where the misconduct actually occurred. The attorney claims that the neighboring state bar has no jurisdiction over conduct that occurred entirely outside of the state. He also objects that the second punishment raises double jeopardy concerns. Is the attorney correct?

- a) Yes, because even in cases where a second state can administer discipline over the same conduct, double jeopardy rules prevent the second tribunal from imposing a more severe sanction than the first tribunal already imposed on the lawyer.
- b) Yes, because a lawyer cannot be subject to the disciplinary authority of two jurisdictions for the same conduct if it occurred entirely within one state.
- c) No, because a lawyer may be subject to the disciplinary authority of two jurisdictions for the same conduct, and may receive different sanctions in each state.
- d) No, because choice of law rules require that each state impose the same sanction.

Rule 8.5(a)

251. An attorney practices law in two adjacent states, as he has a license to practice in each. He lives near the border and can easily serve clients in each jurisdiction. The two states have different rules about attorney disclosures of confidential client information - one state requires disclosures of client confidences whenever necessary to save a third party from death or serious bodily injury, while the other state forbids disclosures even under these circumstances. The attorney did indeed disclose confidential client information in order to save someone’s life (the client was planning a murder and the attorney notified the authorities and warned the potential victim), but this occurred in the state that forbids such disclosures under these circumstances. The client files a grievance against the attorney in both states, and both state bars commence disciplinary proceedings over the same incident. The state bar of the other state, which would have required disclosure in this situation under its own rules, nevertheless reprimands the attorney for making the disclosure in violation of the rules in the state where the incident occurred. The attorney objects that the state cannot impose a sanction on him for conduct that the state’s rules would have required. Is the state bar correct?

- a) Yes, the state bar should apply the rules of the jurisdiction in which the lawyer's conduct occurred.
- b) Yes, because a state disciplinary authority does not have to consider the rules of professional conduct from its own state in making disciplinary determinations, regardless of where the misconduct occurs.
- c) No, because each state bar should apply its own rules, otherwise we could have the absurd result of a state bar punishing a lawyer for an action that the rules of that state require.
- d) No, because a lawyer can face discipline for professional misconduct only in the state where the misconduct occurred.

Rule 8.5(b)(2)

252. An attorney was representing a client in a probate matter. Nearly all of the representation occurred within the attorney's home state, where the client also lived. One asset of the probated estate, however, was an account receivable from a debtor in a neighboring state; the matter was already the subject of pending contract litigation in that state. The attorney filed a pro hac vice appearance in the neighboring state, and traveled there to represent his client in the contract matter, which was ancillary to the probate matter in his home state. During the proceedings, the lawyer committed an act that constituted a violation of the ethical rules in his home state, but not in the neighboring state where he was appearing in a proceeding; the states had different rules in this regard. Could the attorney be subject to discipline in his home state for violating its rules before a tribunal in the neighboring state?

- a) Yes, because when an attorney takes an oath to uphold the rules of a jurisdiction in order to obtain admission to the bar, he or she does so without regard to the lawyer's future geographic location when a violation of the rules occur.
- b) Yes, because otherwise, lawyers could simply drive across state lines and violate all the rules of professional conduct without repercussions from the state bar where the lawyer practices.
- c) No, because whenever a lawyer's conduct relates to a proceeding pending before a tribunal, the lawyer shall be subject only to the rules of the jurisdiction in which the tribunal sits.
- d) No, because a lawyer cannot be subject to discipline in more than one jurisdiction for the same act or incident.

Rule 8.5(b)(1)

ANSWER KEY – RULE 8.5

250. c

251. a

252. c

Texas Disciplinary Process

253. In Texas, which entity determines what constitutes the unauthorized practice of law in this state?
- The State Bar of Texas (SBOT), subject to review by the Texas courts
 - The Unauthorized Practice of Law Commission (UPC), subject to review by the Texas courts
 - The Texas Committee on Profession Ethics (TCPE), which has sole statutory authority in Texas to issue Ethics Opinion Letters
 - The Texas Office of the Chief Disciplinary Counsel (CDC), subject to review by the Board of Disciplinary Appeals.
254. Attorney has a license to practice law in New York, but she is living in Texas and is practicing law in Texas out of her own firm office in Huntsville. What is the position of state bar regarding this situation?
- The State Bar of Texas has jurisdiction to decide what constitutes the unauthorized practice of law in this state, and to take disciplinary action against individuals who engage in the unauthorized practice of law.
 - The jurisdiction of the State Bar of Texas does not permit it to take disciplinary action for any violation of the Texas Disciplinary Rules against any person who is not licensed to practice law in Texas or who is not specially admitted by a Texas court for a particular proceeding.
 - The State Bar of Texas refers unauthorized practice of law enforcement actions to the United States Department of Justice for enforcement proceedings under federal law in the federal courts, as this situation involves a dispute between a citizen of one state and the state government of another state.
 - Texas has a special reciprocity agreement with the State Bar of New York, so attorneys admitted in New York can practice law in Texas, and vice-versa, as long as they file a notice with the local bar association.
255. What is the role of the Board of Disciplinary Appeals in Texas?
- The final judgment of the Board of Disciplinary Appeals may be appealed in the same way civil cases are generally appealed.
 - If an attorney facing a grievance does not elect a trial in district court, the judgment of an evidentiary panel may be appealed to the Board of Disciplinary Appeals, and an appeal from the Board of Disciplinary Appeals may be taken to the Supreme Court of Texas.
 - Grievances are filed directly with the Board of Disciplinary Appeals, which then makes a Just Cause Determination and offers the lawyer an opportunity to file a Response.
 - The Board of Disciplinary Appeals evaluates the fitness to practice law of new law school graduates and determines whether they meet the good moral character requirements of the state bar.

256. In Texas, an attorney facing discipline can elect whether to have his complaint tried before an evidentiary panel or in district court. Which of the following best describes the attorney's tradeoff in making this election decision?
- a) The lowest form of sanction, a private reprimand, is available only if the complaint is in district court; but a jury is available only before an evidentiary panel, as are many of the evidentiary exclusions and procedural protections of court adjudications.
 - b) The lowest form of sanction, a private reprimand, is available only if the complaint is before an evidentiary panel; but a jury is available only in district court, as are many of the evidentiary exclusions and procedural protections of court adjudications.
 - c) The most severe sanction, disbarment, is available only if the complaint is before an evidentiary panel; but punitive damages are available only in district court, as are orders to make restitution and payment of attorneys' fees.
 - d) The most severe sanction, disbarment, is available only in district court; but punitive damages are available only if the complaint is before an evidentiary panel, as are orders to make restitution and payment of attorneys' fees.
257. Which of the following best describes the first five steps, in order, of the Texas disciplinary process?
- a) Filing of grievance with the Board of Disciplinary Appeals, Just Cause Determination, Response, Election of Forum, Classification
 - b) Filing of grievance with the Office of Chief Disciplinary Counsel, Classification, Response, Just Cause Determination, Election of Forum
 - c) Filing a grievance with the Board of Disciplinary Appeals, Election of Forum, Evidentiary Panel, Sanctions, and Appeal
 - d) Filing of grievance with the Office of Chief Disciplinary Counsel, Election of Forum, Evidentiary Panel, Sanctions, and Appeal
258. Which of the following is NOT one of the most common alleged violations among grievances filed against attorneys in Texas?
- a) Neglect of a client matter
 - b) Conflict of interest
 - c) Failure to communicate
 - d) Improper behavior surrounding withdrawal or termination of representation
259. Of all the grievances filed against Texas attorneys each year, what are the most common alleged violations?
- a) Conflicts of interest, breach of confidentiality, and neglect of client matters
 - b) Neglect, failure to communicate, and improper behavior surrounding withdrawal or termination of representation

- c) Failure to communicate, advertising and solicitation violations, and violation of the duty of candor to a tribunal
- d) Improper behavior surrounding withdrawal or termination of representation, failure to screen new attorneys from matters posing conflicts of interest, and failure to supervise or train support staff at the firm

ANSWER KEY – TEXAS DISCIPLINARY PROCESS

253. b

254. b

255. b

256. b

257. b

258. b

259. b

Rules 7.1-7.6 Communications about legal services

Rule 7.1 Communication Concerning a Lawyer's Services

Rule 7.2 Advertising

Rule 7.3 Solicitation of Clients

Rule 7.4 Communication of Fields of Practice and Specialization

Rule 7.5 Firm Names and Letterhead

**Rule 7.6 Political Contributions to Obtain Legal Engagements or Appointments
by Judges**

RULE 7.1 Communication Concerning A Lawyer's Services

260. Attorney advertises his services on billboards in a major city, emblazoned with the logo, “LOWEST LEGAL FEES IN THE CITY!” The billboard contains the firm’s name, address, phone number, and website, but no disclaimers or qualifications about the claim regarding the legal fees they charge. Approximately 10,000 lawyers practice in that city, and a legal aid clinic provides free legal services for homeless or indigent clients. The location of the billboards happens to be on roads with very high frequency of accidents and traffic fatalities, so the billboards are often visible to those who have just had an accident. Could Attorney be subject to discipline for these billboards?

- a) Yes, because an unsubstantiated comparison of the lawyer's services or fees with the services or fees of other lawyers may be misleading if presented with such specificity as would lead a reasonable person to conclude that the comparison can be substantiated.
- b) Yes, because the billboard constitutes solicitation of clients immediately after they have an accident, as it is directed to the general public, such as through a billboard, an Internet banner advertisement, a website or a television commercial
- c) No, because the billboards do not violate the prohibition against stating or implying an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law.
- d) No, because the lawyer is merely exercising his First Amendment rights to free speech.

261. Attorney recently earned her Juris Doctor degree from a prestigious law school and easily passed the state bar exam, gaining admission to the bar in her home state. She worked for three years for a legal aid clinic that provided free legal services for indigent clients. At the end of her third year at the clinic, Attorney decided to start her own firm, representing primarily low-income clients who were ineligible for free services at the legal aid clinic, but who also rarely could afford the fees of most attorneys. She sent a certified letter to most of the lawyers in her geographic area describing her experience and explaining that she was starting her own firm and intended to specialize in low-dollar consumer protection cases, simple divorces, adoptions, name changes, and landlord-tenant disputes. The letter concluded by offering to handle such cases for other lawyers if the other lawyers did not want to invest their time on such low-dollar matters. She did not notify the legal aid clinic that she planned to leave or that she had sent this letter. Were Attorney’s actions proper?

- a) Yes, because Attorney’s statements were not false or misleading and the letter was an appropriate announcement of the opening of her new firm and her intent to specialize in certain areas of law.
- b) Yes, because Attorney sent the letter only to other lawyers, so there was little risk of manipulation or abuse of unsophisticated clients.
- c) No, because Attorney failed to notify the legal aid clinic of her plans to open a new firm, or to send a letter to hundreds of lawyers that described her experience working at the clinic.
- d) No, because Attorney has never handled such fee-generating cases before, if her only work experience is at a legal aid clinic that provides services without charge to indigent clients.

