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Section 1	**1205**	**5944**	**7166**
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Question 1

The events of this question give the appearance of impropriety. Here we have several communications between the lawyer and the client; this raises the issue of confidentiality and in a couple instance the attorney client privilege (ACP) doctrine as well as the work product doctrine in relation to the photographs.

First off, I make the mistake of not being competent (Rule 1.1) by suggesting that the client and I continue our conversation at a public place such as a returaunt even though I know that the communication needs to be kept in confidence if the rule of ACP is to apply. I also neglect my duties to my client pursuant to Rule 1.4 which requires me to reasonably consult with my client and it is probably not reasonable to do so at a crowded lunch time cafe.

Model rule 1.6, Client Confidentiality governs the protection of ANY information I as a lawyer gain through my conversations with the client dealing with the representation of the client. For instance, when we are back at my office discussing the case, the conversation dealing the automobile accident is covered by the rule of confidentiality (meaning I cannot disclose information i receive from her unless she gives informed consent for me to dos, disclosure is impliedly authorized, or it falls under one of the 1.6b exceptions). However, the conversation relating about her son selling meth out of the garage is not covered by the rule of confidentiality since it does not relate to my representation of client with regards to the automobile accident and in fact under rule 4.1 if I determine that withholding the information of her son selling meth is necessary to avoid assisting with the crime of selling drugs (rule 4.1b).

It is important to note here the difference of confidentiality rule 1.6 and ACP--confidentiality rule 1.6 is self-executing and is separate and apart from the ACP doctrine which ~~must be invoked~~ by the me as the attorney when there is some sort of discovery request. Rule 1.6 governs the ACP doctrine and although the communication is protected, the underlying facts are not. The restatement gives definitions of the elements of ACP, each of which will be discussed in relation to my conversation with the client at the restaurant. Here, the communication at the restaurant between the client and I is the subject of her

case relating the automobile accident, so the first element of ACP is adequately met. Second, the conversation is between me and the my client, the two privileged people between whom the ACP doctrine is meant to protect. However, since we decided to have the conversation at a crowded lunch time returned, there is the issue of whether the ACP has been waived because a non-privileged person is present--this is most likely no the case until the expert witness shows up since waiters or other patrons at the establishment are not listening or maybe even not hearing the conversation, so everything said up until the point that the expert witness shows up is protected under the privileged person prong if the ACP.

However, when the expert witness who has nothing to do with the the facilitation of my client's trial shows up at the restaurant, the privilege evaporates because it is waived due to the presence of an unprivileged person. Everything said between the client and I after the expert witness show up is not longer protected under the ACP.

Regarding the entire conversation at the returaunt ~~between the client and I~~, it was not necessarily made in confidence since it was at a crowded returant rather than my office and certainly as not made in confidence once the expert witness showed up--the client's intent may have been for it to be confident but certainly having a confidential conversation at a crowded returant undermines the objective manifestation of intending to keep the conversation in confidence. Finally, the conversation indeed has the underlying purpose of providing legal assistance since we are talking about her automobile accident, but that is moot since we waived the privilege once the expert witness was invited to join the table and may not have had the privilege at the returant at all since it may not have been in confidence.

To summarize, the conversation with the client at the office is covered by ACP not withstanding the topic about the son selling meth. The conversation at the restaurant may be protected up until the point that the expert witness was invited to join the table if it is deemed to have been made in confidence not withstanding the busy restaurant. The conversation between my client and I after the expert witness was invited to join is not protected by ACP since there was an unprivileged person present at the conversation and I violated my fiduciary duty to my client by doing so since I took ethics in Law school and should know better.

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With regard to the conversation with the expert witness, again there is a communication relating to the subject matter of the litigation, but the communication is not between privileged people since the ACP after provides protection only to the communication between an Attorney and a client. Therefore the conversation with the expert witness has not claim of either 1.6 confidentiality or ACP protection.

