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

Answer-to-Question-_1_ (15)

The first question we need to answer when determining how to respond to the request is whether these communications between the CPA and I are subject to attorney-client privilege ("ACP" from here.) The ACP is a rule of evidence that protects clients from having their attorneys be forced to reveal information obtained in the course of their legal representation that could adversely affect their client. It is an essential rule for the effective representation of clients by their attorneys, ensuring that clients can be candid and forthright in their communications with their attorney. ACP has a much narrower standard than confidentiality under Model Rule 1.6 ("1.6" from here.) It is a privilege that belongs to the client and it is our burden to establish that ACP protects us from the discovery request by the IRS. The privilege can also be waived or "lost" and there is a possibility that it has been lost in this case.

In order for a communication to be protected by ACP, it must be a communication between privileged persons, in confidence, for the purpose of attaining legal assistance. So who are the privileged people here? Certainly my client and I, as the client and attorney are the most fundamental communications that are protected under ACP. I can make an argument that the CPA was acting as my agent, much as a paralegal or secretary normally would for a lawyer, and argue that such agency gives the CPA communications to my client ACP as well. I think this is a pretty fair argument, as the CPA was doing much what a co-counsel with more knowledge in an area, a paralegal, or legal secretary might do in assisting me with my representation of my client. The CPA's work was also clearly related to my legal representation of him. So it would seem as though the CPA's communications with my client are protected by ACP.

However, there are a number of ways ACP can be waived. The first, with the client expressly waiving ACP, didn't occur here. My client never indicated that he wanted the records released, or in any other way affirmatively waived his right to ACP. Failing to object to the disclosure also does not apply

here, as were are deciding whether to disclose or not, and haven't been ordered to by the court or anything. The "detrimental disclaimer" also does not apply here, as we never promised we would release such info. Similarly, it's not a matter where legal assistance or communication is at issue. The client isn't suing me or alleging malpractice. It also does not appear that any crime or fraud was committed, by my client anyway, so far as can be told from the facts.

The one potential issues for the ACP, then, is whether the communications listed in the fact pattern were done in a confidential manner, and with privileged persons only. So, let's examine each communication. The phone conversation with the CPA should be protected under the ACP. It is a conversation between a lawyer representing a client, and an agent he has hired to help him in that representation. It is confidential, in that it's only audible between he and myself. Nobody waived it, and no crimes were committed. Similarly, the email I sent to the CPA and my client is all between privileged people and is confidential with no other waivers that I can see. It too should be protected by ACP. The CPA's interview with the client again passes this analysis, as it's between an agent of mine and my client to assist me in my representation.

The first conversation where the ACP starts getting challenged is when I met with my client and his 16 year old son was present for the interview. While it is still presumably confidential, as it's reasonable to expect that only I, my client, and his son will hear this information, there becomes an issue of privileged parties being present. Sec. 70 of the Restatement defines privileged persons as "the client, ... the client's lawyer, agents of either who facilitate communications between them and agents of the lawyer who facilitate the representation." Under that definition, anyway, the son certainly doesn't meet the standard for privileged person. It seems to me as though my client would not be protected from divulging the dialogue in this conversation.

While that would still normally not require me to turn over the information regarding report the CPA delivered to me, possibly, (at least not in full, as at most, it seems, the information gathered at the last conversation I had ~~with my client would be subject to discovery~~) my client made a mistake in showing the report to his brother. Again, his brother is not a privileged individual, most likely. We might

try to argue that his brother became an agent of my client, and thus subject to being a privileged person as well. It could certainly be argued that his brother was helping in the course of my legal representation of him. I think this would warrant an in camera review, and I can't say how the judge would rule, although I think both my client and I may have been sloppy enough in deciding with who we should share this confidential info that we might be in some trouble and have to reveal the report, or at least a good chunk of the data that went into making the report

