

## What's New? Changing Ethics Rules and Bar Opinions You Need To Know

**John Geelan**

Piper Jaffray Companies  
General Counsel and Secretary  
Minneapolis, Minnesota

**Katherine Lawler**

U.S. Bank National Association  
Senior Vice President, Global Chief Ethics Officer  
Minneapolis, Minnesota

**William Wernz**

Dorsey & Whitney LLP  
Former Partner & Ethics Counsel  
Office of Lawyers Professional Responsibility  
Former Director  
Minneapolis, Minnesota

**Elizabeth Baksh**

Dorsey & Whitney LLP  
Partner  
New York, New York  
baksh.elizabeth@dorsey.com  
(212) 415-9204

### Handouts

1. PowerPoint Presentation
2. Excerpts from ABA Model Rules of Professional Conduct and Minnesota Rules of Professional Conduct

Materials are Available on [www.dorsey.com](http://www.dorsey.com) at

<https://www.dorsey.com/newsresources/events/event/2019/11/corporate-counsel-symposium-2019-materials>

## What's New? Changing Ethics Rules and Bar Opinions You Need To Know

**John Geelan, General Counsel and Secretary, Piper Jaffray Companies**

**Katherine Lawler, Senior Vice President, Global Chief Ethics Officer,  
U.S. Bank N.A.**

**William Wernz, former Ethics Partner, Dorsey & Whitney LLP**

**Elizabeth Baksh, Partner, Dorsey & Whitney LLP**

Wednesday, November 6, 2019

1

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

- (A) Private Company or Firm**
- (B) Public Company or Firm**
- (C) Government**
- (D) Other**

2

## Internal Investigation – Duty/Freedom To Warn Employee of Criminal Investigation

The Rules of Professional Conduct and “*Upjohn*  
Warnings.”

Wednesday, November 6, 2019

3

### HYPOTHETICAL #1

- **Cody Cooper has been Apex Co. in-house counsel for 20 years. Cody frequently advised Fredi Francis, the Apex assistant CFO, on corporate affairs.**
- **Cody and Fredi are close professional friends but do not socialize outside work.**
- **Cody is assisting outside counsel in investigating whether Apex employees may have (1) illegally backdated stock options; and (2) paid employees of customers for steering business.**

4

## HYPOTHETICAL #1 Cont.

- Cody is told (1) criminal authorities are investigating; (2) Apex and Apex employees may be targets.
- On request of outside counsel and authorities, Apex management asks Cody to interview Fredi and other employees, to learn what they know about the matters under investigation.
- Management instructs Cody, “Disclose as little as possible in making these inquiries. And do NOT mention any right to independent counsel. We want employees to respond candidly.”

5

## Question 1: Which of the following is Cody NOT required to tell or explain to Fredi before the interview?

- (A) Fredi’s interests and Apex’s interests are or may well be adverse.
- (B) The nature of the adversity as between Fredi’s interests and the interests of Apex.
- (C) Cody represents only Apex and not Fredi.
- (D) Cody has no obligation of clarification or correction if Fredi tells Cody, “I know you’re not representing me, but I also know you’ll look out for me.”

6

## Correct Answer (B)

**(B) The nature of the adversity as between Fredi's interests and the interests of Apex.**

- **“A lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse.” Rule 4.3(b).**
- **The rule requires disclosure only of the fact of adversity. Disclosure of the nature of adversity might well entail disclosure of confidential client information.**

7

## Incorrect Answers

**(A) Fredi's interests and the interests of Apex are or may well be adverse.**

- Must disclose. Minn. Rule 4.3(b).
- *“In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person.”* Model Rule 4.3 cmt. 1.

**(C) Cody represents only Apex and not Fredi.**

- Must disclose. “In dealing with an organization's directors, officers, employees, members, shareholders, or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.” Rule 1.13(e).

8

## Other Answers Continued

(D) **Must Correct.** Cody has no obligation of clarification or correction if Fredi tells Cody, “I know you’re not representing me, but I also know you’ll look out for me.”

- **Must correct the misunderstanding.** “When a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.” Rule 4.3(d).
- In the adversary system, a party has no general obligation to correct another party’s mistakes. However, Rule 4.3 requires correction of this misunderstanding.

