The University of New Mexico

School of Law Library
MSC11 6080
1 University of New Mexico
Albuquerque, NM 87131-0001
Telephone (505) 277-0939
FAX (505) 277-0068

This document was scanned pursuant to the express permission of its author and rights holder.

The purpose of scanning this document was to make it available to University of New Mexico law students to assist them in their preparation and study for Law School exams.

This document is the property of the University of New Mexico School of Law. Downloading and printing is restricted to UNM Law School students. Printing and file sharing outside of the UNM Law School is strictly prohibited.

NOTICE: WARNING CONCERNING COPYRIGHT RESTRICTIONS

The copyright law of the United States (Title 17, United States Code) governs the making of photocopies or other reproductions of copyrighted material.

Under certain conditions specified in the law, libraries and archives are authorized to furnish a photocopy or other reproduction. One of these specified conditions is that the photocopy or reproduction is no to be "used for any purpose other that private study, scholarship, or research." If the user makes a request for, or later uses, a photocopy or reproduction for purposes in excess of "fair use," that user may be liable for copyright infringement.

This institution reserves the right to refuse to accept a copying order if, in its judgment, fulfillment of the order would involve violation of copyright law.

TOP EXAM 2010 ETHICS - STOUT

① The communication regarding the client's problems with her teenage son ~~[illegible]~~ might not be protected under rule 1.6.

+2

1.6 states that "a L shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized or permitted under (b)." This protects only information relating to the representation, whatever its source. If this information was relating to the representation, it would be protected against disclosure. However, the client's case is a personal injury case arising from an automobile accident. Her problems regarding her son's selling meth are not related to the representation. Thus, they are not protected.

The restatement §60 protects disclosure or use of

confidential client information. 459 defines this as information relating to the representation of a client. Thus, as previously discussed, this information would not be protected under the restatement because it is not relating to the representation.

This communication is not protected by attorney work product because it is not a document or tangible thing as referenced in federal rule of civil procedure 26. which?

This communication might be protected by attorney client privilege. ~~Unde~~ Under the restatement, attorney client privilege may be invoked with respect to a communication made between privileged persons in confidence for the

+2

purpose of obtaining legal advice (§§ 69-72).

This was a communication as it was an expression by which a privileged person, the client undertook to convey information (§69). The client told the attorney something, conveying information. It was made between privileged persons, the attorney and the client (§ 70). It was in confidence, as it was made in circumstances reasonably indicating that it would be learned only by them. § 71. It was made in an office, thus meeting this requirement. However, it was not made

+1 for the purpose of obtaining legal advice if she was simply complaing about her problems. If she was asking for

legal assistance, then it possibly would be protected.

The communication about the client's case at the resturant that was crowded will probably be protected by 1.6. "The fundamental principle of the relationship is that absent the client's informed consent the attorney will not reveal this information." [2]. this was information relating to the representation as referenced in 1.6 as it was concerning the case. In the lunch some matters unrelated to her case were discussed. these matters would not be protected under 1.6 as they were not relating to the representation.

The restatement §60 also protects confidential

client information if there is a reasonable prospect that disclosing the information will adversely affect a material interest of the client. ~~the~~ §59 defines this information as that relating to the representation. Thus the matters relating to her case would be protected, while the unrelated matters would not.

Attorney work product would not apply as this is not a document or tangible thing.

It is possible that attorney client privilege would protect this communication, but unlikely. The converation was a communication as defined by §69 as it was an expression

by which a privileged person expressed information. The client told things to the lawyer. It was made between privileged persons, the client and lawyer (§ 70d)

+2 It was arguably not in confidence, however, as it was not made in circumstances reasonably indicating that it would be learned only by the lawyer and client because the resturant was crowded and you talked loud to hear each other. This means that other people could have learned the information, so it was arguably not in confidence. The information regarding the clients case was arguably for the purpose of getting legal advice. However, the matters unrelated to her case were probably not made for

getting legal assistance (as far as is known on those facts). Thus, the communications, even those regarding the client's case, are probably not privileged as they were arguably not in confidence

When the expert witness for another case joined the conversation, the communications were definently not in confidence as a

+2 person was there who was not a privileged person, so any conversations ~~regarding~~ after his or her arrival are not privileged.