(1) As far as ethical obligations, the first one that comes to mind is that I would have the duty to communicate to my client that the IRS has made this discovery request. Pursuant to rule 1.4, I would want to communicate this major possible turning point in his case. I'd want to make sure he was properly informed about it enough so that he could make informed consent. If it does turn out that we have to turn this information over, and it potentially incriminates him, he would want to know it was going to occur so that we might want to change strategies and plea guilty or something. Additionally, I have the duty to diligently respond promptly, without unreasonably delaying the discovery process, as defined in 1.3. I would say that because this is very potentially damaging evidence, and there is a good argument to be made that it should be protected by ACP, I have a duty under Model Rule 1.1 to make that argument, as any reasonably competent lawyer would do. Under Model Rule 3.4 I would have a duty to not destroy the evidence or otherwise block access to it, were it not found to be protected by the ACP, and also couldn't fail to make reasonably diligent effort to comply with their request, were it not covered by ACP (or even if it is, I must diligently respond asserting ACP.)

1.6?

Answer-to-Question-__2_ (19) Excellent Answer

Okay, the most obvious problem here is that the corporation is represented by a lawyer. Their lawyer, in his complaint, would accuse me of communicating with his client in violation of Model Rule 4.2. 4.2 (2) states that "In representing a client, a lawyer shall not communicate about the subject matter of the representation with a person the lawyers knows to be represented by another in the matter UNLESS the opposing party's lawyer consents OR the lawyer is authorized by law to contact the opposing party without his attorney present. It certainly appears as though this might be the case, but the key would be to determine whether my friend is a CONSTITUENT of the corporation. That is, can he take acts or omit (4) acts that could bind the corporation. The commentary further clarified, saying constituents "supervise, direct or regularly consults with the organization's lawyer concerning the matter." No information is given in the fact pattern regarding whether he can be found as a constituent "adverse witness" "very important" testimony on pleadings If he is in such a position, then I would be violating Model Rule 4.2 by contacting him without alerting to, and getting consent from, his attorney to contact him.

However, even if he is not legally a constituent of the corporation, and wasn't represented by any other attorney (and there is no indication that he had a private attorney,) I could still be in trouble a (2) number of ways. First of all, I could run afoul of Model Rule 4.3, which governs communications with non-represented parties. Under 4.3, a lawyer is required to inform 3rd parties about his interest in a case before questioning them, and is not supposed to attempt to appear disinterested. It seems as though I did attempt to see uninterested by making it seem as though I just wanted background information, and I didn't inform my friend that I was representing a party that was in the process of suing his corporation. It seems that I clearly did violate Model Rule 4.3 and would be punished for it. There may be some issue

with the fact that I knew him from high school, only because I remember something similar from one of the problems in the book, but I can't remember what rule that would fall under, if any. I think the primary problem is the manner in which I contacted him and violations of 4.3 or 4.4. Since I was being dishonest and not telling him that I was representing a client and making it seem as though I just wanted to have a kind of casual conversation, I could be in trouble under 4.1, 8.4 as a catch-all for any other misconduct.

8.4(a) and specifically 8.4(c) and maybe (d)

My defense here would be that I was acting properly under Rule 5.2. (b). I would claim that I was acting in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty. However, in the fact pattern, I clearly had reservations about it, and it's a strict liability "offense," anyway. It could possibly be mitigating that I was ordered to do it, and that I was a new lawyer, but the argument that I was following a reasonable resolution of an arguable question doesn't seem to fit. Nobody would argue that it's proper to question either a represented party without the knowledge of his counsel, or to question an non-represented party without informing him of my position in the case and why I am interested in it. This seems like it would be a slightly mitigating factor, if anything.

My boss would also be in trouble, possibly even bigger trouble than me. She has been a lawyer a lot longer and is likely to be held to a higher standard of presumed knowledge regarding legal ethical behavior. My boss would be potentially disciplined for a number of things as well. First, she was pretty clearly violating Model Rule 5.1. Under paragraph (a) of 5.1 she is a partner in the firm, and has managerial authority in the firm. She is thus required to make reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct. ("ROPC" from here) Under paragraph (c) of 5.1, she would be found responsible for my violations because she (as in subparagraph 1) ordered me to do the conduct that violated the ROPC. She also could be found liable under subparagraph 2 as she is a partner in the firm and knows of the conduct at the time when its consequences can be avoided or mitigated by failed to take remedial action. Under rule 8.4, she would also be in trouble for violating subparagraph (a) in knowingly or assisting me in violating the ROPC. I should have reported her 8.4 violation as required

5.1 Vague.

under 8.3, as well, so I would likely also get in trouble with the disciplinary board for failing to report her attempt to induce me to violate the ROPC.