Finally, the photos of the accident may be protected by the work product doctrine. The work product doctrine has two categories of protection: the mental impressions of the attorney concerning legal theories and the tactics of the litigation, and the documents and other tangible items that are made in anticipation of litigation. Hickman v Taylor describes the former as more protected than the latter. Here, the pictures taken after the accident are more documents that are prepared for the impending litigation than they are mental impression or my legal opinions. Since my client gave these to me, there should be protected by the work product doctrine absent a showing that the opposing party has a substantial need or undue hardship will be caused by me not releasing them and that the opposing party cannot obtain the photographs from another source.

The opposing party can defeat any work product assertions by pointing out that they will h ave a substantial need of the photographs of the accident scene in a suit regarding the car crash. It is quite obvious that the scene of the accident immediately after the event will have a substantial more impact in determining fault than the pictures of the scene after it was recreated or without all the debris strewn about. If the opposing party was not taking pictures of the accident scene right after it happened, then it would be impossible for them to obtain the photographs from a reproduced source or other source and therefore have both a subtnatial need for the photographs and an inability to obtain them from another source so they can defeat any assert of work product. I can attempt to argue to the court that any recreate whether through a poster board or computer generation would adequately substitute for the actual photographs of the scene my client gave me, but discovery requests for the photographs will most likely be successful.

Question 2

The information I have learned regarding the potential hazards of the diet kola may be protected by Rule 1 6 Confidentiality since I ascertained the information in the course of representing my client 21st Century Foods. I have the conflict of wanting to warn Anna, so I must turn to the rule for guidance. First off, it is doubtful that the client will give me informed consent to disclose the information to Anna since if I fulfill my duties in giving my client informed consent according to its definition in Rule 1.0 I will have to explain all the deleterious affects of such a disclosure and 21st century foods will not lilkey risk its thousands of dollars put into research for my friend Ana when there is no clear indication as of yet that the diet kole affects pregnant women. Second, disclosure is also not immliedly authorized in order to carry out the representation since according to the principal-agent doctrine I have a fiduciary duty to protect my client's interests and not give out information that may come to my client's harm. So finally, I must turn to 1.6b to see if I have any room in the enumerated exceptions to rule 1.6

Good

The primary exception that can be invoked is 1.6(b)(1) that says I MAY reveal information if I believe it reasonably necessary to prevent reasonably certain death or substantial bodily harm. The problem is the statistics that I have read are not event statistically significant so there is technical no probability that the horrid results of the mice tests are true with humans; much less that there is a reasonable probability that my friend will be subtnatially harmed by drinking my client's soda. The death or bodily harm has to be reasonably certain, and according to the results of the tests that I have read, that is simply no the case. Even though there is a possibility that death or bodily harm could occur to Ana, that is not the language of the rule and I am precluded from revealing information under this aspect of the rule.

What I would do in this situation, is go to my ethics teacher and invoke 1.6(b)(4). This section of the rule allows me to disclose confidential information that I have obtained from my client through the course of representation in order to secure legal advice about my compliance with the rules. IN other words, I can present the situation that I know there is the possibility of harm from drinking my client's product and that my close personal friend drinks the product and in this was reveal the information to my ethics teacher to see if I can tell my friend without violating the rules of ethical conduct.

My teacher is most likely going to come to the same conclusion as above, but perhaps there is a way to hint toward Ana that she should be careful of consumption of any products while she is pregnant and to investigate the side effects of anything she consumes; especially if she is going to consume something in large quantities. The ethical rules do not prohibit discussing in generics, like the class discussion on the other problem from the book regarding conversation with Ana and a client who was involved in a bar fight. If I can tell Ana in a generic fashion without talking about specifics, I can navigate the shoals of ethical rules and save both my friend and her baby's life as well as protect the confidence of my client all while not violating the rules of ethical conduct.

Imust also be aware of the fact that I c most likely cannot take Ana's case if she indeed has pregnancy compications and wishes to sue 21st Century since I would then have two client's that have a directly adverse conflict of interest pursuant to Rule 1.7 and would have to decline Ana's potential representaion according to Rule 1.16a.

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Question 3

The first issue to engage is whether Rule 4.2 precludes me from discussing the matter with either the employee that no longer works at the corporation or the employees still remaining there. According to Rule 4.1 and the language in the restatement section 100 (which is slightly different as there is some tension in the rules) I first need to determine whether each category of people are represented or not.