262. Attorney has advertisement placards on the sides of public transportation buses in his city. The signs read, "If your home suffered storm damage this year, you are entitled to full recovery! Call us now!" Attorney represents clients in claims against their homeowner insurance companies, who often deny claims for storm damage, at least initially. Attorney often wins at least a small settlement, if not full recovery costs, for his clients. Is this advertisement proper?
- Yes, because Attorney does, in fact, represent clients who have suffered storm damage in claims against their insurers.
 - Yes, because this is not an in-person solicitation, so there is little risk of unsophisticated potential clients misunderstanding the claims in the advertisement.
 - No, because it contains a material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading.
 - No, because the advertisement was placed on a public transportation vehicle, which tacitly suggests an endorsement of the municipal government, as opposed to a privately-owned billboard on private property near a roadside.
263. Attorney grew up in a family that spoke the Maori language in the home. His law practice advertisements prominently state that he speaks Maori and can represent Maori-speaking clients. No Maori speakers live within 2000 miles of where Attorney practices. Is it improper for Attorney to include this language ability in his advertisements?
- Yes, because it creates a misperception that Attorney is unusually intelligent.
 - Yes, because Maori speakers in far-away jurisdictions might misunderstand and believe that Attorney is admitted in their jurisdiction as well.
 - No, because the statement is true.
 - No, because Attorney has Free Speech rights to make any claim he wants in his public advertisements.
264. Attorney practices law in Texas, and he runs advertisements in local newspapers and journals that say, "HIRE THE BEST LAWYER!" The advertisement does not explicitly claim that Attorney is the best lawyer in the state, but it does include Attorney's website address, which is www.bestlawyerintexas.com. Is such an advertisement improper?
- Yes, because the advertisement is misleading.
 - Yes, because it includes a website address.
 - No, because it merely exhorts readers to hire the best lawyer, without suggesting who is the best lawyer.
 - No, unless Attorney is, by all measures, the best lawyer in Texas.

RULE 7.2 Advertising

265. Attorney pays \$1000 per month for a billboard advertisement for his firm, \$2000 per month for a few radio commercials, \$3000 per month for internet advertising, and \$4000 per month for newspaper and magazine advertisements. The total amount for advertising is \$10,000. Attorney's average total income from legal fees is \$15,000 per month. Is it permissible for Attorney to spend such sums on advertising?

- a) Yes, because a lawyer may advertise services through written, recorded or electronic communication, including public media and may pay the reasonable costs of such advertisements or communications.
- b) Yes, because as long as the lawyer is not making in-person solicitations, there are no limitations on advertising by law firms, as long as the advertisements are not for a particular lawyer.
- c) No, because it is not reasonable to spend more than half of a firm's monthly revenues on advertising.
- d) No, because it is not reasonable to spend \$1000 on billboards, which are notoriously ineffective.

266. Attorney represented Client as the plaintiff in a personal injury lawsuit and won a large settlement for Client. Attorney had represented Client on a contingent fee basis, with an agreement at the outset of representation to charge 30% of the total winnings or settlement amount. Client was very good-looking, and Attorney offered at the end of representation to discount his fee by another 10% if Client would pose for a photograph with Attorney for use in printed advertisements, with a quote by Client that truthfully expressed gratitude to Attorney for providing excellent representation in the case. The advertisement did not include any disclaimer explaining that not all of Attorney's clients were as attractive as the client who appeared in the photo. The advertisement also included a promise from Attorney "to provide the same type of excellent legal representation to you [the reader] as well." Was this advertisement proper?

- a) Yes, because the client and the lawyer both made truthful statements.
- b) Yes, because the discount offered to the client was reasonable for such an endorsement, as long as the amount was comparable to hiring a model to pose for the photograph instead.
- c) No, because the lawyer promised implicitly to obtain similar results for other potential clients, without knowing their circumstances or the merits of their claims.
- d) No, because the lawyer effectively offered money to the client by giving a discount on the earned legal fees in exchange for appearing in the advertisement.

267. Attorney made an informal agreement with Physician that they would refer clients to each other when the situation seemed appropriate. They did not pay each other any money for referrals, but the relationship was explicitly reciprocal – Attorney referred patients who needed medical examinations to Physician, and when Physician had patients needing legal representation, he referred them to Attorney. The relationship was not explicitly exclusive – each was free to refer clients to others – but it happened

that neither had similar reciprocal relationships with anyone else. They always inform their clients when making such referrals that they have a reciprocal relationship. Is such an arrangement proper?

- a) Yes, a lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer, as long as clients are aware and the relationship is not exclusive.
- b) Yes, because the agreement is informal, not a written contract.
- c) No, because a lawyer may not agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer.
- d) No, because the relationship described here is de facto exclusive, even if they have not agreed specifically to keep the relationship exclusive.

268. Attorney made and distributed bumper stickers advertising for his firm that simply provided a catchy phone number: 1-800-LAWYER-1. The phone number rolled over to Attorney's office phone. The bumper stickers included no other information. Could Attorney be subject to discipline for such an advertisement?

- a) Yes, because bumper sticker advertising undermines the dignity of the legal profession.
- b) Yes, because it does not include the name and office address of at least one lawyer or law firm responsible for its content.
- c) No, because bumper stickers do not constitute advertising under the Model Rules of Professional Conduct.
- d) No, because the information on the bumper stickers was truthful and accurate.

269. Attorney made an informal agreement with Physician that they would refer clients to each other when the situation seemed appropriate. They did not pay each other any money for referrals, but the relationship was explicitly reciprocal – Attorney referred patients who needed medical examinations to Physician, and when Physician had patients needing legal representation, he referred them to Attorney. The relationship was explicitly exclusive – each agreed not to refer clients to others – but it happened that neither had similar reciprocal relationships with anyone else anyway. They always inform their clients when making such referrals that they have a reciprocal relationship. Is such an arrangement proper?

- a) Yes, a lawyer may agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer, as long as clients are aware of the existence and nature of the arrangement.
- b) Yes, because the agreement is informal, not a written contract.
- c) No, because a lawyer may not agree to refer clients to another lawyer or a nonlawyer professional, in return for the undertaking of that person to refer clients or customers to the lawyer, if the relationship is exclusive.
- d) No, because the relationship described here is de facto exclusive, even if they have not agreed specifically to keep the relationship exclusive.

270. Attorney is a friend of Blogger, who operates a successful local blog about events, news, and gossip about their city. Blogger includes posts about local judges and well-known lawyers. Attorney and Blogger have a secret agreement. Attorney passes along tips to Blogger in the form of courthouse gossip regarding local lawyers and judges, or even about big cases. Blogger, in turn, covers Attorney's successful cases in glowing terms and recommends Attorney to his readers. Blogger's website is so successful that he earns approximately \$50,000 in advertising revenue from the site. Attorney occasionally purchases a small, inexpensive advertisement on the site, which merely gives Attorney's name, address, phone number, and areas of practice. Could Attorney be subject to discipline?

- a) Yes, because Attorney provides gossip that undermines the dignity of the profession
- b) Yes, because Attorney provides something of value to Blogger in exchange for recommending his services.
- c) No, because Attorney pays a reasonable sum for his advertisements on the blog
- d) No, because it is impossible to quantify the value of the information that Attorney provides to Blogger in exchange for favorable reviews of Attorney's legal victories

271. An internet marketing company, GlomOn, advertises “daily deals” and permits users to receive frequent email notifications of daily deals that might interest them. GlomOn makes arrangements with local businesses to offer goods or services at discount rates to GlomOn subscribers. After a certain number of subscribers purchase a particular daily deal, GlomOn splits the proceeds with the local business, and the purchaser receives a code or electronic voucher with an expiration date. Attorney decides to use GlomOn to find new clients, and offers an online deal for \$400 off a client’s legal fees if they retain Attorney. Attorney honors these commitments and resists the urge to raise his rates for GlomOn clients in order to offset the \$400 rebate, so his GlomOn advertisements are not misleading in any way. GlomOn costs Attorney more than other internet advertisers. In fact, because GlomOn promotes Attorney’s message to a large number of subscribers, and because GlomOn handles the processing of payments from the coupon purchasers, nearly the entire fee paid by GlomOn customers actually goes to GlomOn, not to Attorney. Could Attorney be subject to discipline for marketing his legal services through GlomOn in this way?

- a) Yes, because this constitute fee sharing with nonlawyers.
- b) Yes, because it is an unreasonable fee for advertising if it is higher than comparable advertisers and most of the initial fee goes to the advertiser.
- c) No, because the Model Rules do not regulate internet advertising for lawyers.
- d) No, because the fee is reasonable, given the services that GlomOn provides to advertisers.

ABA Formal Op. 13-465

RULE 7.3 Solicitation of Clients

272. Which of the following most accurately describes the Model Rules' treatment of in-person solicitations of prospective clients by lawyers and live telephone solicitations by lawyers?
- a) The Rules treat in-person solicitations as much more serious and likely to result in abuse than telephone solicitations.
 - b) The Rules treat live telephone solicitations the same as in-person solicitations.
 - c) The Rules treat live telephone solicitations the same as email solicitations.
 - d) The Rules treat live telephone solicitations the same as a billboard, an Internet banner advertisement, a website, or a television commercial.
273. Attorney heard that an acquaintance from law school, now also a lawyer, was the subject of a recent grievance before the state disciplinary authority for live telephone solicitation of prospective clients. Attorney called his acquaintance and offered to represent him in his hearing before the grievance committee, for a fee of \$400 per hour, higher than the usual rate for such representation. Attorney's motivation was primarily for pecuniary gain, not concern for his former classmate. Could Attorney himself be subject to discipline for making this live telephone solicitation of his law school classmate?
- a) Yes, because a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
 - b) Yes, because Attorney offered to represent the prospective client for a higher-than-average fee.
 - c) No, because the prospective client is also a lawyer.
 - d) No, because the prospective client is an acquaintance from law school.
274. Attorney's brother is a physician. Attorney calls his brother and explains that his firm is not doing well, that he needs more cases, and asks his brother to use him as his lawyer for any medical malpractice actions he faces or any collection actions against patients who do not pay their bills. Attorney's brother finds this request annoying and makes no promises. Was it proper for Attorney to make such a telephone solicitation?
- a) Yes, because the recipient of the solicitation has a family relationship with the lawyer.
 - b) Yes, because he merely asked his brother to use his services whenever a case should arise, without offering to represent him in a specific matter or for a specific fee.
 - c) No, because the brother found the call annoying and the appropriateness of the solicitation is from the perspective of the recipient.
 - d) No, because a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.