Answer-to-Question-_3__

(21) Excellent Answer

So, in this case, Maria is a prospective client, and our firm has never represented anyone with adverse interests to her, but a new hire has some potential conflicts that may hurt the firm's ability to represent Maria fully.

The first section of the ROPC that I will examine is Model Rule 1.9. Rule 1.9 is intended to protect former clients from lawyers using information they gained from previous representation of the client against them in future litigation. In this case it clearly seems as though the pending litigation by Maria could be related to this lawyer's (old firm's) representation of Bicycle Bill in developing strip malls. Any factual information the lawyer had about how Bill operated his leasing business could potentially hurt bill in this new litigation. This litigation is also materially adverse to Bill, as Maria will be seeking damages against him. Despite the results of our discovery that the lawyer did not have any direct responsibility in representing Bill, I would advise our firm's senior partner to question the lawyer on office policies, to see if he could have potentially accessed confidential information, had meetings with the lawyers who were assigned to Bill's case with updates on the status of their representation etc. Despite the fact that he/she didn't directly represent Bill, there is still the potential for damaging additional knowledge, and it could appear improper or could be a violation of 1.9 to allow the lawyer to work on this case.

(7)

If there were found to be a 1.9 conflict, it would be imputed to the lawyer's entire current firm, and they would be unable to represent Maria, unless the firm chooses to screen the lawyer. The screen process must consist of the firm not allowing the lawyer in question to access materials or documents related to the case, that the lawyer not work on any part of the case, and that the screened lawyer not receive any of the fees from the case. Additionally, the firm would need to notify Bicycle Bill of the

(5)

potential conflict and if he requested, continually update her on the screening process of the lawyer. Alternatively, she and Bicycle Bill could both sign informed consent forms, allowing the firm, with the previous attorney included, to represent her.

Second, I will examine 1.7, which deals with concurrent conflicts, or conflicts that affect present and potential clients. I am analyzing this section because the lawyer may have personal conflicts with out potential client, Maria, and this may cause the lawyer to be unable to represent Maria loyally, confidentially, and using her independent professional judgment. Because there is at least an appearance of impropriety, and I would argue that vacationing to a foreign country does imply a strong personal relationship, anyway, I would advise our managing partner to inform Maria about the potential conflict and ask for her informed consent. We would also need Bicycle Bill's signed informed consent release. We must examine 1.7(b) to determine whether this potential conflict can even be legally waived, though, as it can't necessarily in every situation be waived. First, we need to examine if there is direct adversity. This is an easy one, clearly there is. Maria is suing bill and by definition wants some kind of monetary compensation from him. 2 Is there significant risk that the representation of one or both clients will be materially limited by the lawyer's responsibilities to another client, former client, or third person by the lawyer's personal interests? I know I would not want a lawyer trying to win a case for me and monetary damages against someone that they at least frequently bike ride with, and have been on a foreign trip with. Sounds like they are pretty good friends, at least, and I am not sure this lady lawyer (I am assuming there.) would be fully diligent in representing me against her pal. So, I definitely see a conflict there, however, the lawyer could still represent Maria if the following was met. 1. The lawyer would have to reasonably believe that she could provide competent and diligent representation. I am not sure that she could reasonably believe that, as it is an objective standard, but maybe other people don't find frequent sporting collaboration and foreign trips to be signs that they are really close to someone, so I suppose it is possible. The representation isn't prohibited by law, so far as I can tell, as nothing is mentioned to say that it would be statutorily illegal to represent her. The matter also is not a direct claim by one client against

another current client and on 1 matter before the Court. So, as long as the lawyer reasonably believed she could provide competent and diligent representation, and both Maria and Bicycle Bill signed off on the concurrent conflict of interest based on Bill and the lawyer's friendship, she could represent Maria.