+1 I can assume that since the supervisor left the company he is no longer represented by xyz since the duty of a lawyer representing an organization under Rule 1.13 pertains only to the organization itself and not its constituents. If that is indeed the case and the former supervisor is not represented, then Rule

+1 4.3 would apply and I would have to not state or imply that I am a neutral party in the impending litigation. I cannot mislead the supervisor to think that I am there merely to attack just xyz corporation, or that I do not have my client's best interest's in mind. If I feel that the supervisor no longer working at xyz misunderstands my role as an advocate for my client, I will have to immediately correct such a misunderstanding. I cannot give legal advice to the supervisor and not suggest to him an appropriate course of legal action on the matter. I need to basically make clear to the supervisor that no longer works for the company and who is unrepresented that I am looking out for my client's interests, not his. It would also be a violation of Rule 8.4(c) to misrepresent myself to the supervisor.

4.2 Comment 2

As far as contacting the rest of the employees who still work at xyz, my actions are governed by

+2 rule 4.2 if they can meet the definition of represented employees per the restatement in section 100. If the employees are considered to be represented by the organization (since again, according to Rule 1.13 the organization is represented by counsel, but not necessarily the constituent workers that comprise it),

+1 then I SHALL not communicate the about the subject of the repsentation with the person if I KNOW that

4.2 Comment 7

+1 they are represented UNLESS their attorney gives consent--I can however, sing Happy Birthday to them since it does not relate to the subject of the representation.

In order to determine whether the coworker's fall under the protection of rule 4 2, I must turn to the restatement an determine if any of the co-workers supervises, direct, or regularly consults with the

+2 lawyer of the organization, if their actions can be imputed on to the organization, OR if a statement from one of them would have a binding affect on the organization. Here, since they seem to be mid-level employees, there is no indication that they have contact with the corporate attorney, so the first prong is out. IT can be argued that the acts of the employees can be imputed to the organization since the actions of any one of a member of the work force will deireclty affect the image of a corporation. If I wanted to contact the employees, I would have to argue that they fall under the class of non-represented employees and no one word seriously impute the actions of some mid-level employee to the organization itself, else the exception would swallow the rule and all employees of an organization will be considered to be represented. Finally, I would also argue that statements from mid-level employees would not be unbinding onto the orgzanition itself since that would not even meet the rules of evidence and again because not just any employee has the power to speak for the corporation itself.

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Therefore, i would conclude that the coworker's of my client are not represented according to the defitnion of the restatement, and I am therefore not precluded to contact them (or seek consent from the corporate attorney) under rule 4.2.

If for whatever reason, the supervisor that no longer works with xyz is still represented by the corporate attorney, then I would need to seek the attorney's consent to contact him since a supervisor most likely would be considered represented according to the language of the restatement as a supervisor's actions would be more likely to be imputed to the organization, a supervisor would be more lilkey to work with the corporate attorney, and his statements would be more likely to be binding on the organization.

After my analysis, I would then consult with my client pursuant to Rule 1.4(a)(5) and explain to my client the limitations the Rules of ethical conduct impose on my actions. I would have to perform the

above analysis in a reasonable and diligent fashion according to Rule 1.3.

Question 4

My actions in this situation are governed by Rule 1.11 which governs actions by former government employees now working in the private practice. Here, specifically Rule 1.11a,b, & c apply. I am also subject to rule 1.9(c) since the former client in this case is the government. I am prohibited by this rule from working a matter in connection with the private clients which I participated personally and substantially. Here I worked directly with the CYFD program to augment the rules of driver's licenses to be revoked if people were behind on their judgments obtained by the state with regard to deadbeat parents. I lobbied to the state legislature and participated in direct development of the law regarding the revocation of drivers license if the people of the state fell behind on the reimbursement suits. Now that I am working in private practice, two prospective clients want to discuss with me a challenge to their revocation of the driver's licenses because of a glitch in the software.