275. Attorney's brother is a physician. Attorney calls his brother and explains that his firm is not doing well, that he needs more cases, and asks his brother to use him as his lawyer for any medical malpractice actions he faces or any collection actions against patients who do not pay their bills. Attorney's brother finds this request annoying and reminds Attorney that he has asked him on several occasions not to pester him to use Attorney as his lawyer. Was it proper for Attorney to make such a telephone solicitation?
- a) Yes, because the recipient of the solicitation has a family relationship with the lawyer.
 - b) Yes, because he merely asked his brother to use his services whenever a case should arise, without offering to represent him in a specific matter or for a specific fee.
 - c) No, because the call involves contact with someone who has made known to the lawyer a desire not to be solicited by the lawyer.
 - d) No, because a lawyer shall not by in-person, live telephone or real-time electronic contact solicit professional employment when a significant motive for the lawyer's doing so is the lawyer's pecuniary gain.
276. Attorney sends a solicitation letter to a prospective client, with the designation "Advertising Material" printed on the outside of the envelope. The recipient of the letter opens it and reads it, but does not respond. Lawyer then sends a follow-up letter to the prospective client, again with the designation "Advertising Material" printed on the outside of the envelope. Could Attorney be subject to discipline for sending the second letter?
- a) Yes, because a lawyer may not solicit individual prospective clients with direct mail unless the prospective client has requested the information.
 - b) Yes, if after sending a letter or other communication as permitted by the Rules, the lawyer receives no response, any further effort to communicate with the recipient of the communication may violate the provisions of Rules.
 - c) No, because the lawyer clearly indicated that it was advertising material on the outside of the envelope.
 - d) No, because the lawyer had no way to know whether the prospective client received the first letter.

Rule 7.3 Cmt. 6

277. After a hurricane damaged hundreds of homes in a southeastern state, Attorney received requests for information about legal representation from several affected homeowners. Attorney wrote back, offering to represent them in their insurance claims arising out of the storm damage. Each letter was handwritten and personalized, and Attorney addressed each envelope by hand so that recipients would perceive it as a personal letter and would be more likely to open it and read it. At the top of the letter itself, Attorney wrote by hand the words "Advertising Material." Were Attorney's actions proper?
- a) Yes, because Attorney clearly indicated at the top of the letter that it was advertising material.

- b) Yes, because the requirement that certain communications be marked "Advertising Material" does not apply to communications sent in response to requests of potential clients.
- c) No, because Attorney did not include the phrase "Advertising Material" on the outside of the envelope.
- d) No, because a lawyer should not send a solicitation letter to those who have recently experienced a tragedy and are vulnerable to manipulation or coercion.

Rule 7.3 Cmt. 8

278. Attorney made a lateral move to another firm in the same city where he already practiced. Attorney sent letters to area residents and businesses, whom he knew to be in need of legal services, announcing that he had gone to work for a new firm and had a new office address. The letter stated that he was excited about the new opportunities he would have at this firm to provide excellent legal representation to new clients in the city. Nowhere on the letter or envelope did Attorney include the words "Advertising Material." Could Attorney be subject to discipline for sending these letters?

- a) Yes, because every written communication from a lawyer soliciting professional employment from anyone known to be in need of legal services in a particular matter shall include the words "Advertising Material" on the outside envelope.
- b) Yes, because Attorney was implicitly soliciting new clients through this general professional announcement.
- c) No, general announcements by lawyers, including changes in personnel or office location, do not constitute communications soliciting professional employment from a client.
- d) No, because Attorney sent the letters only to area residents and businesses.

Rule 7.3 Cmt. 8

279. After a bizarre accident that received heavy media coverage, the victims took the unusual step of sending written notices to every plaintiff's firm in the area stating that the victims did not want to hear from any lawyers about the matter. Attorney received the notice and promptly forgot about it, because he had not yet seen any of the media coverage about the accident. Two weeks later, Attorney decided to catch up on the recent news, and read an article online about the bizarre incident. He sent a letter to the victims expressing condolences for their suffering and offering to provide legal services if they decided to file a claim over the incident. The victims read the letter, changed their minds, and agreed to have Attorney represent them. A lawyer at another plaintiff's firm, who had also received the notice from the victims, learned that Attorney was representing the victims. He made some inquiries and discovered how the Attorney had found his new clients. The lawyer filed a grievance against Attorney with the state disciplinary authorities. Should Attorney be subject to discipline for the way in which he offered to represent the victims?

- a) Yes, because the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer.

- b) Yes, because it was unfair for Attorney to have the opportunity to represent these clients when other lawyers had diligently avoided soliciting them.
- c) No, because the victims decided that they wanted Attorney to represent them.
- d) No, because the grievance came from a rival lawyer and the motivation was petty envy.

280. Attorney specializes in criminal defense work. His advertising, signage, and firm brochures offer a service that other lawyers in his city do not provide – Attorney promises to post bail or bond for any client who cannot afford the amount of his bail or bond. Could Attorney be subject to discipline for such an advertisement offer?

- a) Yes, because the advertisement is inherently misleading.
- b) Yes, given the coercion and duress inherent in the client's incarceration, using the promise of securing the client's release from custody as an inducement to engage the lawyer would be a violation of Rule 7.3(b)(2).
- c) No, as long as he actually posts bail or bond for every client who claims to be unable to afford it themselves.
- d) No, because lawyers can post bail for clients under certain circumstances, as long as it does not generate a conflict of interest that the client is unwilling to waive.

ABA Formal Op. 04-432

281. Attorney is representing a group of plaintiffs in a mass tort claim, and he hopes to obtain class certification so that it will become a class action lawsuit. Attorney sends letters to hundreds of potential class members inviting them to join the lawsuit and inquiring about whether they would be willing to join as a named party in the action. He does not designate the letters as “advertising material” on the outside because each recipient is a potential class member of a lawsuit that is already underway, but not yet certified as a class action. Could Attorney be subject to discipline for sending these letters?

- a) Yes, because if plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3 apply.
- b) Yes, because it is always inappropriate for a lawyer to contact putative members of a class prior to class certification.
- c) No, because it is always permissible for lawyers to contact putative members of a class prior to class certification, and such contact does not constitute solicitation.
- d) No, because the lawyer and the class have a legitimate interest in finding the best possible named plaintiffs for the lawsuit.

ABA Formal Op. 07-445

282. Attorney is representing a group of plaintiffs in a mass tort claim, and he hopes to obtain class certification so that it will become a class action lawsuit. Attorney sends letters to hundreds of potential class members inviting them to testify as witnesses. All

the statements in the letter are accurate and are not coercive. Even so, he does not designate the letters as “advertising material” on the outside because each recipient is a potential class member of a lawsuit that is already underway, but not yet certified as a class action. Could Attorney be subject to discipline for sending these letters?

- a) Yes, because if plaintiffs' counsel's goal is to seek to represent the putative class member directly as a named party to the action or otherwise, the provisions of Rule 7.3 apply.
- b) Yes, because it is always inappropriate for a lawyer to contact putative members of a class prior to class certification.
- c) No, because it is always permissible for lawyers to contact putative members of a class prior to class certification, and such contact does not constitute solicitation.
- d) No, because Rule 7.3's restrictions do not apply to contacting potential class members as witnesses, so long as those contacts are appropriate and comport with the Model Rules.

ABA Formal Op. 07-445

RULE 7.4 Communication Of Fields Of Practice And Specialization

283. Attorney specializes in tax law, and primarily represents individuals and entities defending themselves against enforcement claims by the IRS. Attorney has a successful practice, but she would like to attract even more clients. She identifies potential clients, those facing enforcement proceedings, from public records and filings. She sends each one the following email:

“ADVERTISING MATERIAL: Do you have problems with the IRS? I specialize in defending individuals and entities against tax evasion and delinquency claims, and I have decades of experience. For free information, visit my website or reply to this email. Advertising material.”

Is the tax lawyer subject to discipline for this email?

- a) No, as a lawyer may identify potential clients from public records and contact them, even if they have indicated to the lawyer that they do not want such solicitations
- b) No, because lawyers may represent that they specialize in particular fields of law
- c) Yes, as a lawyer cannot misleadingly state or imply a certification as a specialist
- d) Yes, as the lawyer cannot solicit clients using real-time electronic contact unless the person contacted the lawyer, or is a relative or close friend of the lawyer, or was a prior client of the lawyer

284. In his advertisements, Attorney, who practices in California, states, “CERTIFIED SPECIALIST IN CALIFORNIA LAW.” Attorney is referring to the fact that he passed the California Bar Exam, not to any other official certification beyond admission to the California bar. According to the Model Rules of Professional Conduct, is such a statement proper in a lawyer’s advertisement?

- a) Yes, because a lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law.
- b) Yes, because passing a state’s bar exam demonstrates sufficient expertise in the laws of that state to practice there as a lawyer.
- c) No, because a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law without being certified as a specialist by an official certifying organization in that state, and without including the name of the certifying organization in the advertisement.
- d) No, because under the Model Rules, lawyers should not claim to be “certified specialists” in anything.

285. Attorney promotes himself on his website and through other advertisements as a “Patent Attorney.” He is admitted to engage in patent practice before the United States Patent and Trademark Office, but he does not mention this on his website or in his advertisements – he simply states that he is a “Patent Attorney.” Is it proper for him to use this designation without the name of the U.S. Patent and Trademark Office being clearly identified in the communication as the certifying organization?

- a) Yes, because a lawyer admitted to engage in patent practice before the United States Patent and Trademark Office may use the designation "Patent Attorney" or a substantially similar designation without further clarification.
- b) Yes, but only if he does not handle any other types of cases or matters for clients.
- c) No, because a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the name of the certifying organization is clearly identified in the communication.
- d) No, because a lawyer shall not state or imply that a lawyer is certified as a specialist in a particular field of law, unless the lawyer has been certified as a specialist by an organization that has been approved by an appropriate state authority, and the states do not approve the U.S.P.T.O.

286. Attorney describes his areas of practice in his advertisements as "real estate" and "personal injury," but his state bar requires that lawyers use the less descriptive terms "property law" and "tort law" instead. Could Attorney be subject to discipline for using these more descriptive terms instead of the verbiage prescribed by the state bar?

- a) Yes, because states have an absolute right to place reasonable requirements on lawyers pertaining to the verbiage used in their advertisements.
- b) Yes, because "real estate" and "personal injury" are inherently misleading terms, whereas "property law" and "tort law" are very precise.
- c) No, because states may not regulate lawyer advertising in any way.
- d) No, because lawyers have a First Amendment right to use verbiage that is accurate and descriptive in their advertisements, as long as the statements are not misleading.

See In re R.M.J., 455 U.S. 191 (1982)

287. In his advertisements and firm brochures, Attorney describes his many years of experience litigating in a particular area of commercial real estate litigation, without claiming to be a specialist or an expert. He does not mention any official certification. Is it permissible for Attorney to boast of his years of experience practicing in a particular area, even though some readers might infer from this that he is an expert or a certified specialist?

- a) Yes, the Supreme Court has held that state bars may not pass any rules that limit or sanction communications by lawyers to potential clients.
- b) Yes, the Supreme Court has held that state bars cannot prohibit lawyers from describing their years of experience with certain types of cases, as long as the information is truthful.
- c) No, the Supreme Court has held that describing one's years of experience is too misleading, because readers could incorrectly infer that the lawyer will obtain successful results in their case.
- d) No, because the lawyer cannot predict what types of cases he will handle in the future, when new clients hire him.

See Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985)

288. Attorney identified himself on his letterhead as a “Certified Trial Specialist by the National Board of Trial Advocacy.” Attorney’s state has no lawyer certification program of its own, besides admission to the bar. Is it inherently misleading, and therefore improper, for Attorney to list a certification if it did not come from an organization that has been approved by an appropriate state authority?