(2)

Rule 1.10 would again come into play when examining whether the lawyer's potential personal conflict is imputed to the rest of the firm. Here, however, since the conflict is strictly personal, it would be analyzed independent of the screening process (although I am not sure how much it matters, as the lawyer is still not allowed to represent the client, it appears as though the firm might not need to screen her based on the 1.10 general rule.) The disqualification is based on a personal interest, and the firm could argue that it does not ~~present a significant~~ risk of materially representing the other lawyers in the firm. This is plausible, at least, as she is a new associate and not a prestigious partner in the firm with long-standing social contacts with other members. I amm really not sure how this is analyzed or who decides, but I guess it iss up to the firm to decide whether there is a risk of getting in disciplinary trouble under 1.10.

I would strongly recommend that we screen the lawyer, especially if it is found that she had any access to Bill's information at her prior firm, but even just for the concurrent personal conflict potentiality, unless of course Maria didn't have a problem with that and neither did Bill, and both signed informed consent waivers. I would advise notifying them first and making sure that they both had objections to it (which is highly likely, I would imagine.)

(3)

Answer-to-Question-__EC 1_

(3)

The Attorney-Client privilege is a rule of evidence, but is important enough to the ethical discussions about lawyers' roles that it was included in the class, despite not being in the ROPC.

Institution **University of New Mexico School of Law**
Control Code **N/A**
Extegrity Exam4 > 11.2.8.0 878-M.-12-12
Course / Session **M11 Ethics - Stout**
Instructor **NA**
Section **-1** Page **12** of **12**

Answer-to-Question-_EC 2__ (3)

The potential inability of a lawyer to maintain loyalty, Confidentiality, Independent Professional Judgment, and competence (in some cases) is the basis for the rules against conflicts of interest.

477

ETHICS

STOUT

(20) Outstanding Answer

1) The attorney-client privilege (ACP) is entirely subsumed in the concept of confidentiality outlined in Rule 1.6. The ACP is governed by §§68-93 of the Restatement of the Law Governing Lawyers. Many of the communications in this case are subject to an attorney-client privilege analysis, and all are subject to potential confidentiality protections. §68 provides that the ACP entails four elements: (1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client.

(5-) 2/sub-4

A "communication" for ACP purposes is defined in §69 as "any expression through which a privileged person ... undertakes to convey information to another privileged person and any document or other record revealing such an expression." "Privileged persons," defined in §70, are "the client (including a prospective client), the client's lawyer, agents of either who facilitate communications between them, and agents of the lawyer who facilitate the representation." A communication is "in confidence," according to §71, "if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person ... or another person with whom communications are protected under a similar privilege." Finally, according to §72, "[a] communication is made for the purpose of obtaining or providing legal assistance ... if it is made to or to assist a person: (1) who is a lawyer or who the client or prospective client reasonably believes to be a lawyer; and (2) whom the client or prospective client consults for the purpose of obtaining legal advice."

The IRS's request only seeks discovery of any communications between the lawyer and the CPA. The first such communication is the discussion between the lawyer and CPA over the phone. The lawyer and the CPA are both privileged persons because the client's lawyer and the CPA, an agent of the lawyer who

(2) is facilitating the representation both fall within the definition in §70. The phone call is a communication because it was an expression through which these two privileged persons sought to exchange information about the client's case. This phone call was in confidence because the lawyer and CPA could reasonably believe that no one was listening in on their private phone call and that the conversation was thus limited to privileged persons. Finally, this communication was made overtly for the purpose of the lawyer briefing the CPA on the case. Thus all four elements are met and the ACP could validly be invoked for the discussion over the phone in response to the IRS discovery request

Similarly, the detailed e-mail to the CPA meets all four elements of the ACP. The additional (2) considerations for the email are as follows The e-mail is a different mode of communication, but under the broad "any expression" definition of this term under §69, the email is a communication for ACP purposes. The email is a record revealing the expression of the phone discussion discussed above. An additional concern for this communication is that the email was copied to the client. The client, however, is also a privileged person as explicitly stated in §70 so this does not defeat the applicability of the ACP to the email. Other than these factors, the email is virtually the same communication for purposes of ACP analysis as the phone discussion discussed above. Therefore, because neither of the additional concerns for this communication undermine its ability to meet all four elements of the ACP, the ACP could also validly be invoked regarding this communication.

