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TWENTY-SEVENTH ANNUAL
CORPORATE COUNSEL SYMPOSIUM
THURSDAY, NOVEMBER 10, 2016

Multiple Choice:
Picking the Right Path Through In-House Ethical Issues

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Program Materials, including "correct" and "incorrect" answers, are available on www.dorsey.com at https://www.dorsey.com/newsresources/events/event/2016/11/corporate-counsel-symposium-2016

1. PowerPoint Presentation

2. Applicable Rules of Professional Conduct

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Multiple Choice: Picking the Right Path Through In-House Ethical Issues

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Thursday, November 10, 2016

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Before We Start:

In re Hartke **(DC Ct. App. 5/12/16) (6 month suspension)**

- **Hartke fell asleep during CLE and was snoring.**
- **Hartke argued that he should not be suspended for sleeping and snoring in the CLE.**
- **The Court rejected the notion that Hartke was being suspended for sleeping and snoring, but instead was suspended because he had been untruthful with Virginia Discipline Authorities by denying the sleeping and snoring and instead claiming he was "taking notes."**

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Lesson(s) of the Day

- If you fall asleep today, try not to snore!
- If you do fall asleep and snore – Don't deny it!

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Trial Run: Which of the following categories best fits you?

(A) Private Company or Firm

(B) Public Company or Firm

(C) Government

(D) Other

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Investigation Ethics

***Meyer v. Kalanick and Uber* (SDNY 7/25/16)**

- **Meyer brought a putative antitrust class action against Kalanick and Uber.**
- **Uber's GC asked the Chief Security Officer to find out a little more about Meyer. The CSO directed the Director of Investigations at Uber to do a careful check on Meyer and authorized the use of an outside source to do the investigation and keep it "under the radar."**
- **Ergo was hired to do the investigation and asked to make its Statement of Work "general enough so that the research remains discreet from a discovery perspective."**

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The Ergo Investigation included:

- **Reaching out to 28 acquaintances or colleagues of Meyer and his counsel using false pretenses to get information about Meyer and his counsel.**
- **Conducting recorded phone interviews with eight individuals without disclosure and consent to the recording.**
- **Misrepresenting that the purpose of the contact was to profile up-and-coming labor lawyers in the US to get information about Meyer's Counsel.**
- **Misrepresenting that the purpose of the contact was to profile Meyer for a report on leading figures in conservation (Meyer was an academic).**

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Meyer's Counsel Learns About Ergo Contacting his Colleagues and Acquaintances

- Meyer's Counsel asks Uber's Outside Counsel about the Ergo investigation. Outside Counsel says "it is not us."
- Meyer threatens to bring the matter to the Court's attention in order to get a subpoena issued to Ergo. Outside Counsel contacts the Uber In-House Counsel who ultimately confirm that Uber hired Ergo.
- Meyer demands the Ergo investigation information.
- Uber agrees to provide the names of those contacted and how they were contacted, but only if Meyer agreed not to use the information in the litigation for any purpose whatsoever.

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The Court Authorizes Issuance of Subpoenas to Both Uber and Ergo

- Uber and Ergo object claiming attorney-client privilege and work product protection as to a number of Ergo documents.
- Uber also claimed it commissioned the Ergo investigation due to concern over whether Meyer constituted a safety threat to Uber employees.
- The Court orders in camera review expressing on the basis that the crime-fraud exception may apply.
- Uber and Ergo assert the *Gidatex* defense – a NY case condoning the use of pretexting customers to gather evidence in a "knock-off" furniture trade dress case.

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Question 1: How Does the Court Rule?

(A) Work product protection applies because the Ergo investigation was conducted in anticipation of and in conjunction with the Meyer litigation.

(B) Attorney-Client privilege applies to the Ergo investigation documents because the investigation was directed by Uber's In-House Counsel.

(C) The crime-fraud exception applies because Ergo (1) made misrepresentations to get the information; (2) recorded calls without caller consent; and (3) was not a licensed private investigation company in NY.

(D) Work product protection does not apply because the investigation was not conducted in anticipation of litigation.