- a) Yes, because the traditional rule is that lawyers may state areas in which they practice, but may not claim to be certified specialists in anything.
- b) Yes, because consumers are likely to think that the state bar actually certified Attorney as a Trial Specialist.
- c) No, because the Supreme Court has held that such statements are merely “potentially misleading” and that it would violate the First Amendment for states to prohibit such statements completely.
- d) No, because the Model Rules place no restrictions on lawyers making claims about certifications, expertise, or specialization.

See *Peel v. Attorney Registration & Disciplinary Comm’n*, 496 U.S. 91 (1990)

Rule 7.5 Firm Names And Letterhead

289. Attorney's law firm is simply "The Law Offices of [Attorney's name], Esq." Attorney specializes in courtroom litigation. His website address is www.mytrialattorney.com. Attorney selected this domain name and registered it so that he could use it for his law firm's website. Is this website address/domain name proper for Attorney's law firm?

- a) Yes, because it is not misleading, and lawyer or law firm may also be designated by a distinctive website address or comparable professional designation.
- b) Yes, because "internet neutrality" requires that anyone can use any domain name they want.
- c) No, because the ABA Model Rules require that law firm domain names include the names of the partners.
- d) No, because the ABA Model Rules forbid lawyers from designating themselves with a distinctive website address.

Rule 7.5 Cmt 1

290. Attorney's law firm is simply "The Law Offices of [Attorney's name], Esq." Attorney specializes in courtroom litigation. He sees himself as a savior to his clients, who really appreciate his help. His website address is www.mytrialattorney.org. Attorney selected this domain name and registered it so that he could use it for his law firm's website. Is this website address/domain name proper for Attorney's law firm?

- a) Yes, because it is not misleading, and lawyer or law firm may also be designated by a distinctive website address or comparable professional designation.
- b) Yes, because "internet neutrality" requires that anyone can use any domain name they want.
- c) No, because the ABA Model Rules require that law firm domain names include the names of the partners.
- d) No, because the use of ".org" as the ending of the domain name suggests that the firm is a charitable legal aid clinic, so it is misleading.

291. Attorney practices in a small town in a rural area. His law firm's sign reads, "HOME TOWN ATTORNEY." Attorney's entire practice consists of representing local townfolk. Other lawyers and law firms in the town use more traditional designations, listing the named partners on their signage and advertising. Could Attorney be subject to discipline for using this designation for his law firm?

- a) Yes, because the name suggests that he is associated with the municipal government in that locale.
- b) Yes, because he is not the only lawyer in the town, so he should not have a sign suggesting that he is the only lawyer in town.
- c) No, because the sign is not misleading or untruthful, and a law firm may use a trade name instead rather than lawyers' personal names.
- d) No, because the rules pertaining to firm names and letterheads do not apply to sole practitioners.

292. Attorney left Big Firm to open his own practice. Not wanting to sound alone and isolated, he decided to call it “[Attorney’s Name] & Associates,” even though he had no lawyers working for him. Nevertheless, he did have a receptionist and a paralegal. Could Attorney be subject to discipline for using this name for his firm?

- a) Yes, because the name is misleading if there are no lawyer associates working for Attorney.
- b) Yes, because the Model Rules require sole practitioners to invert the order and call it “Associates & [Attorney Name]”
- c) No, because the name is not misleading or confusing to the public.
- d) No, because the name is his personal name, and “associates” could include his nonlawyer staff.

293. Attorney left Big Firm to open his own practice. He decided to give it a grandiose name, and called it “The Law Firm of America.” He hopes someday to have offices in all fifty states. Could Attorney be subject to discipline for using this name for his firm?

- a) Yes, because he does not yet have offices in all fifty states.
- b) Yes, a trade name may be used by a lawyer in private practice only if it does not imply a connection with a government agency
- c) No, because he intends to have offices in all fifty states someday.
- d) No, because a trade name may be used by a lawyer in private practice if it does not imply a connection with a government agency, and there is no agency named, “America.”

294. Three lawyers open a new firm (a partnership) together and call it “The Houston Litigation Center,” named after the city where they practice. Their advertising, brochures, and signage contain no disclaimers disavowing any connection with the Houston municipal government or with the Houston City Attorney’s Office, which is a department of the municipal government. Could they be subject to discipline for using this name?

- a) Yes, because a trade name may be used by a lawyer in private practice only if it does not imply a connection with a government agency or subdivision of government.
- b) Yes, because the firm name does not include the names of the three founding partners.
- c) No, because a firm may use the name of the city where they have their office, but not the state or federal government.
- d) No, because there is nothing untruthful or misleading about the name, as long as they have headquarters in Houston.

295. Attorney outsources complicated legal research to a firm that exclusively provides background legal research for lawyers. Client is a nationwide business with branches operating in all fifty states, so he needs information about his legal responsibilities regarding a particular issue in every state – a state-by-state survey. Attorney represents himself as a sole practitioner. Could Attorney be subject to discipline for failing to inform Client that he plans to outsource the 50-state survey to a research firm?
- a) Yes, because the client may prefer to hire fifty separate research firms to investigate the issue in each state.
 - b) Yes, because lawyers must not misrepresent their partnership with others or other organizations.
 - c) No, because this is no different than delegating research tasks to an in-house associate attorney.
 - d) No, as long as the lawyer does not affirmatively deny that he will outsource the legal work.

ABA Formal Op. 08-451

Rule 7.6 Political Contributions To Obtain Legal Engagements Or Appointments By Judges

296. Attorney solicits campaign contributions on behalf of an elected judge who is running for reelection. The judge wins reelection, and shows his gratitude to Attorney by frequently appointing him to represent indigent defendants at the state's expense. Attorney engaged in the solicitation of contributions for the judge's reelection campaign because he hoped to receive such appointments. The fees from the appointments are disappointing, though, and Attorney later realizes that the fees earned from these appointments were not equal to the time Attorney spent soliciting the contributions. Could Attorney be subject to discipline for accepting these appointments?

- a) Yes, because a lawyer shall not accept a government legal engagement or an appointment by a judge if the lawyer makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
- b) Yes, because this type of quid-pro-quo arrangement constitutes a bribe.
- c) No, because the fees earned from the appointments did not match the time Attorney spent soliciting contributions, so at least some of the solicitation was merely volunteer activity.
- d) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.

297. Attorney solicits campaign contributions on behalf of an elected judge who is running for reelection. Attorney engaged in the solicitation of contributions for the judge's reelection campaign because he hoped to receive court appointments. The judge won reelection, but never rewarded Attorney by appointing him to represent indigent defendants at the state's expense. Could Attorney be subject to discipline for soliciting funds for a judge with such self-interested motives?

- a) Yes, because a lawyer shall not accept a government legal engagement or an appointment by a judge if the lawyer makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
- b) Yes, because this type of quid-pro-quo arrangement constitutes a bribe.
- c) No, because the lawyer never received or accepted any appointments after soliciting the contributions.
- d) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.

298. Attorney volunteered for a judge's reelection campaign because he hoped to receive court appointments. He drives the judge from campaign stop to campaign stop without receiving any compensation for his time or effort. The judge wins reelection, and shows

his gratitude to Attorney by frequently appointing him to represent indigent defendants at the state's expense. The appointments turn out to be lucrative and generate substantial fees for Attorney. Could Attorney be subject to discipline for soliciting funds for a judge with such self-interested motives?

- a) Yes, because a lawyer shall not accept a government legal engagement or an appointment by a judge if the lawyer makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.
- b) Yes, because this type of quid-pro-quo arrangement constitutes a bribe.
- c) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.
- d) No, because for purposes of this Rule, the term "political contribution" does not include uncompensated services.

Rule 7.6 Cmt. 2

299. Attorney made substantial financial contributions to the reelection campaign of an elected judge. The judge won reelection, and showed his gratitude to Attorney by frequently appointing him to represent indigent defendants at the state's expense. Attorney made the donations not because he hoped to receive such appointments, but because he honestly believed that the judge was the best candidate for the position. Attorney especially admired the fact that the judge had attended Harvard Law School and that the judge was an active member of the Federalist Society. Could Attorney be subject to discipline for accepting these appointments?

- a) Yes, because a lawyer shall not accept a government legal engagement or an appointment by a judge if the lawyer makes a political contribution or solicits political contributions.
- b) Yes, because attending Harvard Law School is not a valid reason to believe that a candidate would make a good judge.
- c) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.
- d) No, because the lawyer's motivation was a sincere political or personal support for the judge's candidacy, not a design to receive court appointments.

300. Attorney made substantial financial contributions to the reelection campaign of an elected judge. The judge won reelection, and showed his gratitude to Attorney by frequently appointing him to represent indigent defendants at the state's expense. Attorney claims that he made the donations not because he hoped to receive such appointments, but because he honestly believed that the judge was the best candidate for the position, though he could not explain why. In addition, it turned out that in the aggregate, Attorney gave more than every other lawyer or law firm in the judge's district. Could Attorney be subject to discipline for accepting these appointments?

- a) Yes, because a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution

or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment.

- b) Yes, because contributions that in the aggregate are substantial in relation to other contributions by lawyers or law firms, made for the benefit of an official in a position to influence award of a government legal engagement, and followed by an award of the legal engagement to the contributing or soliciting lawyer or the lawyer's firm would support an inference that the purpose of the contributions was to obtain the engagement
- c) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.
- d) No, because the lawyer's motivation was a sincere political or personal support for the judge's candidacy, not a design to receive court appointments.

Rule 7.6 Cmt 5

301. Attorney made substantial financial contributions to the reelection campaign of an elected judge. The judge won reelection, and showed his gratitude to Attorney by frequently appointing him to serve as referee or mediator in situations where Attorney received no compensation except reimbursement for travel expenses. Attorney made the donations because he hoped to receive such appointments, but received no fees as a result. Could Attorney be subject to discipline for accepting these appointments?

- a) Yes, because a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered for that type of legal engagement or appointment, regardless of the amount of the fees earned.
- b) Yes, because this type of quid-pro-quo arrangement constitutes a bribe.
- c) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.
- d) No, because the term "government legal engagement" does not include substantially uncompensated services.

Rule 7.6 Cmt 3

302. Attorney made substantial financial contributions to the reelection campaign of an elected judge. The judge won reelection, and Attorney thereafter received court appointments to represent indigent defendants at the state's expense, and over time these appointments turned out to be lucrative in terms of generating high legal fees. All appointments were made on a rotational basis from a list compiled without regard to political contributions. Attorney made the donations because he hoped to receive such appointments, and became wealthy as a result. Could Attorney be subject to discipline for accepting these appointments?

- a) Yes, because a lawyer or law firm shall not accept a government legal engagement or an appointment by a judge if the lawyer or law firm makes a political contribution or solicits political contributions for the purpose of obtaining or being considered

- for that type of legal engagement or appointment, regardless of the amount of the fees earned.
- b) Yes, because this type of quid-pro-quo arrangement constitutes a bribe.
 - c) No, because all constituents who donate or solicit donations for election campaigns are hoping to receive some direct or indirect benefits as a result.
 - d) No, because the term "government legal engagement" does not include appointments made on a rotational basis from a list compiled without regard to political contributions.