The CPA also interviewed the client regarding some of the records. This was a communication, within the meaning of §69. Under the circumstances, both the CPA and the client are likely to have reasonably believed that the interview was intended only for the purpose of representation. Both likely expected to share the results only with the lawyer and possibly agents of the lawyer who are also facilitating the client's representation. However, the client's 16 year old son was present during the interview. The son (2) is not a privileged person unless he is an agent of the client who facilitates communication between the client and the lawyer, and under these facts it does not appear that the son is such an agent. The interview regarding some of the records was explicitly for purposes of providing the client with legal assistance for there would be no other reason for these two persons to be communicating. Specifically,

this communication meets the element defined in §72 because it was made to assist the lawyer in the client's representation. Overall, the interview would have been protected by the ACP, but the presence of the client's son during the interview defeats the privilege because he is a non-privileged person. Finally, the discovery request may not mandate disclosure of this interview because the request seeks any communications between the lawyer and the CPA, and the interview itself was only between the CPA and the client. The next communication, however, arguably makes this a moot consideration.

The next communication is the detailed report given by the CPA to the lawyer that analyzes each transaction. This report would be have valid ACP protection were it not for the chain of events that followed the CPA's giving it to the lawyer wherein the lawyer sends the report to the client and the client shares it with his brother. The only way that the client's action of sharing the report with his brother, a subsequent disclosure under §79, does not defeat the existence of the ACP for this communication is if the brother is an agent of the client who facilitates communications with the lawyer or the lawyer's agents for purposes of the client's representation, which he is not under the facts provided. Therefore, although this communication meets the four elements required for invoking the ACP, the transmission of the report to the client's brother, an ostensibly non-privileged person, defeats the ACP.

A final point on the applicability of the ACP to the above communications is that it only protects the communications themselves, not the underlying facts. The IRS may seek through other discovery devices much of the information contained within these communications, but certain of them, as discussed above, may be a valid basis for invoking the ACP nonetheless.

The ethical obligations implicated by the IRS discovery request relate primarily to confidentiality. Under 1.6(a), a lawyer "shall not reveal information relating to the representation of a client." There are some exceptions to this. Under 1.6(b), a lawyer "may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary" to accomplish certain ends. Here, the potentially relevant considerations are 1.6(b)(2)and (3), both of which allow a lawyer to disclose confidential information to prevent crime or fraud "in furtherance of which the client has used or is using the lawyer's services." This latter element makes these exceptions inapplicable because this client does

not appear under the facts given to be continuing the behavior that is the subject of the IRS investigation, especially since the major culprit, the client's former tax accountant, has fled the country. Thus Rule 1.6 still protects all of the communications discussed above as confidential because they all relate to the representation of the client and are not found in any of the six exceptions listed in 1.6(b). Restatement §82 provides for a similar exception under the ACP which is similarly inapposite under the given facts because none of the communications was for the purpose of obtaining assistance to "engage in a crime or fraud" or for later use as such.