9

**Question 2: Under Minnesota Rules, which is the best answer as to whether Cody *should, must, may, or must not* tell Fredi of the right to counsel before Fredi’s interview?**

- (A) Cody ***should tell*** Fredi that Fredi has the right to independent counsel.
- (B) Cody ***must tell*** Fredi that the interview may not be protected by the attorney-client privilege.
- (C) Because clients determine the “objectives” of a representation, and lawyers determine the “means,” Cody ***may tell*** Fredi that Fredi has the right to independent counsel.
- (D) Because of management’s directive, Cody ***must not advise*** Fredi that Fredi has the right to counsel.

10

## Arguably Correct Answers

### (A) Cody *should* advise Fredi that Fredi has the right to independent counsel.

- **Arguably correct.** A lawyer for an organization “*should* advise” a constituent with interests that are apt to be adverse to the organization’s interests “that such person may wish to obtain independent representation.” Rule 1.13 cmt. 9.
- **However**, “Many of the comments use the term “*should*.” Comments do not add obligations [or permissions?] to the rules, but provide guidance for practicing in compliance with the rules.” Rules, Preamble [14].

### (B) Cody *must* tell Fredi that the interview may not be protected by the attorney-client privilege.

- **Arguably correct.** “Care *must* be taken to assure that the individual understands that, when there is such adversity of interest, . . . discussions between the lawyer for the organization and the individual may not be privileged.” Rule 1.13 cmt. 9.
- **However**, again, a comment cannot create an obligation. Rule 1.13 does not even mention privilege. The comment converts what may be good advice into an ethics obligation.

11

## Arguably Correct Answers Continued

### (C) Because clients determine the “objectives” of a representation, and lawyers determine the “means,” Cody *may* tell Fredi that Fredi has the right to independent counsel.

- **Arguably correct.** “A lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued.” Rule 1.2(a).
- **Arguably correct.** “An attorney enjoys broad authority in dealing with the procedural aspects of his client’s case.” *Sprader v. Mueller*, 121 N.W.2d 176 (Minn. 1963).
- **However**, here management’s objective is expressly to obtain unfiltered information from employees and management has dictated the means to that objective.

12

## Best Answer?

Because of management's directive, Cody *must not* advise Fredi that Fredi has the right to counsel.

- **Best Answer?** “A lawyer is not required to carry out an instruction that the lawyer reasonably believes to be contrary to professional rules or other law . . . or which the lawyer reasonably believes to be unethical or similarly objectionable. . . . However, a *lawyer may not continue a representation while refusing to follow a client’s continuing instruction.*” RESTATEMENT OF THE LAW GOVERNING LAWYERS, § 21 cmt. d.
- A lawyer “consults” with the client regarding means, and the consultation may result in a client determination and instruction to the lawyer. Rule 1.4.
- Another arguable best answer is “*Pecca Fortiter!*” (“*Sin Bravely!*”)

13

## Other Considerations

- Beyond what is arguably “correct,” what else should be considered?
- Has the company considered various effects – reputation, PR, employee morale, possible litigation – of not advising Fredi of the right to counsel?
- If Fredi is not advised regarding the attorney-client privilege, the company’s later claim to the privilege may be contested.
- Does Fredi have a right of indemnification for expense of counsel under an employment contract or law?
- Is treating Fredi like a stranger or adversary *the right thing to do?*

14

## Sexual Harassment

**Three Me Too Scenarios.**

**Minnesota and ABA Rules Compared.**

Wednesday, November 6, 2019

15

## HYPOTHETICAL #2 – Larry Peters Findings

- **Trinity Law School’s internal investigation of Larry Peters, Alberto Mose, and James Kerr-Lee - the dean, assistant dean, and director of clinics - results in troubling findings of fact.**
- **Peters called himself “the tactile dean.”**
- **Seven Trinity female students and employees credibly reported that Peters gave them hugs, stroked their hair, and leaned against them, all of which was unwelcome and unsolicited.**
- **However, none of the women communicated to Peters that the contacts were unwelcome.**

16

### Question 3: Which is the best answer as to whether Peters will be disciplined for sexual harassment?

- (A) Under the Model Rules, Peters will not be disciplined because the women did not complain.
- (B) Under the Model Rules and Minnesota Rules, Peters will not be disciplined because his conduct was not related to the practice of law.
- (C) Under Minnesota Rules, Peters will not be disciplined because his conduct does not “reflect adversely on fitness to practice.”
- (D) Under Minnesota Rules, Peters will be disciplined because his conduct was connected with his “professional activities.”