Rule 7.6 Cmt 3

ANSWER KEY

Communication about Legal Services

Rule 7.1

260. a

261. a

262. c

263. c

264. a

Rule 7.2

265. a

266. d

267. a

268. b

269. c

270. b

271. d

Rule 7.3

272. b

273. c

274. a

275. c

276. b

277. b

278. c

279. a

280. b

281. a

282. d

Rule 7.4

283. b

284. c

285. a

286. d

287. b

288. c

Rule 7.5

289. a

290. d

291. c

292. a

293. b

294. a

295. b

Rule 7.6

296. a

297. c

298. d

299. d

300. b

301. d

302. d

Rules 2.1-2.4, 3.8-3.9, & 1.13 Different Roles of the Lawyer

- Lawyer as advisor – Rule 2.1
- Lawyer as evaluator – Rule 2.3
- Lawyer as negotiator – Rule 2.4
- Lawyer as arbitrator, mediator etc Rule 2.4
- Prosecutors and other government lawyers – Rule 3.8
- Lawyer appearing in nonadjudicative proceeding – Rule 3.9
- Lawyer representing an entity or other organization – Rule 1.13

Rule 2.1 Advisor

303. An insurance company retained Attorney to represent one of its policyholders (i.e., an insured) against a lawsuit. The insurance company that hired Attorney requires its retained counsel to follow its own litigation management guidelines, designed to monitor the fees and costs of the lawyers the insurer retains. The litigation management guidelines include the requirement of a third-party audit of legal bills. Although the guidelines usually serve the interests of both the insured and the insurer by keeping litigation costs low and expediting the resolution of the case, in this instance Attorney finds that the guidelines require tactical moves that are adverse to the insured's interests. The insurer claims that the insured impliedly consented to the guidelines by agreeing contractually in the insurance policy to "cooperate" during litigation. The insurance company hired Attorney for the case. Should Attorney comply with the insurer's litigation management guidelines?
- a) Yes, because the insured impliedly consented to the arrangement by accepting the insurance company's choice of legal counsel in defending the claim.
 - b) Yes, because the insurer retained Attorney to handle the case.
 - c) No, because a lawyer shall exercise independent professional judgment, and the insurer's litigation management guidelines in this instance materially impair the lawyer's professional judgment.
 - d) No, because a lawyer hired by an insurance company to represent an insured should always represent the interests of the insured rather than the insurer.

Rule 2.1; ABA Formal Op. 01-421

ANSWER KEY - RULE 2.1

303. c

Rule 3.8 Special Responsibilities of a Prosecutor

304. A prosecutor brought charges against a defendant for rape and murder, but only one witness could link the defendant to the crime, and that witness disappeared mysteriously while the defendant was out on bail awaiting trial. The prosecutor's case collapsed and the defendant won an easy acquittal, even though the defendant had confessed to the murder. The confession turned out to be inadmissible because the police erred in failing to read the defendant all of his rights before taking his confession, which he later recanted. The prosecutor now has some evidence – less than probable cause but enough to be worth a try – that the defendant committed check fraud, so he brings charges in hopes that the attenuated charges will stick this time, and the dangerous murderer will be off the streets, regardless of the reason. Is the prosecutor in compliance with his ethical duties as a lawyer?

- a) Yes, because he is trying to protect the public from a dangerous criminal, and the defendant still has a fair chance to beat the charges in the new case, especially if the evidence is weak.
- b) Yes, because the “beyond a reasonable doubt” burden of proof in a criminal case provides protection for defendants when prosecutors bring unfounded charges.
- c) No, because the prosecutor is trying to use a lesser charge to incarcerate a murderer, which will result in the murderer receiving an unfairly short sentence.
- d) No, because the prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.

Rule 3.8(a)

305. A prosecutor sees the backlog of prosecutions coming from his office and feels concern about whether all the cases will come to trial in time to comply with the Speedy Trial Act. In order to expedite some of the simpler cases, the prosecutor asks arrestees to waive their right to a pre-trial hearing, which saves up to a week due to scheduling complications, and allows the defendants' cases to come to trial sooner. Because most of the defendants in these cases are unrepresented by counsel, the prosecutor explains that they have a right to a preliminary hearing, but that defendants without a lawyer usually accomplish little or nothing at such hearings, and that the defendant will have a full trial at which to argue his innocence. He also explains that if the defendant believes he can win an acquittal, waiving a preliminary hearing might bring about the defendant's moment of freedom a bit sooner. Nearly all the defendants without representation agree to waive their preliminary hearings, which relieves some of the pressure on the local criminal docket and makes this more manageable for everyone. Is the prosecutor behaving properly in this regard?

- a) Yes, because he is making a good-faith effort to expedite the proceedings, which is good for the defendants who are innocent and want to get their trials done sooner rather than later.
- b) Yes, because he is apprising them of their rights before asking them to waive the right to a preliminary hearing.

- c) No, because it is improper for a prosecutor to have any direct contact with an unrepresented defendant before trial.
- d) No, because a prosecutor must not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing.

Rule 3.8(c)

306. Attorney works as a prosecutor and brings charges against a defendant. Attorney clearly has probable cause for alleging that the defendant committed the crime, but he also doubts that a judge or jury will find that the evidence satisfies the standard of “beyond a reasonable doubt.” Attorney brings the case anyway, and the defendant wins an acquittal. Has Attorney acted improperly, under the Rules of Professional Conduct?
- a) Yes, because a prosecutor in a criminal case shall not seek a conviction unless the prosecutor believes in good faith that the defendant is guilty beyond a reasonable doubt.
 - b) Yes, because the prosecutor should have conducted more investigation before commencing the proceedings so that he could ensure a conviction, if he already has probable cause to believe the defendant is guilty.
 - c) No, because when a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor’s jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.
 - d) No, because a prosecutor may bring charges as long as the prosecutor knows the charges are supported by probable cause.

Rule 3.8(a)

307. What is the basic difference between a prosecutor’s duties under Brady v. Maryland and the duties under MRPC 3.8?
- a) Brady requires prosecutors to turn over all material exculpatory information, while the Model Rules require prosecutors to turn over any information that tends to negate guilt of the accused or mitigate the offense, which is more inclusive.
 - b) The Model Rules require prosecutors to turn over all material exculpatory information, while Brady requires prosecutors to turn over any information that tends to negate guilt of the accused or mitigate the offense, which is more inclusive.
 - c) The two standards are identical.
 - d) The Model Rules apply even before the filing of criminal charges, while Brady requirements apply only if a case goes to trial.

Rule 3.8(d)

308. Attorney is an Assistant U.S. Attorney (federal prosecutor) working for the Department of Justice, and he must prosecute the defendants arrested in a high-profile sting operation against a terrorist cell. Attorney faces tremendous political and media pressure to win convictions at any cost. Attorney argues with his supervisor that he is not subject to local ethics rules, as he is litigating exclusively in federal court in cases

involving federal law, and that he should therefore be immune from state bar disciplinary proceedings. Is Attorney correct?

- a) Yes, because of federal preemption of state law, a federal prosecutor who litigates exclusively in federal court, under federal law, does not come under the jurisdiction of the local bar disciplinary authorities.
- b) Yes, because under the USA Patriot Act, federal prosecutors are immune from disciplinary actions for their decisions in antiterrorism prosecutions.
- c) No, because Attorney will inevitably have cases that involve questions of state law, or will have cases transferred to state court.
- d) No, because federal statute, as well as Department of Justice regulations, subject federal prosecutors to the ethics rules of the state where such attorney engages in that attorney's duties.

28 U.S.C. § 530B; 28 C.F.R. §77.3

309. A prosecutor receives a call from a crime lab about some DNA samples that someone had misplaced years before in a freezer at the lab. The DNA related to one of the prosecutor's former cases. Someone at the crime lab had checked the files and realized that the defendant in the case had been convicted of rape and murder, and was serving a life sentence in prison, but that the DNA evidence absolutely exonerates the defendant and points instead to the victim's cousin as the perpetrator. Does the prosecutor have specific ethical duties about what to do regarding this information?

- a) Yes, the prosecutor must notify the defense counsel of the man who was wrongfully convicted, and must investigate to see if there is corroboration for the new confession to the crime by the New York defendant.
- b) Yes, the prosecutor shall seek to remedy the conviction.
- c) No, as long as the prosecutor believes that the original defendant really did commit the crime.
- d) No, unless other evidence turns up to corroborate the story that the crime lab just told the prosecutor, the prosecutor does not need to take any action.

Rule 3.8(g)

310. A prosecutor discovers a single item of evidence that partly undermines the state's case against a criminal defendant – the state's star witness in the case, the prosecutor learns, had a suspension from high school for an instance of egregious plagiarism. The prosecutor believes this is not material in that it would not change the outcome of the case, because the incident occurred ten years ago and the witness is now an undercover police officer-informant. In fact, the prosecutor believes it is trivial, and he is correct that the item would not fall under the duty of disclosure set forth by the U.S. Supreme Court in Brady v. Maryland. At the same time, the defense lawyer in the case has a reputation for making much ado about nothing, prolonging trials unnecessarily with tedious minutia. Prosecutor decides to keep the information about the high school suspension to himself and let defense counsel discover it on his own if he wants. Is this action proper for the prosecutor to take?

- a) Yes, because the trivial incident in the distant past is extremely unlikely to prove helpful to the defendant in a substantial way.
- b) Yes, because the defense lawyer can find the information himself and admit it into evidence; the prosecutor does not have to do the other lawyer's work for him.
- c) No, because the evidence is material in that it substantially impeaches the credibility of a key witness against the defendant.
- d) No, because the evidence tends to negate the guilt of the accused.

Rule 3.8(d)

311. A prosecutor in New York is engaged in plea bargain negotiations with a defendant and defense counsel. The defendant offers to confess to a much more serious crime, committed several years ago in California, if the prosecutor will drop the current charges, which will put the defendant in danger of retaliation from his gang once he is in prison. The prosecutor agrees, and the defendant confesses to a notorious armored car robbery in California ten years earlier that made national news, and for which another man had been convicted and was serving his sentence. The defendant describes the crime with sufficient detail that the prosecutor doubts that he could be fabricating the story. Does the prosecutor have any ethical duties about what to do with this information?

- a) Yes, the prosecutor must notify the defense counsel of the man who was wrongfully convicted, and must investigate to see if there is corroboration for the new confession to the crime by the New York defendant.
- b) Yes, the prosecutor must promptly disclose that evidence to an appropriate court or authority.
- c) No, the prosecutor does not have to take any action unless there is clear and convincing evidence that the wrong person was convicted of a crime and is in prison.
- d) No, because the prosecutor cannot breach his duty of confidentiality, but he should urge the defendant to contact the authorities in California directly so that the wrongfully-convicted man can get out of prison.

Rule 3.8(g)

312. Three years after prosecuting a defendant and obtaining a conviction for murder, another individual comes to the police station and confesses to committing the very murder for which the defendant is already serving time. The defendant always maintained his innocence and the basis of his conviction was an identification (in a lineup) by a single eyewitness. The person now confessing to the crime also fits the description given by the eyewitness and had a plausible motive for committing the murder. Does the prosecutor have a duty report this to the convicted defendant's lawyer?