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Correct Answers (C) and (D)

(C) The court cited all three of these reasons as a basis for crime fraud.

- **Some of the recorded calls were to numbers with area codes in CT and NH where the law requires both parties to consent.**
- **Ergo was not a licensed Private Investigation company in NY and claimed that its work did not fit the traditional Private Investigation type work.**
- **The Court rejected the *Gidatex* defense distinguishing it from the *Gidatex* type conduct where the purpose is to determine misuse of an intellectual property right, or violation of a license or court order.**

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Other Correct Answer (D)

- **Because Uber had initially argued that the purpose in retaining Ergo was to determine whether Meyer presented a "safety concern" to Uber employees, the Court found that Uber was estopped from later claiming that the investigation was conducted in anticipation of litigation.**

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Incorrect Answers (A) and (B)

(A) Although the Ergo investigation was likely prepared in *anticipation of litigation,* Uber had claimed the "safety concern" purpose. Despite this finding, the Court expressed skepticism about the purported "safety concern" explanation.

(B) Attorney-client privilege protection requires a communication between a lawyer and a client. Ergo's investigation materials were not a communication between a lawyer and a client.

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Contingent Pay for Expert Witness

Murray v. Just In Case Business Lighthouse **(CO Sup. Ct. 6/20/16)**

- **JIC sued Murray for misrepresentation and fraud alleging Murray deprived JIC of a commission by selling Murray's company to a purchaser that JIC had introduced to Murray.**
- **JIC hired Sumner as a business evaluation expert to provide an opinion which would support damages.**
- **During discovery Murray learned that Sumner was to be compensated on a contingency basis.**
- **Murray brought a *motion in limine* to preclude Sumner from testifying as a witness because Colorado Rule of Professional Conduct 3.4(b) prohibits compensating witnesses on a contingent basis.**

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Question 2: How does the Court rule?

(A) Sumner is allowed to testify as an expert.

(B) Sumner is prohibited from testifying as an expert and offering any expert opinions but permitted to testify as a fact witness.

(C) Sumner is prohibited from testifying or appearing in any capacity at the trial.

(D) JIC's counsel is disqualified for participating in the contingent compensation of a trial witness and the case is dismissed without prejudice.

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Correct Answer (B)

- **The trial court, later affirmed by the Supreme Court, permitted Sumner to testify as a lay witness because the transaction was complex and the trial court determined Sumner's lay testimony would assist the court in understanding the transaction.**
- **Sumner was prohibited from offering any expert opinion testimony.**

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Incorrect Answers (A), (C) and (D)

(A) The trial court found that Rule 3.4(b) only prohibited Sumner from testifying as a witness. However there is no analysis for this decision and Rule 3.4(b) does not distinguish between expert and lay witnesses in its prohibition.

(C) Both courts determined that the Ethics prohibition did not override the Rules of Evidence which permit a trial judge to determine whether the evidence will have probative value that is not outweighed by its potential prejudicial value.

(D) The case was not dismissed and there was no mention in the Supreme Court opinion about whether JIC's counsel was referred for discipline.

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Colorado Rule 3.4(b) and Comment

(b) [A lawyer shall not] … offer an inducement to a witness that is prohibited by law;

With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

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Minnesota Rule 3.4(b) and Comment

(b) [A lawyer shall not] … offer an inducement to a witness that is prohibited by law;

With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

No express prohibition against paying witnesses on a contingent basis.

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Practice "From a Distance…"

In re Panel File 39302 **(Minn. Sup. Ct. 8/31/16)**

- **Doe, a Colorado licensed lawyer, was contacted by his in-laws who live in MN concerning a judgment obtained by their Condominium Association against them.**
- **Doe sends an email to counsel for the Condominium Association attempting to resolve the matter. Counsel for the Association in his first email responding to Doe asks whether Doe is licensed to practice in MN.**
- **Thereafter Doe and Association Counsel exchange two dozen emails over the next four months, concerning ability to pay and whether the Association's judgment would have priority in a foreclosure sale.**

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The Judgment is Not Resolved

- **In his final email, Doe provides financial disclosure forms and makes a settlement offer.**
- **Association Counsel responds that Doe is engaging in the Unauthorized Practice of Law.**
- **Association Counsel files an ethics complaint against Doe with the MN Lawyer Discipline Agency.**
- **The MN Lawyer Disciplinary Agency issues Doe a private admonition.**
- **Doe appeals the admonition to the MN Supreme Court.**

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How Does the Court Rule?