17

### Correct Answer (D)

***(D) Under Minnesota Rules, Peters will be disciplined because his conduct was connected with his “professional activities.”***

- **Correct.** “It is professional misconduct for a lawyer to harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status **in connection with a lawyer’s professional activities.**” Minn. Rule 8.4(g).
- Facts are drawn from *In re Peters*, 428 N.W.2d 375 (Minn.1988). Original version of Minn. Rule 8.4(g) was in part based on *Peters*.

18

## Other Answers

- (A) Under the Model Rules, Peters will not be disciplined because the women did not complain.
- Incorrect. Although whether a party who is adversely affected by a lawyer's conduct files an ethics complaint may be relevant, in serious matters discipline will be issued regardless of whether the party complains.
- (B) Under the Model Rules and Minnesota Rules, Peters will not be disciplined because his conduct was not related to the practice of law.
- Probably Incorrect. While the Minnesota rule requires only a connection to the lawyer's "professional activities," Model Rule 8.4(g) requires "conduct related to the practice of law."
- (C) Under Minnesota Rules, Peters will not be disciplined because his conduct does not "reflect adversely on fitness to practice."
- Incorrect. The "reflects adversely" standard applies in other rules, but not in Rule 8.4(g).

19

## HYPOTHETICAL #3 – Alberto Mose Findings

- Before an alumni event, Ann, a recent Trinity graduate, had coffee with Asst. Dean Mose.
- Ann gave Mose money to buy coffee.
- After Mose got the coffee, he returned, then reached over, flipped one of the flaps open on Ann's shirt pocket, touched the shirt, and put the coins in her pocket.
- Ann found the conduct unwelcome and filed an ethics complaint.

20

## Question 4: Which is the best answer as to whether Mose will be professionally disciplined for sexual harassment?

- (A) Under Minnesota precedent, this conduct does not rise to the level of misconduct that will be disciplined.
- (B) Under Minnesota precedent, this conduct will be disciplined by public reprimand.
- (C) Under the Model Rules, this conduct will be subject to discipline as sexual harassment.
- (D) There is no Minnesota precedent, but this conduct will be subject to discipline.

21

## Correct Answer (A)

***(A) Under Minnesota precedent, this conduct does not rise to the level of misconduct that is subject to discipline.***

- ***Correct.*** “In our view, the “shirt incident” and [another incident] were not so patently offensive that, standing alone, they rise to the level of judicial [or attorney] misconduct. Moreover, this behavior showed less potential for abuse of authority, as it involved personnel with whom Judge Miera had no direct supervisory power and only casual contact. Nor, from the record, were these acts ever repeated. By themselves, the incidents would not warrant discipline.”

*In re Miera*, 426 N.W.2d 850 (Minn. 1988) (Reprimanding Judge Miera – both as a judge and as a lawyer - for other sexual misconduct).

22

## Other Answers

**(B) Under Minnesota precedent, this conduct will be disciplined by public reprimand.**

- Incorrect, as a matter of precedent. However, standards have evolved and what was borderline thirty years ago may well be over the border now.

**(C) Under the Model Rules, this conduct will be subject to discipline as sexual harassment.**

- Apparently incorrect. An element of Model Rule 8.4(g) is, “conduct related to the practice of law.”

**(D) There is no Minnesota precedent, but this conduct will be subject to discipline.**

- Incorrect as to precedent. Whether this conduct would result in discipline now is uncertain.

23

## HYPOTHETICAL #4 – James Kerr-Lee Findings

- James Kerr-Lee taught a trial practice court in a clinic at Trinity.
- On behalf of a clinic client, Kerr-Lee brought suit against a landlord. Betty Busby represented the landlord.
- In a negotiation, on eight occasions after Busby stated her client’s positions, Kerr-Lee used the word “bitching,” as in “Betty, why are you bitching about that?” and “Let’s stop bitching and be reasonable.”
- After Kerr-Lee used “bitching” three times, Betty asked him to stop using the word, saying it was sexist and unwelcome. Nonetheless, Kerr-Lee persisted.