- a) Yes, when a prosecutor knows of new, credible and material evidence creating a reasonable likelihood that a convicted defendant in his jurisdiction did not commit an offense of which the defendant was convicted, the prosecutor shall promptly

- disclose that evidence to the defendant unless a court authorizes delay, and undertake further investigation, or make reasonable efforts to cause an investigation, to determine whether the defendant was convicted of an offense that the defendant did not commit.
- b) Yes, the prosecutor shall seek to remedy the conviction.
 - c) No, as long as the defendant received a fair trial and had presentation by counsel, a judgment of the court is final and the new evidence is irrelevant.
 - d) No, the prosecutor should report it to the defendant himself and urge him to file a habeas corpus petition in federal court.

Rule 3.8(g)

Rule 3.9 Advocate in Nonadjudicative Proceedings

313. Attorney testified before a state legislative committee about the need for the state to privatize its dysfunctional prison system. Attorney said he was there to testify as a concerned citizen of the state and a taxpayer, and Attorney did in fact believe that prison privatization was smart public policy. Attorney did not disclose that he was representing Alcatraz Incorporated, the largest private prison company in the country, which hoped to secure the lucrative contracts to operate the state's prisons after the legislature votes to privatize them. Was it improper for Attorney to neglect to disclose his representation of the private prison company?
- a) Yes, because a lawyer representing a client before a legislative body or administrative agency in a nonadjudicative proceeding shall disclose that the appearance is in a representative capacity.
 - b) Yes, because the lawyer pretended that he was hoping to save on his taxes, but the privatization of prisons often turns out to be more expensive than having state-run prisons.
 - c) No, because what the lawyer told the committee was factually accurate – he is a concerned citizen, a taxpayer, and he truly believes in privatizing prisons.
 - d) No, because a lawyer's duty of candor pertains to tribunals, not to legislative subcommittees.

Rule 3.9

314. Attorney represents an alternative energy firm that is lobbying the state legislature to provide subsidies for companies that develop wind, solar, or geothermal energy sources. When appearing before a legislative committee, Attorney discloses that he represents the company, and submits reports from his client about the efficiency of his client's products and the savings that could accrue to the public if more people used their products. The reports also purported that the company was having trouble staying in business and could not survive without a large government grant or subsidy. Attorney knew, however, that many of these figures were inaccurate, and that in fact the company was making a handsome profit on products that were less efficient than fossil fuel sources of energy. Is it improper for Attorney to submit such documents to a legislative committee?
- a) Yes, because a lawyer appearing before a legislative body in a nonadjudicative proceeding shall conform to the same standards of candor and honesty that are expected of lawyers in a courtroom.
 - b) Yes, because Attorney should have simply submitted the documents on behalf of the client without endorsing them by providing oral testimony.
 - c) No, because many special interest group submit exaggerated or highly biased reports to legislative committees, and the legislators recognize that they are unreliable.
 - d) No, because the lawyer is not appearing before a tribunal or court in an adjudication and does not have the same requirements of candor that he would in the adjudicative context.

Rule 3.9

ANSWER KEY RULE 3.8-3.9

- 304. d
- 305. d
- 306. d
- 307. a
- 308. d
- 309. b
- 310. d
- 311. b
- 312. a
- 313. a
- 314. a

Rule 1.13 Organization as Client

315. An attorney worked for a corporation as in-house counsel. The attorney discovered that the Chief Financial Officer (CFO) falsified the corporation's quarterly earnings report in order to prop up the firm's share price, as the CFO's compensation is partly in stock options. The attorney knows that these misrepresented earnings appeared in the filings to the Securities and Exchange Commission, and will eventually result in severe regulatory fines or civil liability for the corporation. What should the attorney do in this situation?

- a) The attorney should immediately report the matter to the appropriate government authorities without warning the Chief Financial Officer or his friends within the corporation, lest they have an opportunity to destroy evidence.
- b) The attorney should confront the Chief Financial Officer, but if the CFO remains recalcitrant, the attorney must drop the matter.
- c) The attorney should start with the Chief Financial Officer, and then take the matter to up the chain of command in the organization if necessary, eventually bringing the matter to the board of directors if nobody in management will address the problem.
- d) The attorney should drop the matter unless the SEC inquires about it.

Rule 1.13(b)

316. An attorney worked for a corporation as in-house counsel. The attorney discovered that the Chief Financial Officer falsified the corporation's quarterly earnings report in order to prop up the firm's share price, as the CFO's compensation is partly in stock options. The attorney knows that these misrepresented earnings appeared in the filings to the Securities and Exchange Commission, and will eventually result in severe regulatory fines or civil liability for the corporation. The attorney thus reasonably believes that the violation is reasonably certain to result in substantial injury to the organization. The Chief Financial Officer hired the attorney, and he directly supervises the attorney in the organizational chain of command. The attorney confronted the Chief Financial Officer, but this proved unfruitful, and then the Chief Financial Officer discharged the attorney. What should the attorney do in this situation?

- a) The attorney should immediately report the matter to the relevant government regulatory authority.
- b) The attorney should keep the information confidential, because the person who hired him has not authorized him to disclose the information.
- c) The attorney should proceed as the lawyer reasonably believes necessary to assure that the organization's highest authority is informed of the lawyer's discharge.
- d) The attorney should notify the manager directly above the Chief Financial Officer in the corporation and then drop the matter.

Rule 1.13(e)

317. A corporation consents to having the attorney who serves as its in-house counsel represent the corporation's officers and directors on matters related even tangentially to the company. The consent came by a vote of the shareholders. Can an attorney be subject to discipline for representing both a corporation and its officers or directors individually?

- a) Yes, because there is always a potential conflict of interest between the individual running a corporation and the shareholders.
- b) Yes, because shareholders of a corporation cannot consent or grant a waiver to a potential conflict of interest.

- c) No, because a lawyer representing an organization may also represent any of its directors or officers, if the shareholders give consent.
- d) No, because conflicts of interest apply only between natural persons, not between individuals and organizations.

Rule 1.13(g)

318. An organizational client requested that its lawyer investigate allegations of wrongdoing. The lawyer conducted interviews in the course of that investigation of the organization's employees and managers. It turned out that the alleged wrongdoing involved only one employee, whom the corporation promptly terminated. After the resolution of the matter, the lawyer wrote a series of blog posts about the amusing anecdotes he heard during his interviews, revealing the pettiness of internal politics in the organization, the low morale in certain departments, and a few of the office romances that had ended badly. Did the lawyer violate his duty of confidentiality to his client?

- a) Yes, because if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client's employees come under the client-confidentiality rules.
- b) Yes, because when a lawyer represents an organization, every constituent of that organization is a client of the lawyer, and he owes a duty of confidentiality to each one.
- c) No, because the employees were not the lawyer's clients, if he represented only the organization as a whole, and the disclosed information was personal information, not institutional information.
- d) No, because after the represented ended, the lawyer no longer had a duty of confidentiality to anyone in the organization.

Rule 1.13 Cmt. 2

319. An attorney works as in-house counsel for a large international corporation and has daily contact with higher-level executives and managers. One day, a senior executive mentions casually to the attorney that he has offered lucrative stock options, worth millions of dollars, to a foreign government official who has agreed to give the firm an exclusive contract to provide certain goods and services to the foreign state. The executive seems to think this is normal and good for the company, but the attorney believes it constitutes bribery of foreign officials, which would violate the Foreign Corrupt Practices Act, and could subject the company to enormous fines and penalties. The attorney explains her concerns to the executive, including her concern that he could face personal criminal charges in addition to bringing liability on the corporation, and she reminds him that she represents the corporation, not him personally. The executive is dismissive of her concerns, even though she approaches him several times about the matter. How must the attorney proceed?

- a) She should report the matter immediately, in writing, to the Department of Justice, and tell no one in the company that she has done so.
- b) She should keep her conversations with the executive confidential but try to document everything that she knows about the situation in case the Department of Justice brings an enforcement action.
- c) She should approach the executive's immediate corporate superior, advising those next up the chain of authority to stop the transaction and take appropriate actions against the executive involved.

- d) She should immediately notify the company's Board of Directors, advising them about the potential liability and threatening to report the activities to the Department of Justice if they take no action.

320. An attorney served as general counsel for a municipal auditing and enforcement bureau, which monitored the internal affairs and expenditures of the municipal government. The attorney discovered that the head of the bureau engaged in selective enforcement and self-dealing, and suspected that bribery had occurred in a few instances. The attorney's confrontation of the bureau head proved futile, so the attorney then needed to proceed up the chain of command. Can the attorney serving as general counsel for a government bureau report wrongdoing to anyone higher within that municipality?

- a) Yes, but only by testifying under subpoena at a city council hearing or the legislative equivalent for that municipality (town aldermen, board of county commissioners, etc.).
- b) Yes, because if the action or failure to act involves the head of a bureau, either the department of which the bureau is a part or the relevant branch of government may be the client for purposes of the Rules of Professional Conduct.
- c) No, because the head of the bureau is the general counsel's client.
- d) No, because governmental lawyers do not have a "client" organization in the same sense as attorneys in the private sector, because civil servants must act in the public interest.

Rule 1.13 Cmt. 9

321. According to the official Comment to Rule 1.13 of the Model Rules of Professional Conduct, when it is reasonably necessary to enable the organization to address the matter in a timely and appropriate manner, a lawyer must refer the matter to higher authority. This includes, if warranted by the circumstances, the highest authority that can act on behalf of the organization under applicable law. Ordinarily (unless applicable law specifies otherwise), which of the following would be an organization's highest authority to whom a lawyer might refer the matter?

- a) The Chief Executive Officer (CEO)
- b) The board of directors or similar governing body
- c) The annual meeting of the shareholders or the majority shareholder
- d) The general counsel of the corporation

Rule 1.13 Cmt. 5

322. An attorney served as in-house counsel for a corporation, and uncovered illegal actions taken by a particular senior manager (not the Chief Executive Officer or any comparable officer or director, but an individual with decision-making authority and several direct subordinates in the organization). The senior manager had a reputation for being arrogant and unreasonable, and he and the attorney had clashed on several occasions and were barely on speaking terms. At the same time, the senior manager was exceptional in his area of expertise and was an asset to the company despite his unpleasant demeanor. The attorney summoned the nerve to confront the senior manager about the problem as graciously as possible, and the senior manager's initial response was to be dismissive, saying that he was unaware of any laws or regulations that he might have violated. The attorney walked away from the conversation discouraged and planned to take the matter up with the corporate officers, and perhaps the board of directors. Before doing so, he reconsidered and returned to the manager, and patiently explained to him the relevant laws and regulations that the manager had violated. The senior manager

begrudgingly accepted the attorney's advice and took all necessary measures to rectify the wrongdoing and prevent any long-term repercussions. The senior manager also insulted the attorney, called him incompetent for not bringing up the matter earlier, and suggested that the attorney's incompetence was due to the attorney's ethnic background. Could the attorney be subject to discipline for not referring the matter of the illegal actions to a higher authority in the corporation?