My argument for representing these clients in the class action suit (which is sure to bring lots of money since it is class action) is that even though I wanted to pass the law which uninteitonally snared my clients, the real problem is with the software and I am bringing suit on the improper application of the law through faulty development of the software. I would contend that I did not personally participate in the matter regarding the application of the software, just simply the legislation itself; and further more tha the real "matter" is the deadbeat parents and not the drivers license revocation. The counter to this would be that the matter is one in the same and that according to Rule 1.11(d), the definition of a matter includes any "controversy" and here the controversy is the revocation of driver's licenses of which I participated personally and substantially even though it was a merely a punishment for the deadbeat parents. The question would hinge on whether the matter is defined as broadly or narrowly--if it is defined narrowly,

then the matter would be definded as the deadbeat parents or the software application of the rule that unfairly included my prospective clients, but if the matter is defined broadly, then it would include any controversy involving the revocation of driver's licenses and I would be precluded from representing my prospective clients.

Even if I am disqualified under the above rule, the conflict can be waived if the CYFD gives its informed consent confirmed in writing (which according to the defintion in Rule 1 0 does not necesasrily have to be signed by CYFD, or even written by them, it jsut has to be confired in writing) which is not likely to happen since I was the one who knows the revocation rule inside and out, I am most likely the best equipped to find its fallacies and bring a successful suit against it.

If it is deemed that the matter is defined broadly, then Rule 1.13(b) precludes any other attorney in my firm from working with the prospective clients unless I am timely screened and written notice is promptly given to the CYFD.

As mentioned above, Rule 1.9(c) also governs my activity in this area and I must not use any information that I gained while at CYFD to the disadvantage of the state unless the information has become generally known. For instance, if there was some information that I became privy to when I was working at CYFD that would be helpful to my prospective clients but be to the disadvantage of CYFD, Rule 1.9(c) bars me from using this information. The information must have been acquired, not merely that I could have acquired it.

In summary, it appears that 1.11(a) precludes me from representing the two clients in their attack on the CYFD's law that I helped pass. Even though my mission was to get deadbeat parents to pay their child support, I made the punishment the revocation of their drivers licenses and my prosepctive clients list their licenses as a direct result of the legislation I lobbied for. The fact pattern on this situation goes to the very root of the rule's impetus in that a person working for the governemtnn who helps pass a law or regulation should not be allowed to then turn around and while in private practice attack it through litigation. Other attorneys at my firm, however, are not so precluded as long as I have been timely screened and written notice is promptly given to CYFD. This being the case, everything must be

communicated to the prospective clients pursuant to Rule 1 4 and I must not represent them according to the 1 16.

Question 5

+3 The primary rule implicated with Sara's situation is Rule 3.1 which precludes me from bringing suit when it is frivolous. There must be some basis in either law or fact for them to bring the claim; there must be a good faith arguemtn to bring the claim. Here, Sara wants me to bring this claim for the underlying reason of punishing John and in effect using the courts to coerce him into losing his property and business. If there was a legal basis for the claim or could be supported by non-frivolous arguments, +2 then there would not be a problem with bringing it against John. However, their claim is brought with basis in fact or law and therefore would result in a frivolous litigation that would not be ethical to the court, my client, society, or the interest of justice. (Not to mention that I could also be sanctioned under Federal Rule Civil Procedure 11B for bringing such a frivolous claim)

+2 I would advise my prospective client pursuant to Rule 2.1 that there are social and perhaps moral reasons beyond the absence of law that should preclude suits brought in bad faith. I would communicate with my client pursuant to Rule 1.4 that the ethical rules of conduct preclude me from +2 taking this claim even if she wanted to pursue it. I would mention to her that Ii would also violate Rule 1.1 in that a competent attorney should bring frivolous claims and that in doing so he opens himself up to malpractice litigation as falling below the Strickland standard of competence. Although my client has authority concerning the objectives of representation pursuant to Rule 1.2, and I am required to consult with her about hte means of obtaining those objectives (1.4), I am still ethically bound by my own +2 conduct and cannot even encourage her to pursue the suit elsewhere according to Rule 8.4(a).