(3)

(17) Good Answer

2)This is a transaction with a person other than a client and thus primarily implicates Article 4 of the Model Rules of Professional Conduct. Rule 4.1 states that "[i]n the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person." The exchange with the lawyer's old high school friend constitutes a misrepresentation under Comment [1] to 4.1 because the lawyer affirmed that it was "okay" for him to speak with his friend even though the Rules, as explained below, govern that this communication was in fact not permissible. This statement whereby the lawyer told his friend that it was okay to participate in the lawyer's interview and investigation was arguably made "knowingly" as defined by 1.0(f) because the lawyer arguably had actual knowledge of the fact that the interview was not permitted by the Rules of Professional Conduct. The arguable point is that the lawyer received guidance to the contrary from his senior managing partner. The lawyer "has some concern" but the partner reassures the lawyer that it is "okay" to interview this critical witness. The lawyer's misgivings here may not constitute actual knowledge so as to satisfy the definition of the term "knowingly" as used in 4.1 and defined in 1.0, but the lawyer's knowledge may be inferred from the circumstances under 1.0, and the circumstances here are such that the lawyer's and the lawyer's friend's hesitation and misgivings are strong evidence that the lawyer knew that the interview was not permitted. Comment [8] to 4.2 reinforces the circumstantial basis for finding that the lawyer had knowledge that his friend was represented by the defendant corporation's counsel. The fact about which the lawyer made a

(2)

+1

false statement here is material because his friend is a critical witness who the lawyer is told has testimony that may be very important for the client's punitive damages claim. Furthermore, related to the managing partner's reassurance to the lawyer that the interview with the lawyer's friend was "ok," 5.2(a) provides that a lawyer is bound by the Rules of Professional Conduct "notwithstanding that the lawyer acted at the direction of another person." 5.2(b) is more debatable under these facts. It provides that a "subordinate lawyer does not violate the Rules ... if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." 1.0(h) defines "reasonable" conduct as that of a "reasonably prudent and competent lawyer." Though this circular definition provides little amplification, there is sufficient factual basis here to conclude that a reasonably prudent and competent lawyer would know better than to send a junior associate in his first month after passing the bar to conduct an interview quite likely disallowed by Rule 4.2 which governs communications with persons represented by counsel.

Under 4.2 a lawyer "shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." The defendant here is a corporation represented by counsel. Comment [7] provides that 4.2 "prohibits communications with a constituent of the organization who ... has authority to obligate the organization with respect to the matter." This friend of the lawyer's is a current employee of the corporation. If he were a former employee, the analysis would be different and far less restrictive. This witness also has testimony that may be very important for the lawyer's client's punitive damages claim, which satisfies the "authority to obligate" language above. Also, Comment [7] states that a lawyer "must not use methods of obtaining evidence that violate the legal rights of the organization" as governed by 4.4.

Under Comment [1] to 4.4, an organization's rights include "legal restrictions on methods of obtaining evidence from third persons and unwarranted intrusions into privileged relationships, such as the client-lawyer relationship." The lawyer's interview with his high school friend violates the defendant corporation's rights because this interview was not a valid basis for obtaining evidence under the rules of

discovery, whereas the planned deposition of the lawyer's friend would be valid. Also, the lawyer's friend has a client-lawyer relationship with the defendant corporation's lawyer as a current employee and constituent whose knowledge may be very damaging to the defendant's defense.

This interview could be consented to by the defendant corporation's counsel, but such consent is not present in the facts. Thus, overall, the associate's only potential defenses lie in claiming that he lacked actual knowledge of the fact that his friend was a constituent of the defendant corporation and the dubious assertion that his action of interviewing his friend was in accordance with his senior managing partner's reasonable resolution of an arguable question of professional duty, as described in 5.2(b). Under these facts and the definitions of critical terms as discussed above, neither of these potential defenses appears sufficient to combat the defendant's lawyer's disciplinary complaint against the lawyer, although the lawyer's extreme inexperience and attempt to seek clarification from the partner are likely to be considered as a mitigating factors in the resolution of the complaint

Note, as with any violation of the Rules of Professional Conduct, Rule 8 is implicated here. Specifically, (2) anything discussed above that constitutes a violation of any of the Rules is a violation of 8.4(a). Furthermore, the lawyer's reassurance of the lawyer's friend that the interview was okay constitutes a (2) violation of 8.4(c) and (d) because the lawyer's response, as discussed above, appears to have been an instance of dishonesty and misrepresentation, which is inherently prejudicial to the administration of justice. Again, the planned deposition would not have violated the Rules, but the interview ahead of the deposition appears to have violated several.