24

## Question 5: Will Kerr-Lee will be professionally disciplined for sexual harassment? Best answer in MN?

- (A) Kerr-Lee's conduct will not be disciplined, because rough talk among litigators, although regrettable, is tolerated.
- (B) Kerr-Lee's conduct will be subject to a private discipline, because it is "isolated and non-serious."
- (C) Kerr-Lee's conduct will be subject to a public reprimand, because the Minnesota Supreme Court has held, "Sexual harassment by an attorney is an inherently serious matter."
- (D) None of the above.

25

## Best Answer (B)

***(B) Kerr-Lee's conduct will be subject to a private discipline, because it is "isolated and non-serious."***

- *Arguably the best answer.* Numerous lawyers have received admonitions for using words like "bitch," as epithets. Kerr-Lee's repeated use of "bitching" to a female attorney, even after a cease and desist demand, arguably is similar to calling her a "bitch."
- *Even if Kerr-Lee's persistence is not found to be harassment, it will be disciplined under Rule 4.4, "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, . . ."*
- *Precedent? A male lawyer said, "Stop bitching" once to a female lawyer. She filed an ethics complaint. It was dismissed.*

26

## Other Answers

**(A) Kerr-Lee’s conduct will not be disciplined, because rough talk among litigators, although regrettable, is tolerated.**

- Arguably correct. However, if rough talk relates to sex, race, sexual orientation, etc. it is repeated, and it rises to the level of harassment, it is not tolerated.

**(C) Kerr-Lee’s conduct will be subject to a public reprimand, because the Minnesota Supreme Court has held, “Sexual harassment by an attorney is an inherently serious matter.”**

- Incorrect. The Court has held, “Race-based misconduct by an attorney is an inherently serious matter.” *In re Panel File 98-26*, 597 N.W.2d 563 (Minn. 1999). Whether the court would also hold that sexual harassment is inherently serious is unknown.

**(D) None of the above.**

- Incorrect.

27

## Additional Observations

- Because Minnesota has had rules on discrimination and harassment for thirty years, Minnesota precedents may guide application of Model Rule 8.4(g) in other states.
- The Minnesota Supreme Court frequently emphasizes abuses of power in public disciplines for sexual harassment. Where the alleged harasser does not have power over the person in question, the Court and the Lawyers Board have required more egregious forms of harassment before issuing discipline.
- In addition to *Peters*, an adjunct law professor was disciplined for sexual harassment. *In re Griffith*, 838 N.W.2d 792 (Minn. 2013).

28

## More Observations

- If a corporation, a law office, or a governmental department had a pattern of sexual harassment or discrimination like that at Trinity, the General Counsel and others would be required to take reasonable measures to ensure correction.
  - “A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.” Rule 5.1(a).
  - “Firm” or “law firm” denotes a lawyer or lawyers in a law partnership, professional corporation, sole proprietorship, or other association authorized to practice law; or lawyers employed in a legal services organization or the legal department of a corporation or other organization.” Rule 1.0(d).
  - Both Model Rule 8.4(g) and Minnesota Rule 8.4(h) apply to “discrimination,” in somewhat different ways. A civil finding of illegal discrimination could be a precursor to a disciplinary complaint, although the civil finding would not be preclusive.

29

## Quick Takes

*Electronic Social Media*

*Solicitation*

*Multi-Jurisdictional Practice and UPL*

Wednesday, November 6, 2019

30

## QUICK TAKE #1: ESM

- **2014-2018**, Fran was the sole in-house lawyer for a closely held Minnesota business, US Sybaritic (USS).
- **2017-2018**: USS CEO insisted that Fran approve actions that Fran thought were fraudulent. Fran refused and left USS.
- **Sept. 2019**: USS named sole defendant in a fraud suit, based on the CEO's alleged conduct.

31

## Quick Takes - ESM

- **Oct. 2019**: the CEO Tweets that USS's actions were based on Fran's legal advice.
- The media prominently reports the fraud suit and the CEO's Tweets.
- Fran has documents showing that she advised *against* the allegedly fraudulent actions the CEO falsely claims she approved.