(A) Admonition is affirmed because the Court finds Doe practiced law in MN and none of the temporary practice exceptions apply.

(B) Admonition is dismissed because Doe was not licensed in MN, was never physically in MN, and therefore MN lacked jurisdiction.

(C) Admonition is dismissed because the temporary practice exception for representing family members applied.

(D) Admonition is "stayed" and Association's Counsel is instructed to file the complaint with the Colorado Lawyer Discipline Authority.

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Correct Answer (A)

(But this was a 4-3 decision).

(A) Admonition is affirmed because the Court finds Doe practiced law in MN and none of the temporary practice exceptions apply.

- **Court rejects argument Doe was practicing law in Colorado and not in MN.**
- **Court also holds that the judgment did not relate to a "pending or potential proceeding."**
- **Court rejects argument that judgment "arose out of or was reasonably related to" Doe's Colorado practice.**

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Incorrect Answers (B), (C) and (D)

(A) Admonition is dismissed because Doe was not licensed in MN, was never physically in MN, and therefore MN lacked jurisdiction.

- **MN Rule 8.5(a) Disciplinary Authority. A lawyer admitted to practice in this jurisdiction is subject to the disciplinary authority of this jurisdiction, regardless of where the lawyer's conduct occurs. A lawyer not admitted in this jurisdiction is also subject to the disciplinary authority of this jurisdiction if the lawyer provides or offers to provide any legal services in this jurisdiction.**

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Other Incorrect Answers (C) and (D)

(C) Admonition is dismissed because the temporary practice exception for representing family members applied.

There is no temporary practice exception for representing family members.

(D) Admonition is "stayed" and Association's Counsel is instructed to file the complaint with the Colorado Lawyer Discipline Authority.

Once the Court determined Doe was practicing law in MN, there was no need to defer to Colorado Discipline Authorities.

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Temporary Practice Exceptions

(The applicable exceptions in Rule 5.5(c))

(1) Association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) Are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer is authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(4) Are not within paragraph (c)(2) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

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Lawyer v. Client Legal Fee or Palimony Suit?

Sands v. Menard **(Wisc. Ct. App. 9/20/16)**

- **Sands claimed she lived with John Menard from 1998 through 2006 and during that time performed work for Menards that increased the value of his companies.**
- **Sands claimed that Menard promised to compensate her for her services by giving her ownership in various Menards companies for which she provided assistance.**
- **Sands also provided legal services to Menards companies.**
- **After Menard fired Sands she brought a claim for non-legal services (coordinating medical care, gardening etc.) as well as quantum meruit for legal services provided between 2003 and 2006.**

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Most of Sands' claims are dismissed:

- **The court dismissed the claims for non-legal services based upon Sands' affidavit stating she never expected to be compensated for the non-legal services.**
- **As for legal fees, Sands claimed she was entitled to quantum meruit damages between $2.4 and $4.3M based upon nearly 7,000 hours at rates ranging from $355 to $640. The court dismissed this claim because the only invoices generated by Sands reflected a $145/hr rate.**
- **Sands dismissed her only remaining claim to collect at the $145/hr rate in order to appeal the Court's dismissal of her other two claims.**

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The Appellate Court Rules:

(A) Affirms the dismissal of both claims.

(B) Affirms dismissal of the quantum meruit claim but remands on the breach of promise issue.

(C) Remands both claims for further discovery.

(D) Affirms dismissal of the personal services claim, but remands the quantum meruit claim for further discovery.

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Correct Answer (A)

Affirms the dismissal of both claims.