I would also mention that even if she did not like the implication that her claim is frivolous, I am prohibited from accepting a contingency fee that gives me a proprietary interest in her property. Rule

+2 1.8(i) prohibits me from gaining a proprietary interest in the subject matter of the litigation and in this case Sara wants the title of John's property as compensation for her perceived damages. By offering me 1/3 interest in the property, I would be agreeing to a proprietary interest in the subject matter of the litigation and be in direct conflict with 1.8(i). I could also run afoul of 1.8(c) if it is determined that I solicited the property from Sara and that it is a gift.

+1 The contingency fee arrangement may also run afoul of Rule 1.5 which governs legal fees. I can only accept a reasonable amount or reasonable compensation for my work done in relation to my representation and 1.8(i) not withstanding, if the land is deemed to be worth far more than my provided legal services, I would violate the ethical rules regarding the legal fees that I can charge. There are special rules governing the contingency arrangements under 1.5c&d, and although there is nothing specifically written about the acceptance of property as compensation (that is left to 1.8i), there are requirements that the arrangement be specifically laid out and the percentage must be fair, in writing and not have to do with a domestic relations matter, so if Sara and John are married, then any discussion of the contigney fee would come under scrutiny since it would pertain to a propriety settlement thereof.

I may also consider Rule 4.1(b) if the action's that Sara proposes are fradulent since I have a duty under that rule to disclose material facts when it is necessary to avoid assisting in a fraud and if indeed her actions are fradulent I would not be prelcuded from doing so under Rule 1.6 is she perpetrated the fraud through the furtherance mof my legal services.

Outstanding Answer —

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Question 6

As an attorney for ABC corporation, I have a fiduciary duty as the agent for the company to protect its interests. Under Rule 1.13, there is an affirmative duty to report if I KNOW that someone associated with the organization has acted or will act that violates the law and will result in substantial injury to the organization. Here, I am the attorney for ABC, and I may know that there is some violation of the law in that the judge may in bed with the salesperson who keeps the contract with ABC through a close relationship with the president of the company Andrea. According to the definition in Rule 1.0, "know" does not require actual knowledge, but knowledge ascertained from the circumstances such my conversation with Jose.

If it comes to light that constituent employees of ABC are giving money to judges at the courthouse to subvert justice, then there indeed can be substantial harm to ABC since such charges would bring about the financial ruin of the corporation. After my conversation with Jose, I have an affirmative duty (SHALL) to proceed as reasonably necessary in the best interests of the organization. Unless I reasonably believe it is not necessary to do so, then I SHALL refer the matter to a higher authority within the organization. Here, since Andrea, the CEO is implicated, I may believe that it is not necessary to go to her, but I still would in this instance since I am not exactly sure that she has violated the law and would want to present the issue to her to get her reaction.

After presenting the issue to Andrea, the CEO, I would wait to see her reaction. If she is aghast and appalled and takes immediate steps to rectify what is happening with regard to Jose's story, then I would wait and see what affect it has on the situation. If, however, Andrea does not take any action or is openly hostile that I brought up the matter to her in the first place, then pursuant to 1.11c&d I can disclose

the information despite the limitations of 1.6 if I belive it will prevent substantial harm to the organization and I reasonably belive it to be necessary. I cannot, however disclose the information to an outside source (like the stakeholder's or board of directors) if I am called on to defend the organization in a claim arising out of a violation of law. Here, since it is likely that I may have to defend the organization in a criminal matter, I would not go to the police or other authorities, but I would make sure that the board of directors and other stakehodlers knew of the alleged wrongdoing.

If I am released by Andrea after I confront her, then I am protected under 1.13e for wrongful discharge, but even if I am fired I still have a duty to report.

Now if things get really ugly, and the allegations are true, then I may even have to defend Sam or even Andrea in a criminal case subject to 1.13(g). I would have to get the consent of the appropriate official of the organization (since Andrea is the CEO, I would have to go the board of directors) but I would also be subject to the concurrent conflict rules of 1.7. If it comes out that Andrea's or Sam's interests are directly adverse to the interests of ABC or that there is a significant risk that my responsibilities to ABC will be materially limited by my representation of Sam or Andrea, then I will be precluded from representing either or both of them since my fiduciary duty is first and foremost to the corporation and not its constituents.

I must also be careful to avoid falling under 8.4(c) in misrepresenting myself in any fashion or in being deceitful about my actions.

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