(19) Excellent Answer

3) This is a problem of migrating conflicts involving both former and prospective clients. Overall, for reasons explained below, as ethics counsel I would advise the senior partner to take on the representation but to screen Lawyer A, as defined by Rule 1.0(k) during the course of the representation of Maria. Under Comment [4] to 1.9, "[w]hen lawyers have been associated within a firm but then end their association ..... [t]here are several competing considerations. First, the client previously represented by the

Good
Y1

former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association."

First, Lawyer A, as a former member of Lawyer A's old firm, has certain obligations to Bicycle Bill under 1.9 because he was a client of Lawyer A's old firm. This scenario does not appear to be governed by 1.9(a) because the representation of Maria would not involve the same or a substantially related matter in which her interests are materially adverse to the interests of Bill. This is so because the old firm's representation of Bill primarily had to do with development of small strip malls and Maria is seeking to purchase a small office building from Bill. Under Comment [3] to 1.9, matters are substantially related "if they involve the same transaction or legal dispute or if there otherwise is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter." If these representations were related, for example because the office building is part of one of Bill's strip malls, then I would advise the senior partner that he would have to obtain Bill's informed consent to Maria's representation, confirmed in writing. 1.9(b) and (c) are more applicable here, however. Although in this transactional context the interests of Maria and Bill are not likely to be as adverse as in the context of litigation, the potential still exists here for conflict. Lawyer A did not have any direct responsibility in the representation of Bill at Lawyer A's old firm. Under Comment [2] to 1.9, "[t]he underlying question is whether the lawyer was so involved in the matter that the subsequent representation can be justly regarded as a changing of sides in the matter in question." This does not appear to be the case here, at least in the context of Lawyer A's apparently minimal involvement in Lawyer A's former firm's representation of Bill.

However, Lawyer A's romantic involvement with Bill complicates matters. Comment [5] to 1.9 states that 1.9(b) "operates to disqualify the lawyer when the lawyer involved has actual knowledge of information protected by Rules 1.6 and 1.9(c)." Thus, "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." This would be the situation in this case except that Lawyer A is likely to be privy to information protected by Rules 1.6 and 1.9(c) because of the romantic involvement with Bill. As such, the potential prohibition of the representation of Maria because of Lawyer A's association with Bill falls under 1.10. Under 1.10, no lawyers associated in a firm shall knowingly represent a client when "any one of them practicing alone would be prohibited from doing so by Rules 1.7 or 1.9, unless (1) the prohibition is based upon a personal interest of the disqualified lawyer and does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm; or (2) the prohibition is based upon Rule 1.9(a) or (b), and arises out of the disqualified lawyer's association with a prior firm, and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; (ii) written notice is promptly given to any affected former client ... and (iii) certifications of compliance with these Rules and with the screening procedures are provided to the former client ..." Due to the personal relationship of Lawyer A with Bill, Lawyer A must be screened, but this is a personal interest-based disqualification meaning that the provisions above are sufficient to avoid a conflict of interest in taking on the representation of Maria.

Another rule implicated here is 1.8(j), which states: "A lawyer shall not have sexual relations with a client unless a consensual sexual relationship existed between them when the client-lawyer relationship commenced." Lawyer A's involvement with Bill here is not known to be sexual in nature, however the potential for conflict because of the relationship, whatever its extent, creates a conflict mandating screening procedures for Lawyer A in the firm's representation of Maria because Lawyer A is likely to learn information that would be protected by Rules 1.6 and 1.9(c), which is prohibited under 1.9(b)(2). Under 1.0(k), Lawyer A would be sufficiently screened if Lawyer A was isolated from any participation in Maria's representation through the timely imposition of procedures within the firm that are reasonably adequate under the circumstances to protect information that Lawyer A is obligated to protect.

Extra Credit (3)

1) The attorney-client privilege is an Evidentiary concept codified for federal purposes in Federal Rule of Evidence 502 (2)

2) These three fundamental values are loyalty, zealous advocacy/representation, and independent professional judgment