32

## Question 6: Best answer under Minnesota Rules re Fran's response, if any, to the CEO's Tweets?

- (A) Fran may post on ESM, "The CEO's statements are false."
- (B) Fran may disclose information as necessary to her malpractice insurer and to an attorney advising her on ethical conduct, but may not disclose the exculpatory documents or other confidential information on ESM.
- (C) Fran may reveal such information as is necessary to establish a claim in a defamation per se suit against the CEO.
- (D) All of the above.

33

## Correct Answer (D)

*(D) All of the Above.*

- (A) Fran may post a response on ESM, "The CEO's statements are false."
  - At a January 2019 hearing, Justice Lillehaug asked whether this response was permissible. The Lawyers Board Director said, "Yes."
- (B) Fran may not otherwise reveal confidential information on ESM, but she may disclose information as necessary to her malpractice insurer and to an attorney advising her on ethical conduct.
  - Lawyers Board Op. 24 states that ESM self-defense disclosures are prohibited, except as the rules expressly provide. Rule 1.6(b) allows these disclosures.
- (C) Fran may reveal such information as is necessary to establish a claim in a defamation per se suit against the CEO.
  - Rule 1.6(b)(8) allows disclosure of confidential information as needed to "establish a claim."

34

## QUICK TAKE #2: Solicitation

- **W.W. Williams Company makes widgets.**
- **A lawyer, Barry (“call me Champ”) Atry, represents many plaintiffs in product liability suits against WWW.**
- **“Champ” announces at community meetings, “If you have ever used a WWW widget, see me to talk about how you may be able to recover money.”**
- **WWW management instructs GC to draft an ethics complaint, to put a stop to Champ’s solicitations.**

35

## Question 7: Under the Model Rules, which of the following is accurate?

- (A) Champ violated the rule against in-person solicitation.
- (B) Champ violated the rule requiring him to preface his announcement with a notice that this is an advertisement for legal services.
- (C) Champ is free to solicit in-person, so long as he does not know that any individual who is solicited is in need of legal services in a particular matter.
- (D) The First Amendment has been held to protect in-person solicitations.

36

## Correct Answer (C)

**(C) Champ is free to solicit in-person, so long as he does not know that any individual who is solicited is in need of legal services in the WWW widget matter.**

- Model Rule 7.3(a), as amended, defines “solicitation” as a communication by or on behalf of a lawyer, “that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.”
- The Lawyers Board will soon file a petition for adoption of the Model Rule in Minnesota.

37

## Other Answers

**(A) Champ has violated the rule against in-person solicitation.**

- Until 2018, in-person solicitation was generally prohibited, with certain exceptions. The prohibition was greatly narrowed by 2018 amendment.

**(B) Champ has violated the rule that requires him to preface his announcement with a notice that this is an advertisement for legal services.**

- This rule was in effect until 2018 but only as to written solicitations.

**(D) The First Amendment has been held to protect in-person solicitations.**

- The First Amendment protects in-person solicitation by accountants, but not by lawyers. *Edenfield v. Fane*, 507 U.S. 761 (1993); *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978).

38

## **QUICK TAKE #3: UPL / MJP**

- Colin, in-house counsel for The Colorado Company, is from Minnesota, but has a law license only in Colorado.
- A condo association in Edina has a judgment against Colin's parents for \$2,400. The association lawyer, Hardman, also in Edina, demands payment from the parents.
- The parents ask Colin to try to resolve the problem. In August 2019, Colin sends Hardman an e-mail, "I am the attorney for my parents. Please do not contact them. Call me to discuss and resolve."
- After several e-mails and calls between Colin and Hardman, Hardman files an ethics complaint against Colin, alleging UPL.
- Colin has not set foot in Minnesota during the negotiations.

39

## **Question 8: Under current Minnesota Rules, how will the complaint be resolved?**

- (A) Dismissed, because Colin has not been "in" Minnesota for jurisdictional purposes.
- (B) Dismissed, based on the realities and common practices of contemporary lawyers.
- (C) Discipline, because Colin's actions are "in" Minnesota, and Colin is practicing law without a Minnesota license.
- (D) Dismissed, because Minnesota allows non-Minnesota lawyers to provide legal services for family members in Minnesota.