- **The appellate court found that Sands had not appealed the lower court ruling finding that she never expected to be paid for the non-legal services.**
- **As to claims for legal services, the appellate court found they were barred by Sands' failure to comply with Rule 1.8(a) which applies to business transactions between lawyers and clients.**
- **Sands' hands were "unclean" due to her failure to comply with the disclosures required under Rule 1.8(a) and therefore barred her equitable claims.**

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Then Existing Wisconsin Rule 1.8(a):

(1) The transaction and terms … are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) The client is given the reasonable opportunity to seek the advice of independent legal counsel in the transaction; and

(3) The client consents in writing thereto.

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Playbook Conflicts: Rule 1.9

Gillette Co. v. Provost **(Superior Ct. Mass. 5/5/16)**

- **Chester Ceckla was a patent lawyer at Gillette between 1987 and 2006 during which he had access to privileged communications and information about Gillette patents and technology.**
- **Ceckla started working for Shave Logic in 2012 and became General Counsel in 2013.**
- **Shave Logic told its investors that Ceckla's intimate knowledge of Gillette's patent strategy gave Shave Logic a competitive edge in the market.**
- **Ceckla provided Shave Logic with freedom to operate opinions which included patents he had prosecuted for Gillette.**

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Gillette Sues Ceckla and Others at Shave Logic

- **Gillette alleges Ceckla breached his fiduciary duty to his former client Gillette by representing Shave Logic in matters that are substantially related to those in which he represented Gillette.**
- **The substantial relationship alleged by Gillette is Ceckla's issuance of freedom to operate opinions relating to Gillette patents for which Ceckla oversaw the prosecution.**
- **Ceckla and the others move to dismiss the lawsuit.**

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The Basis for Breach of Fiduciary Duty

Rule 1.9: Duties to Former Clients

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

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How Does the Court Rule?

(A) Motion to Dismiss Denied because there is sufficient pleading that Ceckla's work is adverse to Gillette, and substantially related to his work for Gillette.

(B) Motion Granted because Ceckla's work at Shave Logic is not adverse to his work at Gillette.

(C) Motion Granted because Ceckla's work at Shave Logic is not substantially related to his work at Gillette.

(D) Motion Granted because Ceckla's work at Shave Logic is neither adverse to Gillette, nor substantially related to his work at Gillette.

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Correct Answer (D)

- **Ceckla's Shave Logic work is neither adverse to nor substantially related to his Gillette work.**
- **The Court finds that representation of one client is not adverse to another client merely because the two clients are economic competitors.**
- **The Court further concludes that the successful prosecution of a former client is not substantially related to representation concerning whether another client has infringed the former client's patent because patentability and infringement are different issues with different burdens and different evidence.**
- **The Court does acknowledge the case would be different if Ceckla was challenging the validity of any Gillette patents he prosecuted.**

Litigation Funders: Champerty?

Charge Injection Tech. v. Dupont **(Superior Ct. Del. 3/9/16)**

- **Charge Injection Tech (CIT) filed suit against Dupont in 2007 alleging wrongful use and disclosure of CIT confidential technology.**
- **In 2011, CIT's counsel withdrew from representation. CIT then entered into an agreement with Burford, a UK third party litigation funding organization. Burford provided funding in exchange for a percentage of any future proceeds from the litigation.**
- **DE law recognizes the common law doctrines of Champerty and Maintenance which prohibit selling or assigning causes of action.**

Dupont Moves to Dismiss Arguing that the Burford Agreement is Champertous

- **Champerty under DE law is an assignment of a claim to another who maintains litigation at his or her own risk and expense in consideration of receiving a portion of the proceeds.**
- **Maintenance is the officious intermeddling in a suit for the purpose of stirring litigation and encouraging others to bring actions they have no right to commence.**
- **The CIT agreement with Burford did not permit CIT to terminate its counsel without Burford's approval.**

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How Does the Court Rule?

(A) Motion Granted. CIT's loss of its ability to terminate its counsel and hire other counsel without Burford approval made the agreement champertous.

(B) Motion Granted. Burford's financing of the litigation in exchange for a security interest in CIT's claims and any proceeds was champertous.

(C) Motion Denied. DE law does not apply to a contract executed in the UK and containing UK choice of law provision.