Your expert witness's communications with you and the client might be protected under 1.6 as they were communications

relating to the representation of another case, so arguably the client should not have been there listening. These communications ~~were~~ would not be protected under attorney client privilege as they were not made between privileged persons (an expert witness is not an agent of the lawyer to facilitate representation as they act in a testimonial capacity), and the

+] communication was not in confidence (as the client was there. Thus, the communication between the expert and the lawyer, while probably protected by 1.6 (and the restatement 60 that protects the same kind of information), is not protected by attorney client privilege.

the set of photos that the client handed the

+1 lawyer might be protected by attorney work product. Federal rule of civil procedure 26 protects tangible items and documents (like photographs) from discovery if they were prepared in anticipation of trial ~~and~~ unless the other party shows substantial need for the material & undue harship to obtain the equivalent by other means. These photos are protected if the client took them in anticipation of the personal injury litigation. This is probable, as it is unlikely that the took photos of the accident scene if she was not thinking that they would be helpful in the lawsuit. Thus, they are probably protected

by attorney work product.

The initial conversation about the client's case is protected by 1.6 and 960 as it is relating to the representation. It is also protected by attorney client privilege. It was held in the lawyers office, so it was confidencial. It was a communication between the privileged lawyer and client, and they were discussing the client's case so it meets all the requirements of attorney client privilege.

The photos are ordinary work product, not opinion work product as they do not reflect theories regarding the case. They are simply photos of the accident site.

+1

Excellent

12

(2) The information regarding the tests is information protected by 1.6. 1.6 ~~protects~~ states "a lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized .. or permitted under (b)." This ~~information~~ covers information relating to the representation, whatever its source [3]. Thus, the tests that relate to your firm's representation of Twenty First Century Foods falls into protected information. You do not have the company's informed consent (an agreement to a course of conduct after the lawyer communicated adequate information - 1.0). The disclosure is also not impliedly authorized as it may be if you were filling out discovery requests.

Thus, the only way a person would be able to reveal the information is if it falls into one of the categories in paragraph (b), which states a lawyer MAY reveal information relating to the representation of the client to the extent he reasonably believes necessary." There are 6 exceptions under which the first is: a lawyer may disclose to prevent reas certain death or substantial bodily harm. The comments state that such harm is reasonably certain to occur if it will be suffered imminently or if there is a present or substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action to eliminate the threat [6].

You might argue that Anna might suffer a miscarriage soon or that there is a substantial threat that her child will be deformed so you can disclose the information. However, "some data" that a misscarriage might happen doesnt mean that it is reasonably certain to occur and 10% increase in rate of limb deformities isnt a substantial threat. Thus, disclosure is not permitted under this exception.

The second exception is: ~~that~~ to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests of another and in furtherance of which the client used the

lawyer's services. This is related to #3: which allows disclosure to prevent or mitigate substantial injury to financial interests of another, reasonably certain to result from the client's commission of a crime in furtherance of which he used the lawyer's services. It is unlikely that the client has committed a crime. Those studies just came out. The client has also not committed a fraud (conduct that is fradulent under the law of the jurisdiction and has the purpose to deceive - 1.0). The company is not necessarily hiding the results to deceive the public. Furthermore, Anna's financial interests are not going to be harmed. If anything, her health or happiness would be the only results.

: Disclosure is thus not permitted under these exceptions.

Number (4) allows disclosure to secure legal advice about the lawyer's compliance with the rules. Anna is not a lawyer (assuming the previous hypothetical in the book is true). If she was a lawyer, you might disclose to get legal advice on whether you can disclose to people, but assuming she is not a lawyer, this exception doesn't help.

The fifth allows a lawyer to disclose to establish a claim or defense. There is no litigation started by the lawyer or pending against the lawyer that requires disclosure so the lawyer can establish a defense, etc. Thus this exception

does not apply.

The last allows disclosure to comply with law or court order. As far as is known, there is no law requiring disclosure to prevent harm of a child or pregnant woman. There is also no known court order that would allow for this disclosure. Thus, this exception doesn't apply.

Thus, even though the lawyer might want to, he should not disclose this information to Anna, or he would be violating rule 1.6, and thus possibly incurring a suspension, or other punishment metted by the disciplinary board.

This information is also protected by 660. 660 states that during and after

a representation, the lawyer may not use/disclose confidental client information (which consists of information relating to the representation of a client §59) if there is a reasonable prospect that doing so will adversly affect a material interest of the client or if the client has instructed the lawyer not to. To decide whether the lawyer could disclose this information under the restatement it must be determined whether the disclosure would adversely affect a material interest. Adverse effect is frustration of the client's objectives, material misfortune or predjudice. Disclosure of this information, if it stayed with only Anna may not work

horrors against the company if only she stopped drinking it. However, if it got leaked to the news or many people learned about it it might constitute financial harm to the company as people would stop drinking it. Thus, if Anna is the only person you told it might not adversely affect the company's material interests. Even if it would have a negative financial impact thus requiring you not to disclose, the restatement allows for disclosure to prevent death or serious bodily harm. (§66) As previously discussed, this exception probably would not apply. Also as previously discussed, the exceptions regarding

the lawyer's self defense (§ 64) and preventing or mitigating financial loss (§ 67) would probably also not apply. Thus if the disclosure would constitute a material adverse effect, then the disclosure to Anna would not be allowed under the restatement either.