40

## Correct Answer (D)

***(D) Dismissed, because Minnesota allows non-Minnesota lawyers to provide legal services for family members in Minnesota.***

- Rule 5.5 (“multi-jurisdictional practice”) was amended July 1, 2019. In addition to the family-client exception to UPL, other new exceptions allow non-Minnesota lawyers to provide services in Minnesota that:
  - (1) exclusively involve federal law, tribal law, or the law of the jurisdiction of licensure; or
  - (2) on a temporary basis, involve the lawyer’s recognized expertise, developed in the jurisdiction of licensure.

41

## Other Answers

**(A) Dismissed, because Colin has not been “in” Minnesota for jurisdictional purposes.**

- Incorrect. On the Colin/parents facts, a Colorado lawyer in Colin’s situation received a private discipline, including a finding that Colin was “in” Minnesota. *In re Panel File 39302*, 884 N.W.2d 661 (Minn. 2016).

**(B) Dismissed, based on the realities and common practices of contemporary lawyers.**

- Incorrect. The Court was divided 4-3 in *Panel File 39302*. The majority invited a petition for rule amendment. The MSBA and the Lawyers Board filed petitions.

**(C) Discipline, because Colin’s actions are “in” Minnesota, and Colin is practicing law without a Minnesota license.**

- Incorrect. Before July 1, 2019, this answer would have been correct. This answer might well remain correct in many states. UPL issues require state-by-state analysis.

42

## MJP/UPL – ADDITIONAL OBSERVATIONS

- UPL is a state-by-state analysis.
- Colorado permits, almost without limitation, foreign lawyers to appear temporarily in Colorado.
- In Florida, UPL is a felony.

43

## Former Client Conflicts

*When are a Current and Former Matter “Substantially Related?”*

Wednesday, November 6, 2019

44

## HYPOTHETICAL #4

- **Jan. – May, 2018:** Robin Clyburn borrowed money from Main St. Bank (MSB). The loan went into default. Clyburn retained Taylor Olden, to negotiate a forbearance agreement with MSB. Newby Law Firm represented MSB. MSB required Clyburn to disclose all financial information.
- **June 2018:** A forbearance agreement was signed. Clyburn fired Olden.
- **June 2019:** Clyburn was unable to pay amounts due. MSB, represented by Newby, negotiated forbearance agreement #2. Attorney Zweiman represented Clyburn. Agreement #2 was similar to #1, but with new dates.

45

## Lateral Hire Conflict?

- **August 1, 2019:** Olden joined the Newby Firm.
- **Sept. 15, 2019:** the Newby Firm erected an ethics wall and notified Clyburn.
- **Oct. 1, 2019:** Clyburn filed for Chapter 11 bankruptcy.
- **Oct. 15, 2019:** MSB / Newby sued to foreclose on security Forbearance Agreement #2 (“Foreclosure Action”). Olden was not involved. Clyburn demanded Newby withdraw. Newby declined.
- **Nov. 1, 2019:** Clyburn filed an ethics complaint, alleging Newby violated Rules 1.9(b), 1.10(a), and 1.10(b).

46

## Question 9: Which Recommendation Should the District Ethics Committee Make?

- (A) Dismiss, because the Foreclosure Action is not substantially related to negotiation of the first Forbearance Agreement.
- (B) Dismiss, because creation and notice of the ethics screen were timely.
- (C) Discipline, because creation and notice of the ethics screen were not timely.
- (D) Discipline, because the Foreclosure Action and negotiation of the first Forbearance Agreement are substantially related and information from the Forbearance is likely to be significant in the Foreclosure.

47

## Correct Answer (A)

**(A) *The Office of Lawyers Professional Responsibility chose Answers (C) and (D). Newby appealed the discipline. After hearing, a Lawyers Board panel dismissed the charges.***

- **(A) is correct.** “Substantially related” means either (1) “same” matter, or (2) substantial risk that Olden has substantial, material confidential information that could be used in the Foreclosure Action. However, Clyburn had to disclose *all* financial information in both forbearance agreements and the bankruptcy. Also, the Foreclosure Action focuses on security for the mortgaged properties.
- **“Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying.”** Rule 1.9 cmt. 3. In *State v. 3M*, the Supreme Court remanded a DQ motion to determine if (1) the significant facts had already been disclosed; or (2) 3M had waived the conflict.