- a) Yes, because the senior manager continued to insult him and behave like a bigot even after the attorney proved that the manager's actions violated the law.
- b) Yes, because referral to a higher authority in the corporation is part of the lawyer's professional duty under the Model Rules.
- c) No, because if the circumstances involve a constituent's innocent misunderstanding of law and subsequent acceptance of the lawyer's advice, the lawyer may reasonably conclude that the best interest of the organization does not require that the matter be referred to higher authority.
- d) No, because a lawyer for a corporation represents not only the corporation itself, but all the managers within the corporation, so the lawyer had a direct client-attorney relationship with the manager.

Rule 1.13 Cmt. 4

ANSWER KEY – RULE 1.13

- 315. c
- 316. c
- 317. c
- 318. a
- 319. c
- 320. b
- 321. b
- 322. c

Rules 4.1-4.4 - Transactions and communications with persons other than clients

- Rule 4.1 Truthfulness in Statements to Others**
- Rule 4.2 Communication with Person Represented by Counsel**
- Rule 4.3 Dealing with Unrepresented Person**
- Rule 4.4 Respect for Rights of Third Persons**

Rules 4.1-4.4

323. A lawyer represents one of his former college roommates in litigation over a dissolved business partnership. The client had formed a business partnership with another of their college classmates after graduation, and the dissolved partnership is now the subject of an acrimonious legal dispute. After an incident regarding an attempted ex parte contact, the judge sternly admonished both lawyers against contacting the judge or the opposing party about the case without the other lawyer present. Now, however, the ten-year reunion for their graduating class is two months away, and the lawyer and the opposing party (the other classmate) are both on the Alumni Association's reunion committee. The lawyer calls the opposing party to discuss arrangements for the upcoming reunion banquet, but does not mention the pending litigation at all. Opposing counsel overhears his client talking to the lawyer and reports it to the judge, accusing the lawyer of violating the Model Rules by talking to his client without his consent. Is the lawyer subject to sanctions of discipline for talking to the opposing party, represented by counsel, without opposing counsel present?

- a) The lawyer is not subject to sanctions or discipline because the communication was about a matter outside the representation.
- b) The lawyer is subject to sanctions for violating the court's order but not subject to discipline for violating the Model Rules, as the conversation was about a matter outside the representation.
- c) The lawyer is subject to discipline for violating the Model Rules' no-contact rule, but not to sanctions for violating the judge's order, as the conversation was not about the litigation.
- d) The lawyer is subject to discipline for violating the ethical rules AND is subject to sanctions for violating the judge's order.

324. A lawyer knows that his opposing counsel has a reputation for refusing to settle cases and forcing lawsuits to go to trial, in order to impose the full costs of litigation on the opposing party. Cultivating this reputation serves as a deterrent to other would-be litigants against opposing counsel's clients. In order to avoid a rebuff by opposing counsel, the lawyer finds a close friend of the opposing party, and asks the close friend to communicate an informal settlement offer to the opposing party directly, bypassing the other lawyer. The opposing party is delighted to hear the offer and readily agrees to settle the case. Opposing counsel is furious and reports the lawyer for misconduct. The lawyer claims that he did not communicate with opposing counsel's client, but rather the friend did, so the prohibitions on contact with other parties would not apply. Is the lawyer correct?

- a) Yes, the friend's willingness to be an informal intermediary serves as an independent intervening actor that breaks the line of causation to the lawyer.
- b) Yes, the opposing party's eagerness to settle the case shows that the lawyer did what the other party wanted; such an endorsement after the fact negates any possible violation of the Rules.
- c) No, a lawyer may not make a communication prohibited by the Rules through the acts of another, such as the friend in this case.

- d) No, lawyers are never permitted to speak directly to an opposing party under any circumstances; even if the opposing counsel had consented to the communication, the lawyer would be subject to discipline.

325. While preparing for a trial over workplace discrimination among a company's sales force and marketing department, the plaintiff's lawyer contacts some night shift workers in the company's offsite warehouse to learn about the day-to-day operations of the company, and hoping to hear some revealing gossip about the management and human resources department. The lawyer does this without permission from the defendant's attorney, and if asked, the company's lawyer would have forbid it and would have told the warehouse workers not to talk to the plaintiff's lawyer at all. Was this communication by the plaintiff's lawyer proper?

- a) Yes, because the warehouse workers are not involved in the matter, do not report directly to the firm's in-house counsel, and lack authority to bind the organization in the matter.
- b) Yes, because he knows that opposing counsel would improperly forbid the warehouse workers from talking to him, so the Model Rules allow him to take action to counteract this inappropriate potential behavior by the company's lawyer.
- c) No, because he is mostly looking for gossip about the company's management, which could only serve to embarrass the managers or marketing department at trial.
- d) No, because he knows that the company's lawyer would not approve, and these are constituents of a company that is represented by counsel.

326. In anticipation of trial over workplace discrimination, a plaintiff's lawyer contacts several current managers of the defendant corporation and interviews them about the day-to-day operations of the company and the chain of command for addressing personnel complaints. These managers supervise employees, address interpersonal problems between workers, filed complaints, and consult with the firm's in-house counsel about personnel matters that seem serious. The lawyer does this without permission from the defendant's attorney. Was this proper?

- a) Yes, given that these managers are likely to be witnesses at trial and subject to cross-examination anyway, it is reasonable for the lawyer to have a chance to speak with them informally before trial.
- b) Yes, because 95% of such cases settle before trial, meaning most discrimination cases do not really constitute "litigation" for purposes of the ethical rules.
- c) No, because even the identity of the managers at a defendant corporation is confidential information that should not be available to a lawyer in discrimination litigation.
- d) No, consent of the company's lawyer is always required for communication with a present constituent of the organization who supervises, directs or regularly consults with the organization's lawyer concerning the matter.

327. While preparing for a trial over workplace discrimination, the plaintiff's lawyer contacts an entry-level, night shift worker in the company's off-site warehouse, who supposedly told the frequent, shocking sex jokes that led to the "hostile environment" claim by female workers that became the subject of the pending lawsuit. The lawyer did this without the permission of the company's lawyer, even though he suspects the company's lawyer would have allowed it if he had asked. The warehouse worker has no supervisory authority, has never been to the corporate offices, has no authority to bind the company, and is now on suspension (unpaid leave) while the company does its own internal investigation of the allegations. Was the communication by the plaintiff's lawyer proper?

- a) No, a lawyer may not communicate with the constituent of a represented organization (opposing party) whose act or omission in connection with the matter may be imputed to the organization for purposes of civil liability.
- b) Yes, because this is a low-level employee who has no supervisory authority, has never been to the corporate offices, and has no authority to bind the company
- c) Yes, because the temporary suspension of the worker (unpaid leave) makes him a former constituent of the organization rather than a current constituent
- d) Yes, if the plaintiff's lawyer honestly believed that opposing counsel would have allowed the communication if the lawyer had asked.

328. A business owner hires a lawyer hoping to enforce a non-compete agreement against a former employee at their technology firm. According to the client, a rumor started going around just this past week that the former employee had either started his own business nearby or was working for a nearby competitor, either of which, if true, could violate the non-compete agreement. The employee left the client's company on bad terms about three weeks ago. The client provides a copy of the non-compete agreement, and speculates that the former employee may have forgotten about the agreement (which he signed fifteen years ago), and would probably be oblivious to the fact that he is violating it. The lawyer decides that the first step is to call the former employee and ask him whether he has found another job yet or has started his own business. The lawyer assumed that the former employee would not have retained counsel yet to challenge the non-compete agreement, given the client's comments about him, and how recently the events unfolded. The former employee answers the phone, explains that he has started his own rival company, and that he believes the non-compete agreement is invalid under state law. When the lawyer asks why it would be invalid, the former employee says that his own lawyer says that recent changes in state law make the previous agreement void, and that they plan to challenge the agreement in court. The lawyer asks him to have his own lawyer contact him so that they can discuss possible settlement for the dispute. Has the lawyer acted properly?

- a) Yes, as the prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed, and this means that the lawyer has actual knowledge of the fact of the representation.
- b) Yes, if the non-compete agreement has a binding arbitration clause, as matters covered under alternative dispute resolution (arbitration, mediation, or a non-

- judicial referee) do not implicate the prohibition on communication with opposing parties.
- c) No, the prohibition on communications with a represented person applies regardless of the lawyer's knowledge, because the burden is on every lawyer to determine whether an opposing party has representation before making contact.
 - d) No, because one can easily infer from these facts and circumstances that the lawyer actually knew the former employee had representation.
329. A business owner hires a lawyer to enforce a non-compete agreement against a former executive at the client's technology firm. According to the client, a rumor started going around just this past week that the former executive had either started his own business nearby or was consulting for a nearby competitor; if true, either scenario could violate the non-compete agreement. The client explains that the former executive has already asserted that the non-compete agreement is invalid under a recent decision from the state Supreme Court, and is filing an action for a declaratory judgment to challenge the non-compete agreement preemptively, though the client is unsure whether his company received proper service yet about the lawsuit. The lawyer decides that the first step is to call the former employee and ask him whether he has found another job yet or has started his own business. The former employee answers the phone, explains that he has started his own rival company, and that he believes the non-compete agreement is invalid under state law. The lawyer asks him to have his own lawyer contact him so that they can discuss possible settlement for the dispute. Has the lawyer acted properly?
- a) Yes, as the prohibition on communications with a represented person only applies in circumstances where the lawyer knows that the person is in fact represented in the matter to be discussed, and this means that the lawyer has actual knowledge of the fact of the representation.
 - b) Yes, if the non-compete agreement has a binding arbitration clause, as matters covered under alternative dispute resolution (arbitration, mediation, or a non-judicial referee) do not implicate the prohibition on communication with opposing parties.
 - c) No, because one can easily infer from these facts and circumstances that the lawyer actually knew the former employee had representation.
 - d) No, because this is an action for declaratory judgment rather than money damages, so the usual exceptions to the prohibition on communication do not apply.
330. Attorney represents Plaintiff in a civil suit. Defendant is also represented, but contacts Attorney to negotiate a settlement agreement. Attorney advises Defendant that he cannot discuss the case with Defendant because Defendant is represented by counsel. Defendant faxes Attorney a letter stating that he waives the rule restricting Attorney from communicating with Defendant while Defendant is represented. Upon receipt of the fax, Attorney contacts Defendant and discusses a settlement agreement. Are Attorney's actions proper?
- a) Yes, because an attorney may communicate with represented persons as long as the represented person provides a written waiver to that attorney.

- b) Yes, because an attorney may communicate with represented persons as long as the represented person initiates the communication.
- c) No, because attorneys may not communicate with represented persons at all unless the attorney representing that person is also present.
- d) No, because attorneys may not communicate with represented persons unless the attorney representing that person permits the attorney to communicate with the represented person.

331. Attorney sees Friend at high school reunion. Friend asks Attorney for advice about a possible civil lawsuit Friend is considering hiring an attorney to file. Attorney gives Friend general information about the area of law and about the particular kind of lawsuit an attorney will most likely file for Friend. Friend lives too far away from Attorney for Attorney to handle the case, and Friend is planning to hire an attorney near his residence to handle the lawsuit. Attorney later talks to his own wife about Friend's lawsuit. Wife discusses the suit with her own friend. Friend discovers that several people know about his potential suit and is upset, as he believed that Attorney was not allowed to speak about his potential case to others. Is Attorney subject to discipline?