(13)

③ You want to interview your client's co-workers, who are still working for the corporation. If the corporation is represented by a lawyer, which is likely, ~~the~~ rule 4.2 might restrict your communications with these people. 4.2 states that in representing a client, a lawyer shall not communicate about the subject of representation with a person he knows to be represented by another in the matter unless he has the consent of the other lawyer or is authorized by court order. ~~Commen~~ Comment [7] states that in the case of a prepresented organization, the rule prohibits communication with a constituent of the organization who supervises, directs or regularly consults with the organization's

+2

+2

lawyer concerning the matter or has authority to obligate the organization w/respect to the matter or whose act or ommission may be imputed to to organization for purposes of liability. If those people are supervisors, or regularly consult with the lawyer, or have authority to obligate the organization, you cannot speak to them without the other lawyer's consent or a court order. Thus, you should determine their authority before you interview them.

+1

If the organization is not represented, rule 4.3 still places restrictions on the interview. It states that you should not imply that you are disinterested or give legal advice if the person's interests may conflict with his client's.

+1

thus, if the organization is unrepresented, you may contact these witnesses with this restriction.

When you interview the witnesses, rule 4.1

+2 states that you shall not knowingly make a false statement of material fact or law. ~~ee fed~~ You thus cannot make a false statement if it is material, or possibly important or at issue in the matter.

In the interview, you also cannot ask the employees to refrain from ~~q~~ voluntarily giving relevant information to another party unless the person is a relative of the client and the lawyer reasonably believes that the person's interests will not be adversely affected by refraining from giving such info. (3.4)

Thus, unless one of the employees is reallted to your client, you cannot ask them to not give relavent information to the corporation.

8.4 also places restrictions on your questioning, as it states that it is professional misconduct for a lawyer to engage in conduct involving dishonesty, fraud, deciet or misrepresentation. Thus, even if you can interview those employees, you cannot misrepresent anything or be dishonest in questioning them.

You also wanto to contact the supervisor that left the company about general practices. As she left the company, you are not precluded from contacting her according to 4.2 (if

the organization is represented). You must determine whether she is represented by a lawyer in the matter, which is unlikely. ~~as she~~ If she is

7) not, rule 4.3 should guide the interview. 4.3 states that a lawyer should not state or imply that he is disinterested, and that if he knows or reasonably should know (a lawyer of reasonable prudence and competence would ascertain the matter in question 1.0) that the lawyer's role in the matter is misunderstood, shall make reasonable efforts to correct the misunderstanding. If a reasonable lawyer would think that the lawyer is disinterested, the lawyer must try to correct that impression. If, during

the interview, the lawyer comes to believe that the client's interests might conflict with the former supervisor's he most not give legal advice except to get a lawyer. You can probably contact the supervisor, as she is probably unrepresented, but 4.3 places limits on what you may say in the interview.

3.4 also states that you may not ask the supervisor to voluntarily refrain from giving informatio to the corporation unless she is related to your client and wouldnt be adversely affected by doing so. this is another limit on the interview.

As discussed previously, the lawyer shall not knowingly make a false statement of

material fact or law to the supervisor (4.1). This only covers material facts or law, so the lawyer should not make a false statement as to something that might come up in litigation.

8.4 also restricts the interview by stating that it is professional misconduct for the lawyer to engage in dishonest, fradulent or misrepresentative conduct or engage in conduct that's predjudicial to the administration of justice. Conduct that's predjudicial to the administration of justice includes conduct that is racist, sexist, etc [3] to 8.4. Thus, the lawyer shall not misrepresent anything in the interview or display any bias.

the lawyer is probably not prevented by 4-2 from contacting either the former supervisor or co-workers, as the supervisor left the company and is probably no longer represented, and the co-workers do not sound like supervisors with enough authority to be barred from questioning by 4.2

12 (+1)

(13) Excellent

(4) First, you must determine whether you would have a conflict, then it can be determined whether the conflict would be imputed to the firm.

The first step is to identify the clients. They are CYFD, your friend, and the class action plaintiffs. CYFD is a former client. The conflict is the potential conflict that you have because of your relationship with your friend, and the conflict that arises because of the suit against CYFD based on something that you drafted.