(D) Motion Denied. Because the litigation was commenced before Burford's involvement and the agreement gave Burford no rights to control, direct or settle the litigation.

Correct Answer (D)

- **While rejecting CIT's arguments that DE no longer recognizes the doctrines of Champerty and Maintenance, the Court found the agreement did not violate either of these common law prohibitions.**
- **CIT did not bargain to bring claims it was otherwise not disposed to prosecute.**
- **The agreement did not give Burford any right to control, direct or settle the litigation.**
- **The claim was not assigned to Burford.**
- **The claims had been pending for some time before Burford became involved.**
- **Burford was not privy to CIT's confidential information.**

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Applicable Rules of Professional Conduct

Meyer v. Kalanick and Uber (SDNY 7/25/16)

NEW YORK RULE 5.3:
LAWYER'S RESPONSIBILITY FOR CONDUCT OF NONLAWYERS

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

NEW YORK RULE 8.4

Misconduct

A lawyer or law firm shall not:

(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;

Murray v. Just In Case Business Lighthouse (CO Sup. Ct. 6/20/16)

COLORADO RULE 3.4. FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

COMMENT

[3] With regard to paragraph (b), it is not improper to pay an expert or non-expert's expenses or to compensate an expert witness on terms permitted by law. It is improper to pay any witness a contingent fee for testifying. A lawyer may reimburse a non-expert witness not only for expenses incurred in testifying but also for the reasonable value of the witness's time expended in testifying and preparing to testify, so long as such reimbursement is not prohibited by law. The amount of such compensation must be reasonable based on all relevant circumstances, determined on a case-by-case basis.

MINNESOTA RULE 3.4: FAIRNESS TO OPPOSING PARTY AND COUNSEL

A lawyer shall not:

(b) falsify evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness that is prohibited by law;

Comment

[3] With regard to paragraph (b), it is not improper to pay a witness's expenses or to compensate an expert witness on terms permitted by law.

In re Panel File 39302 (Minn. Sup. Ct. 8/31/16)

MINNESOTA RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction which:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is

authorized by law or order to appear in the proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

Comment

[5] There are occasions in which a lawyer admitted to practice in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction under circumstances that do not create an unreasonable risk to the interests of their clients, the public, or the courts. Paragraph (c) identifies four such circumstances. The fact that conduct is not so identified does not imply that the conduct is or is not authorized. With the exception of paragraph (d), this rule does not authorize a lawyer to establish an office or other systematic and continuous presence in this jurisdiction without being admitted to practice generally here.

[6] There is no single test to determine whether a lawyer's services are provided on a "temporary basis" in this jurisdiction, and may therefore be permissible under paragraph (c). Services may be "temporary" even though the lawyer provides services in this jurisdiction on a recurring basis or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation.

[7] Paragraphs (c) and (d) apply to lawyers who are admitted to practice law in any United States jurisdiction, which includes the District of Columbia, and any state, territory or commonwealth of the United States. The word "admitted" in paragraph (c) contemplates that the lawyer is authorized to practice in the jurisdiction in which the lawyer is admitted and excludes a lawyer who while technically admitted is not authorized to practice because, for example, the lawyer is on inactive status.

[8] Paragraph (c)(1) recognizes that the interests of clients and the public are protected if a lawyer admitted only in another jurisdiction associates with a lawyer licensed to practice in this jurisdiction. For this paragraph to apply, however, the lawyer admitted to practice in this jurisdiction must actively participate in and share responsibility for the representation of the client.

[9] Lawyers not admitted to practice generally in a jurisdiction may be authorized by law or order of a tribunal or an administrative agency to appear before the tribunal or agency. This authority may be granted pursuant to formal rules governing admission pro hac vice or pursuant to informal practice of the tribunal or agency. Under paragraph (c)(2), a lawyer does not violate this rule when the lawyer appears before a tribunal or agency pursuant to such authority. To the extent that a court rule or other law of this jurisdiction requires a lawyer who is not admitted to practice in this jurisdiction to obtain admission pro hac vice before appearing before a tribunal or administrative agency, this rule requires the lawyer to obtain that authority.