- a) Yes, attorneys shall not disclose information about potential lawsuits they discuss with others unless authorized by that person, whether or not the person is or is not a potential or current client.
- b) Yes, persons with whom an attorney discusses potential litigation, even if only in a general manner, are considered prospective clients and are afforded protection as if they were, in fact, clients themselves.
- c) No, an attorney owes no duties or protections, including protections against disclosing information about potential lawsuits, to persons who communicate with attorneys without any expectation of forming a client-attorney relationship.
- d) No, an attorney may discuss potential client cases with others as long as the potential client did not retain the attorney to handle the matter that potential client discussed with the attorney.

ANSWER KEY: RULES 4.1-4.4

- 323. a
- 324. c
- 325. a
- 326. d
- 327. a
- 328. a
- 329. c
- 330. d
- 331. c

Rule 1.15 – Safekeeping Client Funds and Other Property

332. An attorney represented a seller in a business transaction involving industrial equipment. When the deal was complete, the purchaser sent the attorney a check for \$7,000, the agreed-upon purchase price, with a letter directing the attorney to forward the money to his client (the seller). The attorney notified his client immediately that the check had come in. The client was traveling at the time, and asked the attorney to hold the funds until he returned from his trip. The attorney had only recently opened his own firm and did not yet have a client trust account at any banks in the area, so he deposited the check in his own bank account temporarily. As soon as the check cleared, the attorney wrote a check to the client for the full amount, which the client picked up in person. Did the attorney act properly in this case?

- a) Yes, because the amount was less than \$10,000, so it did not trigger the ethical rules pertaining to separate client accounts.
- b) Yes, because the client asked the attorney to hold the funds temporarily, and the attorney faithfully delivered the entire sum to the client with his own check.
- c) No, because a lawyer must hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property.
- d) No, because a lawyer should not have accepted the check at all, but should have instructed the purchaser to write the check out to the client himself, and deliver it directly to the client.

Rule 1.15(a)

333. An attorney represented a seller in a business transaction involving industrial equipment. When the deal was complete, the purchaser sent the attorney a check for \$7,000, the agreed-upon purchase price, with a letter directing the attorney to forward the money to his client (the seller). The attorney notified his client immediately that the check had come in. The client was traveling at the time, and asked the attorney to hold the funds until he returned from his trip. The attorney had only recently moved to this jurisdiction and opened a new firm, did not yet have a client trust account at any banks in the area, so he deposited the check in the client trust account in the neighboring state, where he had practiced until recently. He told the client that the funds would be in a separate client trust account, and explained that it would be out of state, and the client consented. As soon as the check cleared, the attorney wrote a check to the client for the full amount from the client trust account, which the client picked up in person. Did the attorney act properly in this case?

- a) Yes, because a lawyer may deposit client funds in an out-of-state client trust account if the client gives informed consent to this arrangement.
- b) Yes, because the client asked the attorney to hold the funds temporarily, and the attorney faithfully delivered the entire sum to the client with his own check.

- c) No, because a lawyer should not have accepted the check at all, but should have instructed the purchaser to write the check out to the client himself, and deliver it directly to the client.
- d) No, because client funds must be kept in a separate account maintained in the state where the lawyer's office is situated, unless the client explicitly consents to another arrangement.

Rule 1.15(a)

334. An attorney has a busy transactional practice and frequently must handle client funds, either for making commercial purchases, sales, leases, dispute settlements, or other transfers. The attorney faithfully deposits client money in a separate trust account and does not commingle the funds with his own, except that he deposits enough of his own money in the account to cover the monthly bank service charges. The attorney keeps complete, accurate records of all deposits and withdrawals for a full year, after which he destroys the records to preserve client confidentiality. Is the attorney acting improperly?

- a) Yes, because the attorney did not keep records for a long enough period.
- b) Yes, because the attorney should not have deposited any of his own funds in the account together with client funds.
- c) No, because the lawyer may deposit the lawyer's own funds in a client trust account for the sole purpose of paying bank service charges on that account.
- d) No, because the attorney keeps property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property, in a separate account maintained in the state where the lawyer's office is situated.

Rule 1.15(a)

335. A client hires an attorney to represent him in a divorce proceeding, and gives the attorney a \$10,000 retainer to cover all legal fees and expenses in the case. The attorney deposited the money in his client trust account, to be withdrawn by the lawyer only as the fees were earned or expenses incurred. Was this arrangement proper?

- a) Yes, a lawyer may deposit into a client trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred.
- b) Yes, because \$10,000 is a reasonable amount for the legal fees and expenses in a typical divorce case, and the lawyer did not charge a contingent fee.
- c) No, because the fees are for the lawyer, and therefore the lawyer has commingled his own legal fees in the client trust account, in violation of the Model Rules.
- d) No, because withdrawing the fees gradually throughout the course of the representation constitutes a contingent fee arrangement, which is impermissible in representation for a divorce proceeding.

Rule 1.15(c)

336. An attorney received a small settlement check for a client from the opposing party on Christmas Eve, late in the afternoon. All the support staff at the firm had already gone home for the day, due to the impending holiday, and the firm was to stay closed until January 2. Attorney was rushing to catch a flight to Europe, where she planned to spend the holidays with her family. On January 2, when attorney returned and the office reopened, attorney promptly notified the client that the check had arrived. Could the attorney be subject to discipline for her actions in this case?
- a) Yes, because she should have instructed the opposing party to send the check directly to the client.
 - b) Yes, because she did not notify the client soon enough.
 - c) No, because the office was closed during the entire period, and the attorney notified the client promptly as soon as the office reopened.
 - d) No, because the attorney had to catch a flight, and the client suffered no harm from this delay.

Rule 1.15(d)

337. An attorney received a small settlement check from a client for the opposing party on Christmas Eve, late in the afternoon. All the support staff at the firm had already gone home for the day, due to the impending holiday, and the firm was to stay closed until January 2. Attorney was rushing to catch a flight to Europe, where she planned to spend the holidays with her family. On January 2, when attorney returned and the office reopened, attorney promptly notified the opposing party that the check had arrived. Could the attorney be subject to discipline for her actions in this case?
- a) Yes, because she did not notify the opposing party soon enough.
 - b) Yes, because she should have instructed the client to send the check directly to the opposing party.
 - c) No, because the office was closed during the entire period, and the attorney notified the opposing party as soon as the office reopened.
 - d) No, because there is no attorney-client relationship with the opposing party, so the attorney did not have a duty to notify the opposing party immediately.

Rule 1.15(d)

338. Attorney, a solo practitioner who recently passed the bar exam, accepts Client's case for a flat fee of \$3,000.00. Attorney's contract includes a statement in underlined and bold print that states the entire fee is non-refundable regardless of the outcome of the case or whether Client continues to retain Attorney through the finalization of the case. After several weeks with no movement on the case by Attorney, Client fires Attorney and hires other counsel to represent him on this case. Client sends a request in writing for reimbursement of the retainer. Attorney responds to Client by stating the funds are non-refundable and refuses to refund Client. Are Attorney's actions proper?
- a) Yes, because attorneys may refuse to refund an advanced payment of fees if the contract contained such language and the language was clear and obvious in the contract.

- b) Yes, because attorneys are not required to refund advanced payments if they are fired from a case.
- c) No, because client requested refund in writing and attorneys must refund any unused portion of an advanced fee if the client requests such reimbursement in writing.
- d) No, because attorneys shall refund unused portions of an advanced payment of fees and provide client with a detailed listing of fees deducted from the advanced payment, regardless of how long the attorney represents the client.

339. Client retains Attorney to handle a criminal matter. Client delivers a retainer check to Attorney on Friday afternoon. The retainer check will only cover the work Attorney anticipates he will begin and complete the following Monday. Because the following Monday is a banking holiday, if Attorney deposits the retainer check into his client trust account on Friday afternoon, he will not have access to the funds until Tuesday. Attorney deposits the retainer check into his business checking account and pays himself on Friday before the firm closes with those funds. Is Attorney subject to discipline?

- a) Yes, attorneys shall not accept amounts paid in advance for criminal matters.
- b) Yes, attorneys shall deposit amounts paid in advance into a client trust account and the attorney shall not withdraw the funds until fees are earned or expenses are incurred.
- c) No, if an attorney believes the funds will be earned within a short period, the attorney may deposit the amount he anticipates will be earned directly into his business account.
- d) No, when an event out of an attorney's control, such as a bank holiday, cause the funds to be unavailable when the attorney anticipates he will need to withdraw the funds, the attorney may deposit the amount he reasonably believes will be earned or needed for expenses into his business account instead of the client trust account.

340. "IOLTA" is an acronym for which of the following?

- a) Interest Owed on Legal Transaction Accounts
- b) Interest On Lawyers' Trust Accounts
- c) In-house, Of Counsel, Litigation, and Transactional Attorneys
- d) Internal Oversight of Lawyer Trial Advocacy

341. Most funding for legal aid clinics in the United States comes from which of the following sources?
- a) LSC and IOLTA
 - b) Private foundation grants and court filing fees
 - c) Fundraiser events and grants from the state bar association
 - d) The American Bar Association and the American Civil Liberties Union
342. What is the Legal Services Corporation?
- a) LSC is a nationwide network of affiliated legal aid clinics
 - b) LSC is a national for-profit corporation that provides law firms with many law-related services, including title insurance, liability insurance, archiving, document indexing and review, printing, and investigation/research
 - c) LSC is a quasi-government corporation that receives an annual budget apportionment from Congress, which it then distributes to other entities around the country.
 - d) LSC is an ABA-approved group legal services plan that refers members of the plan to participating law firms when the members need a lawyer.
343. What historical development necessitated the creation of IOLTA programs around the country?
- a) Congress defunded the LSC
 - b) Congress imposed burdensome restrictions on the activities of entities receiving LSC funds
 - c) A Supreme Court decision forced the ABA to amend the Model Rules
 - d) The passage of the Civil Rights Act and its subsequent amendments
344. Do state IOLTA programs violate the Takings Clause of the United States Constitution?
- a) Yes, but the Supreme Court held that the takings are nevertheless justified because of their important social purpose
 - b) Yes, but individual clients do not have standing to challenge IOLTA programs, because their losses are too small to constitute an injury-in-fact
 - c) No, because the Supreme Court held that the interest is not client “property” and therefore does not constitute a governmental taking.
 - d) No, because even though the programs constitute a governmental taking, the Supreme Court has held that the compensation owed to an individual client is zero.
345. How does enforcement of the rules pertaining to safeguarding client funds or property differ from enforcement of other professionalism or disciplinary rules?

- a) The state bar rarely discovers mishandling of client funds because normally it goes unreported
- b) Unlike its reactive enforcements of other rules, the state bar actively audits firms to catch violations of the rules about handling client funds.
- c) Disqualification is the primary enforcement mechanism.
- d) Legal malpractice actions are the primary enforcement mechanism, rather than disciplinary action by the bar.

ANSWER KEY- Rule 1.15

- 332. c
- 333. a
- 334. a
- 335. a
- 336. b
- 337. a
- 338. d
- 339. b
- 340. b
- 341. a
- 342. c
- 343. b
- 344. d
- 345. b