Next, determine if there is a conflict. 1.7 states that there is a concurrent conflict of interest if the representation of one client will be directly adverse to another client or if there

is a significant risk that the representation of one client will be materially limited by the lawyers responsibilities to a former client, another client third person, or personal interest of the lawyer.

There is no directly adverse representation at issue here. However, it is possible that the representation of the plaintiffs might be limited by the responsibilities to the former client and the lawyer's personal interest

First, we will deal with the lawyer's personal interest. The supervisor is the lawyer's good friend. The lawyer's friendship might interfere with the lawyer's representation of the plaintiffs against the supervisor. Thus, there is

a concurrent conflict under 1.7. Notwithstanding
this conflict, the lawyer can represent the
plaintiffs if he reasonably believes (~~believes that~~
~~reasonable person question~~ subjective & objective 1.0)
that he can provide competent & diligent representation,
if the representation is not prohibited by law,
and doesnt involve asserting one client's claim
against another client, and each client gives
informed consent in writing (agreement to a
proposed course of conduct after the lawyer has
communicated adequate information and explanation
of the material risks in a writing) = 1.0. If the
lawyer believes his friendship will not hamper
his representation and gets informed consent he

will be able to represent the plaintiffs against his friend. Even if he believes that he cannot provide competent & diligent representation, or the plaintiffs do not give informed consent, the firm can still represent the plaintiffs against the supervisor. Rule 1.10 states that firm can't knowingly represent a client when a lawyer would be prohibited by 1.7 or 1.9 unless the conflict is a personal one and doesn't present a significant risk that the representation by remaining lawyers will be materially limited.

The representation against CYFD [illegible] by the lawyer would be limited by his responsibilities

to CYFD, a former client. As discussed previously, the lawyer may represent the plaintiffs if they give informed consent, he believes he can represent them diligently and competently and is not prohibited by law. The representation doesn't involve asserting a claim against another client. But because it involves a former client, the lawyer must also look to 1.9 for this conflict. The lawyer is barred from representation under 1.9 if the plaintiffs have interests materially adverse to the interests of CYFD in the same or a substantially related matter unless the former client gives informed consent in writing. The same matter is a single transaction or suit or if represen

tation involves a document that the lawyer was involved in producing. this representation would not involve challenging the constitutionality of the document the lawyer drafter so it might not be the same matter. Things are substantially related if they invoke the same transaction ~~and~~ or legal dispute or there is a substantial risk that confidential factual information as would normally have been obtained in the representation would materially advance the clients position in subsequent matter [3]. Even if this doesnt constitute the same matter it might consitute substantially related as the lawyer might have learned information drafting the document that could help in the

representation. However, the litigation doesn't deal with the document, it deals with a programming error. However, it is probably at the least, substantially related as it deals with legislation the lawyer wrote. Thus, if the plaintiffs interests are materially adverse to CYFD's (which they are as CYFD is being sued by the plaintiffs), there is a conflict under 1.9 that can only be waived by informed consent in writing (as previously defined under 1.0). Thus, you can represent the plaintiffs if CYFD gives informed consent.

However, as you were a government lawyer, rule 1.11 might apply, which

states that you are subject to 1.9(c) (protecting information relating to CYFD's representation) and shall not otherwise represent a C in connection with a matter in which you were personally and substantially involved. You were personally and substantially involved with the legislation (you drafted and lobbied for it). Thus, you might be barred from representation unless CYFD gives informed consent in writing (as previously defined under 1.0).

However even if you are barred, 1.11(b) states that no lawyer in the firm may take such a matter unless the disqualified lawyer is timely screened and

is apportioned no part of the fee therein

and written notice is promptly given to CYFD.

Thus, the firm can represent the case plaintiffs

if the lawyer is screened (isolation from

any participation in a matter through imposition

of reasonable procedures that are adequate

to protect information 1.0), is given no

part of the fee resulting from the representation

& CYFD is given notice.

13

(5) Model rule 3.1 is implicated. It states that a

+3 lawyer shall not bring or defend a proceeding

~~or~~ unless there is a basis in law and fact for

doing so that is not frivolous. The comments

state that an advocate has a duty not to abuse

legal procedure. The action is frivolous if

one cannot make a good faith argument on

its merits. Thus, because the action appears

+2 marginal if not frivolous from a legal standpoint,

the lawyer might be disciplined for bringing

the suit. However, if a good faith argument

can be made, the lawyer can bring the suit

under 3.1.

Another rule that is implicated by these

+] ~~Rule Rel.~~ facts is 1.5. A lawyer may make a contingent fee agreement in this case under 1.5 (it is not a divorce or criminal case), but the agreement should be in writing signed by the client and should state the method of determining the fee, the percentage that shall accrue to the law, whethere litigation expenses are deducted before of after calculation of the fee. thus, if a contingent fee is decided upon, then the rules regarding a contingent fee should be followed.