[10] Paragraph (c)(2) also provides that a lawyer rendering services in this jurisdiction on a temporary basis does not violate this rule when the lawyer engages in conduct in anticipation of a proceeding or hearing in a jurisdiction in which the lawyer is authorized to practice law or in which the lawyer reasonably expects to be admitted pro hac vice. Examples of such conduct include meetings with the client, interviews of potential witnesses, and the review of documents. Similarly, a lawyer admitted only in another jurisdiction may engage in conduct temporarily in this jurisdiction in connection with pending litigation in another jurisdiction in which the lawyer is or reasonably expects to be authorized to appear, including taking depositions in this jurisdiction.

[11] When a lawyer has been or reasonably expects to be admitted to appear before a court or administrative agency, paragraph (c)(2) also permits conduct by lawyers who are associated with that lawyer in the matter, but who do not expect to appear before the court or administrative agency. For example, subordinate lawyers may conduct research, review documents, and attend meetings with witnesses in support of the lawyer responsible for the litigation.

[12] Paragraph (c)(3) permits a lawyer admitted to practice law in another jurisdiction to perform services on a temporary basis in this jurisdiction if those services are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice. The lawyer, however, must obtain admission pro hac vice in the case of a court-annexed arbitration or mediation or otherwise if court rules or law so require.

[13] Paragraph (c)(4) permits a lawyer admitted in another jurisdiction to provide certain legal services on a temporary basis in this jurisdiction that arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted but are not within paragraphs (c)(2) or (c)(3). These services include both legal services and services that nonlawyers may perform but that are considered the practice of law when performed by lawyers.

[14] Paragraphs (c)(3) and (c)(4) require that the services arise out of or be reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted. A variety of factors evidence such a relationship. The lawyer's client may have been previously represented by the lawyer, or may be resident in or have substantial contacts with the jurisdiction in which the lawyer is admitted. The matter, although involving other jurisdictions, may have a significant connection with that jurisdiction. In other cases, significant aspects of the lawyer's work might be conducted in that jurisdiction or a significant aspect of the matter may involve the law of that jurisdiction. The necessary relationship might arise when the client's activities or the legal issues involve multiple jurisdictions, such as when the officers of a multinational corporation survey potential business sites and seek the services of their lawyer in assessing the relative merits of each. In addition, the services may draw on the lawyer's recognized expertise developed through the regular practice of law on behalf of clients in matters involving a particular body of federal, nationally-uniform, foreign, or international law.

Sands v. Menard (Wisc. Ct. App. 9/20/16)

CURRENT WISCONSIN SCR 20:1.8 CONFLICT OF INTEREST: PROHIBITED TRANSACTIONS

(a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:

(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing in a manner that can be reasonably understood by the client;

(2) the client is advised in writing of the desirability of seeking and is given a reasonable opportunity to seek the advice of independent legal counsel on the transaction; and

(3) the client gives informed consent, in a writing signed by the client, to the essential terms of the transaction and the lawyer's role in the transaction, including whether the lawyer is representing the client in the transaction.

ABA COMMENT

Business Transactions Between Client and Lawyer

[1] A lawyer's legal skill and training, together with the relationship of trust and confidence between lawyer and client, create the possibility of overreaching when the lawyer participates in a business, property or financial transaction with a client, for example, a loan or sales transaction or a lawyer investment on behalf of a client. The requirements of paragraph (a) must be met even when the transaction is not closely related to the subject matter of the representation, as when a lawyer drafting a will for a client learns that the client needs money for unrelated expenses and offers to make a loan to the client. The Rule applies to lawyers engaged in the sale of goods or services related to the practice of law, for example, the sale of title insurance or investment services to existing clients of the lawyer's legal practice. See Rule 5.7. It also applies to lawyers purchasing property from estates they represent. It does not apply to ordinary fee arrangements between client and lawyer, which are governed by Rule 1.5, although its requirements must be met when the lawyer accepts an interest in the client's business or other nonmonetary property as payment of all or part of a fee. In addition, the Rule does not apply to standard commercial transactions between the lawyer and the client for products or services that the client generally markets to others, for example, banking or brokerage services, medical services, products manufactured or distributed by the client, and utilities' services. In such transactions, the lawyer has no advantage in dealing with the client, and the restrictions in paragraph (a) are unnecessary and impracticable.