48

## Other Answers

(B) Dismiss, because creation and notice of the ethics screen were timely.

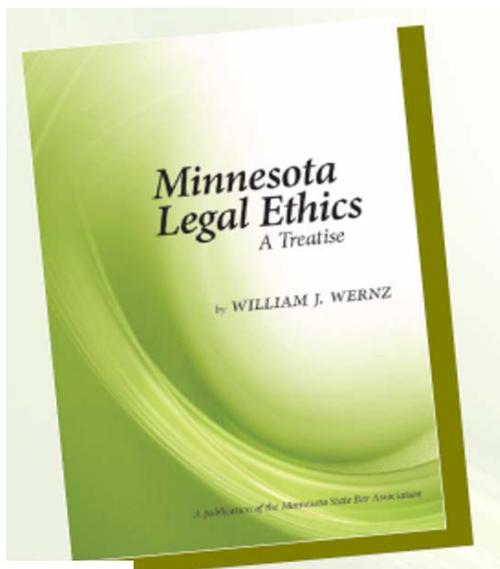
**Incorrect. In Minnesota, an ethics screen will not cure a lateral hire conflict. And creation and notice were not timely.**

(C) Discipline, because creation and notice of the ethics screen were not timely.

**Incorrect. Because there was no conflict, the screen is irrelevant.**

(D) Discipline, because the Foreclosure Action and negotiation of the first Forbearance Agreement are substantially related and information from the Forbearance is likely to be significant in the Foreclosure.

**Incorrect. OLPR took this position in issuing an Admonition, but the Admonition was reversed after hearing.**



<https://www.mnbar.org/resources/practice-resource-center/ebooks/legal-ethics>.

**Excerpts from  
Minnesota Rules of Professional Conduct  
and  
ABA Model Rules of Professional Conduct**

## **Minnesota Rules of Professional Conduct**

### **RULE 4.3. DEALING WITH UNREPRESENTED PERSON**

In dealing on behalf of a client with a person who is not represented by counsel:

- (a) a lawyer shall not state or imply that the lawyer is disinterested;
- (b) a lawyer shall clearly disclose that the client's interests are adverse to the interests of the unrepresented person, if the lawyer knows or reasonably should know that the interests are adverse;
- (c) when a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding; and
- (d) a lawyer shall not give legal advice to the unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of the unrepresented person are or have a reasonable possibility of being in conflict with the interests of the client.

### **RULE 4.4. RESPECT FOR RIGHTS OF THIRD PERSONS**

- (a) 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, or use methods of obtaining evidence that violate the legal rights of such a person.

### **RULE 8.4. MISCONDUCT**

It is professional misconduct for a lawyer to: \* \* \* (g) harass a person on the basis of sex, race, age, creed, religion, color, national origin, disability, sexual orientation, status with regard to public assistance, ethnicity, or marital status in connection with a lawyer's professional activities.

## **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.

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.

## **ABA Model Rules of Professional Conduct**

### **Rule 8.4: Misconduct**

It is professional misconduct for a lawyer to: \* \* \* (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.

### **RULE 7.3 Solicitation of Clients**

(a) "Solicitation" or "solicit" denotes a communication initiated by or on behalf of a lawyer or law firm that is directed to a specific person the lawyer knows or reasonably should know needs legal services in a particular matter and that offers to provide, or reasonably can be understood as offering to provide, legal services for that matter.

(b) A lawyer shall not solicit professional employment by live person-to-person contact when a significant motive for the lawyer's doing so is the lawyer's or law firm's pecuniary gain, unless the contact is with a:

- (1) lawyer;
- (2) person who has a family, close personal, or prior business or professional relationship with the lawyer or law firm; or
- (3) person who routinely uses for business purposes the type of legal services offered by the lawyer.

(c) A lawyer shall not solicit professional employment even when not otherwise prohibited by paragraph (b), if:

- (1) the target of the solicitation has made known to the lawyer a desire not to be solicited by the lawyer; or
- (2) the solicitation involves coercion, duress or harassment.

(d) This Rule does not prohibit communications authorized by law or ordered by a court or other tribunal.