+2 Another rule that is implicated is 1.8. 1.8 states that a lawyer shall not acquire a proprietary interest in the cause of action of

subject matter of the litigation the lawyer is conducting for the client, except he may acquire a lien authorized by law to secure the lawyer's fee and contract with the client for a reasonable contingent fee.

If you agreed to represent Sara for 1/3 an interest you would be creating a conflict of interest because you would be acquiring interest in the cause of action. Thus, you would be violating rule 1.8 and would have to do an analysis under 1.7 to determine whether you could continue the representation (which you could not as your personal interest violates 1.8).

Another rule implicated if you are able to bring suit under 3.1, is 1.5. It is arguable

of whether the contingent fee would be reasonable. Rule 1.5 states a lawyer shall not charge or collect an unreasonable fee. The factors to be considered include the time and labor required, the novelty and difficulty of the questions, the likelihood that the suit would preclude other employment, the fee customarily charged, the amount involved, the time limitations, whether the fee is contingent, and the lawyer's experience. This fee might be unreasonable because the lawyer would get 1/3 for something that seems as if it will require little work as John will be willing to settle quickly. So the amount that the lawyer might get, the fact that

the suit appears to be a easy, meritless contract claim, and the quickness with which it might settle all point towards the fee being unreasonable.

Another rule implicated by these facts is 4.4 which states "in representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person. This suit seems as though it might be brought simply to burden a person. Sara wants to bring it because she knows John has little money and might quickly settle and given her property just to keep his busness. It seems, especially

because the contract claim is close to frivolous, that this suit (bringing the suit) is a means that has no other substantial purpose than to burden and harrass John, thus possibly violating 4.4. → Does not apply to opposing party. Substance governed by 3.1

+2. Rule 8.4 is also implicated because of the potential violation of the previously discussed rules (a lawyer commits professional misconduct if he violates the rules). This rule is also implicated as bringing an action mainly to get property as John might quickly settle might involve some dishonesty, and it is professional misconduct to engage in dishonest conduct.

It might be dishonest as the purpose for bringing the suit is not really the alleged breach of contract.

10 +1

1.4(a)(5)
2.1

11

Good answer

(6) A lawyer who knows that a judge has committed a violation of the applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority (8.3). In this case, however, you dont know that Judge Royal has committed a violation (which could be 1.3 - abusing the prestige of judicial office to advance the economic interests of the judge or others). The Judge didnt tell you that he did this, this information is funnelled through two people so it might not be a requirement to disclose this information.

You represent ABC, which is an organization. Rule 1.13 states that the organization is your client. Rule 1.13 also states that if the lawyer knows that an officer or employee of the organization is engaged in action in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that might reasonably be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably

believes that it is not necessary to do so, he shall refer the matter to the highest authority in the organization. Here, the lawyer has come to know of conduct by an employee of the organization (a sales representative) that might be a violation of law that might be reasonably imputed to the organization. (the violation of bribing, etc might be imputed to ABC). Thus, the lawyer has to act in the best interest of the corporation, as this might result in a substantial injury to the corporation. It might result in the corporation being charged with criminal charges or being

fined. The lawyer should thus refer the matter to a higher authority in the corporation, Including if necessary the highest authority. From this fact pattern, the known higher authority is Andrea. A threat ~~[illegible]~~ should not disuade the lawyer from complying with his duty of informing a higher authority. Andrea is the president. If she is the highest authority and "fails to address in a timely and appropriate manner an action that is clearly a violation of law and the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the corporation

then the lawyer may reveal information relating to the representation whether or not 1.6 permits such disclosure to the extent reasonably necessary." Thus, if Andrea is the highest authority and doesn't act the lawyer can ~~[illegible]~~ disclose the information reasonably necessary to prevent substantial injury (such as criminal charges or fines), to outside entities/public officials.

BC/SA

Paragraph (c) doesnt apply in this situation as the lawyer was not hired to investigate an alleged violation of law or defend the corporation. The lawyer did work for ABC in all matters, as

the organization didnt have in house counsel.

The lawyer did not explain the identity of the client (ABC), but this was a correct action because Jose's interests are not adverse to ABC's. If Sam had come into the office and started to confess, the lawyer should have told him that the organization was the lawyer's client, and he should think about retaining independent counsel.

However, the lawyer should simply attempt to refer the matter to a higher authority in ABC to remedy the violation, and if that doesnt result

in action being taken, should disclose as much as is reasonably necessary to an outside entity to protect ABC

12