[2] Paragraph (a)(1) requires that the transaction itself be fair to the client and that its essential terms be communicated to the client, in writing, in a manner that can be reasonably understood. Paragraph (a)(2) requires that the client also be advised, in writing, of the desirability of seeking the advice of independent legal counsel. It also requires that the client be given a reasonable opportunity to obtain such advice. Paragraph (a)(3) requires that the lawyer obtain the client's informed consent, in a writing signed by the client, both to the essential terms of the transaction and to the lawyer's role. When necessary, the lawyer should discuss both the

material risks of the proposed transaction, including any risk presented by the lawyer's involvement, and the existence of reasonably available alternatives and should explain why the advice of independent legal counsel is desirable. See Rule 1.0(e) (definition of informed consent).

[3] The risk to a client is greatest when the client expects the lawyer to represent the client in the transaction itself or when the lawyer's financial interest otherwise poses a significant risk that the lawyer's representation of the client will be materially limited by the lawyer's financial interest in the transaction. Here the lawyer's role requires that the lawyer must comply, not only with the requirements of paragraph (a), but also with the requirements of Rule 1.7. Under that Rule, the lawyer must disclose the risks associated with the lawyer's dual role as both legal adviser and participant in the transaction, such as the risk that the lawyer will structure the transaction or give legal advice in a way that favors the lawyer's interests at the expense of the client. Moreover, the lawyer must obtain the client's informed consent. In some cases, the lawyer's interest may be such that Rule 1.7 will preclude the lawyer from seeking the client's consent to the transaction.

[4] If the client is independently represented in the transaction, paragraph (a)(2) of this Rule is inapplicable, and the paragraph (a)(1) requirement for full disclosure is satisfied either by a written disclosure by the lawyer involved in the transaction or by the client's independent counsel. The fact that the client was independently represented in the transaction is relevant in determining whether the agreement was fair and reasonable to the client as paragraph (a)(1) further requires.

Gillette Co. v. Provost (Superior Ct. Mass. 5/5/16)

MASSACHUSETTS RULES OF PROFESSIONAL CONDUCT RULE 1.9:
DUTIES TO FORMER CLIENTS

(a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter;

unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use confidential information relating to the representation to the disadvantage of the former client or for the lawyer's advantage or the advantage of a third person, except as Rule 1.6, Rule 3.3 or Rule 4.1 would permit or require with respect to a client; or

(2) reveal confidential information relating to the representation except as Rule 1.6, Rule 3.3 or Rule 4.1 would permit or require with respect to a client.

Comment

[3] Matters are "substantially related" for purposes of this Rule 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. For example, a lawyer who has represented a businessperson and learned extensive private financial information about that person may not then represent that person's spouse in seeking a divorce. Similarly, a lawyer who has previously represented a client in securing environmental permits to build a shopping center would be precluded from representing neighbors seeking to oppose rezoning of the property on the basis of environmental considerations; however, the lawyer would not be precluded, on the grounds of substantial relationship, from defending a tenant of the completed shopping center in resisting eviction for nonpayment of rent. Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying. Information acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related. In the case of an organizational client, general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation. A former client is not required to reveal the confidential information learned by the lawyer in order to establish a substantial risk that the lawyer has confidential information to use in the subsequent matter. A conclusion about the possession of such information may be based on the nature of the services the lawyer provided the former client and information that would in ordinary practice be learned by a lawyer providing such services.

[8] Paragraph (c) provides that confidential information acquired by the lawyer in the course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client or for the lawyer's advantage or the advantage of a third person unless the client gives informed consent, except as permitted or required by these Rules. However, the fact that a lawyer has once served a client ordinarily does not preclude the lawyer from using generally known information about that client when later representing another client. See Comment 3A to Rule 1.6.